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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.

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Page 19, for footnote (1), read footnote (2).

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„ 127, for „ (3) „ [1903] 2 K.B., 756.

„ 155, for *F. A. Tamplin Steamship Company v. Anglo-American Petroleum Products Co.*, read *F. A. Tamplin Steamship Company v. Anglo-Mexican Petroleum Products Co.*

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„ 172, for „ (1) „ C.R.P., 933 of 1915 (unreported).

„ 400, for *Rama Aiyar v. Palaniappa Chetty* read *Narayanan Chetty v. Muthia Servai*.

Page 400, to footnote (1), add (F.B.).

„ 611, for *M. Bhaskara Ayyar* read *M. Subbaraya Aiyar*.

„ 641, for *Avant Lal Sahu* read *Anant Lal Sahu*.

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adjournment so as to enable one of the parties to apply to the Court to set aside their appointment, they were not guilty of misconduct, and the award was not liable to be set aside.

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CIVIL PROCEDURE CODE (ACT XIV OF 1882), ss. 36, 37—"Pleader duly appointed"—Appointment of authorized agent—Signature to execution petition.] Where a party to a suit authorizes an agent by special power-of-attorney to appoint a pleader to sign execution petitions, a pleader so empowered by the agent, is a "pleader duly appointed to act on his" (the party's, "behalf," within section 36 of the Code of Civil Procedure, and the petition signed by the pleader but not signed by the party is a duly presented petition even if neither the agent nor the pleader is a "recognized agent" within section 37. [Judgment of the High Court reversed.]

Thiruvengatasami Iyengar v. Pavadai Pillai ... (1921) I.L.R., 44 Mad. (P.C.), 736

SEC. 392:—See CIVIL PROCEDURE CODE (V OF 1908), O. XXVI, B. 9 AND O. XVIII, R. 18 640

SEC. 539:—See RELIGIOUS ENDOWMENT 263

(ACT V OF 1908), SEC. 11—Suit for rent by lessee for a term of a zamindari—Reference to arbitration—Award passed into a decree—Finding of arbitrator, not incorporated in the judgment—Surrender of lease—Subsequent suit for rent for another year covered by lease instituted by the zamindar—Previous judgment, whether *res judicata*—Section 11, Civil Procedure Code, whether a rule of jurisdiction or estoppel.] A decision in a suit

for rent, instituted in a civil Court by the lessee for a term of a zamindari against the tenant, is not *res judicata* in a subsequent suit for rent instituted by the zamindar after surrender of the lease by the lessee, even though the rent claimed in the later suit was for a period covered by the original lease. Surrender by the lessee does not operate as an assignment of the rights of the lessee in favour of the lessor, but determines the tenancy so as to let in the lessor's rights.

Rajah of Ramnad v. Ramanathaswami ... (1921) I.L.R., 44 Mad., 514

CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 11—Evidence Act (I of 1872), ss. 40 to 43—*Sec. 43, Specific Relief Act (I of 1877)*—Judgment not *inter partes*, whether *res judicata*.] A judgment operates as a bar only as between the parties thereto or their privies; hence a judgment in a suit by A against B a rival claimant for an office negating A's title as against B is no bar to a suit by A against a third party for the emoluments of the said office. It is only a piece of evidence on the question of title. *Gokul Mandur v. Padmanund Singh*, (1902) I.L.R., 29 Cal., 707 (P.C.), and *Peari Mohan Shaha v. Durlavi Dassya*, (1913) 18 C.W.N., 954, followed. *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar*, (1910) I.L.R., 33 Mad., 483, and *Ramamurti Dhora v. The Secretary of State for India in Council*, (1913) I.L.R., 36 Mad., 141, overruled.

Secretary of State v. Syed Ahmad Badsha ... (1921) I.L.R., 44 Mad. (F.B.), 778

SEC. 47:—See MORTGAGE 483

SEC. 64:—See ATTACHMENT 232

IN EXECUTION OF MONEY DECREE

SEC. 73:—See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, R. 52, SEC. 73 100

SEC. 102—Second Appeal—Suit of a nature cognizable by a Small Cause Court, meaning of—Suit by a landholder for rent under the Madras Estates Land Act (I of 1908), ss. 77 and 189—Second Appeal in such suits whether competent—Provincial Small Causes Courts Act (IX of 1887), sec. 15.] A suit by a landholder for rent under the Madras Estates Land Act is cognizable only by a Revenue, and not by a Civil, Court; and such a suit is therefore not of a nature cognizable by a Court of Small Causes within the terms of section 102, Civil Procedure Code, and consequently a Second Appeal in such a suit is not barred by that section. *Soundaram Ayyar v. Sennia Naicken*, (1900) I.L.R., 23 Mad., 547 (F.B.), applied.

Zamindar of Tarla v. Kanda Barikivadu ... (1921) I.L.R., 44 Mad., 697

SEC. 109 (e), O. XLV, B. 3:—See PROCEDURE 293

SEC. 115, O. XXI, R. 89—Private sale by judgment debtor after Court auction—Application to set aside Court sale—Whether purchaser in private sale or judgment-debtor entitled to apply—Dismissal of petition as of person not entitled to apply—Powers of High Court—Revision.] A judgment-debtor who, after the Court sale, transfers his interest in the properties sold in execution of a decree retains sufficient "interest" within the meaning of Order XXI, rule 89, to allow him to apply under the rule. *Subbarayudu v. Lakshminarasamma*, (1915) I.L.R., 38 Mad., 775, overruled; *Pandurang Laxman v. Govind Dada*, (1916) I.L.R., 40 Bom., 557, and *Mussumat Dhanwari Kuer v. Sheo Sankar Lal*, (1919) 4 Patna L.J., 340; s.c., 52 I.C., 873, followed; *Ishar Das v. Asaf Ali Khan* (1912) I.L.R., 34 All., 186, dissented from. The purchaser of such properties after Court sale is precluded from applying under the rule. *Lakshmi Ammal v. Sankaran Nair*, (1913) 24 M.L.J., 205, overruled. The High Court can interfere in revision if an application under Order XXI, rule 89, has been dismissed on the ground that it was made by a person who was not entitled to apply.

Sundaram v. Mausai Maruthar ... (1921) I.L.R., 44 Mad. (F.B.), 554

Unni Maidin v. Pocker

O. XXII, R. 1—Probate and Administration Act (V of 1881), sec. 89—"Personal injuries not causing the death of the party," meaning of—Suit for malicious prosecution—Death of defendant more than a year after prosecution—Whether right to sue survives. Where, in a suit for malicious prosecution, the defendant dies more than a year after the prosecution in question and before judgment is given in the suit, the right to sue does not survive within the meaning of Order XXII, rule 1, of the Code of Civil Procedure. The expression "personal injuries not causing the death of the party" in section 89 of the Probate and Administration Act does not mean injuries to the body merely, but all injuries which do not necessarily cause damage to the estate of the person wronged. *Punjab Singh v. Ramautar Singh* (1919) 4 Patna L.J., 678, followed; *Krishna Behari Sen v. The Corporation of Calcutta*, (1904) I.L.R., 31 Calo., 993, dissented from. The Legal Representatives' Suits Act (XII of 1855) makes no provision for the continuance of suits already begun by

the wronged against the wrong-doer in the event of the death of either party. *Haridas Ramdas v. Ramdas Mathuradas*, (1889) I.L.R., 13 Bom., 667, and *Ramchode Doss v. Rukmany Bhoj*, (1905) I.L.R., 28 Mad., 47, followed.

Rustomji Dorabji v. Nurse ... (1921) I.L.R., 44 Mad. (F.B.), 357

CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXVI, R. 9, AND O. XVIII, R. 18—*Commission for local investigation—Personal inspection by Judge—Old Code (Act XIV of 1882), sec. 392—Alteration in language, effect of.* Under Order XXVI, rule 9, read with Order XVIII, rule 18, of the Civil Procedure Code a Judge has power to make a local investigation in person in any case in which he sees fit to do so or he can issue a commission for local investigation if he thinks fit, irrespective of the question whether it is convenient for himself to conduct the investigation in person. The Privy Council in *Kesoreji Issur v. G.I.P. Railway Company* (1907) I.L.R., 31 Bom., 381 (P.C.), does not lay down that Judges should under no circumstances hold an inspection of the site in dispute but only objects to opinions being formed upon an inspection made under conditions quite different from those which were material to the question at issue at the trial.

Subapathy Pathan v. Perumal Padayachi ... (1921) I.L.R., 44 Mad., 640

O. XLI, R. 22 (4)—*Death of an appellant who had sued for damages for malicious prosecution, abatement of appeal by—Jurisdiction to hear memorandum of objections.* Where a person sued for damages for malicious prosecution and obtained a decree but preferred an appeal claiming more damages than he had been awarded and died pending the appeal, the appeal abates. *Rustomji Dorabji v. Nurse*, (1921) I.L.R., 44 Mad., 357 (F.B.) and *Josiam Tiruvendakachariar v. Sarami Iyengar*, (1911) I.L.R., 34 Mad., 76, followed. After such abatement any Memorandum of Objections filed by the respondent cannot be heard. *Alayappa Chettiar v. Chockalingam Chettiar* (1918) I.L.R., 41 Mad., 1907 (F.B.), followed.

Murugappa Chettiar v. Ponnusami Pillai ... (1921) I.L.R., 44 Mad., 828

COMMISSION FOR LOCAL INVESTIGATION—Personal Inspection by Judge—Old Code (Act XIV of 1882), sec. 392—Alteration of language, effect of.—See CIVIL PROCEDURE CODE (V OF 1908), O. XXVI, R. 9; O. XVIII, R. 18. 640

COMPOSITOR, AN ARTIFICER—Contract to gradually work out advance from wages, a contract under the Act.—See WORKMEN'S BREACH OF CONTRACT ACT (XIII OF 1859) ... 53

CONTRACT ACT (INDIAN) (IX OF 1872), SEC. 23—*Principal's illegal contract with a stranger—Money recovered by agent from stranger under the contract—Right of principal to recover from agent money realized.* The illegality of a contract between the principal and a stranger, under which an agent recovers money due to the principal is no bar to the principal recovering the money so realized from the agent.

Palaniyappa Chettiar v. Chockalingam Chettiar ... (1921) I.L.R., 44 Mad., 334

SEC. 135.—See PRESIDENCY TOWNS
INSOLVENCY ACT (III OF 1900), SEC. 30 ... 381

CONVERSION OF A MEMBER OF MARUMAKKATTAYAM TARWAD TO MUHAMMADANISM.—*Right of convert to partition of tarwad property—Removal of Caste Disabilities Act (XXI of 1850), effect of.*—See MALABAR LAW ... 891

COUNCILS ACT (INDIAN) (1861), SS. 22 AND 42.—See HINDU LAW ... 448

COVENANTS FOR RENEWAL AND FOR PRE-EMPTION, distinction between.—See LEASE FOR A TERM ... 280

CRIMINAL LAW—*Sentence exceeding legal maximum—Transportation for term of years—Practice of Judicial Committee—Remitted to High Court to revise*

sentence—Indian Penal Code (Act XLV of 1860), ss. 59, 304. Section 59 of the Indian Penal Code authorizes a sentence of transportation for life, but not one of transportation for a term of years exceeding the maximum term of imprisonment which can be awarded for the offence. The appellants were convicted by a Sessions Judge under the Indian Penal Code, section 304, of culpable homicide not amounting to murder and were liable under that section to a sentence of imprisonment for a term not exceeding ten years. They were sentenced to three years' rigorous imprisonment. Upon appeal to the High Court the conviction was affirmed, and upon a petition for revision the sentences were enhanced to fourteen years' transportation. *Held*, that ten years was the maximum term of years to which the appellants could be sentenced to transportation, and that the cases should be remitted to the High Court with instructions to pass sentences according to law.

Sayyapureddi v. King-Emperor ... (1921) I.L.R., 44 Mad., 297

CRIMINAL PROCEDURE CODE (V OF 1898), SEC. 195.—*Court hearing an appeal application for sanction—Jurisdiction itself to take additional evidence.* An Appellate Court, hearing an application to revoke or grant a sanction granted or refused by a Lower Court under section 195, Criminal Procedure Code, has power itself to take additional evidence before disposing of the application. *Rama Aiyar v. Venkatuchella Padayachi*, (1907) I.L.R., 30 Mad., 311 and *Krishna Reddy v. Emperor*, (1910) I.L.R. 33 Mad., 90, distinguished.

Subbasari v. Emperor ... (1921) I.L.R., 44 Mad., 47

SEC. 250.—*Order for compensation without examining all the witnesses of complainant, legality of.* In a case of rioting and intimidation, the Magistrate, after examining only some of the witnesses of the complainant, discharged the accused and, after asking the complainant to show cause why he should not be ordered to pay compensation to the accused, passed an order for compensation without examining the remaining witnesses in spite of his request to do so. *Held*, that the order was not illegal but one that should only be made in very exceptional circumstances.

Appalanarasayya Bhukta v. Emperor ... (1921) I.L.R., 44 Mad., 51

CUSTOM—*Nattukkottai Chettis of Madura district—Patnibhaga—Moopu.*—See HINDU LAW—PARTITION ... 740

DECISION OF SURVEY OFFICER—*Finality of decision—Decision, whether final for all or for what purposes—Effect of word 'final' in sec. 12, sub-sec. (3).*—See SURVEY AND BOUNDARIES ACT (IV OF 1837), SECS. 12, SUB-SEC. (3) AND 13 ... 340

DECREE—*Form of decree—Suit by son for partition against father and father's alienee—Alienation held not binding on son.*—See HINDU LAW—SUIT BY SON. 801

"DEFAULTER" UNDER MADRAS ESTATES LAND ACT, MEANING OF.—See ESTATES LAND ACT (MADRAS) (ACT I OF 1908), SEC. 146 ... 534

DELEGATION OF POWERS OF TRUSTEE—*Power to appoint and dismiss hereditary temple servants—Delegation of such powers to an agent, whether valid—Dismissal of archaka by agent, whether valid.*—See TRUSTEE OF A TEMPLE ... 636

"DISCIPLE" MEANING OF.—See HINDU LAW—INHERITANCE ... 704

DISTRICT MUNICIPALITIES ACT (MADRAS) (IV OF 1884), SS. 72 AND 73 (2)—*Theatre unfit for use and unused owing to removal of part of roofing—Exemption from tax.* A building cannot be held to be "completely demolished or destroyed" within section 73 (2) of the Madras District Municipalities Act (IV of 1884) so as to completely exempt it from liability to tax, simply because part of its roof is removed for the purpose of effecting repairs and the building is thus rendered unfit for use. As a building actually unused, it is liable for half the usual tax under section 72 of the Act.

Municipal Council of Tanjore v. Krishna Pillai ... (1921) I.L.R., 44 Mad., 354

DIVORCE ACT (INDIAN) (IV OF 1869), sec. 37—*Decree absolute dissolving marriage—Petition for alimony, 15 years after decree—Power of Court to grant after such delay—Delay, whether reasonable, how determined—“On any decree absolute” in sec. 37, meaning of*] A wife, whose marriage was dissolved by a decree absolute passed in 1905, petitioned to the Court in 1920 for grant of permanent alimony. *Held*, that the Court had no power to pass an order in her favour under section 37 of the Indian Divorce Act after such unreasonable delay after the passing of the decree absolute. The words “on any decree” in section 37 of the Act should be construed as meaning “at the same time as or after a reasonable time after the passing of the decree.” “What is reasonable time” must be determined upon all the circumstances of each case. *Scott v. Scott*, [1921] P., 107 (O.A.), followed.

Lloyd v. Lloyd ... (1921) I.L.R., 44 Mad., 989

DOWER :—See LIMITATION ACT (INDIAN) (IX OF 1918) ss. 4 AND 14 ... 817

ESCHEAT TO GOVERNMENT—*Inheritance—Sudra ascetic—Right of Sishya (disciple) to inherit—Texts of Hindu Law* :—See HINDU LAW—INHERITANCE. 704

ESTATES LAND ACT (MADRAS) (I OF 1908)—*Arrears of rent—Transfer of interest in “the estate”—Suit for recovery of arrears—Revenue or Civil Court—Jurisdiction.*] The Revenue Court alone has jurisdiction to try a suit for arrears of rent which accrued due to a “landholder” under the Madras Estates Land Act, even though before the date of the filing of the suit plaintiff’s interest in “the estate” had been transferred. *Forbes v. Maharaj Bahadur Singh* (1914) I.L.R., 41 Cal., 926 (P.C.), distinguished. *Per SADASIVA AYYAR, J.*—Even a bare assignee of the arrears of rent from the owner of “an estate” or a part thereof is a landholder within the meaning of the Act for the purpose of pursuing the remedies of a “landholder” under the Act.

Venkata Lakshamma Garu v. Achi Reddi ... (1921) I.L.R., 44 Mad. (F.B.), 433

... SEC. 3, CL. (5)—*Minor inamdar—Lands granted by zamindar after settlement in permanently settled estate—Whether inamdar a “landholder”—Whether tenants under him have occupancy rights.*] Where a zamindar made a post-settlement inam grant of a portion of a village with both the warams on a permanent kattabadi, *Held* (KUMARASWAMI SASTRI, J., dissenting) such minor inamdar is a “landholder” within the meaning of section 3, clause (5), of the Estates Land Act and the tenants have permanent rights of occupancy.

Gadadhara Das Bavaji v. Suryanarayana Patnaik ... (1921) I.L.R., 44 Mad., 677

... SEC. 6—*Permanent right of occupancy—Subletting—“Ijaradars and farmers of rent”—Middlemen.*] The appellants were leasees of certain lanka lands under a lease made before the Madras Estates Land Act, 1908, came into operation. The lease by its terms contemplated the cultivation of the land by ryots, and did not prohibit subletting; it provided for the termination of the tenancy in 1910. The appellants sublet the lands to tenants who occupied and cultivated them. *Held* that the appellants had not a permanent right of occupancy under section 6, sub-section 1 of the Act, being merely middlemen. If the “Ijaradars and farmers of rent” referred to in section 6, sub-section 6, are ryots at all they are non-occupying ryots, and cannot be converted into ryots with a permanent right of occupancy. [Judgment of the High Court affirmed.]

Butchayya v. Appa Rao ... (1921) I.L.R., 44 Mad. (P.C.), 866

... SEC. 6 (1), Explanation—*Trespasser in possession on the date of the Act, not entitled to occupancy right.*] Where a landholder bought in execution of his decree for arrears of rent his tenant’s right in a ryoti land before the date of the commencement of the Estates Land Act, but the tenant continued in actual possession of the land

on that date. *Held*, that the tenant was then a mere trespasser and did not acquire occupancy rights by virtue of the Explanation to section 6, clause (1) of the Act. *Sirapada Mudali v. Thyagaraja Chettiar*, (1914) 27 M.L.J., 665, not followed.

Venkatachala Naidu v. Ethirajammall ... (1921) I.L.R., 44 Mad., 220

ESTATES LAND ACT (MADRAS) (I OF 1908), sec. 46 (5)—*Application to Receiver of an estate, for conferring occupancy right, validity of.*] An application by a non-occupancy ryot under section 46 of the Madras Estates Land Act, for the acquisition of occupancy right in an estate, can be made only to or against the owner of the estate and not to a Receiver in charge of the estate.

Swaminatha Odayar v. Sundaram Aiyar ... (1921) I.L.R., 44 Mad., 274

... SEC. 52 (3) :—See PROCEDURE CODE (V OF 1908), SEC. 102 ... 298

... SEC. 55 AND 146—*Purchaser of occupancy right—Suit for patta in a Revenue Court—Duty of Revenue Court to decide as to title of plaintiff—Rival claimant of such right, previously recognized by landlord as transferee—Power and duty of Court to decide in the suit—Proceedings under section 146, effect of—Non-joinder of parties—Dismissal of suit—Civil Procedure Code (V of 1908), O. I, r. 10, cl. (2).*] The power and duty of a Revenue Court, in a suit under section 55 of the Madras Estates Land Act, to deal with the rights of the parties before it, are not affected by the provisions of section 146 of the Act. Where a suit is instituted in a Revenue Court under section 55 of the Act by the purchaser of land from a ryot against the landlord to obtain patta, the Court is bound to decide whether the plaintiff is entitled to patta or not, if his title is disputed, although the landlord might have previously recognized a rival claimant as transferee and issued patta to him, on the joint application of claimant and the transferee. In such a suit, the rival claimant is only the transferor and not a necessary party: even if he were a necessary party, the Court should not dismiss the suit for non-joinder of such claimant, but add him as a party if it thought fit to do so, under Order I, rule 10, clause (2), Civil Procedure Code, which is made applicable to Revenue Courts by section 192 of the Act.

Ramanathan Chetty v. Arunachalam Chettiar ... (1921) I.L.R., 44 Mad., 43

... SEC. 77 AND 189 :—See CIVIL PROCEDURE CODE (V OF 1908), SEC. 102 ... 697

... SEC. 146—*Second crop of paddy, raised by ryot with landlord’s water—Landlord’s right to extra rent—Usage or contract disentitling landlord to extra rent—Proof of—Burden of proof on tenant—Heir of registered pattadar—Right to be recognized as ryot—Defaulter under the Act, meaning of—Mere receipt of rent from a person, whether landlord bound to accept as ryot.*] The landlord is *prima facie* entitled to claim extra rent for second crop of paddy raised with the landlord’s water by the tenant on his wet holding, in the absence of proof of an established usage or an express or implied contract disentitling the landlord to the same, the burden of proving such usage or contract being on the tenant. The landlord is bound to recognize the heir of the registered pattadar as the ryot under the Madras Estates Land Act in the place of the deceased pattadar; and, if a suit under the Act is instituted by a person claiming as heir to be recognized as the ryot, the question whether he is the heir or not must be determined by the Court, and if the heirship is established or admitted, the suit must be held to be competent. Mere receipt by the landlord of the rent due upon the holding from any person, cannot bind him to recognize the latter as the ryot. “Defaulter” in the Estates Land Act, denotes only the man who is the registered pattadar or his heir or the person whom the landholder has become bound to recognize as the ryot under section 146 of the Act.

Midnapore Zemindary Co., Ltd. v. Muthappudayan ... (1921) I.L.R., 44 Mad., 534

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EXCESS PROFITS DUTY ACT (X OF 1919)—Whether duty should be assessed within the revenue year.] Under the Excess Profits Duty Act (X of 1919) it is not necessary that the duty should be assessed within the year for which the duty is payable. <i>Chief Commissioner of Income-tax v. Ramnathan Chettiar</i> . (1921) I.L.R., 44 Mad. (S.B.), 768	
EXECUTION—Civil Procedure Code (Act V of 1908) O. XXI, rr. 15, 16, O. XXII, r. (10) (1)—Transfer of part of decree—Right of transferee to execute or to join in execution—Prohibition of execution by transferee, void under section 28 Contract Act (IX of 1872)—Appeal against orders purporting to be passed under O. XII, r. 10, Civil Procedure Code.] Section 146, Civil Procedure Code, recognizes the validity of a transfer of a part of a decree and execution thereof by the transferee. Order XXI, rule 16, is no bar to the application of the section. Such transferee is like a joint decree-holder and can under Order XXI, rule 15, protect his rights either by executing the decree himself or by joining or intervening in the execution by his transferor. An agreement by the transferee of part of a decree that the transferor shall conduct execution proceedings and may compromise the same as he thinks fit, only constitutes the transferor the agent of the transferee and the agency is revocable. An agreement between them that the transferee shall not in any way enforce his rights under the transfer, e.g., execute or intervene in execution, is void under section 28 of the Contract Act. An order purporting to be passed under Order XXII, rule 10, by a Court of first instance is appealable though on the facts the order should not have been passed under the rule. <i>Muthiah Chettiar v. Govindoss Krishnadoss</i> ... (1921) I.L.R., 44 Mad., 919	
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HIGH COURTS ACT (INDIAN) (1861), SEC. 11—Supreme Court Charter, cl. 22—See HINDU LAW—WILL	446
HINDU LAW—Adoption of an orphan—“Factum valet,” applicability of.] The adoption of an orphan is invalid under the Hindu Law and the doctrine of “factum valet” cannot be invoked to validate it. <i>Lakshmappa v. Ramaya</i>, (1875) 12 Bom. H.C.R., 384, at 398 and <i>Ganga Sahai v. Lakhray Singh</i>, (1887) I.L.R., 9 All., 253 at 297, followed. <i>Mareyya v. Ramalakshmi</i> (1921) I.L.R., 44 Mad., 260	

HINDU LAW—Adoption—Sudras—Partition—Respective shares of adopted and after-born aurasa son—Dattaka Chandrika—Joint family property—Accountability of managing member.] In the case of Sudras in the Madras Presidency an adopted son on partition of the family property shares equally with a son or sons of the adoptive father born after the adoption. So held on the grounds that the rule stated in the Dattaka Chandrika (section 5, paragraphs 29, 32) as to the share of an adopted son among Sudras had been accepted and acted on for more than a century in that Presidency, until disturbed by the decision of the Madras High Court in <i>Gopalum v. Venkataraghavulu</i>, (1917) I.L.R., 40 Mad., 632, and the rule, although not supported by the Smritis, or by the Mitakshara, is not inconsistent with them. <i>Semle</i>, that the same rule applies among Sudras in Bengal. Judgment of the High Court reversed and the above-mentioned decision disapproved. In the absence of proof of direct misappropriation or fraudulent and improper conversion, the manager of a joint family estate, is liable to account only for what he has received, not for what he ought or might have received if the family moneys had been profitably dealt with. <i>Arumilli Perrazu v. Subbarayadu</i> (1921) I.L.R., 44 Mad. (P.C.), 656	
Authority by a will to widow to adopt—Appointment by will of a guardian during minority of boy to be adopted, validity of.] A childless Hindu without co-parceners authorizing, by his will, his widow to adopt can at the same time appoint a guardian to manage the property of the boy to be so adopted during his minority. <i>Chidambara Pillai v. Rangasami Naicker</i>, (1918) I.L.R., 41 Mad., 581 (F.B.) and <i>Pratapsingh Sivasingh v. Agarsingji Rajasangji</i>, (1919) I.L.R., 43 Bom., 778 (P.C.), distinguished. <i>Jagannadha Rao v. Ramayamma</i> (1921) I.L.R., 44 Mad., 1189	
Impartible zamindari—Rule of succession—Heirs of the same degree but of different branches—Preference of senior line—Right of zamindar to incorporate self-acquisitions and income from zamin with zamin—Rule of descent thereto, when not incorporated.] The devolution of an impartible estate held by a single person depends upon whether the last holder was undivided or divided from the other members of the family. If he was undivided, then for the purposes of succession, the property must be treated as if it had been partible, and the successor found among those who would have been in that event his co-parceners. If he was separated, the estate devolves, in the absence of any special custom, on the next of kin who is nearest in blood to the deceased, as, for instance, his mother, and if there be several collaterals of the same degree but of different branches, the senior representative of the senior line takes. <i>Tara Kumari v. Chathurbhuj Narayan Singh</i> (1915) I.L.R., 42 Cal., 1179 (P.C.), and <i>Bhai Narindar Bahadur Singh v. Achal Ram</i> (1893) I.L.R., 20 Cal., 649 (P.C.), followed. It is open to the holder of an impartible zamindari to incorporate with his zamin, his self-acquisitions such as those made from the income of the zamin or to his self-acquisitions, the devolution thereof follows that of keep them distinct. If incorporated, the devolution thereof follows that of the zamin; if not, his own heirs succeed to them : <i>Murtaza Husain Khan v. Muhammad Yasin Ali Khan</i> (1916) I.L.R., 38 All., 552 (P.C.) at 567 and <i>Janki Prasad Singh v. Dwarka Prasad Singh</i>, (1918) I.L.R., 35 All., 391 (P.C.) at 401, followed; <i>Rajindra Bahadur Singh v. Raghubans Kunwar</i> (1918) I.L.R., 40 All., 470 (P.C.), distinguished. <i>Gurusami Pandiyan v. Pandia Chinna Thanbiar</i> ... (1921) I.L.R., 44 Mad., 1	
Inheritance—Bandhus—Heritability, test of—Sapinda relationship—Mutuality—Paternal grandfather's sister's great-grandson, whether a heritable bandhu.] Under the Mitakshara Law, the great-grandson of the paternal grand-aunt of the last male owner is not a heritable bandhu of the latter. <i>Umaid Bahadur v. Udoi Chand</i>, (1881) I.L.R., 6 Cal., 119 (F.B.) and <i>Babu Lal v. Noulla Ram</i>, (1895) I.L.R., 22 Cal., 339, followed; <i>Budda Singh v. Lattu Singh</i>, (1915) I.L.R., 37 All., 604 (P.C.), distinguished; <i>Subramania Mudaliar v. Ranganathan Chettiar</i> (1921) I.L.R., 44 Mad., 114, referred to. <i>Chinna Pichu Iyengar v. Padmanabha Iyengar</i> ... (1921) I.L.R., 44 Mad., 121	
Inheritance—Mitakshara—Bandhus—Atma bandhus—Preferential heir—Atma bandhus ex parte paterna preferential to Atma bandhus ex parte	

materna--Father's sister's son's son preferable to mother's brother.] Under the Mitakshara Law among Atma bandhus of a deceased male owner those that are related to him *ex parte paterna* are preferential heirs to those that are related to him *ex parte materna*. The son of the father's sister's son of the deceased male owner is a preferential heir to his mother's brother. *Sundarammal v. Ramasami Mudaliar*, (1895) 1 L.R., 18 Mad., 193; *Balusami Pandithar v. Narayana Rau*, (1897) 1 L.R., 20 Mad., 349, followed.

Subramania Mudaliar v. Ranganathan Chettiar ... (1921) I.L.R., 44 Mad., 114

HINDU LAW--Inheritance--*Sudra ascetic*--Right of *sisya* (disciple) to inherit--Texts of Hindu Law, whether obsolete--*Yajnavalkya*--*Mitakshara*--Escheat to Government--Religious instruction to *Sudras*--Disciple, meaning of--Spiritual relationship, proof of.] The disciple of a *Sudra* ascetic who dies without leaving any blood relations is an heir of the latter under the Hindu Law and succeeds to his estate so as to prevent its escheat to the Government. The texts relating to succession by preceptors, disciples and fellow-students, enunciated in *Yajnavalkya Smriti*, Chapter II, verse 137, and in the *Mitakshara*, section VII, are not obsolete. In determining who is a preceptor, a pupil or a fellow-student under the above texts, we have only to consider the imparting of purely religious instruction. Religious instruction and training are not confined to Brahmins. *Giyana Sambandha Pandara Sannadhi v. Kandasami Tambiran*, (1887) I.L.R., 10 Mad., 375. *Dharmapuram Pandara Sannadhi v. Virapandiyam Pillai*, (1899) I.L.R., 22 Mad., 302, distinguished. Strict proof is required to be given by the claimant regarding his alleged spiritual relationship to the deceased.

Sambasivam Pillai v. Secretary of State for India ... (1921) I.L.R., 44 Mad., 704

Joint family--Joint debt--Joint acts of insolvency--Single petition by creditor to adjudicate debtors as insolvents whether maintainable--Multifariousness in suits--Tests of:--See INSOLVENCY ACT (PROVINCIAL) (III of 1907), ss. 5, 14 AND 47 ... 810

Joint family--Partition--Service-inam lands--Enfranchisement subsequent to partition in name of a member--Right of a divided member to share in enfranchised lands--Onus of proof.] If a divided member of a Hindu family claims to share in service inam lands, which belonged to the family but were subsequent to a partition in the family, enfranchised in the name of a member who was the office-holder at the time of the enfranchisement, the onus lies on the claimant of proving not only that he is a member of the original service family but also that the inam was excluded from the partition as undivided property in which the sharers retained their joint rights. *Pirappa v. Syama Rao*, (1918) M.W.N., 849, considered.

Venkatasubba Rao v. Satyanarayanamurti ... (1921) I.L.R., 44 Mad., 179

Partition--Custom--*Patnibhaga*--*Moopu*.] A custom was found to exist among the Nattukottai Chetties inhabiting seven villages in the Madura district of the Madras Presidency, whereby when a Chetti during the life of his wife married another wife he appropriated out of his property a portion, called *moopu*, for the first wife's maintenance, that portion descending to her son if she had one, and the rest of the property was notionally divided, one moiety going to the son or sons by the first wife and the other moiety to the son or sons by the second wife. In a suit for partition brought by the only son of a first wife against his father and the sons by the second wife, the Judicial Committee applied the custom, without, however, determining what the father's share would be in the circumstances, as the question did not arise before their Lordships. The authorities as to the custom of *patnibhaga*, or the division according to wives, considered. [Judgment of the High Court reversed.]

Palaniappa Chettiar v. Alagan Chetti ... (1921) I.L.R., 44 Mad. (P.C.), 740

Public charitable trust, management of--Devolution--Right of female heirs.] The right of management of a public charity possessed by the members of a Hindu family descends in the absence of a custom to the contrary to all the heirs including females in the same manner as ordinary family property. A claim that the most senior male member alone amongst the heirs is entitled to manage or that female heirs are excluded from

management should be proved as a special custom. *Ramanathan Chetti v. Murugappa Chetti*, (1906) I.L.R., 29 Mad., 283 (P.C.), followed. *Purappa-ravelingam Chetti v. Nullasiyan Chetti*, (1883) 1 M.H.C.R., 415, and *Chenna Kesavaraya v. Vaidelinga*, (1877) I.L.R., 1 Mad., 343, not followed.

Meenakshi Achi v. Somasundaram Pillai ... (1921) I.L.R., 44 Mad., 205

HINDU LAW--Sale by a co-parcener of specific lands--Sale by vendee to another, pending suit for partition in vendor's family--Allotment of different lands by the decree to the vendor--Co-parcener--Right of vendee's vendee to get lands of same value out of the lands allotted to vendor--Right to damages--Measure of damages.] Even though a vendee of specific lands from a co-parcener of a Hindu family may be entitled to recover lands of equal value out of the lands allotted to his vendor in a subsequent partition in the family, a vendee from the first vendee has no such right, his only remedy being to get damages from his vendor. In assessing damages the vendee is entitled to ask that they should be assessed at the present enhanced value of the lands.

Dhadha Sahib v. Muhammad Sultan Sahib ... (1921) I.L.R., 44 Mad., 167

Self-acquisition of father--Undivided son--Suit on promissory note after death of father--Whether succession certificate necessary.] An undivided Hindu son acquires the self-acquired properties of his deceased father by inheritance and not by survivorship. Observation in *Nana Tawker v. Ramachandra Tawker*, (1909) I.L.R., 32 Mad., 377, dissented from. In a suit by the son for the recovery of money which was the self-acquired property of the deceased father a succession certificate must be produced before a decree can be given in his favour. *Venkataramanna v. Venkayya*, (1891) I.L.R., 14 Mad., 377, followed.

Vairavan Chettiar v. Srinivasachariar ... (1921) I.L.R., 44 (F.B.), 499

Son's liability--Pious obligation--Unascertained debt of father--Money collected by father as an agent and subsequently misappropriated by him--Liability of sons for such sums--Principal and agent--Suit against agent, who died pending suit--Continuance of suit against his sons as legal representatives--Liability of latter for moneys actually collected as well as moneys not collected owing to negligence of the agent.] Where a suit was instituted by a principal against his agent for an account and for recovery of moneys to be found due on the taking of accounts, but the agent died pending the suit which was continued against his sons as his legal representatives. Held, that under the Hindu Law, the sons were liable to pay their father's debt out of the joint family property in their hands, although the amount of his indebtedness had not been ascertained; that it was no answer to a claim based on an antecedent civil liability to plead a subsequent criminal act, and that consequently, the sons were liable, under the Hindu Law, to pay moneys collected by their father as an agent and subsequently misappropriated by him. Held, also, that the sons were liable not only for moneys proved to have been actually received by their father and not duly accounted for but also for moneys which he negligently failed to collect.

Venkatacharyulu v. Mohana Panda ... (1921) I.L.R., 44 Mad., 214

Succession--Bandhus--Maternal uncle--Father's sister's grandson--Preference among *atma-bandhus*.] Under the Mitakshara law a maternal uncle succeeds in preference to a son of the paternal aunt's son. So held on the ground that both claimants being *atma-bandhus*, the maternal uncle and the deceased were *sapindas* to each other, whereas the other claimant offered no *pinda* to the ancestors of the deceased, and the maternal uncle was the nearer in degree; a contention that the claimant who was *ex parte paterna* should be preferred to the claimant who was *ex parte materna* being rejected. Four propositions as to bandhus enunciated by the Madras High Court in *Muthusami v. Muttukumarasami* (1883) I.L.R., 16 Mad., 23, 30, approved, as furnishing a safe guide in the absence of any express authority varying the rule. *Sundarammal v. Rangasami Mudaliar*, (1895) I.L.R., 18 Mad., 193, and *Balusami Pandithar v. Narayana Rau*, (1897) I.L.R., 20 Mad., 342, so far as they held that among bandhus of the same

class those *ex parte paterna* are to be preferred to those *ex parte materna*, disapproved. [Judgment of the High Court reversed.]

Vedachela Mudaliar v. Subramania Mudaliar ... (1921) I.L.R., 44 Mad. (P.C.), 753

HINDU LAW—Suit by son for partition against father and father's alienee—
Alienee held not binding on son—Form of decree to be given to the son.
 If in a suit for partition by a son against his father and an alienee from the father, the Court holds the alienation not to be binding on the son, the son is entitled to get a decree for his share in the family properties without any condition being imposed on him to refund the consideration paid by the alienee to the father. *Sahu Ram Chundar v. Bhup Singh*, (1917) I.L.R., 39 All., 37 (P.C.); L.R., 44 I.A., 126, applied. The dictum of MITTER, J., in *Koer Hasmat Bai v. Sunder Das*, (1885) I.L.R., 11 Cal., 286, not followed. Held further by SESHAGIRI AYYAR, J., a son is bound to pay only such debts of his father as exist while they are joint; and a son getting a decree for partition becomes divided from his father as from the date of suit for partition. Any liability of the father to refund the consideration to the alienee arising as the result of the decree for partition is a liability for unliquidated damages and not a debt and even if it becomes a judgment-debt it is not a debt existing on the date of suit for partition.

Srinivasa Aiyangar v. Kuppuswami Aiyangar ... (1921) I.L.R., 44 Mad., 801

Widow—Husband's Estate—Inheritance—Moveable property—Corpus—Waste of corpus—Reversioners, right of—Suit by reversioners to prevent waste—Suit against widow and her alienees without consideration—Receiver—Right to place property in hands of Receiver—Liability of alienees to replace moveable corpus in their possession—Accountability of widow as to corpus—Nature of accountability—Duty of widow to replace corpus, if in her possession—Right to enjoy income of such property—Limitation Act (IX of 1908) art. 120. A Hindu widow inheriting moveable property of her husband is not entitled to commit waste of the corpus of such property. Where she commits waste of the corpus of such property, the nearest reversioner is entitled to file a suit praying that such corpus may be reduced into possession and handed over to a Receiver appointed in the suit; the transferees from the widow without consideration can be directed to replace any part of the corpus of the moveable property which can be traced to their hands, and the widow herself made accountable for waste in the sense of making her replace the moveable corpus of her husband's estate which she has made away with, if she is in a position to do so, allowing her to enjoy the income of the fund so replaced. Article 120 of the Limitation Act applies to such a suit. *Nobin Chunder Chuckerbutty v. Guru Persad*, (1868) B.L.R., Supp. Vol. 1008 (F.B.); 9 W.R., 505 (F.B.) and *Radha Mohan Dhar v. Ram Dad Dey*, (1869) 3 B.L.R., 362, referred to; *Sinclair v. Brougham*, [1914] A.C., 398, applied.

Venkanna v. Narasimham ... (1921) I.L.R., 44 Mad., 184

Will—Testator, resident in Presidency town of Madras—Bequest to unborn persons, validity of—Rule of Hindu Law, whether abrogated by Hindu Wills Act (XXI of 1870), or by Hindu Transfers and Bequests Act, Madras (I of 1914)—Latter Act whether ultra vires of provincial legislature—Indian Councils Act, 1861, ss. 22 and 42—Indian High Courts Act, 1861, sec. 11—Supreme Court Charter, cl. 22—Rule of perpetuity—Indian Succession Act (X of 1865), ss. 101, 102, 111 and 126—Bequest to daughters and on their death their shares to be taken by their children who shall attain 21 years—Indian Majority Act (IX of 1875), s. 3—Bequest, whether void for perpetuity—Absolute gift followed by settlement on children—Failure of settlement—Reversion to original donee as absolute estate. A testator, resident in the City of Madras, executed at Madras a will in 1897 disposing of his properties situate mostly therein, and died in 1904. By the will, after directing the formation of a fund for the payment of a monthly sum to his widow during her life, the testator provided that "the residuary trust funds are vested in trustees in trust to apportion the fund into as many equal shares as there may be daughters of mine living at the time of my decease or who having predeceased shall have left issue her or them and me surviving, and to pay the income of each equal share to my

said daughters respectively during their lives and thereafter to stand possessed of the share in trust for all the children of the deceased daughter who shall attain the age of twenty-one in equal shares, etc." Only some of the grand children were born before the testator died. On a suit being brought on the Original Side of the High Court by some of the grandsons after the death of testator's widow and his three daughters, for a construction of the will and a declaration of the rights of the parties. Held, that the rule of Hindu law that gifts and bequests in favour of unborn persons are invalid, had not been abrogated, by the Hindu Wills Act (XXI of 1870); and that Madras Act (I of 1914) Hindu Transfers and Bequests Act (1914), which validates such dispositions was ultra vires of the legislative powers of the provincial Legislative Councils in so far as it purports to affect the law administered on the Original Side of the High Court, having regard to the Indian Councils Act, 1861, sections 22 and 42, and the Indian High Court Act, 1861, section 11; and that therefore the bequests to the unborn persons in the will were void; that the bequests were void under section 101, Indian Succession Act, made applicable by the Hindu Wills Act to Hindu Wills executed in Presidency Towns, because the vesting of the property under the will in the grandchildren, might be delayed beyond the life-time of the daughters and the minority of the grandchildren by whom the property was to be taken, and the provisions of the Indian Majority Act (IX of 1875), extending minority to twenty-one years, in certain events, did not affect the construction of section 101 of the former Act; that the bequests in favour of some of the grandchildren failing under section 101 of the Act, the bequest in favour of the whole class of grandchildren, including those born in the life-time of the testator, also failed under section 102 of the Act; that the bequest to the grandchildren did not fall within the terms of section 111 of the Indian Succession Act and was not affected by its provisions; that under section 126 of the same Act, which embodies the rule laid down in *Lassence v. Tierney*, (1849) 1 Mac. & G., 551; s.c., 41, E.R., 1379, where there is an absolute gift to a legatee and the provisions that follow in the will are in the nature of a settlement of that gift, then the settlement, if it is effectual, will have operation and reduce what appears to be an absolute gift into a life estate; if however the settlement for any reason fails, then in so far as it fails there is no intestacy but the person who was the object of the original gift takes the property absolutely; that on the true construction of the provisions of the will, there was a clear intention to confer an absolute estate on each of the daughters followed by a settlement in favour of her children within the meaning of the rule referred to; and that, consequently, on the failure of the request to the grandchildren, the original absolute gift in favour of each of the daughters remained good; and the share of each of the daughters passed on her death to her heirs.

Soundararajan v. Natarajan ... (1921) I.L.R., 44 Mad., 446

HINDU TRANSFERS AND BEQUESTS ACT (MADRAS) (I OF 1914):—See
 HINDU LAW—WILL ... 446

HINDU WILLS ACT (XXI OF 1870):—See HINDU LAW—WILL ... 446

IMPARTIBLE ZAMINDARI—Rule of succession:—See HINDU LAW—IMPARTIBLE ZAMINDARI ... 1

INAMS—Karnam service lands—Enfranchisement—Inam title-deed—Confirmation in last holder—Nature of title. The karnam of a village in Madras occupies his office not by hereditary or family right but as a personal appointee, although the appointment is primarily made of a suitable person who is a member of a particular family. When karnam service lands have been enfranchised, a quit-rent being imposed in lieu of the service, and an inam title-deed is granted confirming the lands to the holder of the office, his representatives and assigns, the lands are his separate property, and are not subject to any claim to partition by other members of the family. *Venkata v. Rama*, (1885) I.L.R., 8 Mad., 249 (F.B.), approved; *Gunnaiyan v. Kamakchi Ayyar*, (1903) I.L.R., 26 Mad., 339 and *Pingala Lakshmi-pathi v. Bommireddipalli Chalamayya*, (1907) I.L.R., 30 Mad., 434 (F.B.), disapproved.

Venkata Jagannadha v. Veerabhadrayya ... (1921) I.L.R., 44 Mad. (P.C.), 813

INAMS—Presumption of Law—Whether grant is of both melvaram and kudivaram.] Although their lordships of the Privy Council do not expressly lay down, in *Suryanarayana v. Patanna*, (1918) I.L.R., 41 Mad., 1012 (P.C.) and *Venkata Sastrulu v. Setharamudu*, (1920) I.L.R., 43 Mad., 166 (P.C.), that there is a presumption in law that in inam grants both the melvaram and kudivaram are included, such an initial presumption is deducible from the grounds on which these judgments are based.

Muthu Goundan v. Perumal Iyen ... (1921) I.L.R., 44 Mad. (F.B.), 588

Shrotriyam—Construction of grant—Conveyance of Minerals—Enfranchisement, effect of—Royalties on quarried stone—Madras Act VIII of 1869.] A village was granted as a shrotriyam inam in A.D. 1750 by the Nawab of the Carnatic. The grant, the terms of which appeared from a translation produced from a Government register, provided that its purpose was that the grantee having appropriated to his own use the produce of the seasons each year might pray for the prosperity of the Empire, and that he should pay a fixed yearly sum to the Sirkar. The inam was enfranchised in 1865, there being given to the inamdars title-deeds which purported to convert the tenure into a permanent freehold upon payment of a quit-rent. After the enfranchisement the Madras Government requiring stones acquired part of the village from the shrotriyamdars under the Land Acquisition Act. In or about 1905 the Madras Government imposed and levied upon the shrotriyamdars royalties in respect of stone which they had quarried in the village. Held (1) that upon the true construction of the grant the full right to the quarries and minerals did not pass to the grantees; (2) that the terms of the grant being in evidence neither the inam title-deeds nor the land acquisition proceedings were evidence as to its effect; (3) that having regard to Madras Act VIII of 1869, the inam title-deed could not vest in the inamdars a subject-matter not vested in them by the grant; (4) that consequently the Government was entitled to impose royalties on stone quarried in the village. An inam grant may be no more than an assignment of revenue, and even where it is or includes a grant of land what interest in the land passed must depend on the language of the instrument and the circumstances of the case.

The Secretary of State for India v. Srinivasa Chariar ... (1921) I.L.R., 44 Mad. (P.C.), 421

INCOME-TAX ACT (INDIAN) (VII OF 1918)—Rule 1 framed by Government of Madras under section 43 (2) (c)—Company incorporated in England with branches in India and elsewhere—"Total profits"—Whether income-tax and excess profits duty payable in England and income-tax payable elsewhere to be excluded.] Rule 2 framed by the Government of Madras under section 43 (2) (c) of the Income-tax Act provides that the profits of the Indian Branch of a foreign Company may be assumed for income-tax purposes to bear the same proportion to the total profits of the Company as its receipts bear to the total receipts. A Company incorporated in England with branches in India and elsewhere cannot, in calculating the total profits for the purposes of this rule, claim deduction of the excess profits duty and the income-tax payable by it in England and elsewhere.

Chief Commissioner of Income-tax, Madras v. The Eastern Extension Australasia and China Telegraph Co., Ltd. ... (1921) I.L.R., 44 Mad., (S.B.), 489

Money-lending firm—Interest accruing due but not received in the year of account, whether taxable under section 9.] On a reference under section 51 of the Indian Income-tax Act, 1918. Held, by the majority of the Court:—Interest which accrues due to a money-lending firm in the year of account is not assessable under section 9 as profits of the business unless it is received or realized in the year of account. What will amount to receipt or realization considered by NAPIER and KRISHNAM, JJ. Held by SADASIVA AYYAR, J.—Such interest would be taxable, though not realized, if it came so completely under their control that by an act of their will they could receive it in cash without greater trouble than is involved in drawing money from their bankers.

Secretary to the Board of Revenue, Income-tax, Madras v. Arunachalam Chettiar ... (1921) I.L.R., 44 Mad. (S.B.) 65

INCOME-TAX ACT (INDIAN) (VII OF 1918), ss. 3, 33 (1)—Non-resident foreigner having business connexion in British India—Assessability to income-tax in British India.] A person who is not a resident in British India, but to whom income arises or accrues through business connexions in British India is assessable to income-tax under sections 3 and 33 (1) of the Indian Income-tax Act (VII of 1918) whether he is a British subject or a foreigner. The provision in the latter section that such income shall be taxable in the name of the agent of any such person does not mean that it is not chargeable unless assessed in the name of an agent.

Chief Commissioner of Income-tax v. Bhanjee Ramjee & Co. ... (1921) I.L.R., 44 Mad. (S.B.), 773

... ss. 51 (1) AND 52—Sec. 106 (2) of the Government of India Act—5 and 6 George V, Chapter 61—Sec. 45 (h) of the Specific Relief Act (I of 1877)—English decisions on English Income-tax Act, guides to interpret Indian Income-tax Act.] Where a person who was assessed to income-tax appealed to the Board of Revenue and the Board dismissing the appeal refused to refer the matter to the High Court under section 51 of the Income-tax Act, though requested to do so, Held that section 106 (2) of the Government of India Act, and section 52 of the Income-tax Act prohibited the High Court from entertaining any application under section 45 in the nature of a *Mandamus* for the purpose of compelling the Revenue Board to refer the matter to the High Court under section 51 of the Income-tax Act: *Spencer v. Juddow*, (1950) 4 M.L.A., 553, followed. Issuing an order under section 45 of the Specific Relief Act in the nature of a *Mandamus* is an exercise of "Original jurisdiction" within section 106 (2) of the Government of India Act. An application under section 45 of the Specific Relief Act against the Board is a "proceeding" within section 52 of the Income-tax Act. In *re Onward Building Society*, [1891] 2 Q.B., 468, English decisions are not decisions of "Foreign Courts" and as the Income-tax Act of India generally follows the lines of the English Income-tax Act, the decisions of English Courts on the latter Act are the best guides to the interpretation of the Indian Act. The meaning of "unnecessary" in section 51 of the Income-tax Act considered.

Chief Commissioner of Income-tax v. North Anantapur Gold Mines, Limited ... (1921) I.L.R., 44 Mad., 718

INDIAN COUNCILS ACT (1861), ss. 22 AND 42: See—HINDU LAW—WILLS ... 446

INSOLVENCY ACT (PROVINCIAL) (III OF 1907), ss. 14, 5 AND 47—Civil Procedure Code (Act V of 1908), O. I, r. 3—Single petition by creditor to adjudicate debtors as insolvents—Debtors, members, of a joint Hindu family—Joint debt—Joint acts of insolvency—Single petition against joint debtors, whether maintainable—Multifariousness in suits—Test of.] The members of a joint Hindu family can be adjudicated insolvents on a single petition of a creditor if they are liable on a joint debt and have been guilty of a joint act or acts of insolvency. The test is whether, if the application were treated as a suit, the suit would be bad for multifariousness, that is, for misjoinder of different causes of action against different defendants; if no such objection can be successfully advanced, a single application for adjudication is maintainable. *Sarda Prasad Ukil v. Ram Sukh Chandra* (1905) 2 C.L.J., 318, dissented from.

Mamayya v. K. R. Rice Mill Co. ... (1921) I.L.R., 44 Mad., 810

KANOM—Lease or mortgage—Deed of taraga, construction of—Attestation of deed, necessity for—Transfer of Property Act, ss. 59 and 98—Anomalous mortgage—Civil Procedure Code (V of 1908) O. I, r. 9—Non-joinder of parties—Decree against parties in appeal:—See MALABAR LAW ... 844

KARNAVAN OF TAVAZHI MAKING A GIFT—Gift not questioned even by last surviving member of the tavazhi—No right of attaladakkam heirs to question gift:—See MALABAR LAW ... 140

- LAND ACQUISITION ACT (I OF 1894)**—*Acquisition of land for quarrying—Principle of compensation—Value of prospective gravel.* When a piece of land is compulsorily acquired for quarrying purposes, its special adaptability for quarrying is an element for consideration in fixing the amount of compensation, in spite of the fact that no one but the local authority for which the acquisition was made ever made any demand for the land as a quarry; and it is not right to award compensation for it only as cultivable land. *Daya Khushal v. Assistant Collector, Surat*, (1914) I.L.R., 38 Bom., 37, followed. Judgment of Moulton, L.J., in *In re Lucas and Chesterfield Gas and Water Board* [1909] 1 K.B., 16 at 30, 31, distinguished. The amount of compensation to be awarded is the present value of all the gravel that might be expected to be realized in the future.
- Raghunatha Row v. Secretary of State for India* ... (1921) I.L.R., 44 Mad., 204
- "LANDHOLDER"**—*Minor Inamdar—Lands granted by Zamindar after settlement in permanently settled estate—Whether inamdar a 'landholder'—Whether tenants under him have occupancy rights:—See ESTATES LAND ACT (MADRAS) (I OF 1908), SEC. 3, CL. (5)* ... 677
- LANDLORD AND TENANT**—*Forfeiture of lease by non-payment of rent—Relief against forfeiture only on payment of all arrears of rent though barred by limitation—Transfer of Property Act, sec. 114.* Under section 114 of the Transfer of Property Act a tenant can be relieved against forfeiture of lease incurred by non-payment of rent only on payment of all arrears of rent, including such as may be barred by limitation, together with such interest as might be legally due thereon. *Semble*:—The arrears of rent so payable will probably be limited to twelve years.
- Vasudeva Udpu v. Krishna Udpu* ... (1921) I.L.R., 44 Mad., 629
- Lessee sub-letting his right to another for a term, without obtaining possession—Trespass by stranger—Right of lessee to sue stranger for possession, mesne profits and damages.* A lessee of certain lands who had not obtained possession from his lessor but sub-letted his right to others for a term with a stipulation that they should obtain possession, has no right to sue, during the continuance of the term, trespassers in possession either for mesne profits or for damages. *Per* Chief Justice (SADASIVA AYYAR, J. contra): The lessee is also not entitled to sue the trespassers for possession.
- Mohideen Ravuthar v. Jayarama Ayyar* ... (1921) I.L.R., 44 Mad., 937
- LEASE**—*Taraga lease for reclamation and improvement by a stanomdar for twelve years with a clause for renewal for another twelve years, validity of:—See MALABAR LAW* ... 509
- Unregistered lease for six months—Whether admissible to prove tenancy:—See TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 4 AND 107* ... 55
- LEASE FOR A TERM**—*Covenant for renewal of lease from time to time, whether void for perpetuity—Transfer of Property Act (IV of 1882), sec. 14—Covenants for renewal and for pre-emption, distinction between.* A covenant, in a lease for a term, for its renewal from time to time at the option of the lessee, is not void as being in violation of the rule against perpetuities; section 14, Transfer of Property Act, applies only to transfers and not to covenants such as covenants for renewal of lease. Covenants for the renewal of a lease are not similar to covenants for pre-emption with regard to the application of the rule against perpetuities. *Kolathu Ayyar v. Ranga Vadhyar*, (1915) I.L.R., 38 Mad., 114, distinguished.
- Pichi Naidu v. Jefferson* ... (1921) I.L.R., 44 Mad., 230
- LEGAL PRACTITIONER**—*Witness—Whether can appear for accused person.* The rule as to the exclusion of witnesses from Court until they have been examined does not extend to counsel for accused, who is cited as a prosecution witness. There may be circumstances which may make it desirable for a counsel not to appear in a case in which he is a witness, but they would not render his appearance illegal.
- In re Babu Reddi* ... (1921) I.L.R., 44 Mad., 916

- LEGAL REPRESENTATIVES SUITS ACT (XII OF 1855)**:—*See CIVIL PROCEDURE CODE, O. XXI, r. 1* ... 257
- LIFE INSURANCE COMPANY**—*Agent—Dismissal of agent—Commission—Renewals, meaning of—Premium paid by policy-holders subsequent to dismissal of agent—Right of agent to commission on renewals or subsequent premium paid after dismissal—Express contract for such commission, necessity for.* In the absence of a definite agreement to that effect, an agent of a Life Insurance Company who has secured policy-holders for the Company and whose duties as agent do not cease with the first introduction of the customer, has no right to commission or renewals, that is, subsequent premium paid in by such policy-holders, after he ceased to be agent. *In re The Albert Life Assurance Arbitration* (Lewine's Case) 15 S.J., 828; *Boyd v. Mathers*, (1893) 9 T.L.R., 443; Original Side Appeal No. 42 of 1899; and Civil Suit No. 178 of 1903, followed.
- Empire of India Life Assurance Company, Ltd. v. Nanu Ayyar* ... (1921) I.L.R., 44 Mad., 170
- LIMITATION**—*Adverse possession—Plaintiff proving title—Both parties having uncertain possession—Indian Limitation Act (IX of 1908), schedule I, article 144.* Adverse possession in order to bar by limitation a suit for the possession of land must be adequate in continuity, in publicity, and extent, so as to show that it is possession adverse to the competitor. When a person establishes his title to land and proves that he has been exercising during the currency of his title various acts of possession, then the quality of those acts, even though they might have failed to constitute adverse possession against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is required from any person challenging by possession the rightful title. *Radhamoni Devi v. The Collector of Khulna*, (1900) I.L.R., 27 Cal., 943 (P.C.); s.c., L.R., 27 I.A., 140; and *Secretary of State for India v. Chellikani Rama Rao*, (1916) I.L.R., 39 Mad., 617 (P.C.); s.c., L.R., 43 I.A., 192, applied. [Judgment of the High Court reversed.]
- Kuthali Moothavur v. Paringati Kunharankutty* ... (1912) I.L.R., 44 Mad., (P.C.), 883
- LIMITATION ACT (INDIAN) (IX OF 1908), ARTS. 11, 13 AND 120**—*Attachment before judgment—Decree and order for sale—Claim to attached property, filed after order for sale—Order allowing claim—Suit filed more than one year after to contest the order on claim—Limitation.* Property was attached before judgment, and after a decree in the suit and an order for sale in execution were passed, a claim to the property was preferred and allowed by the Court. On a suit to contest the order on the claim being filed more than a year after such order, *Held*, that the property must be deemed to have been attached in execution of a decree by virtue of Order XXXVIII, rule 11, Civil Procedure Code, and that article 11 and not article 13 or 120 was applicable and that the suit was barred by limitation.
- Arunachalam Chetti v. Peraisami Servai* ... (1921) I.L.R., 44 Mad. (F.B.), 902
- ARTS. 31 AND 62—Railways Act (Indian) (IX of 1890), sec. 56—Suit by consignee of goods for surplus, sale-proceeds—Suit against the Company—Sale of goods under section 56 of the Railways Act—Suit for compensation distinct from suit for surplus sale-proceeds—Money had and received—Applicability of article 31 or 62, Limitation Act.** A suit by the consignee of goods by a Railway Company for the recovery of the surplus sale-proceeds realized by the Company by sale of the goods under section 56 of the Indian Railways Act, is governed by article 62 and not article 31 of the Limitation Act. *M. & S.M.Ry. Co., Ltd. v. Haridoss Banmalidoss*, (1918) I.L.R., 41 Mad., 871, referred to.
- Tarachand v. M. & S.M.Ry. Co., Ltd.* ... (1921) I.L.R., 44 Mad., 823
- ART. 118 AND SEC. 9—Suit for declaration that an adoption is untrue or invalid—Nearest reversioner's consent to adoption for a bribe—No suit by nearest reversioner—Suit by**

remoter reversioner, more than six years after adoption came to knowledge of the nearest reversioner—Plaintiff born after adoption and before suit barred—Bar of Limitation. A suit for a declaration that an alleged adoption is untrue or invalid, instituted by a remoter reversioner, more than six years after the adoption came to the knowledge of the nearest reversioner, is barred under article 118 of the Limitation Act. Neither the fact that the nearest reversioner did not himself bring such a suit because he had been bribed to give his consent to the adoption, nor the fact that the remoter reversioner who sued was born after the alleged adoption and before the suit became barred under article 118, gives the latter any fresh cause of action or stops time running which had begun to run against the whole body of reversioners from the date of adoption.

Venkata Sivayya v. Ademma ... (1921) I.L.R., 44 Mad., 218

LIMITATION ACT (INDIAN) (IX OF 1908), ART 120:—See HINDU LAW—WIDOW.

Reversioner—Suit by reversioner to recover possession after death of daughter of the last male owner—Lands mortgaged usufructually by last male owner in 1866—Sale in 1900 by mort. age after male owner's death, during daughter's life-time—Death of daughter in 1906—Suit in 1914 by reversioner against vendee for possession of lands—Bar of Limitation. A Hindu reversioner instituted a suit in 1914 to recover possession of certain lands which had been usufructually mortgaged by the last male owner in 1866, and had been sold for consideration by the mortgagee in 1900 after the death of the last male owner and during the life-time of his daughter who had inherited his estate and died in 1906. The vendees who were impleaded in the suit pleaded, *inter alia*, the bar of limitation. Held, that article 134 and not article 141 of the Indian Limitation Act (IX of 1908) applied to the case and that the suit was barred by limitation.

Sesha Naidu v. Periasami Odayar ... (1921) I.L.R., 44 Mad., 951

ART. 181—Appeal against preliminary decree for sale in a mortgage suit—Application for final decree under O. XXXIV, r. 5, Civil Procedure Code—Article applicable and starting point of limitation. An application for a final decree for sale under Order XXXIV, rule 5, Civil Procedure Code, is governed by article 181 of the Limitation Act and the starting point, in cases where there has been an appeal from the preliminary decree, is the date of appellate decree whether the latter confirmed or varied the preliminary decree: *Bhup Indar Bahadur Singh v. Bijai Bahadur Singh*, (1901) I.L.R., 23 All. 152 (P.C.), applied. *Juscurn Boid v. Pirthichand Lal Choudhury*, (1919) I.L.R., 43 Calo., 670 (P.C.), explained. *Viswanatha Sastri v. Sitalakshmi Ammal*, (1921) 13 L.W., 87, distinguished.

Venkayya v. Sathiraju ... (1921) I.L.R., 44 Mad., 714

ss. 4 AND 14—Suit for dower—Period of limitation expiring during Christmas holidays—Suit filed in a Subordinate Judge's Court, on its Small Cause side on the re-opening day—Plaint returned for want of jurisdiction on the Small Cause side—Plaint presented as an Original Suit in the same Court on its regular side—Limitation, bar of. Where the period limited for the institution of a suit for dower expired on a day when the Court was closed for the Christmas holidays, and the suit was instituted on the re-opening day as a Small Cause suit in the Court of a Subordinate Judge on its Small Cause side and on the plaint being returned after some days for want of jurisdiction it was filed on the next day in the same Court as an original suit and the defendant pleaded that the suit was barred by limitation. Held, that the time during which the suit was pending on the Small Cause side of the Court and which the plaintiff was allowed to deduct under section 14 of the Limitation Act could not be tacked on to the period during which the Court was closed, under section 4 of the Act, so as to save the bar of limitation.

Ummathu v. Pathumma ... (1921) I.L.R., 44 Mad., 817

LIMITATION ACT (INDIAN) (IX OF 1908), ss. 6, 10—Receipt of interest by a mortgagee from a trustee knowing mortgage to be in breach of trust—Suit by beneficiary for such interest against mortgagee—Applicability of section 10 to such suit—Cause of action for beneficiary to recover such interest—No new cause of action on beneficiary attaining majority.] Interest received by a mortgagee from a trustee in respect of a mortgage executed by the latter in breach of trust to the knowledge of the mortgagee is not 'property' vested in the mortgagee 'in trust for any specific purpose' within section 10 of the Limitation Act. If on the dates of payment of interest, the beneficiary be a minor, his cause of action to recover the same arises from such dates, and if he sues for the recovery of such interest after attaining majority he is bound to sue within the time limited by section 6 of the Act; and he does not get a fresh cause of action on attaining majority.

Raja of Ramnad v. Ponnusami Tevar ... (1921) I.L.R., 44 Mad., 277

SEC. 20—Execution of decree for sale—Part of the hypotheca taken up under the Land Acquisition Act—Compensation paid into Court—Payment of amount to decree-holder through Court—Paper showing payment, signed by Judge—Judge, whether an agent of judgment-debtor—Signature of Judge, whether sufficient under section 20.] After a decree for sale on a mortgage was passed in 1912, a part of the hypothecated property was taken up under the Land Acquisition Act, and the Government paid the amount of compensation into Court to the credit of the suit; and the same was paid out to the decree-holder on the 11th August 1914. When the payment was made the Judge signed a paper showing that payment was made in his presence and through Court. On the decree-holder filing an application for execution of the decree on the 10th August 1917, the judgment-debtor pleaded the bar of limitation. Held, that the Judge should be deemed to have been an agent duly authorized by the judgment-debtor to make the payment, and that the signature of the Judge on the paper showing the payment satisfied the condition that the fact of payment should appear in the handwriting of the person making it, as required by section 20 of the Limitation Act; and that consequently, the application for execution was not barred. *Chinnery v. Evans*, (1864) 11 H.L.Cas., 115, applied; *Lakshmanan Chetty v. Sadayappa Chetty*, (1918), 35 M.L.J., 571, referred to.

Govindasami Pillai v. Dasai Goundan ... (1921) I.L.R., 44 Mad., 971

SEC. 20—Mortgage decree against mortgagor and purchaser of the equity of redemption—Payment of interest as such by the purchaser, effect of. A purchaser of the equity of redemption is a person liable to pay the mortgage debt within section 20 of the Limitation Act; hence, if under a mortgage decree for sale of the mortgage property, to which he is a party, though exempted from personal liability, he pays interest as such, such payment gives a fresh period of limitation for execution of the decree. *Bolding v. Lane*, (1863) 1 De G.J. & Sm., 122, and *Chinnery v. Evans*, (1864) 11 H.L.Cas., 115 at 135, followed.

Askaram Soucar v. Venkataswami Naidu ... (1921) I.L.R., 44 Mad., 544

SEC. 28—Several daughters of a Hindu jointly succeeding to their father's estate—Exclusive possession of one for more than twelve years—Right of survivors, on her death, to the estate by survivorship. Where, on the death of a Hindu, his daughters jointly succeeded to his estate, but one of them excluded the others from the enjoyment of the estate for more than twelve years and then died, after alienating some of the properties. Held, in a suit by a surviving daughter against the son of the deceased and the alienees to succeed to the estate by right of survivorship, that with the extinction of the right to joint possession under section 28 of the Limitation Act, the right of survivorship, which is only an accretion to the right to joint possession was also lost. *Katama Natchiar v. Rajah of Shivuganga*, (1863) 9 M.I.A., 543, at p. 611, and *Sachindra Kishore Dey v. Rajani Kant Chuckerbutty*, (1915) 27 I.C., 250, followed.

Atchamma v. Papiah ... (1921) I.L.R., 44 Mad., 131

LOCAL BOARDS ACT (MADRAS) (IV OF 1884), SEC. 100— <i>Order of a Taluk Board, to an owner to fill up a tank without regard to attendant circumstances, validity of.</i> A Taluk Board passed an order under section 100 of the Madras Local Boards Act (V of 1884) asking the owner of certain tanks to fill them up on the ground that they were in an insanitary condition without taking into consideration (1) that such condition was brought about not by any act of the owner, but by the Taluk Board allowing drainage water to escape into the tanks and (2) that filling up the tank was far more expensive than raising a bund all round the tanks which would have equally served the purpose. <i>Held</i> , that the power conferred by section 100 of the Local Boards Act, though a very wide power, must not be exercised for ulterior purposes, or in a capricious, wanton and arbitrary manner, and, if so used, can be controlled by the Civil Courts: and that the order passed by the Board in this case was one that should be set aside.	
<i>Taluk Board, Bandar v. Zamindar of Chellapalli ...</i>	(1921) I.L.R., 44 Mad., 150
MADRAS INAMS ACT (VIII OF 1869) :— <i>See INAMS ...</i>	421
MAJORITY ACT (INDIAN) (IX OF 1875), SEC. 3 :— <i>See HINDU LAW—WILL ...</i>	448

MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS ACT (I OF 1900), SS. 5 AND 6 (3)—*Decree for ejectment—Value of improvements ascertained and specified in the decree—Improvements effected subsequent to decree, not ascertained—Application for execution by ejectment whether maintainable.* Where a landlord in Malabar obtained a decree for ejectment of his tenant on payment by him of an ascertained amount for compensation for value of improvements, applied for execution of the decree by ejectment of the tenant after depositing into Court the amount specified in the decree for value of improvements, *held*, that the landlord was entitled to an order in execution for ejectment of the tenant from all the lands specified in the decree, even though the value of improvements, effected by the tenant on some of the lands, subsequent to the decree, had not been ascertained under section 6 (3) of the Malabar Compensation for Tenants Improvements Act.

Sankaran Nambuduripad v. Sankaran Nair ... (1921) I.L.R., 44 Mad., 960

MALABAR LAW—*Conversion of a member of Marumakkattayam tarwad to Muhammadanism—Right of convert to partition of tarwad property—Removal of Caste Disabilities Act (XXI of 1850), effect of.* A member of a Marumakkattayam tarwad does not, by reason of his conversion to Muhammadanism, acquire right to a partition of the tarwad property: *Observation of WILSON, J., in Matungini Gupta v. Ram Rutton Roy, (1892) I.L.R., 19 Cal., 289 (F.B.) at 291, followed. Kunhichekkan v. Lydia Arucanden, (1912) M.W.N., 388, and Abraham v. Abraham, (1863) 9 M.L.A., 195, explained.*

Pathumma v. Raman Nambiyar ... (1921) I.L.R., 44 Mad. (F.B.), 891

Kanom—*Lease or mortgage—Deed of taraga, construction of—Attestation of deed, necessity for—Transfer of Property Act, ss. 59 and 98—Anomalous mortgage—Civil Procedure Code (V of 1904), O. I, r. 9—Non-joinder of parties—Decree against parties in appeal.* A kanom is an anomalous mortgage falling under section 98 of the Transfer of Property Act, with certain well-known incidents attached to it under the customary law of Malabar; and a kanom-deed, to be valid, must be attested as a mortgage-deed under section 59 of the Act. The fact that the document is described as a taraga or royal grant or that the kanom amount is exceedingly insignificant does not alter the nature of the transaction.

Kanna Kurup v. Sankara Varma Rajah ... (1921) I.L.R., 44 Mad., 844

Karnavan of tavazhi making a gift—*Gift not questioned even by the last surviving member of the tavazhi—No right of attaladakkam heirs to question gift.* An attaladakkam heir succeeds only to such of the properties of a tavazhi as have not been disposed of by its last members. He can-

not therefore question an alienation made by the karnavan of the tavazhi, when the other members had not by any unequivocal act called it into question during their lifetime.

Thayyil Mammad v. Purayil Mammad ... (1921) I.L.R., 44 Mad., 140

MALABAR LAW—*Taraga lease for reclamation and improvement by a stanomdar for twelve years with a clause for renewal for another twelve years, validity of.* A taraga lease in Malabar given for reclaiming and improving lands contained the following clause by the lessee: "I shall well improve this paramba and plant, etc., when the improvements have survived the period of decay and the coconut trees begin to bear their first fruits, I shall take at araga after fixing the rent in accordance with the local custom on an inspection of Kuzhikanoms." *Held*, that the clause entitled the lessee to a renewal of the lease for twelve years from the expiry of the first term of twelve years at an enhanced rent to be determined in accordance with it. *Gopalan Nair v. Kunhan Menon (1907) I.L.R., 30 Mad., 300, distinguished.* A stanomdar is entitled to grant a lease so as to last beyond his life-time and to bind his successors provided the lease is beneficial to the estate.

Kuttiyali v. Unmamma ... (1921) I.L.R., 44 Mad., 509

MALICIOUS PROSECUTION—*Appeal—Death of appellant—Abatement of appeal—Jurisdiction to hear Memorandum of Objections :—**See CIVIL PROCEDURE CODE (V OF 1908), O. XLI, s. 22 (4) ...* 828

MANAGING MEMBER OF JOINT HINDU FAMILY—*Accountability :—**See HINDU LAW—ADOPTION ...* 656

MOOPU :—*See HINDU LAW—PARTITION ...* 740

MORTGAGE—*Sale in execution—Sale certificate—Property sold—Conclusiveness of certificate in a subsequent suit—Code of Civil Procedure (V of 1908), sec. 47.* Certificates of sale are documents of title which ought not to be lightly regarded or loosely construed. Where upon a sale under a mortgage decree the purchaser has been given a sale certificate which plainly includes a certain property and has been put into possession of that property, it is not open to a Court in a subsequent suit by the mortgagor's representative to hold by reference back to the mortgage-deed that the property in question was not sold under the decree. The title of the purchaser can be questioned only by a petition in the execution proceedings under section 47 of the Code of Civil Procedure and not at all where that remedy is barred by limitation. [*Judgment of the High Court reversed.*]

Ramabhadra Naidu v. Kadriyasami Naicker ... (1921) I.L.R., 44 Mad. (P.C.), 483

MORTGAGOR AND MORTGAGEE—*Discharge of debt—Oral arrangement—Mortgagee in possession as full owner for more than twelve years after arrangement for discharge of debt—Suit by mortgagor after twelve years to redeem—Bar—Adverse possession of mortgagee—Proof of nature of possession.* Where, under an oral arrangement between the mortgagor and the usufructuary mortgagee, the latter retained possession of a portion of the mortgaged property in full ownership in satisfaction of the mortgage debt, and enjoyed it as full owner for more than twelve years after the arrangement, on a suit being instituted by the mortgagor to redeem the property more than twelve years after the arrangement. *Held*, that the mortgagee had acquired by adverse possession an absolute title to the property, and that the mortgagor's right to redeem the property was barred by limitation. *Usman Khan v. Dasanna (1914) I.L.R., 37 Mad., 515, Gonindu v. Mallayya, L.P.A., No. 207 of 1915 (unreported), and Varada Pillai v. Jeevarathnammal (1920) I.L.R., 43 Mad., 244 (P.C.), followed. Ariyaputhira v. Muthukumaraswami (1914) I.L.R., 37 Mad., 423, dissented from.*

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MURDER —Circumstantial evidence—No ground for imposing lesser sentence.] If the Court is satisfied beyond reasonable doubt that the accused is guilty of murder and the circumstances require the imposition of the death penalty, the fact that the conviction is based on circumstantial evidence is not a reason for passing the lesser sentence allowed by law. <i>Public Prosecutor v. Paramandi</i> ... (1921) I.L.R., 44 Mad., 443	
NEGOTIABLE INSTRUMENT ACCOMPANIED BY DEPOSIT OF TITLE-DEEDS —Endorsement of negotiable instrument without transfer—Equitable mortgage by registered instrument—Right of endorsee to enforce the mortgage.] The endorsee for value of a negotiable instrument, the amount of which had been secured by a mortgage by deposit of title-deeds, cannot claim to enforce the mortgage in the absence of a registered instrument conveying the mortgage-right to him. <i>Perumal Ammal v. Perumal Naicker</i> (1921) I.L.R., 44 Mad., 196, dissented from. <i>Erumalai Chetty v. Balakrishna Mudaliar</i> ... (1921) I.L.R., 44 Mad., 965	
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PALAYAM —Unsettled palayam—Alienability—Land held on service tenure—Abolition of service—Police duties of landowner—Effect of sanads.] A palayam in the Madura district was held originally on military service tenure and subject to the payment of a tribute to the paramount power. It was contended that it was also held on condition of rendering police service to the State. In support of that contention reliance was placed upon sanads granted in 1797 and 1800, by which the palayagar was bound to protect the inhabitants from robberies and to deliver up murderers and deserters. In 1895, the palayagar mortgaged villages of the palayam for debts incurred by him prior to that date, and in 1900 the villages were bought by the mortgagees at a sale under a mortgage decree. No permanent settlement had been made with the palayagar, but in 1905 one was made with the alienees. Held, that the palayam was not by reason of its tenure inalienable, since military service was abolished in the Madura district by a proclamation in 1801, and since even if it could be inferred from the sanads that the palayam was held on a tenure of rendering police service to the State (which it could not) such police duties by land-holders were abolished before the alienation; and that the alienees obtained a good title. [Judgment of the High Court approved.] <i>Appayasami Naicker v. Midnapore Zamindari Company, Ltd.</i> ... (1921) I.L.R., 44 Mad. (P.C.), 175	
PAPER CURRENCY ACT (INDIAN) (II OF 1910), SEC. 26 —Hundi payable to bearer—Suit by endorsee against endorser—Invalidity of hundi—Estoppel, if any.] The endorsee of a hundi, which was drawn payable to bearer and which was not saved by the proviso to section 23 of the Paper Currency Act, sued to enforce it as against the endorser. Held, that the hundi was invalid according to the section and that the endorser was not estopped from denying the validity of the hundi. <i>Chidambaram Chettiar v. Ayyasami Tharan</i> (1917) I.L.R., 40 Mad., 585, followed. The observations of SESHAGIRI AYYAR, J., to the contrary in <i>Arunachalam Chettiar v. Narayanan Chettiar</i> (1919) I.L.R., 42 Mad., 470, held obiter and not followed. The mere fact that a hundi is drawn on a certain person and that he endorses it to another does not make the drawee a "banker" within the proviso to the section. <i>Alagappa Chetty v. Alagappa Chetty</i> ... (1921) I.L.R., 44 Mad., 157	
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PENAL CODE (INDIAN) (ACT XLV OF 1860), SEC. 323 —Death of person injured—Abatement of proceedings—Probate and Administration Act (V of 1881), sec. 89.] A criminal prosecution under section 323 of the Indian Penal Code does not abate by reason of the death of the person injured. The words "to prosecute . . . any proceeding" in section 89 of the Probate and Administration Act do not refer to criminal prosecutions but to civil actions only. <i>Rama Nand v. Emperor</i> (1917) 40 I.C., 1008 (Punjab), and <i>Labhu v. Emperor</i> (1919) 52 I.C., 797 (Punjab), dissented from. <i>Muhammad Ibrahim Sahib v. Shaik Davood</i> ... (1921) I.L.R., 44 Mad., 417	
SEC. 341—Restraint upon a drunken and disorderly person—Common Law of England—Applicability to India.] A private citizen has the right to arrest under the Common Law any person as to whom there is reasonable apprehension that he will commit a breach of the peace. <i>Timothy v. Simpson</i> (1835) 4 L.J. (M.C.) 73, and <i>Queen v. Light</i> (1857) 27 L.J. (M.C.), 1, referred to. <i>In re Ramaswami Ayyar</i> ... (1921) I.L.R., 44 Mad., 913	
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PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), SEC. 30 —Indian Contract Act (IX of 1872), sec. 135—Surety—Dubash of a Company guaranteeing customers—Part-payment of debt by surety to creditor—Insolvency of debtor—Composition effected by insolvent-debtor with creditors—Subsequent approval by Court and annulment of insolvency—Right of surety to refund of money paid to creditor—Composition and annulment, whether under section 30 of the Act.] The dubash of a Company stood surety for customers introduced by him to them and deposited with them certain Government promissory notes as security. One of such customers failing in business, the Company sold the notes and appropriated the proceeds in part-payment of the debt of the customer. Both the customer and the dubash were adjudicated insolvents. The customer entered directly without the Official Assignee's intervention into a composition with his creditors with a view to obtain the approval and sanction of the Insolvency Court, and subsequently applied to the Court for approval of the composition and annulment of the insolvency. The Court annulled the insolvency but the order did not embody the terms of the composition, as required by section 30 of the Presidency Towns Insolvency Act. The Company had agreed to the composition without the consent of the dubash and received a dividend on the full amount of their debt, without giving credit for the money which was appropriated. The Official Assignee, acting on behalf of the insolvent dubash, applied to the Court to direct the Company to refund the money of the dubash appropriated by them. Held, that a creditor was entitled to prove for the full amount of his debt in the insolvency of the principal debtor, notwithstanding that the surety had paid a portion of the debt; and that the surety could not prove, until he had paid the full amount for which he was liable: <i>Ellis v. Emmanuel</i> (1876) 1 Ex. D., 157, and <i>In re Sass. Ex parte National Bank of England</i> [1896] 2 Q.B., 12, followed; that the fact that the creditor entered into a composition with the principal debtor without the surety's consent did not entitle the latter to a refund of payments already made by him to the creditor, although it	

might release him from future liability; that the irregularities in the procedure did not vitiate the Court's approval of the terms of the composition and the consequent annulment of the insolvency, under section 30 of the Insolvency Act; and that the discharge of the principal debtor in such a case being by operation of law and not by act of the creditor, the surety would not be discharged from his obligation to the creditor under section 135 of the Indian Contract Act. *Ex parte Jacobs, In re Jacobs* (1875) 10 Ch. App., 211, followed. On the question whether the fact that the creditor had given receipts in full settlement of the debt without waiting until the composition was sanctioned by the Court discharged the creditor. *Held*, by SESHAGIRI AYYAR, J. (WALLIS, C.J., not deciding the point) that where after notice to the surety the composition was accepted by the Court it became an act of the Court and the surety was not discharged from liability.

Bombay Company, Ltd. v. Official Assignee of Madras (1921) I.L.R., 44 Mad., 281

PRINCIPAL AND INTEREST—*Appropriation of payments*:—See ACCOUNT ... 570

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PROCEDURE—*Appeal to Privy Council*—*Certificate of High Court*—*Code of Civil Procedure* (V of 1908), sec. 109 (c), O. XLV, r. 3—*Madras Estates Land Act, 1908, sec. 52, sub-sec. (3)*—*Patta decreed under earlier Act—Res judicata—Special leave to appeal refused.* A certificate granted by a High Court upon a petition under Order XLV, rule 3, Code of Civil Procedure, for leave to appeal to the Privy Council should show clearly whether it is intended to certify merely that the case falls within section 110 of the Code or that it falls within section 109 (c) and section 110 as a case otherwise fit for appeal. Upon a petition under Order XLV, rule 3, for leave to appeal from a decree of the High Court in a suit for the recovery of Rs. 4,605 rent, the High Court certified "that as regards the subject matter and the nature of the questions involved, the case fulfils the requirements of sections 109 and 110 of the Code of Civil Procedure, and that the case is a fit one for appeal to His Majesty in Council." *Held*, that the appeal could not be maintained, since the value of the subject matter was under Rs. 10,000, and there was nothing in the certificate to show that the discretion conferred on the High Court by section 109 (c) was invoked or exercised. *Held*, further, that a contention that the provision in section 52, sub-section (3) of the Madras Estates Land Act, 1908, for the remaining in force of decreed pattas and muchilkas referred only to pattas and muchilkas decreed under that Act, was not of sufficient weight to justify their Lordships in granting special leave to appeal.

Radhakrishna Ayyar v. Swaminatha Ayyar ... (1921) I.L.R., 44 Mad. (P.C.), 298

PROCLAMATION OF SALE—*Non-publication in village—Announcement of a wrong place as place of sale—Sale held not in the place ordered by Court, but in the wrong place—Sale, illegal and void and not merely irregular*—See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, RR. 54 (2), 66, 67 AND 90.

PROVINCIAL INSOLVENCY ACT (INDIAN) (III OF 1907), ss. 3, 16, 18, 36 AND 37—*Order of adjudication—Appointment of Receiver by District Court—Sale in execution of money decree held by District Munsif's Court, subsequent to appointment of Receiver—Application by Receiver to the District Court for cancellation of sale and for delivery of possession—Application whether competent—Jurisdiction of District Court.* Where after the appointment of a Receiver for the estate of an insolvent had been made by a District Court some of the properties of the insolvent were sold in auction by a District

Munsif's Court in execution of a decree for money passed by the latter Court prior to the order of adjudication. *Held*, it was competent to the Receiver to make an application to the District Court for annulment of the sale and for delivery of possession of the properties from the purchaser, under section 18, clause (3) of the Provincial Insolvency Act (III of 1907).

Official Receiver, Tinnevely v. Sankaralinga Mudaliar ... (1921) I.L.R., 44 Mad., 524

PROVINCIAL INSOLVENCY ACT (INDIAN) (III OF 1907), ss. 18, 20 (a), (e) AND 23—*No vesting order in favour of Receiver—Order to Official Receiver to adjudicate and administer the insolvent's estate, effect of.* On an application for adjudication of insolvency the District Court passed the following order:—"The petition is transferred to the Official Receiver for adjudication and for the administration of the estate." After adjudication by the Receiver no separate order vesting the insolvent's estate in the Receiver was passed by the District Court under section 18 of the Provincial Insolvency Act. *Held*, that by the combined effect of section 20 (a) and (e) and section 23 of the Act, the order to administer the estate empowered the Receiver to sell the insolvent's estate. *Muthuswami Swamiam v. Somoo Kendiar* (1920) I.L.R., 43 Mad., 869, distinguished.

Subba Ayyar v. Ramaswami Aiyangar (1921) I.L.R., 44 Mad., 547

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PUBLIC CHARITABLE TRUST, MANAGEMENT OF—*Right of female heirs to management*:—See HINDU LAW ... 205

PURCHASER OF OCCUPANCY RIGHT—*Suit for patta in a Revenue Court—Duty of Revenue Court to decide as to title of plaintiff—Rival claimant of such right, previously recognized by landlord as transferee—Power and duty of Court to decide in the suit—Proceedings under section 146, Estates Land Act, effect of—Non-joinder of parties—Dismissal of suit—Civil Procedure Code (V of 1908), O. I, r. 10, cl. 2*:—See ESTATES LAND (MADRAS) ACT (I OF 1908), ss. 55 AND 146 ... 43

RAILWAYS ACT (INDIAN) (IX OF 1890), SEC. 56:—*See* LIMITATION ACT (IX OF 1908), ARTS. 31 AND 62 ... 823

REGISTRATION ACT (INDIAN) (III OF 1877), SEC. 17—*Registration—Adoption—Authority to adopt—Whether document a will.* A Hindu about three weeks before his death executed a document which was headed by a statement that it was a will in favour of the executant's wife; by it the executant, after stating that he had long been seriously ill and had no issue, said, "I have consented to your adopting a son at your pleasure and conducting the management of the estate in the best manner. None of my heirs shall have cause to raise disputes touching this matter. This will has been executed by my consent." The document was not registered. After the executant's death his widow adopted a son to him. *Held*, that the document was merely an authority to adopt and not a will, and was therefore required to be registered by the last provision in section 17 of the Indian Registration Act, 1877. [*Judgment of the High Court affirmed.*]

Bheema Deo v. Behari Deo ... (1921) I.L.R., 44 Mad. (P.C.), 738

(XVI OF 1908), ss. 2 AND 17 (ii), CL. 5—*Lease—Agreement to lease—Instrument not registered—Admissibility of instrument in evidence—Suit by lessor to eject lessee—Lessee setting up counter-claim for specific performance of agreement to lease or for damages for its breach by lessor.* An agreement to lease, which does not operate as an immediate demise of the property, does not fall within the definition of "lease" contained in section 2 of the Registration Act (XVI of 1908) and is admissible in evidence without registration. The question whether an

agreement to lease operates as an immediate demise should be determined on the facts of each case. *Hemanta Kumari Debi v. Midnapur Zamindari Company* (1919) I.L.R., 47 Cal., 485 (P.C.); s.c., I.L.R., 46 I.A., 240, followed; *Narayanan Chetty v. Muthiah Serrai* (1912) I.L.R., 35 Mad., 63 (F.B.), not followed.

Swaminatha Mudaliar v. Ramaswami Mudaliar ... (1921) I.L.R., 44 Mad., 399

REGISTRATION ACT (INDIAN) (XVI OF 1908), ss. 17 AND 49:—*See*
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REGULATION XXV OF 1802 (MADRAS), ss. 3 AND 4—*Zamindar Permanent settlement—Sanad—Construction of sanad—Right of Government to resume inam lands.* A sanad issued by the Government on August 24, 1802, to a zamindar in the Presidency of Madras (Arcot) stated that in consideration of the relief which the zamindar's finances would derive from the relinquishment of his military services, and of the Government charging itself with the duty of protecting his territories, "the British Government has fixed your annual contribution, including equivalent for military service and the established peshkash for every year, at the sum of star pagodas 1,11,053, which said amount shall never be liable to changes under any circumstances." Clause (5) reserved to the Government the revenue derived from salt and saltpetre, and certain other subjects, without making any mention of lakhiraj or inam lands. It appeared from other documents that the assessment had been fixed on the whole zamindari, irrespective of the assets derived from each particular unit of property within it. Madras Regulation XXV of 1802, which was passed on July 13, 1802, provided by section 3 that in all cases of disputed assessment reference was to be had to the sanads and kabuliats executed; and by section 4 that the Government having reserved to itself certain articles of revenue including lakhiraj lands (or lands exempt from the payment of Government revenue) and all other lands paying only favourable quit-rents, the permanent assessment of the land-tax shall be made exclusively of the said articles now recited. At the time of issue of the sanad there were in the zamindari certain religious and charitable inams and lakhiraj lands granted by the zamindar or his predecessors. *Held*, that having regard to the terms of the sanad, and the circumstances in which it was issued, the Government was not entitled to resume them or assess them to public revenue. [*Judgment of the High Court affirmed.*]

Secretary of State for India v. Raja of Venkatagiri... (1921) I.L.R., 44 Mad. (P.C.), 864

REGULATION XI OF 1816 (MADRAS), SEC. 10—*Village Magistrate Power to sentence confinement—Confinement to be only in village choultry and nowhere else—Sentence of confinement before a temple, legality of.* Under section 10 of Madras Regulation XI of 1816, the village magistrate has power to pass sentence of confinement only in the village choultry and not in front of a temple, although a public place. Criminal Revision Petition No. 190 of 1896, 1 Weir, 924, referred to.

Ponnusami Pillai, In re ... (1921) I.L.R., 44 Mad., 118

RELIGIOUS ENDOWMENT—*Mutt—Relation of heads and managers of religious institutions to their property—Alienation by head of mutt—"Trustee"—Indian Limitation Act (IX of 1908), Schedule I, arts. 134 and 141.* The endowments of a Hindu mutt are not "conveyed in trust," nor is the head of the mutt a "trustee" with regard to them, save as to any specific property proved to be vested in the head for a specific and a definite object. Consequently, article 134 of Schedule I of the Indian Limitation Act, 1908, which contains the expressions above quoted, does not apply where the head of a mutt has granted a permanent lease over a part of the mutt property not proved to be subject to specific trust. The same rule applies to the endowments of Muhammadan religious institutions, and alienations made by the sajjadanashin or mutwali *Ram Parkash Das v. Anand Das* (1916) I.L.R., 43 Cal., 707 (P.O.); I.L.R., 43

I A., 73, explained. *Behari Lal v. Muhammad Muttaki* (1898) I.L.R., 20 All., 482 (F.B.); *Dattagiri v. Dattatraya* (1903) I.L.R., 27 Bom., 363, *Nilmony Singh v. Jagabandhu Roy* (1896) I.L.R., 23 Cal., 536, disapproved. Except for unavoidable necessity, the head of a mutt cannot create any interest in the mutt property to endure beyond his life. A lessee, however, has not adverse possession under article 144 of the schedule abovenamed during the life of the head who granted the lease. If the lessee's possession is consented to by the succeeding head, that consent can be referable only to a new tenancy created by him, and there is no adverse possession until his death. [*Judgment of the High Court reversed.*]

Vidya Varuthi Thirtha v. Balasami Ayyar ... (1921) I.L.R., 44 Mad. (P.C.), 831

RELIGIOUS ENDOWMENT—*Mutt—Head of mutt—Trustee of temples—Appointment of successor—Compromise to avoid prosecution—Invalidity—Code of Civil Procedure (XIV of 1882), sec. 539.* By the usage of a mutt the pandara sannidhi, or head, had power to appoint his successor, and was trustee of the endowments of certain dependent temples. In 1894 the pandara sannidhi appointed the appellant as chinna pattam, or junior head with a right to succeed as head. This appointment was not made bona fide in the interests of the mutt, but under a compromise whereby he had avoided a threatened prosecution for forgery of a will purporting to be that of his predecessor and appointing him as successor. The appellant having succeeded as pandara sannidhi, suits were instituted in 1905 to remove him from being trustee of the mutt properties and of the temple properties. *Held*, that the appellant's appointment as head of the mutt was invalid and that consequently he never became trustee of the temple; but that on the finding, which was not challenged on appeal, that there was no evidence that the head of the mutt was a trustee of the mutt properties, the suit to remove him from the headship of the mutt could not be maintained under section 539 of the Code of Civil Procedure, 1882. *Ramalingam Pillai v. Vithilingam Pillai* (1893) L.R., 20 I.A., 150, followed and applied.

Nataraja Tambiran v. Karlasami Pillai ... (1921) I.L.R., 44 Mad. (P.C.), 283

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SPECIFIC RELIEF ACT (I OF 1877) , ss. 15 AND 17—Sale by managing member—Sale of family property not for necessity—Suit for specific performance—Specific performance of entire contract whether can be granted—Option of purchaser for specific performance as regards share of vendor on date of contract on payment of full consideration—Such share to be specified in decrees.] The managing member of a joint Hindu family, who, for purposes not binding upon the other co-parceners and without their concurrence, agrees to convey a specific item of joint family property, cannot "perform" his contract in its entirety and the case falls within the provisions of section 15 of the Specific Relief Act. The purchaser in such a case cannot enforce specific performance of the entire contract. But Courts will grant specific performance by a conveyance of the share which the vendor had in the property at the date of the contract, if the purchaser elects to pay the entire consideration, and the share should be specified in the decree. <i>Kosuri Ramaraju v. Ivalury Ramalingam</i> (1903) I.L.R., 26 Mad., 74 and <i>Srinivasa Reddi v. Sivarama Reddi</i> (1909) I.L.R., 32 Mad., 320, dissented from; <i>Poraka Subbarami Reddi v. Vadlamudi Seshachallam Chetty</i> (1910) I.L.R., 33 Mad., 859, and <i>Nagiah v. Venkatarama Sastrulu</i> (1914) I.L.R., 37 Mad., 387, approved.	
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SURVEY AND BOUNDARIES ACT (MADRAS) (IV OF 1897) , ss. 12, SUB-SEC. (3) AND 13—Decision of a Survey officer—Finality of decision—Decision whether final for all or for what purposes—Effect of word "final" in sec. 12, sub-sec. (3).] The effect of section 12, sub-section (3) of the Survey and Boundaries Act is to make the orders of a Survey officer in cases falling under that section, final for the purposes of the survey, but it does not go so far as to preclude the land owners altogether from afterwards disputing its correctness in a Court of Law, unless there was a dispute before the Survey officer and the order is one to which section 13 of the Act applies. <i>Muthirulandi Poosuri v. Sethuram Aiyar</i> (1919) I.L.R., 42 Mad., 425 (F.B.), explained.	
<i>Chinna Venkatrayudu v. Ramamurti</i> (1921) I.L.R., 44 Mad.,	84

TRANSFER OF PROPERTY ACT (IV OF 1882) , ss. 3, 8 AND 123—Actionable claims, transfer of—Mortgage debts, book-debts and promissory-notes, gift of—Unregistered instrument, validity of, to effect gift—Law before and after amending Act of 1900.] Under the Transfer of Property Act, 1882, as originally passed, mortgage-debts were assignable as actionable claims, and the assignment of the debt passed the security with it under section 8 of the Act. But in consequence of the amendments made in 1900 of the original Act, mortgage-debts being excluded from the definition of actionable claims, can only be transferred together with the security as immoveable property and therefore only by a registered instrument. Where, however, the law still admits of the separate transfer of the mortgage-debt, as by the endorsement of promissory notes secured by a deposit of title-deeds or by attachment and sale in execution of a mortgage-debt under the Civil Procedure Code, section 8 of the Transfer of Property Act still operates to carry the security with it. Where certain mortgage-debts, book-debts and promissory notes were transferred by way of gift under an unregistered document the gift of the mortgage-debts was invalid under section 123 of the Act, but the gift of book-debts and promissory notes fell under Chapter VIII (Transfer of actionable claims) and not under Chapter VII (Gifts) of the Act, and was valid and took effect. Where there is a gift of immoveables and moveables but the former fails owing to want of registration, the latter may nevertheless be held good, the question to be considered being whether the latter was conditional on the validity of the former. <i>Godman v. Godman</i> (1920) P., 261, followed; <i>Pothi Naicken v. Naganna Naicker</i> (1919) 30 M.L.J., 63, distinguished.	
<i>Perumal Ammal v. Perumal Naicker</i> (1921) I.L.R., 44 Mad., 196	
ss. 4 AND 107—Indian Registration Act (XVI of 1908), ss. 17 and 49—Unregistered lease for six months—Whether admissible to prove tenancy.] Section 49 of the Registration Act applies only to instruments which are required to be registered by section 17 of that Act, and is not applicable to instruments which have to be registered under the provisions of the Transfer of Property Act. Hence, an unregistered lease for a period of less than one year, which is required to be registered under section 107 of the Transfer of Property Act, but not under section 17 of the Registration Act, is admissible in evidence to prove the nature of the possession under the instrument.	
<i>Rama Sahu v. Gowro Ratho</i> (1921) I.L.R., 44 Mad. (F.B.),	55
SEC. 6 (e)—Assignment of a decree passed for immoveable property and for ascertainment of mesne profits—Transferee's right to be made a party and to mesne profits.] Where the right to mesne profits has been declared by a decree, but the exact amount has been left to be ascertained at a future stage in the same suit, a transfer of such right is not invalid under section 6 (e) of the Transfer of Property Act as the transfer of a "right to sue."	
<i>Venkatarama Aiyar v. Ramasami Aiyar</i> (1921) I.L.R., 44 Mad., 539	
SEC. 6 (h)—Settlement for concubinage—Immoral object carried out—Right to annul the settlement.] It is a well-established rule of equity that a person who has transferred a property to another for an illegal or immoral purpose cannot get it annulled if the intended purpose has been carried out, and section 6, clause (h) of the Transfer of Property Act has not the effect of modifying it. <i>Ayerst v. Jenkins</i> (1873) L.R., 16 Eq., 275, followed. Per <i>OLDFIELD, J.</i> —It is the sense of the community as a whole that decides whether a certain purpose is immoral; the fact that in a certain section of the community concubinage is allowed and is not regarded as immoral does not make a settlement made by a member of such community in consideration of concubinage any the less immoral.	
<i>Deivanayaga Padayachi v. Muthu Reddi</i> (1921) I.L.R., 44 Mad., 329	
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ss. 60, 61, 62—*Mortgages with possession and charge on the same property in favour of the same person—Assignment of equity of redemption—Breach of contract by mortgagor—Loss to mortgagee—Right of assignee of equity of redemption to redeem mortgage with possession without paying amount due on the charge and the loss sustained by mortgagee.* A mortgagor has a statutory right under section 62 (b) of the Transfer of Property Act to redeem a usufructuary mortgage on property which is also subject to a simple mortgage, without redeeming the latter also. Therefore where a person mortgaged some of his properties, with possession and regained possession of them by executing a rental agreement giving a charge thereon and on other properties for all arrears of rent, held that the mortgagor could redeem the properties mortgaged, with possession alone without being obliged to pay at the same time any amount due under the simple mortgage: *Tajjo Bibi v. Bhagwan Prasad* (1894) [I.L.R., 16 All., 295, followed. The losses which the mortgagee might have sustained by reason of breach of contract committed by the mortgagor and which were not specifically charged on the mortgaged properties are recoverable only from the mortgagor and not from the mortgaged properties in the hands of his assignee. *Bohra Thakur Das v. Collector of Aligarh* (1910) I.L.R., 32 All., 612 (P.C.), followed. *Per WALLIS, C.J.*—*Quære* whether in India a mortgagor has the right to redeem one mortgage on his property without at the same time paying off another mortgage on the same and other properties as well. *Per SESHAGIRI AYYAR, J.*—Whatever may be the rights of a mortgagee in India to compel the mortgagor to consolidate mortgages upon the same property, the rule is not applicable against purchasers of the equity of redemption. The rule in *Vint v. Padget* (1858) 2 De G. & J., 611, is not applicable to India.

Ramarayaningar v. Maharajah of Venkatagiri ... (1921) I.L.R., 44 Mad., 301

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TRUSTEE OF A TEMPLE—*Delegation of powers of the trustee—Power to appoint and dismiss hereditary temple servants—Delegation of such power to an agent whether valid—Dismissal of archaka by agent, whether valid.* A trustee of a temple cannot appoint an agent, to do acts which involve the exercise of judicial discretion by himself. He cannot therefore delegate to an agent his power of appointing and dismissing hereditary temple servants who cannot be dismissed without sufficient cause being established. *Krishnama-charlu v. Rangachariu* (1893) I.L.R., 16 Mad., 73, referred to.

Parasurama Udayan v. Tirumal Row Sahib ... (1921) I.L.R., 44 Mad., 636

UNENFRANCHISED PERSONAL INAM OF LANDS—*Attachment in execution of decree, validity of.* Unenfranchised inam lands granted not for future public or private services but as a matter of favour for the maintenance of the donee and his heirs are liable to attachment and sale in execution of a decree against the holder of the inam. *A. Vissappa v. A. Ramajogi* (1865) 2 M.H.C.R., 341, and *Bhanappa Garu v. Kamanna*, S.A. No. 1897 of 1918 (unreported), followed.

Venkataramu Ayyar v. Chandrasegara Ayyar ... (1921) I.L.R., 44 Mad., 632

UN-REGISTERED LEASE FOR SIX MONTHS WHETHER ADMISSIBLE TO PROVE TENANCY:—See TRANSFER OF PROPERTY ACT (V OF 1908), ss. 4 AND 107 ... 55

VAKIL—*Suit on the Original Side of the High Court—Fees, non-payment of—Duty of vakil to take necessary steps in the suit—Written statement not filed in time—Refusal of vakil to file, because his fees were not paid—Refusal of vakil to consent to transfer of case to another vakil—Application for change of vakil*

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—*Order of Court—Delay in filing written statement, whether excusable—Rules of Practice, Original Side of the High Court, rule 48.* A vakil engaged in a suit on the Original Side of the High Court is not entitled to refuse to take a necessary step in the suit on the ground that his own fees had not been paid, and at the same time refuse his consent to a change of vakalat to another vakil. Delay in filing a written statement within the time fixed by the rules of the High Court caused by such refusal on the part of the vakil on the record was excused.

Muthu Krishna Yachendra v. Nurse ... (1921) I.L.R., 44 Mad., 978

VILLAGE MAGISTRATE—*Power to sentence confinement—Confinement to be only in village choultry and nowhere else—Sentence of confinement before a temple, legality of:—See REGULATION XI of 1816 (MADRAS), SEC. 10* ... 113

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VOID USUFRUCTUARY MORTGAGE—*Possession by mortgagee as such for more than 12 years—Acquisition of title as mortgagee—Suit for redemption—Liability of mortgagee to account for the whole period of possession.* A person in possession of a property as usufructuary mortgagee under a void mortgage, for more than 12 years, acquires by prescription, the rights of a mortgagee, and is as such accountable to the mortgagor for the rents and profits not only of the last 3 years preceding the suit for redemption but for the whole period of his possession. *Madhava v. Narayana* (1886) I.L.R., 9 Mad., 244, and *Sundara Gurukkal v. Subramania Archakar* (1912) 16 I.C., 960, followed.

Gopala Dasu v. Rami ... (1921) I.L.R., 44 Mad., 946

WILL—*Authority to widow to adopt—Appointment of guardian for minority of such boy, validity of:—See HINDU LAW* ... 189

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WORKMEN'S BREACH OF CONTRACT ACT (XIII OF 1859)—*Compositor, an artificer—Contract to gradually work out advance from wages, a contract under the Act.* A compositor is an artificer if not a workman within Act XIII of 1859. An agreement by which an advance given to an artificer is to be repaid by him by periodical deductions from his wages does not merely create a relation of debtor and creditor but is a contract between master and workman within the meaning of the Act.

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have applied to it for execution before the receipt of such assets. Where the property in the custody Court is the subject of several attachments in execution of several decrees the custody Court must award priority to the first in point of time. If the other decree-holders want to share in the rateably distribution they must apply in time to the first attaching Court. The power conferred on the custody Court by the proviso to Order XXI, rule 52, Civil Procedure Code, to determine claims to priority, etc., does not entitle the custody Court itself to distribute the assets rateably among the attaching decree-holders. *Katam Sahiba v. Hajee Badsha Sahib*, (1915) I.L.R., 38 Mad., 221, overruled. *Thakurdas Motilal v. Joseph Iskander*, (1917) I.L.R., 44 Cal., 1072, not followed. Where the attaching Court and the custody Court are the same, there is a receipt of assets within the meaning of section 73, Civil Procedure Code, only when so much of the money standing to the credit of the judgment-debtor as is necessary to satisfy the decree-holders who have applied to it for execution, is ordered to be transferred to the credit of the first attaching creditor's suit.

Viswanadham Chetty v. Arunachalam Chetty, (1921) I.L.R., 44

Mad., (F.B.) ... 100

CIVIL PROCEDURE CODE (V OF 1908), ORDER XXI, RULES 54 (2), 56, 67 AND 90—Non-publication of proclamation of sale in the village—Announcement of a wrong place as the place of sale—Sale held not in the place ordered by Court, but in the wrong place—Sale, illegal and null and void and not merely irregular. Where a proclamation of sale of lands in execution of a decree, as framed by the Court, was not published in the village where the lands were situate but the process-server intimated at the village that the sale would be held at a place and by an officer different from those fixed by the proclamation, a sale held at the place and by the official fixed by the proclamation is illegal and a nullity and not merely 'irregular' within the meaning of Order XXI, rule 90, Civil Procedure Code. *Basharutulla v. Uma Churn Dutt*, (1889) I.L.R., 16 Cal., 794, applied.

Jayarama Aiyar v. Vridhagiri Aiyar ... (1921) I.L.R., 44 Mad., 35

CRIMINAL PROCEDURE CODE (V OF 1898), SEC. 195—Court hearing an appeal application for sanction—Jurisdiction itself to take additional evidence. An Appellate Court, hearing an application to revoke or grant a sanction granted or refused by a Lower Court under section 195, Criminal Procedure Code, has power itself to take additional evidence before disposing of the application. *Rama Aiyar v. Venkatachella Padayachi*, (1907) I.L.R., 30 Mad., 311 and *Krishna Reddy v. Emperor*, (1910) I.L.R., 33 Mad., 90, distinguished.

Subbasari v. Emperor ... (1921) I.L.R., 44 Mad., 47

CRIMINAL PROCEDURE CODE (V OF 1898), SEC. 250—Order for compensation without examining all the witnesses of complainant, legality of. In a case of rioting and intimidation, the Magistrate, after examining only some of the witnesses of the complainant, discharged the accused and, after asking the complainant to show cause why he should not be ordered to pay compensation to the accused, passed an order for compensation without examining the remaining witnesses in spite of his request to do so. Held, that the

order was not illegal but one that should only be made in very exceptional circumstances.

- Appalanarasayya Bhukta v. Emperor* ... (1921) I.L.R., 44 Mad., 51
- ESTATES LAND MADRAS ACT (I OF 1908), ss. 55 AND 146—*Purchaser of occupancy right—Suit for patta in a Revenue Court—Duty of Revenue Court to decide as to title of plaintiff—Rival claimant of such right, previously recognised by landlord as transferee—Power and duty of Court to decide in the suit—Proceedings under section 146, effect of—Non-joinder of parties—Dismissal of suit—Civil Procedure Code (V of 1908), O. I, r. 10, cl. (2).* The power and duty of a Revenue Court, in a suit under section 55 of the Madras Estates Land Act, to deal with the rights of the parties before it, are not affected by the provisions of section 146 of the Act. Where a suit is instituted in a Revenue Court under section 55 of the Act by the purchaser of land from a ryot against the landlord to obtain patta, the Court is bound to decide whether the plaintiff is entitled to patta or not, if his title is disputed, although the landlord might have previously recognised a rival claimant as transferee and issued patta to him, on the joint application of the transferor and the transferee. In such a suit, the rival claimant is only a desirable and not a necessary party: even if he were a necessary party, the Court should not dismiss the suit for non-joinder of such claimant, but add him as a party if it thought fit to do so, under Order I, rule 10, clause (2), Civil Procedure Code, which is made applicable to Revenue Courts by section 192 of the Act.
- Ramanathan Chetty v. Arunachalam Chettiar* ... (1921) I.L.R., 44 Mad., 48
- HINDU LAW—*Impartible zamindari—Rule of succession—Heirs of the same degree but of different branches—Preference of senior line—Right of zamindar to incorporate self-acquisitions and income from zamin with zamin—Rule of descent thereto, when not incorporated.* The devolution of an impartible estate held by a single person depends upon whether the last holder was undivided or divided from the other members of the family. If he was undivided, then for the purposes of succession, the property must be treated as if it had been partible, and the successor found among those who would have been in that even his co-parceners. If he was separated, the estate devolves, in the absence of any special custom, on the next of kin who is nearest in blood to the deceased, as, for instance, his mother, and if there be several collaterals of the same degree but of different branches, the senior representative of the senior line takes. *Tara Kumari v. Chathurbhuj Narayan Singh* (1915) I.L.R., 42 Cal., 1179 (P.O.), and *Bhai Narindar Bahadur Singh v. Achal Ram* (1898) I.L.R., 20 Cal., 649 (P.O.), followed. It is open to the holder of an impartible zamindari to incorporate with his zamin, his self-acquisition such as those made from the income of the zamin or to keep them distinct. If incorporated, the devolution thereof follows that of the zamin; if not his own heirs succeed them, *Murtaza Hussain Khan v. Muhammad Yasin Ali Khan* (1916) I.L.R., 38 All., 553 at 567 (P.O.) and *Janki Prasad Singh v. Dwarka Prasad Singh*, (1918) I.L.R., 35 All., 891 at 401 (P.O.), followed; *Rajindra Bahadur Singh v. Raghubans Kumwar* (1918) I.L.R., 40 All., 470 (P.O.), distinguished.

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- INDIAN INCOME-TAX ACT (VII OF 1918)—*Money-lending firm—Interest accruing due but not received in the year of account—Whether taxable under section 9.* On a reference under section 51 of the Indian Income-tax Act, 1918. Held by the majority of the Court:—Interest which accrues due to a money-lending firm in the year of account is not assessable under section 9 as profits of the business unless it is received or realized in the year of account. What will amount to receipt or realization considered by NAPIER AND KRISHNAN, JJ. Per SADASIVA AYYAR, J.—Such interest would be taxable, though not realized, if it came so completely under their control that by an act of their will they could receive it in cash without greater trouble than is involved in drawing money from their bankers.
- Secretary to the Board of Revenue, Income-tax, Madras v. Arunachalam Chettiar* ... (1921) I.L.R., 44 Mad. (Spl. B.), 65
- REGISTRATION INDIAN ACT (XVI OF 1908), ss. 17 AND 49—*See TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 4 AND 107* ... 55
- REGULATION XI OF 1816 (MADRAS), SEC. 10—*Village-Magistrate—Power to sentence confinement—Village choultry—Confinement to be only in village choultry and nowhere else—Sentence of confinement before a temple, legality of.* Under section 10 of Madras Regulation XI of 1816, the village-magistrate has power to pass sentence of confinement only in the village choultry and not in front of a temple, although a public place. Criminal Revision Petition 190 of 1898. 1 Weir, 924, referred to.
- Ponnusami Pillai In re* ... (1921) I.L.R., 44 Mad., 112
- TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 4 AND 107—*Indian Registration Act (XVI of 1908), ss. 17 and 49—Unregistered lease for six months—Whether admissible to prove tenancy.* Section 49 of the Registration Act applies only to instruments which are required to be registered by section 17 of that Act, and is not applicable to instruments which have to be registered under the provisions of the Transfer of Property Act. Hence, an unregistered lease for a period of less than one year, which is required to be registered under section 107 of the Transfer of Property Act, but not under section 17 of the Registration Act, is admissible in evidence to prove the nature of the possession under the instrument.
- Rama Sahu v. Gouro Ratho* ... (1921) I.L.R., 44 Mad. (F.B.), 55
- WORKMEN'S BREACH OF CONTRACT ACT (XIII OF 1859)—*Compositor, an artificer—Contract to gradually work out advance from wages, a contract under the Act.* A compositor is an artificer if not a workman within Act XIII of 1859. An agreement by which an advance given to an artificer is to be repaid by him by periodical deductions from his wages does not merely create a relation of debtor and creditor but is a contract between master and workman within the meaning of the Act.
- Somanna v. Chellapathi Rao* ... (1921) I.L.R., 44 Mad., 53

THE
INDIAN LAW REPORTS

MADRAS SERIES.

APPELLATE CIVIL.

*Before Sir John Wallis, Kt., Chief Justice and Mr. Justice
Krishnan.*

GURUSAMI PANDIYAN, APPELLANT IN BOTH APPEALS
(SECOND DEFENDANT IN ORIGINAL SUIT NO. 27 OF 1914 AND PLAINTIFF
IN ORIGINAL SUIT NO. 48 OF 1914),

1920,
March, 12.

v.

SENDATTIKALAI PANDIA CHINNA THAMBIAR AND FOUR
OTHERS, RESPONDENTS IN APPEAL NO. 324 OF 1918 (PLAINTIFF AND
DEFENDANTS NOS. 3, 4 AND 5 IN ORIGINAL SUIT NO. 27 OF 1914),

SENDATTIKALAI PANDIYAN AND TWO OTHERS, RESPONDENTS IN
APPEAL NO. 325 OF 1918 (DEFENDANTS NOS. 1 TO 3 IN ORIGINAL SUIT
NO. 48 OF 1914).*

*Hindu Law—Impartible samindari—Rule of succession—Heirs of the same degree
but of different branches—Preference of senior line—Right of zamindar to
incorporate self-acquisitions and income from zamin with zamin—Rule of
descent thereto, when not incorporated.*

The devolution of an impartible estate held by a single person depends upon whether the last holder was undivided or divided from the other members of the family. If he was undivided, then for the purposes of succession, the property must be treated as if it had been partible, and the successor found among those who would have been in that event his co-parceners. If he was separated, the estate devolves, in the absence of any special custom, on the next of kin who is nearest in blood to the deceased, as, for instance, his mother, and if there be several collaterals of the same degree but of different branches, the senior

* Appeal Nos. 324 and 325 of 1918.

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representative of the senior line takes. *Tara Kumari v. Chathurbhuj Narayan Singh*, (1915) I.L.R., 42 Cal., 1179 (P.C.), and *Bhai Narindar Bahadur Singh v. Achal Ram*, (1893) I.L.R., 20 Cal., 649 (P.C.), followed.

It is open to the holder of an impartible zamindari to incorporate with his zamin, his self-acquisitions such as those made from the income of the zamin or to keep them distinct. If incorporated, the devolution thereof follows that of the zamin; if not, his own heirs succeed to them. *Murtaza Husain Khan v. Muhammad Yasin Ali Khan*, (1916) I.L.R., 38 All., 552 at 567 (P.C.) and *Janki Prasad Singh v. Dwarka Prasad Singh*, (1913) I.L.R., 35 All. 391 (P.C.), at 401 followed; *Rajindra Bahadur Singh v. Raghubans Kunwar*, (1918) I.L.R., 40 All., 470 (P.C.), distinguished.

APPEALS from the decree of Subordinate Judge of Tuticorin in Original Suits Nos. 27 and 48 of 1914.

The facts are fully stated in the judgment of KRISHNAN, J.

The Advocate-General (S. Srinivasa Ayyangar) with *K. C. Subrahmanyam, K. Srinivasa Ayyangar, A. K. Sundaram Ayyar, K. Raja Ayyar, T. M. Ramaswami Ayyar*, for appellants.—The branches of *Peria Dorai* and *Chinna Dorai* were divided from each other. The plaintiff is not the legitimate son of his father. The plaintiff is younger in age than the second defendant. Evidence on these points was then referred to. The second defendant as the senior in age is the heir to the zamindari in preference to the plaintiff: *Katama Natchiar v. The Rajah of Shivagunga*(1), *Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar*(2), *Naraganti Achammagaru v. Venkatuchalapati Nayanivaru*(3), *Subrahmanya Pandya Chokka Talavar v. Siva Subrahmanya Pillai*(4), *Muttuvaduganadha Tevar v. Periasami Tevar*(5), on appeal from *Muttuvaduganatha Tevar v. Periasami*(6), *Mohesh Chunder Dhal v. Satrugan Dhal*(7), *Tara Kumari v. Chathurbhuj Narayan Singh*(8), *Baijnath Prasad Singh v. Tej Bali Singh*(9) and *Muttu Vaduganadha Tevar v. Dora Singha Tevar*(10).

As regards self-acquisitions and accumulations, the law is that a zamindar owning an impartible estate cannot incorporate

(1) (1863) 9 M.I.A., 543, 559, 589, 592. (2) (1872)¹ 14 M.I.A., 570.
(3) (1882) I.L.R., 4 Mad., 250. (4) (1894) I.L.R., 17 Mad., 316, 325.
(5) (1896) I.L.R., 19 Mad., 451 (P.C.). (6) (1893) I.L.R., 18 Mad., 11.
(7) (1902) I.L.R., 29 Cal., 343 (P.C.). (8) (1915) I.L.R., 42 Cal., 1179 (P.C.).
(9) (1916) I.L.R., 38 All., 590.
(10) (1881) I.L.R., 3 Mad., 290 (P.C.), 323, 327.

them with his zamin; for he would thereby make them descend to a single heir and would thus be creating a new line of succession: *Rajindra Bahadur Singh v. Raghubans Kunwar*(1). This has been laid down from the earliest times, e.g., from the time of *Juttendromohun Tagore v. Ganendromohun Tagore*(2). Even if he can incorporate, the evidence shows that many items, including the last two years' income, were not so incorporated. Hence, they cannot pass to the heir along with the zamindari, but must be distributed among the heirs of the person whose property they are.

A. Krishnaswami Ayyar, with *G. Ramachandra Ayyar, A. S. Viswanatha Ayyar, R. Krishnaswami Ayyar, K. C. Gopala-desikan, S. Varadachariar* and *A. N. Krishna Ayyangar*, for the respondents.—*Peria Dorai* and *Chinna Dorai* being daughters' sons inherited their maternal grandfather's estate as joint tenants with rights of survivorship between them: *Venkayamma Garu v. Venkataramayamma Bahadur Garu*(3), *Karuppai Nachiar v. Sankaranarayana Chetty*(4), *Vythinatha Ayyar v. Yeggia Narayana Ayyar*(5), and *Ramayya v. Jaganadham*(6). Evidence was then referred to, to show that the branch of *Peria Dorai* did not later on become divided from the branch of *Chinna Dorai*. Even if divided, plaintiff and not the second defendant is the heir to the last zamindar. Plaintiff is the legitimate son of his father. Plaintiff is older than the second defendant. Whether the two branches were joint or divided, and whether the plaintiff is older than the second defendant or not, plaintiff is entitled to the zamindari as he belongs to the senior branch. Succession to an impartible zamindari is governed by the ordinary rules of inheritance subject to such modifications as flow from the fact of the estate being impartible, and so of being liable to be held by only one person. Even if this property be treated as the separate property of the late zamindar, it must descend to his nearest blood relation: *Katama Natchiar v. The Rajah of Shivagunga*(7), *Jogendro Bhupati Hurrochundra Mahapatra v. Nityanand Man Singh*(8), *Visvanathaswamy Naicker*

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(1) (1918) I.L.R., 40 All., 470 (P.C.).
(2) (1872) 1 I.A., Sep., Vol., 47. (3) (1902) I.L.R., 25 Mad., 678 (P.C.).
(4) (1904) I.L.R., 27 Mad., 800 (F.B.), 310. (5) (1904) I.L.R., 27 Mad., 382.
(6) (1915) M.W.N., 838. (7) (1863) 9 M.I.A., 539 at 589.
(8) (1891) I.L.R., 18 Cal., 151 (P.C.).

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v. *Kamu Ammal*(1), *Rajah of Kalahasti v. Achigadu*(2), *Zamindar of Karvetnagar v. Trustee of Tirumalai, Tirupati, etc., Devas-tanam*(3).

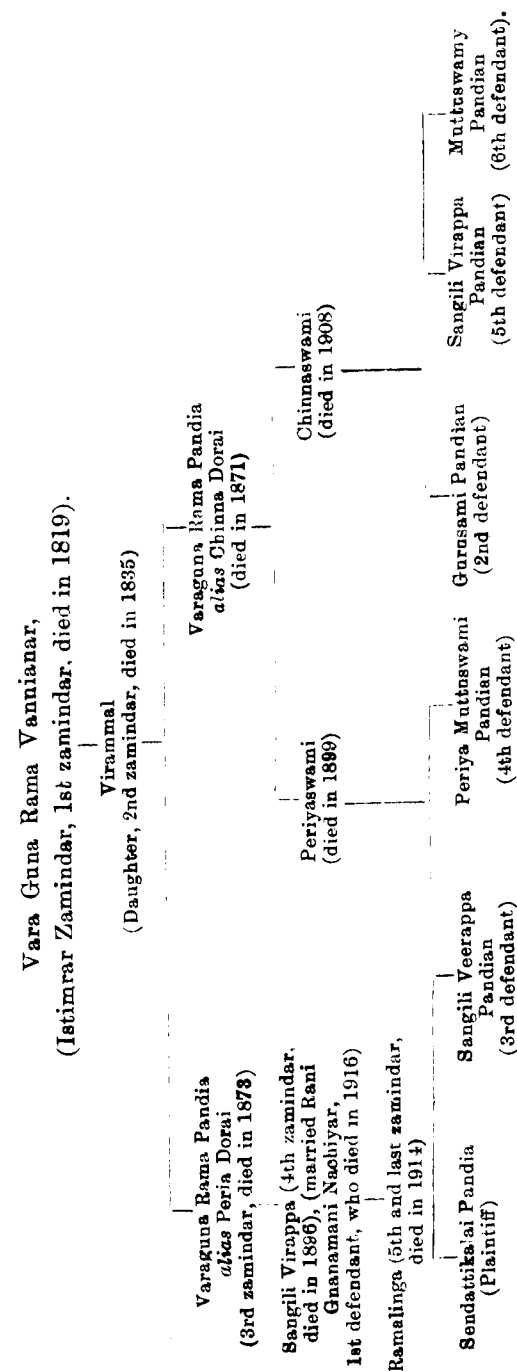
But where, as here, there are two persons of the same degree, but of different branches the representative of the senior branch succeeds: *Bhai Narindar Bahadur Singh v. Achal Ram*(4); see also *Achal Ram v. Udai Partab Addiya Dat Singh*(5). The cases quoted by the appellant are distinguishable as depending on their special facts. A holder of an impartible zamin can incorporate his self-acquisitions with the zamin: *Murtazu Husain Khan v. Muhammad Yasin Ali Khan*(6). As regards accumulations, the last case decides that it is a question of intention whether the holder of the zamin incorporated the same with the zamin or kept them distinct as his separate property. See also *Janki Prasad Singh v. Dwarka Prasad Singh*(7). *Rajindra Bahadur Singh v. Raghubans Kunwar*(8), does not apply, as it was a case of a grant by the Crown who can impose by the grant any course of descent: see Crown Grants Act (XV of 1895). Evidence was then referred to to show that certain items and the zamin income were incorporated with the zamin.

K. Srinivasa Ayyangar in reply.—*Bhai Narindar Bahadur Singh v. Achal Ram*(4) was not a case of ordinary Hindu Law but dealt with succession under custom and also a special Act.

The following genealogical tree gives the descent of the parties referred to in the judgments:—

- (1) (1913) 24 M.L.J., 271, 277, 284. (2) (1907) I.L.R., 30 Mad., 454.
 (3) (1909) I.L.R., 32 Mad., 429, 435.
 (4) (1893) I.L.R., 20 Cal., 849 (P.O.).
 (5) (1894) I.L.R., 10 Cal., 511 (P.O.).
 (6) (1916) I.L.R., 38 All., 552 (P.O.).
 (7) (1913) I.L.R., 35 All., 391 (P.O.).
 (8) (1918) I.L.R., 40 All., 470 (P.O.).

GENEALOGICAL TREE.



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WALLIS, C.J.—This is an appeal from the judgment of the Subordinate Judge of Tuticorin in two suits which were tried together. In the first suit the plaintiff sued to recover the impartible estate of Sivagiri from the mother of the late zamindar who died unmarried in 1914, while in the second suit the plaintiff sued for a declaration that he was entitled to succeed as nearest reversioner on the death of the late zamindar's mother. She died in 1916 while the suit was pending, and he was then brought on as the second defendant in the first suit and will be so referred to. The istimrar or grantee of the permanent sanad died in 1819, and was succeeded by his daughter Virammal who died in 1835. She left two sons, Peria Dorai who succeeded her and was the grandfather of the late zamindar, and Chinna Dorai who had two sons, the elder commonly known as Periaswami who was the father of the plaintiff, and the younger, commonly known as Chinna-swami, who was the father of the second defendant. Chinna-swami and his family resided at Veppangulam, a village some twenty miles distant from Sivagiri, in a house which appears to have belonged to his father. Later, in 1843, he received a grant of lands and money in lieu of maintenance, and he and his family were allowed to occupy certain pannai or home farm lands belonging to the zamindari at a favourable rent, and also received occasional allowances for the performance of the usual ceremonies in connexion with births, deaths and marriages.

The late zamindar's mother, as first defendant in the main suit, did not rely solely on her title as preferential heir to the plaintiff, but also questioned his legitimacy, and put him to the proof that his father Periaswami was senior to the second defendant's father Chinna-swami, and also alleged that the plaintiff himself was younger than the second defendant.

The indication of seniority in the use of the names Periaswami and Chinna-swami is as clear as if one brother had been known as major and the other as minor, and the contention that Chinna-swami was the senior, which was the subject of the first issue, was withdrawn in the course of the trial. It is characteristic, however, of the unscrupulous manner in which the defence was conducted that the second defendant, who had admitted in his own plaint that his father Chinna-swami was junior to Periaswami, subsequently obtained leave to amend his plaint by alleging that

his father was senior, and that he did not withdraw this contention until 1st August 1918, as stated by the Subordinate Judge in his judgment, after twenty-five of his witnesses had been examined. Allegations of illegitimacy have been almost invariably made in suits as to the succession to zamindaris in Tinnevely and the adjoining districts. In the present case they have been rightly rejected by the Subordinate Judge as baseless. Periaswami, the plaintiff's father, had no other wife but the plaintiff's mother, who was a lady of equal rank with his own, lived with him as his wife for some thirty-five years until his death, and bore him nine children. The case for the defence, which was not fully disclosed until a late stage of the trial, was that the plaintiff's mother was the wife of one Vythilinga of Venganallur village and left him shortly after the marriage to live with Periaswami; and a large number of defence witnesses have come forward to speak to this. The Subordinate Judge has rightly commented on the way in which this part of the case was put forward.

The first defendant only pleaded that the plaintiff's mother was not the lawfully wedded wife of Periaswami, though some underling about the same time stated in an affidavit that the union was adulterous. The second defendant was equally vague.

[His Lordship discussed the evidence and continued:]

The appellant's case as to this part of the case is really hopeless, and the main issue of fact argued before us was as to whether the plaintiff had proved that he was older than the second defendant, as the Subordinate Judge has found. If the finding be correct, the plaintiff is entitled to succeed as the preferential heir in any view as to the line of succession to the zamindari.

[His Lordship discussed the evidence as to whether plaintiff was older than second defendant and continued:]

On the whole, I am clearly of opinion that there is no sufficient reason for differing from the finding of the Subordinate Judge, that the plaintiff is proved to be the elder of the two.

These findings are admittedly conclusive as to the plaintiff's present right to the zamindari, but the question whether he is entitled to the income of the estate as from the death of the late zamindar until the death of his mother some two years later,

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during which period the estate was in the hands of a Receiver appointed in this suit, depends upon the question, whether on the death of the late zamindar without male descendants the zamindari devolved upon the plaintiff on the ground that the late zamindar and the plaintiff were members of a joint Hindu family in which the plaintiff was the preferential heir, or devolved in the first instance upon the late zamindar's mother on the ground that, as the late zamindar at the time of his death was divided from the plaintiff's family, she was entitled to succeed as next heir to his separate property. In that case, the plaintiff could only claim to succeed on the mother's death as next heir to the separate property of the zamindar.

If the late zamindar was undivided from the plaintiff's family, then for the purposes of succession the estate must be treated as if it had been partible; and, as on a partition the plaintiff and his brothers would have represented their deceased father and taken his share, they must also be considered to represent him for the purposes of succession to the impartible zamindari, so as to entitle the plaintiff as the eldest among them to succeed to the zamindari to which their father would have succeeded, if he had survived the late zamindar. This law of succession, which may have had its origin in the theory of dormant coparcenary on the part of the other members of the family, is not affected by the decisions of the Privy Council, beginning with *Sartaj Kuari v. Deoraj Kuari*(1), and ending with the recent decision of *Rama Rao v. Rajah of Pittapur*(2), that the right of the other members of the family to maintenance must be rested entirely upon custom and was applied by the Privy Council in the very recent case of *Tara Kumari v. Chaturbhuj Narayan Singh*(3).

That, in my opinion is a very important decision for our guidance, because it lays down, that in determining which line of succession to follow, the test is whether the last owner who left no male issue was or was not separated from the other members of the family, and expressly negatives the contention that, to let in the rule of succession as to separate estates, there must have been something in the nature of a partition of the impartible estate, or of an abandonment express or implied of the

right to succeed to it as joint family property. As regards the first point, their Lordships observed that the claimants had no coparcenary rights in the impartible estate, and no rights in that estate which entitled them to a partition of the impartible estate. As regards the second point, the result of the decision in my opinion is that the particular line of succession is incident to the status of the family, and depends entirely on whether the family is joint or has become separated. The earlier cases relied on for the respondent must be held to be merely applications of the rule laid down in this last case to the particular facts of those cases; and all we have to do is to decide whether the late zamindar at the time of his death was joint with or separated from the plaintiff's family. In this view of the law I cannot agree with the statement of the learned Subordinate Judge at the end of paragraph 134 of his judgment that it is not shown that "assuming that Periadurai and Chinnadorai had a co-parcenary interest in the zamindari there was at any time a partition in respect of it between them." I think it must be taken that Chinnadorai never had any coparcenary interest in the zamindari, and that all we have to decide is whether Periadurai's branch, to which the late zamindar belonged, was divided at the time of his death from Chinnadorai's branch.

When, in 1835, Periadurai on the death of his mother succeeded to the zamindari, as the heir of his maternal grandfather, the istimrar zamindar, he was joint with his father and his brother Chinnadorai; and, as, if the zamindari had been partible, the two brothers would have taken it as ancestral property with rights of survivorship, as decided in the Juggempet case, *Venkayamma Garu v. Venkataramanayyamma Bahadur Garu*(1), I see no reason why Chinnadorai should not be considered for the purposes of succession to the zamindari to have been joint with Periadurai. Here I may say that I agree with the learned Subordinate Judge, for the reasons given by him, in rejecting the contention that Periadurai took the zamindari as his separate property under the alleged will put forward by the defendants and that his mother was only given the right to manage. The official correspondence on the istimrar's death in 1819 refers to a will, but it is fairly clear from the

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(1) (1888) I.L.R., 10 All., 272 (P.C.). (2) (1918) I.L.R., 41 Mad., 778 (P.C.).
(3) (1915) I.L.R., 42 Cal., 1179 (P.C.).

(1) (1902) I.L.R., 25 Mad., 678 (P.O.).

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correspondence and from the fact that the daughter was recognized as owning the zamindari in her own right that it was not the will put forward by the defence with the view of showing that the zamindari was the self-acquisition of Periadurai and so descendible as his separate property.

In the year 1843, when Periadurai was old enough to be given possession of the estate which had been managed by his father, disputes arose and were adjusted by an agreement. The Subordinate Judge has rejected the alleged agreement put forward for the defendants, Exhibit 44(a), and it is unnecessary to rely on it, as the terms of the agreement may be sufficiently gathered from the allegations and admissions of either side, which are recited in Exhibits O and O1, the judgment in the suit instituted by Chinnadorai for partition of the zamindari in 1848. The judgment of the first Court states that the plaintiff Chinnadorai admitted that in 1843 he had accepted an allowance from the zamindar in lieu of all claims. In his grounds of appeal, in Exhibit O1, Chinnadorai stated it was unlikely he would have remained satisfied with land amounting to 30 sangalies and 30 cottavarapadee yielding yearly revenue of only Rs. 200. To this the respondent replied that the evidence in the suit showed that the lands allotted to the defendant for his support were capable of yielding yearly Rs. 1,500, and that additional property valued at Rs. 21,300 had been given him. The fact that Chinnadorai renounced all claims to the zamindari would not of course include a renunciation of his right to succeed as heir according to the law of succession to joint family property, if the family was undivided when the succession opened. After 1843 Chinnadorai and his father and family went to live at Veppangulam about 20 miles from Sivagiri in a family house, or palace as it is styled, which is said to have been the property of the father. Then came the unsuccessful suit of 1848 for partition of the zamindari. It has been contended before us that the effect of filing this suit was necessarily to effect a division in status between Chinnadorai and his brother Periadurai. In view of some of the earlier cases cited I do not propose to rely on this suit as evidence of division, especially as there is other evidence sufficient to establish it. The lands allotted to him were sold by him and his sons in course of time; and in 1871 when Periadurai had involved himself in difficulties

and the zamindari was in the hands of a receiver who was seeking to raise money by the sale of the pannai or home-farm lands, it was reported that Chinnadorai and his family were in the possession of some of these pannai lands as tenants at a favourable rent, and this arrangement was not disturbed. After Chinnadorai's death at the close of 1871 his sons were left in possession of these lands; and during the minority of the late zamindar, as the rent paid by them was in arrears, the Court of Wards decided to sue them for possession and arrears and a plaint was drawn up, Exhibit I, but was not filed. Again on the death of Periasami in 1899 the plaintiff and his brother were similarly left in possession of the lands then in their occupation. Their possession, however, was that of tenants, and was exactly the same as that of their sister Virammal and her family to whom also pannai lands were let on favourable terms. From Periadurai's death until the birth of the late zamindar in 1889 Chinnadorai's family were the next reversioners to the zamindari, a position they again occupied from his succession till his death. They were also very near relations whose claims on his bounty were great. The numerous petitions which they presented to the zamindar for assistance on the occasion of family ceremonies sought his assistance as a matter of grace, and were similar in terms to those presented by other persons, such as their sister Virammal and by mere strangers in whom the zamindar took an interest. In my opinion, the facts that Chinnadorai's family were allowed to occupy pannai lands as tenants and were assisted on the occasion of family ceremonies by the zamindar are entitled to very little weight as evidence that they continued joint in estate with him. In Southern India the test whether the two branches continued joint in worship is inapplicable. On the other hand, the fact that the two branches lived separately, though ordinarily inconclusive, is in my opinion entitled to considerable weight, when the separate living had been going on for seventy years before suit and the existence of joint property at the end of the period is not shown. Exhibit A series, and the other documents referred to in paragraph 126 of the Subordinate Judge's judgment, show that between 1872 and 1897 Periasami and Chinnasami freely alienated their properties without any

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reference to the zamindar. Exhibit F, which is a petition by Periasami to the Collector, dated 17th April 1872, alleged that the Veppangulam house had belonged to his father Chinnadorai and that he and his father had been enjoying it for nearly thirty years without dispute and complained that Periadurai was attempting to interfere with his enjoyment, and also with his endeavours to sell his father's lands in satisfaction of his debts. This is opposed to the theory that he and the zamindar were then joint in estate. On the other hand, the fact that Periadurai, who had alienated all his estate and was then living on an allowance from the Court of Rs. 100, tried to assert a claim to the Veppangulam house is of very little weight in view of his desperate circumstances. Exhibit MMMI is open to the same observation, and the fact that Periadurai had included the house in a mortgage of 1854, Exhibit MMM, throws very little light on the state of the family in 1914. He died in 1873 and his son, who succeeded in recovering the zamindari from the alienees, seems to have raised no objection to Periasami and his family dealing freely with their properties by the alienations in Exhibit A and other series. Exhibit XXVII shows that the Veppangulam house, or Periasami's share in it, was sold in a suit on a mortgage executed by him and purchased on 22nd June 1877 for Rs. 251 by one Muthusubba Ayyar, who appears from Exhibit FFF to have been a *benamidar* for the zamindar. That is a petition complaining that the zamindar's servants had been resisted by Periasami in taking possession, on the ground that delivery had not been given by the Court. Probably the zamindar did not really want to evict his cousins and had only purchased the property to prevent its getting into the hands of strangers. There does not seem to have been any allegation by the zamindar on that occasion that it was not the separate property of Periasami, the mortgagor. Also, as stated by the Subordinate Judge in paragraph 30 of his judgment, Chinnasami afterwards filed a suit against the *benami* purchaser and Periasami for a half share of the Veppangulam house and succeeded. The decree, Exhibit XXVII(d), states that the suit was brought to recover the scheduled properties which fell to the share of the plaintiff and are being enjoyed by him, and the decree exempted specific portions of the property from the sale

apparently as property which had already fallen to the plaintiff on partition. Further, the mortgages and sale-deeds executed by Periasami after his father's death which are found in Exhibit IV series, such as Exhibit IV(p) and IV(q) and others, point to a division by metes and bounds having taken place between Periasami and Chinnasami after their father's death. This is, in my opinion, very strong evidence that they had already become separated in estate from the senior branch. I think the transactions already referred to, and the other transactions mentioned in paragraphs 126 to 128 of the Subordinate Judge's judgment, are sufficient to show that the two branches were separate in status in 1914. In my opinion, the branch of the late zamindar at the time of his death was divided in status from the plaintiff's branch of the family, consequently the zamindari devolved, according to the rule of inheritance applicable under the Mitakshara law to separate property, on his mother. As she left no female issue, the question whether the accumulations should be regarded as her stridhanam is immaterial, as, even if so, they would devolve on her husband's heirs.

Assuming the law of succession to separate property to apply, the finding that the plaintiff is both the representative of the senior branch of his family and the eldest of those who are equal in descent with himself from the common ancestor is sufficient, in my view, to establish his title to succeed on the death of the late zamindar's mother. In the case of succession to separate property the ordinary rule, that to the nearest in blood the heritage belongs, entitles the nearest in descent of whatever branch to succeed in preference to the other claimants. *Achal Ram v. Udai Partab Addiya Dat Singh*(1), a decision of the Privy Council, is an application of the same rule. This rule, however, affords no assistance where, as here, the rival claimants are equal in descent. In that event, the Privy Council has decided in *Bhai Narindar Bahadar Singh v. Achal Ram*(2), which relates to the same impartible estate as the case just cited, that the person entitled to succeed as preferential heir is the representative of the senior branch. The facts which gave rise to these two decisions may be briefly summarised. Under

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(1) (1884) I.L.R., 10 Cal., 511 (P.C.). (2) (1893) I.L.R., 20 Cal., 649 (P.C.).

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the Oudh Estates Act, 1 of 1869, one Prithi Pal had been entered in the first and second of the lists prepared under section 8 as a talukdar under the Act, whose estates according to the custom of the family and before the 13th February 1856 (the date of the Mutiny) ordinarily devolved on a single heir. It was provided by section 22 that such estates should be descendible in the line of succession prescribed in sub-sections (1) to (10) of section 22, and in default thereof under sub-section (11).

"to such persons as would be entitled to succeed to the estate under the ordinary law to which persons of the religion and tribe of such talukdar or grantee, heir or legatee are subject".

Prithi Pal was succeeded by his widow, who died in 1870. The estate was then enjoyed by his daughter and her husband Achal Ram. After the daughter's death in 1870, Achal Ram retained possession, and was first sued by Udai Partab who was the representative of the senior line but seventh in descent from the common ancestor. He was nonsuited by the judgment of the Privy Council in *Achal Ram v. Udai Partab Adaiya Dat Singh*(1), on the ground that, though the estate was recognized in accordance with previous family custom as impartible or descendible to a single heir, the single heir must be determined in the circumstances with reference to the rule of Mitakshara as to the succession to separate property. If the succession opened at the death of the widow in 1870 Harbaghat, who was fifth in descent from the common ancestor, was then living, and was the next heir; while, if it opened at the death of the daughter in 1870, there were then living Harbaghat's sons and other collaterals who were sixth in descent, and so nearer than the plaintiff. That case having decided that the succession was to the nearest in blood though belonging to a junior branch, Harbaghat's son Narindar sued to recover the estate, and contended unsuccessfully that the succession opened in 1860 on the death of the widow, when his father Harbaghat was the nearest heir; but it was held by the Privy Council that it opened on the death of the daughter in 1870, that then, nearest collaterals included Harbaghat's son, the plaintiff, and his cousin Jubrag, who were both sixth in descent from the ancestor. As between them the Privy

(1) (1884) I.L.R., 10 Cal., 511 (P.C.).

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Council held that the estate would go to Jubrag, as he came of a branch senior to the plaintiff's branch. It no doubt may have been, and probably was, the case that Jubrag, the other collateral, not only came of the senior branch but was also older than the plaintiff. That consideration however was treated as immaterial. The Act left the succession to the impartible estate in the event which happened to be governed by the ordinary law which included the custom of the family. As this custom did not include the rule of lineal primogeniture the ordinary Mitakshara law of succession to separate property would appear to have been applied; and according to this law, as between collaterals equal in degree, the representative of the senior branch was held to be the preferential heir. It was no doubt suggested by MUTTUSAMI AYYAR, J., in *Muttu Vaduganatha Tevar v. Dora Singha Tevar*(1), that in such a case the eldest among the heirs of equal degree should be preferred on the ground that he would have a preferential right as regards ceremonies and also to the position of manager if the property had been joint. I agree, however, with the learned Subordinate Judge that, so far as this Court is concerned, the question must be regarded as settled by superior authority. I may add that in my opinion this rule is also superior in convenience, as, having regard to the conditions which prevail here, it is much easier to ascertain who is the senior representative of the senior branch than to ascertain which of a number of collaterals of equal degree was born first.

The only other question argued before us was as to which of the properties acquired by the fourth and fifth zamindars should be considered to have been incorporated in the zamindari and to pass with it to a single heir. The recent decision of *Rajindra Bahadur Singh v. Raghubans Kunwar*(2) has been cited as deciding that a zamindar cannot incorporate any property in an impartible zamindari, but we think it is not authority for so extreme a proposition. The Crown, in that case, in the exercise of a right now recognized in the Crown Grants Act, had made the estate descendible in a particular manner, and it was held that the holder could not make the same rule applicable to properties acquired by him. As regards estates of

(1) (1881) I.L.R., 8 Mad., 290 (P.C.) at 323 and 327.

(2) (1918) I.L.R., 40 All., 470 (P.C.).

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persons governed by the Mitakshara law, where estates are by family custom impartible or descendible to a single heir, it has been repeatedly held that it is open to the owner, if so minded, to incorporate his self acquisitions in the impartible zamindari, and this is expressly stated in *Murtaza Husain Khan v. Muhammad Yasin Ali Khan*(1), which was decided not very long before the case already cited. I think we must overrule this contention. As to the properties which should be held to be incorporated in the zamindari, I agree with the judgment of my learned brother and with the order proposed by him in both appeals.

Appeal No. 324 of 1918.

KRISHNAN J. KRISHNAN, J.—This is an appeal from the decree of the Subordinate Judge of Tuticorin in Original Suit No. 27 of 1914, brought by the plaintiff, Sendatti Kalai Pandya Chinnathambiyar, claiming for himself the zamindari of Sivagiri, which is an ancient impartible estate in the District of Tinnevely included in the Schedule to the Madras Impartible Estates Act, II of 1904. The suit was originally brought against Rani Gnanamani Nachiar, the mother of the last zamindar Ramalinga, who took possession of the zamindari on his death. But as she died on 23rd November 1916, when the suit was pending in the lower Court, it became unnecessary to decide who the preferential heir to the zamindari was as between her and the plaintiff to settle the claim to the zamindari. On her death the dispute about the succession to the zamindari became one between the plaintiff and Gurusami Pandyan who was added to the record of this suit as the second defendant. He has already brought a suit himself, Original Suit No. 48 of 1914, in the same Court, admitting the right of the Rani and claiming to be next reversioner entitled to succeed to the zamindari on her death. The two suits were tried together by consent of parties, and appeal from the decree in the second suit is also before us as Appeal No. 325 of 1918. The first and main question for our decision in this appeal is whether the plaintiff or the second defendant is the man entitled to succeed to the zamindari now.

(1) (1916) I.L.R., 38 All., 552 (P.C.).

The pedigree of the family attached to the plaint is accepted as correct before us, except as regards the ages of certain persons mentioned in it. It may however be noted as a correction that Nos. 35 and 36 were the wives of No. 25 and not his daughters. As stated in this pedigree, Ramalinga (No. 39), was the fifth and last zamindar. He died in Madras in 1914, leaving no issue and no male heirs in his own line, and it is to him that succession has now to be traced. He was the son of Sangili Veerappa, the fourth zamindar (No. 25), who was himself the son of Varaguna Rama Pandya, the third zamindar (No. 13), who was ordinarily known as Periyadorai and who will be referred to hereafter by that name. He had a younger brother, also a Varagunna Rama Pandya, but known ordinarily as Chinnadorai, under which name he will hereafter be referred to. He had two sons, Sendatti Kalai Pandyan (No. 26), ordinarily known as Periyasami, and Varagunna Rama Sendatti Kalia (No. 28), ordinarily known as Chinnasami, besides a daughter Veerammai Nachiar (No. 27). Plaintiff (No. 42) is admittedly the eldest son of Periyasami, and the second defendant (No. 50) is the eldest son of Chinnasami. It will be seen therefore that as grandchildren of Ramalinga's grandfather's brother, they stand in the same degree of relationship or agnateship to the last zamindar. But as only one man can succeed to this impartible zamindari, we have to decide who the preferential heir of the two is. The plaintiff contends that he is to be preferred, because he belongs to the senior line, his father being older than second defendant's father, and furthermore that as between himself and the second defendant he is also the senior in age. The second defendant admitted that plaintiff's father was senior to his father, though at one stage of the case he disputed it; but he contended that the plaintiff was an illegitimate son of his father, being born of an adulterous connexion between his parents and as such he was not entitled to succeed at all, and also that even if plaintiff were a legitimate son of his father, he, the second defendant, was the senior in age to him and that seniority in age and not seniority of the line was the deciding factor in the choice of the heir to the zamindari in the circumstances of this case.

On these pleas, the first question we have to settle is the question of fact whether the plaintiff is the legitimate son of

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his father or the illegitimate offspring of an adulterous connexion as alleged against him. The Subordinate Judge has discussed the question at great length in a carefully considered judgment, and I entirely agree with him that the finding must be in favour of legitimacy.

[His Lordship discussed the evidence and proceeded:]

Accepting the plaintiff's evidence on the point before us as more reliable I concur with the Subordinate Judge in finding that the plaintiff is the legitimate son of his father.

Taking that finding, it follows that plaintiff and second defendant are persons who stand in an equal degree of relationship to the last zamindar from whom descent has now to be traced for the zamindari. It was laid down by their Lordships of the Privy Council, so early as in the *Shivagunga* case, *Katama Natchier v. The Rajah of Shivagunga*(1), that in the case of impartible estates, in the absence of a special custom governing the succession to it, the rule of succession must be taken to be that of the ordinary Hindu Law by which the parties are governed, with such modifications only as flow from the impartible character of the estate. This rule was followed in *Rimalakshmi Ammal v. Siranantha Perumal Sethurayar*(2), and has been accepted ever since. There is no special custom alleged in the present case, and we have thus to turn to the Mitakshara Law by which the parties are governed for the rule of succession. Under that law there is a different line of succession for ancestral property, and for separate or self-acquired property, and accordingly the same difference must arise with regard to succession to impartible estates also. To apply the rules of succession to impartible property one must treat it for a moment as ordinary partible property and see to whom it would pass as such. If it passes to a single individual he or she would be the person entitled to the zamindari. But if it passed to two or more as equally entitled to it, further rules have to be applied to determine which one of them should be selected as the zamindar, as only one person can be the zamindar at a time. If the zamindari is property in which the right of survivorship subsists it would pass like ordinary joint family property by the

(1) (1863) 9 M.I.A., 543.

(2) (1872) 14 M.I.A., 570.

rule of survivorship, and when there are more persons than one coming within that rule it will, as was held in *Naraganti Achammagaru v. Venkatachalapati Nayanivaru*(1), pass to the nearest co-parcener of the senior line and not to the co-parcener nearest in blood to the propositus. This view was approved of by the Privy Council in the *Udayarpalayam Case*(2), and must be treated as settled. The rule is based on the recognized principle of representation of the father on his death by his sons in taking joint family property. If this rule of succession by survivorship applied to the present case, it is conceded that the plaintiff would be the preferential heir as the eldest son of Periasami whose line is the senior line. In fact he would have excluded the Rani also. At the early stages of this case both the Rani and the second defendant had denied the seniority of Periasami to Chinnasami and the first issue was framed on that plea. But the contention was subsequently given up by the second defendant and the seniority of Periasami's line was admitted.

If on the other hand the zamindari is taken to be the separate property of the last zamindar, as I find later in this judgment, the Mitakshara rule of succession to separate or self-acquired property will apply, and on the death of the last zamindar the Rani would take the estate first, as his mother, there being no nearer heirs, and on her death it must pass to this zamindar's nearest reversioners under the rule that the nearest in blood excludes the more remote. But as both plaintiff and second defendant fall in the category of nearest in blood a further rule has to be applied to choose between them. Plaintiff contends that that rule is the rule of seniority of line, whereas the second defendant maintains that the seniority of age is the proper rule for it.

Before however deciding this question, it will be convenient to consider whether the plaintiff or the second defendant is in fact the senior in age, for each claims to be senior to the other. The Subordinate Judge has held that plaintiff is the senior, and I am on the whole inclined to agree with him though the evidence is not so full and satisfactory on this point as on the first question dealt with.

(1) (1905) I.L.R., 28 Mad., 508 (P.C.)

(2) (1882) I.L.R., 4 Mad., 250.

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[His Lordship discussed the evidence and proceeded:]

In these circumstances, I am inclined to think that the Subordinate Judge's finding is right that plaintiff is the senior in age to the defendant and I accept it. On this finding, plaintiff must be held to be the proper heir now to the zamindari in preference to the second defendant, whether the rule of seniority of line or of seniority of age be applied.

I may here observe that it was argued by the plaintiff's vakil that even if his client was not the senior in age, and even if we take the zamindari to have been the separate property of the last zamindar, his client would still be entitled to succeed as the representative of the senior line. In other words, he contended that the rule of seniority of line applied where there were two or more reversioners of different lines but of equal degree of relationship to the last holder of the impartible estate, from whom descent has to be traced, competing for the zamindari. He has relied for this contention on the ruling of the Privy Council in *Bhai Narindar Bahadur Singh v. Achal Ram*(1), and that case clearly supports him. Though the impartible estate in that case was one to which the Oudh Estates Act applied, the successor to the last holder had to be found according to clause (11) of section 22 of that Act and not according to any of the previous clauses, and under that clause the ordinary Hindu Law of collateral succession had to be applied. Lord HOBHOUSE who delivered the judgment of the Board says:

"It may be, and it has so happened in this case, that the heir according to lineal primogeniture is more remote in degree from the ancestor than other collaterals, or other persons in the line of heirship. If so, the degree prevails over the line according to the classification under the Act; though if two collaterals, or persons in the line of heirship, are equal in degree, then, as the property can only go to one, recourse must be had to the seniority of line to find out which that one is."

His Lordship again says:

"But Jubraj comes of a branch senior to the branch of the plaintiff; and therefore if the estate can only go to one, it will go to that one who represents the senior branch."

(1) (1898) I.L.R., 20 Cal., 649 (P.C.).

The pedigree of the family is given in *Achal Ram v. Udai Partab Addiya Dat Singh*(1), and that case read with *Bhai Narindar Bahadur Singh v. Achal Ram*(2), shows clearly that in a case of collateral succession though the rule of seniority of line is not applicable in the first instance but the ordinary Mitakshara rule of nearness in blood applies, the former rule applies for the choice of one from among those equal in degree. The ruling in *Bhai Narindar Bahadur Singh v. Achal Ram*(2), thus seems to cover the exact position in the case that we are considering, and following it the plaintiff should be declared to be the preferential heir, irrespective of any question of seniority in age even if the succession is a collateral one. The learned vakil for the appellant tried to distinguish this case from the present case, on the ground that it was decided on some question of custom or on some admission of the plaintiff that Jubraj was the preferential heir if the succession was held to open only on the daughter's death. But there does not seem to be any basis in the judgment of their Lordships for these contentions, nor does it appear that their Lordships were deducing the rule from anything in the Act or from anything peculiar to the estate in suit. He also drew our attention to the judgment of MUTTUSWAMI AYYAR, J., in *Muttu Vaduganadha Tevar v. Dora Singha Tevar*(3), and particularly to the learned Judge's observations on page 327. But, in that case, the dispute was between daughter's sons of the last male holder and it was as between them that the rule of seniority of age was applied. That case is not in point here, and we are relieved from the necessity of discussing on general principles of Hindu Law what rule of preference should be applied between collaterals of equal degree but of different lines as we have the high authority of the Privy Council to prefer the senior line. In this view, even if the finding that the plaintiff is the senior in age turns out to be incorrect, he must still be held to be the rightful zamindar now, as he is admittedly of the senior line.

The next question we have to consider is whether the items of properties, included in issues 16 and 17, claimed by second

(1) (1884) I.L.R., 10 Cal., 511 (P.C.).

(2) (1893) I.L.R., 20 Cal., 649 (P.C.).

(3) (1881) I.L.R., 3 Mad., 290 (P.C.).

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defendant to be partible property and not part of the zamindari are really so or not. Issue 16 refers to acquisitions said to have been made by Sangili Veerappa, the fourth zamindar, and issue 17 to those of Ramalinga, the fifth and last zamindar, respectively. The Subordinate Judge found some to be zamin properties and the rest to be partible properties, and both sides have appealed against the finding in so far as it is against them, the respondents Nos. 1, 4 and 5 appealing by way of memoranda of objections.

Before considering this question in detail, it is necessary to notice an argument advanced by the learned Advocate-General, for the appellant, that it is not legally competent to a zamindar to add new properties to his estate, as he will thereby be changing the line of descent with reference to them to a single heir, a power which it is contended, he is not possessed of. For this argument reliance was placed on the observations of the Privy Council in *Rajindra Bahadur Singh v. Raghubans Kunwar*(1), at page 480, where their Lordships quote and agree with the opinion of Sir EDWARD CHAMIER as Judicial Commissioner of Oudh where he says

"I take it that is settled law that a subject cannot make this property descendible in a manner not recognized by the ordinary law and that he cannot subject it to a rule of descent such as is contained in the primogeniture sanad granted to Girwar Singh. If this is so, it appears to me to follow that Balbhadder Singh could not by express declaration, still less by mere volition, whether actual or presumed, subject property acquired by him to the rule of succession entered in the primogeniture sanad granted to Girwar Singh."

That case, it seems to me, has really no bearing on the case before us. It related to a taluk in Oudh claimed under a special grant by the Crown with a condition of lineal primogeniture imposed on it by the Crown at the time of the grant. Though the estate was registered under list 2 of section 10 of the Oudh Estates Act it did not previously descend according to any family custom of primogeniture. The validity of the grant was considered by the Privy Council in *Sheo Singh v. Raghubans Kunwar*(2), and it appears clear from that judgment that

(1) (1918) I.L.R., 40 All., 470 (P.C.). (2) (1905) I.L.R., 27 All., 634 (P.C.)

the Crown was imposing for the first time a new line of descent by lineal primogeniture. An addition to that estate will make the special line of descent apply to it. The circumstances of the present case are however entirely different. We have here an ancient zamindari, which descends according to the ordinary Mitakshara Law with only the modification necessary to select a single heir out of a class of heirs when that contingency arises, also derived from that law. When a zamindar adds further property to his zamin all that he can be said to do is to impose on it a condition of impartibility which he is competent to do. I do not think he can be said to impose thereby a new line of descent on the property different from that of the ordinary law. It is not uncommon for provident zamindars in South India to aggrandise their estate by new additions of property, and the only question to be decided in such cases is to find out whether it was intended by the acquirer to incorporate them with the original estate. That has been laid down in several rulings: see *Lakshmipathi v. Kandasami*(1), *Ramaswami Kamaya Naik v. Sundaralingaswami Kamaya Naik*(2), *Parbati Kumari Debi v. Jagadis Chunder Dhabal*(3), and *Janki Prasad Singh v. Dwarka Prasad Singh*(4), the last two being rulings of the Privy Council. In the last case their Lordships expressly say, on page 40:

"As has been pointed out by this Board in the case of *Parbati Kumari Debi v. Jagadis Chunder Dhabal*(3), the question whether properties acquired by an owner become part of 'the ancestral estate for the purpose of his succession' depends on his intention to incorporate the acquisitions with the original estate."

Following these rulings, the legal argument addressed to us on the point must I think be overruled and we must consider on the evidence how far the intention to incorporate is made out with reference to the various disputed properties.

With regard to properties included in issue 17 and declared by the Subordinate Judge to be partible, no serious attempt was made before us to dispute the finding as regards properties outside the zamindari. There is no proof that they were incorporated by Ramalinga with the zamin. In fact the power-

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(1) (1893) I.L.R., 16 Mad., 51. (2) (1894) I.L.R., 17 Mad., 422.
(3) (1902) I.L.R., 29 Cal., 433 (P.C.) (4) (1913) I.L.R., 35 All., 391 (P.C.)

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of-attorney, Exhibit XIV(a), which he executed points the other way as observed by the Subordinate Judge. The finding with reference to them must therefore be accepted. But the finding as to the other items included in issue 16 and items in issue 17 has been strongly contested.

The first item which is plaint Schedule III, item I, is the Sivagiri palace itself with its site and attached buildings, where the zamindars have been residing all along. It is in fact the official residence of the zamindar at his headquarters. It was brought to sale in execution of the decree in O. S. No. 1 of 1867 against the then zamindar, and was purchased by a Chetti and was taken possession of by him in 1874. In 1882, Sangili Veera, the next zamindar, bought it back from the Chetti by Exhibit V. He used it till his death for his zamindari palace and his son used it similarly after him. In these circumstances I agree with the Subordinate Judge that the proper inference is that it was made part of the zamin estate. The fact that Exhibit V recites that the vendee is given rights of sale, gift and alienation in the property seems to me to be immaterial, as such a statement would usually be made by the vendor in any conveyance.

The next item, Schedule III, item 2, is the Teppakulam (or tank) and the adjacent buildings. They seem to stand on the same footing as the palace, as the Subordinate Judge remarks: they are near the palace and were used by the zamindars and were never let out. They were purchased under Exhibits 12(a) and 12(b) in 1877 for Rs. 38-14-0 and Rs. 18. Being neighbouring properties which have not been separately enjoyed, they may, I think, be reasonably treated as appurtenant to the palace itself.

The third item, plaint Schedule III, item 40, is a bungalow in Courtallam, a neighbouring hill sanitarium. It was purchased in 1877, under Exhibit XII (h). It is altogether outside the zamin limits. There is nothing in the sale-deed to indicate that it was intended to be used as a hill residence of the zamindar for the time being, and there is no evidence that it was generally or exclusively used by the zamindar; in fact it was let to a stranger, when the Court of Wards was in management. There does not seem to be any point of difference between this

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property and the bungalows purchased by the fifth zamindar in Courtallam and in Ootacamund, another hill station, except that it was purchased by the father, Sangili. We have held the latter to be partible property and I think we must consistently hold the former also to be property of the same kind.

The next items, plaint Schedule III, items 42, 44 and 45, are a bungalow in Sankaranainarkoil and another in Srivilliputtur with another small building there. These are the headquarter stations of the two taluks in which the zamindar's property lies, and the zamindar and his officials have been using them when going to transact zamindari business, as they have often to do. They have not been let out or used for any other purpose. In these circumstances, I am inclined to agree with the Subordinate Judge that though these properties are outside the zamindari limits, they should nevertheless be held to have been acquired for zamin purposes and made part of the zamin estate for its use.

The next items are items 43, 47 and 48 of plaint Schedule III. They are all outside the zamin boundaries. The burden is therefore on the plaintiff to show that they were incorporated with the zamindari. There is no evidence when they were acquired, and in the case of items 43 and 47 there is nothing to show that they were incorporated into the zamindari or used for zamin purposes. As regards item 48, there is, however, Exhibit UU, which seems to show that that item was used for zamin purposes so long ago as 1885. That item, I think, may therefore be reasonably considered to have been incorporated with the zamindari, but not the others, which will therefore be treated as partible property.

The next items are items 6, 15, 20, 22 and 30 referred to by the Subordinate Judge in paragraphs 142 and the end of 149 of his judgment. He held them to be impartible properties. They are all within the zamin limits, and being additions to the zamindari property must be held to have been acquired for the zamindari on the view stated below regarding the next items.

The next items are those in plaint Schedule IV(a) to IV(q); they are pannai lands or lands under the cultivation of the zamindar himself. They are of three classes, nanjai lands, and topes or garden lands purchased by the zamindar, and other lands

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obtained when commuting the rents of some of the estate lands into money. They are all within the zamindari limits and are all properties which were already in the holding of the zamindar or over which the zamindar had melwaram rights. What was subsequently acquired by the zamindar was only the kudivaram rights in them. I agree with the Subordinate Judge that in the absence of clear evidence that they were dealt with as the zamindar's private property they must be held to be part of the zamin. The cases referred to by the Subordinate Judge—*Lakshminipathi v. Kandasami*(1), *Ramaswami Kamaya Naik v. Sundaralingaswami Kamaya Naik*(2), *Sarabjit Partap Bahadur Sahi v. Indarjit Partap Bahadur Sahi*(3), *Udayarpalayam Case* (4), and *Visvanathaswami Naicker v. Kamalu Ammal*(5)—support his conclusion. The properties were zamin properties to start with and the subsequent acquisitions only resulted in an enlargement of the zamin rights in them. As the new rights acquired were not kept separate, they must be taken to have passed as part of the zamindari. It was pointed out that in some of the documents of purchase it is expressly mentioned that the purchase was for the zamindari, and it was argued that we must therefore assume that in cases where such express recitals do not occur the rights purchased were intended to be kept separate as the acquirer's private property. I do not think that it is a valid argument, for even in cases falling in the latter class there are several lands in which the rights obtained by purchase are not claimed to be private property. I therefore agree that all the lands in Schedules IVa to IVg are part of the zamin estate.

The next items, those in Schedules Vb to Vg, are ayan patta lands in Government villages belonging to the zamindar. They are ryotwari lands outside the zamin limits and so they could not have been part of the original zamindari. Plaintiff must therefore prove that they were incorporated with the zamindari. There is, it is true, no evidence when they were acquired but that will not justify us in treating them as part of the zamin. I think in the absence of proof they must be regarded as partible

(1) (1893) I.L.R., 10 Mad., 54.

(2) (1894) I.L.R., 17 Mad., 422.

(3) (1905) I.L.R., 27 All., 203.

(4) (1903) I.L.R., 23 Mad., 503 (P.C.).

(5) (1915) M.W.N., 963.

properties and not part of the zamindari. Item in Schedule Va was allowed as partible property and it was not argued to be impartible property.

It follows then that the Subordinate Judge's finding on this part of the case must be accepted, except as to the house in Court-allam, items 43 and 47, 6, 15, 20, 22 and 30 and the ayan patta lands, which I think should all be included among the partible properties.

It may be noticed here that issues 18 to 22 were admittedly not tried in the lower Court as persons other than those who are parties to the suit are interested in them. The title to the properties included in them was left to be settled in a future suit. The decree should accordingly be modified on the point.

The next question to be dealt with is whether the award of past profits to the plaintiff from the assets of the first defendant is correct. The amount is large. It is strongly contended that the first defendant was the rightful zamindarni during her lifetime and that therefore she was not bound to account for any profits. If she was the rightful zamindarni the accumulated income of the zamindari during her lifetime, which was collected and paid into Court by the receiver, will be her absolute property; and on her death only a one-sixth share in it will go to the plaintiff as one of her six heirs. The decision of this question depends on whether the zamindari should be looked upon as the separate property of the last zamindar in which plaintiff had no right of succession by survivorship or whether it was one in which he had such a right. If it is the latter, it is conceded that the plaintiff will be entitled to the whole of the profits as he would have excluded the Rani in the succession, as I have already pointed out. If it is the former, it is equally conceded that plaintiff would be entitled only to a one-sixth share in the money. We have, therefore, to decide in this connexion the question above stated, which it was found to be unnecessary to decide in connexion with the succession to the zamindari itself, as the Rani died during the trial.

It was claimed by the respondent's vakil that as Periadurai succeeded to the zamindari as the daughter's son of the Istimrar zamindar (No. 10) in the plaint pedigree, his undivided brother Chinnadorai obtained at the same time a right of succession

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by survivorship in it, according to the ruling of the Privy Council in the Jaggampet case, *Venkayamma Garu v. Venkataramanayamma Bahadur Garu*(1), read with *Katama Natchiar v. The Rajah of Shivangunga*(2), and that that right has descended to his grandson the plaintiff and is still subsisting. The first answer given by the second defendant to this contention was that Periadurai took the zamindari not as the heir but as the whole legatee under the will of the old zamindar, Exhibit 21, and thus his brother got no interest in it at all.

The Subordinate Judge has held this will to be a spurious document, and I think he is right.

[His Lordship discussed the evidence and proceeded:]

For these and other reasons stated in great detail by the Subordinate Judge, which I accept, I think that it is quite unsafe to act on Exhibit 21 as a genuine document and that we must leave it out of consideration.

The position then is that Periadurai succeeded to his maternal grandfather's estate as his daughter's son. If it were partible property we are bound to hold on the authority of the *Jaggampet Case*(1), that he and his undivided brother Chinnadorai would have taken the property jointly with the rights of survivorship between them; and applying the rule in *Katama Natchiar v. The Rajah of Shivangunga*(2), Chinnadorai would have had a right to succeed by survivorship if Periadurai had died before him without male issue and undivided from him. It was however argued that this ruling which was given with reference to partible property should not be extended to an impartible estate, because it is said there is co-parcenary in such property. No doubt an impartible estate is the holder's separate property, which he can deal with as he likes except in so far as he is restrained by statute law, such as the Madras Impartible Estates Act. That is the effect of the rulings of the Privy Council in *Sartaj Kuari v. Deoraj Kuari*(3), *Sri Raja Rao Venkata Surya Mahipati Ramakrishna Rao Bahadur v. The Court of Wards*(4), and *Tara Kumari v. Chaturbhuj Narayan*

Singh(1). Even a right of maintenance does not exist except by custom. See *Rama Rao v. Rajah of Pittapur*(2), decided recently by the Privy Council. Nevertheless, these considerations do not affect the point before us as the rule of succession to an impartible estate has to be deduced not from the existence of any real co-parcenary in that estate but from a notional co-parcenary treating it for the purpose as partible property.

Mr. Justice MILLER has explained the position very clearly in his judgment in *Viswanathaswami Naicker v. Kamulu Ammal*(3), and I accept his statement of the law on the point. It thus follows that Chinnadorai had a right at one time to succeed to the zamindari by survivorship excluding the widow and other female heirs. That however is not the question we have to decide. It is at best only a step in the argument for the appellant. The question before us is whether as between plaintiff and the last zamindar, Ramalinga, there was any right of survivorship. We must, therefore, consider the effect of the subsequent events proved in the case.

Periadurai was a member of a joint family, consisting of himself, his brother, his father and his uncle, which owned some little ancestral property. Periadurai succeeded to the zamindari in 1835, but his father acting under Exhibit (10m) looked after it for him for some years. About 1842 Periadurai wished to assume management and it seems to have led to quarrels between him and his father and others. It would appear from Exhibit 10 that the Collector intervened in 1843 to settle the dispute, and we find in Exhibit N series that the zamindar was put in possession of the zamindari in 1844 and his father separated from him and went away to live in Veppangulam: see Exhibit K. In 1848, Chinnadorai brought a suit against the zamindar for partition and delivery of a half share in the zamindari and in a certain house and other personal property of the zamindar. The zamindar pleaded in defence impartibility, and also an agreement of 1843 by which he alleged his brother gave up all his claims against the estate. Exhibit O is the judgment in that suit and Exhibit O1, the judgment on appeal. A

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(1) (1902) I.L.R., 25 Mad., 678 (P.O.).

(2) (1863) 9 M.I.A., p. 543.

(3) (1888) I.L.R., 10 All., 272 (P.O.).

(4) (1899) I.L.R., 22 Mad., 333 (P.O.).

(1) (1915) I.L.R., 42 Cal., 1179 (P.C.).

(2) (1918) I.L.R., 41 Mad., 778 (P.C.).

(3) (1915) M.W.N., 968.

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stamped agreement of 1843 was filed in the case: see item (1) in the list of defendant's documents. The trial Court held that the plaintiff had accepted by that agreement 'a specific allowance from the defendant in full of all claims' and rejected his claim to a share in the personal property on that ground: see paragraph 6 of Exhibit O. In the Appeal, Chinnadorai referred to the agreement and said that the words 'no right whatever to the zamindari' were subsequently added to the document after he had signed it and the agreement itself was extorted from him. The Appellate Court, however, confirmed the judgment of the first Court holding that it was 'very much in accordance with the facts and law of the case.'

Exhibit 44 (a) is now produced by the second defendant as the correct copy of the agreement of 1843 filed in that suit. The Subordinate Judge holds that it is not proved. But whether this copy is properly proved or not, it is clear from the recitals in Exhibits O and O1 that there was an agreement executed by Chinnadorai in 1843 by which he renounced all his claims to the zamindari and the zamindar's personal property in return for an allowance agreed to be given to him. It is sufficient for this case to find that there was such an agreement as above stated.

At this time Chinnadorai was living in Veppangulam palace. After his father's death we find him alienating ancestral properties without any reference to Periadurai. Some of the properties alienated belonged to his uncle who had also died; they were in the uncle's patta: see Exhibits IVa and IVb. Exhibits IVc, IVd, IVf and IVg are similar alienations of other ancestral properties. He was also making acquisitions separately for himself: see paragraph 126 of the Subordinate Judge's judgment where the documents are all collected. After his time we find his sons Periaswami and Chinnaswami living separately from each other and holding separate pattas and selling properties separately: see Exhibit A series; this would indicate that probably they became divided between themselves.

The Veppangulam palace which was used as the residence of Chinnadorai and his branch, and which is now admitted to be a part of the paternal estate was, it is true, included by Periadurai in a mortgage executed by him in 1854, Exhibit MMM. But for some reason this attempt to claim the property failed,

for we find in 1877 the property sold in Court-auction for Periaswami's debt, when his brother Chinnaswami filed a suit and got his half share in it released—see Exhibits 27 and 27(d). No claim was made by the zamindar to a share as he would have done if it was his joint family property in which he had a share. On the other hand what he did was to buy it as Periaswami's property, through his agent Muthusubbier: see Exhibit 27 (a). Exhibit MMM1 and MMM2 referred to by the Subordinate Judge merely show that the zamindar was helping Chinnaswami in repairing the building and the wall. As regards the paternal ancestral properties, therefore, except by the inclusion of Veppangulam in Periadurai's mortgage in 1854, there is no evidence whatever of any interference by Periadurai or his descendants with them or of any joint dealings with reference to them.

No doubt, as stated by the Subordinate Judge in paragraph 130 and 131 of his judgment where all the documents are mentioned, there were maintenance grants made to Chinnadorai and his descendants from the zamindari, and when they were temporarily resumed, grain was given in substitution. The zamindar also gave occasional grants of timber, fuel, paddy and money. All these however seem to have been made out of grace, as some of the documents expressly say. They were made not only to the male members but also to the ladies of the family, showing that they were not made in recognition of any right of co-parcenary. We may also take it that the members of the zamindar's family and his brother's family were exchanging visits from time to time, as the Subordinate Judge finds in paragraph 132.

The question then is whether on this evidence we should find that the two branches were divided or remained undivided. Though there is no proof of a formal partition, I consider that the long course of separate living and separate dealing with properties by each branch, and the absence of proof of any joint dealings at all regarding them, coupled with the fact that Periaswami and Chinnaswami, the sons, apparently also became divided between themselves are strong evidence in support of a finding of complete separation, between the two branches of Ramalinga and of the plaintiff. The way in which Veppangulam palace was dealt

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with in 1877, as referred to by me earlier, is very significant in this connexion. There was also admittedly separation in food and in worship. But as there was no commensality from the very first as regards worship, separateness of worship may not count for much. But I think there is enough evidence to justify a finding of separation, at any rate in status and as regards all partible properties. It may be that the zamindar's branch, being very well off, did not care to claim any rights in this small paternal ancestral property. But that does not really affect the question. It was then argued that whatever the position may be with reference to the general partible properties of the family the separation regarding them cannot affect the interest of the plaintiff and his branch in the zamindari property, in other words, that the right they originally had to succeed by survivorship is still subsisting, as the zamindari was not the subject matter of any of the transactions from which division has been inferred. The Subordinate Judge has accepted this argument. But I am unable to adopt his conclusion.

I may dispose of, first, the argument that the maintenance grants made from time to time from the zamindari assets to Chinnadorai and his descendants have expressly kept alive their right of succession. That junior members have no right of maintenance by law in the zamindari is now settled by the decision of the Privy Council in *Rama Rao v. Rajah of Pittapur*(1), confirming the decision of this Court in *Sri Rajah Rama Row v. Rajah of Pittapur*(2). It has not been shown that in this zamindari there is any customary right to maintenance. It must therefore be taken that the maintenance grants in this case were not made in recognition of any rights but were made as matters of grace; and they cannot therefore be relied on as keeping alive any right of succession. I am unable to agree with the Subordinate Judge's view that it was necessary to show that there was an express division 'as regards the zamindari itself' to affect plaintiff's right to succeed by survivorship. That position I think cannot now be maintained after the recent ruling of the Privy Council in *Tara Kumari v. Chaturbhuj Narayan Singh*(3).

(1) (1918) I.L.R., 41 Mad., 778 (P.C.) (2) (1916) I.L.R., 39 Mad., 396.
(3) (1915) I.L.R., 42 Cal., 1179. (P.C.)

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The Subordinate Judge has, in my opinion, not properly appreciated the effect of that ruling. In that case, their Lordships overruled the contention that an express abandonment of the right to succeed or a partition directly affecting the impartible estate was necessary to put an end to the right of succession by survivorship in the zamindari and to let the widow come in. Their Lordships held that a complete separation in worship, in food and in estate, was proved in the case generally and not particularly with respect to the impartible estate, and gave effect to that finding by preferring the widow's right to succeed. They point out that the Thakur's brother, Bhupat, and his son had at no time any co-parcenary rights in the impartible estate in the hands of the Thakur. *Laliteshwar Singh v. Rameshwar Singh*(1), in which it was held that as regards an impartible *raj* there could be no separation in estate as there was nothing on which such separation could operate, as the interest of the junior members of the holder's family was only a *spes successionis*, was cited in argument to their Lordships, and though it is not referred to in the judgment it must be taken to have been overruled. No doubt the view taken in the Calcutta case is a possible view but that view was not accepted by their Lordships. A general partition between the zamindar and the other members of his joint family putting an end to their co-parcenary must, I think, be now held to put an end to their interests, if any, in the impartible estate also.

An attempt was made to reduce the importance of this ruling by suggesting that it only embodied a finding of fact as to separation, and two recent decisions—*Rani Jagadamba Kumari v. Thakur Wazir N. Singh*(2), and *Baijnath Prasad Singh v. Tej Bali Singh*(3)—were cited for the purpose. No doubt in every case the question whether there has been a complete separation or not is one of fact to be decided on the evidence in it. But when that fact is found, and it is decided that when the succession opened there was no co-parcenary between the last holder and the person who claims to be his successor, the ratio of the rule of succession by survivorship is gone and succession must then be traced as between divided members.

(1) (1909) I.L.R., 35 Cal., 481. (2) (1917) 2 Patna L.J., 239.
(3) (1916) I.L.R., 38 All., 590.

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Applying this view to the present case I think it must be held that the plaintiff had no right of succession by survivorship in the zamindari, as I find that he and the last holder were completely separated from each other. The Rani, therefore, succeeded to the zamindari in preference to him and the income during her life was thus her property and plaintiff can claim only a one-sixth share in it as one of her heirs. It was faintly suggested that as she had not drawn it and spent it, it must be taken to have been incorporated by her with the zamindari. Her inability to deal with it was due to the action of the Court in appointing a Receiver and not to any act of volition on her part; and so no inference of any intention of hers to leave it unspent for the benefit of the estate can be drawn. The Receiver of Court holds property for the person rightfully entitled to it and the money collected by him must therefore be treated as the Rani's absolute property. The decree of the lower Court must be modified to give plaintiff only a one-sixth share in the profits that accrued from the impartible estate up to the death of the Rani, he, of course, being entitled to the whole of it thereafter.

No other questions or issues were argued before us and I have therefore not dealt with any of them.

In the result the decree of the lower Court will be modified with reference to item 40, Schedule III, the Courtallam Bungalow, items 43 and 47, 6, 15, 20, 22 and 80, the Ayyan patta lands in Schedules Vb to Vg, and the properties involved in issues 18 to 22 and past profits in accordance with the findings above stated. In the partible properties and in the outstandings and in the past profits that accrued during the Rani's lifetime, there will be a declaration that plaintiff and the defendants Nos. 2 to 6 are each entitled to a one-sixth share; and a final partition decree will be drawn up by the Subordinate Judge regarding them.

As regards the rest of the property the decree of the lower Court must be confirmed. The appeal and the Memorandum of Objections are thus allowed in part and dismissed in part. As regards costs I direct the appellant and the first respondent to pay and receive proportionate costs of the appeal and under Rule XLI of the Rules of Practice fix the appellant's vakil's fee at Rs. 1,000 and the first respondent's, who has succeeded in the main, at Rs. 5,000. In the Memorandum of Objections of

the first respondent, he and the appellant will also pay and receive proportionate costs. The costs of the fourth and fifth respondent in the appeal and their own Memorandum of Objections proportionate to their success will come out of the partible estate.

Appeal No. 325 of 1918.

This is the appeal from the suit brought by Gurusami Pandian for a declaration that he was the nearest reversioner entitled to succeed to the zamindari on the death of the Rani Gnanamani, the mother of the last zamindar who was in possession then. It is now settled that such a declaration cannot be claimed and should not be given: see the ruling of the Privy Council in *Janaki Ammal v. Narayanasami Aiyer*(1).

Furthermore, we have found that he has no such right in the connected Appeal. This Appeal therefore fails and must be dismissed. No costs.

N.B.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

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VRIDHAGIRI AIYAR AND FOUR OTHERS
(DECREEHOLDER AND JUDGMENT-DEBTORS), RESPONDENTS.*

Civil Procedure Code (V of 1908), O. XXI, rr. 54(2), 66, 67 and 90—Non-publication of proclamation of sale in the village—Announcement of a wrong place as the place of sale—Sale held not in the place ordered by Court, but in the wrong place—Sale, illegal and null and void and not merely irregular.

Where a proclamation of sale of lands in execution of a decree, as framed by the Court, was not published in the village where the lands were situate but the process-server intimated at the village that the sale would be held at a place and by an officer different from those fixed by the proclamation, a sale held at the place and by the official fixed by the proclamation is illegal and a nullity and not merely 'irregular' within the meaning of Order XXI, rule 90, Civil Procedure Code.

Basharutulla v. Uma Churn Dutt, (1889) I.L.R., 16 Cal., 794, applied.

(1) (1916) I.L.R., 39 Mad., 634 (P.O.).

* Appeal against Order No. 321 of 1919.

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CHINNA
THAMBIAR.
KRISHNAN, J.

1920,
April, 14.

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APPEAL against the Order of J. C. STODART, District Judge of South Arcot, in Interlocutory Application No. 233 of 1919 in Execution Application No. 18 of 1919, in Original Suit No. 26 of 1915.

In this case which related to the legality of an execution sale of certain lands, the proclamation of sale stated that the sale would take place at Cuddalore before the Central Nazir. This proclamation was not actually published in the village where the lands were situate, but the process-server entrusted with the duty of publishing it announced in the village that the sale would take place at the District Munsif's Court of Villupuram. But the sale actually took place at Cuddalore. The further facts appear from the Judgment of OLDFIELD, J.

K. V. Krishnaswami Ayyar for appellant.

N. Chandrasekhara Ayyar for respondent.

OLDFIELD, J.—These proceedings were marked in the lower Court by grave irregularities; and it is the more necessary that in correcting these irregularities, we should be careful to do nothing which would inflict unfair prejudice on either party.

The sale, which is the subject of these proceedings, was according to the proclamation to be held by the Central Nazir of the Cuddalore District Court on 10th July 1919 and it was held accordingly. On the evening of that day the judgment-debtor represented to the Court that bidders had not come and that the sale was open to objection on other grounds, with which we are not concerned. Afterwards, and this was material in connexion with the representation that bidders had not come, he brought to the notice of the Nazir that the process-server charged with the duty of making the proclamation in the village had proclaimed that the sale would be held not by the Central Nazir at Cuddalore but by the District Munsif's Court of Villupuram. This communication from the judgment-debtor to the Nazir was brought to the notice of the Court on the next day, 11th July 1919, and I am constrained to express my disapproval of the Court's method of doing business by accepting representation of this kind made by a subordinate officer. Such complaints should be considered by the Court only when they are made to it in open Court in the usual way.

The Court then, however, at once cancelled the sale of the three items of property which had been sold the previous day, of which the second and third items, those purchased by the appellant are the subjects of the present appeal. It also directed the refund to the purchasers of their deposits and lastly it ordered that a fresh sale should be held on 20th August on a fresh proclamation. It does not appear that any communication of these orders was made, at all events at the time, to the present appellant. For, on 24th July 1919, he paid into Court the remainder of the purchase money due from him, and on 12th August 1919 applied for confirmation of sale and the grant of sale certificate; and again this cancellation of the sale was obviously an irregularity of considerable moment.

On 29th July 1919, the Court had obtained a draft proclamation, apparently from the decree-holder, and altered the date fixed for sale to 4th September 1919. Later, it may be said that as regards items other than 2 and 3, to which I shall return, the Court passed an order that the original sale should be continued as it was the Court's own fault that it was not held properly and as, properly speaking, there was no sale; and later on the sale was stopped by an order of this Court, dated 6th November 1919.

To go back to items 2 and 3: on the purchaser's application for confirmation of sale and sale certificate of 12th August 1919 notice was issued to the decree-holder, who contended, that the sale should be set aside, that a resale should be ordered, and that the purchaser's petition should be dismissed; and in these proceedings the order now under appeal was passed.

It is material that there has in this case been an order (now appealed against) which was passed after notice to all concerned, and which was passed after every opportunity had been given for the production of evidence. In these circumstances, greatly as we must regret the irregular manner in which the then District Judge, Mr. Edgington, passed the order by which the sale was in the first instance set aside, we think we can disregard that order and deal with the matter simply with reference to what had happened afterwards in connexion with the application of 12th August 1919. As I have pointed out, there was no prejudice to the appellant, the purchaser, or to any one else owing to any omission of the Court to hear them or to take

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evidence. These proceedings were perfectly regular and we therefore examine the order now under appeal simply on its merits and without regard to what had happened at the earlier stage.

The order under appeal purports to be passed under Order XXI, rule 90, on the ground of a material irregularity in publishing the sale proclamation. We have been shown no valid objection to the lower Court's finding that the sale proclamation, as it was framed by the Court, was not published in the village. The process-server owing to carelessness, or some other reason, substituted for the selling officer and place of sale fixed by the Court a different selling officer and a different place of sale. Besides finding that this occurred and that it was an irregularity, the lower Court has also, as rule 90 requires, found that the plaintiff decree-holder sustained substantial injury by reason of that irregularity. We do not think it necessary to follow the lower Court in that part of its order, because we do not think that rule 90 is applicable at all. The mistake, so to describe it, made by the process-server resulted not in any irregularity, but in an illegality which invalidated the proceedings.

Mr. Krishnaswami Ayyar, on behalf of the appellant, has referred to a number of authorities dealing with the facts in particular cases, which were or were not held to constitute irregularities or illegalities. It is unnecessary to go through those cases, because the decision in each rested on the facts in it, and because it does not appear that any general rule for distinguishing between an irregularity and an illegality has ever been laid down. It would appear, in fact, that the distinction is one of degree, and that an irregularity of so serious a nature as to render impossible the publicity which affords one main security for the fairness of public sales must be deemed to be an illegality. This view that the question is one of degree, is implied, it seems to me, in the judgment of Mr. Justice HEATON in *Krishnaji v. Bomanji* (1), and although I am doubtful as to the correctness of the main conclusion reached by the learned judges in that case, I avail myself of the support, which the view I take receives, from Mr. Justice HEATON's observation that although the facts

before him did not constitute such an illegality as would render the sale in question void, yet he wished at the same time to be clearly understood not to ignore that in other cases there might be other circumstances which, combined with similar ones, would amount to an illegality such as the Court could act on.

The nearest case perhaps to the facts before us is *Basharut-ulla v. Uma Churn Dutt* (1). There, the property that had been advertised for a particular date was sold on that date, but at an earlier hour than that stated in the proclamation, and the Court said that in those circumstances it seemed to it that there was no sale within the meaning of the Code and that the proclamation of the time and place and the holding of the sale at such time and place advertised were conditions precedent to its being a sale under the Code at all. It appeared to the Court that the property never had been sold under the Code, and consequently the plaintiff was entitled to a declaration that whatever took place when the property was put up for sale had no effect as against him. It seems to me that if, when a proclamation was made any of the usual and effective methods prescribed or permitted by the Code for its publication has been misleading as to details of the matter proclaimed and has been such as not merely not to give information to possible bidders, but to divert them to a place where the sale is not to be held, the result must be in the words of *Basharut-ulla v. Uma Churn Dutt* (1) that the property had never been sold under the Code at all.

In these circumstances the order of the lower Court must be confirmed and the appeal dismissed. As regards the question of costs we bear in mind that the decree-holder and the judgment-debtor were in fact present during the sale, and apparently it was not until the sale was concluded that the latter made any objection to the manner in which it had been proclaimed or conducted. There is then the fact that throughout the proceedings, apparently without objection from the decree-holder who ordinarily would have their direction, have been carried on in the highly irregular manner to which we have referred. In these circumstances we think that we are justified in making no order as to costs in this Court.

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(1) (1909) 11 Bom. L.R., 380.

(1) (1889) I.L.R., 16 Cal., 794.

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SESHAGIRI AYYAR, J.—I entirely agree. The facts have been fully stated by my learned brother. The question for consideration is whether the Court sale should be regarded as having been irregularly conducted or whether it was illegal. As this point was argued with some insistence by Mr. Krishnaswami Ayyar, I propose to say a few words on it.

The Code itself gives some indication as to when a sale can be regarded as irregular and when illegal. In Order XXI, rule 90, which permits an aggrieved party to come to Court to set aside a sale, the language employed is that it may be set aside on the ground of material irregularity or fraud in *publishing or conducting* it. Where there is no publication or conduct of the sale, it is, I think, a right inference to draw from rule 90 that the sale should be regarded as illegal. In the present case, on the facts which my learned brother has fully stated, my conclusion is that there has been no publication at all. If a sale is held at a place to which the proclamation at the village makes no reference, and *per contra* invites bidders to go to another place, I am prepared to hold that there was no proclamation leading up to the sale. Mr. Krishnaswami Ayyar drew our attention to cases where there has been no beating of a drum and it was held that such a mistake should be regarded only as an irregularity. As Mr. Chandrasekara Ayyar pointed out, under the rules it is not obligatory to beat the drum and the proclamation may be made in any other manner which the people of the village are accustomed to hear. Therefore, the decision in *Trimbak Ravji v. Nana* (1), that the omission to beat the drum is only an irregularity, does not affect the present case.

The present case, I agree, with my learned brother, is practically covered by the authority of *Basharutulla v. Uma Churn Dutt* (2). In that case the question was whether if a sale was held at an hour anterior to the one mentioned in the proclamation the sale was irregularly conducted or whether it was illegally held. The learned Judges came to the conclusion that there was a violation of the fundamental conditions of the sale, namely, the time of sale, and that consequently the sale was a nullity. The same argument can be used with reference to a sale held at a place different from the one mentioned in the proclamation.

(1) (1886) I.L.R., 10 Bom., 504.

(2) (1889) I.L.R., 16 Cal., 794.

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I concede that it is not easy to draw the line between an irregularity and an illegality, but I am clear that where a substantial provision of law has been violated, and that has the effect of not attracting persons who could be expected to be present for the purpose of bidding at the sale, the sale should be regarded as having been illegally conducted. As regards the decision chiefly relied on by Mr. Krishnaswami Ayyar, namely, *Krishnaji v. Bomanji* (1), I agree with my learned brother in dissenting from the conclusion reached in that case. Mr. Justice CHANDRAVARKAR, J., bases his conclusion mainly on *Arunachellam v. Arunachellam* (2). In the latter case, the Judicial Committee had before it a case of misdescription of property, and their Lordships were of opinion that a mere description would be only an irregularity. Their Lordships laid stress on the fact that the judgment-debtor was throughout present and acquiesced in the irregularity, and that when he found that there was no other means of vacating the order he resorted to this expedient of setting aside the sale. The principle on which their Lordships rested their decision was estoppel. There is no such question in this case. I do not think that case is an authority for the broad proposition which CHANDRAVARKAR, J., has deduced in *Krishnaji v. Bomanji* (1).

In *Nana Kumar Roy v. Golam Chunder Dey* (3), the proclamation was in the Collector's office. Mr. Krishnaswami Ayyar argued that as the proclamation in the Court or in the Collector's office and the proclamation in the village are all mentioned together in the Code no distinction should be drawn between one mode of proclamation and another. I am unable to agree with him. The failure to proclaim in the Collector's office will not have as serious an effect on bidders as the failure to proclaim in the village. It is in the latter place that people who are likely to purchase will gather. That is the most important part of the procedure relating to proclamation and, if it is violated, such a violation does not stand upon the same footing as the failure to affix a copy of the proclamation in the Collector's office.

There is only one other decision to which reference may be made, and that is *Rang Lal Singh v. Ravaneshwar Pershad*

(1) (1909) 11 Bom., L.R., 380. (2) (1889) I.L.R., 12 Mad., 19 (P.C.).

(3) (1891) I.L.R., 18 Calc., 422 (F.B.).

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Singh(1). In that case, the Judicial Committee had to consider a case of sale which was held some days after the date mentioned in the proclamation. The facts of that case make it clear that that was a case of mere irregularity. The sale itself was being adjourned from day to day and ultimately it was fixed for the day on which the usual Court sales were held. That was the 13th July. On 13th July the presiding officer happened to be absent on leave and the sale was held on the day when he returned. The people in the locality were apparently aware that in consequence of the absence of the presiding officer the monthly sales would not be held on the usual day but would be held immediately on the return of the presiding officer. On those facts the Judicial Committee came to the conclusion that there was only an irregularity, and that it would not vitiate the sale unless substantial loss was proved. That case is no authority for this case, where there was no proclamation relating to the place where the sale is actually held.

For these reasons I agree that the order of Mr. STODART is right and that this appeal must be dismissed.

N.R.

(1) (1912) I.L.R., 39 Cal., 26 (P.O.).

APPELLATE CIVIL

Before Mr. Justice Ayling and Mr. Justice Krishnan.

RAMANATHAN CHETTY (PLAINTIFF), APPELLANT,

1920,
 July 20 and
 27.

A. L. AR. RM. ARUNACHELAM CHETTIAR, THROUGH AGENT
 T. N. RAMACHANDRA ROW (DEFENDANT), RESPONDENT.*

Madras Estates Land Act (I of 1908), ss. 55 and 146—Purchaser of occupancy right—Suit for patta in a Revenue Court—Duty of Revenue Court to decide as to title of plaintiff—Rival claimant of such right, previously recognized by landlord as transferee—Power and duty of Court to decide in the suit—Proceedings under section 146, effect of—Non-joinder of parties—Dismissal of suit—Civil Procedure Code (V of 1908), O. I, r. 10, cl. (2).

The power and duty of a Revenue Court, in a suit under section 55 of the Madras Estates Land Act, to deal with the rights of the parties before it, are not affected by the provisions of section 146 of the Act.

Where a suit is instituted in a Revenue Court under section 55 of the Act by the purchaser of land from a ryot against the landlord to obtain patta, the Court is bound to decide whether the plaintiff is entitled to patta or not, if his title is disputed, although the landlord might have previously recognized a rival claimant as transferee and issued patta to him, on the joint application of the transferor and the transferee.

In such a suit, the rival claimant is only a desirable and not a necessary party: even if he were a necessary party, the Court should not dismiss the suit for non-joinder of such claimant, but add him as a party if it thought fit to do so, under Order I, rule 10, clause (2), Civil Procedure Code, which is made applicable to Revenue Courts by section 192 of the Act.

SECOND APPEAL against the decree of C. KRISHNASWAMI RAO, District Judge of Rāmnād at Madura, in Appeal No. 855 of 1918, preferred against the decree of M. PITCHU AYYAR, Special Deputy Collector of Rāmnād, in Summary Suit No. 2847 of 1916.

The original owner of the suit land was one Kaliappan Servai, who sold on 19th June 1888 $\frac{1}{4}$ th part to one Adaikalam Chetti and on 9th November 1889 sold the remaining $\frac{3}{4}$ th part to plaintiff. In 19th June 1890 plaintiff bought from Adaikalam

* Second Appeal No. 756 of 1919.

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Chetti the 1/4th part and since then he was in possession and enjoyment of the entire land; the patta, however, remained in the name of the original owner and was not transferred to the name of the plaintiff, and the receipts for payment of rent were issued in the name of Kaliappan and, on his death, in the name of his wife, Kaliammai. After the death of Kaliappan his widow, Kaliammai, and his brother's son conveyed the lands to one Perianayagi in 1894 and 1910 respectively; and on the joint application of the vendors and the vendee (Perianayagi) the patta was transferred to the latter in 1912. The plaintiff brought this suit under section 55 of the Madras Estates Land Act to compel the defendant to issue patta to him; to this suit Perianayagi was not joined as a party. The plaintiff set up that he had applied to the landlord under section 146 of the Act for issue of patta to him but that the latter had improperly refused to do so. The defendant pleaded that he had already recognized Perianayagi as a ryot entitled to the patta, on an application under section 146 of the Act, that he could not be compelled to issue another patta, and the Revenue Court had no power to direct him to issue a patta to the plaintiff. The Deputy Collector held that the plaintiff was entitled to obtain a patta from the defendant, and decreed accordingly. On appeal, the District Judge reversed the decree, holding that the Revenue Court could not direct the defendant to issue a patta to the plaintiff, as the plaintiff had not applied along with his vendors for transfer of patta under section 146, while Perianayagi had obtained patta thereunder; and that the non-joinder of Perianayagi as a party to the suit was a valid objection to the suit and that the only remedy open to the plaintiff was a suit in a Civil Court properly framed, impleading Perianayagi as a party. The plaintiff preferred this Second Appeal.

C. V. Anantakrishna Ayyar for appellant.—The Revenue Court is bound to decide the question as to who is the proper transferee from the original tenant and direct the landlord to tender patta to such transferee. In a suit under section 55 of the Madras Estates Land Act, the Court has power, and is also bound, to decide all questions which are incidental to directing the defendant to tender patta to the plaintiff. Reference was made to sections 3, 50, 55, 146 and 147 of the Act. Sections 146 and 147 only lay down that the landlord on a joint application

by the transferor and the transferee may recognize him as ryot, and anything done with such transferee will be valid as against the real transferee. But the latter is entitled to sue under section 55 of the Act to enforce his right to get a patta from the landlord. This right is not affected by what the landlord may do under section 147. The transferee need not go to a Civil Court. The recognition of a transferee by the landlord under section 147 is not conclusive and does not take away the right of the real transferee to enforce his right to a patta under section 55 of the Act. See *Tallapragada Subba Row v. Gopiseti Narayanaswami Naidu* (1) and *Sethurama Aiyangar v. Subbiah Pillai* (2).

The lower Appellate Court was wrong in dismissing the suit for non-joinder of parties; the rival transferee is not a necessary party. The first Court held that he need not be joined as a party. If the Appellate Court thought otherwise, it might have joined him as a party under Order I, rules 9 and 10, Civil Procedure Code, which are applicable to Revenue Courts under section 192 of the Act. *A. Krishnaswami Ayyar* for respondent.—The landlord has accepted one transferee as a tenant and given him a patta. That is conclusive. The Revenue Court cannot go counter to that acceptance. The transferee must sue in a Civil Court and settle the matter between himself and the rival claimant, and then sue in the Revenue Court under section 55 of the Act.

KRISHNAN, J.—This second appeal arises from a suit brought by the plaintiff under section 55 of the Estates Land Act, I of 1908, to obtain a patta from the defendant—the landholder for the plaint land. Plaintiff's case was that he obtained the occupancy right by purchase of the rights of the previous ryot, one Kaliappan Servai, some years ago and that he was paying the rent due, though the patta remained in the latter's name. Kaliappan died some time ago leaving his widow, one Kaliammai. Plaintiff recently made an application under section 146 of the Estates Land Act jointly with Kaliammai for the transfer of patta to his name, but the defendant refused it. Hence the suit. Defendant pleaded that some time ago he had recognized one Perianayagi as the ryot on a joint application by herself and Kaliammai alleging that the occupancy right had been sold to

(1) (1916) 4 L.W., 293.

(2) (1917) 33 M.L.J., 599.

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her by one Muthu Servai, a nephew and heir of Kaliappa, that he had issued a patta in her name and that having done so, he was not bound to issue a new patta to the plaintiff unless the latter took proper steps under section 146 of the Estates Land Act. He also pleaded that as plaintiff did not take such steps the Revenue Court had no jurisdiction to decree delivery of patta to him. He further contended that the suit was also bad for non-joinder of Perianayagi. The District Judge upheld his objections and dismissed the suit. Hence the appeal to us by the plaintiff.

On the question of non-joinder I agree with the Deputy Collector that Perianayagi was not a necessary party, though it may be desirable to have her as a party, to settle effectively the dispute raised. But even if she was a necessary party the suit should not have been dismissed for her non-joinder. It is clear from Order I, rule 9, Civil Procedure Code, which applies to Revenue Courts by force of section 192 of the, Estates Land Act, that the order of dismissal is improper. The Court should have acted under Order I, rule 10, clause (2), and added her as a party defendant if it thought fit to do so.

The defendant's chief objection, however, is that in the circumstances stated by him the Revenue Court had no authority to direct him to issue a patta to the plaintiff. This is said to result from section 146 of the Act. I am unable to see what bearing that section has on the present case. That section seems to be intended to prevent landholders from contumaciously refusing to recognize transfers which are prima facie valid. But it cannot be read as validating transfers which are in truth invalid or as affecting the real rights of parties. Section 50 gives every ryot a right to demand a patta and section 55 a right to sue for it in the Revenue Court. When such a suit is brought the Court is bound to decide whether the plaintiff is entitled to a patta or not, if his title to it is denied. The fact that the landholder has previously recognized a rival claimant, who is alleged to have no right in the land, cannot, in my opinion, make any difference in the matter, for any action of his, to which plaintiff is not a party, cannot be allowed to prejudice the latter's right. The definition of the term 'ryot' in section 2, clause (15), does not seem to lend any support to the defendant's contention

on the point. Nor has any authority been cited in support of it. I consider section 55 is not affected in any way by section 146, and the Revenue Court's power to deal with the rights of parties before it under the former section is not controlled by anything in the latter. The opinion of the learned District Judge that plaintiff's only remedy was to sue Perianayagi in a Civil Court for a declaration that his rights are superior to hers and after getting a decree to apply to defendant to recognize him as the ryot is not, in my opinion, correct, for I think he is entitled to ask the Revenue Court to decide whether he is not the rightful ryot and to dispose of his suit on the merits of his claim.

I would, therefore, set aside the decree of the lower Appellate Court, and remand the appeal to it for disposal according to law, and direct respondent to pay appellant's cost in this Court.

AYLING, J.—The maintainability of the suit in the Revenue Court is a point on which I must confess to a certain amount of doubt. But I am not prepared to differ from my learned brother and I agree in the order proposed.

K. R.

APPELLATE CRIMINAL.

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

SUBBASARI AND ANOTHER, PETITIONERS (PETITIONERS),

1920,
August, 13.

v.

EMPEROR.*

Criminal Procedure Code (V of 1898), sec. 195—Court hearing an appeal application for sanction—Jurisdiction itself to take additional evidence.

An Appellate Court, hearing an application to revoke or grant a sanction granted or refused by a Lower Court under section 195, Criminal Procedure Code, has power itself to take additional evidence before disposing of the application. *Rama Aiyar v. Venkatachella Padayachi* (1907) I.L.R., 80 Mad., 311 and *Krishna Reddy v. Emperor* (1910) I.L.R., 33 Mad., 90, distinguished.

* Criminal Miscellaneous Petition No. 274 of 1920.

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EMPEROR.

PETITION to revoke the order of J. J. COTTON, Sessions Judge of Coimbatore, in Criminal Miscellaneous Petition No. 22 of 1920, filed against the order of J. M. TURING, District Magistrate of Coimbatore, in Miscellaneous Case No. 3 of 1920, filed against the order of B. K. SAMBAMURTI, Second-class Magistrate of Avanashi, in Miscellaneous Cases Nos. 1 and 2 of 1919.

Facts are given in the judgment.

G. N. Tirumalai Acharya for C. Narasimha Acharya for petitioner.

V. L. Ethiraj for Public Prosecutor for the Crown.

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SADASIVA AYYAR, J.—Sanction was granted by the Second-class Magistrate of Avanashi to prosecute the petitioners under section 193, Indian Penal Code, because their evidence before him as committing Magistrate in a murder case was opposed, to what was alleged to have been their statements taken by the police at their investigation. There can be no doubt that if the statements before the police were properly proved either before the Magistrate, when he performed the duty of a committing Magistrate in the murder case, or before him when he was inquiring into this sanction petition, he had sufficient materials on which to base a grant of sanction for the prosecution of petitioners for an offence under section 193 so far as the statements made before him were concerned, no separate sanction being necessary to prosecute the petitioners for the perjury in the alternative committed by them in their statements to the police: see *In re Fakir Mohideen*(1).

There seems to have been an appeal from the Second-class Magistrate's order granting sanction to the District Magistrate, who in a short order refused to revoke the sanction. There was an application to the Sessions Judge, as the appellate authority over the District Magistrate, to revoke the sanction which was taken to have been a sanction granted by the District Magistrate himself, because he refused to revoke the sanction granted by the Second-class Magistrate. The learned Sessions Judge evidently thought that the Second-class Magistrate did not act upon sufficient materials, because the statements alleged to have been made before the police had not been legally proved to have

(1) (1909) 5 M.L.T., 855.

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been so made; so, he took the statement of the police officer who held the inquest, and on that police officer saying that he correctly recorded the statements as found in the inquest report he ordered the prosecution of the petitioners. Then, as the appellate authority over the Sessions Judge, this application is now made before us to revoke the sanction which must be taken to have been granted by the Sessions Judge.

Only three questions were argued before us, the other points taken in the revision petition being clearly unsustainable. Those three points are—

“(2) The Sessions Judge had no jurisdiction in cases under section 195, Criminal Procedure Code, to remand or take additional evidence;”

“(5) The learned Judge had no jurisdiction to grant a fresh sanction himself”; and

“(6) The second accused in S.C. No. 15 of 1919 having been acquitted and the learned Judge in that case having held that a substantial portion of the case was concocted and eye witnesses substituted, that is not a fit case for sanction.”

As regards the first point, *Rama Aiyar v. Venkatachella Padayachi*(1) and *Krishna Reddy v. Emperor*(2) do seem to contain observations laying down the following propositions: (1) that an application to the Appellate Court to grant or revoke a sanction refused or granted by the lower Court is in the nature of an appeal; (2) that in the inquiry into such an application made to the Appellate Court, the Appellate Court has no power to call for fresh evidence (to be taken by the lower Court and sent on to the Appellate Court) for consideration in deciding the so-called appeal and that the Appellate Court has not even got the power to take fresh evidence itself as such power is granted to an Appellate Court only under section 428, Criminal Procedure Code, in cases falling under the chapter in which section 428 occurs.

I am myself inclined to hold (1) that the application to the Appellate Court to revoke or grant a sanction granted or refused is not an appeal, but an original application; (2) that, it having been held that, though section 195, Criminal Procedure Code itself does not expressly give power to the Court to which an

(1) (1907) I.L.R., 80 Mad., 811.

(2) (1910) I.L.R., 88 Mad., 90.

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—
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application is made for sanction to take evidence, that Court has an inherent power to take such evidence before granting or refusing sanction. The Appellate Court which is asked to grant or refuse sanction (as the case may be) has also the same inherent power to take the evidence which it considers necessary to satisfy its mind as to the propriety of granting or refusing sanction. It may be that it has got no power to ask the lower Court to take evidence in such cases and send it on to itself for consideration or to set aside the order of the lower Court without passing any definite order itself and merely to remand the case for fresh disposal by the lower Court. Such a power to give directions to the lower Court is not necessarily involved in its power to itself grant or refuse sanction. It is unnecessary, however, to deal with that question finally in this case because the only point actually decided in *Rama Aiyar v. Venkachella Pudayachi*(1) and *Krishna Reddy v. Emperor*(2), was that the Appellate Court cannot call for fresh evidence to be taken by the lower Court and to be sent on to itself. In the present case, I shall therefore hold, as at present advised, that the Sessions Judge had power himself to take additional evidence, but having considered the record as a whole I do not think that this is a fit case for granting sanction for perjury against the petitioners and I would therefore revoke the sanction.

NAPIER, J.

NAPIER, J.—I agree with my learned brother that this is not a fit case for granting sanction. I entirely agree with the views expressed by my learned brother on the point of law and only wish to add a few words. I have examined *Krishna Reddy v. Emperor*(2) very carefully and I am satisfied that the learned Judges did not intend to lay down anything more than that the Court before whom an application to grant or refuse sanction was pending had no power to make an order calling for further evidence from the Court below. I do not think that the reference to section 428, Criminal Procedure Code, and the words "power to take or call for further evidence" was anything more than a reference to the section which gives power to call for evidence or that it was intended to be a ruling on the point. It seems to me that if the original Court has power to take evidence, which proposition it is too late now to contest, it necessarily

(1) (1907) I.L.R., 3 Mad., 311.

(2) (1910) I.L.R., 33 Mad., 90.

follows that the Court which, under sub-section (6) of section 195, Criminal Procedure Code, has power to revoke or grant sanction, must have the same power to take fresh evidence, and it also seems to me that it might be very disastrous if the Court was not so empowered. The object of the section is to prevent improper prosecution for offences in connexion with the administration of justice, and very rightly a certain power is vested in Courts to limit the wide powers given to the public generally of laying complaints under section 190, Criminal Procedure Code. The fetters which are put on this power of complaining are generally discretionary and I conceive nothing more dangerous to the proper exercise of these discretionary powers than to tell the Court that it could not procure any further material it required for the due exercise of its discretion. I am therefore quite clear that the Court has power to take fresh evidence and that the Sessions Judge was therefore entitled to do so.

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—
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N.R.

APPELLATE CRIMINAL.

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

In re APPALANARASAYYA BHUKTA (ACCUSED) AND SEVEN
OTHERS,

v.

EMPEROR.*

1920,
August, 19

Criminal Procedure Code (V of 1898), sec. 250—Order for compensation without examining all the witnesses of complainant, legality of.

In a case of rioting and intimidation, the Magistrate, after examining only some of the witnesses of the complainant, discharged the accused and, after asking the complainant to show cause why he should not be ordered to pay compensation to the accused, passed an order for compensation without examining the remaining witnesses in spite of his request to do so.

Held, that the order was not illegal but one that should only be made in very exceptional circumstances.

CASE referred for the orders of the High Court under section 438 of the Criminal Procedure Code by A. T. FORBES, Sessions

* Criminal Revision Case No. 274 of 1920 (Case Referred No. 28 of 1920).

APPALANARA-
SAYYA
BHUKTA
v.
EMPEROR.

Judge of Vizagapatam, against the order of compensation awarded by A. G. LEACH, First-class Magistrate of Vizianagram, in Calendar Case No. 109 of 1919.

In this case, the complainant filed a complaint against eight persons of rioting and criminal intimidation and cited ten witnesses. The Magistrate, after examining four witnesses, discharged the accused, holding the complaint to be frivolous and vexatious. He then called on the complainant to show cause why he should not be ordered to pay compensation to the accused. The complainant prayed that his remaining witnesses may be examined. But the Magistrate, without examining any of them, awarded compensation to the accused. The Sessions Judge of Vizagapatam referred the award to the High Court under section 438, Criminal Procedure Code, as illegal.

V. L. Ethiraj for the Public Prosecutor.—The order is illegal. Section 250 (1) (a) requires the Magistrate to consider the objections of the complainant, which was not done in this case.

B. Satyanarayana for the accused.—The order was right. *Queen-Empress v. Chiragh Ali*(1) lays down that no separate inquiry before awarding compensation was contemplated by the Code.

The Court delivered the following ORDER :—

Reading sections 250 and 253 of the Code of Criminal Procedure together we cannot say that the order for compensation made in spite of the complainant's request for the examination of his remaining witnesses is illegal. But in our opinion it is not one that should be made except in very exceptional cases. Directly a Magistrate informs a complainant that he is considering making an order against him under section 250, Criminal Procedure Code, the complainant's position is changed and he comes within the mischief of the Criminal Procedure Code and is on his defence though not actually accused. The Code provides for a record of his objection, and it seems to us that his position is made, by the words of the Code, stronger than that of a complainant against whom sanction for prosecution for an offence under section 182 or 211, Indian Penal Code, is sought, and in such cases this Court has always required that notice and opportunity

(1) (1898) 18 A.W.N., 198.

to meet should be given and the party permitted to adduce evidence though section 195 contains no such provision. We think that he should be allowed to call witnesses, for until the Magistrate has heard them he cannot say whether their evidence will not help him to decide (firstly), the propriety of such an order and (secondly) the extent of the culpability of the complainant to be expressed in the amount of the compensation. *Queen-Empress v. Chiragh Ali*(1), relied on by Mr. Satyanarayana (who appears for the person who received compensation), was a case where the accused was acquitted, and such acquittal in a summons case could only be after all the evidence for the prosecution was taken, and in a warrant case after charge was framed. We therefore set aside the order for compensation.

N.R.

APPELLATE CRIMINAL.

Before Mr. Justice Oldfield and Mr. Justice Hughes.

SOMANNA (ACCUSED), PETITIONER,

v.

CHELLAPATHI RAO (COMPLAINANT), RESPONDENT.*

Workmen's Breach of Contract Act (XIII of 1859).—Compositor, an artificer—Contract to gradually work out advance from wages, a contract under the Act.

A compositor is an artificer if not a workman within Act XIII of 1859. An agreement by which an advance given to an artificer is to be repaid by him by periodical deductions from his wages does not merely create a relation of debtor and creditor but is a contract between master and workman within the meaning of the Act.

PETITION under sections 435 and 439 of the Code of Criminal Procedure to revise the order of G. JAMES, Second-Class Magistrate of Ellore, in Calendar Case No. 223 of 1920.

The complainant is the proprietor of the Manjuvani Press, Ellore. The accused entered into a contract with the complainant

(1) (1898) 18 A.W.N., 198.

* Criminal Revision Case No. 386 of 1920 and Criminal Revision Petition No. 271 of 1920.

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binding himself to work in the latter's press as a compositor under the following agreement:—

"I have agreed to work in your office as a compositor, for a monthly pay of Rs. 17. I have already received from you Rs. 10 as an advance. I have agreed to receive Rs. 40 at the time of the registration of the document before the Sub-Registrar. In all Rs. 50 (fifty rupees) has been received by me in the aforesaid manner. The said advance amount may be deducted by you from the pay you give me, at Rs. 4 every month. Till the entire amount of your advance has been discharged in this manner, that is, for one year and fifteen days, I shall work under you and discharge the amount without praying for any increase in my pay."

The contract was registered on 8th May 1920, and the accused after working for a few days stopped away from 18th May 1920. The proprietor complained under the Workmen's Breach of Contract Act. The accused pleaded that he received Rs. 50, not as advance for the work but as a loan, and that he stopped from work as the complainant used abusive language towards him. The lower Court found both the points against the accused, and passed an order under section 2 of the Act. The accused preferred this Revision Petition.

K. Ramnath Shenai for the accused.—A compositor does not come within the Act; he is neither an artificer, nor a workman, nor a labourer. Only people who do manual labour are within the Act. A compositor has to do more intellectual than manual work: see *Kunhi Moidin v. Chamu Nair*(1). Moreover, the agreement is not a 'contract' within the Act, because the advance is not one on account of the work to be done but is a loan: see *In re Abdul Rasul Ismailji*(2) and Madras High Court Proceedings No. 39 (3).

V. L. Ethiraj for the Public Prosecutor and *V. Suryanarayana* for the complainant were not called upon.

The Court delivered the following JUDGMENT:—

The first question argued in this Revision Petition is whether the petitioner, who is a compositor, is an artificer, workman or labourer within the meaning of Act XIII of 1859. A compositor is defined in the Century Dictionary

(1) (1918) I.L.R., 41 Mad., 182, 187.

(2) (1911) 18 Bom. L.R., 548; (1911) 11 I.C., 586. (3) (1880) 1 Weir, 661.

as one who sets up type. Mr. Shenai on petitioner's behalf contends that because he has to use his brains to some extent in order to set type he does not come within the scope of the Act. Mr. Shenai has relied on the judgment of AYLING, J., in *Kunhi Moidin v. Chamu Nair*(1); but that is not in point. We think that a compositor in ordinary parlance would be regarded as an artificer if not as a workman. This point therefore fails.

The remaining argument is that Exhibit A, the agreement between the petitioner and his master, simply creates a relation of debtor and creditor, not of a master with a workman who has received an advance. Reliance is placed on the construction put by the Courts on what are alleged to be similar agreements: *In re Abdul Rasul*(2) and Madras High Court Proceedings No. 39 (3). Neither of these cases is in our opinion analogous to the present. In the first, the last sentence of the agreement provided quite generally, for payment of the advance made within a period which was specified, although no doubt, from the workman's wages. In the second, similarly the deposit or loan was to be refunded at the close of the period of the contract. In neither was there anything resembling the provision in Exhibit A, by which the advance to the workman is to be repaid by periodical deductions from the amount of his wages and should in any case be worked out by him.

The Revision Petition fails and is dismissed.

N.B.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling and Mr. Justice Krishnan.

RAMA SAHU (SECOND DEFENDANT), APPELLANT,
v.

GOWRO RATHO (PLAINTIFF), RESPONDENT.*

Transfer of Property Act (IV of 1882), ss. 4 and 107—Indian Registration Act (XVI of 1908), ss. 17 and 49—Unregistered lease for six months—Whether admissible to prove tenancy.

Section 49 of the Registration Act applies only to instruments which are required to be registered by section 17 of that Act, and is not applicable to

(1) (1918) I.L.R., 41 Mad., 182, 187.

(2) (1911) 18 Bom. L.R., 548; (1911) 11 I.C., 586. (3) (1880) 1 Weir, 661.

* Second Appeal No. 2051 of 1918.

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Hence, an unregistered lease for a period of less than one year, which is required to be registered under section 107 of the Transfer of Property Act, but not under section 17 of the Registration Act, is admissible in evidence to prove the nature of the possession under the instrument.

SECOND APPEAL against the decree of T. KRISHNASWAMI, Temporary Subordinate Judge of Ganjām at Berhampur, in Appeal No. 71 of 1918 (Appeal Suit No. 275 of 1917, Ganjām District Court), preferred against the decree of THARINI CHARAN RATH, District Munsif of Aska, in O.S. No. 400 of 1916.

The plaintiff sued, as purchaser of the suit house from fourth defendant, to recover possession from defendants Nos. 1 to 3, alleging that they were in wrongful possession and obstructed his taking delivery of it. Defendants 1 to 3 alleged that the suit house was their ancestral property, that they had been in undisturbed possession and enjoyment for a long time, and that they had been in adverse possession for more than the statutory period. The District Munsif dismissed the suit against defendants 1 to 3, but on appeal that decree was set aside. The second defendant preferred this Second Appeal, which first came on for hearing before SPENCER and KRISHNAN, JJ., who made the following:—

ORDER OF REFERENCE TO A FULL BENCH.

SPENCER, J.—The question raised in Second Appeal is whether Exhibit B, which is an unregistered lease for six months of a house at a rent of eight annas a month, was admissible in evidence to prove that defendants Nos. 1 to 8 occupied the house as fourth defendant's tenants.

To be effective as a lease of immoveable property this document required registration under section 107 of the Transfer of Property Act, although, being a lease for a period less than one year, it was not compulsorily registrable under section 17 (d) of the Indian Registration Act (XVI of 1908).

Section 107 of the Transfer of Property Act provides that leases of immoveable property from year to year or for any term exceeding one year must be made only by a registered instrument, and that all other leases may be made either by a registered instrument or by an oral agreement accompanied by delivery of possession.

No place is provided by this section for written but unregistered leases even for periods of less than one year, whether accompanied by delivery of possession or not. Similarly, section 54 of this Act makes no provision for written but unregistered sale-deeds of immoveable property, even in cases where the value is less than rupees one hundred. In fact a lessee or a purchaser in possession who can prove an oral agreement is better off than one who holds an unregistered instrument, when his title is in question.

Section 4 provides that section 107 and the material portions of section 54 are to be read as supplemental to the Indian Registration Act. Does this signify that section 107 is to be understood as supplementing particular sections of the Registration Act? If, for instance, all instruments referred to in section 107 are to be added to the list of instruments compulsorily registrable under section 17 of the Registration Act, the effect will be to enlarge clause (d) of that section by including leases of immoveable property for terms of less than one year. In that case the Legislature would have to be accused of a very clumsy device for avoiding an alteration in the wording of the section which of itself does not provide for all leases of immoveable property without exception being registered. Again, if section 107 is to be read as supplementing particular sections of the Registration Act, it may equally well be taken as supplementing section 18 and thereby making the registration of leases for more than a year optional. Thus there would be a contradiction in terms between section 17 and section 18.

In my opinion, it was only intended that section 107 of the Transfer of Property Act should be taken as a whole and read as supplemental to the Registration Act as a whole.

In *Kaki Subbanadri v. Muthu Rangayya*(1), there are words which imply that the learned Judges who decided that case accepted the argument that section 107 of the Transfer of Property Act was to be read as supplemental to section 17 of the Registration Act (XVI of 1908). In *Muthukaruppan v. Muthu*(2), there are similar observations as to the effect of

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(1) (1909) I.L.R., 32 Mad., 532.

(2) (1915) I.L.R., 38 Mad., 1153.

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section 4 to those met in *Kaki Subbanadri v. Muthu Rangayya*(1), but with due respect I cannot appreciate them. The learned Judges in the former case avoided the difficulty, which that argument led to, by saying that an undertaking to occupy certain premises was not an instrument referred to in section 107 of the Transfer of Property Act. For that matter, unregistered leases are not specifically mentioned in section 107, except in the proviso which relates to exemption by the Local Government of unregistered leases for a term of less than one year. In this Presidency there has been no such exemption by notification of Government. The result is that by the amendment of this Act by Act VI of 1904 all leases except agricultural leases, which fall under section 117, must be registered. Otherwise they do not have the effect of passing the right to enjoy the property. But section 49 of the Registration Act deals only with documents required by section 17 to be registered when it declares that such documents shall not be received in evidence of any transaction affecting immovable property until they have been registered. As I have endeavoured to show, the document which has been exhibited in this case as Exhibit B is not a document falling under section 17. That is a sufficient reason for supporting the Subordinate Judge's reference to Exhibit B as a piece of evidence in the case, and as there is no other point of law, for dismissing the appeal with costs. I only wish to add my regret that the sections of these two Acts which deal with short leases have been left in a state of obscurity which renders the value of unregistered documents a matter of considerable ambiguity. I cannot believe that if it was the intention of the Legislature to make unregistered leases for periods of less than one year of no practical value, they would have limited the compulsory registration of leases under section 17 (d) of the Registration Act to leases for a term exceeding one year. When Act III of 1877 was superseded in 1908 by Act XVI of that year, sections 17 and 49 remained practically unaltered. Nor can I believe that it was intended that a tenant who receives a letter from a house-owner living, say in Madras, allowing him to occupy his house, say in Ootacamund, for six months on a fixed rent should

(1) (1909) I.L.R., 32 Mad., 532.

be in a worse position after he commences his occupation than one who has only got verbal permission for such occupation.

I therefore think that this appeal should be dismissed with costs, but as there has admittedly been considerable difference of opinion in the view taken by several Benches of this Court as to the effect of sections 4, 54 and 107 of the Transfer of Property Act read with section 49 of the Registration Act, I agree to refer the question as to the admissibility of Exhibit B as evidence of the tenancy of defendants Nos. 1 to 3, to a Full Bench.

KRISHNAN, J.—The question for decision in this Second Appeal is, as stated by my learned brother, whether Exhibit B is admissible in evidence to prove that defendants Nos. 1 to 3 occupied the suit house during the period mentioned in it as tenants of the fourth defendant and not in their own right.

Exhibit B is an unregistered muchilika or written undertaking executed by the first defendant in favour of the fourth by which he agreed to occupy the suit house as the latter's tenant for six months at a rent of eight annas a month. That a lease can be made by such a document when accepted by the lessor even though it is not one signed by the lessor was settled by the Full Bench in *Syed Ajam Sahib v. Ananthanarayana Aiyar*(1), overruling the contrary opinion expressed in *Turof Sahib v. Esuf Sahib*(2) and *Kaki Subbanadri v. Muthu Rangayya*(3).

The argument of the appellant against the admissibility of the document in evidence may be briefly stated as follows: Exhibit B is an instrument falling under the second clause of section 107, Transfer of Property Act; by virtue of section 4, clause (2) of the same Act, section 107 should be read as supplemental to section 17 (d) of the Registration Act (XVI of 1908), and section 49 (c) of the same Act therefore makes it inadmissible in evidence in proof of any transaction affecting the property, as it is unregistered. It cannot therefore be used to prove the tenancy of the defendants Nos. 1 to 3.

On the points that arise on the above contention there seems to be some difference of judicial opinion in this High Court. In

(1) (1912) I.L.R., 35 Mad., 95 (F.B.). (2) (1907) I.L.R., 30 Mad., 322.
(3) (1909) I.L.R., 32 Mad., 532.

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Muthukaruppan v. Muthu(1) it was held by a bench of this Court that in the analogous case of a sale for less than Rs. 100 dealt with by section 54, clause (3), of the Transfer of Property Act the unregistered instrument evidencing it was not admissible in evidence even for the purpose of showing the nature of the occupier's possession (see page 1161). The subsequent discussion shows that the learned Judges were basing their view on section 49 (c) of the Registration Act, though they do not expressly refer to it. This view involves the position that the effect of section 4, clause (2), of the Transfer of Property Act, is to make sections 54, clauses 2 and 3, 59, 107 and 123, parts of section 17 of the Registration Act; otherwise, section 49 which in terms refers only to documents mentioned in section 17 will not apply. The rulings in *Kommachi Kather v. Pakker*(2), and *Kaki Subbanadri v. Muthu Rangayya*(3) (which has not been dissented from on this point), and the observation of the learned Chief Justice in the Full Bench case of *Syed Ajam Sahib v. Ananthanarayana Aiyar*(4), are in favour of the view that the effect of section 4 is to make section 107 and other sections referred to in it integral parts of section 17.

On the other hand, SADASIVA AYYAR and NAPIER, JJ., in their judgments in *Kathari Narasimha Raju v. Bhupati Raju*(5), have dissented from the view expressed in *Muthukaruppan v. Muthu*(1). NAPIER, J., in particular observes:

"I am however unable to agree with it [that is, the view expressed in *Muthukaruppan v. Muthu*(1)]. The document is not compulsorily registrable under section 17 of the Registration Act, and therefore we have not to consider whether the proposed use to prove the agreement would not be permissible, because it would affect immoveable property within the meaning of section 49 of the Registration Act. I am unable to accept the construction put on section 54 in the above case that it requires all sale-deeds, if in writing, to be registered. In my opinion it only requires that if the sale-deed is to be relied on to establish the transfer it must be registered. There being no law requiring the document to be registered, I see no reason why it should not be proved and used as required by the Evidence Act, section 91,"

(1) (1915) I.L.R., 38 Mad., 1158.

(2) (1897) I.L.R., 20 Mad., 107.

(3) (1909) I.L.R., 32 Mad., 532.

(4) (1912) I.L.R., 35 Mad., 95. (F.B.).

(5) (1915) 31 I.C., 52.

and it was admitted in evidence to prove an oral sale. On the above reasoning, it will be equally correct to hold that an unregistered lease-deed, which is not relied on for the purpose of proving the creation of a lease by its own force or for the enforcement of the terms of it, is not required to be registered by section 107, Transfer of Property Act, and is admissible in evidence for the collateral purpose of proving either an oral lease or for explaining the nature of the possession of the person in occupation.

Again, in *Poomalai v. Karuppa*(1), another Bench took the same view. The learned Judges held that under section 54 (3), Transfer of Property Act, an unregistered instrument of sale, where the property sold was less than Rs. 100 in value, was admissible in evidence to prove the antecedent oral contract to sell and if coupled with delivery of possession was sufficient to transfer title. The learned Judges point out that section 49 of the Registration Act deals only with documents required by section 17 to be registered.

My learned brother also takes the view that section 49 (c) cannot be applied to Exhibit B.

In view of this conflict of judicial opinion, I think it is desirable to have the question settled by a Full Bench. I would therefore refer to a Full Bench the following question:—

"Is Exhibit B admissible in evidence to prove that defendants Nos. 1 to 3 were in occupation of the plaint house as fourth defendant's tenants during the period covered by it?"

ON THIS REFERENCE—

M. S. Ramanuja Ayyangar for appellant.—Exhibit B ought to have been registered. Under section 107, Transfer of Property Act, if an instrument of lease is in writing it must be registered. Here there is no proof of any oral lease. See *Varada Pillai v. Jeevarathnammal*(2), *Tilak Dhari Lal v. Khedan Lal*(3), *Yuruva Venkata Reddy v. Maddi Veeranna*(4), and *Muthukaruppan v. Muthu*(5). The Registration Act shows the general intention of the legislature, the Transfer of Property Act the particular, and the provisions of the latter override the provisions of the former. See *Vairananda Nadar v. Miyakan Rowter*(6), *Kaki*

(1) (1916) 34 I.C., 821.

(2) (1920) I.L.R., 43 Mad., 244 (P.C.).

(3) (1920) 39 M.L.J., 243 (P.C.).

(4) (1914) 15 M.L.T., 192.

(5) (1915) I.L.R., 38 Mad., 1158.

(6) (1898) I.L.R., 21 Mad., 109.

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Subbanadri v. Muthu Rangayya(1), and *Syed Ajam Sahib v. Ananthanarayana Aiyar*(2). *Dawal Piranshah v. Dharma Rajaram*(3) similar to the present case. Reference was also made to *Kathari Narasimha Raju v. Bhupati Raju*(4), *Hemanta Kumari Debi v. Midnapur Zamindari Co.*(5), *Poomalai v. Karuppa*(6) and *Venkatasami v. Kristayya*(7).

B. Jagannadha Doss for respondent.—The effect of section 4, Transfer of Property Act, is not to make section 107 part of section 17, Registration Act; nor does section 49 of the Registration Act prevent an unregistered document being admissible in evidence. See the judgment of BRAMAN, J., in *Kathari Narasimha Raju v. Bhupati Raju*(4). If a lease is sought to be admitted in evidence it need not be registered and is admissible. It is only when it is sought to prove a transfer of property that such a lease would be inadmissible under sections 17 and 49. Section 107 does not make registration of a written document compulsory: see *Gunya Narain Gope v. Kali Churn Goala*(8) and *Juman v. Mohammad Nabineoaz*(9). Section 4 contemplates the harmonious reading of the two acts together. If it had been the intention of the legislature to make the sections mentioned therein part of section 17 it would have expressed itself differently: see *Cox v. Andrews*(10).

The OPINION of the Court was delivered by

WALLIS, C.J.

WALLIS, C.J.—The question raised in the Order of Reference in this case is whether leases for less than a year, which require registration to make them operative by virtue of section 107 of the Transfer of Property Act, must be considered, by virtue of section 4 of that Act which provides that that and other sections shall be read as “supplemental to the Indian Registration Act” to be documents “required by section 17 of the Registration Act to be registered” so as to bring them within the operation of section 49 of the Registration Act which provides that

- (1) (1909) I.L.R., 33 Mad., 532. (2) (1918) I.L.R., 35 Mad., 65 (F.B.), 99.
(3) (1917) I.L.R., 41 Bom., 550. (4) (1915) 29 M.L.J., 721.
(5) (1920) I.L.R., 47 Calc., 485 (P.C.).
(6) (1916) 2 M.W.N., 138. (7) (1893) I.L.R., 16 Mad., 341.
(8) (1895) I.L.R., 22 Calc., 179. (9) (1917) 41 I.O., 779.
(10) (1883) 12 Q.B.D., 126.

“no document required by section 17 to be registered shall affect any immoveable property . . . or confer any power to adopt, or be received as evidence of any transaction affecting such property or conferring such power unless it has been registered.”

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—
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The question what precise effect is to be given to the provisions of section 4 of the Transfer of Property Act as to section 107 and the other sections specified being read as supplemental to the Registration Act is a very nice question upon which considerable difference of opinion has prevailed in this Court and elsewhere. The earliest case in this Court is the case of *Vairananda Nadar v. Miyakan Rowther*(1). That case, in our opinion, is not an authority for the proposition that this and other sections are to be considered as read into section 17. What the learned Judges say is that they are to be read with section 17, and in that case they held that the provisions of section 107 of the Transfer of Property Act, that a lease for more than a year must be registered, must take full effect and could not be read as subject to the proviso in section 17 enabling the Local Government to grant exemption in cases where the term of the lease does not exceed five years and the annual rent reserved does not exceed fifty rupees. That case was, however, treated in *Kaki Subbanadri v. Muthu Rangayya*(2), as an authority for the proposition that the provisions of section 107 were to be treated as inserted in section 17 of the Registration Act. There are *dicta* to the same effect in the opinions of Sir ARNOLD WHITE, C.J., and of KRISHNASWAMI AYYAR, J., in the Full Bench decision in *Syed Ajam Sahib v. Ananthanarayana Aiyar*(3); but the question there was whether a registered rental agreement executed by tenants could be held to be a registered lease granted by the landlord and the question here in no way arose in that case. This particular question was really not considered at all in *Muthukaruppan v. Muthu*(4), but it was apparently assumed that section 107 must be taken to be inserted in section 17.

From that time the current of authority in this Court has set the other way. We have a decision of SADASIVA AYYAR and NAPIER, JJ., in *Kathari Narasimha Raju v. Bhupati*

- (1) (1898) I.L.R., 21 Mad., 109. (2) (1909) I.L.R., 32 Mad., 532.
(3) (1912) I.L.R., 35 Mad., 95 (F.B.). (4) (1915) I.L.R., 38 Mad., 1158.

RAMA SAHU *Raju*(1), and the decision of PHILLIPS and BAKEWELL, JJ., in *Poomalai v. Kuruppa*(2), and the referring judgment of SPENCER, J., in the present case.

WALLIS, C.J. Turning to the other Courts, we have the two respective views of section 4 forcibly presented by Mr. Justice BEAMAN on the one side and by Mr. Justice MACLEOD (as he then was) on the other in *Dawal Piranshak v. Dharma Rajaram*(3). As I have said the point is a nice one and either view is a possible view, but after carefully considering the question we are inclined to agree with the view of Mr. Justice MACLEOD for the reasons stated by him rather than with the view taken by Mr. Justice BEAMAN. All that section 4 says is that section 107 and other sections are to be read "as supplemental to" the Registration Act. "Supplemental" has been defined as meaning "added to." We think that if the legislature intended that these provisions should be treated for all purposes as inserted in particular sections of the Registration Act it was for the legislature to say so. We are not prepared, as a matter of construction, to say that the provisions of section 107, which says that a written instrument in order to have the effect of a lease for less than a year must be registered, must be taken to have been inserted in section 17; if not, such a lease is not a document required by section 17 to be registered and section 49 can have no application to the case. SPENCER, J., in his Referring Order, has pointed out that anomalous results follow from the other view. That, however, is not the ground of our decision. We are not satisfied that the legislature has sufficiently indicated its intention that these sections should be considered as inserted in section 17. Our answer must, therefore, be that the document is admissible. The question, however, loses much of its importance if, as has been contended before us, the Privy Council in *Varada Pillai v. Jeevarathnammal*(4) are to be understood as ruling that documents which are compulsorily registrable under section 17, and so governed by section 49 of the Registration Act may nevertheless be admissible in evidence to prove the character of the possession.

M.H.H.

(1) (1915) 29 M.L.J., 721; s.c., 31 I.C., 52.

(2) (1916) 2 M.W.N., 136; s.c., 34 I.C., 921.

(3) (1917) I.L.R., 41 Bom., 550.

(4) (1920) I.L.B., 48 Mad., 244 (P.C.).

APPELLATE CIVIL—SPECIAL BENCH.

Before Sir John Wallis, C.J., Mr. Justice Ayling, Mr. Justice Sadasiva Ayyar, Mr. Justice Napier and Mr. Justice Krishnan.

THE SECRETARY TO THE BOARD OF REVENUE,
INCOME-TAX, MADRAS, PETITIONER,

1920,
September,
7, 8 and
October, 6.

v.

AL. AR. RM. ARUNACHALAM CHETTIAR AND BROTHERS,
RESPONDENTS.*

Indian Income-tax Act (VII of 1918)—Money-lending firm—Interest accruing due but not received in the year of account—Whether taxable under section 9.

On a reference under section 51 of the Indian Income-tax Act 1918, Held by the majority of the Court:—Interest which accrues due to a money-lending firm in the year of account is not assessable under section 9 as profits of the business unless it is received or realized in the year of account.

What will amount to receipt or realization considered by NAPIER and KRISHNAN, J.J.

Held by SADASIVA AYYAR, J.—Such interest would be taxable, though not realized, if it came so completely under their control that by an act of their will they could receive it in cash without greater trouble than is involved in drawing money from their bankers.

CASE stated under section 51 of the Income-tax Act (VII of 1918) by the Secretary to the Board of Revenue, Income-tax, Madras.

The material portions of the letter from the Board are as follows:—

"I am directed by the Board of Revenue to refer, under section 51 of the Income-tax Act, 1918, for the decision of the Honourable the Judges of the High Court the question of the liability to the tax under the Act of interest which became due in the year of account but which was not realized in cash or by adjustment in the accounts.

2. Messrs. Al. Ar. Rm. Arunachalam Chettiar and Brothers of Devakottai, a Nattukkottai Chetti firm, carry on business in money-lending and other trades in several places in British India. For the year 1918-19 they were assessed under the Income-tax Act (VII of 1918) by the Collector of Rāmnād on the amount of their net income in British India, which included also interest which had accrued to them during the year of account but had not been actually realized.

* Referred Case No. 2 of 1920.

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They contended before the Board that such interest should not be taken as income as it had not been realized by them in cash nor adjusted in their accounts . . .

3. Section 3 (1) of the Income-tax Act (VII of 1918) defines taxable income as income which '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.' The question to be decided is whether the interest in question accrued or arose in British India within the meaning of the Act. The words 'accrues or arises' have nowhere been defined in the Act. In the Judgment of FRY, L.J., in the Appeal Court, see *Colquhoun v. Brooks*(1), these words were interpreted as general words descriptive of a right to receive; and if the relevant words in section 3 (1) of the Income-tax Act (VII of 1918) are paraphrased accordingly, the provision would run thus: the income to which the Act applies is income received in British India or income to which there is a right to receive in British India. In the present case, the assessee has a right to receive the interest in question, and, as the money-lending business is carried on in British India, the right to receive would not be anywhere else except in British India. The Collector's order assessing the firm on interest accrued but not realized is, in the opinion of the Board, correct.

4. It has to be specially mentioned that in the case of Nattukottai Chettis, interest which becomes due in the year is often not actually paid to them in that year nor in subsequent years but is added to the capital and itself bears interest. In general also actual receipt of cash is seldom required as a condition precedent to determining the actual profits of an ordinary business enterprise and the Board considers that it could not have been the intention of the legislature to exempt such interest from taxation under the Income-tax Act (VII of 1918).

* * * * *

K. V. Krishnaswami Ayyar for respondents.—Income is what is realized in the year and comes into his pocket: see Stroud's Dictionary, *Tennant v. Smith*(2). It must be actual receipt and in the present case the Board admit that the money has not been realized within the year: *Colquhoun v. Brooks*(3) and *Colquhoun v. Brooks*(4). Sections 6, 7, 9, 10, 11 and 14 of the Act referred to. The present case comes under section 9. Profit connotes the idea of receipt and we have to ascertain what is meant by profit.

(1) (1888) 21 Q.B.D., 52.
(3) (1887) 19 Q.B.D., 400.

(2) [1892] A.C., 150 at 164.
(4) (1889) 14 App. Cas., 498.

[NAPIER, J.—What about bad debts?]

They are deductions. Under the rules I have to fill up Form D. Therein I have to give a return of the income received during the year. Paragraph 9 says that where interest has been added to capital and itself bears interest it is to be treated as capital. It is a receipt and is a fresh debt.

[CHIEF JUSTICE.—That covers the case of a mortgage bearing compound interest.]

Yes. Income is nowhere defined in the present Act. Sections 3 (i), 5 (iv), 6, 7, 8, 9, 10, 11 and 15 referred to. Profit is the excess of receipts over expenditure: Murray's Dictionary, *Russell v. Town and County Bank*(1), *Dent v. London Tramways Co.*(2) and *Mersey Docks v. Lucas*(3). What is outstanding is not income. Provisions of sections 19, 31 and 33 show that "income" or 'profit' relates to money received. Form D requires me to show only amounts received, and it is upon this that I am to be assessed.

The Hon'ble the Advocate-General for petitioner.—In some cases income is earned when actually received and in others, even though not actually received, e.g., money-lending business. Section 3 shows that the principle of the Act is to tax profits whether made in British India or received in British India. In England there are two kinds of accounts—cash account and ordinary account—see Snelling on Income-tax Practice. The respondents want only the cash account to be taxed. Income does not necessarily mean money actually in your pocket. English Statute, Schedule D, makes it clear that it does not refer to actual receipts. FLETCHER MOULTON, L.J., explains profits as the gains made in a year: *In re Spanish Prospecting Company, Limited*(4). "Accrued" means earned, even though it may be actually paid in the next year. In *Colquhoun v. Brooks*(5) all the Judges are agreed that if that income had accrued in the United Kingdom it would have been liable to taxation. Profits in a business are never calculated on the actual receipts. All balance sheets of businesses are made up on the basis of income accruing.

(1) (1888) 13 App. Cas., 418 at 424. (2) (1880) 50 L.J. Ch., 190 at 196.
(3) (1883) 8 App. Cas., 891 at 908. (4) [1911] 1 Ch., 92 at 98.
(5) (1889) 14 App. Cas., 498.

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[NAPIER, J.—It seems to me the word we have to define is receipts.]

Receipts must mean actual receiving: *Gresham Life Assurance Society v. Bishop*(1). The use of the word receipts is misleading. What you have to do is to ascertain "the profits of a business." The word "receipts" is not used in the Act. Profit is the difference between receipts and the expenditure incurred to earn it.

[SADASIVA AYYAR, J.—Whatever is put on the credit side of a profit and loss account of a business is receipt, whether it is actually paid or not? Yes.]

Reference was also made to *Badham v. Williams*(2), *In re Craven's Mortgage*, *Davies v. Craven*(3), *Samuel v. Inland Revenue Commissioners*(4) and *Mathews v. Cork County Council*(5).

OPINION.

WALLIS, C.J. WALLIS, C.J.—The only question argued before us was whether money which became due to a money-lending firm in the course of its business by way of interest in the year of account, or year on the income of which the tax is to be assessed for the current year, is to be treated as part of the assessable income for that year of account, although it was not recovered or realized by the firm in that year, either in cash or by adjustment in the accounts.

"Income" is defined in the "Concise Oxford Dictionary of Current English", adapted from the great Oxford Dictionary and published at the Clarendon Press, as "Periodical (usually annual) receipts from one's business, lands, work, investments, etc.; *income-tax* (levied on this)." This is also the legal acceptance of the term, as appears from Stroud's Judicial Dictionary and numerous definitions, some of which are there cited while others have been referred to by Mr. K. V. Krishnaswami in his argument for the petitioners. Lord SELBORNE's "income signifies what comes in" is the tersest, and at the same time sufficiently indicates that the taxation of interest which has not come in is not within the scope of an Income-tax

(1) [1902] A.C., 287.

(2) (1902) 88 L.T., 191.

(3) [1907] 2 Ch., 448.

(4) [1918] 2 K.B., 553, 555, 558.

(5) [1910] 2 I.R., 521.

Act. The use of the word "income" in section 3 of the present Act, on which some reliance is placed in the reference, also seems to me to be entirely in accordance with this view. That section, which appears under the head of "Taxable income," provides in effect that the income which is to be taxed under the Act is income from whatever source derived if it accrues or arises or if it is received in British India, that is to say, income which accrues or arises in British India is taxable even if it is received elsewhere as in England, while income which is received in India is taxable even if it accrued or arose out of British India. With this may be compared the more stringent provisions of Schedule D of the English Income-tax Act, 1918, which make residents in the United Kingdom liable in respect of annual profits or gains accruing or arising from any trade or business, whether the same be carried on in the United Kingdom or elsewhere.

What we are concerned with in the present case is, not the liability of the petitioners to pay income-tax which is admitted, but the way in which the income they derive from their business is to be arrived at. That, of course, is to be ascertained by reference to the provisions of the Act regarding the particular class of income, which in this case is "income derived from business," but in construing these provisions and the uniform interpretation which has been put upon the corresponding provisions of the English Acts, it must always be borne in mind that in its natural and legal meaning income means periodical receipts; that an income-tax is therefore presumably a tax on annual receipts; and that, while it is open to the legislature for good and sufficient reason to enact that debts which have not been paid but are still outstanding shall be treated as income for the purposes of the Act, the Court would not be justified in attributing such an intention to the legislature, in the absence of the clearest and most express language. As observed by WARRINGTON, L.J., in *Inland Revenue Commissioner v. Blott*(1), with reference both to the Super-tax Act and the Income-tax Act, "it is income and income only which is brought into charge."

The tax on income derived from business, which is the class of income with which we are dealing, has never been charged on

(1) [1920] 2 K.B., 257, 267.

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the actual receipts of the year, which would involve postponing the levy of the tax to the following year, but has been charged in England on the average income for the three previous years. The language of rule 1 of Schedule D of the English Income-tax Act, 1918, which has superseded all the earlier enactments dealing with this class of income, requires the tax in respect of trade not otherwise provided for to be "computed on the full amount of the balance of the profits or gains upon a fair and just average of three years ending, etc."

In *Coltness Iron Co. v. Black*(1), Lord BLACKBURN traces this provision back to the Income-tax Act of 1803, 43 Geo. III, ch. 122, and observes :

"Instead of saying that the duty should be imposed on a fair and just average of the amount of the profits for three years, it is imposed 'on the balance' of such profits. I have not been able to discover any difference in the meaning of the two phrases."

Now, as I shall show, the uniform construction placed by the Courts on this provision, occurring as it does in an Act, the general scope of which is to impose a tax on annual income, which, as already pointed out, means annual receipts, has been that it refers to the difference between the amount of the receipts of the business for three years and the expenditure incurred in earning them. This interpretation has been accepted by the legislature, which left this somewhat old-fashioned phraseology unaltered for so many years with a full knowledge of the interpretation placed upon it by the Courts, and has even reproduced it without material alteration in the new consolidating Act of 1918. Fully accepting the view that the tax is to be assessed on the basis of the receipts for three years, the legislature has confined itself to legislating as to the deductions which are allowable on the other side of the account in order to arrive at the taxable income; and, as will be seen, the Indian Legislature in the corresponding section 9 of the present Act has followed exactly the same course.

It would be endless to cite all the cases in which the profits and gains on which the tax is computed under the schedule have been held to be receipts. In *Rhymney Iron Co. v. Fowler*(2),

(1) (1881) 6 App. Cas., 315.

(2) [1896] 2 Q.B., 79, 80.

the Revenue Authorities observed, in the case submitted for the opinion of the Court, that

"the balance of profits and gains had repeatedly been held in the Exchequer Courts to be the difference between the receipts and the expenditure necessarily incurred in obtaining those receipts."

In *Gresham Life Assurance Society v. Styles*(1), Lord ESHER described this balance as

"the difference between what was received in any three years and what it cost to obtain those receipts."

The rule was again laid down practically in the same terms by Lords ATKINSON, PARKER and PARMOOR in *Inland Revenue Commissioners v. Southend-on-Sea Estates Company, Limited*(2).

Something has been said about commercial balance sheets, but in *Gresham Life Assurance Society v. Styles*(1), LINDLEY, L.J., observed that the rules in Schedule D were

"very different from the rules ordinarily employed in trade in ascertaining the net profits divisible among those who carry it on."

Even so, as pointed out in Volume 16 of Halsbury's Laws of England, by Sir Francis Gore, the learned author of the article "Income-tax" who left his practice at the Bar to become solicitor to the Inland Revenue and writes with much experience of the subject, the difference between the commercial and the income-tax balance sheet is not as to the receipts side but as to the deduction side of the account. He says at page 650, paragraph 1310,

"The profits of a trade or business would for commercial purposes seem to be the difference between the receipts and the expenses necessary to earn them. In estimating profits, however, for the purpose of income-tax the rules specifically prohibit a variety of deductions some of which would probably form proper subjects of deduction in a commercial balance sheet."

The same view is taken by KEKEWICH, J., in *Badham v. Williams*(3), dealing with the case of two solicitors going into partnership and getting a good deal of business in the first year for all of which they would only be paid later. In such a case, the learned Judge points out, there would be no profit or income for the first year for the purpose of income-tax or otherwise, though there might be a good prospect of profit or income in future

(1) (1890) 25 Q.B.D., 351, 354, 355. (2) [1915] A.C., 428.
(3) (1902) 86 L.T., 191.

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years, against which the partners might be justified in borrowing. Lord Moulton's method of calculating profit or loss for a particular period in *In re Spanish Prospecting Company, Limited*(1), as the difference between the valuation of the total assets at the beginning and end of the particular period, was not made with reference to the Income-tax Acts and could not be applied to them consistently with the authorities to which I have referred. The learned Advocate-General relied upon the decision of the House of Lords in *Colquhoun v. Brooks*(2), but the only question in that case was whether a resident in Great Britain was liable under the language of the English Income-tax Acts to be assessed on the profits of a business which arose or accrued in Australia and were not received by him in the United Kingdom. It was held that he was not liable to pay any income-tax on such profits, and no question arose as to the amount at which they were to be assessed. The respondent was apparently willing to pay, if liable, upon a sum of £9,000 odd which probably was not very different from the sum which he would have been liable to pay if assessed regularly under the schedule on the average profits for the three preceding years.

Coming now to the Indian Statutes, under the Indian Income-tax Act, 1886, trade profits were chargeable under "Class D—Other sources of income," and under section 15 (1) the assessment was to be made on the income accruing during the preceding year. This was admittedly interpreted in practice, and I think rightly, as meaning the receipts of the previous year less the cost of earning them. In the Indian Income-tax Act, 1918, 'income derived from business' forms the fourth of the six classes of income specified in section 5. By section 9 'the tax,' that is, income-tax,

"shall be payable by an assessee under the head (Income derived from business) in respect of the profits of any business carried on by him."

This means on the amount of the profits, and is therefore identical in scope and meaning with the provision in Schedule D of the English Act as interpreted by Lord Blackburn in the passage to which I have referred. Section 9, which is clearly modelled on Schedule D of the English Act, also follows the Schedule in regulating the deductions which are allowable on

(1) [1911] 1 Ch., 92.

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

the other side of the account, the main difference being that under section 18 (5) of the Indian Act the assessment is to be on the aggregate of the assessee's income in the previous year chargeable under the head, and not as in Schedule D to be computed upon the average profits for the previous three years. Unpaid debts, whether consisting of principal sums or interest, in so far as they are bad, are allowed as deductions under the statute, and do not otherwise come into an income-tax balance sheet.

Having regard to the uniform interpretation placed by the Courts on the corresponding language of Schedule D and accepted by the legislature, it is not, in my opinion, open to this Court to place a different interpretation on the word 'profits' occurring in section 9 of the present Act and to hold, as contended, that they include not only receipts but also claims for interest which have fallen due but have not been paid within the year of account and therefore form no part of the income of the year in its natural and legal sense. Such interest when it is paid will necessarily form part of the profits or receipts of the year in which it is paid, and I can see no reason for including it in the profits or receipts of an earlier year. If the present Act is found to admit of extensive evasion in India, the remedy, in my opinion, is to be found in an alteration of the law.

Since this opinion was written, the report of the recent decision of the Court of Appeal in *National Provident Institution v. Brown*(1) has become available. It was there held that the words in Schedule D, "profits on discounts" and "profits on interest," in the Income-tax Act must mean profits arising from discounts received on discounting transactions and profits arising from interest received on securities bearing interest, and Lord STENDALE, M.R., observed:

"The amount received is, in my opinion, to be taxed in the year in which it is received. Although it may be accruing over several years it only becomes taxable income in the year in which it is received."

These words, in my opinion, supply an answer to the reference.

AYLING, J.—The question referred to us is whether interest which became due to a money-lending firm in the year of account

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(1) [1920] 3 K.B., 85.

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but was not realized in cash or by adjustment in the accounts is liable to income-tax under Act VII of 1918.

I think the answer must be in the negative. I find it impossible to hold that the mere fact that the assessee has become legally entitled to a sum of money as interest justifies the inclusion of that sum either as "income" or "profits of the business" within the meaning of section 9 of the Act. It may be found impossible to recover the amount due, and I observe that section 9 contains no proviso for deduction of bad debts, nor is there any provision as in the English Act referred to by my brother NAPIER for the valuation of doubtful debts. On the other hand, I would emphasize the word "adjustment" which I take to mean a constructive receipt. I agree with NAPIER, J., that if a person entitled to receive interest agrees with his debtor to let the money stand in the hands of the debtor either by way of deposit or as a fresh loan or investment that would amount to a constructive receipt or "adjustment," and would justify the inclusion of the sum in question as profits or income, just as much as if it had been received in cash. Such an agreement might be express or implied: but should not, in my opinion, be inferred solely from the failure to take any steps for realization.

This seems to me the reasonable construction of the Act as it stands. If it involves practical difficulties in working, the only remedy seems to be in amendment of the Act.

I think it unnecessary to add to the exhaustive discussion of the authorities by my Lord the Chief Justice and my learned brothers.

SADASIVA
AYYAR, J.

SADASIVA AYYAR, J.—The question referred to us by the Board of Revenue under section 51 of the Income-tax Act (VII of 1918) is formulated vaguely thus in paragraph 3 of the letter: whether the interest in question accrued or arose in British India within the meaning of the Act. In paragraph 1 of the letter, "the interest in question" is described as "interest which became due in the year of account but which was not realized in cash or by adjustment in the account." One other sentence in the Board's letter refers to "interest accrued but not realized." Thus taking the letter as a whole, the question referred to us might be expanded thus: whether the interest which became due in the year of account to a firm of Nattukkottai Chettis in

British India but which was not realized in cash or by adjustment in the accounts is income which accrued or arose in British India within the meaning of section 3 (1) of the Income-tax Act (VII of 1918).

Section 3 (1) uses four verbs in the clause "to all income from whatever source it is (1) derived, if it (2) accrues or (3) arises or (4) is received in British India." The Board of Revenue assumes in its letter that because in its opinion the income in question was not "realized" (a fifth verb) the income was not "received" within the meaning of the fourth verb "is received." As regards the verbs "accrues" and "arises," they are both interpreted in the Board's letter as meaning "becomes the subject of a right to receive." (The word "accrues" seems to be the more appropriate word to be used in connexion with a periodically recurring right to receive an income which is usually definite in amount, while "arises" seems to be used more appropriately and frequently in connexion with a business in which rights arise to receive income of a more fluctuating kind and at more uncertain intervals.)

Very learned and subtle arguments were advanced before us on both sides based on the various shades of meaning in which the six verbs "derive," "accrue," "arise," "receive," "earn," and "realize," and the two nouns "income" and "profits" (with the grammatical variations of some of these words) have been used in the several English and Indian Income-tax Acts and in the numerous English decisions dealing with the provision of certain English Acts. It must be admitted that large numbers of words are not used (either in the English language, or in any other language) with such precise and exclusive meanings as to give no room for doubt as to their exact meanings in particular contexts. I may add with profound respect that the language used in the English decisions quoted to us is not free in many cases from the ambiguity involved in the use of several of the above words each with different shades of meaning. I was therefore not much impressed with arguments based upon the root meanings of such words as "income," "received," etc. In *Colquhoun v. Brooks* (1), Lord FITZGERALD says:—

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"The case stated further finds 'the amount standing to the credit of Mr. Henry Brooks in the books of the Australian firm, as representing the *estimated profits* due to him for the year ending April 1885 would, if *realized*, amount to the sum of £9,219. This sum of £9,219 was arrived at by an estimate and valuation on taking of stock on a certain fixed day, after deducting therefrom the estimate and valuation of the preceding year, but as a matter of fact only a portion of the amount had been actually realized".

After thus stating the case, the learned Lord proceeds:—

"At first sight it struck me very strongly that the respondent was chargeable here" (that is in England) "for income-tax in respect of this sum of £9,219, though not actually received in this country, but as being income *arising* out of trade carried on in Melbourne, his share of the profits having been actually ascertained and fixed and accruing to him in this sense, *that it was so completely under his control that by an act of his will he could have it actually transferred to his bankers here.* There would be no hardship, and nothing dangerous or to be deprecated in charging the respondent on his share of profits so ascertained, but the facts of the case do not warrant our doing so. On looking critically at the findings in the case it will be perceived that there is no sufficient finding to warrant us in coming to the conclusion that the profits of the Australian firm have been so ascertained for the year 1885 as to be legitimately the subject of taxation here. It is only put that the profits due to him would if *realized* amount to £9,219—a sum 'arrived at by an estimate and valuation' on stock-taking on some particular day (not stated), and 'deducting therefrom the estimate and valuation of the preceding year' (also made on a day not stated), 'but as a matter of fact only a portion of the amount had been actually realized' — *what the meaning of the word 'realized' there is I do not know.*"

Lord HERSHELL and Lord MACNAGHTEN and Lord HALSBURY (Lord Chancellor) have not in their judgments in this case expressed dissent from the above observations of Lord FITZGERALD. The decision itself depended on the answer to the question whether the profits or gains arising from the Melbourne business of Brooks fell under the fifth case of Schedule D of the English Income-tax Act, 5 & 6 Vic., ch. 35, s. 100, whose language is somewhat peculiar and special and which speaks of sums *actually received in Great Britain*. It was held by all the Law lords that mere "arising" or "accruing" of the profits in England will not do, that they must also be received *in England*, and that

the words "arising" and "accruing" do not mean the same thing when used in connexion with profits or gains as the word "received." No doubt, the words "accrues" and "arises," in section 3 of the Indian Income-tax Act, cannot have (except in the very special circumstances referred to by Lord FITZGERALD) the same meaning and legal effect as the words "is received." Section 9 (1) of the Income-tax Act uses the words "income derived from business" by an assessee as synonymous with "profits of any business carried on by him." In *Colquhoun v. Brooks* (1), which is the case which went up from the Court of Appeal to the House of Lords in *Colquhoun v. Brooks* (2), FRY L.J., says:

"I cannot read the words 'arising' or 'accruing' as meaning 'received by.'"

In *In re Spanish Prospecting Company, Limited* (3), FLETCHER MOULTON, L.J., goes elaborately into the question what is income from profits of a business and comes to the conclusion (as I understand him) that what is treated as profits by a reasonable auditor auditing the accounts of a business for a particular year might be reasonably treated as "income or profits" accruing or arising or received from the business for the purpose of income-tax. The learned Lord Justice deals at length with the meaning of the word "profits" in pages 98 to 101. He says that the word has a "fundamental meaning" but

"in mercantile phraseology the word may at times bear meanings indicated by the special context which deviate in some respects from this fundamental signification."

Then he says:

"The fundamental meaning is the amount of gain made by the business during the year. This can only be ascertained by a *comparison of the assets of the business at the two dates*"

and then the learned Lord Justice proceeds to show how the net assets must be valued in money and "how difficult in practice" it may be "to follow out the strict consequences of the legal conception."

(1) (1888) 21 Q.B.D., 52. (2) (1889) 14 App. Cas., 493.
(3) [1911] 1 Ch., 92.

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The small hand-book relied on by the Advocate-General, namely, Snelling's Income-tax Practice (see page 15) also takes the same view. I do not intend to refer to the other authorities quoted on both sides. I am not prepared, with the greatest respect, to go as far as FLETCHER MOULTON, L.J., and to hold that the income derived from profits (whether the derivation is by way of accruing, arising or being received) should be calculated on the basis of the usual annual "profit and loss" account (subject of course to the special provisions of the Income-tax Acts which usually impose limitations on the deductions allowable for repairs of business premises and damage or destruction of building, machinery and plant, depreciation and so on) and that such income is liable to tax as "received" in the commercial sense. If the opinion of FLETCHER MOULTON, L.J., is to be followed, a business might have made no "profits" at all in the popular sense in a particular year (or might have even incurred loss), but because the commercial value of some items on the "assets" side, say, the business premises and the plant, had risen in price, income-tax might become leviable on "profits" shown on paper in the "Profit and Loss" account. I do not think, having regard to the rule that fiscal statutes should be construed strictly in favour of the subject, that the legislature should be held to have intended to levy income-tax even in such a case in the absence of unequivocal language to that effect.

However, even having regard to this canon of strict construction, I am of opinion that profits which were received in a year include not only money actually received but money which (in the language of Lord FITZGERALD) had accrued or arisen in the sense that it was so completely under the assessee's control

"that by an act of his will he could have it actually transferred to his bankers."

The words "accrue" and "arise" are no doubt usually confined to moneys which are due but not received and hence are used as alternatives to "received" in section 3) [see also *Board of Revenue, Madras v. Ramanadhan Chetty*(1)]. While

moneys accrued which cannot be immediately, in a business sense, received at the will and pleasure of the assessee ought not to be said to have accrued in such a manner as to have the same legal effect as moneys received, I think that an assessee should not be allowed to evade payment of income-tax on interest and other moneys which have become due to him in such a manner that he could at pleasure receive them for re-investment or otherwise or could get into his hands at once or within the reasonable time usually necessary to cash a cheque on a banker, or which he knows will be treated according to the usual course of business by his banker-debtor as reinvested by him (the assessee). Whether any such profits in the shape of interest or other moneys had become due to the assessee in this immediately available manner, and whether his omission to show them in his accounts as profits was consequently attributable to his intention to commit a fraud upon the income-tax revenue, are questions of fact which must be decided in each case on the facts of that case and on the custom and practice of the assessee's and his debtor's business arrangements. The argument of Mr. K. V. Krishnaswami Ayyar that only those interest-moneys which have been entered as cash-receipts in the assessee's accounts or which have actually been placed in his hands can be considered in arriving at his income for purposes of taxation goes, in my opinion, to the other extreme. If an assessee chooses to leave his interest-income with his customer, who is also a banker, and does not bring it into his accounts as income on the date it falls due, but he knows that his banker-customer would credit the money in his accounts in favour of the assessee and allow him interest thereon from the date of its accrual, or if the assessee could at any time draw upon the customer for that money and obtain actual receipt of that sum in due course of business, I think that such interest-income has accrued and arisen in that year in such a manner that the legal effect is the same as if it had been "received" by him, and that it is liable to be charged income-tax thereon. It is well known that deposits of moneys carrying interest are made with a Nattukkottai Chetti firm not only by other Nattukkottai Chetti firms but by gentlemen earning rich incomes in other professions. Take a case where Rs. 10,000 a year is the year's interest-income

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(1) (1920) I.L.R., 43 Mad., 75 (F.B.).

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from such an investment with *A*, a Nattukkottai Chetti firm, by *B*, another Nattukkottai Chetti firm, or a rich professional gentleman who has retired from his profession. *A* at the end of that year adds Rs. 10,000 to the credit of *B* in his accounts but *B* makes no entry in his accounts of the receipt of that money. *B* has some lands which yield him sufficient for the maintenance of his family and allows the interest to accumulate with the *A* Chetti, drawing only Rs. 500 or Rs. 1,000 out of the interest annually either for expenses or in order that no question of limitation might arise (assuming that there is any risk of that question arising in such cases). Is *B* to escape taxation on the Rs. 10,000 income, though that income is being credited in his favour and he knows that he *could* receive it in cash at any time he wishes?

My answer to the question, therefore, is that the interest which became due to a firm of Nattukkottai Chettis in British India, which was not realized in cash or by adjustment of accounts, would be such income as would be liable to be ~~taxed~~ under the Income-tax Act (VII of 1918), if such interest-money had become due to the assessee in the manner and in the sense that it was so completely under his control that by an act of his will he could receive it in cash without greater trouble than is involved in drawing money from his bankers. If it ~~has~~ not become due in that sense, it is not such an income as would be liable to payment of tax.

Of course, I agree with my Lord that it is advisable that the legislature should periodically try to remove anomalies and difficulties of interpretation by amendments of the Act expressed in clear and definite language.

NAPIER, J.

NAPIER, J.—This is a reference under section 51 of the Income-tax Act (VII of 1918) which empowers the Chief Revenue Authority if in the course of any assessment a question has arisen with reference to the interpretation of any of the provisions of this Act or any rules thereunder, to draw up a statement of the case and refer it with its own opinion thereon to the High Court. The question referred to us is as to the liability to tax under the Act of interest which became due in the year of account, but which was not realized in cash or by adjustment in the accounts. The statement further sets out that Messrs. Al. Ar. Rm. Arunachala Chetti and Brothers, a Nattukkottai

Chetti firm, carry on business in money-lending and other trade in several places in British India, that they were assessed for the year 1918-19 by the Collector of Rāmnād on the amount of their net income in British India which, according to the assessing authority, should include interest which had accrued to them during the year of account, but had not actually been realized.

The relevant sections of the Act for the purpose of this reference are as follows:—section 3 (1) provides that

“this Act shall apply to all income from whatever source it is derived if it accrues or arises or is received in British India,” etc.

Section 5 is the next section—

“The following classes of income shall be chargeable to income-tax in the manner hereinafter appearing.”

Sub-section (4)—

“Income derived from business.”

The next section is section 9—

“The tax shall be payable by an assessee under the head of ‘Income derived from business’ in respect of the profits of any business carried on by him.”

Clause (2)—

“such profits shall be computed after making the following allowances in respect of sums paid or, in the case of depreciation, debited, namely”

and the payments and debits allowed are set out in nine subparagraphs. Then comes section 14—

“The aggregate amount of an assessee’s income chargeable under each of the heads mentioned in sections 6 to 11 shall be the taxable income of the assessee.”

Reading these sections together, it is, to my mind clear that the form in which the reference is made is incorrect. It seems to me that we are not really asked any question about income as defined in the Act. What the reference requires is a ruling from us as to whether a certain sum should have been entered in the account on which the profits within the meaning of section 9 should be computed. This mistake has led to a misapprehension of a decision of the English Court which I shall refer to later. Nor have we to consider any question arising under section 8, for, we are not asked to say whether the income derived from business has accrued or arisen or been received

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within the meaning of section 3. It is therefore, to my mind, not strictly necessary for us to consider the meaning of the word "income" as used in the Act, for, income, for the purpose of section 3, is income derived from business as defined under section 9, to be ascertained under that section.

The question is how are the profits of the business carried on by the firm in question to be computed so as to make the resultant income derived from business chargeable under the Act? It is first necessary to see what assistance we get from section 9 itself; and it is to be noted that no part of the section lays down what is to be put on the credit side. The whole of clauses 1 to 9 are concerned with amounts on the debit side. Of those clauses, clauses 1 to 5 are payments which are allowed; clause 6 is depreciation which may be debited; clause 7 is a resultant of depreciation and sale price of buildings, machinery and plant; clause 8 is land revenue and local or municipal taxes paid; and clause 9 is what may be described as an omnibus clause for other expenditure incurred solely for the purpose of earning such profits, which is in fact the main expenditure. For the credit side, as I have said, there are no statutory instructions, and it is with reference to the credit side item that we are asked to advise the Board. So far for the Act.

Then as to the rules made under the Act, section 43 gives power to the Governor-General in Council, and by delegation to the Local Government, to make rules for the ascertainment and determination of any class of income. I have examined them and find that there is no assistance to be procured from the rules.

Further, there are no decisions of any Courts in India to which our attention has been drawn which could throw any light on this subject, and we are driven to English decisions under the English Income-tax Acts. These acts are in *pari materia*, but as their provisions are somewhat different, it is necessary before examining the decisions to see what the Acts provide. The Acts are the Income-tax Act of 1842 as amended by the Income-tax Act of 1853. The relevant sections of these Acts are section 2 and Schedule D of 16 & 17 Vic., Ch. 34, which has been substituted for the corresponding section and schedule

of 5 & 6 Vic., Ch. 35. One curious feature of the Acts is that though they are called Income-tax Acts, the phrase "income-tax" is never used in any part of the Act, nor is the word "income" applied to the resultant to be charged, though in the Customs and Inland Revenue Act, 1888, the tax payable under Schedule D is called income-tax. What is granted to Her Majesty under these Acts are "duties on profits arising from property, professions, trades and offices." Section 2 of the later Act provides that

"for the purpose of classifying and distinguishing the several properties, profits and gains for and in respect of which the said duties are by this Act granted, and for purposes of the provisions for assessing, raising, levying and collecting such duties, respectively the said duties shall be deemed to be granted and made payable yearly for and in respect of the several properties, profits and gains respectively described or comprised in the several schedules contained in the Act;"

and the schedules are set forth. Schedule D is the relevant schedule. It applies to trade and professional profits which correspond to clauses 4 and 5 of section 5 of the Indian Act, namely, income derived from business and professional earnings. The language of Schedule D is as follows:

"For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment or vocation, etc."

What is chargeable here therefore is "annual profits or gains" just as under section 9 of the Indian Act, "profits of any business." The further provisions of the Income-tax Act of 1853 with respect to Schedule D are sections 48, 49 and 50 of which section 50 is alone of importance. This section provides that

"In ascertaining, estimating, or assessing the profits of any person chargeable under Schedule D of this Act, either upon appeal or otherwise, it shall be lawful to estimate the value of all doubtful debts due or owing to such person; and in the case of bankruptcy or insolvency of the debtor, the amount of the dividend which may reasonably be expected to be received on any such debt shall be deemed to be the value thereof and the duty chargeable under the said schedule shall be assessed and charged upon the estimated value of all such doubtful debts accordingly."

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I can find nothing in the Indian Act which at all corresponds to this section, but it is one to be borne in mind in considering what are 'profits' under Schedule D of the English Act, for it seems to presume that debts due and owing shall be items in an account for the purpose of arriving at profits and gains and permits the assessee to value them in his account at a figure lower than the face value where they are doubtful debts. Returning to the principal Act, section 100 contains the rules for assessing and charging duties under Schedule D. Section 100 provides that

"the duties hereby granted contained in the Schedule marked D, shall be assessed and charged under the following rules, which rules shall be deemed and construed to be a part of this Act, and to refer to the said last-mentioned duties."

Under this section, the duties are provided for in respect of trade in what is called "First case", and in respect of professions in what is called "Second case." The first rule in the first case is as follows :—

"The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade "on a average of three years."

The third rule is :

"In estimating the balance of profits and gains chargeable under Schedule D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from or allowed to be set against, or deducted from, such profits or gains, on account of any sum expended" (for various purposes set out), "nor on account of any capital withdrawn, nor on account of, or under pretence of, any interest which might have been made on sums if laid out for interest, nor for any debts except bad debts (nor for certain other matters set out in the rule)."

It is to be noted that the method of computing profits here is the exact opposite of that employed in the Indian Act. Section 9 of the latter, as already pointed out, provides what may be debited for the purpose of computing profits, whereas this rule under section 100 of the English Act provides what may not be debited. But the material for assessment after the proper deductions is the same in both cases. It is "the balance of profits" or gains in the English Act; "the profits of any business" in the Indian Act. And as we are not asked to

advise on any question of a debit item it is unnecessary to examine the differences between the English and the Indian Act on this point. Apart too from section 50, there is no instruction in the English Act as to what must be put on the credit side of the account.

Turning now to the cases, I will first deal with the decisions under the Income-tax Acts. The first relevant case is the *Mersey Docks v. Lucas*(1). This was a reference by the Commissioners under powers analogous to those under which the reference in our case is made. The particular point under consideration need not be considered, but in his judgment the Lord Chancellor, at page 903, states that the question arises under Schedule A of the Act and enters into a discussion as to what are profits received from certain properties. He lays down that the manner in which those profits were to be disposed of under the private Act was not a matter for consideration, but that the profits of the concern must be

"all the net profits of the concern after deducting the necessary outgoings without which those proceeds could not be earned or received."

Again, on the same page, he says that the word "profits" as here used, means the "incomings of the concern after deducting the expenses of earning and obtaining them." Again, at page 906, he uses the same phrase. Lord BLACKBURN, who concurred, states that the same result will arise from the construction of Schedule D. We have, therefore, here a definition of "profits" for income-tax purposes: the net proceeds of the concern, or the incomings of the concern, after deducting the outgoings necessary for earning them or the expenses of earning and obtaining them. It is obvious that this definition of "profits" will apply, whatever be the method under which the proper debits are to be ascertained.

The next case I wish to refer to is *Colquhoun v. Brooks*(2) and I do so not because I think it has any bearing on the question of profits but because it has been referred to by the Board of Revenue, and in my opinion, a wrong inference drawn from the language used in it. The Board of Revenue, in their reference, say,

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(1) (1883) 8 App. Cas., 891.

(2) (1886) 21 Q.B.D., 52.

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"The question to be decided is whether the interest in question accrued or arose in British India," and go on

"the words 'accrued' or 'arose' have nowhere been defined in the Act but in the Judgment of FRY, L.J., in *Colquhoun v. Brooks*(1) these words were interpreted as general words descriptive of a right to receive."

It is true that the decision in this case, which eventually went to the House of Lords, did turn on the question as to whether a certain income "accrued or arose in the United Kingdom." But that is not the point in this case at all, as I have already said, and the view of FRY, L.J., on the construction of the words "accrued or arose" has no bearing whatever on this question. The words which the Court was construing were words of Schedule D, "arising or accruing to any person", etc., and with reference to these words, FRY, L.J., said

"the tax is in respect of 'profits or gains arising or accruing'. I cannot read those words as meaning 'received by' . . . I think that the words 'arising or accruing' are general words descriptive of a right to receive profits."

That is the sole question decided by FRY, L.J., and it is obvious that it has nothing to do with the question of profits. The case has really no bearing on the question before us.

The next case is *Russell v. Town and County Bank*(2). That was a decision as to the propriety of a certain debit for rent of business premises which contained dwelling accommodation for the Bank Agent. The only point of importance in this case is the definition of "profits". Lord HERSHELL, at page 424, says:

"The profit of a trade or business is the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning those receipts."

Lord FITZGERALD says:

"'Profits' I read on authority to be the whole of the incomings of a concern after deducting the whole of the expenses of earning them—that is, what is gained by the trade."

The learned Lord is here obviously referring to the language of Lord SELBORNE in *Mersey Docks v. Lucas*(3).

(1) (1888) 21 Q.B.D., 52.

(2) (1883) 13 App. Cas., 418.

(3) (1883) 8 App. Cas., 891.

The next case is *Gresham Life Assurance Society v. Styles*(1). In that case the learned Lord Chancellor stated that:

"the word 'profits' is to be understood in its natural and proper sense—in a sense which no commercial man would misunderstand."

and that the framers of the Act could never have assumed that the cost of the articles sold to the trader should not be taken into account before you arrive at what was intended to be the taxable profits.

Lord HERSHELL said that the words 'profits and gains' should be construed according to their ordinary significance; and in another passage said:

"the only thing to be regarded is the fact of expenditure and the purpose for which it had been incurred."

Another case referred to in argument was the *Gresham Life Assurance Society v. Bishop*(2). This turned on the construction of the words "received in the United Kingdom" within the meaning of the Income-tax Act of 1842, Schedule D (fourth case), which allows duty to be charged in respect of interest arising from foreign securities on the full amount of the sums which have been or will be received in Great Britain. It is not a decision on profits, but it is of value on the meaning to be given to the word "receipts", and I will deal with it later. So far, therefore, we have nothing but receipts or incomings to be put on the credit side. So far then for the income-tax cases. The decisions appear to me to be all based on the assumption that an assessee should prepare a statement of receipts or incomings setting against them the outgoings necessary for earning receipts including also depreciation to the extent permitted by the Act, and that this account should be annually prepared and be the basis on which the taxable income should be ascertained.

It was suggested, however, by the learned Advocate-General that such an account was not the proper method of ascertaining the profits, and he has very strongly relied on the judgment of FLETCHER MOULTON, L.J., in *In re Spanish Prospecting Co., Ltd.*(3). In this case, two persons agreed to serve the company at a fixed salary which they were not to be entitled to draw except out of the profits. The question was what were the profits. It arose

(1) [1892] A.C., 809 at 315.

(2) [1902] A.C., 287.

(3) [1911] 1 Ch., 92.

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in liquidation, and the dispute was with regard to certain debentures which had been included in the yearly balance sheets of the company as unvalued assets. In liquidation the debentures realized a sum of over three thousand pounds and the claimants contended that these were undrawn profits arising from the business of the company out of which they were entitled to be paid. In the course of his judgment, the learned Lord Justice discusses the meaning of the word 'profits' and says that the word "profits" implies a comparison between the state of a business at two specified dates usually separated by an interval of a year. The fundamental meaning is the amount of gain made by the business during the year. This can only be ascertained by a comparison of the assets of the business at the two dates and the increase of the assets at the later date represents in strictness the profits of the business during the year in question.

"To render the ascertainment of profits of a business of practical use it is evident that the assets, of whatever nature they may be, must be represented by their money value. But as a rule these assets exist in the shape of things or rights and not in the shape of money. The debts owed to the company may be good, bad or doubtful."

and

"Profits may exist in kind as well as in cash."

The learned Advocate-General now relies on these statements as indicating that the debts good, bad or doubtful must be shown on the credit side of an account. Now the first observation I would make about this case is, that the learned Lord Justice states, on page 101, that

"The actual profit and loss accounts of the company do not in any way bind the Crown in arriving at the tax to be paid" and therefore clearly he was not considering the profits as meant in an income-tax sense. This method of computing profits is, in the language of the learned Lord Justice, totally unsuited for computation for income-tax purposes. The balance sheet must of course contain a valuation of the whole of the property of the undertaking, including, as stated by the learned Lord Justice, debts owing to the company, good, bad or doubtful. It must also include debts accruing due, and on the debit side must be placed debts considered bad or doubtful. One may

venture to doubt whether many of the trading companies do in act prepare their statements of profits for the year in the manner suggested by the learned Lord Justice. It is admittedly not the method contemplated by the Companies Act. Article 106 of the standing articles of association provided in table A of the First Schedule of the Companies Consolidation Act (1908) provides that

"once at least in every year the directors shall lay before the company in general meeting a profit and loss account for the period since the preceding account"

and it is common knowledge that this account is an account of the actual transactions of the company during the preceding year. Article 97 provides that

"no dividend shall be paid otherwise than out of profits;" and the learned author of Buckley's "Law and Practice under the Companies Acts" states the law to be as follows:—

"The 'profits of a business' are the excess of revenue receipts over expenses properly chargeable to revenue account. For the purpose of ascertaining profit available for the dividend, capital account and revenue account are to be treated as separate accounts. The credit balance of a revenue account is applicable for dividend."

This language very nearly reproduces the words used by the learned Lords in the income-tax cases above referred to and the learned author relies strongly on the case of *Lee v. Neuchatel Asphalt Company*(1). That was a decision of the Court of Appeal, and the Court held there that there was nothing in the Companies Act to prohibit a company from calculating its profits and paying a dividend out of them without providing a sinking fund to meet depreciation in the value of wasting property, such as a mine. LINDLEY, L.J., draws a clear distinction between a capital account and a revenue account, and speaking of the latter says

"If your earnings are less than your current expenses you must not cook your accounts so as to make it appear that you are earning a profit, and you must not lay your hands on your capital to pay dividend. But it is, I think, a misapprehension to say that dividing the surplus after payment of expenses of the produce of your wasting property is a return of capital in any such sense as is forbidden by the Act."

(1) (1889) 41 Ch.D., 1.

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It is clear, therefore, that both LINDLEY, L.J., and the very eminent editor of Buckley's Law and Practice under the Companies Act regard a revenue account as the proper basis for the ascertainment of profits under the Companies Act.

The same view was expressed in the case of *Badham v. Williams*(1) by KEKEWICH, J. There the question arose on a partnership and the learned Judge points out the difference between the balance sheet and the profit and loss account with regard to money accruing due but not actually received. He takes the case of six months' bills in payment for goods not maturing until the year after that for which the account was being made up and asks

"Are such bills to be considered so much cash for the purposes of the business of the year?" and answers:

"For the purposes of the balance sheet, no doubt, they would estimate that there is an outstanding asset which they hope to realize; but for the purpose of ascertaining the profit and loss it seems to me that they must consider only what they have received, because those bills will only come in when met at maturity" in the next year. It is to be noted that in this case the learned Judge refers specifically to the profit and loss for the purposes of income-tax returns and says that

"the income-tax return is a return of the actual receipts less such expenditure as is chargeable against those receipts."

It seems to me that "profit" in a commercial sense differs very little from the meaning given to it in the income-tax cases quoted above, though there may be debits which are not permissible under the provisions of Income-tax Acts. I can see no practical difference between "the receipts or incomings after deducting the necessary out-goings without which profits could not be earned or received or after deducting the expenses of earning and obtaining them", and "the excess of revenue receipts over expenses properly chargeable to revenue account", as stated by the learned author, to be the profits of a business under the Companies Acts.

The net result of all these cases is that on the credit side must be put receipts or incomings and it only remains to consider what these words cover.

(1) (1902) 86 L.T., 181.

That actual cash need not be received is of course obvious. The receipt of any form of negotiable security would of course be receipt. But the more difficult question is whether any, and if so, what form of constructive receipt is a receipt for the purposes of the Act. In *Gresham Life Assurance Society v. Bishop*(1), this very question was dealt with by Lord LINDLEY. He states as follows, at page 296:

"First, let us consider what is meant by the receipt of a sum of money. My Lords, I agree with the Court of Appeal that a sum of money may be received in more ways than one, e.g., by the transfer of a coin or a negotiable instrument or other document which represents and produces coin, and is treated as such by business men. Even a settlement in account may be equivalent to a receipt of a sum of money, although no money may pass; and I am not myself prepared to say that what amongst business men is equivalent to a receipt of a sum of money is not a receipt within the meaning of the statute which your Lordships have to interpret" (i.e., Income-tax Act). Then referring to the Scottish case of *New Mexico Co.*(2), the same learned Lord states on page 298, that that case

"was very peculiar. Money received by the Company's agents abroad was clearly and unmistakably treated by the company as remitted to and received by it here, and money here was treated by the company as remitted abroad in exchange for it. The exchange was effected by a book entry; but that entry was the business mode of carrying out cross-remittances which it would have been unbusinesslike and really childish to have effected in any other way."

Applying this last observation, apart from the complication introduced by the word "abroad," it seems to me to come to this: that as between two parties where money has to be paid and received by both, an exchange effected by a book entry would amount to payment and receipt. In *Larocque v. Beauchemin*(3), their Lordships had to construe the words "paid in cash" and in the judgment of the Board their Lordships relied on and applied the decision in *Spargo's case*(4). That was a decision in liquidation of the Harmony and Montague Tin and Copper Mining Co., and turned on the meaning of the

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(1) [1903] A.C., 287.
(2) [1897] A.C., 358.

(3) (1894) 14 R., 93.
(4) (1873) 8 Ch. App., 407.

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phrase 'payment in cash' within section 25 of the Companies Act, 1867. Spargo subscribed for thirty-one shares in the company and instead of paying in full in cash was credited in the books of the company with a sum of £2176 for the purchase of the lease of the mine in respect of the amount of £2176 part of the amount due by him for his purchase of shares. JAMES, L. J., laid down as follows:

"Anything which amounted to what would be in law sufficient evidence to support a plea of payment, would be a payment in cash within the meaning of this provision; and MELLISH, L.J., reiterated what he had stated in *Fothergill's case*(1):—

"If the circumstances relied on would in an action for the money due upon shares be evidence only in support of a plea of accord and satisfaction, this section would prevent their being a good defence; but that if they would support a plea of payment, then the 25th section did not prevent their being a good defence."

He then continues:

"Nothing is clearer than that if parties account with each other, and sums are stated to be due on one side, and sums to an equal amount due on the other side on that account, and those accounts are settled by both parties, it is exactly the same thing as if the sums due on both sides had been paid. Indeed, it is a general rule of law, that in every case where a transaction resolves itself into paying money by A to B, and then handing it back again by B to A, if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards."

This form of constructive receipt is therefore clearly permissible. So, if a person entitled to receive money agrees with his debtor to let the money stand in the hands of the debtor, either by way of deposit or as a fresh loan or investment, that would, in my opinion, amount to receipt. No transaction of this character is indicated in the case submitted to us, and I am therefore of opinion that the amount in question need not be taken into account by the assessee for the purposes of his statement of profits and gains and is not therefore chargeable under the Act.

KRISHNAN, J. KRISHNAN, J.—The question referred to us for our decision by the Revenue Board under section 51 of the Income-tax Act

VII of 1918 is whether a person carrying on a money-lending business is liable to be assessed to income-tax on interest which has accrued due to him in the year of account but which has not been realized by him by payment, or adjustment in the accounts, or otherwise. In other words, the question is whether such interest becomes liable to taxation on accrual, as the learned Advocate-General contends for the Government, or only on its realization, as the learned vakil for the assessee contends.

The decision turns upon the construction to be placed on the relevant sections of the Act. The first section on which the learned Advocate-General insisted is section 3, clause (1), and it is an important provision to consider, as it defines the scope and applicability of the Act. That clause says:

"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 this Act deemed to accrue or arise or to be received in British India."

This clause defines the scope of the Act, and unless a sum of money can be brought within the words of the clause I think it cannot be taken into consideration for purposes of taxation under the Act. A lengthy argument was addressed to us by the learned Advocate-General about the meaning of this clause but to my mind its meaning is perfectly plain. It makes the Act applicable to all incomes which would fall under one or the other of the heads mentioned in the latter part of the clause. Not only incomes which accrue and are received in British India, which form the bulk of taxable incomes, but also incomes which accrue in British India but are received outside British India, and incomes which though accrued outside are received here, are all brought by it within the purview of the Act and become taxable under the taxing sections. Sections 31 and 33 are examples of the former class of incomes. The Advocate-General tried to persuade us to read the clause as implying that an income becomes liable to taxation as soon as it has accrued in British India and contended that it was not necessary that it should be received by the assessee at all to create the liability. I think his argument is untenable as it entirely ignores the governing word in the clause, "income." Till a sum of money can be said to have become an 'income' it is clear to me that the Act will not apply to it.

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I fully agree that the words 'accrues or arises' do not imply a receipt at all but only a right to receive as pointed out by FRY, L.J., in *Colquhoun v. Brooks*(1). The two words seem to denote the same idea but one is perhaps more appropriate than the other in particular cases. Their meaning is, as observed by the Full Bench in *Board of Revenue v. Ramanadhan Chetty*(2), "to become a present or enforceable right to demand." In fact the words are used in contradistinction to the words "is received" in the clause itself. Though this is so, it is clear from the section that before the Act can apply what has so accrued or arisen must have become an income. The section cannot be read as applying the Act to a sum of money which has become payable to a person but which has not become his "income" yet. That the Act applies only to "incomes" is made further clear by the heading of the chapter which says "Taxable income," and by section 5, which says "the following classes of income shall be chargeable to income-tax" and also by the taxing section, section 14, which also speaks of taxable income.

The question then is what really is the meaning of the term "income" as used in the Act and whether it involves the idea of receipt in some form or other or not. The word is not defined in the present Act, though the expressions "agricultural income" and "total income" are defined in section 2. Those definitions however throw no light on the exact connotation of the term "Income." In the absence of a statutory definition, we must take its ordinary meaning in the English language as its proper legal meaning as well for construing the Act. The learned Chief Justice has adopted the meaning given to it in the concise Oxford Dictionary, viz., "periodical (usually annual) receipts from one's business, lands, work, investments, etc." I think that definition is correct and I adopt it. That this is also its legal acceptance is clear from Stroud's Judicial Dictionary. I think the word clearly implies the idea of receipt, actual or constructive. We cannot speak of a sum of money which is expected to be paid as an income; however well founded the expectation may be, it is still only an expectation. There is nothing in section 3, or anywhere else in the Act, inconsistent with this meaning

(1) (1888) 21 Q.B.D., 52 at 59. (2) (1920) I.L.R., 48 Mad., 75 (F.B.) at 90.

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of the term. In the case of incomes taxable at the source under the Act, the taxation is made simultaneously with the payment or receipt of the amount due by the payee when it becomes his income; the case is thus not against the view I am taking of the meaning of "income." What exactly would amount to a receipt, to make a sum due to a person his income, is a different question and I shall deal with it later. The present case however refers to a particular kind of income from a money-lending business; section 5, clause (4) which makes income derived from business chargeable to income-tax, and section 9 clause (1), which says that "the tax shall be payable by an assessee under the head of "income derived from business" in respect of profits of any business carried on by him" apply to it. The Advocate-General argued that whatever implication there might be in the term "income" the term "profits" as used in section 9 included earned or estimated but unrealized profits as well, and in the case of a money-lending business it included interest accrued due but unrealized; and he relied strongly on *Colquhoun v. Brooks H.L.*(1) and *In re Spanish Prospecting Company Limited*(2), in support of his argument.

Before considering the cases cited, I may observe that as by section 3 the Act is made applicable only to incomes and as that term implies, as I think, a realization of the sum due it is difficult to hold that by the use of the expression "profits" in section 9 the legislature has extended the scope of the Act to unrealized sums as well in the case of business ventures, which would be the result of accepting the Advocate-General's argument. No doubt the term "profits" is not a term of very precise and definite significance. It is used in different meanings in different connexions. The profits of a business are ascertained in various ways for various purposes. But as the learned Chief Justice has shown in his judgment, the word has always been understood in England, for income-tax purposes, to mean the difference between the receipts of a business and the expenditure incurred in earning them. I need not refer to the authorities as he has done so. This meaning is consistent with our Act, and will avoid the difficulty I have pointed

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

(2) [1911] 1 Ch., 92.

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out at the beginning of this paragraph, and I think it should be accepted by us. The ordinary meaning of the term as used for commercial purposes in ascertaining profits, as on a revenue account, is also much the same, the difference in ascertainment of profits for income-tax and commercial purposes being only in the ascertainment of the nett profits and not the total profits. The deductions allowable for income-tax purposes to arrive at nett taxable profits are only those allowed by the Act and are not the same as would ordinarily be allowed in a commercial account; but the credit side is the same in both.

The term "profits" as used in section 9 does not, in my opinion, properly apply to unrealized amounts at all. The fact that some firms include estimated profits in their balance sheets for payment of dividends to shareholders is of no importance in this connexion; when they so deal with unrealized profits they are really substituting for such a purpose the capital in their hands for profits, hoping to recoup it from profits when they are realized. Such practice cannot affect the proper meaning of the term "profits," particularly for income-tax purposes.

Our attention has not been drawn to any provision of the Act to show that the term 'profits,' as used in it, is intended to include earned but unrealized profits. The deductions allowed to be made under section 9 from profits lend no support to the Advocate-General's contention. On the other hand, the D Form, prescribed under the Act for returns to be submitted by assesseees, refers to 'income received from business' and the use of the word 'received' supports the view I am taking.

I shall now turn to the case of *Colquhoun v. Brooks*(1), cited by the Advocate-General. Admittedly, the decision in the case has no bearing on the present case but certain observations of Lord FITZGERALD are relied on, which are no doubt not dissented from by the other learned Lords. The facts of the case are set out by NAPIER, J., and the relevant passages by SADASIVA AYYAR, J., and I need not repeat them. Lord FITZGERALD was dealing with the income of Mr. Brooks and not with that of his firm. Though the firm had not apparently realized the profits, it would appear from the judgment that it

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

had taken such profits into consideration in ascertaining the profits due to each partner, and so far as Mr. Brooks was concerned his share of the profits had been actually ascertained and fixed at £9,219 and the amount was apparently entered in the book of the firm to his credit, so that, as his Lordship observes:

"It was so completely under his control that by an act of his will he could have it actually transferred to his bankers here (in England)."

Apparently, his Lordship treated the money as received in Melbourne and was at first sight inclined to treat it as received in England also, as Mr. Brooks could have it transferred to England at his will and pleasure, but ultimately his Lordship held with the other learned Lords that the sum could not be treated as received in England. That I understand to be the effect of his judgment; I do not understand his Lordship to have laid down that a person was liable to pay income-tax on a sum not realized by him. His Lordship does not say so and there is nothing in what His Lordship says that even implies it. The case, therefore, does not support the Advocate-General in any way.

Much reliance was also placed by the learned Advocate-General on the judgment of MOULTON, L.J., in *In re Spanish Prospecting Company, Limited* (1), and his observations on what constituted profits of a business. The facts of this case are set out by NAPIER, J., and I need not repeat them. The learned Lord Justice it will be observed was not dealing with an income-tax case at all nor even with a case of a company which was a going concern but with the case of a company which was in liquidation. The ascertainment of profits of such a company is clearly different from their ascertainment in the case of a going concern for revenue purposes or for income-tax purposes. In the former case, one would no doubt take the total value of the property of the Company when wound up, including the increased value of the stock in trade and other properties belonging to the Company and all the realizable outstandings, and deduct therefrom the capital invested, to ascertain the total profits of the venture. As the company had come to a stop

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the calculation of profits had to be made on the footing that all its assets and outstandings had been realized. Manifestly such a method cannot apply in making up a revenue account of a going concern to ascertain profits. In such an account the unearned increment resulting from a rise in prices in the market never forms a proper item at all: it is never entered as an item by any auditor in a revenue account of a going concern, though it may no doubt be a proper item in a capital account made up to ascertain the financial position of the business. When a company is wound up the account made up is really much the same as a capital account, as the whole of its assets are taken as realized. His Lordship's observations cannot in my view be applied at all to a going concern, or to an income-tax case, and do not thus apply to the present case.

I have referred to these two cases as they are the cases which the learned Advocate-General relied on most strongly. I do not propose to refer to the other cases cited, and the analogous English law of income-tax, as they have all been referred to by the learned Chief Justice and I think it unnecessary for me to refer to them again.

In the course of the argument I put to the Advocate-General an extreme case to test his contention and to see how far he was prepared to go. It was this: A invested a lakh of rupees in a money-lending business and lent out the whole amount in the first year at 12 per cent interest. At the end of the year Rs. 12,000 accrued to him as interest but none of his debtors paid him anything. The next year he unfortunately lost the whole of the capital and his interest, by his debtors becoming unable to pay. Is A liable to pay income-tax to the Government on Rs. 12,000 or not? The Advocate-General had to contend, and did contend, that A was liable to pay, even though he had not realized any profit at all from his venture but had actually lost the whole of his capital. It seems to me that very clear and definite language in a taxing act is necessary to make us hold that a person is liable under such circumstances. The Income-tax Act being a fiscal enactment has to be construed strictly against the Crown, and I can see no provision in our Act to make a person liable to pay tax on unrealized incomes or profits. On the other hand all its provisions indicate to my mind that it is only realized income or profits that is taxable.

The question what would amount to receipt or realization of an income for the purpose is not one that properly arises on this reference, for in the case stated by the Board it is expressly mentioned that the interest in the present case was neither received by the assessee nor realized by adjustment of accounts or otherwise. But as my learned brothers have dealt with the point I shall briefly state my opinion on it. Actual payment of cash by the payer to the payee is of course not necessary to constitute a receipt or realization. Generally speaking, I think it may be said that wherever the payer deals with a sum of money due to the payee in any manner according to the directions or instructions of the payee, so as to obtain a valid discharge for himself, and the payee obtains the benefit thereof, would be a case of realization by the payee. The payment by a firm of the share of the profits due to a partner into a bank, or to his credit in the firm's own books according to his instructions, would amount in my view, to a realization by him and that I think was apparently the case of Mr. Brooks in *Colquhoun v. Brooks*(1) already referred to with reference to the money in Melbourne. Payment by a bank of interest earned by a fixed deposit to a person's current account in the bank itself would also amount to a receipt by him as held in *Mathews v. Cork County Council*(2). Again, in the case put by the Board, of a Nattukkottai Chetti not drawing the interest that has accrued to him but leaving it with the payer to be added to the capital and to carry interest itself would also be a case of realization in the view I am taking. Reference may also be made to the judgment of LINDLEY, L.J., in *Gresham Life Assurance Society v. Bishop*(3) on the point. In each case when the question arises it will have to be decided on its facts whether there has been a receipt or not.

Although actual receipt of cash is not required to constitute a realization of the income or profit in my view, I am clearly of opinion that a sum of money unrealized in any manner by the assessee is not liable to be included in the amount for which he is taxable under the Income-tax Act, VII of 1918. The tax can be levied during the year when the income or profit is realized, and the Crown therefore loses nothing in having to wait. I

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(1) (1883) 14 App. Cas., 493.

(2) [1910] 2 I.R., 521.

(3) [1902] A.C., 287.

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therefore agree that our answer to the reference must be in the negative.

THE COURT.—Respondents' costs will be paid by Government within three months from this date. Pleader's fee will be Rs. 250.

M.H.H.

APPELLATE CIVIL—FULL BENCH.

*Before Sir John Wallis, Chief Justice, Mr. Justice Ayling,
Mr. Justice Sadasiva Ayyar, Mr. Justice Napier and
Mr. Justice Krishnan.*

1920,
October, 6.

E. M. VISWANADHAN CHETTY AND TWO OTHERS (SECOND
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v.

ARUNACHELAM CHETTI (FIRST DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. XXI, r. 52, sec. 73—Attachment of property in custody of Court—Rateable distribution governed by sec. 73 and not by O. XXI, r. 52—Duty of attaching Court—Powers of custody Court—Several attachments—Priority of attachment—Where attaching Court and custody Court are same—Assets 'held by a Court.'

Where the property attached is in the custody of a Court it is the duty of such Court to hold it at the disposal of the attaching Court and it is the duty of the attaching Court, if the property attached is money, to call upon the custody Court to pay it into the attaching Court and in other cases, to provide for the realization of the property, and to divide the money or proceeds rateably between the attaching decree-holder and the other decree-holders who are entitled to distribution under section 73, Civil Procedure Code, viz., those who have applied to it for execution before the receipt of such assets.

Where the property in the custody Court is the subject of several attachments in execution of several decrees the custody Court must award priority to the first in point of time. If the other decree-holders want to share in the rateable distribution they must apply in time to the first attaching Court. The power conferred on the custody Court by the proviso to Order XXI, rule 32, Civil Procedure Code to determine, claims to priority, etc., does not entitle the custody Court itself to distribute the assets rateably among the attaching decree-holders.

Katun Sahiba v. Hajee Badsha Sahib, (1915) I.L.R., 38 Mad., 221, overruled.
Thakurdas Motilal v. Joseph Iskander, (1917) I.L.R., 44 Cal., 1072, not followed.

* Second Appeal No. 663 of 1919.

Where the attaching Court and the custody Court are the same, there is a receipt of assets within the meaning of section 73, Civil Procedure Code, only when so much of the money standing to the credit of the judgment-debtor as is necessary to satisfy the decree-holders who have applied to it for execution, is ordered to be transferred to the credit of the first attaching creditor's suit.

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SECOND APPEAL against the order of A. NARAYANA NAMBIYAR, Temporary Subordinate Judge of Sivaganga, in Appeal Suit No. 85 of 1918 preferred against the decree of T. V. KRISHNAN NAYAR, Additional District Munsif of Sivaganga, in Original Suit No. 477 of 1916.

Suit was for a declaration that first defendant is not entitled to rateable distribution in Rs. 1,755 held to the credit of one Lakshmanan Chetti in Original Suit No. 207 of 1908 in the Sub-Court of Rāmnād.

Second plaintiff is the son of second defendant and first plaintiff is the brother of second defendant and form members of an undivided Hindu family. They were entitled to a sum of Rs. 8,415-10-3, under a decree in Original Suit No. 87 of 1913 on the file of the Sub-Court of Rāmnād, against Muthia Chetty, minor Lakshmanan Chetti and others. In the same Court a sum of Rs. 1,755 was in deposit to the credit of the minor Lakshmanan Chetti in Original Suit No. 207 of 1908. Plaintiff in the present suit became aware of this and on 23rd December 1915 filed an application for attachment of the said amount, in execution of his decree in Original Suit No. 87 of 1913. On this application the Subordinate Judge passed the following order: 'Attach; notice of the attachment to second defendant.' Meanwhile, first defendant who had obtained a decree in Original Suit No. 9 of 1914 on the file of the Temporary Sub-Court, Rāmnād, against Lakshmanan Chetti, filed an application in the Sub-Court of Rāmnād on 25th February 1916, for the attachment of the same amount. On 6th March 1916 the Subordinate Judge of Rāmnād ordered the amount to be rateably distributed among the two decree-holders. The present plaintiffs thereupon filed this suit. Both the lower Courts dismissed the suit. The plaintiffs and second defendant then filed this Second Appeal which first came on for hearing before SADASIYA AYYAR and SPENCER, JJ., who made the following

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SPENCER, J.—The question to be decided in this Second Appeal is whether money deposited in Court to the credit of a judgement-debtor before any decree-holder applies in execution to have it paid towards the satisfaction of his decree should be dealt with on a system of priority when several decree-holders afterwards come in and apply to have it attached or whether it should be rateably distributed among them.

In this case, the money was deposited on January 7th, 1910, by the judgment-debtor in Original Suit No. 207 of 1908 to the credit of his decree-holder, Lakshmanan Chetti, and was about to lapse to Government on 15th February 1916, when the appellants attached it on December 23rd, 1915, in execution of their decree in Original Suit No. 87 of 1913. The respondent (another decree-holder) came in later on February 25th and obtained rateable distribution, notwithstanding the fact that the amount would have lapsed to Government by the date he filed his execution petition had it not been for the appellants' diligence. The present suit was brought to obtain a re-adjustment of the order for rateable distribution passed in execution.

On the point of law as stated above there is a considerable difference of opinion.

Section 73, Civil Procedure Code, does not in terms apply, because the money deposited is not strictly speaking "assets held" in the process of execution—vide *Sorabji Coovarji v. Kala Raghunath*(1), and because the persons desirous of having it paid towards their decrees did not apply for execution before the money was received—vide *Tiruchittambala Chetti v. Seshayyengar*(2).

Order XXI, rule 52, Civil Procedure Code, has been held by BAKEWELL, J., in *Katum Sahiba v. Hajee Badsha Sahib*(3), to be the appropriate section of the Code for disposing of such a fund, but in his opinion that section does not stand in the way of the Court making a rateable distribution disregarding the order in which attachments have been made, as attachment does not confer any right of priority. A similar view was taken by

SANDERSON, C.J. and MOOKERJEE, J., in *Thakurdas Motilal v. Joseph Iskender*(1), on general principles of justice, equity and good conscience. On the other hand, in the latest reported case of this Court, *Umma Venkataratnam & Co. v. Adamji Usman & Co.* (2), OLDFIELD and SESHAGIRI AYYAR, JJ., have laid down that in such cases the diligence of the first applicant should be rewarded by paying him in full before other decree-holders are allowed to take a share; and this decision has been followed since in an unreported case, Civil Revision Petition No. 1309 of 1917, by BAKEWELL, J.

BAKEWELL, J., in *Katum Sahiba v. Hajee Badsha Sahib*(3), followed the practice in administration suits which was fully discussed in *Soobul Chunder Lall v. Russick Lall Mitter*(4).

SESHAGIRI AYYAR, J., in his judgment in *Umma Venkataratnam & Co. v. Adamji Usman & Co.*(2), purports to follow the judgment of WALLIS, C.J., in *Tiruvengadial v. Tiruvengadiah*(5), but the head-note in that case does not properly represent what was decided.

Under these circumstances, I think that an authoritative decision is needed for the guidance of Courts which are hesitating whether, under the compulsion of Act XVIII of 1875, to follow the opinion of a single Judge reported in the authorized reports, or to follow the judgment of a Bench which has not been so reported, when the single Judge who pronounced the former judgment has since subscribed to the decision of the Bench of two Judges who took a different view. I would, therefore, refer the question stated at the beginning of his reference to a Full Bench.

SADASIVA AYYAR, J.—I agree that the question raised is an important one and as the answer is not free from difficulty, it should be referred to a Full Bench.

In the old section, the words were "are realized by sale or otherwise" and "prior to the realization." In the new section, the words are "are held" and "before the receipt of such assets." I do not think the change of language is very

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(1) (1912) I.L.R. 36 Bom., 156. (2) (1882) I.L.R., 4 Mad., 383.
(3) (1915) I.L.R., 38 Mad., 221.

(1) (1917) I.L.R., 44 Calc., 1072. (2) (1919) I.L.R., 42 Mad., 692.
(3) (1915) I.L.R., 38 Mad., 221. (4) (1886) I.L.R., 15 Calc., 202.
(5) (1916) 26 M.L.J., 364.

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material. The moneys which were held not liable to be distributed under the old section 295, because they were not realized by sale or otherwise but were voluntarily paid into Court, seem also to be governed by section 73 (see *Vibudha Priya Tirthaswami v. Yusuf Sahib*(1), for the old law) (moneys whether in the possession of the same Court or of another Court are attached by the procedure laid down in Order XXI, rule 52).

Both the new section 73 and the old section 295 contemplate rateable distribution *only among those decree-holders who have applied for execution before the receipt by the Court of the moneys sought to be operated upon*. On that ground, section 73 does not, in terms, apply to the present case. I am not quite sure of the other ground mentioned in my learned brother's opinion for taking the case out of section 73, namely, that the moneys were not "assets held" in the process of execution. I am inclined to think that they are so held. *Sorabji Coovarji v. Kala Raghunath*(2), referred to, was a case in which the assets were deposited by the judgment-debtor for the particular purpose of satisfying two individual creditors, and hence it was decided that the assets were not held in the process of execution, that is, as assets to be disposed of by the Court in execution proceedings in accordance with the general provisions of the Civil Procedure Code relating to execution, including section 73. In the present case, the assets remained in Court to the credit of the judgment-debtor and had not been earmarked by him to be paid to any of the *competing decree-holders in particular* and when attached, were (it seems to me) assets held in the process of execution.

In deciding the difficult point in dispute, some weight has to be given to the argument that the fact that the legislature specially provided for rateable distribution among those competing decree-holders who had put in execution petitions *before receipt of assets* is some indication that the legislature probably intended a different rule to be followed when the competition was between decree-holders who put in execution applications after the date of the receipt of assets.

(1) (1905) I.L.R., 28 Mad., 380.

(2) (1912) I.L.R., 36 Bom. 150.

ON THIS REFERENCE—

K. Raja Ayyar for appellants.—Order XXI, rule 52 confers priority and respondent is not entitled to rateable distribution. Both the referring Judges are agreed that section 73 does not apply. No equitable principles can be applied unless section 73 applies. Civil Rules of Practice have the force of law. Rules 179 and 180 referred to. In this case the Court has treated me as an assignee. Notice was ordered to second defendant, who is my judgment-debtor, to show cause why I should not be treated as an assignee. Neither section 73 nor Order XXI, rule 52, speaks of a transfer from one suit to credit of another. All that section 73 says is that the application must be made before receipt. The point of time of "the receipt" when it is in the same Court, is when the money came into Court, i.e., when it takes notice of its own attachment. Reference was made to *Katum Sahiba v. Hajee Badsha Sahib*(1), *Tiruvengadial v. Tiruvengadiah*(2), *Umma Venkataratnam & Co. v. Adamji Usman & Co.*(3), *Thakurdas Motilal v. Joseph Iskender*(4), *Sankaralinga Reddi v. Kandasami Tevan*(5).

A. Krishnasami Ayyar for respondent.—The only effect of Order XXI, rule 52, is to place the funds in the custody Court at the disposal and order of the attaching Court. The proviso provides that the custody Court shall decide which is the first in point of time, but the disposal and distribution is in the attaching Court only. If a second Court attaches, the proper course for the custody Court is to say "send your attaching creditor to the first attaching Court as the funds are held to its orders." The attachment cannot be interfered with and execution by that Court must go on. Civil Rules of Practice, rules 179, 180, are clearly ultra vires, as they are in direct opposition to the enactment. In every case there must be an attachment and further orders. Money deposited in one suit cannot be assets in another suit. Rule 52 contemplates time for the disposal of claim petitions and other matters. The principle cannot be different when by accident the custody Court and the attaching Court are the same. After attachment, if the property is moveable or immoveable

(1) (1915) I.L.R., 38 Mad., 221.

(2) (1914) 26 M.L.J., 364.

(3) (1919) I.L.R., 42 Mad., 692.

(4) (1917) I.L.R., 44 Cal., 1072.

(5) (1907) I.L.R., 30 Mad., 412.

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it will have to be sold, if money it will have to be transferred from the one suit to the other, and only then will it become "receipts of assets." In the present case our application was before such transfer.

OPINION.

WALLIS, C.J.

WALLIS, C.J.—The answer to the reference appears to depend on the construction of Order XXI, rule 52, of the Code of Civil Procedure, which was first enacted as section 237 of the Code of 1859, under which the first attaching decree-holder was entitled, as the first judgment-creditor suing out a writ of *fi-fa* in England, to have his claim satisfied in full out of the proceeds of execution, the surplus only being liable under the Code to rateable distribution among subsequent attaching creditors. It was however retained as section 272 of the later Codes under which by virtue of section 295, now 73, the attaching judgment-creditors were obliged to submit to rateable distribution with, but only with, other decree-holders who had applied to the attaching Court for execution before the date specified in the section. Now, it does not seem likely that the legislature would have retained, and even extended, the old section 217 by substituting the word "property" for "money or any security" if it had considered that it would interfere with the due working of the procedure for rateable distribution introduced by section 295, and would authorize the admission to rateable distribution of decree-holders who had not entitled themselves to rateable distribution under section 295 by applying for execution to the Court in which the first attaching decree-holder's decree was being executed, but had themselves subsequently to the first attachment attached the property in the Court which had the custody of it, hereinafter called the custody Court. The procedure for rateable distribution under section 295, now 73, applies to attached property in the custody of a Court just as much as to any other kind of attached property, and, in my opinion, precludes any rateable distribution on equitable grounds, of property attached under rule 52 among any other class of decree holders.

The section which is now rule 52 prescribes a form of attachment for property which is "in the custody of a Court or any public officer" and "under the attachment is to be held

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subject to the further orders" of the attaching Court. Where the property attached is in the custody of a public officer, it is clearly the duty of the attaching Court to provide, if necessary, for the realization of the property and to divide the proceeds of the realization rateably between the attaching decree-holder and the other decree-holders who have applied to it for execution before it received such proceeds in satisfaction of their decrees. If the attached property is money, it is now, in my opinion, the duty of the attaching Court, having regard to the provisions of section 295, to call on the public officer to pay it into Court and to deal with it in the same manner. When the property attached is in "the custody of a Court," it is equally to be held by the custody Court subject to the further orders of the attaching Court, and subject also to the proviso which has next to be examined which does not in my opinion either relieve the attaching Court of the duty of getting in and distributing the money or proceeds of realization if available and distributing them among the decree-holders entitled under section 295, now 73, or authorize the custody Court to embark on another sort of rateable distribution among another class of decree-holders. The proviso only says that "any question of title or priority arising between the decree-holder" (meaning the decree-holder who had made the attachment) "and any other person not being the judgment-debtor claiming to be interested in such property by virtue of any assignment, attachment, or otherwise shall be determined by such Court," the custody Court. This will include claims questioning the title of the judgment-debtor and other cases, but taking the present case of the property in the custody Court being made the subject of several attachments in execution of several decrees, the custody Court is then in my opinion required by the proviso to determine which of these attachments is entitled to priority, and in the absence of any legislative provision (section 63, which has given rise to difficulties which need not now be considered, does not apply to the present case) to award such priority to the first attachment in date because that attachment became complete on the service of the notice on the custody Court and subsequent attachments cannot, in the absence of express legislative provision, affect the right of the first attaching creditor to have the attached property

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realized in execution of his decree and distributed rateably among the decree-holders entitled under section 295, now 73, in satisfaction of their decrees. If the other decree-holders want to share in the rateable distribution, their proper course is to apply in time, if they can, to the attaching or executing Court; and if, instead of doing so, they choose to attach the property in the custody Court, the result will be that the attaching decree-holder who is second in point of time will be entitled to proceed in execution against any balance that may be left in the hands of the custody Court after the full satisfaction of the decree of the first attaching decree-holder and of the other decree-holders who have entitled themselves to rateable distribution under section 295, now 73, in executing his decree. For these reasons, I am of opinion, with great respect, that *Katum Sahiba v. Hajee Badsha Sahib* (1) and in *Thakurdas Motilal v. Joseph Iskendar* (2), allowing rateable distribution among decree-holders attaching the property in the custody Court, should not be followed.

The same principles must be applied in the present case, in which the attaching Court and the custody Court are the same. The fact that money was lying in Court to the credit of the judgment-debtor in a suit other than that in which the attachments were made does not make it assets "held by a Court" within the meaning of section 73, which clearly refers to assets levied in execution or paid into Court in satisfaction of the decree under execution, and not to assets lying in the same Court to the credit of the judgment-debtor in another suit. Such assets may of course be attached by the Court in execution of another decree of the same Court. The Code does not say how such attachment is to be made. The order "attach" appears to be sufficient, though of course some record of the attachment must be placed among the records of the suits to the credit of which the money is lying. On the other hand the order of attachment does not of itself effect a transfer to the credit of the suit in which the attachment is made so as to constitute a receipt of assets within the meaning of section 73. The money may not be available as being already subject to another attachment, possibly in another Court, and it is

(1) (1915) I.L.R., 38 Mad., 221.

(2) (1917) I.L.R., 44 Cal., 1072.

only when the Court comes to the conclusion that there is no objection and orders the money, or so much as it thinks necessary to satisfy the decree-holders who have applied to it for execution, to be transferred to the credit of the first attaching creditor's suit which it is engaged in executing, that there can be said to be receipt of assets within the meaning of section 73 and that a rateable distribution can be made. Judged by this test, the respondents in this appeal were entitled to rateable distribution, not on the grounds assigned in the lower Courts and referred to in the reference, but under section 73, Civil Procedure Code, because they applied for execution of their decrees to the Court executing the first attaching creditor's decree before the receipt of assets by that Court. The appeal therefore fails and is dismissed with costs.

AYLING, J.—I agree.

NAPIER, J.—I agree.

SADASIVA AYYAR, J.—I agree with my Lord in his reasoning and in his conclusion. I shall however say a few words of my own, principally on the question what "before the further receipt of assets" means. In our Referring Order SPENCER, J., and myself held that section 73 of the Civil Procedure Code did not in terms apply to the present case. SPENCER, J.'s reasons were two, namely (1) because "the money deposited" was not "assets held" within the meaning of those words in that section, and (2) because execution was not applied for "before the receipt of" such assets, within the meaning of these words, in that same section. My sole reason was the reason No. (2) of Mr. Justice SPENCER, as I was doubtful about his reason No. (1). On the further consideration which I have been able to give to this case, I am satisfied that the second reason also is not valid as the words "before receipt of such assets" in section 73, though much more clear than the words "prior to the realization" in the old section 295 (realization having been a word of controverted meaning), must themselves be qualified by the understood words "levied in the course of execution and paid into Court in satisfaction of any of the decrees under execution, or transferred for purposes of execution, to the credit of one or more of the decrees under execution."

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In the present case, the assets seem not to have been "received" in this sense till long after the dates of the two attachments, in question and in fact, till the money was impliedly so transferred to the credit of one or both of the decrees just before the order was passed for rateable distribution. Hence section 73 clearly applies.

As regards Order XXI, rule 52, the proviso in the second paragraph is an exception to the first paragraph and the words "question of priority by attachments" in the second paragraph, in my opinion, were intended to include questions of priority arising by reason of attachments made by several executing Courts but not questions of priority arising out of attachments made by decree-holders executing through the same Court where the latter Court is not the custody Court.

I think that portions of rules 179 and 180 of the Civil Rules of Practice, which require that the Court should proceed in certain cases mentioned in rule 179 as if the decree-holder was an assignee of the judgment-debtor and require in certain cases mentioned in rule 180 that "the execution petition shall ask that the decree may be transmitted to the custody Court," are ultra vires, as being inconsistent with the rights and privileges given to decree-holders and their assignees in the old Civil Procedure Code, and as not having been framed in the manner and by the authority prescribed by the new Code for the making of valid new rules and for altering existing rules.

Rules 179 and 180 of the Civil Rules of Practice are however very convenient rules, and, if followed, would markedly diminish the number of conflicts among orders passed by different Courts, as the directions in these rules when followed have the effect of converting the custody Court into the executing Court. I would, therefore, suggest to the Rule Committee to take up this question and frame new rules on the lines of rules 179 and 180, of the Civil Rules of Practice, to avoid as far as possible nice, intricate and difficult questions as regards the conflict of jurisdiction and powers among Courts being litigated in execution proceedings.

KRISHNAN, J. KRISHNAN, J.—As I agree with the judgment of the learned Chief Justice who has dealt with the case very fully, I shall only briefly state my reasons.

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It seems to me that Order XXI, rule 52, Civil Procedure Code, is the provision for the attachment of money or property in the custody of any Court, whether that Court be the same Court as the attaching Court or a different Court. There is no limitation in the point in the wording of the rule and there is no other provision for attachment when the attaching Court and the "custody Court" are one and the same. When the two are the same, it seems to me that, as attaching Court, it will act in the suit in which the attachment order was made and as custody Court, in the suit in which the money or property attached was brought into Court. This is the only distinction that I can see.

When the Court acts as the custody Court, it will decide in the latter suit the questions arising under the proviso to rule 52, such as questions of title arising in claim petitions under rule 58, and if there are attachments on the property by more Courts than one, questions as to which attachment has priority. After deciding these, it will hold the property, as the rule directs, subject to the further orders of the Court whose attachment it has held to have priority, whether it is the same Court or another Court. The position is just the same whether the custody Court is the same Court as the attaching Court or a different Court.

The custody Court has, in my view, nothing to do with the distribution of assets under the Code, as it has to hold the property subject to the further orders of the attaching Court; and section 73 of the Civil Procedure Code has no application to the custody Court. If the property attached has to be sold to convert it into money, the attaching Court will take the necessary steps under the rules for sale in the Code as in the case of any other property attached. But if it is money in the hands of the custody Court, the attaching Court may direct the money to be paid over to itself. It is only when the attaching Court gets the money into its hands, so as to be available for distribution, that section 73, Civil Procedure Code, comes into play; rateable distribution will then have to be given to all decree-holders who have brought themselves under the terms of the section by having applied for execution prior to the receipt of such assets. When the attaching Court and the custody Court are the same, it seems to me that an order should be made by the Court as attaching Court for transferring the

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money from the suit in which it came into Court to the suit in which the attachment took place. It is only when this is done, the Court, as attaching Court, can properly be said to have received the assets and to hold it within the meaning of section 73; and decree-holders who have attached prior to that are entitled to rateable distribution.

This view, it seems to me, is in complete accord with the provisions of the Code and applies the statutory rule of rateable distribution to all cases, including property in the custody of a Court. There is no necessity to treat the case of such property as different from the case of other properties as regards rateable distribution and as an exception to the general rule and to rely on equitable principles as was done in *Thakurdas Motilal v. Joseph Iskender*(1) and *Katum Sahiba v. Hajee Badsha Sahib*(2). In fact when there is a statutory rule governing the case, there is no room, in my view, for the application of equitable principles and with all respect to the learned Judges in the Calcutta and Madras cases, I agree that they should not be followed. The Code makes no difference between property in the custody of the attaching Court itself, property in the custody of other Courts or in the custody of public officers, and property in the possession of other persons, as regards the method of distribution; the difference under the Code is in the method of attachment and in the mode of decision as to its effect and validity. After the assets have been realized by the executing Court, section 73 of the Civil Procedure Code applies to all of them equally. If the other decree-holders cannot bring themselves within the section, the decree-holder under whose attachment the assets were realized must be paid in full, for section 73 is the only provision which enables other decree-holders to share with him. [See *Umma Venkataratnam & Co. v. Adamji Usman & Co.*(3).]

Applying this view to the present case, the Second before us fails and I agree to its being dismissed with costs.

(1) (1917) I.L.R., 44 Cal., 1072.

(2) (1915) I.L.R., 38 Mad., 221.

(3) (1919) I.L.R., 42 Mad., 692.

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shipper is not entitled to refund of the advance freight nor is the shipowner	
bound to send the goods to their destination by another vessel at his	
expense. <i>Allison v. Bristol Marine Insurance Company</i> , (1876) App. Cas.	
209, and <i>Hansen v. Dunn</i> , (1906) 11 Com. Cas. 100; s.c., 22 L.T.R., 458,	
followed. Where a bill of lading provided that the shipowner should not be	
liable for loss or damage occasioned, <i>inter alia</i> , by 'arrest and restraint of	
princes, rulers or people,' Held that the requisition of the ship by the	
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<i>Krishna Naik & Sons v. Ceyser Irwines & Co., Ltd.</i> ... (1921) I.L.R.,	
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be adopted so during his minority. <i>Chidambara Pillai v. Rangasami Naicker</i>	
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subsequent to partition in name of a member—Right of a divided member to	
share in enfranchised lands—Onus of proof.] If a divided member of a	
Hindu family claims to share in service inam lands, which belonged to the	
family but were, subsequent to a partition in the family, enfranchised in the	
name of a member who was the office-holder at the time of the enfranchise-	
ment, the onus lies on the claimant of proving not only that he is a member	
of the original service family but also that the inam was excluded from the	

operates, to carry the security with it. Where certain mortgage-debts, book-debts and promissory notes were transferred by way of gift under an unregistered document, the gift of the mortgage-debts, was invalid under section 123 of the Act, but the gift of book-debts and promissory notes fell under Chapter VIII of the Act (Transfer of actionable claims) and not under Chapter VII (Gifts), and was valid and took effect. Where there is a gift of immovables and moveables but the former fails owing to want of registration, the latter may nevertheless be held good, the question to be considered being whether the latter was conditional on the validity of the former. *Godman v. Godman* (1920) P., 261, followed; *Pothi Naicken v. Naganna Naicker* (1916) 30 M.L.J., 63, distinguished.

Perumal Ammal v. Perumal Naicker ... (1921) I.L.R., 44 Mad., 196

APPELLATE—CRIMINAL.

Before Mr. Justice Abdur Rahim.

PONNUSAMI PILLAI, PETITIONER (ACCUSED IN C.C. No. 1 of 1919, ON THE FILE OF THE VILLAGE MAGISTRATE OF VILLAI ADAMBAR).*

1920,
October, 8.

Regulation XI of 1816 (Madras), sec. 10—Village magistrate—Power to sentence confinement—Village choultry—Confinement to be only in village choultry and nowhere else—Sentence of confinement before a temple, legality of.

Under section 10 of Madras Regulation XI of 1816, the village magistrate has power to pass sentence of confinement only in the village choultry and not in front of a temple, although a public place.

Criminal Revision Petition No. 190 of 1896, 1 Weir, 924, referred to.

PETITION under section 107 of the Government of India Act and clause 27 of the Letters Patent praying the High Court to revise the Judgment of RAMASWAMI AYYAR, the Village Magistrate of Vellai Adambar, in Calendar Case No. 1 of 1919, dated 31st December 1919.

In this case the village magistrate convicted the accused of the offence of using abusive language, and sentenced him to be placed under confinement for five hours in front of Sri Pidari Amman temple which was said to be a public place in the village. The accused filed a Criminal Revision Petition to the High Court objecting, inter alia, that the sentence was illegal and ought to be set aside.

R. Ganapati Ayyar for petitioner.

V. L. Ethiraj for Public Prosecutor.

ORDER.

ABDUR RAHIM, J.—Section 10 of Regulation XI of 1816 authorizes the village magistrate to sentence a person guilty of certain offences of a trivial nature to confinement in the village choultry for a period not exceeding 12 hours. In this case the accused was sentenced and placed in confinement in front of a temple which is said to be a public place in the village of Vellayatham-but. The village magistrate has power only to enforce the sentence of confinement in the village choultry and nowhere else [see *Criminal Revision Petition No. 190 of 1896(1)*]. The sentence is therefore set aside.

ABDUR
RAHIM, J.

K.R.

* Criminal Revision Petition No. 263 of 1920.
(1) 1 Weir, 924.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sadasiva Ayyar.

SUBRAMANIA MUDALIAR (PLAINTIFF), APPELLANT,

v.

RANGANATHAN CHETTIAR AND OTHERS
(DEFENDANTS), RESPONDENTS.*

Hindu Law—Inheritance—Mitakshara—Bandhus—Atma bandhus—Preferential heir—Atma bandhus ex parte paterna preferential to Atma bandhus ex parte materna—Father's sister's son's son preferable to mother's brother.

Under the Mitakshara Law, among Atma bandhus of a deceased male owner those that are related to him *ex parte paterna* are preferential heirs to those that are related to him *ex parte materna*. The son of the father's sister's son of the deceased male owner is a preferential heir to his mother's brother. *Sundrammal v. Rangasami Mudaliar*, (1895) I.L.R., 18 Mad., 193; *Balusami Pandithar v. Narayana Rau*, (1897) I.L.R., 20 Mad., 349, followed.

APPEAL against the decree of A. N. ANANTARAMA AYYAR, the Subordinate Judge of Tinnevely, in Original Suit No. 6 of 1911.

T. R. Ramachandra Ayyar, S. Muthayya Mudaliyar and A. Subrahmanya Ayyar for the appellant.

T. V. Muthukrishna Ayyar for respondents.

The following is the full text of the judgment, dated 22nd February 1913 :—

MILLER, J. MILLER, J.—The only question with which we have to deal in this appeal is whether the plaintiff or the tenth defendant is the nearest reversionary heir of one Sankara Murthi Mudaliyar.

The plaintiff is the son of Sankara Murthi's father's sister's son and the tenth defendant is the brother of Sankara Murthi's mother. The Subordinate Judge has decided the question in favour of the tenth defendant, holding that the maternal uncle, being nearer in blood, and being a person who would offer oblations to ancestors of the deceased, must be preferred to the plaintiff who makes no such offerings. The Subordinate Judge, rightly, I think, holds that the plaintiff and the tenth defendant are both Atma bandhus of Sankara Murthi; that does not appear, judging from the judgment, to have been questioned

* Appeals Nos. 65 and 82 of 1912.

before him. Before us Mr. Ramachandra Ayyar suggested the possibility of regarding the plaintiff as Pitru bandhu, but I am unable to accede to that suggestion, and in the face of *Sundrammal v. Rangasami Mudaliar*(1), to which I refer immediately, it cannot be held that the father's sister's grandson is merely on the ground of remoteness disentitled from succeeding before nearer relatives in the maternal line.

Both competitors then being in the class of Atma bandhus, the matter is, in my opinion, concluded by authority in this Court. In *Sundrammal v. Rangasami Mudaliar*(1) and *Balusami Pandithar v. Narayana Rau*(2) it was held that bandhus *ex parte materna* are to be postponed to those *ex parte paterna*. The contest in the former case between the plaintiff and the third defendant closely resembles the position in the case before us and there (vide page 199) preference was given to the more distant paternal kinsman over the nearer relative on the maternal side.

It was contended by Mr. Ramachandra Ayyar that the decision may be supported on the ground that in that case the heir preferred by the Court was a person who offered oblations to paternal ancestors of the deceased, while his competitor offered oblations only to the maternal ancestors.

If that were the sense in which the learned Judges were using the Latin phrases "*ex parte paterna*" and "*ex parte materna*" I have no doubt they would have said so, and as they make no reference whatever to the superior spiritual efficacy of oblations offered to paternal ancestors of the propositus I have no doubt that they did not base their decision on any such consideration.

Mr. Muthukrishna Ayyar, on behalf of the ninth defendant, in supporting the case of the tenth defendant, contended that the decision as between the plaintiff and the third defendant in *Sundrammal v. Rangasami Mudaliar*(1) was unnecessary for the decision of the case; but the case for the appellants, fourth and fifth defendants, was that the alienation in their favour had the assent of the third defendant, and in that way it became necessary for them to establish the position of the third

(1) (1895) I.L.R., 18 Mad., 193.

(2) (1897) I.L.R., 20 Mad., 342.

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defendant as the nearest reversioner; and it cannot be said that the rule laid down was an obiter dictum.

In *Balysami Pandithar v. Narayana Rau*(1) the preference of bandhus *ex parte paterna* is said to be a fundamental principle of the law, and the learned Judges support their statement of the law by a reference to *Sundrammal v. Rangasami Mudaliar*(2) and to a text of the *Saraswati Vilasa* from which they draw an inference opposed to the maternal bandhus.

It is urged, as detracting from the authority of this case, that the decision was also based on other grounds, but that of course does not entitle us to treat this particular ground as unnecessary for the disposal of the matter.

It is also suggested that the rule is not based on the authority of the Smritis or any of the accepted commentaries, but that, if that is so, is not a sufficient reason why we should refuse to follow the course of decisions in this Court. As a matter of fact the result at which I arrive in the present case is in accord with the views of several learned writers on this very difficult branch of Hindu Law. The Subordinate Judge was in error in treating this decision as of no authority on the question in dispute.

Holding that we are concluded by the case to which I have referred, and in the absence of any case in this Court to the contrary, I would allow the appeal, decide the first part of the first issue in the affirmative, and remand the suit for disposal according to law.

Costs will abide the result.

SADASIVA
AYYAR, J.

SADASIVA AYYAR, J.—The question for decision in this case, as stated by my learned brother, belongs to a "very difficult branch of Hindu Law." As Mayne says "The order of succession among bandhus under the Mitakshara Law is very obscure; and the principle upon which any case is to be decided is far from clear." In *Muttusami v. Muttukumarasami*(3) MUTTUSWAMI AYYAR, J., laid down four conclusions:

"(i) that those who are bhinnagotra sapindas, or related through females born in or belonging to the family of the propositus, are bandhus; (ii) that as stated in the text of *Vridha Satatapa* or

Baudhayana they are of three classes, viz., *Atma bandhus*, *Pitru bandhus* and *Matru bandhus* and succeed in the order in which they are named; (iii) that the examples given therein are intended to show the mode in which nearness of affinity is to be ascertained; and (iv) that as between bandhus of the same class, the spiritual benefit they confer upon the propositus is as stated in *Viramitrodaya*, a ground of preference."

On the principles above enunciated I intend to make some comments, as they are necessary for making clear the reasons for my conclusions in the present appeal. The Sanskrit sloka on which all the remarks of all the ingenious text writers and commentators are based is, in my opinion, a spurious one. As usual with such spurious texts the authorship is not definitely stated, some saying that it is a text of *Vridha Satatapa* and some that it is a text of *Baudhayana*. The text is not, I believe, found in any work acknowledged as a complete or fairly complete smriti of *Vridha Satatapa*. As usual with these spurious texts, the smriti to which they belong is attributed to a rishi having the same name as that of an acknowledged great rishi, but with the word "Vridha" or "elder" attached to the name so that no objection might be raised that the text is not of the well known rishi of that name. And so, we have spurious texts of *Vridha Manu* and other *Vridha* rishis. As Mr. Mayne shrewdly points out, the text in question omits mention of much nearer *Atma bandhus* of the propositus, such as his sister's son or daughter's son's son or maternal grandfather or maternal uncle. As I pointed out in the course of the arguments, the text is illogical, incomplete and inconsistent. However, it has to be accepted though, in my opinion, it is not a shastraic text; for I am bound by the authority of the Privy Council not to rely upon the more ancient and authoritative shastras where the law has been settled by the Courts according to the custom and practice of the Hindu community resident in a certain province, even though the custom is based upon less authoritative treatises. (The mother's sister's son is unconditionally stated to come under the term "bhinna gotrasapinda," though very frequently he is of the same gotra as the propositus, that is, when the mother and her sister have married husbands of the same gotra.) Though the bandhus are classified as *Atma bandhus*, *Pitru bandhus* and *Matru bandhus*, all three come in as heirs, because

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(1) (1897) I.L.R., 20 Mad., 342.

(2) (1895) I.L.R., 18 Mad., 193.

(3) (1893) I.L.R., 16 Mad., 23.

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they are bandhus of the propositus himself, though the first class alone is technically called Atma bandhus (or own bandhus). With the greatest deference, the fourth proposition laid down by MUTTUSWAMI AYYAR, J., viz., that between bandhus of the same class the spiritual benefit they confer on the propositus is a ground of preference, does not commend itself to me, though guarded obiter dicta to the same effect are found in other learned judgments also, both earlier and later in date than *Muttusami v. Muttukumarasami*(1). Some of the Pitru bandhus and Matru bandhus mentioned in the text itself confer no spiritual benefit whatever on the propositus, and I fully agree with those judicial observations which hold that according to the Mitakshara (and ignoring the Benares branch of the school) the question of spiritual benefit or of death pollution or of the right of performance of obsequial ceremonies should not be introduced when considering the question of heirship. I go further and say that the introduction of such questions would lead only to inextricable confusion. The other three propositions laid down by MUTTUSWAMI AYYAR, J., have been too well established now to allow of being controverted or overthrown by judicial pronouncements.

Two other propositions also have been established, viz., that all female bandhus in the Madras Presidency (except the daughter) must be postponed to all male bandhus, and that agnates to the fourteenth degree take precedence of all male and female bandhus except the daughter and daughter's son, whose exclusion was recognized as so outrageous even by the mediaeval commentators that they were obliged to bring them in by a sort of special pleading based on special texts. The enumeration in the Vridha Satatapa's text being clearly not exhaustive, several bandhus have been brought in by the decisions of Courts even in precedence of three Atma bandhus specially mentioned in the text (the said three being the father's sister's son, the mother's sister's son and the mother's brother's son). When we once bring in others, Atma bandhus before Pitru bandhus it seems logical to hold that all Atma bandhus (lower in status to the three specially mentioned) should also be exhausted before even

(1) (1898) I.L.R., 16 Mad., 23.

the first. Pitru bandhu could come in. The only convenient and logical principle seems to me to so bring in all the Atma bandhus, though removed to the extreme limit of five degrees from the propositus, before bringing in a Pitru bandhu, though the latter may be removed by a less number of degrees from the propositus, and (by the same analogy) to bring in all the Pitru bandhus even up to the fifth degree before a Matru bandhu, though the latter is removed by less than five degrees. The table given in Mayne, paragraph 579, is clearly inaccurate, and it is misleading in some particulars. It puts down the maternal grandfather as No. 17 and the maternal uncle as No. 9, whereas *Krishnayya v. Pichamma*(1) and *Chinnammal v. Venkatachala*(2) contain clear dicta that the maternal grandfather ranks higher than a maternal uncle when the question of heirship is involved. Mayne's table puts the maternal uncle's son again as No. 10 and the maternal aunt's son as No. 11 which is opposed to *Appandai Vathiyar v. Bagubali Mudaliyar*(3). Again, Mr. Mayne does not carry the three classes of bandhus up to the fifth degree from the propositus in most cases and hence his list is incomplete. I am therefore inclined to agree with the learned leader writer in 9 Madras Law Journal at page 69 who states that the 32 Atma bandhus (10 in the line of the propositus, 11 in that of the propositus' father and 11 in that of the propositus' grandfather) should be exhausted before the maternal grandfather (the first of the Atma bandhus *ex parte materna* or the maternal uncle (the second of the Atma bandhus *ex parte materna*) could come in as heir. The plaintiff in this case, belonging to one of the 11 Atma bandhus *ex parte paterna*, comes in therefore before the maternal uncle. I am fortified in this view by *Sundrammal v. Rangasami Mudaliar*(4) and *Ram Bharos v. Ram Parshad*(5). This is, therefore, the law which I as a Judge feel myself bound to lay down, though it is not the shastra according to my view. In the very recent case, *Buddha Singh v. Laltu Singh*(6), the learned Judges held that the word 'son' is usually used in the

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(1) (1898) I.L.R., 11 Mad., 287.
(3) (1908) I.L.R., 33 Mad., 439.
(5) (1906) 3 A.L.J., 461.

(2) (1892) I.L.R., 15 Mad., 421.
(4) (1895) I.L.R., 18 Mad., 198.
(6) (1912) I.L.R., 34 All., 663.

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Ayyar, J.

Mitakshara so as to include 'son' 'grandson' and 'great-grandson' and if so, the paternal aunt's son's son will come within the term 'paternal aunt's son' and must therefore come before the maternal uncle and his santanam. The Mitakshara contravenes the shastras (and ordinary rationalistic principles) in two ways: (a) by bringing in as heirs very remote agnates before near bandhus, like the sister and sister's son, and (b) by excluding all females (except the daughter) from succession as bandhus till males are exhausted. In finding out the order of succession, therefore, according to the Mitakshara, these two irrational principles become the foundation of all further reasoning, and it is no wonder that this branch of law based upon reasons themselves founded upon unreason is most unsatisfactory. The obvious course of remedying the confused and unshastraic character of this branch of law is by resort to legislation which must be initiated by the enlightened Hindu members of the Bar and of the Legislative Council. The uncertainty and confusion at present existing no doubt favours the cultivation of the legal acumen of the Bar and the Bench [see the very acute judgment, if I may be permitted to say so, of Piggot, J., in *Buddha Singh v. Lattu Singh*(1)] but it is clearly detrimental to the permanent interests of the Hindu public.

In the result I agree in the orders proposed by my learned brother in the matter of the disposal of this Appeal.

K. R.

(1) (1912) I.L.R., 34 All., 663.

APPELLATE CIVIL.

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

CHINNA PICHU IYENGAR ALIAS K. VEERARAGAVA
IYENGAR (PLAINTIFF), APPELLANT,

1920,
July 29.

v.

PADMANABHA IYENGAR AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Hindu Law—Inheritance—Bandhus—Heritability, test of—Sapinda relationship—Mutuality—Paternal grandfather's sister's great-grandson, whether a heritable bandhu.

Under the Mitakshara Law, the great-grandson of the paternal grandaunt of the last male owner is not a heritable bandhu of the latter.

Umaid Bahadur v. Udoi Chand, (1881) I.L.R., 6 Calc., 119 (F.B.) and *Babu Lal v. Noulla Ram*, (1895) I.L.R., 22 Calc., 389, followed; *Buddha Singh v. Lattu Singh*, (1915) I.L.R., 37 All., 604 (P.O.), distinguished; *Subrahmaniamudaliar v. Ranganathan Chettiar*, (1921) I.L.R., 44 Mad., 114, referred to.

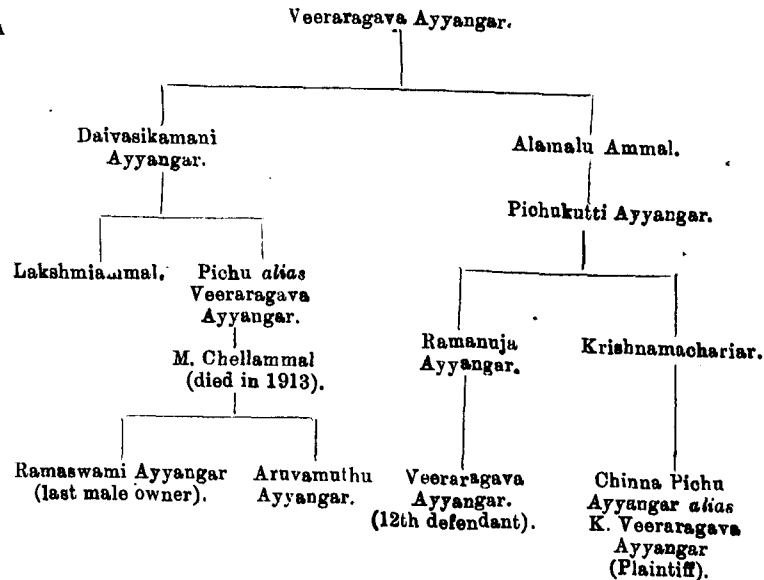
SECOND APPEAL against the decree of MUHAMMAD FUZZ-UD-DIN, Subordinate Judge of Tinnevely, in Appeal No. 53 of 1917, preferred against the decree of T. N. KRISHNAMURTI VAJAPAYAR, Additional District Munsif of Tinnevely, in Original Suit No. 266 of 1914.

This is a suit by the plaintiff for recovery of certain properties as the reversionary heir, along with the twelfth defendant, to the estate of one Ramaswami Ayyangar, who was the last male owner of the suit properties, and died issueless leaving his mother who died in 1913 as his heir. The suit was to recover a half-share in the suit properties on the death of the mother, who had inherited the properties from her son, and alienated some of them to some of the defendants. The defendants contended inter alia, that the plaintiff was not a heritable bandhu who can succeed to the last male owner under the Hindu Law. Both the lower Courts up held this contention and dismissed the suit. Plaintiff preferred this Second Appeal.

* Second Appeal No. 830 of 1919.

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The relationship of the parties is shown by the following genealogical tree :—



K. R. Rangaswami Ayyangar for the appellant.—The plaintiff is a heritable bandhu within the meaning of the Mitakshara and comes under the category of bandhus specifically mentioned therein. The plaintiff is the father's father's sister's son of the propositus and is specifically mentioned under the class of 'Pitru bandhus.' The term 'son' in this text of the Mitakshara must be taken to include grandson and great-grandson. The Privy Council has held in *Buddha Singh v. Lattu Singh*(1), that the term 'Putra' as used in the Mitakshara must be construed as including sons and grandsons wherever it occurs in the chapter on Inheritance. Though *Buddha Singh v. Lattu Singh*(1) related to agnatic collateral succession, the reasoning is general and is applicable to bandhu succession. This rule of interpretation was applied by SADASIVA AYYAR, J., to a case of bandhu succession, even before the abovementioned decision of the Privy Council: see *Subramania Mudaliar v. Ranganathan Chettiar*(2).

Even if the plaintiff is not included among the heirs specifically mentioned in the Mitakshara, he is a bandhu of the deceased within heritable limits; the bandhus mentioned

in the Mitakshara are only illustrative and not exhaustive: see *Grihdhari Lall Roy v. The Bengal Government*(1). Plaintiff is a bhinnagotra sapinda of the deceased: both are within five degrees of the common ancestor; they are therefore mutually related as sapindas. Mutuality will be wanting only when one is within the degree of sapinda relationship from the common ancestor and the other is not. In this case both are within five degrees and have mutuality of sapinda relationship; the conditions as to heritability laid down in *Ramchandra Martand Waikar v. Vinayek Venkatesh Kothekar*(2), are satisfied. There is no warrant for the further condition laid down by Dr. Sarwadhikari, viz., that the claimant must be so related to the propositus that the latter is in the line of the maternal grandfather of either the claimant, or of his father, or his mother: see Dr. Sarwadhikari on "Inheritance," page 699. A similar statement of the law is contained in *Umaid Bahadur v. Udoi Chand*(3), but is an obiter dictum, and there is no suggestion in the case of any basis for such a proposition. *Ramchandra Martand Waikar v. Vinayek Venkatesh Kothekar*(2) only shows that sapindaship must be mutual in the sense that both the claimant and propositus must be within the degree of sapinda relationship from the common ancestor, and the conclusions summarised at page 420 preclude all possibility of importing any further conditions as to heritability beyond the mutuality already explained. *Umaid Bahadur v. Udoi Chand*(3) is not approved of by Dr. Ghose: see Dr. Ghose's "Principles of Hindu Law," page 146 (Third Edition). See also Trevelyan on Inheritance, page 38, the article on Succession of Cognates in 8 Madras Law Journal, page 58, at pages 70—72 and 99, and the article on Bandhus in 9 Madras Law Journal, 147 at 151.

S. Srinivasa Ayyangar for respondents.—As regards the first contention of the appellant, there is no warrant to extend the dictum in *Buddha Singh v. Lattu Singh*(4), to cases of cognate succession. The observations of the Privy Council, at page 623, show that their Lordships confined their decision to cases of collateral succession among agnates. Again, the text

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(1) (1868) 12 M.I.A., 448. (2) (1915) I.L.B., 42 Cal., 384 (P.C.).

(3) (1881) I.L.B., 6 Cal., 119 (F.B.).

(4) (1915) I.L.B., 37 All., 604 (P.C.) at 616.

(1) (1915) I.L.B., 37 All., 604 (P.C.) at 616. (3) (1921) I.L.B., 44 Mad., 114.

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enumerating the three classes of bandhus is the text of Satatapa, and the sense in which Vignaneswara uses the term 'Putra' cannot be ascribed to Satatapa's text. The observations of SADASIVA AYYAR, J., in *Subramania Mudaliar v. Ranganathan Chettiar*(1), are dissented from in *Umashankar Prasad Parasari v. Mussamat Najeswari Koer*(2).

As regards the second contention: the plaintiff does not come under any of the three classes of bandhus mentioned in the Mitakshara. The classes mentioned there cannot be added to [see *Ramchandra Martand Waikar v. Vinayek Venkatesha Kothekar*(3)], though the enumeration of individuals in each class is not exhaustive.

There is no mutuality of sapindaship between the propositus and the claimant, even if the latter (claimant) be taken as a Pitru bandhu of the former, the former (propositus) is neither Atma bandhu, Pitru bandhu or Matru bandhu of the latter. The propositus is outside the pale or class of bandhus referred to in the Mitakshara. Hence, mutuality is wanting in this case, and cannot exist unless the conditions laid down in *Umaid Bahadur v. Udoi Chand*(4), and by Dr. Sarwadhikari, are fulfilled. Dr. Ghose is wrong in saying in his book that *Umaid Bahadur v. Udoi Chand*(4), is not followed in *Babu Lal v. Nanku Ram*(5), for it is expressly approved and followed there. The Privy Council in *Ramchandra Martand Waikar v. Vinayek Venkatesha Kothekar*(3), approves of *Umaid Bahadur v. Udoi Chand*(4), and adopts the statement of Dr. Sarwadhikari as a correct exposition of the law.

K. R. Rangaswami Ayyangar in reply.—Though *Buddha Singh v. Lattu Singh*(6), related to agnatic succession, the reasoning at page 616 is of general application. See also a passage to similar effect in *Umaid Bahadur v. Udoi Chand*(4), quoted with approval by the Privy Council in *Ramchandra Martand Waikar v. Vinayek Venkatesha Kothekar*(3). Though the text specifying the bandhus is taken from Satatapa by Vignaneswara, the language must be construed as if it were the latter's own, if the term 'Putra' was used in a

(1) (1921) I.L.R., 44 Mad., 114.

(2) (1918) 3 Patna L.J., 663.

(3) (1915) I.L.R., 42 Cal., 384 (P.C.) at 417.

(4) (1881) I.L.R., 6 Cal., 119 (F.B.).

(5) (1895) I.L.R., 22 Cal., 339.

(6) (1915) I.L.R., 37 All., 604 (P.C.).

different sense by Satatapa from his own, Vignaneswara would have indicated the same. In *Umashankar Prasad Parasari v. Mussamat Najeswari Koer*(1), MULLICK, J., differs, from JWALA-PRASAD, J., and disapproves of the view of Dr. Sarwadhikari. The dictum in *Umaid Bahadur v. Udoi Chand*(2), is clearly an obiter dictum. The only condition laid down by the Privy Council in *Ramchandra Martand Waikar v. Vinayek Venkatesha Kothekar*(3), exists in the present case.

NAPIER, J.—In this suit the plaintiff claims to be entitled as an heir to a moiety of the estate of one Ramaswami Ayyangar, deceased, and to set aside certain alienations as not binding on him. The sole question before this Court in Second Appeal is whether the plaintiff is a heritable bandhu and is entitled to the estate of the last male owner.

The District Munsif has found, and there is no dispute on this point, that the last male owner is the plaintiff's paternal grandfather's mother's brother's grandson and has held that as such he is not entitled to inherit. The lower Appellate Court accepted that view.

It is argued before us that the statement to this effect in Dr. Sarwadhikari's book on Hindu Law is not correct and that even if it was thought good law previously the decision of the Privy Council in *Buddha Singh v. Lattu Singh*(4), renders this view no longer tenable. I do not propose to consider the principles underlying sapinda relationship on which this plaintiff is excluded. It seems to me sufficient to say that the view taken by this learned text writer is supported by a decision of the Calcutta High Court as long ago as *Umaid Bahadur v. Udoi Chand*(2). In that case the question which is at issue here was not directly at issue, but the Full Bench used this relationship as an illustration of a case in which Sapindaship did not exist and the principle they laid down was as follows:

"Although *F* is within six degrees from the common ancestor, yet *B* (the propositus) not being a descendant of the line of the maternal grandfather, either of *F* or of his father or mother, they are not sapindas of each other."

F in the Calcutta case would represent the plaintiff in this case. It is contended before us that this dictum is obiter which

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(1) (1918) 3 Patna L.J., 701.

(2) (1881) I.L.R., 6 Cal., 119 (F.B.).

(3) (1915) I.L.R., 42 Cal., 384 (P.C.).

(4) (1915) I.L.R., 37 All., 604 (P.C.).

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is true. But it is used by the Bench as axiomatic of the principles governing the relationship between the bandhus. Mr. Srinivasa Ayyangar for the respondents finds authority for it in Chapter II, section 6, placitum 1, of the Mitakshara. His argument is that cognates to be heirs must be one of the three classes referred to in the passage, i.e., related to the person himself or to his father or to his mother.

He admits that the persons enumerated in the placitum can be extended but he contends that the classes cannot be extended. The appellant contends that on a proper reading of the passage the plaintiff does come within the class.

I can only deal with this question on authority. If I found that the dictum in *Umaid Bahadur v. Udoi Chand*(1) had ever been doubted or departed from the matter would be different. But when I find it treated as axiomatic and when there is no case in which it has ever been doubted I cannot treat it as a mere obiter dictum.

In a later case—*Babu Lal v. Nanku Ram*(2)—*Umaid Bahadur v. Udoi Chand*(1) and the rule expounded in Dr. Sarwadhikari's book to the same effect were referred to with approval and the principles underlying bandhu relationship laid down in that case accepted. It was suggested before us that the decision in *Umaid Bahadur v. Udoi Chand*(1) was peculiar to Calcutta. But *Babu Lal v. Nanku Ram*(2) shows that it is based on the Mitakshara. Unless therefore a different view has to be taken, based on the authority of the Privy Council in *Buddha Singh v. Laltu Singh*(3), the law laid down in *Umaid Bahadur v. Udoi Chand*(1) must, I think, be followed. The appellant contends that the decision of their Lordships in that particular case, that the term 'Putra' includes grandson and great-grandson, must be generally applied and relies on a passage at page 616. The words are:

"Having regard to the fact that this great legist, whose logical acumen judging from his work seems to have been remarkable, has used the term 'Putra' in previous parts of his book on inheritance in a comprehensive and generic sense, their Lordships find it difficult to conceive why he should arbitrarily and without any explanation have used the word towards the end in quite a different and restricted sense or why, if his intention was to confine the

(1), (1881) I.L.R., 6 Calo., 119 (F.B.).

(2) (1895) I.L.R., 22 Calo., 339.

(3) (1915) I.L.R., 37 All., 604 (P.C.).

descent in the case of collaterals to the actual sons of brothers and uncles, he did not employ terms which would have exactly conveyed his meaning, such as *atmaja* or *auras*, which their Lordships understand mean 'son of one's loins.'"

He contends that their Lordships intended to rule that in the Mitakshara, whether the words of the commentator or an original text are being construed, the word 'Putra' must always include grandson and great-grandson. This is a very extreme contention. Their Lordships in that case were not dealing with sisters' or aunts' sons but with the case of sons *ex parte paterna*. It seems to me that the language of their Lordships at page 623 is the real summing up of their Lordships' decision. It is as follows:

"They have already given reasons for holding that in the Mitakshara, as expounded in the Benares School, the word 'Putra,' and its synonym employed by Vignaneswara in connexion with brothers and uncles must be understood in a generic sense as in the case of the deceased owner, and that the descendants in each ascending line, up to the fixed limit, should be exhausted at any rate to the third degree, before making the ascent to the line next in order of succession."

Their Lordships were undoubtedly dealing with a case of succession among agnates as laid down in section 5 of Chapter II and it is, if I may say so, perfectly understandable that where the word 'Putra' is being used in connexion with sons of males it should always be given an extended meaning to include grandsons and great-grandsons. But very different considerations arise in a case of succession of bandhus, and I do not think we are entitled from the general language used by the Privy Council on one page to apply the principles enunciated with regard to agnate's succession to a case of cognate kindred where such application would result in the destruction of the principle to be found in the section dealing with the succession of cognate kindred. There must surely be a profound distinction between relationship in one gotra and the relationship in persons belonging to a different gotra. I cannot therefore hold that the decision of their Lordships in *Buddha Singh v. Laltu Singh*(1) has created a law of succession among cognates different from that which seems to have been accepted for a

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great many years. That is the view of the District Munsif in this case and I see no reason to doubt that it is correct.

I would dismiss the second appeal with costs : one set.

SADASIVA AYYAR, J.—The facts have been set out in the judgment of my learned brother which I have had the advantage of reading before writing this opinion of mine. I have considered in *Subramania Mudaliar v. Ranganathan Chettiar*(1) the sloka about Atma bandhus, Pitru bandhus and Matru bandhus which is attributed to Baudhayana by one commentator and Vridha Satatapa by others. I have expressed my considered opinion in that case that the sloka is a childish and spurious text and that it is an illogical, incomplete and inconsistent classification of bandhus. Mr. S. Srinivasa Ayyangar, with great legal acumen and a wealth of legal terms of highly subtle meaning, tried to establish that the classification was not so illogical or inconsistent as I thought. I can only say that he has merely confirmed me in my view, though it may be that the subtlety and (what he called) the intricacy of the ideas involved in the classification make it so elusive as to escape the grasp of ordinary minds including my own.

As regards *Umaid Bahadur v. Udoi Chand*(2) I recognize that it contains the opinion of a Full Bench of five Judges of whom Mr. Justice ROMESHCHANDAR MITTER was one. But as my learned brother points out, the passage in that judgment of the Full Bench relevant to the question which we have to consider is an obiter dictum. There is no discussion of the subject, and the obiter dictum is laid down as if it is an axiomatic truth. In the phrase 'maternal grandfather either of F or of his father and mother,' found in the relevant passage, the word 'and' seems to be a clerical error for 'or.' The enumeration (in this sentence of the judgment) of the persons within whose category the male claimant's male ancestor (who is the nearest common male ancestor of the propositus and the claimant) should be found, in order that the male claimant can be recognized as a heritable male bandhu, is very incomplete. The persons enumerated are : (1) The maternal grandfather of the claimant, (2) the maternal grandfather of his father and (3) the maternal grandfather of his mother (the claimant being

(1) (1921) I.L.R., 44 Mad., 114.

(2) (1881) I.L.R., 6 Cal., 119 (F.B.).

lettered F in the tree found at the end of the judgment). The Atma bandhus, Pitru bandhus and Matru bandhus, as given by the text already referred to, include the descendants not only of the three ancestors mentioned in the above sentence in *Umaid Bahadur v. Udoi Chand*(1) (which is the first sentence in the last paragraph of the judgment at page 125) but also of several others. The full enumeration of the male ancestors of a claimant F (whose descent is traced through a female or females from the common male ancestor) should therefore have been as follows (confining ourselves to that text for the moment) :

	Class.	Remarks.
1. F's paternal grandfather	Atma bandhus.	
2. F's maternal grandfather		
3. F's father's paternal grandfather	Pitru bandhus.	
4. F's father's maternal grandfather		
5. F's mother's paternal grandfather	Matru bandhus.	
6. F's mother's maternal grandfather		

The male heritable bandhus should be found among the descendants of these six ancestors, if the text is taken to impose a further restriction on the number of the heritable bandhus than the restriction already imposed by the general rule of restriction, that where the claimant claiming through a common male ancestor has female or females intervening in the line of descent he should be within 5 degrees of the common male ancestor. It is clear that several bandhus nearer than some of those enunciated in the text, such as maternal uncle, sister's son and son's daughter's son of the propositus, do not find a place in the text. I can only again express my regret that in *Umaid Bahadur v. Udoi Chand*(1) the learned Judges did not even indicate the chain of reasoning by which they arrived at the conclusion, that the enumeration of bandhus in the text was not merely illustrative but restrictive, and if restrictive how far and on what principles the restriction proceeded. The Atma bandhus mentioned in the text are descended from the paternal or maternal grandfather alone, but it has now been settled by decisions that Atma bandhus might be the descendants of the father, such as sister's son, or even of one's self, such as son's daughter's son.

However, I am reasonably certain that neither the old spurious text, nor the commentators, intended to impose any

(1) (1881) I.L.R., 6 Cal., 119 (F.B.).

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restriction on the number of heritable bandhus based on the limitation of the classes of the (male) ancestors of the claimant (in whose descent there is female intervention) from which ancestors the propositus ought also to be descended. But *Umaid Bahadur v. Udoi Chand*(1) by great ingenuity did derive three such classes as flowing from the text. Mr. Sarvadhikari extended them and such far-fetched deductions remained unquestioned for long. I might here remark that the text classifies only the claimant bandhus of the propositus into three classes. If propositus A is a bandhu (blood relation by cognate affinity) of the claimant B, claimant B is also clearly a bandhu of propositus A. The relation of bandhuship of the claimant to the propositus is alone considered in the text relating to the class of heritable bandhus. But a further ingenuity has been elaborated, namely, that not only should the claimant be a heritable bandhu, that is, a bandhu restricted by the ingeniously evolved limitations deduced from the text, but the propositus must also be a heritable bandhu of the claimant with the same limitations (that is, we must hypothetically assume that the propositus was living and claiming to succeed as heir to the claimant who must be supposed to be dead for that purpose). In other words a principle of so-called "mutuality" was to be further considered in these cases. Ingenuity calculated to make this branch of the law so obscure as to lead to mere gambling in litigation cannot go further than this. I, therefore, consider with the greatest respect that the conclusion in *Umaid Bahadur v. Udoi Chand*(1) is fallacious. As I said in *Subramania Mudaliar v. Ranganatham Chettiar*(2):

"When two irrational principles become the foundation of all further reasoning, it is no wonder that a branch of the law based upon reasons themselves founded upon unreason becomes most unsatisfactory."

But I do not wish to differ from precedents unless I am convinced that any broad principles of equity, justice and good conscience are contravened thereby.

I feel that no such principles are at stake in considering these claims by remote relations to succeed to the property of a deceased man. In olden days when the ties of relationship were

(1) (1881) I.L.R., 6 Cal., 119 (F.B.). (2) (1921) I.L.R., 44 Mad., 114.

very strong, and when agnates even to the fourteenth generation sometimes lived together in one family commensality, the claim of a remote relation to succeed might have a basis in broad principles of justice, equity and good conscience. But in these modern days, when even first cousins rarely live together, I do not see any justice or equity in claims to inherit made by very remote relations and I should be glad if legislation is initiated to prevent claims by bandhus not descended from the propositus himself or his father or his paternal grandfather or his maternal grandfather so that even the persons specially mentioned in the spurious text as Pitru bandhus and Matru bandhus may be excluded.

In the result I agree that the Second Appeal should be dismissed with costs.

K.B.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr Justice
Seshagiri Ayyar.

ATCHAMMA (PLAINTIFF), APPELLANT IN APPEAL NO. 247 OF 1918,

v.

PAPIAH AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act (IX of 1908), sec. 28—Several daughters of a Hindu jointly succeeding to their father's estate—Exclusive possession of one for more than twelve years—Right of survivors, on her death, to the estate by survivorship.

Where, on the death of a Hindu, his daughters jointly succeeded to his estate, but one of them excluded the others from the enjoyment of the estate for more than twelve years and then died, after alienating some of the properties,

Held, in a suit by a surviving daughter against the son of the deceased and the alliances to succeed to the estate by right of survivorship, that with the extinction of the right to joint possession under section 28 of the Limitation Act, the right of survivorship, which is only an accretion to the right to joint possession was also lost. *Katama Natchiar v. Rajah of Shivaganga*, (1868) 9 M.I.A., 539, at p. 611 and *Sachindra Kishore Dey v. Rajani Kant Chuckerbutty*, (1915) 27 I.C., 250, followed.

APPEALS from the decree of G. GANGADHARA SOMAYAJULU, Subordinate Judge of the Temporary Sub-Court at Ellore, in Original Suit No. 5 of 1916.

The facts are given in the judgment of SESHAGIRI AYYAR, J.

* Appeals Nos. 247 and 266 of 1918.

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P. Narayanamurti for appellant in Appeal No. 266 of 1918.—Adverse possession of one of several joint tenants for more than twelve years puts an end not only to the right to joint possession but also the right to succeed by survivorship on the death of the person exclusively enjoying the estate. The right of survivorship is not an independent right, but is only a *jus accrescendi* to the right to joint possession. Where the latter right is extinguished by section 28 of the Limitation Act, there is nothing to which there can be an accretion. Hence, there is no right by survivorship. Reliance was placed on *Katama Natchiar v. The Rajah of Shivagunga*(1), *Sachindra Kishore Dey v. Rajani Kant Chuckerberty*(2), Coke on Littleton, 188 (a), Halsbury, Vol. 24, page 250, Stephen's Commentaries, 16th Edition, Vol. I, page 236, William's Real Property, 21st Edition, page 140, *Bhugwandeem Dooley v. Myna Bare*(3), *Tenkayyamma Garu v. Venkataramanayyamma Bahadur Garu*(4), *Krishnasami Ayyangar v. Rajayopala Ayyangar*(5), and *Amirtolal Bose v. Rajonee Kant Miller*(6).

N. Rama Rao for respondents.—The law of joint tenancy as known to English Law does not apply to Hindus. The right of survivorship is not an incident of joint ownership but is an incident of inheritance: *Dowlut Kooer v. Burma Deo Sahoy*(7).

WALLIS, C.J.

WALLIS, C.J.—In this case the estate of the last male owner descended to his widow and on her death in 1877 to their four surviving daughters. According to the law in this part of India they inherited jointly a woman's estate in their father's property determinable on the death of the last survivor when the succession would devolve on the then next heir of their father, the last male owner. Sundaramma, one of the four daughters, excluded and held adversely to her three sisters and, on the expiration of the statutory period of twelve years, their rights of suit became barred and their rights in the property were extinguished under section 28 of the Limitation Act, IX of 1908. The present plaintiff, one of the excluded sisters, survived Sundaramma who died in 1905 and instituted

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within twelve years the present suit in which she sought to recover the estate by right of survivorship from Sundaramma's alliees and her son, the seventh defendant, who is at once heir to his mother's separate estate and the next reversioner to the estate of the last male owner. At the hearing of the Appeal the plaintiff's claim to the whole of the estate was hardly pressed, but it was contended that though she might have become barred as to her own share and the shares of her excluded sisters she was at any rate entitled to succeed by survivorship to the share of her sister Sundaramma who continued in possession and enjoyment of the estate until her death, on the happening on which event, it was argued, the plaintiff became entitled for the first time to succeed to her share. In my opinion this contention is untenable. It has never, so far as I know, been suggested that a member of an undivided family, who has been excluded for the statutory period, is entitled on the death of any undivided co-parcener leaving no direct heirs to represent him, notwithstanding his own exclusion and the statutory extinguishment of his rights in the joint family property, to succeed with the other co-parceners by right of survivorship to the share of such deceased co-parcener. This contention ignores the fact that this so-called right of survivorship is incident to the right of joint possession and enjoyment of the estate with the others who are jointly entitled and cannot exist separately when the right of joint possession and enjoyment has been lost. This, in my opinion, is a rule of general jurisprudence applicable to all cases of joint tenancy. It is so laid down in Coke on Littleton, 188 (i), where the right of survivorship is treated as a *jus accrescendi* or right of accretion to the existing interest of the surviving joint tenant, and a Latin maxim is cited to the effect that there can be no such right of accretion in the absence of an existing interest.

It has also been expressly applied to India in *Katama Natchiar v. The Rajah of Shivagunga*(1), where the Lords of the Judicial Committee in negating the right of the other co-parceners to succeed to the separate property of a deceased co-parcener lay down that the right of survivorship cannot exist apart from the right of joint possession and enjoyment:

(1) (1863) 9 M.I.A., 543 at 615.

(2) (1915) 27 I.C., 250.

(3) (1867) 11 M.I.A., 487.

(4) (1902) I.L.R., 25 Mad., 678 (P.C.) at 697.

(5) (1895) I.L.R., 13 Mad., 73, 81, 85.

(6) (1875) 15 B.L.R., 10 (P.C.).

(7) (1874) 22 W.R., 54.

(1) (1863) 9 M.I.A., 539 at 611.

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"According to the principles of Hindu Law there is co-partnership between the different members of a united family and survivorship following upon it. There is community of interest and unity of possession between all the members of the family and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession. But the law of partition shows that as to the separately acquired property of one member of a united family the other members of that family have neither community of interest nor unity of possession. The foundation, therefore, of a right to take such property by survivorship fails."

In the present case the plaintiff had no community of interest or unity of possession with her sister Sundaramma at the time of the latter's death and therefore, in their Lordship's language, the foundation of the plaintiff's right to take her sisters' share by survivorship fails. This view is also supported by the decision of JENKINS, C.J., in *Sachindra Kishore Dey v. Rajani Kant Chuckerbutty*(1). It would appear, though it is unnecessary to decide the point, that the effect of the interests of the other sisters being barred and their rights being extinguished under the Limitation Act was to enlarge the estate of Sundaramma and to give her an estate for her own life and the lives of her sisters determinable on the death of the last survivor. I concur in the order proposed by my learned brother.

SESHAGIRI
AYYAR, J.

SESHAGIRI AYYAR, J.—One Veerasalingam died in 1864 leaving a widow and five daughters. The widow, Bangaramma, died in 1877 and on her death one of her daughters, Sundaramma, took possession of the entire estate and was in sole enjoyment of it till she died in 1905. She made various alienations during her lifetime. Defendants Nos. 1 to 6 are the alienees. The seventh defendant is the son of Sundaramma. The plaintiff is the sole surviving daughter of Veerasalingam. She sues for the recovery of the property on the ground that on the death of Sundaramma she became entitled to it by survivorship.

One of the contentions of the defendants was that Veerasalingam was succeeded by a son and that consequently the plaintiff was not the nearest heir to the property being the sister of the last male owner.

(1) (1915) 27 I.O., 250.

The Subordinate Judge held that Veerasalingam died last and we agree with him. The defendants have also raised the plea of limitation. The Subordinate Judge says with reference to it, in paragraph 27 of his judgment, that the plaintiff's right to recover the properties is barred by limitation. He has, however, decreed to her some items of property, apparently on the ground that she succeeded to the estate of her sister by survivorship. The plaintiff has preferred Appeal No. 247 in respect of the items disallowed, and some of the alienees from the seventh defendant's mother have filed Appeal No. 266. Appeal No. 266 was allowed to be argued first as that raised a contention which if successful would render the hearing of the other Appeal unnecessary.

It relates to portions of items 2 and 3. A decree was given to the plaintiff for the other items but as no appeal was preferred by the persons affected we do not think that this is a proper case for exercising our power under Order XLI, rule 33 of the Civil Procedure Code, in their favour.

I shall now consider the plea of limitation. The estate which Sundaramma and the plaintiff had under the Hindu Law was only for life. On their death the grandson, tracing descent from his grandfather, will succeed to the full estate. To him the cause of action would arise, under article 141 of the Limitation Act IX of 1908, on the death of the last of the life-estate holders, namely, the plaintiff. Under the Limitation Act, XIV of 1859, adverse possession acquired against a life-owner was held to bar the reversioner as well. The language of article 141 of the present Act has been advisedly changed and the cause of action against the reversioner starts only on the death of the last life-estate holder.

Now, the question arises whether on the death of Sundaramma, who held adversely to the plaintiff, the latter had any title to succeed to the property by survivorship. Mr. Rama Rao contended that what was lost by the plaintiff was her right of enjoyment along with her sister Sundaramma and that her right of survivorship was unaffected by the adverse enjoyment. Mr. Narayanamurti for the defendants contended that the plaintiff lost both the rights. It was held in *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*(1), after a very elaborate examination of the authorities, by SUTCLIFFE, C.J., and ELLIS, J.,

(1) (1868) 8 M.H.C.R., 424.

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"two or more lawful wives of a Hindu take a joint estate for life in their husband's property with rights of survivorship and of equal beneficial enjoyment."

The Judicial Committee in *Gajapathinilamani v. Gajapathiradhamani*(1) quote with approval this statement of the law. The Privy Council had already held in *Blugwandeem Dorbey v. Myna Bae*(2), that one of the widows had no power of disposition over an estate which she may enjoy conjointly with her co-widow. In *Kuthaperumal v. Venkubai*(3), and in *Musst. Dal Koer v. Musst. Panbas Koer*(4), the same view was expressed. It is now well-settled that co-widows and daughters are on the same footing in this respect.

The characteristics of joint-tenancy have been described by ancient text-writers. In Vol. 2 of Blackstone, page 180, it is stated :

"The properties of a joint estate are derived from its unity which is fourfold: the unity of interest, the unity of title, the unity of time, and the unity of possession, or in other words, joint tenants have one and the same interest accruing by one and the same conveyance commencing at one and the same time and held by one and the same undivided possession."

This definition deals no doubt with a case of conveyance, but there is no reason for holding that cases of inheritance differ in any material particulars from it. The Judicial Committee in *Katama Nutchiar v. The Raja of Shivagunga*(5), applied it to a case of ordinary co-parcenary.

The argument of the learned vakil for the plaintiff is that each one of the characteristics is capable of being separated and enjoyed when occasion arises and that they do not coalesce. On the other hand, Mr. Narayanamurti contended that it is of the essence of this class of rights that they are inseparable and that each of them is dependent on the other. This contention seems to be supported by the authorities.

Coke on Littleton, Vol. II, 138 (a) is the foundation for all the propositions which have been subsequently deduced by writers and recorded in judicial decisions. The law is thus laid down there :

(1) (1877) I.L.R., 1 Mad., 290 (P.O.). (2) (1867) 11 M.I.A., 437.
(3) (1880) I.L.R., 2 Mad., 194. (4) (1904) 8 C.W.N., 639.
(5) (1863) 9 M.I.A., 542.

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"And this is to be observed that there shall be no survivor unless the thing be in jointure at the instant of the death of him that first dyeth ;" for the rule is nihil de re accrescit ei, qui nihil in re quando jus accresceret habet."

In commenting upon it Williams in his Law of Real Property, 21st Edition, page 140, says :—

"As joint tenants together compose but one owner it follows that the estate of each must arise at the same time ; so that if A and B are to be joint tenants of lands, A cannot take his share first and then B come in after him"

and again he says :

"The incidents of a joint-tenancy above referred to last only so long as the joint tenancy exists."

Blackstone comments upon the same passage in these terms—

"This right of survivorship is called by ancient authors the *jus accrescendi* because the right upon the death of one joint tenant accumulates and increases to the survivors."

(See Stephen's Commentaries, 16th Edition, Vol. I, page 236.)

The authorities to which I shall presently draw attention establish that where there is a disruption of the joint-tenancy the right of survivorship goes. For example, where one of the joint tenants releases his interest in favour of the others the joint-tenancy comes to an end and a tenancy in common is created : see *Chester v. Willan*(1).

It has also been held that a joint-tenancy will be put an end to by operation of law, for example, when one of the joint tenants becomes a bankrupt : vide *Thomason and Higgip v. Frere*(2), *Morgan v. Marquis*(3), *Re Butler's Trusts*. *Hughes v. Anderson*(4).

In the latter case a male and a female became joint tenants under a bequest. They subsequently married. The question was whether the female's right of survivorship was lost by this marriage. A strong Bench consisting of COTTON, L.J., LINDLEY, L.J., and BOWEN, L.J., came to the conclusion that it was not lost. BOWEN, L.J., thus states the law :

"It depends on whether the marriage divests the property from the wife and vests it in the husband. If it does then the joint tenancy is severed. If it does not there is no severance."

(1) (1670) 2 Wms. Stand., 96 ; s.c., 85 E.R., 703.
(2) (1908) 10 East, 418. (3) (1933) 9 Exch., 145.
(4) (1888) 39 Ch. D., 234, 274.

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Applying the same principle to the present case, if by virtue of limitation, the right of enjoyment to the exclusion of the plaintiff vested in Sundaramma, the joint tenancy was severed.

This leads me to the consideration of the effect of the law of limitation in this case. Article 127 of the Limitation Act is not in terms applicable because it has been held from the earliest times that widows and daughters taking as joint tenants are not entitled as a matter of right to alienate their share or to enter into a partition. No doubt for the sake of convenient enjoyment they may ask the Court, if they cannot agree among themselves, to allot particular portions of the property for them during their lives. The Madras High Court appears to have gone farther than the other High Courts, but even on the authority of our decisions article 127 of the Limitation Act cannot be applied as between co-widows and daughters. The proper article is 144. That article read with section 28 of the Limitation Act makes it clear that by non-enjoyment for the statutory period the right of survivorship is lost. The expression "the right to such property" in section 28 must include the right to joint enjoyment as well as the right of survivorship. In *Subbammal v. Lakshmana Iyer*(1) the learned Judges of this Court held that the right of survivorship is not separable from the right of enjoyment.

Some argument was based on the decision of the Judicial Committee in *Amirtolal Bose v. Rajoneekant Mitter*(2), and on *Chotay Lall v. Chundoo Lall*(3). In both these cases the question was considered with reference to a right of preference which a married daughter having issue has over barren and unmarried daughters. From the nature of the right it would necessarily follow that the right of survivorship would revive when the preference was gone. I do not think these cases are of any assistance in dealing with this case.

I feel no difficulty in holding that Sundaramma acquired adversely the right of survivorship possessed by her sister. The only doubt in my mind is whether on the death of Sundaramma the succession would be in abeyance until the death of the plaintiff because the grandson under the Hindu Law does not take the inheritance so long as the last life-estate holder is alive.

(1) (1914) 26 M.L.J., 479.

(2) (1875) 15 B.L.R., 10 (P.O.).

(3) (1874) 14 B.L.R., 235, 243.

cf. article 141 of the Limitation ; Act in English Law under similar circumstances a civil death is spoken of as letting in the next heir but I do not think we need apply that principle. In my opinion the analogy of the English Law regarding estates *pur autre vie* can be extended to this case. The estate for the life of her sister which Sundaramma acquired does not come to an end with her death. An estate *pur autre vie* may arise by express limitation or by assignment of an existing life estate (see 24, Halsbury, para. 340). If there can be an assignment of another's estate for life I fail to see why there should not be an acquisition of an estate for the life of another. It is now settled by legislation in England that this estate *pur autre vie* can be bequeathed and would descend in a particular manner to the heir at law or to the personal representative of the holder of the estate. No doubt it will come to an end with the death of the *cestui que vie*; but till his death the legatee, donee or the heir is entitled to possession. The death of the holder of the estate *pur autre vie* does not put an end to it.

Now, applying that analogy to the present case, if Sundaramma by excluding the plaintiff not only acquired a full right of enjoyment of the property but also acquired an estate *pur autre vie*, that is for the life of the plaintiff, this estate would descend to Sundaramma's heirs. This view receives support from the decision of Sir LAWRENCE JENKINS and CHATTERJEE, JJ., in *Satchindra Kishore Dey v. Rajani Kant Chukerbutty*(1). The learned Chief Justice says :

"So far as the original title to a moiety is concerned it is not suggested before us that the claim of the plaintiff could be resisted but it is said that in as much as Harasundari died in 1306 the plea of adverse possession and the consequent extinguishment cannot prevail as to the 8 annas that originally survived to Kasiswari on Harasundari's death. So the problem that arises in this case is what was the effect of adverse possession against the two daughters who succeeded on the death of their father under the Dayabhaga system of law."

Then after discussing some of the cases he concludes : •

"The result appears to me to be that so far as Kasiswari is concerned her right was extinguished not only in the original 8 annas

(1) (1915) 27 I.C., 250.

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that devolved on her but in respect of the whole 16 annas which passed to her and her sister as a single inheritance on the death of their father."

No doubt in the case before the Calcutta High Court the acquirer was a stranger but the principle of that decision seems applicable to the present case.

On the whole I have come to the conclusion, though not without some hesitation, that the true rule is that enunciated by Sir LAWRENCE JENKINS in *Sachindra Kishore Dey v. Rajani Kant Chukerbatty* (1). That view is in accordance with the English authorities to which I have referred. I must therefore hold that plaintiff lost her right of survivorship by the operation of section 23 of the Limitation Act and that this suit so far as a portion of item 2 is concerned should be dismissed.

Appeal No. 266 of 1918 is allowed with costs.

Appeal No. 247 of 1918 is dismissed with costs.

N.R.

APPELLATE CIVIL.

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

THAYYIL MAMMAD AND FIVE OTHERS (PLAINTIFFS),
APPELLANTS,

v.

PURAYIL MAMMAD AND EIGHT OTHERS (DEFENDANTS),
RESPONDENTS.*

Malabar Law—Karnavan of tavazhi making a gift—Gift not questioned even by the last surviving member of the tavazhi—No right of attaladakkam heirs to question gift.

An attaladakkam heir succeeds only to such of the properties of a tavazhi as have not been disposed of by its last members. He cannot therefore question an alienation made by the karnavan of the tavazhi, when the other members had not by any unequivocal act called it into question during their life-time.

SECOND APPEAL against the decree of H. D. C. RILEY, District Judge of North Malabar, in Appeal No. 299 of 1915, against the decree of P. SANKUNNI MENON, District Munsif of Taliparamba, in Original Suit No. 82 of 1913.

(1) (1915) 27 I.O., 250.

* Second Appeal No. 1373 of 1918.

One Ali Kunhi was the karnavan of a tavazhi, in 1907, and the only other member of the tavazhi at that time was one Pukkoya. In November 1907 Ali Kunhi made a gift of some of the tavazhi properties to his children and died in 1909. Pukkoya died in 1911, without questioning the gift. The plaintiffs as the attaladakkam heirs of the extinct tavazhi filed this suit in October 1913 for a declaration that the gift was invalid and not binding on them. The defendants, the donees, pleaded *inter alia* that the plaintiffs' only right as attaladakkam heirs was to succeed to such properties as have been left undisposed of by the tavazhi and that they have no right to question the alienations made by the tavazhi or by its last survivor. Both the Lower Courts upheld the defendants' plea and dismissed the suit. The plaintiffs preferred this Second Appeal.

C. V. Anantakrishna Ayyar for the appellants.

K. P. M. Menon for the respondents.

ABDUR RAHIM, J.—In this appeal the question of law is as to the right of attaladakkam heirs to dispute certain alienations made by the karnavan of a tavazhi who owned the property in dispute when the other surviving member of the tavazhi living at the time did not revoke it by any unequivocal act of his during the life-time of the karnavan or after his death. There is no express authority on the point, but it seems to me all the same that it does not admit of any substantial doubt. In this case there were two members of the tavazhi to which this property belonged and the karnavan for the time being made gifts of some of the properties to his children. The other member of the tavazhi at the time was one Pukkoya. He did not during the life-time of the karnavan take any steps to question these gifts except as regards one item of property, which is not in dispute and with respect to which before his death he had instituted a suit and obtained a decree declaring that the alienation of that item of the family property was invalid. But he did not take any steps to get the rest of the property from the donees.

It was contended by Mr. Anantakrishna Ayyar, the appellants' learned Vakil, that the attaladakkam heirs, that is, the tarwad which would succeed to the property on the death of the

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last surviving member of the tavazhi, were entitled to recover the property from the alienees. The plaintiffs are called attaladakkam heirs, although it appears that their right to succeed to the property on the death of its last surviving member is provided for by a karar which was executed when the tarwad became divided into several tavazhis. I don't think it makes any difference whether the right of the plaintiffs is based on the karar or on the general law which gives to the tarwad the right of succession to the property of a tavazhi which has become extinct. The main argument of Mr. Anantakrishna Ayyar is that the alienation by a karnavan of a Malabar tarwad or tavazhi without such necessity as is recognized by the law is *ab initio* void and the alienee is in the position of a trespasser. The right of the remaining members of the tarwad to the property according to this contention is not in any way affected by the alienation and they can recover the property without seeking to set aside the alienation. His argument is founded on the decisions on the question of limitation whether it is necessary for a junior member of a tarwad or of a reversioner under the ordinary Hindu Law to have a deed of alienation executed by the karnavan or a limited owner like a Hindu widow cancelled and set aside within the period of limitation provided by article 91. There used to be a conflict of decisions on this subject but it has been ultimately ruled by the Privy Council in *Bijoy Gopal Mukerji v. Krishna Mahishi Debi*(1) that it is unnecessary to have the alienation cancelled and set aside in such cases. Their Lordships say that by instituting a suit for possession a reversionary heir sufficiently elects to avoid the transaction and it is not necessary for him to have the deed set aside by any act previous to the institution of the suit. And we have also been referred to several decisions of this Court in which similar language is used in respect of alienations by the karnavan of a Malabar tarwad: *Chappan v. Raru*(2) and *Sankara v. Kelu*(3). But these decisions on the question of limitation do not really conclude a point of this nature. The main basis of the argument is that if a case falls under article 144 of the Limitation Act, then we must take it that the person in possession is a mere trespasser

and although he may profess to claim possession under a deed executed by a person who in proper circumstances would be entitled to convey the property yet he had no title to the property and we must treat the case as if the alienation had never been made. It is difficult to see how any such proposition can be derived from the cases to which we have been referred. It would be a very extreme proposition of law to lay down that an improper alienation by a limited owner or by a person in the position of a karnavan of a tarwad must be treated for all purposes as if it had never taken place. It is quite clear that there may be persons in adverse possession of a property to whom article 144 of the Limitation Act is applicable, but who cannot be properly treated as mere trespassers. However that may be the question before us is, are persons like the plaintiffs in the present case entitled to question and avoid the alienations made by the karnavan of a Malabar tarwad? There can be no doubt that only the remaining members of the tarwad whose property has been wrongfully alienated by the karnavan can question such an alienation. The karnavan of a tarwad under the Malabar Law is the only person who can deal with the properties of the tarwad in circumstances recognized by the law, and the other members have no rights in the property in the sense of their being entitled to a share in the property or to be able to ask for partition. Their rights consist in being maintained by the karnavan out of the income of the family property and to see that the karnavan does not injure the family property by dealing with it in an improper way. If the junior members did not choose to question the alienation made by the karnavan it is impossible to conceive on what principle their right would descend to a person like an attaladakkam heir. It cannot be disputed that the karnavan and the junior members all together might make a gift of the entire family property if they so chose and if the karnavan makes such a gift and the other members of the family affirm it the result would be the same. There is no provision of law which lays down that they must affirm it by some positive act of theirs and so far as I can see it would be sufficient if they did not by any unequivocal act call in question the alienation. In this case we have been asked by Mr. Anantakrishna Ayyar to say that it was alleged

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(1) (1907) I.L.R., 34 Cal., 829 (P.C.). (2) (1914) I.L.R., 37 Mad., 420.
(3) (1891) I.L.R., 14 Mad., 29.

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in the plaint that Pukkoya in fact had elected in his life-time to avoid the transaction in question but we do not think that there is any such definite allegation. All that is stated in paragraph 3 of the plaint is that "the deceased Pukkoya also had taken objection to the said demises, etc." That is not a statement that he had by any clear unambiguous act made a declaration, supposing that a mere declaration would be sufficient, that he would not be bound by the alienation made by the karnavan Ali Kunhi. In the plaint in the suit in respect of the item of property not in question in this litigation, there occurs a statement to this effect "other documents also appear to have been executed for the benefit of the wife and children and other reliefs will be sought in respect of them." There is nothing in this statement which would enable us to identify any of the properties involved in the suit and in other respects also the statement cannot be said to be at all clear or unambiguous.

A number of English authorities have been cited before us by Mr. Anantakrishna Ayyar, in order to establish that the right to avoid a transaction of this nature descends to the heirs and legal representatives. But those cases can be of no help to us. They are cases which relate to the right to recover damages or similar remedies with respect to torts, and it will be totally unsafe to draw any analogy between those cases and a case like the present arising under the peculiar institution of the Malabar Law. Even the cases relating to the rights of a reversioner to avoid transactions of this kind under the ordinary Hindu Law do not furnish an exact analogy because the position of the junior members of the tarwad is in some respects weaker than that of the reversioners under the ordinary Hindu Law. A Hindu widow has merely a limited estate and her powers of alienation and management of the property are more limited than those of a Malabar karnavan. An attaladakkam heir succeeds to the properties of a tavazhi only when there are no members of the tavazhi left and of course only to properties which were not disposed of by the last members of the tavazhi. I must hold in this case that the property in dispute was disposed of by the last members of the tavazhi and there was nothing left for the plaintiffs to succeed to. This Second Appeal (Second Appeal No. 1373 of 1918) is dismissed with costs. The other Second

Appeals (Second Appeals Nos. 1374, 1375 and 1376 of 1918) follow.

OLDFIELD, J.—I agree with my learned brother and concur in the order proposed by him.

N.B.

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APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Odgers.

MESSRS. M. KRISHNA NAIK & SONS (PLAINTIFFS),
APPELLANTS,

1920,
August
2, 3 and 10.

v.

MESSRS. CAYZER IRWINE & Co., LTD., GLASGOW,
BY THEIR AGENTS

MESSRS. PEIRCE LESLIE & Co., LTD. (DEFENDANTS),
RESPONDENTS.*

Bill of lading—Shipping contract—Freight paid in advance—Voyage, interrupted by requisition of ship by Government—Right of shipper to refund of advance freight—Duty of shipowner to tranship goods and send them to their destination at his expense—Restraint of princes or rulers, construction of—Requisition by Government of India, whether within the exemption.

Where a shipper paid freight in advance to the shipowner but the voyage of the ship was interrupted by its requisition by the Government of India, the shipper is not entitled to refund of the advance freight nor is the shipowner bound to send the goods to their destination by another vessel at his expense.

Allison v. Bristol Marine Insurance Co., (1876) 1 App. Cas., 209; and *Hansen v. Dunn*, (1906) 11 Com. Cas., 100; s.c., 22 L.T.R., 458, followed.

Where a bill of lading provided that the shipowner should not be liable for loss or damage occasioned, *inter alia*, by 'arrest and restraint of princes, rulers or people,' *Held* that the requisition of the ship by the Government of India fell within the exemption.

SECOND APPEAL against the decree of T. JIVAJI RAO, Subordinate Judge of South Kanara, in Appeal Suit No. 86 of 1918 (A.S. No. 583 of 1917 on the file of the District Court) preferred against the decree of JAGANNATHA RAO S. TAGAT, District Munsif of Mangalore, in Original Suit No. 281 of 1916.

The material facts are set out in the judgment of AYLING, J. The plaintiffs, who were the shippers of goods, sued to recover

* Second Appeal No. 1429 of 1919.

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the amount of freight and other amounts paid by them to the British India Steam Navigation Company, being the freight, etc., due to them for the carriage of the goods from Bombay to Mangalore, although they had already paid the full freight in advance to the defendant Clan Line Company for carriage of the goods from Liverpool to Mangalore. The defendants pleaded non-liability both under the general law by reason of the interruption of the voyage of their ship *Clan Mackellar* by reason of the requisition of the ship by the Government of India, and under the terms of the bill of lading which exempted them from liability for loss by arrest and restraint of princes, rulers or people. The material clauses of the bill of lading, Exhibit I, were as follows:—

Exhibit I.

OUTWARD—MANGALORE.

"Shipped in good order and condition by Lever Bros., Limited, on board steam ship *Clan Mackellar*, lying in the port of Liverpool for carriage to Mangalore, five hundred packages of merchandise as described by shippers and marked and numbered as per margin. The said goods to be delivered, subject to the terms and conditions hereof, etc. . . . at the aforesaid port of Mangalore . . . ; freight and primage, as agreed, being due on shipment and being first paid by the shippers in cash without deduction, ship lost or not lost

The following are the terms and conditions above referred to —

(3) The shipowners shall not be liable for loss or damage occasioned by the Act of God, the King's enemies, perils of the sea, rivers, canals and navigation of any kind, pirates, robbers by land or sea, fire wherever occurring, jettison or barratry of the master or crew, arrest and restraint of princes, rulers or people, riots, strikes, lockouts, labour disturbances, etc., etc. . . ."

(4) is set out in the judgment at page 152.

Both the Lower Courts dismissed the suit. The plaintiffs preferred this Second Appeal.

V. Ramesam (with him *K. Satyanarayanamurti*) for appellants.—The contract of carriage of goods did not become impossible of performance by reason of the requisition of the *Clan Mackellar* by the Government of India. The shipowner

should have carried the goods in another ship. The bill of lading in this case contains a clause (viz., clause 4), which gives a very wide discretion to the master of the ship to tranship the cargo whenever he likes. The contract in this case does not contain an implied term that the carriage of the goods should be performed in the same bottom, but the parties contemplate performance of the contract by carrying goods in several ships. In *Shipton v. Thornton*(1), the question was much discussed but not decided. There the parties intended that the goods should be carried in the same ship. In *Byrne v. Schiller*(2), the goods were intended to be carried in the same bottom. The rule followed in America and on the continent of Europe is different from the English law as laid down in the abovementioned English decisions. The principle underlying these cases is this, viz.,—where a contract becomes impossible of performance, the rights of the parties remain where they are at the time when performance became impossible: cf. *Civil Service Co-operative Society v. General Steam Navigation Co.*(3). Impossibility of performance may be caused by the loss of goods or of the ship, where the goods were intended to be carried by the same bottom, or where performance becomes illegal as by declaration of war as in *Leiston Gas Company v. Leiston-cum-Sizewell Urban Council*(4). But in the present case there is no kind of impossibility, because, though *Clan Mackellar* was commandeered by the Government of India, it was still possible to carry the goods to their destination in another ship. Reference was made to Carver on Carriage, sections 302 to 304, which refers to cases where goods were intended to be carried in the same bottom. *Hansen v. Dunn*(5) is not against this contention. *F. A. Tamplin Steamship Company v. Anglo Mexican Petroleum Products Company*(6), affirmed by the House of Lords in *F. A. Tamplin Steamship Company v. Anglo-Mexican Petroleum Products Company*(7), and *Modern Transport Company, Limited v. Duneric Steamship Company*(8), show that a contract of charterparty

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- (1) (1888) 9 Ad. & El., 314; s.c., 112 E.R., 1239.
(2) (1871) L.R., 6 Exch., 319. (3) [1908] 1 K.B., 756.
(4) [1916] 1 K.B., 912.
(5) (1906) 11 Com. B.C., 100; s.c. 22 T.L.R., 458.
(6) [1916] 1 K.B., 485. (7) [1916] 2 A.C., 397.
(8) [1916] 1 K.B., 726.

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did not come to an end by the requisition of the ship by the Admiralty. Halsbury's Laws of England, Vol. 36, paragraphs 331 to 333, are not against the appellants, as they refer to voyage in the same ship. Abbot on Merchant Shipping, 2nd Edition, page 241, says that it is the primary duty of the shipowner to carry the goods. Clause (3) of the bill of lading in this case excepting liability for loss or damage by restraint of princes or rulers, does not apply to this case, as there is no loss or damage of goods.

C. V. Anantakrishna Ayyar for respondent.—The advance freight cannot be recovered by the appellants. In addition to the cases mentioned already, which support this view, *Allison v. Bristol Marine Insurance Company*(1) supports the contention of the respondent that advance freight is irrecoverable. BRETT, J., mentions the origin of contracts for payment of freight in advance as due to the long time taken for voyages to India, and Lord O'HAGAN at page 219 in the above case expressly decides the point in favour of the respondent's contention. See Leake on Contracts, page 70 and MacLachlan's Law of Merchant Shipping, page 481. Scrutton on Charterparties and Bills of Lading, 6th Edition, article 80, supports the same view. The bill of lading in this case is a printed form, and clause (4) therein ought not be taken too strictly. It states only the general law which gives liberty to the shipowner to tranship the goods to enable him to earn his freight when freight was not paid in advance, but imposes no duty on the shipowner; clause (4) does not apply to cases of advance freight. The footnote to article 103, in Scrutton, says that there is no duty to tranship and refers to article 30.

V. Ramesam in reply.—The passage in article 80 of Scrutton relied on by the respondent is omitted in the 8th and 9th Editions. The reference in the footnote to article 103 relates to impossibility of performance. The point did not arise in *Allison v. Bristol Marine Insurance Company*(1), which was a case of an insurance company. The passages referred to in McLagan and Leake by the other side relate like the other text-books to voyages in the same bottom.

(1) (1876) 1 App. Cas., 209.

AYLING, J.—The essential facts of this case are simple. Plaintiffs are merchants of Mangalore. In September-October 1915 their English agents shipped to them three consignments of steel and soap by defendants' steamship *Clan Mackellar*. Freight was paid in advance. The *Clan Mackellar* arrived at Bombay with the goods on board on 3rd November 1915. She was then requisitioned by the Government of India, and passed out of the hands of defendants' company. Defendants after some correspondence and after being requested by plaintiffs to send the goods to Mangalore despatched them to that port by the S.S. *Aviemoor* belonging to the B.I.S.N. Co. They were delivered to plaintiffs in February 1916 on payment of freight from Bombay to Mangalore, and sundry other charges. Plaintiffs sued to recover these charges amounting to Rs. 2,470, with interest from defendants' company.

Both the Lower Courts have agreed in dismissing plaintiffs' suit: and I think they are clearly right.

It is settled law that where freight in advance is paid to the shipowner, it is his absolutely and is irrecoverable under any circumstances by the shipper of the goods—vide *Allison v. Bristol Marine Insurance Company*(1). This is not disputed by the learned vakil for appellants. Appellants could not recover any portion of the freight already paid, if delivery of the goods were prevented by the total loss of the ship at sea. The requisitioning of the *Clan Mackellar* by Government at Bombay took her out of defendants' control and put an end to the voyage just as effectively as if she had been torpedoed and sunk before reaching that port: and in the one case no more than the other could refund have been claimed. This would be so even apart from any special terms of the bills of lading: but I agree with the Subordinate Judge, that the requisitioning of the ship is an "act of rulers," which is specially provided for in clause (3) of the bill of lading and for which defendants are specifically exempted from liability.

This being the law, I do not see how it can possibly be held that defendants were under any obligation to forward the goods to Mangalore at their own cost. Such a view would be inconsistent with the doctrine above referred to, that they are

(1) (1876) 1 App. Cas., 209.

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entitled to retain the advance freight even although the voyage is stopped by the loss of the ship and the goods never reached the consignee. Clause (4) of the bill of lading provides that the shipowners shall have the option of transshipping the goods to another ship of their own or of a different line. But this proviso is obviously designed to secure the shipowner in cases in which freight is not paid in advance and in which it is necessary for him to complete his contract by delivery of the goods in order to earn his freight money. No inference of a corresponding duty seems to me to arise even in these cases. The shipowner may elect to leave the goods where they are at an intermediate port on interruption of the voyage, and abandon his claim to freight. However that may be, I am quite clear that no such obligation arises in cases of advance freight: and that nothing can be built on the presence of this clause in the bill of lading. The latter are obviously printed forms intended to be applicable to either class of cases; and the differentiation is effected by a stamp bearing the words "Freight prepaid."

This seems to me to be the law as laid down by KENNEDY, J., in *Hansenv. Dunn*(1). I would therefore dismiss this Second Appeal with costs.

ODGERS, J.

ODGERS, J.—Certain goods, consigned to appellant at Mangalore, were shipped by Messrs. Lever Brothers, Limited, and others on board the Clan Line steamer *Clan Mackellar* at Liverpool. The ship arrived at Bombay on 4th November 1915 and was then requisitioned by Government. She discharged her cargo, and the agents informed appellant in June 1916 that the ship had been requisitioned and that the appellant should make his own arrangements for bringing the goods forward to Mangalore. The goods eventually arrived at Mangalore on the S.S. *Ariemoor*, a steamer belonging to the British India Line, whose agent refused to deliver unless the appellant paid the freight from Bombay to Mangalore. The appellant contended that as he had already paid the full freight from Liverpool to Mangalore to the Clan Line Company, he was not liable for more, but to avoid further delay he paid these charges and now seeks to recover from the original carriers, i.e., the Clan Line, the amount so paid. The law to be

(1) (1906) 11 Com. Cas., 100; s.c., 22 T.L.R., 468.

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applied is admittedly the English Law. The appellant relies on the terms of the bill of lading (Exhibit A in Civil Revision Petition No. 52 of 1918) for his contention that the Clan Line was bound to send on the goods to Mangalore at whatever cost to themselves. He admits that the requisitioning at Bombay was a restraint of princes and is within condition 3 of the bill of lading. Had the bill of lading stopped there, the appellant also admits he would have had no case, as the contract would be one impossible of performance and the freight having been paid in advance (cf. Exhibit A) each party remained in the position he was in at the time the performance of the contract was rendered impossible; thus the shipping company would be in such a case entitled to retain the freight already paid him and the consignee would have no remedy: see per ROWLATT, J., in *St. Enoch Shipping Company, Limited v. Phosphate Mining Company*(1) and per Lord HALSBURY, L.C., in *Civil Service Co-operative Society v. General Steam Navigation Co.*(2); cf. also *Allison v. Bristol Marine Insurance Co.*(3). It is conceded by the learned vakils on either side that the difference lies in the fact of prepayment of freight. Once the freight is paid, it can be retained in a case of impossibility of performance arising, e.g., from any of the circumstances mentioned in condition 3 of the bill of lading. If, however, the freight is not paid in advance, at most only a portion pro rata to the carriage actually accomplished would be recoverable. That this is the English Law seems well established. It admittedly differs from the law of other countries and the difference, though sometimes regretted, must be regarded as binding: cf. *Byrne v. Schiller*(4). COCKBURN, C.J., observed:

"We are all agreed that the law is too firmly settled for us to depart from it, even in a Court of appeal, that where freight is paid in advance, it cannot be recovered back."

(See also Leake on Contracts, 6th Edition, p. 70.) Mr. Ramesam for the appellant contends that this is not a case of impossibility of performance because the parties did not stipulate that the *Clan Mackellar* should be the only ship to

(1) [1916] 2 K.B., 624.

(3) (1876) 1 App. Cas., 209.

(2) [1903] 2 K.B., 756.

(4) (1871) L.R., 6 Exch., 319, at 324.

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convey the goods, by virtue of the conditions of the bill of lading, that ship-owners and master were at liberty to tranship (see condition 4, Exhibit A, in Civil Revision Petition No. 52 of 1918).

The material portions are as follows:

"4. The ship-owners and master shall have liberty as regards the whole, or any part, of the goods, and at the risk of the owners thereof, at any time during the transit to ship or to tranship to any other vessel, or land, or store, or put into hulk, craft or lighter, or re-ship in the same or any other vessel, or forward by any other conveyance, whether any of these belong to the same ship-owners or not . . . In case the ship shall be prevented from any cause from proceeding in the ordinary course of her voyage, the ship-owners have liberty to tranship the goods to their destination by any other first-class steamship."

He contends that this clause obliged the ship-owners to tranship the goods at Bombay when the original ship the *Clan Mackellar* was requisitioned there, thus distinguishing the case where the contract was to carry the goods in one bottom only.

Shipton v. Thornton(1) was a case of the kind referred to. The original ship, the *John Scott*, on a voyage from Singapore to London was obliged to put into Batavia disabled. The master thereupon transhipped the goods in question to the *Mountaineer* and *Sesostriis* and sued for the difference in freight. Held he was entitled to recover. Lord DENMAN, C.J., at page 383 said:

"It is clear that, by the contract, the shipowner (and the master as his agent) is bound to carry the goods to their destination, if not prevented from doing so in his own ship by some event which he has not occasioned, and over which he has no control. The master [says Lord TENDERDEN in his book on Shipping, Part 3, Ch. 8b (page 241, 5th Edition)], "should always bear in mind that it is his duty to convey" the cargo "to the place of destination. This is the purpose for which he has been intrusted with it, and this purpose he is bound to accomplish by every reasonable and practicable method." When, however, such an event has occurred to interrupt the voyage, as above defined, and the ship-owner or master (for we think no distinction can be made between the two) has no opportunity of consulting the freighter, there seems to be

(1) (1838) 9 Ad. & El., 314.

much disagreement in foreign ordinances and jurists on the point whether or no he is bound to tranship, or whether, having contracted only to carry in his own ship, he is not absolved from further prosecution of the enterprise by the vis major which prevents his accomplishing it in the literal terms of his undertaking."

Further at page 385,

"It may therefore be safely taken to be either the duty or the right of the shipowner to tranship in the case above supposed; if it be the former, it must be so in virtue of his original contract; and it should seem to result from a performance by him of that contract that he will be entitled to the full consideration for which it was entered into without respect to the particular circumstances attending its fulfilment; on the other hand, if it be the latter, a right to the full freight seems to be implied; the master is at liberty to tranship; but for what purpose, except for that of earning his full freight, at the rate agreed on? In the case supposed, we may introduce another circumstance, let the owner of the goods arrive, and insist, as he undoubtedly may, that the goods shall not proceed, but be delivered to him at the intermediate port; there is then no question that the whole freight at the original rate must be paid; and that because the freighter prevents the master, who is able and willing, and has the right to insist on it, from fulfilling the contract on his part, and because the sending the goods to their destination in another vessel is deemed a fulfilment of the contract. If, therefore, the owner of the goods be not present, and personally exercises no option, still the ship-owner, in forwarding the goods, must have the same rights, and, in so doing, must be taken to exercise them with the same object in view."

It is to be remarked that the right of transhipment is treated as a privilege to the ship-owner or master for the purposes of enabling him to earn his full freight by getting the goods conveyed to their destination. Further, in Carver's Carriage by Sea, 6th Edition, at page 415, the learned writers say:

"It is his (i.e., the master's) business to get the ship repaired, and to carry the cargo to its destination in her; and if that cannot be done, he ought to tranship the goods into another vessel and forward them, if it be possible to do so, on such terms as to make it profitable to his employer."

i.e., the owner; and again at page 420:

"But the ship-owner is not bound to employ another vessel to complete the voyage to his own loss. If, therefore, the only terms

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upon which another ship can be got are such that the whole agreed freight and more will be absorbed by the expenses of forwarding, the master is entitled, and in duty to the ship-owner is bound, to abandon the voyage unless he can complete it in his own ship. And presumably, the same is true where the freight has been paid in advance."

Cf. to the same effect Scrutton on Charterparties and Bills of Lading (7th edition), at page 248, where it is stated (in footnote 2):

"In *Shipton v. Thornton*(1), the point was much discussed whether it was not the duty, as well as the right, of the master to tranship the goods if opportunity offered. The point was not determined, and does not seem to have been expressly decided except by KENNEDY, J., in a dictum in *Hansen v. Dunn*(2). And on general principles (see article 30) it would seem that there is no such duty."

Hansen v. Dunn(2) was the judgment of a single Judge (KENNEDY, J.), but one of wide experience in commercial cases. The case turned on the negligence of the ship-owner in keeping the cargo on board during repairs instead of discharging and transhipping it. The learned Judge observes:

"If, on the other hand, the circumstances are such that the ship-owner is justified in not repairing his ship, or are such that, even if the ship is eventually repaired, it is not, with a due regard to his own interest and the interest of the owner of the cargo reasonably practicable, owing either to the length of time which the repairs will take, or the perishable nature of the cargo, or to the expense involved, or all or any such reasons, that the carriage of the cargo should be completed in the ship when repaired, then the ship-owner is at liberty to tranship and carry the cargo to its destination in another bottom and so earn his freight. He is not bound to employ another vessel to complete the voyage at his own loss."

The learned Judge goes on to say that if the ship-owner decides neither to repair nor to tranship, he ought to be diligent to inform the owner of the cargo of these facts, so that the latter may not be unnecessarily damaged.

From these authorities it seems to me fair to say that it is the right, but has not so far been held to be also the duty of the

(1) (1888) 9 Ad. & El., 314.
(2) (1906) 11 C.C., 100, at 102; s.c., 22 T.L.R., 458.

ship-owner or master to tranship, and this would be the case, in my opinion, even where there is an express clause as here in the bill of lading giving the ship-owners liberty to tranship and the clause must be deemed to have been inserted for the protection of the ship-owners alone. I think, therefore, that the Second Appeal fails on this ground.

I think it also fails on another ground. It is admitted by Mr. Ramesam for the appellants that if the contract was put an end to by the requisitioning of the *Clan Mackellar* at Bombay, he must fail. In *Countess of Warwick S.S. Company, Limited v. Le Nickel Societe Anonyme*(1), a case of charter party, it was held by the Court of appeal that the adventure was frustrated by the requisition by Government. The charter was for not less than twelve calendar months and contained an exception of the restraint of princes. Six months later the ship was requisitioned by the Admiralty. In a similar case in *F. A. Tamplin Steamship Company v. Anglo-American Petroleum Products Company*(2), it was held that the commercial adventure was not frustrated inasmuch as each party was deriving in substance though not in form a substantial part of the benefit they respectively contemplated obtaining from the enterprise, and that there was nothing to prevent the charterers resuming the control of the vessel and completing the charter if and when the Government restored the vessel to them. This was approved by a majority of the House of Lords in *F. A. Tamplin Steamship Company v. Anglo-Mexican Petroleum Products Company, Limited*(3). In my opinion, the case here must clearly fall under the category of which the former of the cases quoted above is an example. I think the adventure was frustrated by the requisition at Bombay and that it was a restraint of princes (as found by the Lower Appellate Court) and falls within condition 3 of the bill of lading. The contract was therefore at an end in Bombay.

I agree with the order proposed by my learned brother.

K.R.

(1) [1918] 1 K.B., 372.
(2) [1916] 1 K.B., 465. (3) [1916] 2 A.C., 297.

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APPELLATE CIVIL.

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

TALUK BOARD, BANDAR (DEFENDANT), APPELLANT,

v.

ZAMINDAR OF CHELLAPALLI (PLAINTIFF), RESPONDENT.*

Madras Local Boards Act (IV of 1884), sec. 100—Order of a Taluk Board to an owner to fill up a tank without regard to attendant circumstances, validity of.

A Taluk Board passed an order under section 100 of the Madras Local Boards Act (V of 1884) asking the owner of certain tanks to fill them up on the ground that they were in an insanitary condition without taking into consideration (1) that such condition was brought about not by any act of the owner, but by the Taluk Board allowing drainage water to escape into the tanks and (2) that filling up the tank was far more expensive than raising a bund all round the tanks which would have equally served the purpose.

Held, that the power conferred by section 100 of the Local Boards Act, though a very wide power, must not be exercised for ulterior purposes, or in a capricious, wanton and arbitrary manner, and, if so used, can be controlled by the Civil Courts: and that the order passed by the Board in this case was one that should be set aside.

SECOND APPEAL against the decree of K. KRISHNAMACHARIYAR, Subordinate Judge, in Appeal No. 141 of 1918 in the Temporary Sub-Court of Masulipatam filed against the decree of T. R. NARASIMHAMURTI SASTRI, District Munsif of Avanigadda at Masulipatam, in Original Suit No. 861 of 1916.

The facts are set out in the judgment of ABDUR RAHIM, J. The defendant (Taluk Board) preferred the Second Appeal.

K. Satyanarayanamurthy for V. Ramesam for appellant.—An act of a statutory body like the Taluk Board, which alone is vested by the statute with a discretion to do certain acts in the interests of the public, cannot be questioned by Courts and Courts cannot usurp the functions of the statutory body by substituting what would be proper in their own discretion; *Duke v. Rameswar Malia*(1), *Patel Panachand v. Ahmedabad Municipality*(2), *Gangjibhoy v. Mun. Cor. of Bombay*(3), *Stockton and Darlington*

* Second Appeal No. 1690 of 1919.

(1) (1899) I.L.R., 26 Calc., 811, 818.

(2) (1898) I.L.R., 22 Bom., 230, 238.

(3) (1899) 1 Bom. L.R., 754.

Ry. Co. v. Brown(1), and *Wilkinson v. Hull, etc., Railway and Dock Company*(2). Due notice, as is required to be given by section 100 of the Local Boards Act before the passing of the order, was given in this case, and section 162 (2) of the Act authorizes the Board to recover the expenses incurred in filling up the tanks. If the expense is too much, the private owner may surrender the tank to the Board.

[RAHIM, J.—There is no provision in the Act for surrendering.]

C. V. Anantakrishna Ayyar for respondent.—Where a statutory body improperly exercises the discretion vested in it, and acts either capriciously or unreasonably or without any regard to attendant circumstances, as in this case, Courts can interfere. The findings in this case are that the insanitary condition of the tanks was brought about only by the action of the Board, and that filling up the tanks is far more expensive than raising a bund all round the tanks. The cases quoted by the appellant are distinguishable. *Nagar Valab Narsi v. The Municipality of Dhandhuka* (3), *Lalbbhai v. The Municipal Commissioner of Bombay*(4), *Leader v. Moxon*(5), *Rex v. Board of Education*(6), *Williams v. Giddy*(7), *Sutton v. Clarke*(8), *Weinberger v. Inglis*(9), *Tinkler v. Wandsworth District Board of Works*(10), *The Municipal Commissioners for the City of Madras v. Parthasaradi*(11), and Maxwell's Interpretation of Statutes, page 208, referred to.

OLDFIELD, J., having expressed his concurrence on 17th August 1920 delivered his separate judgment on 31st August 1920.

ABDUR RAHIM, J.—In this case the Taluk Board of Bandar appeals against the decree of the Lower Courts by which it has been restrained from filling up three tanks belonging to the respondent, the Zamindar of Chellapalli. The Board purported to act under section 100 of the Madras Act V of 1884 by which

(1) (1860) 9 H.L.Cas., 246; s.c., 11 E.R., 724, 728. (2) (1882) 20 Ch.D., 323.

(3) (1898) I.L.R., 12 Bom., 490, 494. (4) (1909) I.L.R., 33 Bom., 334.

(5) (1773) 2 Black W., 924; s.c., 96 E.R., 546.

(6) [1910] 2 K.B., 165, 168. (7) [1911] A.C., 381.

(8) (1815) 6 Taunt., 29; s.c., 128 E.R., 943.

(9) [1919] A.C., 606. (10) (1858) 2 De. G and J. 261; s.c., 44 E.R., 989, 993.

(11) (1888) I.L.R., 11 Mad., 341.

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"The Taluk Board may, by notice, require the owner of any tank or well to cleanse, fence, repair or fill it up, if, on inspection, it appears likely to be dangerous, or prove injurious to the health of the neighbourhood."

It appears that there were reports of the District Medical and Sanitary Officer before the Board to the effect that the tanks in question were injurious to the health of the villagers and the President of the Board also inspected the tanks and it may be taken that the Board came to the conclusion that the existence of the tanks in their present condition was injurious to the health of the neighbourhood.

I am prepared to proceed, for the purposes of this judgment, on the assumption that there was sufficient material before the Board on which to found the conclusion as to the present unhealthy and injurious nature of these tanks. The rulings to which we have been referred show that if there were materials before a local authority to come to such a conclusion it is not for the Civil Courts to inquire into the sufficiency or otherwise of those materials. It is for the Board to decide upon the evidence whether a certain tank is dangerous or injurious to the health of the neighbourhood, and when such decision is arrived at it is not for the Court to interfere with it on the ground that the Court would have come to a different conclusion. That, I take it, is the effect of the rulings in *The Municipal Commissioners for the City of Madras v. Parthasaradi*(1), *Duke v. Rameswar Malia*(2), and *Patel Panachand v. Ahmedabad Municipality*(3), and to that extent I have nothing to say as regards the applicability of these decisions to this case. But what the respondent, the zamindar, contends is that the Board has exercised its discretionary power in this case arbitrarily and unreasonably, having regard to the admitted facts and circumstances of the case. The power conferred on the Local Board by section 100 is a very wide power. The Board acting under that section may require the owner of a tank to repair it or fill it up at his own expense, for there is no provision in the Act for the owner being recouped the expenses incurred by him in complying with

(1) (1888) I.L.R., 11 Mad., 341.

(2) (1899) I.L.R., 26 Cal., 811.

(3) (1898) I.L.R., 22 Bom., 280.

the provisions of the Act. The Board has the power to acquire the land, if it chooses, by proceedings properly taken, in that connexion. But in that case it would have to make compensation to the owner of the land. There is however no provision for the Board making any compensation to the owner of the property who is called upon to do certain acts under section 100. It is suggested on behalf of the Local Board that the owner of the tank may give up the tank to the Board if he so chooses and thus save himself the expense of filling it up; that is to say the owner may be compelled under section 100 indirectly to transfer his property to the Board without any compensation whatever. That is the only way by which the owner of a tank can save himself, according to the argument, from what may in some circumstances amount to considerable loss. I should say that in such circumstances the Courts will see that the Taluk Board does not exercise the power conferred on it by section 100 for ulterior purposes. If the Board uses its powers for any such purpose, the Civil Court undoubtedly has jurisdiction to restrain the Board from abusing its powers in that manner.

Apart from the question of the Board using its powers for any direct purpose, it may be safely laid down on the basis of decided cases that where a local authority is invested with discretionary powers the Court can interfere in cases where such powers are exercised, to use the language of some of the decisions, in a "capricious, wanton and arbitrary" manner, or to adopt the language of some other cases, in an "unreasonable" manner: see *Nagar Valab Narsi v. The Municipality of Dhandhuka*(1), and *Lalbhai v. The Municipality Commissioner of Bombay*(2). The Indian Courts in this connexion have only followed the principles established by the English authorities: see *Leader v. Mowon*(3), *Rex v. Board of Education*(4), *Williams v. Giddy*(5), *Sutton v. Clarke*(6), *Weinberger v. Inglis*(7). So far as this Court is concerned, these principles have been adopted in *Somu Pillai v. The Municipal Council, Mayavaram*(8). To my mind there is no difficulty,

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(1) (1888) I.L.R., 12 Bom., 490, at 494. (2) (1909) I.L.R., 38 Bom., 394.

(3) (1778) 2 Black W., 924; s.c., 96 E.R., 546.

(4) [1910] 2 K.B., 165, at 168. (5) [1911] A.C., 381.

(6) (1815) 6 Taunt 29; s.c., 128 E.R., 943. (7) [1919] A.C., 606.

(8) (1905) I.L.R., 28 Mad., 520.

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therefore, in ascertaining the principle applicable to this class of cases, but difficulty undoubtedly lies in applying the principle to the facts of a particular case. It is not possible to define in an abstract way what would or would not be a reasonable and proper exercise of such a power as is conferred on the Board by this Act. But, when we have the facts of a case before us the difficulty would not seem to be always very formidable. On the one hand, as has been pointed out in some cases relied on by the learned vakil for the respondent, as for example, *Duke v. Rameswar Matia*(1), where a local authority is given the power to decide a certain matter for itself it is not for the Court to substitute its own judgment for the judgment of the statutory authority. On the other hand, where it is clear that a discretionary power has been exercised in a manner which could not have been in the contemplation of the legislature, then the Court undoubtedly has jurisdiction to interfere. In this case the Taluk Board in exercising its powers under section 100 seems to have acted without taking into consideration some very important matters. First of all, as the deposition of the President of the Taluk Board shows, the insanitary condition of the tanks in question is caused mainly, if not entirely, by the discharge into them of the drainage water through channels recently constructed by the Board. The District Munsif accepts this evidence and gives that as one of the reasons for holding that the action of the Board was arbitrary and unreasonable. When the Act gives power to a Taluk Board to require the owner of an insanitary tank to fill it up, the legislature could not have contemplated a case in which the insanitary condition of the tank was caused by the action of the Board itself. In such a case it might be said that the tank itself was not injurious to the health of the neighbourhood within the meaning of the Act but that it was made so by the action of the Local Board. The Taluk Board here seems to have built drains without making any provision for the proper disposal of the contents of these drains. If it took measures to carry the drainage water to some place other than the tanks, the question of taking any action against the owner of the tanks under the

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Act would not arise. Then it is obvious that there must be cases in which any direction to fill up the tanks would be prima facie unreasonable and oppressive having regard to the expense and difficulty of filling them up. The Taluk Board is empowered by section 100 to do one of several things in the interests of the health and safety of the community, and if it does not take into consideration any alternative course that is open to the Board to adopt and which would be more practicable and not entail obvious hardship on the owner of the land within its jurisdiction, the Board might well be said not to have exercised its powers in a reasonable manner. Here, it is quite clear, upon the facts as found by the lower Courts, that by putting up an embankment round the tank the object in view would have been accomplished without any particular hardship to the owner of the tanks. These tanks, according to the evidence, have been in existence for a number of years and were, at any rate, at one time needed in the interests of the villagers. It is not suggested that the owner has done anything by which the tanks have become insanitary. If that had been so then the owner might well have been asked to take such steps as would be necessary to put the tanks in a sanitary condition. The evidence shows that the expense of filling up the tanks would be considerable, at least Rs. 4,000 and very likely much more; and, as pointed out by the respondent, he will have to dig in some other place in the village in order to fill up these tanks with the result that other tanks will come into existence and perhaps prove as injurious to the health of the villagers as the present one. So far as it appears the Taluk Board seems to have acted without regard to any of these considerations, and quite reckless of the consequences to the respondent. I am also of opinion, judging from the evidence of its President, that the Board has laid down a sort of general rule, although not reduced to a form of resolution or formal proceeding, that wherever there is an insanitary tank within its jurisdiction it should require the owner to fill it up. That would not be a proper exercise of the power, as has been pointed out in *Maxwell on Interpretation of Statutes*, page 208; see also *Tinkler v. Wansworth District Board of Works*(1). The Board is required by

(1) (1899) I.L.R., 26 Cal., 811.

(1) (1858) 2 De G. & J., 261; a.c., 44 E.R., 989 at 993.

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the Act to consider each case on its own merits, and if it does not do so it would be exceeding the powers conferred on it by the Act. There is no trace on the record, of the Taluk Board having taken into consideration the particular circumstances in connexion with these tanks before passing the orders. On the whole I am of opinion that the Board's action in this case was not in the proper exercise of the powers conferred on it by the Act and I would therefore dismiss the Appeal with costs. The decree of the Lower Appellate Court however requires modification in order to give proper effect to our judgment. It should be declared that the plaintiff is not liable to fill up the tanks as required by the defendant's notice, dated 1st April 1915, and that the defendants be restrained in case they themselves fill up the tanks, from recovering the cost thereof from the plaintiff.

The memorandum of objections is dismissed with costs.

OLDFIELD, J. OLDFIELD, J.—I agree with my learned brother's conclusion and deliver a separate judgment, only because the questions raised are of great and increasing importance. For, although in particular we are dealing with the validity of an order by the appellant Board requiring plaintiff to fill up certain tanks as insanitary, we have generally to define the limits, within which such action by a public body is subject to control by the Courts, and with the increase in the number and activities of such bodies to be anticipated in the near future disputes as to those limits may be frequent.

That the Courts have power of control is not denied; and no doubt in some directions the law is clear as to their extent, since there is no doubt that they can be exercised, if the action complained of is wholly outside the legal powers of the body concerned or is taken for an ulterior motive: *Gard v. Commissioners of Sewers*(1). In cases however of the kind before us, in which the public body concerned proceeded within its apparent authority and the objection is that it ought not to have done so on the facts before it, such of the decisions referred to by my learned brother, as restrict their description of the circumstances in which the Court can interfere, to a bare reference to the unreasonable or mala fides or arbitrary and capricious

(1) (1883) 49 L.T., 325.

character of the action complained of, seem to me, with all respect, to afford very little assistance in cases similar to the present. For it is no easier, when the conflict is between the interest of the community and that of the individual than it is in other connexions, to apply the test of what is reasonable and, as will appear, that test must be applied for the present purpose primarily to the method by which the merits of the case have been ascertained rather than to those merits themselves; the test by the arbitrary or capricious character of the proceedings is inconclusive, when, as in the present case, some reason for them is forthcoming and the complaint is to some extent of the public body's improper adherence to principle in disregard of the particular circumstances; and although the necessity for good faith in the procedure employed can be insisted on, that will carry the matter very little further until the nature and extent of the minimum precautions to be observed have been defined. It may be useless to look for any absolutely exhaustive rule. But it is worth while to consider whether recent decisions do not indicate any which will be susceptible of general statement and will suffice for the decision of the majority of cases, including the one before us.

In *Rea v. Board of Education*(1), FARWELL, L.J., without, as I understand him, departing from the effect of the language used in earlier cases, stated the law as follows:—

"If the tribunal (public body) has exercised the discretion entrusted to it bona fide, not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the Courts cannot interfere; they are not a Court of Appeal from the public body, but they have power to prevent . . . the refusal of its true jurisdiction by the adoption of extraneous considerations in arriving at its conclusion or deciding a point other than that brought before it, in which cases the Courts have regarded it as declining jurisdiction."

and the case will be the same, if the rejection of relevant instead of the adoption of extraneous considerations is in question, as appears from a reference to *Queen v. Vestry of St. George's, Southwark*(2), where a vestry declined to deal with the merits of a claim, because it considered the only amount

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(1) [1910] 2 K.B., 165, 179.

(2) (1887) 19 Q.B.D., 533.

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which it thought that it could legally grant excessive. It will, as the judgments in *Weinberger v. Inglis*(1) show, be presumed that an associated body, and similarly (it is not disputed) a public body, has in reaching its decision dealt fairly with the materials available to it; and, until that presumption is displaced, the Court will not attempt inquiry into the particular ground on which the decision was reached. But on the other hand that presumption may be displaced, as it was, to give two instances only, in *Re v. Board of Education*(2), by inference that action was taken on a wrong understanding of the law or the question in issue, and in *Williams v. Giddly*(3), by evidence, consisting of an admission of Counsel, of the existence of matter, which it would have been reasonable to consider, but which was not considered at all, the result being an award which,

"though made under guise of exercising discretion, was at best a colourable performance and tantamount to a refusal by the public body concerned to exercise the discretion entrusted to it."

The facts in that case were extreme. But in it, as in the others, the Court interfered, because the use of a sound discretion by the public body concerned had been disproved, or more fully because that body was shown not to have given an honest consideration to the matters which a reasonable man would have considered before he decided.

To apply this to the case before us, there is first the contention which is supported also by reference to the wording of section 100 of the Act, that the defendant Board did not consider the case honestly, because the members directly responsible for the order complained against did not themselves inspect plaintiff's tanks, but acted on the reports of their President and the District Medical and Sanitary Officer, who had done so. In fact section 100 merely requires an inspection and does not specify by whom it is to be made; and it is a sufficient answer to the general argument that no question of fact which an inspection would have decided, is shown ever to have been raised and that an obligation to make the substantial journeys, in some cases of over fifty miles from a railway, which a personal inspection would entail, cannot fairly be regarded as essential to the performance of their duties by Taluk Board members.

(1) [1909] A.C., 606.

(2) [1910] 2 K.B., 165, 172.

(3) [1911] A.C., 381, 388.

It is next pointed out that the notice issued by the Board required plaintiff to abate the nuisance alleged as constituted by his tanks in a particular way, by filling them up, and argument has been based on the evidence of D.W. 1, the President of the Board, since on this and other points it is our only source of information as to its procedure and reasons. He said that "the general course adopted when the Board finds insanitary tanks is to ask their filling up 'and' in doing so, it never considered the question of expense;" and he admitted that in plaintiff's case no estimate of the costs of the work required was obtained, although it might have been as much as Rs. 4,000 for one tank alone and according to other evidence would have been more. This, it is urged, shows that the Board had adopted a general pre-appointed rule for dealing with this and all similar cases without regard to the particular circumstances of each, and, if the objection were established, it would clearly be valid, not only because some part of the matter reasonably demanding and available for consideration never received it, but with reference to the judgment of TURNER, L.J., in *Tinkler v. Wandsworth District Board of Works*(1), disallowing the order before him on the ground that it had proceeded on the footing of a general resolution "come to before that order had been issued and without reference to the particular case." But, with all deference to my learned brother, it is necessary to distinguish between such a definite resolution as was there held to be in question and a policy to which as in *Weinberger v. Inglis*(2), and (as I think) here, the decision under consideration may be intended to give effect. Nothing resembling such a resolution as was held proved in *Tinkler v. Wandsworth District Board of Works*(1) is established before us, and the most to be deduced from the evidence of the President seems to me to be a policy, which it is probably neither possible nor desirable to discountenance so long as its adoption does not preclude consideration of the facts of each case, to which it is proposed to apply it.

A stronger objection and one, which I am constrained to admit, is however that in fact such consideration did not take place, because the President deposed further that "if bunds

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(1) (1858) 2 Deg. & J., 261.

(2) [1919] A.C., 606.

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were raised round the tanks to prevent sewage water falling into them, they would not be insanitary;" and it is urged there could have been no honest or reasonably comprehensive consideration of the relevant facts, when the nature of the work to be required and the greater burden imposed by one remedy rather than another were not considered. That the erection of bunds would have been less expensive than the filling in of the tanks, which was actually directed, is not denied; and the President has given no reason for preferring the latter. A duty to prefer the less onerous of the remedies available was recognized in *Lal Bhai v. Municipal Commissioner of Bombay*(1), and, if a mere statement of the position is not sufficient, it need only be observed that the use of a sound discretion can be no less obligatory in respect of this part of the order before us than of the remainder. On this ground therefore that order cannot stand.

Another and more fundamental objection to it however arises in connexion with the reference to sewage water as reasonable for the insanitary condition of plaintiff's tanks, although it has been misapprehended by the lower Appellate Court. For, it is stated that the insanitary condition of the tanks had been admitted by plaintiff, although he had denied it in his plaint and, as paragraph 9 of the District Munsif's judgment shows, at the trial; and, after referring to the expedient of excluding the sewage by bunds as deserving consideration, it failed to see that as the President admitted the existing arrangements were inadequate to dispose of the sewage and that it and not the condition of the tanks was the cause of any nuisance, which required abatement. As to these facts there is no dispute; and it follows that the Board, if it is not to be regarded as having used its powers ultra vires, when admittedly no contingency in which it could legally use them against plaintiff had occurred, at least used them after neglecting one essential portion of the materials for its decision. There is no question here of the Courts sitting in appeal over the Board or usurping its function as the judge of the existence and origin of a nuisance, but of the Board having passed its order on an assumption, which evidently, on the facts admitted by its President, was unfounded. In this respect again

(1) (1909) I.L.B., 33 Bom., 334 at 357 and 361.

that order has been shown to have been made in no fair exercise of its discretion.

These defects in the order being sufficient to justify the Court's interference with it, I concur in the decree proposed by my learned brother.

N.R. OLDFIELD, J.

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APPELLATE CIVIL.

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

DHADHA SAHIB (FIRST DEFENDANT), APPELLANT,

v.

MUHAMMAD SULTAN SAHIB (PLAINTIFF), RESPONDENT.*

1920,
August 19.

Hindu Law—Sale by a co-parcener of specific lands—Sale by vendee to another, pending suit for partition in vendor's family—Allotment of different lands by the decree to the vendor—Co-parcener—Right of vendee's vendee to get lands of same value out of the lands allotted to vendor—Right to damages—Measure of damages.

Even though a vendee of specific lands from a co-parcener of a Hindu family, may be entitled to recover lands of equal value out of the lands allotted to his vendor in a subsequent partition in the family, a vendee from the first vendee has no such right, his only remedy being to get damages from his vendor.

In assessing damages the vendee is entitled to ask that they should be assessed at the present enhanced value of the lands.

SECOND APPEAL against the decree of D. G. WALLER, District Judge of Coimbatore, in Appeal Suit No. 23 of 1918, preferred against the decree of V. K. KRISHNAN NAMBIYAR, District Munsif of Tiruppur, in Original Suit No. 839 of 1917.

The material facts are set out in the judgment.

V. Ganapati and G. Krishna Arya for appellant.

T. R. Krishnaswami Ayyar and N. A. Krishna Ayyar for respondent.

The Court delivered the following JUDGMENT:—

The plaintiff bought certain specific land from the first defendant, a Muhammadan. The first defendant had bought this land from a co-parcener in a Hindu family. The other

* Second Appeal No. 1334 of 1919.

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coparcener instituted a suit for partition and it was during the pendency of that suit that the first defendant sold the land to the plaintiff. By the decree in the suit for partition the land with which we are concerned was not allotted to the vendor of the first defendant but some other land was given to him instead. According to the dictum of the learned Judges of this Court in *Manjaya v. Shanmuga*(1), under such circumstances, so far as any question lay between the first defendant and the coparcener from whom he bought the land, the first defendant would be entitled to whatever was substituted by any decree for partition for the land which he had bought from the coparcener. This principle seems to have been acquiesced in in two other decisions of this Court, one of which is *Sabapathi Pillay v. Thandavaroya Odayar*(2), and we are prepared for the purposes of this argument to assume that that proposition of law is correct. Even then it is difficult to see how it avails the plaintiff in this suit. The plaintiff has not bought the land from a Hindu coparcener who according to Hindu Law would have a right to demand partition of the family property and to get the share due to him. The plaintiff has bought certain specific land from the first defendant who is a Muhammadan and between them there can be no question of working out any such equity as is mentioned in *Manjaya v. Shanmuga*(1). When analysed, the position is simply this. A sells a particular parcel of land to B. It is found that A has no title to the land. Can it be said that B is entitled to ask A to convey to him some other land in place of what he bought? When stated in those words, the position of the plaintiff would be quite untenable and it is difficult to see why the character of the superior title by which the title of the vendor in the land which he purported to sell is defeated, should make any difference to the vendee's rights. As the vendor's title to the land in dispute has been superseded by a superior title, the only remedy open to the vendee is damages for breach of warranty of title. It is brought to our notice that in *Sabapathi Pillay v. Thandavaroya Odayar*(2) the plaintiff was a purchaser from a purchaser at Court auction in execution of a money decree against a Hindu coparcener, and it was apparently not argued before

(1) (1915) I.L.R., 38 Mad., 684.

(2) (1920) I.L.R., 43 Mad., 309.

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the learned Judges that a vendee of a purchaser from a Hindu coparcener could not claim against his vendor any such equity as was mentioned in *Manjaya v. Shanmuga*(1). The case was argued on the basis that in the case of a purchaser at Court auction there is no warranty of title. We do not see much significance in the fact that the question now raised before us was not raised before the learned Judges who decided *Sabapathi Pillay v. Thandavaroya Odayar*(2). We are of opinion that if we were to hold that the plaintiff is entitled to whatever land the first defendant might have got in substitution for what he had purchased from his vendor we would be giving him property which he never bargained for. We, therefore, set aside the decree of the District Judge and give the plaintiff in its stead a decree for damages which he has asked for in the plaint as an alternative remedy. He claimed Rs. 300 as damages and we think he is entitled to it. The learned District Judge is evidently wrong in saying that in assessing damages the plaintiff is not entitled to ask that they should be assessed at the present enhanced value of the land. Surely he is entitled to full compensation so that he might be restored pecuniarily to the same position as if he had recovered the land which the first defendant sold to him. We also direct that six per cent interest on this sum be allowed to the plaintiff from the date of the plaint.

The appeal is allowed to this extent. Each party will bear his own costs throughout.

K.R.

(1) (1915) I.L.R., 38 Mad., 684.

(2) (1920) I.L.R., 43 Mad., 309.

APPELLATE CIVIL.

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

EMPIRE OF INDIA LIFE ASSURANCE COMPANY, LTD.,
BOMBAY (FIRST DEFENDANT), APPELLANT,

v.

S. NANU AYYAR (PLAINTIFF), RESPONDENT.*

Life Insurance Company—Agent—Dismissal of agent—Commission—Renewals, meaning of—Premia paid by policy-holders subsequent to dismissal of agent—Right of agent to commission on renewals or subsequent premia paid after dismissal—Express contract for such commission, necessity for.

In the absence of a definite agreement to that effect, an agent of a Life Insurance Company who has secured policy-holders for the Company and whose duties as agent do not cease with the first introduction of the customer, has no right to commission on renewals, that is, subsequent premia paid in by such policy-holders, after he ceased to be agent.

Re The Albert Life Assurance Company, Lewine's Case, 15 S.J., 828; Boyd v. Mathers (1893) 9 T.L.R., 443.

Original Side Appeal, No. 42 of 1899; and Civil Suit No. 178 of 1903, followed.

SECOND APPEAL, preferred against the decree of T. M. FRENCH, Temporary Subordinate Judge of Vellore, in Appeal Suit No. 2 of 1919, preferred against the decree of A. V. RATNAVELU PILLAI, District Munsif of Vellore, in Original Suit No. 307 of 1917.

A. Krishnasami Ayyar and M. Patanjali Sastri for the appellant.

T. R. Venkatarama Sastri and B. C. Seshachala Ayyar for the respondent.

NAPIER, J.

NAPIER, J.—This Second Appeal arises out of a suit by one S. Nanu Ayyar against the Empire of India Life Assurance Company of Bombay. The plaintiff alleges that he was once an agent of the Company and claims a declaration and an account in respect of all premia paid by policy-holders in respect of all policies procured by the plaintiff after the termination of the plaintiff's services as agent. The plaintiff does not allege that he was wrongfully dismissed or claim damages for wrongful dismissal. The lower Appellate Court has found that he was an

agent employed by the Company and was properly dismissed for misconduct, but on the terms of his engagement, as found by itself, has held that the plaintiff is entitled to premia on the original policies obtained through his efforts for three years prior to the suit. I accept the finding as to the agency, but the important question remains whether the lower Appellate Court has based its finding as to the terms of engagement on proper materials. The plaintiff alleged that he was engaged on certain terms but in his plaint did not state whether his engagement was in writing or oral. In his evidence he endeavoured to establish that he was engaged on the terms of a letter which is Exhibit F in the case, his evidence being "the terms written to me by Venkatachala Iyer (that is the chief agent) are mentioned in Exhibit F." The lower Appellate Court has found that Exhibit F was not addressed to him nor any letter in those terms; and as Exhibit F is not a letter but a circular and as he has proved no other letter there can be no doubt that this finding is correct. But the lower Appellate Court has held that he was engaged on the terms set out in a letter, Exhibit S. Now, Exhibit S is not a letter addressed to the plaintiff, but a letter addressed by the Chief Agent for Madras to the Company at Bombay in 1913 and is his report about the plaintiff after the date of his dismissal. In that letter the Agent states that the plaintiff had been working under him until 20th March 1912 under the terms of 10 per cent commission on the first year's premia, 5 per cent on renewals, plus a bonus of one per cent on new collections up to Rs. 1,000, 2 per cent up to Rs. 3,000 and 3 per cent above Rs. 3,000, and he states that he gave one copy of the book of "Instructions to Agents" to the plaintiff. The admissions by this servant of the Company must of course be taken all together, and the statement that the sub-agent was supplied with a copy of the "Instructions to Agents" is part of the admission as to the terms of percentage. This "Instructions to Agents" is Exhibit T in the case. This has been ignored by the Subordinate Judge, whereas it should have been treated as part of the contract.

The "Instructions to Agents" sets out the terms of commission and bonus commission and to the extent that the evidence shows those rates have been altered the contract is varied to that extent, but the other terms undoubtedly apply. Article 29,

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which is in that part of the book dealing with commission, is as follows :

"The commission is allowed so long as the premiums are paid and the agent continues to represent the Company."

This clause was, in my opinion, part of the contract and this being so the claim must fail in toto.

Even if article 29 was not incorporated in the contract I should be of the same opinion. This claim by an agent or sub-agent to be entitled to renewal premia after his connexion with the Company was severed was the subject of a suit, Civil Suit No. 100 of 1899 on the original side of the High Court. In that suit the plaintiff alleged that he was wrongfully dismissed and that he was entitled to receive the future premia. BODDAM, J., held that he was properly dismissed for improper and fraudulent conduct and dismissed the suit. The case went on appeal (Original Side Appeal No. 42 of 1899) before SHEPHARD and DAVIES, JJ., and their Lordships held that in the absence of any special agreement for such payment the agreement must be treated as binding only as long as the agency lasted.

Another suit was filed on the original side of the High Court in 1903, Original Suit No. 178 of 1903. In that suit the plaintiffs who were the head Madras Agents had had their agreement terminated by notice and not for misconduct. They claimed that they were entitled to commission on renewal premia as long as any policy remained in force which had been obtained by them or their sub-agents. The case was tried by MOORE, J., who found that the agreement in that case was founded on Exhibits C and P, two Instruction Books, and he states that nothing is said in either of them as to whether the commission is to continue to be paid after the termination of the agency or not. The learned Judge held that as there was no claim for damages as compensation for wrongful termination of the agency the claim could not be sustained. An appeal was filed from that decision but withdrawn.

The claim has lately been renewed in a suit on the small cause side of the District Munsif's Court of Cuddapah, in *Adinarayana Rao v. The General Manager, Empire of India Life Assurance Company, Bombay*(1) which was brought before a Bench of this Court in *Adinarayana Rao v. The General*

(1) Small Cause Suit No. 991 of 1915.

Manager, Empire of India Life Assurance Company, Bombay(1). That suit was against the defendants in this suit by another dismissed agent. There too the plaintiff did not claim that he was wrongfully dismissed. The difference between that suit and this is that the Court found that the term of the contract were in a letter which was Exhibit A in that case and which contains the terms set out in Exhibit F in this case, and it does not appear that the book of "Instructions to Agents" was sent to the plaintiff. Anyhow it is not found to have been part of the terms of the contract. The District Munsif dismissed the suit relying upon a statement of law in Halsbury's Laws of England, Volume I, page 185, the judgment of the Bench of this Court in Original Side Appeal No. 42 of 1899 and the judgment of Mr. Justice MOORE in Original Suit No. 178 of 1903. The Bench has distinguished those cases on grounds which, with all respect, I am unable to appreciate. The decision presents one difficulty in that there is a seeming contradiction on a finding of fact. The learned Judges say that the

"respondent did not contend that any part of petitioner's claim related to renewals or to anything except the payments of ordinary premia on the original policies obtained through his efforts."

The defendant being the same as in this suit, it is easy to ascertain what is meant by the word "renewals" in respect of which the petitioner is stated not to be claiming. As a matter of fact subsequent premia on original policies are renewals and are called renewals in the books of this company, and are known as renewals in ordinary insurance parlance. When, therefore, the Bench distinguishes the other Madras cases on the ground that they deal with the agent's right to commission on payments made in consequence of renewals they are, with all respect, making a distinction that does not exist, for the claim in the Madras cases was exactly the same as the claim in the case with which they were dealing, namely, subsequent premia on original policies which are in fact renewals.

The only insurance case to which our attention has been called is a decision of Lord CAIRNS, L.C., *Re The Albert Life Assurance Company, Lewine's Case*(2). In that case the Directors

(1) Civil Revision Petition No. 933 of 1916 (unreported).

(2) (1871) 15 S.J., 828.

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of the Albert Company entered into an agreement with one Mr. Lewine that he should act as an agent for the Insurance Company on a salary of £250 with a commission of 10 per cent on the renewal premiums on all policies effected through him, and in case of his retirement from his agency a commission of 5 per cent for the remainder of his life on the renewal premiums on all policies which had been effected through him. The Company went into liquidation and Mr. Lewine claimed to rank as a creditor in respect of the premia which he would have earned after the close of his services basing his claim on the last clause above referred to. The Lord CHANCELLOR held that it was entirely *ultra vires* of the Directors to provide for the payment of commission on renewal in case of the retirement of Mr. Lewine from the agency. In that case, there was salary as well as commission, but his Lordship thought that it was unreasonable and improper to agree to pay commission after the retirement of the agent from his service just as it would have been to agree to pay salary. Both salary and commission must be for services rendered and not for services which are not rendered. It is to be noted that it was not suggested in this case that the general language that the plaintiff was to have a commission of 10 per cent on the renewal premia on all policies effected through him would entitle him to recover commission on premia after retirement but that there was a specific contract to that effect. This case is of value for the proposition that a specific clause being so unreasonable the absence of a specific clause either allowing or refusing in terms cannot lead to the inference that such a right was contemplated or implied in the agreement. With reference to his Lordship's observation that commission is for services rendered it is to be noted that Exhibit T shows the class of services required of agents in respect of renewals. Article 31 of "Instructions to Agents" gives directions to the agent for action to be taken when a policy-holder desires to have his policy altered in any particular. Article 41 deals with the duty of an agent on the death of any person assured in his agency and those duties are of a distinctly exacting nature. One very important duty of an agent will always be to impress upon policy-holders the value of keeping up their premia and this is especially a work necessary for the earning of the premia which in the view taken by the Bench in

the case under consideration would have to be done by some other agent while the original agent or his executors or his trustee in bankruptcy drew the proceeds for doing nothing at all. So far for insurance cases.

Mr. T. R. Venkatarama Sastri in the course of his able argument invited our attention to a series of cases on commission in respect of other businesses. The first case is *Bilbee v. Hassé*(1) a decision of LOPES, L.J., sitting at *nisi prius*. In that case both the parties were butter merchants, the plaintiff having a large and extended business and the defendants only a small business. The defendants agreed with the plaintiff to do business with persons introduced by him and "as regards your commission we have agreed to allow 1½ per cent upon all orders executed by us and paid for by the customers arising from your introduction." After a certain time the defendants gave notice to the plaintiff to close his transactions on defendants' behalf, and a suit was brought to recover commission on business done, after his severance with the defendants with persons who had been introduced by the plaintiff. No cases were quoted and the learned Lord Justice thought that the remedy in the hands of the defendants was to give up business transactions with persons introduced by the plaintiff. He held that the plaintiff was entitled to recover the commission.

The next case is *Boyd v. Mathers*(2), a decision of the Court of Appeal. The plaintiff was an advertising contractor and the defendant, the proprietor of a newspaper. The terms of the contract were that the plaintiff should act as advertising contractor and canvasser in connexion with the paper and should receive from the defendant a commission of 25 per cent on renewal orders of advertisement obtained from the plaintiff. The plaintiff's employment was terminated and he brought a suit for a declaration that he was entitled to commission on renewals which were received after the determination of his employment. KEKEWICH, J., dismissed the suit and his decision was upheld by the Court of Appeal. LINDLEY, L.J., said that he could not read the letters as amounting to a contract that the plaintiff was to receive a commission on all advertisements appearing in the paper after he ceased to have anything to do with it. He was to be paid commission in respect of his services and after he had

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(1) (1889) 5 T.L.R., 677.

(2) (1893) 9 T.L.R., 443.

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ceased to be in a position to render any services he was not to receive anything. BOWEN, L.J., and KAY, L.J., concurred.

Salomon v. Brownfield and the Brownfield Guild Pottery Society(1) is a case tried at *nisi prius* by MATHEW, J. The defendants were pottery manufacturers who employed the plaintiff to go to Australia and travel for them upon terms of their paying 7½ per cent on the net amount of cash in payment of goods, orders for which were obtained through him. The plaintiff's services were terminated in 1835 on three months' notice and he sought for a declaration that he was entitled to the commission on all orders obtained from persons originally introduced by him though after termination of his agency. MATHEW, J., took the same view as LOPES, J., and gave judgment for the plaintiff, but the decision of the Court of Appeal in *Boyd v. Mathers*(2) was not brought to his notice.

The next case is the case of *Gerahty v. Baines*(3), a case tried by Lord ALVERSTONE, C.J. The plaintiff in that case was an advertising agent and claimed a declaration that he was entitled to a commission of 10 per cent on all advertisements received by the newspapers belonging to the defendants from advertisers introduced by the plaintiff, even subsequent to the determination of his employment as the defendants' canvasser. The terms of the contract gave no such specific right, the only reference to renewal orders being that he should have 10 per cent on all renewal orders of such advertisements so long as they were sent in within two years of the next previous order. A mass of evidence was called to prove custom and the cases of *Bilbee v. Hasse*(4), *Boyd v. Mathers*(2) and *Salomon v. Brownfield and the Brownfield Guild Pottery Society*(1) were brought to the notice of the Court. The Lord Chief Justice told the Jury that no custom had been established and left them the question whether there was any agreement between the plaintiff and the defendants that the plaintiff should be entitled to a commission on renewals of advertisements after the expiration of his employment as canvasser: if so, whether it was for any definite time and if so, for what time and on what terms. The Jury found that there was no such agreement between the parties and that the print had

(1) (1896) 12 T.L.R., 239.

(3) (1903) 19 T.L.R., 554.

(2) (1893) 9 T.L.R., 443.

(4) (1893) 5 T.L.R., 677.

never been raised between them. The Lord Chief Justice agreeing with the Jury said that in his opinion the claim must fail. The plaintiff was the defendants' canvasser and it made no difference that his services were paid for by commission and not by salary. These words have, I think, reference to the language of Lord CAIRNS in *Re The Albert Life Assurance Company, Lewine's Case*(1). He then continued:

"The position of a canvasser was that of an agent who, so long as he was acting for his employers, was daily or weekly soliciting advertisements or renewals"

and stated that, in his opinion, there must be a special bargain proved to entitle an advertising agent to recover commission for renewals after the termination of his employment.

The last two cases are the judgments of the learned Judges on the Chancery side, *Wilson v. Harper*(2) and *Levy v. Goldhill*(3). These were cases of independent traders who were able, without interfering with their own business, to introduce customers to the defendants in the two cases. In the one case the language used was "half profits on receipt of orders. Same applies to repeats on any accounts introduced by you," in the other case "5 per cent on all goods supplied to customers introduced by you. We shall be pleased to pay you the said 5 per cent as long as we do business with those you place on the books." In *Wilson v. Harper*(2) the conflicting rulings were brought to the notice of Mr. Justice NEVILLE and he held that the plaintiff, not being an agent, was entitled to recover on the terms of the contract. In the latter case all the former cases, with the exception of the decision of the Court of Appeal in *Boyd v. Mathers*(4), were brought to the notice of the learned Judge; and he appears to have followed the decision of the Court of Appeal on appeal from the decision of LOPES, L.J., in *Bilbee v. Hasse*(5). Unfortunately we have no report of that decision of the Court of Appeal which was only reported in the Times Newspaper. PETERSON, J., relies on the reported language of BOWEN, L.J., and we do not know whether the learned Lord Justice distinguished or dissented from his former judgment in *Boyd v. Mathers*(4). Those are all the cases. In my opinion it may

(1) (1871) 15 S.J., 828.

(3) [1917] 2 Ch., 1297.

(2) [1908] 2 Ch., 370.

(4) (1893) 9 T.L.R., 443.

(5) (1899) 5 T.L.R., 677.

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very well be that where the claimant has to do no work beyond making the first introduction of the customer to a trading firm he can claim commission on repeat orders but where, as in the language of CAIRNS, L.C., and the Court of Appeal in *Boyd v. Mathers*(1) he is paid commission in respect of his services, and services are expected to be rendered in respect of the renewals, when he has ceased to be in a position to render the services he cannot claim to receive the commission. I prefer, therefore, to follow the reported case of the Court of Appeal and the earlier decisions of this Court and hold that in the absence of a definite agreement to that effect the right to receive the commission lapses on dismissal.

In the result the appeal must be allowed and the suit dismissed with costs of the defendant throughout.

SADASIVA
AYYAR, J.

SADASIVA AYYAR, J.—In arriving at the terms of the contract between the parties, I am inclined to hold that we ought to be guided by Exhibit F rather than Exhibit S. There is, however, no inconsistency between the two. But whether we look to Exhibit F or Exhibit S or to both, I agree entirely with my learned brother that the “Instructions to Agents”, Exhibit T, which the plaintiff dishonestly denied having received or looked into, ought also to be considered for the ascertainment of all the terms of the contract between the parties. Considering then Exhibits F, S and T together, I am clear that article 29 of Exhibit T governs the right to claim commission. It follows that when the plaintiff ceased to represent the Company, he lost his right to claim commission on renewals of premiums made after he ceased to be the agent. I, therefore, agree that the appeal should be allowed and the suit dismissed with costs in all Courts.

Whether if article 29 of Exhibit T was not to be incorporated into the contract, the plaintiff's suit should even then fail is a very interesting question. Apart from the English authorities I am inclined to agree with my learned brother that where the duty of the agent does not cease with the first introduction of the customer to the principal, commissions could not be claimed on payments made by the customer after the agency ceases and I concur in his observations on the judgment in *Adinarayana Rao v. The General Manager, Empire of India Life Assurance Co., Bombay*(2).

K.R.

(1) (1893) 9 T.L.R., 448.

(2) Civil Revision Petition No. 983 of 1916 (unreported.)

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Odgers.

DEVULAPALLI VENKATASUBBA RAO (FIRST
PLAINTIFF (APPELLANT),

v.

KOLLURI SATYANARAYANAMURTI AND ANOTHER
(DEFENDANTS) RESPONDENTS.*

1920,
August 18
and 31.

Hindu Law—Joint family—Partition—Service inam lands—Enfranchisement subsequent to partition in name of a member—Right of a divided member to share in enfranchised lands—Onus of proof.

If a divided member of a Hindu family claims to share in service inam lands, which belonged to the family but were, subsequent to a partition in the family, enfranchised in the name of a member who was the office-holder at the time of the enfranchisement, the onus lies on the claimant of proving not only that he is a member of the original service family but also that the inam was excluded from the partition as undivided property in which the sharers retained their joint rights.

Purappa v. Syama Rao (1918) M.W.N., 849, considered.

SECOND APPEAL against the decree of J. C. FERNANDEZ, District Judge of Godāvāri at Rajahmundry, in Appeal Suit No 20 of 1917, preferred against the decree of A. S. KRISHNASWAMI AYYAR, Temporary Subordinate Judge of Rajahmundry at Cocanada, in Original Suit No. 27 of 1915 (Original Suit No. 14 of 1914, on the file of the Court of the Subordinate Judge of Cocanada).

The second plaintiff, the first and second defendants and some of the other defendants were members of a Hindu family. The father of the second plaintiff, the father of the second defendant and the grandfather of the first defendant were brothers. The second plaintiff and the first plaintiff to whom the former had sold a half share in the properties claimed in the suit, instituted this suit for partition of certain properties, among which the properties included in A schedule were inam lands given as emolument to karnam office vested in the family of both the parties. The service inam lands in question, which were enfranchised in the name of the first defendant in 1906,

* Second Appeal No. 1080 of 1919.

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had been in the possession of the first defendant's father and the first defendant for 40 years, and the defendants also set up and proved a partition in the family between the second plaintiff's father, the grandfather of the first defendant and their four other brothers in 1876. The second plaintiff claimed a half share in these enfranchised inam lands as being joint family property liable to partition after enfranchisement. The Subordinate Judge who tried the suit decreed a share to the plaintiff in the enfranchised lands. On Appeal, the District Judge disallowed the claim of the plaintiff in respect of the enfranchised lands, on the ground that there was a partition in the family in 1876, and that there was no reservation of the inam lands from that partition and that ever since the inam lands had become the property of the branch of the family to which the first and second defendants belonged. The first defendant preferred this Second Appeal.

C. Rama Rao for appellant.

P. Narayanamurti for respondents.

AYLING, J.

AYLING, J.—No point of law arises in this Appeal except in connexion with items 1-19 and 25 of plaint schedule A.

These were originally karnam service inam lands and were enfranchised in 1906 in the name of first defendant, who was then holding the office of karnam. Second plaintiff and first defendant belong to what was originally the same joint family in which the post of karnam vested. According to the plaint, partition never took place; but it is found as a fact that partition did take place about 1874 and that second plaintiff's branch and first defendant's branch then became divided and have been living separately since. It is however contended that this does not affect plaintiff's claim to a share of the service inam lands on enfranchisement.

As it is expressed in paragraph 13 of the plaint:

"The enfranchisement of the properties converts them into family property and enures for the benefit of all the members of the service-holder's family existing at the time of enfranchisement whether divided or undivided."

The sole question before us is whether this contention is correct. It is admitted that before partition the office of karnam and the emoluments of that office vested in the family to which

second plaintiff and defendants belong and it is not seriously disputed that, if the family had remained undivided up to the time of enfranchisement, plaintiff as a member of it would have been entitled to a share in the enfranchised property. The latter proposition in fact follows from *Gunnaiyan v. Kamakchi Ayyar*(1) and *Pingala Lakshmipathi v. Bommireddipalli Chalamayya*(2) and although some doubt was thrown on the latter by reference to the judgment of the Privy Council in *Durga Prasad Singh v. Tribeni Singh*(3), I can find nothing in the latter which could be interpreted as over-ruling by implication these decisions which have so long been followed.

It is argued, however, on behalf of defendants that the effect of the partition of 1874 was to put an end to any interest in the office and its emoluments on the part of plaintiff and that on enfranchisement the enfranchised lands became the property only of the office-holder, the first defendant, and any persons who were joint with him at the time of enfranchisement. This argument has been accepted by the District Judge who has dismissed the appeal, relying on the decisions of SPENCER and KRISHNAN, JJ., in *Pyrappa v. Syama Rao*(4).

It will be clear from a careful perusal of the judgments in that case that the two learned Judges took materially different views of the matter. SPENCER, J., undoubtedly held that the fact of partition was conclusive that no member of a divided branch of the family would, in any circumstances whatever, have a right to claim a share in the enfranchised lands and that the latter vested, after enfranchisement, only in the last office-holder in whose name it was enfranchised and in those persons who formed a joint family with him at the time of enfranchisement; KRISHNAN, J., as I understand his judgment, was not prepared to go so far. He draws attention to three unreported cases in which it has been held that members of the family of the original grantee who had become divided from the person who held office at the time of enfranchisement were nevertheless entitled to share in the enfranchised service inam. These cases are *Subramania Sastri v. Sankara Sastrula*(5) *Venkatrama Murty v.*

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(1) (1903) I.L.R., 26 Mad., 339. (2) (1907) I.L.R., 30 Mad., 434 (F.B.).
(3) (1919) I.L.R., 46 Cal., 362 (P.C.). (4) (1918) M.W.N., 849.
(5) S.A. No. 49 of 1911 (unreported).

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AYLING, J.

Mungayya(1) *Veerabhadrayya v. Venkata Jaganadha Sarma*(2)
KRISHNAN, J., says :

"These rulings thus show that, even though a person may have been divided off from the person who subsequently obtained the title deed for the enfranchised land, he may prove that his right was kept intact at the partition and may claim his share."

With this view I am in entire agreement. I was a party to two of the unreported cases above cited. In *Venkatrama Murti v. Mungayya*(1) as in the earlier case, *Subramania Sastri v. Sankara Sastrulu*(3) decided by BENSON and SUNDARA AYYAR, JJ., it was found as a fact that the service inam lands were treated as joint family property after partition. In the last case, *Veerabhadrayya v. Venkata Jaganadha Sarma*(2) the question of what happened at partition appears to have been decided mainly on the pleadings. The respondent in that case endeavoured to set up before us a specific allotment of the service inam to the share of his branch at partition. We disallowed this plea in appeal in the absence of any mention of such allotment in the written statement and on this disallowment it appears to have been accepted without demur on the part of respondent that the property remained joint in spite of partition. The plea of subsequent adverse possession was also disallowed and that plea is not now raised before us. The sole possession of an office-holder being sufficiently explained by his indisputable right to exclusive enjoyment as long as he held office, could not be held to be, *per se*, adverse to other members of the family, divided or undivided, so as to deprive them of any interest which they might possess.

After further consideration of the point, I remain of opinion that the fact of partition from the person in whose name the service inam is enfranchised is not conclusive against a claim to co-parcenary rights in the enfranchised inam lands. Whether the co-parcenary rights survive will have to be determined as a fact in each case. It may be that the office with the inam attached to it was allotted at partition to the coparcener then holding office as a part of his share. In such a case persons divided from him would obviously have no right after enfran-

(1) A.S. No. 79 of 1917 (unreported).
(2) A.S. No. 176 of 1917 (unreported).
(3) S.A. No. 49 of 1911 (unreported).

chisement. It may be that in view of the peculiar nature of the tenure and the legal impossibility of severing the lands or any portion of them from the office, the inam was kept undivided on the understanding that although till enfranchisement only the office-holder could enjoy it, yet in the event of enfranchisement all members would be entitled to share. It may be that as in *Subramania Sastri v. Sankara Sastrulu*(1) and *Venkatrama Murti v. Mungayya*(2) the other co-parceners were actually allowed by the office-holder to enjoy some portion of the inam land or its profits. All that can be said is that if a divided member claims to share in an enfranchised service land the onus lies on him of proving, not only that he is a member of the original service family, but that at any partition which has taken place, the inam was kept out of partition as undivided property in which all the sharers retained joint rights. This is in accordance with the law in all cases of partition. If this onus is borne in mind I do not think the practical difficulties anticipated by SPENCER, J., are likely to prove very formidable; but in any case, if my view of the law is correct, they will have to be faced.

I would, therefore, set aside the decree of the lower Appellate Court as far as it relates to items 1-19 and 25 of plaint Schedule A and remand the appeal for fresh disposal in the light of the above remarks.

In other respects the decree of the District Judge may be confirmed. Costs in this Court may be provided for in the final decree of the District Judge.

ODGERS, J.—This is a suit for partition and the point for decision as stated by the District Judge is whether plaintiffs are entitled to a moiety of the karnam service inams (items 1-19 and 25 Schedule A) or whether these lands became the exclusive property of defendants 1 and 2, on their enfranchisement. The parties originally formed one undivided Hindu family. Both the lower Courts held that the family became divided long prior to the enfranchisement of the inams in 1906, and there was no argument before us on this point. The Munsif held that plaintiffs were entitled to a share in the

(1) S.A. No. 49 of 1911 (unreported).
(2) A.S. No. 79 of 1917 (unreported).

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—
ODGERS, J.

service inams; the District Judge relying on the decision of this Court *Pyrappa v. Syama Rao*(1), held that they were not.

It may be said at the outset that there is no direct evidence as to what was done at partition in respect of these inams. It may of course be that they were then expressly allotted to defendants' share as representing the office-holder and his family at the time of enfranchisement. It may again be that the inams were expressly reserved for the divided members or again that nothing was said as to these.

Now it is clear that no conclusion can be drawn from the fact that possession remained with defendant's branch as they were admittedly doing the work of the office. The decision of the Full Bench of this Court in *Pingala Lakshmipathi v. Bommi-reddipalli Chalamayya*(2) stated that enfranchisement does not confer on the persons named in the title-deed any rights in derogation of those possessed by the persons in the inam at the time of enfranchisement. It is also clear that at the time of enfranchisement the whole family was interested in the inam, i.e., they had a right more or less contingent, to be appointed to the office, unless some binding arrangement in derogation of that right had been entered into. So Mr. Justice BHASYAM AYYANGAR in *Gunnaiyan v. Kamakchi Ayyar*(3) said :

"The free hold title will ensure for the benefit of such person or persons as at the time the service inam was enfranchised was entitled to the hereditary office. No matter in whose name the enfranchisement was effected or the title-deed issued."

It is true that the learned Judge in that case had not to consider the intervention of a partition but the question is would that necessarily make any difference. In my opinion, it would not, unless as before stated some special arrangement was come to at partition whereby the inams were expressly reserved to a particular branch of the family.

The respondent's vakil was willing to admit that the inams were not expressly reserved to defendants' branch at partition but submitted he is nevertheless entitled to succeed on the ruling in *Pyrappa v. Syama Rao*(1) where SPENCER, J., held that nobody belonging to a divided branch would have a right to

(1) (1918) M.W.N., 849.

(2) (1907) I.L.R., 30 Mad., 434 (F.B.). (3) (1908) I.L.R., 26 Mad., .. 9.

come in and take a share of the property of the joint family and KRISHNAN, J., said :

"There is nothing to show that lands were treated as joint family property either before or after enfranchisement or that any rights were reserved at partition."

With deference, the opinion of SPENCER, J., goes too far. At the time of the partition the inam lands would naturally be impartible and would only subsequently become partible on enfranchisement and further it is clearly impossible to say in face of the authorities that the other members of the family could under no circumstances have a right to come in. KRISHNAN, J., was evidently impressed with the fact that the lands had all along been in the possession of the first defendant. The decisions quoted above show that this could not of itself affect the interests of the other members. Further, the learned Judge goes on to say that a divided member may show that his right was kept alive at the partition and may claim his share. He however holds, on the facts of the case before him, that there was no evidence to support such a claim. The onus would naturally be heavily on the divided member to establish his contention which onus might be more difficult to discharge with lapse of time. This, however, is of course a totally different thing from debarring the divided member from the opportunity of proving such a claim.

There are three unreported decisions of this Court *Subramania Sastri v. Sankara Sastrulu*(1), *Venkatrama Murti v. Mangayya*(2), *Veerabhadrayya v. Venkata Jaganadha Sarma*(3), (now before the Privy Council). To the last two of these my brother AYLING, J., was a party. It was held in all these that the divided members were entitled to share in the enfranchised inams. In *Subramania Sastri v. Sankara Sastrulu*(1), it was said :

"The land in question being emoluments of the Reddi office was left undivided at the time of the partition-deed, Exhibit A, but it is not disputed that it was then treated as property in which all the members of the family had an interest."

In *Venkatrama Murti v. Mungayya*(2), it was not contended that the suit lands fell to the share of the first defendant's branch

(1) S.A. 49 of 1911 (unreported). (2) A.S. 79 of 1917 (unreported).
(3) A.S. 176 of 1917 (unreported).

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ODGERS, J.

at partition and the learned Judges say there can be no doubt that the inam lands were enjoyed in common after partition.

In *Veerabhadrayya v. Venkata Jaganadha Sarma*(1) Mr. Narayanamurti who also appeared in *Venkatrama Murti v. Mungayya*(2) did not argue the effect of enfranchisement having regard to (delivered fifteen days previously) *Venkatrama Murti v. Mungayya*(2), and following that decision and relying apparently on the fact that the defendant nowhere in his written statement set up an assignment to his branch on partition the learned Judges passed a decree for plaintiffs' share in the inam lands. Thus KRISHNAN, J., in *Pyrappa v. Syama Rao*(3) disposes of these unreported decisions by saying that :

"in all of these cases there were circumstances justifying the inference that in spite of partition the rights of the divided members were kept alive."

Durga Prasad Singh v. Tribeni Singh(4) was quoted by the respondents' vakil, where their Lordships of the Privy Council held that the incidents of Ghatwali tenure in that case were not such as to give the family any rights over the property while it was in the hands of the Ghatwal and that the latter was not a trustee of or managing member for the family. In that case the plaintiff relied on an asserted actual possession and receipt of their share of the rents and profits by his vendors or their predecessors in title and his evidence on the point was disbelieved.

It will be observed that the decision was confined to a particular instance of Ghatwali tenure and that the Madras decision, *Gunnaiyan v. Kamakchi Ayyar*(5), was not quoted to or considered by their Lordships. I do not, therefore, understand this decision of the Privy Council as overruling the Madras Case.

As a result of the foregoing observations, I must with great respect differ from the opinion of SPENCER, J., in *Pyrappa v. Syama Rao*(3) and on the basis of the judgment of BHASHYAM AYYANGAR, J., in *Gunnaiyan v. Kamakchi Ayyar*(5), agree with the order proposed by my learned brother.

K.R.

(1) A.S. 176 of 1917 (unreported). (2) A.S. 79 of 1917 (unreported).
(3) (1918) M.W.N., 849. (4) (1919) I.L.R., 46 Cal., 862 (P.C.).
(5) (1908) I.L.R., 26 Mad., 339.

APPELLATE CIVIL.

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

ALAGAPPA CHETTY (PLAINTIFF), APPELLANT,

1920,
September 1.

v.

ALAGAPPA CHETTY AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

*Indian Paper Currency Act (II of 1910), sec. 26—Hundi payable to bearer—
Suit by endorsees against endorser—Invalidity of hundi—Estoppel, if any.*

The endorsee of a hundi which was drawn payable to bearer and which was not saved by the proviso to section 26 of the Paper Currency Act sued to enforce it as against the endorser.

Held, that the hundi was invalid according to the section and that the endorser was not estopped from denying the validity of the hundi.

Chidambaram Chettiar v. Ayyasami Thevan (1917) I.L.R., 40 Mad., 585 followed.

The observations of SESHAGIRI AYYAR, J., to the contrary in *Arunachalam Chettiar v. Narayanan Chettiar* (1919) I.L.R., 42 Mad., 470, held *obiter* and not followed.

The mere fact that a hundi is drawn on a certain person and that he endorses it to another does not make the drawee a "banker" within the proviso to the section.

SECOND APPEAL against the decree of A. NARAYANA NAMBIYAR, Subordinate Judge of the Temporary Sub-Court of Sivaganga, in Appeal No. 74 of 1918, filed against the decree of P.R. GOVINDA RAO, District Munsif of Sivaganga, in Original Suit No. 483 of 1916.

Plaintiff sued for Rs. 750, as endorsee from the second defendant of a hundi drawn in favour of the second defendant by the first defendant and made payable by a Rangoon firm. The plaintiff alleged that the hundi was presented for payment but was dishonoured, that he gave due notice of dishonour and that the hundi was lost before filing the suit. The defendants pleaded, *inter alia*, that the allegation that the hundi was lost was false, that "the hundi" was kept back as it was drawn payable to bearer, that it was invalid according to section 26 of the Paper Currency Act, and that there was neither proper presentment nor due notice of dishonour. Accepting the version of the plaintiff the Court of first instance gave a decree against

* Second Appeal No. 493 of 1919.

ALAGAPPA
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ALAGAPPA
CHETTY AND
ANOTHER.

both the defendants as prayed for. The second defendant appealed against the plaintiff and the first defendant, and the Court of appeal upheld the version of the defendants and dismissed the suit. The plaintiff preferred this Second Appeal against both the defendants.

C. V. Anantakrishna Ayyar for the appellant.

K. Bashyam Ayyangar and *N. M. Malim Sahib* for respondents.

The Court delivered the following

JUDGMENT.

The suit in which this Second Appeal has arisen was instituted by the endorsee of a hundi in order to enforce payment of the hundi. The case is pressed only against the second defendant, who is the endorser. The hundi itself is not forthcoming but the defendant in his written statement admitted that such a hundi had been issued but that it was made payable to bearer on demand and as such it was an invalid document by virtue of section 26 of the Paper Currency Act. That section is absolutely clear and there can be no doubt that it applies to a hundi of this character. The point is settled by a ruling of this Court reported in *Chidambaram Chettiar v. Ayyasawmi Thevan* (1). But it was argued by Mr. Anantakrishna Ayyar that the endorser is estopped from denying the validity of his instrument. The authority for the proposition is an observation of one of the learned Judges in *Arunachalam Chettiar v. Narayanan Chettiar* (2). That observation is purely *obiter* and no authority is cited in support of the proposition. It is well established that there can be no estoppel against a clear injunction of a statute. If we were to accept the contention of the appellant, we should be virtually abrogating section 26 of the Paper Currency Act, which prohibits altogether the issue of any document like this except in the case set out in the proviso.

Mr. Anantakrishna Ayyar also argued that the endorser, second defendant, ought to be treated as a banker, apparently merely on the ground that the hundi was drawn on him and he endorsed it to somebody else. There is no basis for this suggestion.

The Second Appeal is dismissed with costs of the first respondent.

N.R.

(1) (1917) I.L.R., 40 Mad., 585.

(2) (1919) I.L.R., 42 Mad., 470.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Odgers.

JAGANNADHA RAO BY GUARDIAN VASANTA RAO (DEFENDANT),
APPELLANT,

1920
September 1.

RAMAYAMMA (PLAINTIFF), RESPONDENT.*

Hindu Law—Authority by a will to widow to adopt—Appointment by will of a guardian during minority of boy to be adopted, validity of.

A childless Hindu without co-parceners, authorizing by his will, his widow to adopt, can at the same time appoint a guardian to manage the property of the boy to be so adopted during his minority.

Chidambaram Pillai v. Rangasami Naicker, (1918) I.L.R., 41 Mad., 561 (F.B.) and *Pratap Singh Shivsingh v. Agarsingji Rajasingji*, (1919) I.L.R., 43 Bom., 778 (P.C.), distinguished.

SECOND APPEAL against the decree of T. A. NARASIMHA ACHARIYAR, Subordinate Judge of the Temporary Sub-Court, Vizagapatam, in Appeal Suit No. 129 of 1918, preferred against the decree of N. BALARAMADOS, District Munsif of Vizagapatam, in Original Suit No. 251 of 1915.

One Suryanarayana Rao died on 31st March 1904 leaving a registered will, by which he authorized his widow to adopt the minor defendant in the case, and directed that until the adoption the defendant's natural father, Timmayya, should manage his estate as executor under the will, and that after the adoption he should be the guardian of the minor defendant until he attained his majority. Timmayya as executor borrowed on a promissory note Rs. 500 from the plaintiff in 1905, for effecting certain urgent and necessary repairs to some godowns belonging to the estate and for paying a cist of Rs. 100 payable for certain lands of the estate. This promissory note was renewed by Timmayya on several occasions both before and after the adoption of the minor defendant by the widow which took place in 1908, and this suit was brought to recover the sum due on the last of such renewed promissory-notes, viz., one executed on 2nd June 1912 by Timmayya as guardian for the minor adopted boy. The minor defendant pleaded *inter alia* that there was no

* Second Appeal No. 1872 of 1919.

JAGANNADHA
RAO
v.
RAMAYAMMA. necessity to borrow, that even if there was, the guardian had no power to renew a promissory note executed by him as executor and that the execution of the last promissory-note was not made in the capacity of a guardian. Rejecting all the pleas of the defendant both the lower Courts passed a decree as prayed for. The defendant preferred this Second Appeal.

D. Balasubrahmanya Mudaliyar for *A. Krishnasami Aiyar* for appellant.

B. Satyanarayana amicus curiae for the respondent.

AYLING, J. The only substantial question in this appeal is whether the minor defendant's natural father Timmayya was entitled to represent his estate after the minor's adoption. If so, there can be no doubt that the suit promissory-note, Exhibit C, is binding on the estate and that the decree of the lower Appellate Court must be upheld.

The facts are these: Mr. M. Suryanarayana Rao, sole proprietor of the Waltair estate died on 31st March 1904, leaving a registered will. This will is not exhibited, but its provisions are admitted to be as set out in the plaint paragraph No. 3. That is to say, it authorized his widow to adopt the minor defendant and directed that until the adoption should be effected, defendant's natural father Timmayya should manage his estate as executor under the will and that after the adoption he should be the guardian of the minor defendant until the latter attained majority. Defendant was duly adopted on 12th December 1908. Subsequently, Timmayya, describing himself as the natural father and guardian of defendant, executed the suit promissory note.

Appellant argues that, once the adoption was effected the minor's adoptive mother, and not Timmayya, was his natural guardian, and that the appointment of a testamentary guardian to manage the minor's estate is illegal.

The first proposition is undeniable; for the second, reliance is placed on the Full Bench decision of this Court in *Chidambara Pillai v. Rangasami Naicker* (1), and on that of the Privy Council in *Pratapsingh Shivsingh v. Agarsingji Rajasangji* (2).

In the former case it was held that the sole adult co-parcener of a Mitakshara family, consisting of himself and minor

co-parceners is not competent to appoint a testamentary guardian to the co-parcenary properties of the minor co-parceners. JAGANNADHA
RAO
v.
RAMAYAMMA.

This would, of course, apply if Mr. Suryanarayana Rao had had a natural born son or a son already adopted at the time of his death; he could not in such circumstances appoint a testamentary guardian to manage the son's property after his death. It is argued, and I think correctly, that the same principle would apply in the case of a posthumous son. Lastly, it is said that a son adopted by a widow under authority stands in exactly the same position as a posthumous son and that in his case also the appointment of a testamentary guardian is incompetent. It is in this connexion that their Lordships of the Privy Council are quoted in *Pratapsingh Shivsingh v. Agarsingji Rajasangji* (1) as laying down that the rights of an adopted son unless curtailed by express texts are in every respect the same as those of a natural born son and that an adoption, so far as the continuity of the line of inheritance is concerned, has a retrospective effect. AYLING, J.

This process of argument is attractive; but we must be on our guard not to follow it too blindly. The remarks of their Lordships of the Privy Council were made without any reference to the question before us; and the propriety of extension of the doctrine in *Chidambara Pillai v. Rangasami Naicker* (2), to a case like the present one requires careful consideration.

The minor co-parceners in that case were all in existence at the time of the testator's death. I was a member of that Bench, and can say that with myself and, I believe, with my learned brothers, a consideration of great weight was the undisputed fact that the testator had no power of disposition over the property for which he purported to appoint a manager. As SESHAGIRI AYYAR, J., said (at page 575):

"I can see nothing in the judgment of the Board in that case to warrant the contention that a person who cannot deal with a species of property by a testamentary document can devise the right of management over such property."

This judgment of SESHAGIRI AYYAR, J., was concurred in both by COUTTS-TROTTER, J., and myself and in my own brief judgment I quoted a remark of SADASIVA AYYAR, J., in another case to the same effect as summing up the whole matter.

(1) (1919) I.L.R., 43 Bom., 778 (P.C.). (2) (1918) I.L.R., 41 Mad., 561 (F.B.).

(1) (1918) I.L.R., 41 Mad., 561 (F.B.). (2) (1919) I.L.R., 43 Bom. 778 (P.C.)

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AYLING, J. Now, in the present case it is most important to note that at the time of the will and right up to the testator's death the testator had absolute power of disposition over the property. There was no co-parcener to share it with him. Up to the moment when the breath left his body he could cancel this will and execute another bestowing the property where he would (subject of course to rights of maintenance). If his wife had been pregnant at the time this power of disposition might have been defeated by the subsequent birth of a son irrespective of any expression of his wishes, but a subsequent adoption could only take place on authority to be given by himself, or as I would put it, by his own expressed desire.

If it was optional with him to authorize the adoption it was surely competent to him to make the authorization conditional on the management of the property during the adopted son's minority, being entrusted to a suitable person in whom he had confidence. This is what he seems to me to have done in the present case; and no authority has been quoted against his power to do so. The only case we were referred to was *Bhyri Appamma v. Bhyri Chinnamm*(1), in which the testator purported to make a disposition of property adverse to the adopted son to take effect after the adoption in a certain contingency entirely unconnected with the adoption itself. That disposition was held to be illegal; but the case was obviously not on all fours with the present one.

Looking to the fact that the appointment of a testamentary guardian here only extends to property over which the testator had complete power of disposition at the time of his death and does not fetter or contravene any interest in existence either actually or potentially (as in the case of a posthumous son) at the time of his death there seems to be no reason why it should not be recognized.

I would therefore dismiss the Second Appeal. Plaintiff was not represented, but Mr. Satyanarayana was good enough to give us the benefit of an argument on her behalf as *amicus curiae*.

ODGERS, J. — I agree with the judgment just pronounced by my learned brother but as the matter is of some importance and

(1) (1920) 12 L.W., 17.

was, owing to the kind assistance of Mr. B. Satyanarayana appearing as *amicus curiae*, fully argued before us, I venture to add a few words of my own.

The facts have been fully set out by my learned brother. It is not necessary to refer to the grounds (save one) on which the suit pro-note was attacked. It is sufficient to say that I agree with the lower Appellate Court as to these. The argument before us was to the effect that Timmayya was incapable of being appointed guardian by will to the adopted minor son of the testator owing to the fact that immediately on the adoption taking place the status of the adopted son became in all respects that of a natural born son and that consequently there was a coparcenary between the testator and the adopted son which prevented the former from appointing a testamentary guardian to the latter on the authority of *Chidambara Pillai v. Rangasami Naicker*(1). In my opinion the case before the Full Bench was different from the present. There, at the death of the testator a coparcenary was already in existence and the testator had no authority to dispose of the property which belonged at the time of his death to the coparcenary. My learned brother, who was a party to the decision, adopted a remark of SADASIVA AYYAR, J. in *Chidambaram Pillai v. Veerappa Chettiar*(2), in which that learned Judge distinctly based his observations on the fact that the testator could not deal with the property by his will. In the present case the testator was the last surviving coparcener and admittedly had power to dispose of the property by his will. He might or might not direct by his will his widow to adopt. It seems to be a large and dangerous extension of the doctrine as to the status of an adopted son laid down by this Court in *Vaidyanatha Sastri v. Savithri Ammal*(3), and by their Lordships of the Privy Council in *Paratapsingh Shivsingh v. Agarsingji Rajasangji*(4), to say that a direction to adopt contained in a will converts the property over which the testator would otherwise have had full powers of disposition into coparcenary property so as to take away the right of the testator to appoint a testamentary guardian to an adopted son; if and when adopted.

(1) (1918) I.L.R., 41 Mad., 581 (F.B.). (2) (1917) 6 L.W., 840.
(3) (1918) I.L.R., 41 Mad., 305 (F.B.). (4) (1919) I.L.R., 43 Bom., 778 (P.C.).

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It may further be remarked that *Vaidyanatha Sastri v. Savithri Ammal*(1) was a case of the right of an adopted son to set aside during the life of the widow an alienation by her not binding upon him. At page 96 KUMARASWAMI SASTRI, J., remarked :

" Though the fiction of constructive pregnancy through permission to adopt has been exploded by a series of decisions, the adopted son on his adoption becomes the son and heir of his father and the adoption has retrospective effect in so far as it divests wholly or partially the estate of all persons whom he would have either excluded from the inheritance or shared with."

I would submit that was all that was required to dispose of the question referred to the Full Bench and that the wider remark of the same learned Judge on the same page is obiter.

The Bombay case in the Privy Council turned on the question as to whether an adoption continued the line of a grantee of a *jivai* right to be enjoyed so long as the grantee's male line lasted and it was held it did ; their Lordships observing (page 792) :

" Again, it is to be remembered that an adopted son is the continuator of his adoptive father's line exactly as an *aurasa* son, and that an adoption, so far as the continuity of the line is concerned, has a retrospective effect ; whenever the adoption may be made there is no hiatus in the continuity of the line."

This seems to me to distinguish the case from the one before us and to be no warrant for extending the doctrine as stated above. If, as I hold, it was competent for the testator to appoint a testamentary guardian to his adopted son it was also competent for him to do so on conditions. In *Lakshmi v. Subramanya*(2), the decision turned on the inference that the adopted son's natural father on adoption tacitly agreed to the arrangement. In *Jagannadha v. Papamma*(3), it was held that an adopted son was not bound by an agreement entered into by his adoptive mother and his natural father. The learned Judges there referring to *Lakshmi v. Subramanya*(2) say :

" The Madras case rests on the principle that the adoptive father in as much as he can, before adoption, dispose of his property as he chooses, can at the time of adoption impose such conditions as he thinks fit upon the enjoyment of his property by the adopted son."

(1) (1918) I.L.R., 41 Mad., 75, (F.B.). (2) (1889) I.L.R., 12 Mad., 490.
(3) (1893) I.L.R., 16 Mad., 400.

In *Visalakshi Ammal v. Sivaramien*(1), the Full Bench of JAGANNADHA RAO v. RAMAYAMMA. ODGERS, J. this Court said (per BENSON, J.) at page 587,

" But it would seem that a fair and reasonable disposition of the property is not essentially repugnant to Hindu law, or the purposes for which adoption is allowed, and is nowhere forbidden by that law. Such dispositions are commonly made, and are upheld by the authority of the caste and the consciousness of the people. In these circumstances, I think that the Courts ought not to refuse to recognize them as binding on the minor, for whose benefit the adoption, coupled with the agreement as to the disposition of the property, was really made."

These cases were not referred to in the argument before us, but the appellant's vakil quoted the decision in *Bhyri Appamma v. Bhyri Chinnammi*(2), in his favour. There a Hindu testator directed his senior widow to adopt and provided that if after adoption disputes arose between the senior widow and the adopted son on one side and the junior widow on the other, the latter was to be given certain property. It was held that the junior widow could not recover as against the adopted son in the absence of an agreement with the natural father of the adopted son at the time of adoption. It will be observed that the disposition of the property had nothing whatever to do with the adoption nor was the adoption in any way conditional ; the direction to adopt did not impose any restrictions on the rights in the property to be taken by the adopted son. All this seems to me to clearly distinguish the case from the one before us.

For these reasons I agree that the Second Appeal must be dismissed.

N.B.

(1) (1904) I.L.R., 27 Mad., 577.

(2) (1920) 12 L.W., 17.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Hughes.

1920,
September
1, 2 and 23,
October 5.

PERUMAL AMMAL (MINOR BY MOTHER AND NEXT FRIEND
KRISHNAMAL (PLAINTIFF), APPELLANT,

v.

PERUMAL NAICKER AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act (IV of 1882), ss. 3, 8 and 128—Actionable claims, transfer of—Mortgage-debts, book-debts and promissory notes, gift of—Unregistered instrument, validity of, to effect gift—Law before and after amending Act of 1900.

Under the Transfer of Property Act, 1882, as originally passed, mortgage-debts were assignable as actionable claims, and the assignment of the debt passed the security with it under section 8 of the Act.

But in consequence of the amendments made in 1900 of the original Act, mortgage-debts, being excluded from the definition of actionable claims, can only be transferred together with the security as immoveable property and therefore only by a registered instrument.

Where, however, the law still admits of the separate transfer of the mortgage-debt as by the endorsement of promissory notes secured by a deposit of title-deeds or by attachment and sale in execution of a mortgage-debt under the Civil Procedure Code, section 8 of the Transfer of Property Act still operates, to carry the security with it.

Where certain mortgage-debts, book-debts and promissory notes were transferred by way of gift under an unregistered document, the gift of the mortgage-debts, was invalid under section 128 of the Act, but the gift of book-debts and promissory notes fell under Chapter VIII (Transfer of Actionable Claims) and not under Chapter II (Gifts), of the Act and was valid and took effect.

Where there is a gift of immoveables and moveables but the former fails owing to want of registration, the latter may nevertheless be held good, the question to be considered being whether the latter was conditional on the validity of the former.

Godman v. Godman (1920) P., 261, followed; *Pothi Naicken v. Naganna Naicker* (1916) 30 M.L.J., 62, distinguished.

APPEAL against the judgment of K. S. KOTHANDARAMA AYYAR, Subordinate Judge of Tuticorin, in Original Suit No. 11 of 1918.

* Appeal No. 849 of 1919.

One Bomma Naik had two sons, Ganga Naik and Perumal Naik (senior); both of them predeceased Bomma Naik. Ganga Naik left two sons Perumal Naik and Velappa Naik who are the defendants in this suit; Perumal Naik (senior) left a daughter Perumal Ammal, the present plaintiff. Bomma Naik, the grandfather of the plaintiff and the defendants, executed a document dated 14th July 1916 (Exhibit 50 in the case), by which he made a gift to the plaintiff, of certain outstandings due to him, consisting of certain mortgage-debts, book-debts and promissory notes. After the death of Bomma Naik, the plaintiff, minor represented by her mother as next friend, brought this suit against the sons of Ganga Naik for a declaration of her right to the outstandings gifted to her by her maternal grandfather under the document aforesaid. The defendants pleaded that Bomma Naik, his sons and grandsons, viz., the defendants, were members of an undivided family, that Bomma Naik consequently was incompetent to make a gift of joint family property, and also that the document, comprising as it did mortgage-debts secured on immoveable property, was not valid and inadmissible in evidence for any purpose, as it was not registered. The Subordinate Judge held that Bomma Naik was divided from his deceased sons, that the outstandings dealt with in Exhibit 50 had fallen to Bomma Naik's share but that the document (Exhibit 50) required registration as it dealt with mortgage-debts, and was inadmissible in evidence and did not operate to transfer even book-debts and promissory notes in favour of the donee, and he accordingly dismissed the suit. The plaintiff preferred this Appeal to the High Court.

T. R. Venkatarama Sastri and *K. Bashyam Ayyangar* for appellant.—A transfer of mortgage-debts need not be by a registered instrument. What is transferred primarily is the debt, and the security therefore is only accessory, and it passes only by operation of law, under section 8 of the Transfer of Property Act: see *Bhagwati Prasad v. Radha Kishen Sevak Pande*(1), *Nataraju Iyer v. The South Indian Bank of Tinnerelly*(2), *Tarvadi Bholanath v. Bai Kashi*(3), *Walker v. Jones*(4), *In re*

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(1) (1893) I.L.R., 15 All., 804.
(3) (1902) I.L.R., 26 Bom., 305.

(2) (1914) I.L.R., 37 Mad., 51.
(4) (1865) L.R., 1 P.O., 50.

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Patrick. Bills v. Tatham(1). A transfer of a mortgage created by way of deposit of title-deeds, need not be registered — see *Gunniah v. Gopala Chettiar*(2) and *Dwaraka Doss (Govardana Doss v. Danakoti Amma)*(3). For purposes of execution of decrees under the Civil Procedure Code (Order XXI, rules 46 and 54 of Act V of 1908), a mortgage-debt is moveable property and may be attached and sold as such; the sale of the debt carries the security with it: see *Nataraja Iyer v The South Indian Bank of Tinnevely*(4), *Chullile Peetikayil Nammad v. Othenam Nambiar*(5), *Ramasami Moopan v. Srinivasa Iyengar*(6). In *Samu Pathan v. Chidambara Udayan*(7) it was held by SRINIVASA AYYANGAR, J., that a mortgage-debt is not immoveable property for the purposes of section 55 of the Transfer of Property Act, and there is no implied covenant for title under that section in cases of transfers of mortgage-debts.

Even if Exhibit 50 be not effective to transfer the mortgage-debts, it at least operates as a valid transfer of the book-debts and the promissory notes. Moveables can be separated from the immoveables dealt with in the document. The intention of the donor to benefit the donee is clear and it is not a case of an indivisible contract. There is no analogy between this case and the case of a partition deed in which the property consists partly of moveable and partly of immoveable property: see *Thandavan v. Valliamma*(8), *Hanmant v. Ramabai*(9), *Pusupati Venkatapathiraju Garu v. Vatsavaya Venkata Subhadrayamma*(10).

T. Ranga Acharya for the respondent.—Under Act II of 1900, the Transfer of Property Act, 1882, was amended, and the definition of an actionable claim in section 8 of the Act expressly excludes mortgage-debts, etc. It is therefore clear that the intention of the legislature was that a mortgage-debt should not be transferred as an actionable claim under section 130 of the Act. Mortgage-debt can be transferred only as immoveable property under Chapters IV, VI, VII, or under

(1) [1891] 1 Ch., 82.

(3) (1914) 15 M.L.T., 198.

(5) (1914) 27 M.L.J., 239.

(7) (1915) 29 M.L.J., 454.

(9) (1919) 21 Bom. L.R., 718.

(2) (1919) 26 M.L.T., 242.

(4) (1914) I.L.R., 37 Mad., 51.

(6) (1915) 28 M.L.J., 338.

(8) (1892) I.L.R., 15 Mad., 838.

(10) (1918) 47 I.C., 503.

section 123 of the Act. A mortgage-debt has been held to be immoveable property for purposes of sale: see *Sakhi-ud-din Saha v. Sonnulla Sarkar*(1), *In re Richards, Humber v. Richards*(2), *Arunachellam Chetti v. Subramanian Chetti*(3), *Mutsaddi Lal v. Muhammad Hanif*(4).

WALLIS, C.J.—This case raises questions of some importance under the Transfer of Property Act as to the transfer of mortgages and of actionable claims by way of gift, and we have taken time to consider our judgment.

The facts may be very briefly stated. A few days before his death one Pothi Naicker executed Exhibit 50, an unregistered instrument, by which he made an immediate disposition of property consisting of mortgages, promissory notes, and book-debts allotting the items in schedule 1 to the defendants, the sons of a deceased son, and the items in schedule 2, to the plaintiff, the daughter and only surviving child, of another deceased son. It is not disputed that this disposition in the deed was intended to take effect at once. Exhibit 50 recites this, and is borne out by the oral evidence of the plaintiff's mother, the first witness for the defence in Original Suit No. 26 of 1917 which was tried along with the present suit that the promissory-notes and the mortgage-deeds mentioned in the second schedule were delivered to her on the plaintiff's behalf when Exhibit 50 was executed. The outstandings or "balances under account" are assigned by the terms of Exhibit 50 but it does not appear that anything was handed over to the plaintiff's mother in respect of such outstandings.

Section 123 of the Transfer of Property Act requires gifts of immoveable property to be made by registered instrument and the first question is whether the gifts of the mortgages are to be regarded as gifts of immoveable or of moveable property. Under the Act as originally passed mortgage-debts were held to be actionable claims and on that view the effect of section 8 was that on the transfer of the mortgage-debt the securities passed with it. That this was the intention of the legislature in my opinion admits of no doubt, first because the language of the section is

(1) (1918) 27 O.L.J., 453.

(3) (1907) I.L.R., 30 Mad., 235.

(2) (1890) 45 Ch.D., 589.

(4) (1912) 10 All. L.J., 167.

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wide enough to cover such securities and it is inconceivable that it would have used such general language if it had not intended to include landed securities, the most important class of all; secondly, because section 8 occurs in Chapter II which deals with the general rules applicable to all classes of property and is in the first part of that chapter which is headed "A. Transfer of Property whether moveable or immoveable;" and, thirdly, because the section reproduces the rule of English law that even as regards mortgages the security passed with the principal debt. In *Martin v. Mowlin*(1) Lord MANSFIELD expressed himself as though the legal estate in the land passed to the transferee of the mortgage-debt, but in *Duffield v. Elwes*(2), Lord ELDON pointed out that this language was not strictly accurate and that what happened was that equity treated the mortgagee making the transfer as a trustee of the land for the transferee of the mortgage debt. The Indian Legislature would seem to have decided to enact the rule in India in the form in which it was expressed by Lord MANSFIELD. Under the Act, as originally passed, mortgage debts were assignable as actionable claims and the assignment of the debt in my opinion passed the security with it under section 8. This was the view taken by this Court in *Subramaniam v. Perumal Reddi* (3), and I think it was right.

The Legislature however subsequently became dissatisfied with the state of the law and in 1900 amended the Act by substituting a new chapter as to actionable claims, and inserting in section 3 a definition of "actionable claim" which excluded any "debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property." The effect of this amendment was that mortgage debts could no longer be transferred as actionable claims under Chapter VIII. The mortgagee's interest in the land had all along been transferable as immoveable property by way of sale, exchange and gift under Chapters IV, VI and VII, and had carried with it the mortgage-debt, and I think that the intention of the Legislature in removing mortgage debts from the category of actionable claims which are transferable under Chapter VIII must have been that in

(1) (1760) 2 Burr., 969 at 979.

(2) (1827) 1 Bl. (N.S.), 497 at 511.

(3) (1895) I.L.R., 18 Mad., 454.

general mortgage-debts should only be transferred in this way under Chapters IV, VI and VII with the mortgagee's interest in the land, and therefore by registered instrument, more especially as the alternative view, that the Legislature intended to permit oral transfers of mortgage debts, appears to be altogether inadmissible as opposed to the general policy of the Act.

In his observations in *Ramasamy Patter v. Chinnan Asari* (1), Sir BHASYAM AYYANGAR would appear to have been of opinion that this was so even before the amendments of 1900. With that view for the reasons already given I am unable to concur, but I agree that it is the result which follows from the amendments introduced in 1900, subject only to this that where the law still admits of the separate transfer of the mortgage-debt as by the endorsement of a promissory note secured by deposit of title-deeds, or by the attachment and sale in execution of a mortgage debt under the Civil Procedure Code, Section 8 still operates to carry the security with it, as held by this Court in *Cunniiah v. Gopala Chettiar*(2), and in *Nataraja Iyer v. The South Indian Bank of Tinnevely*(3).

We are now dealing with a transfer not by way of sale but by gift. If, however, according to the scheme of the Act as amended, mortgages ordinarily can be transferred by way of sale only as immoveable property it follows in my opinion that they can only be transferred by way of gift under section 123 as immoveable property and consequently only by a registered instrument. The gifts of the mortgages under Exhibit 50 therefore fail. The fact that some of them were for less than Rs. 100 makes no difference as section 123 contains no exception in favour of gifts of small value.

We have next to deal with the gift of book-debts which was a gift of actionable claims as now defined in section 3 of the Transfer of Property Act; and the first question which arises is, are such gifts governed by Chapter VII of the Act, which deals with gifts of moveable as well as of immoveable property or by Chapter VIII, which deals separately with the transfer of actionable claims in terms which are wide enough to cover transfers with or without consideration. In my opinion the proper

(1) (1901) I.L.R., 24 Mad., 449.

(2) (1919) 26 M.L.T., 242.

(3) (1914) I.L.R., 37 Mad., 51.

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conclusion on the construction of the Act is that they are governed by Chapter VIII. In the first place section 130 of that Chapter provides

"that the transfer of an actionable claim shall be effected only by the execution of an instrument in writing signed by the transferor or his authorised agent and shall be complete and effectual upon the execution of such instrument."

This is sufficient to show that an actionable claim is not moveable property which can be transferred by way of gift by mere delivery under section 123. Further a mere actionable claim is incapable of tradition and the provision in section 123 that delivery may be made in the same way as goods sold are delivered shows that what are dealt with in section 123 are gifts of tangible moveable property such as goods or a horse or a book. This conclusion is also, in my opinion, in accordance with the principles of English Law, on which the Transfer of Property Act is based. In order that a gift *inter vivos* should be enforced it was necessary that the donee's title should be complete, as equity would not help a volunteer in such a case. A less stringent rule was applied in the case of *donationes mortis causa*, or gifts in contemplation of death, which are excepted from Chapter VII by section 129. Now, as pointed out in the very learned Judgment of FRY and BOWEN, Lords Justices, in *Cochrane v. Moore*(1), where the history of the law on this subject is traced from the earliest times, at common law, in the absence of a deed, delivery was necessary to pass title to chattels. Title passed either by deed or by delivery, and this is the foundation of the rule in section 123 under which, as regards the gifts of moveables, title passes either by registered instrument, which is the Indian equivalent of the English deed, or by delivery. As regards the gift of choses in action there was a difficulty, because on the one hand the common law did not admit of the assignment of a chose in action and equity would not assist a volunteer, and on the other hand they were not capable of delivery in the ordinary sense. Section 25, subsection 6, of the Judicature Act however made choses in action assignable and gave the assignee a complete title and it has been recently held by SARGENT, J., *In re*

(1) (1890) 25 Q.B.D., 67.

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Weston(1), that the effect of that section is to improve the position of a donee or assignee without consideration of a chose in action and to enable him to sue on the assignment because it makes the assignee's title complete, as our own section 130 does in terms. It is true that in the case just cited there was also delivery of the indicia of title, but the learned judge's decision appears to be based entirely upon the assignment. In my opinion both in India and in England an assignment in the statutory form passes title to actionable claims even where the assignment is without consideration. Exhibit 50 is therefore a sufficient assignment of the book debts under section 130 of the Transfer of Property Act. The prevailing view of this Court is that negotiable instruments are actionable claims assignable under this section as well as by endorsement, and it follows that the promissory notes also in this case were sufficiently assigned by Exhibit 50.

The last question is as to whether the failure of the gift of the mortgages was a sufficient ground for dismissing the suit as regards the book-debts and promissory notes also as the subordinate judge appears to have thought.

A somewhat similar question arose in *Pothi Naicken v. Naganna Naicker*(2), where it was held that a partition deed which failed as to immoveables for want of registration could not be given effect to as to moveables. I think that decision was quite right but this question has recently been very fully considered by the Court of Appeal in *Godman v. Godman*(3), a case much more like the present, in which a soldier's codicil to his will, which would have been good as to personalty only, also included realty which it was incompetent to pass; and I think that in deciding the present case we should be guided by the principles laid down in that case though they may not always be very easy of application and the learned Lords Justices differed as to their application in that particular case. What is clearly laid down by all the Judges in that case is that the failure of the disposition as to realty will not in every case have the effect of making it fail as to personalty as well. The

(1) [1919] 2 Ch., 104.

(2) (1916) 80 M.L.J., 62.

(3) (1920) P. 261.

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argument that it was impossible to say what the testator would have done if he had known that his will must fail as to realty was not accepted as a sufficient ground for invalidating it *in toto*. WARRINGTON, L.J., at page 277 treats it largely as a question whether to allow the will to operate as to personalty would defeat the testator's intention and SCRUTTON, L.J., with whose statement of the principles applicable Lord STERNDALE, M.R., concurred appears to regard it as a question whether the bequest of personalty can be treated as conditional on the devises of realty being valid. He observes at page 384—

"If a testator informally expressed his views as to the disposition of his land and those views were frustrated by the statutes of Mortmain or the doctrine of perpetuities, it would not seem to be a ground for interfering with his bequests of personalty unless the latter were conditional on the validity of the disposition as to land."

Applying this test to the present case there seems to be no reason for holding that Exhibit 50 fails as to the book-debts and promissory notes. The object of the donor who was within a few days of his death was to prevent the defendants who are the sons of a deceased son from taking the whole of his property on his death as his natural heirs and to give a share of it to the plaintiff who is the daughter of another deceased son. In these circumstances, he cannot be held to have intended that her getting the moveables allotted to her should be conditional on her also getting the immoveables allotted to her. There is, therefore, no sufficient reason for refusing to give effect to the gift as to moveables and the Appeal must be allowed as to the book-debts and promissory notes and dismissed as to the mortgages. The decree will accordingly be varied by giving the plaintiff the book-debts and promissory notes allotted to her in the second schedule to Exhibit 50. Parties to pay and receive proportionate costs throughout.

HUGHES, J.

HUGHES, J.—I agree.

K.R.

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ATTACHMENT IN EXECUTION OF A MONEY-DECREE—Section 64, Civil Procedure Code, Act (V of 1908)—Sale of the same properties under a mortgage decree against the same judgment-debtor, effect of, on attachment—Extinguishment of attaching creditor's right to redeem—Attachment whether constituting *lis pendens*—Suit on mortgage—Attaching creditor whether proper party—Subsequent agreement to sell to another by judgment-debtor pending application for re-attachment but without notice—Order to re-attach whether *res Judicata* against person agreeing to buy—Execution sale under money-decree—whether conveying also the right of attaching creditor to redeem—Sections 85 and 91, Transfer of Property Act (IV of 1882).] A Court sale of the judgment-debtor's interest in attached property puts an end to the attachment and incidentally to the attaching creditor's right of redemption under section 91 of the Transfer of Property Act. It makes no difference that the Court sale was in execution of a mortgage decree and that the attaching creditor was not a party to the suit on the mortgage. An attaching creditor is not a proper party to such a suit. A private sale pursuant to an agreement entered into after an application for attachment but before notice is good as against the auction purchaser in the Court sale held pursuant to the attachment. After such agreement, the private purchaser is not represented by the judgment-debtor and is not bound by the order of sale made against him. Held, further that a purchaser in execution of a money-decree obtained only the right, title and interest of the judgment-debtor and not also any right of the attaching decree-holder which was purely personal to him, e.g., a right to redeem. *Kashy Nath Roy Chowdhry v. Subbanand Shaha*, (1886) I.L.R., 12 Cal., 817, followed. *Venkata Sestharamayya v. Venkataramayya*, (1914) I.L.R., 37, Mad., 418, dissented from. Held, further by WALLIS, C.J. (SESHASIRI AYYAR, J., dissenting) that a purchaser in execution of a money-decree was not entitled to sue for redemption without setting aside the prior sale of the same properties held in execution of a mortgage decree. *Lala Ganpat Lal v. Bindbasini Prasad Narayan Singh*, (1920) 47 I.A., 91; s.c., 39 M.L.J., 108 (P.O.), discussed. Held also by WALLIS, C.J. (SESHASIRI AYYAR, J., dissenting) that, in the circumstances of the case, the attachment effected by the holder of the money-decree must be deemed to have been abandoned and was not subsisting on the date of

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but also of the execution of other decrees between the same parties. The establishment of the decree-holder's right to bring property to sale free from a claimant's alleged right involves the right of the purchaser at the sale to get a title to the property free from such right. <i>Ramasamy Chetty v. Alagiri Chetty</i> , (1905) 27 I.O., 800, followed; <i>Umash Chander Roy v. Raj Bullabh Sen</i> , (1882) I.L.R., 8 Cal., 279, dissented from. <i>Singarajah Chetty v. Chinabbi</i> ... (1921) I.L.R., 44 Mad., 268	
CIVIL PROCEDURE CODE (V OF 1908), O. XXI, ss. 98, 99, 101—Scope of suit under rule 108.] The scope of a suit under rule 108 of Order XXI, Civil Procedure Code, filed to contest an order made under either rule 98, or rule 99, or rule 101 is not the determination of the mere question of possession of the parties concerned but the establishment of the right or title by which the plaintiff claims the present possession of the property. <i>Nabadwipendra Mookerjee v. Madhu Sudan Mandal</i> , (1912) 18 I.O., 741, (Calo.), followed. <i>Unni Moldin v. Pocker</i> ... (1921) I.L.R., 44 Mad., 227	
CRIMINAL LAW—Sentence exceeding legal maximum—Transportation for term of years—Practice of Judicial Committee—Remitter to High Court to revise sentence—Indian Penal Code (Act XLV of 1860), ss. 59, 304.] Section 59 of the Indian Penal Code authorises a sentence of transportation for life, but not one of transportation for a term of years exceeding the maximum term of imprisonment which can be awarded for the offence. The appellants were convicted by a Sessions Judge under the Indian Penal Code, section 304, of culpable homicide not amounting to murder and were liable under that section to a sentence of imprisonment for a term not exceeding ten years. They were sentenced to three years' rigorous imprisonment. Upon appeal to the High Court the conviction was affirmed, and upon a petition for revision the sentences were enhanced to fourteen years' transportation. Held, that ten years was the maximum term of years to which the appellants could be sentenced to transportation, and that the cases should be remitted to the High Court with instructions to pass sentences according to law. <i>Sayyapureddi Chinmayya v. King-Emperor</i> ... (1921), I.L.R., 44 Mad., 297	
ESTATES LAND (MADRAS) ACT (I OF 1908), SEC. 6 (1)—Explanation—Trespasser in possession on the date of the Act, not entitled to occupancy right.] Where a landholder bought in execution of his decree for arrears of rent his tenant's right in a ryoti land before the date of the commencement of the Estates Land Act, but the tenant continued in actual possession of the land on that date. Held, that the tenant was then a mere trespasser and did not acquire occupancy rights by virtue of the explanation to section 6, clause (1) of the Act. <i>Sivapada Mudali v. Thyagaraja Chettiar</i> , (1914) 27 M.L.J., 665, not followed. <i>Venkatachala Naidu v. Ethirajammal</i> ... (1921) I.L.R., 44 Mad., 230	
SEC. 46 (5)—Application to Receiver of an estate, for conferring occupancy right, validity of.] An application by a non-occupancy ryot under section 46 of the Madras Estates Land Act, for	

the acquisition of occupancy right in an estate, can be made only to or against the owner of the estate and not to a Receiver in charge of the estate.

Swaminatha Odayar v. Sundaram Aiyar ... (1921) I.L.R., 44 Mad., 274

HINDU LAW—Adoption of an orphan—'Factum valet,' applicability of.] The adoption of an orphan is invalid under the Hindu Law and the doctrine of 'factum valet' cannot be invoked to validate it. *Lakshmappa v. Ramaya*, (1875) 12 Bom. H.C.R., 364, at 398 and *Ganga Sahai v. Lakhraj Singh* (1887) I.L.R., 9 All., 253 at 297, followed.

Mareyya v. Ramalakshmi ... (1921) I.L.R., 44 Mad., 260

Public Charitable trust, management of devolution—Right of female heirs.] The right of management of a public charity possessed by the members of a Hindu family descends in the absence of a custom to the contrary to all the heirs including females in the same manner as ordinary family property. A claim that the seniormost male member alone amongst the heirs is entitled to manage or that female heirs are excluded from management should be proved as a special custom. *Ramanathan Chetti v. Murugappa Chetti*, (1906) I.L.R., 29 Mad., 233 (P.O.), followed. *Parappanalingam Chetti v. Nallasivan Chetti*, (1868) 1 M.C.H.R., 415, and *Chenna Kesavaraya v. Vaidalinga*, (1877) I.L.R., 1 Mad., 245, not followed.

Mannabhai Achi v. Somasundaram Pillai ... (1921) I.L.R., 44 Mad., 208

Son's liability—Pious obligation—Unascertained debt of father—Money collected by father as an agent and subsequently misappropriated by him—Liability of sons for such sums—Principal and agent—Suit against agent who died pending suit—Continuance of suit against his sons as legal representatives—Liability of latter for moneys actually collected as well as moneys not collected owing to negligence of the agent.] Where a suit was instituted by a principal against his agent for an account and for recovery of moneys to be found due on the taking of accounts, but the agent died pending the suit which was continued against his sons as his legal representatives. Held, that under the Hindu Law, the sons were liable to pay their father's debt out of the joint family property in their hands, although the amount of his indebtedness had not been ascertained; that it was no answer to a claim based on an antecedent civil liability to plead a subsequent criminal act, and that consequently, the sons were liable, under the Hindu Law, to pay moneys collected by their father as an agent and subsequently misappropriated by him. Held, also, that the sons were liable not only for moneys proved to have been actually received by their father and not duly accounted for but also for moneys which he negligently failed to collect.

Venkatacharyulu v. Mohana Panda ... (1921) I.L.R., 44 Mad., 214

LAND ACQUISITION ACT (I OF 1894)—Acquisition of land for quarrying—Principle of compensation—Value of prospective gravel.] When a piece of land is compulsorily acquired for quarrying purposes, its special adaptability for quarrying is an element for consideration in fixing the amount of compensation, in spite of the fact that no one but the local authority for which the

acquisition was made, ever made, any demand for the land as a quarry; and it is not right to award compensation for it only as cultivable land. *Days Khushal v. Assistant Collector, Surat*, (1914) I.L.R., 38 Bom., 87, followed. Judgment of Moulton, L.J., in *In re Lucas and Chesterfield Gas and Water Board* [1909] 1 K.B., 16 at 80, 81, distinguished. The amount of compensation to be awarded is the present value of all the gravel that might be expected to be realized in the future.

Raghunatha Row v. Secretary of State for India ... (1921) I.L.R., 44 Mad., 284

LEASE FOR A TERM—Covenant for renewal of lease from time to time, whether void for perpetuity—Transfer of Property Act (IV of 1882), sec. 14—Covenants for renewal and for pre-emption, distinction between.] A covenant, in a lease for a term, for its renewal from time to time at the option of the lessee, is not void as being in violation of the rule against perpetuities; section 14, Transfer of Property Act, applies only to transfers and not to covenants such as covenants for renewal of lease. Covenants for the renewal of a lease are not similar to covenants for pre-emption with regard to the application of the rule against perpetuities. *Kolathu Ayyar v. Ranga Vadhyar*, (1915) I.L.R., 38 Mad., 114, distinguished.

Pichi Naidu v. Jefferson ... (1921) I.L.R., 44 Mad., 290

LIMITATION ACT (IX of 1908), ss. 6, 10—Receipt of interest by a mortgagee from a trustee knowing mortgage to be in breach of trust—Suit by beneficiary for such interest against mortgagee—Applicability of section 10 to such suit—Cause of action for beneficiary to recover such interest—No new cause of action on beneficiary attaining majority.] Interest received by a mortgagee from a trustee in respect of a mortgage executed by the latter in breach of trust to the knowledge of the mortgagee is not 'property' vested in the mortgagee 'in trust for any specific purpose' within section 10 of the Limitation Act. If on the dates of payment of interest the beneficiary be a minor, his cause of action to recover the same arises from such dates and if he sues for the recovery of such interest after attaining majority he is bound to sue within the time limited by section 6 of the Act, and he does not get a fresh cause of action on attaining majority.

Raja of Ramnad v. Ponnusami Tevar ... (1921) I.L.R., 44 Mad., 277

ART. 118 AND SEC. 9—Suit for declaration that an adoption is untrue or invalid—Nearest reversioner's consent to adoption for a bride—No suit by nearest reversioner—Suit by remoter reversioner, more than six years after adoption came to knowledge of the nearest reversioner—Plaintiff born after adoption and before suit barred—Bar of limitation.] A suit for a declaration that an alleged adoption is untrue or invalid, instituted by a remoter reversioner, more than six years after the adoption came to the knowledge of the nearest reversioner, is barred under article 118 of the Limitation Act. Neither the fact that the nearest reversioner did not himself bring such a suit because he had been misled to give his consent to the adoption, nor the fact that the remoter reversioner who sued was born after the alleged adoption and before the suit became barred under article 118, gives the latter any fresh cause of action or stops time running which had

begun to run against the whole body of reversioners from the date of adoption.

Venkata Sivayya v. Ademma ... (1921) I.L.R., 44 Mad., 218

MORTGAGOR AND MORTGAGEE—Discharge of debt—Oral arrangement—Mortgagee in possession as full owner for more than twelve years after arrangement for discharge of debt—Suit by mortgagor after twelve years to redeem—Bar—Adverse possession of mortgagee—Proof of nature of possession.] Where, under an oral arrangement between the mortgagor and the usufructuary mortgagee, the latter retained possession of a portion of the mortgaged property in full ownership in satisfaction of the mortgage debt, and enjoyed it as full owner for more than twelve years after the arrangement, on a suit being instituted by the mortgagor to redeem the property more than twelve years after the arrangement. Held, that the mortgagee had acquired by adverse possession an absolute title to the property, and that the mortgagor's right to redeem the property was barred by limitation. *Usman Khan v. Dasanna*, (1914) I.L.R., 37 Mad., 545; *Govindu v. Mallayya*, L.P.A. No. 207 of 1915 (unreported); and *Varada Pillai v. Jeevarathnammal*, (1920) I.L.R., 43 Mad., 244 (P.C.), followed. *Ariyaputhira v. Muthukomaraswami*, (1914) I.L.R., 37 Mad., 423, dissented from.

Kandasami Pillai v. Ohinnabba ... (1921) I.L.R., 44 Mad., 283

PROCEDURE—Appeal to Privy Council—Certificate of High Court—Code of Civil Procedure (V of 1908), sec. 109 (c), O. XLV, r. 8—Madras Estates Land Act (Madras Act of 1908), sec. 52, sub-sec. (3)—Puttah decreed under earlier Act—Res judicata—Special leave to appeal refused.] A certificate granted by a High Court upon a petition under Order XLV, rule 8, Code of Civil Procedure, for leave to appeal to the Privy Council should show clearly whether it is intended to certify merely that the case falls within section 110 of the Code or that it falls within section 109 (c) and section 110 as a case otherwise fit for appeal. Upon a petition under Order XLV, rule 8, for leave to appeal from a decree of the High Court in a suit for the recovery of Rs. 4,605 rent, the High Court certified "that as regards the subject matter and the nature of the questions involved, the case fulfils the requirements of sections 109 and 110 of the Code of Civil Procedure, and that the case is a fit one for appeal to His Majesty in Council." Held, that the appeal could not be maintained, since the value of the subject matter was under Rs. 10,000, and there was nothing in the certificate to show that the discretion conferred on the High Court by section 109 (c) was invoked or exercised. Held, further, that a contention that the provision in section 52, sub-section 3 of the Madras Estates Land Act, 1908, for the remaining in force of decreed puttahs and muchalkas referred only to puttahs and muchalkas decreed under that Act, was not of sufficient weight to justify their Lordships in granting special leave to appeal.

Radhabrishna Ayyar v. Swaminatha Ayyar ... (1921) I.L.R., 44 Mad., 298

RELIGIOUS ENDOWMENT—Mutt—Head of mutt—Trustee of temples—Appointment of successor—Compromise to avoid prosecution—Invalidity—Code of Civil Procedure (XIV of 1882), sec. 589.] By the usage of a mutt the pandara

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sannidhi, or head, had power to appoint his successor, and was trustee of the endowments of certain dependent temples. In 1804 the pandara sannidhi appointed the appellant as chinna pattam, or junior head with a right to succeed as head. This appointment was not made bona fide in the interests of the mutt, but under a compromise whereby he had avoided a threatened prosecution for forgery of a will purporting to be that of his predecessor and appointing him as successor. The appellant having succeeded as pandara sannidhi, suits were instituted in 1905 to remove him from being trustee of the mutt properties and of the temple properties. Held, that the appellant's appointment as head of the mutt was invalid and that consequently he never became trustee of the temples; but that on the finding which was not challenged on appeal, that there was no evidence that the head of the mutt was a trustee of the mutt properties, the suit to remove him from being trustee of the mutt could not be maintained under section 529 of the Code of Civil Procedure, 1882. *Ramalingam Pillai v. Vythilingam Pillai*, (1898) L.R., 20 I.A., 180; I.L.R., 16 Mad., 490, (P.C.), followed and applied.

Nataraja Thambiran v. Kailasam Pillai ... (1921) I.L.R., 44 Mad., 283

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APPELLATE CIVIL.

*Before Sir John Wallis, Kt., Chief Justice and Mr. Justice
 Seshagiri Ayyar.*

MEENAKSHI ACHI AND ANOTHER (DEFENDANTS NOS. 2 AND 3),
 APPELLANTS)

1920,
 July 20.

SOMASUNDARAM PILLAI (PLAINTIFF), RESPONDENT.*

*Hindu Law—Public Charitable trust, management of—Devolution—Right of
 female heirs.*

The right of management of a public charity possessed by the members of a Hindu family descends in the absence of a custom to the contrary to all the heirs including females in the same manner as ordinary family property. A claim that the seniormost male member alone amongst the heirs is entitled to manage or that female heirs are excluded from management should be proved as a special custom. *Ramanathan Chetti v. Murugappa Chetti*, (1906) I.L.R., 29 Mad., 288 (P.C.), followed. *Purappavanalingam Chetti v. Nullasivan Chetti*, (1868) 1 M.O.H.R., 415, and *Chenna Kesavaraya v. Paidelinga*, (1877) I.L.R., 1 Mad., 348, not followed.

APPEAL against the decree of C. RANGANAYAKULU NAYUDU, Temporary Subordinate Judge of Tanjore, in Original Suit No. 24 of 1916.

The facts are set out in the Judgment.

K. Srinivasa Ayyangar (Advocate-General) with *T. V. Muttukrishna Ayyar* and *N. Muttuswami Ayyar*, for appellant.—Succession to trusteeship of an endowment depends on the custom of the institution; *Genda Puri v. Chatar Puri*(1) and *Indar Pal v. The Imperial Bank*(2). On the evidence the plaintiff has no title, hence the suit must fail. It does not matter even if the defendant has no title. At best the plaintiff has only a partial right and there are several others equally entitled; hence the suit would fall under section 92, Civil Procedure

* Appeal No. 275 of 1919.

(1) (1887) I.L.R., 9 All., 1 (P.C.). (2) (1915) I.L.R., 37 All., 214.

MEENAKSHI
ACHI
v.
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Code, and would be bad for want of sanction. Moreover, as all those who are entitled to trusteeship are not made parties the suit is liable to be dismissed. The members of a family can make an arrangement for the management of the trust; *Ramanathan Chetty v. Murugappa Chetty*(1) and *Ramanathan Chetti v. Murugappa Chetti*(2). The last case shows that if there was any such arrangement, then any one who wishes to upset it will have to take proper proceedings in Court, i.e., file a suit for a scheme, under section 92, Civil Procedure Code. In this case it has been held that the plaintiff has not proved that the management descends to the senior male member alone or that the females are to be excluded from the management. The plaintiff who claims to be the sole heir has not proved that he is solely entitled to it; the defendant's predecessors acquired sole right by prescription and defendant has acquired the same by bequest: *Annasami Pillai v. Ramakrishna Mudaliar*(3).

T. R. Ramachandra Ayyar with *T. R. Krishnaswami Ayyar* and *A. S. Venku Ayyar*, for the respondent.—The evidence shows that the senior male member alone had the right of management and that the females had no right. Trusteeship of a public charity is indivisible; ordinarily females cannot succeed to trust offices: *Venkatachella Chetti v. Parvatammal*(4); and where trusteeship is held only by one male member out of several, all the male members must be exhausted before females can succeed: *Chenna Kesavaraya v. Vaidelinga*(5). Reference was made to *Sethuramaswamiar v. Meruswamiar* (6), *Sri Raman Lalji Maharaj v. Sri Gopal Lalji Maharaj*(7), and *Thandavaroya Pillai v. Shunmugam Pillai*(8). Non-joinder is no ground for dismissal of a suit. A Court can take into consideration, events which occur after the filing of a suit, e.g., death of a person who should have been made a party and pass a decree in accordance therewith: *Nuri Mian v. Ambica Singh*(9). If plaintiff is not the sole heir, a joint decree in his favour and in favour of other heirs can be given. As there is no mismanagement, no suit for a scheme can be brought.

(1) (1904) I.L.R., 27 Mad., 192.

(3) (1901) I.L.R., 24 Mad., 219.

(5) (1877) I.L.R., 1 Mad., 343, 346.

(7) (1897) I.L.R., 19 All., 428.

(2) (1906) I.L.R., 29 Mad., 283 (P.C.).

(4) (1863) 1 M.H.C.R., 417.

(6) (1918) I.L.R., 41 Mad., 296 (P.O.).

(8) (1909) I.L.R., 32 Mad., 167.

(9) (1917) I.L.R., 44 Cal., 47.

K. Srinivasa Ayyangar in reply.—Taking the facts to be that plaintiff, who is one of three trustees out of possession, sues another trustee without making the third a party, the suit for possession comes under section 92, Civil Procedure Code; *Ramanathan Chetty v. Murugappa Chetty*(1).

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The Court delivered the following JUDGMENT:—

The plaintiff sues for a declaration that he is solely entitled to the management of 'Pichai Kattalai' in the Amirtagateswara-swami temple at Tirukkadaiyur and to the possession of the lands attached to the said Kattalai; in the alternative, he claims that he should be given joint possession and management with the defendant. His first claim is based on the plea that as he is the seniormost male among the descendants of the original founder, Chidambaram Pillai, he alone is entitled to the sole management and possession of the Kattalai. Incidentally, he contends that the female members of the family of Chidambaram Pillai have no right. His second claim is based on the ground that as he and the defendant are the only surviving male members of the junior branch of the original founder's family, they should both be declared trustees entitled to joint possession and management of the Kattalai and its emoluments. This claim also involves the contention that female members have no right.

Originally there was only one defendant, Parameswara. During the course of the suit he died, and his widow is the second defendant, and the son-in-law, who is alleged to be in sole possession of the lands, is the third defendant. The Subordinate Judge, in a judgment which both sides have attacked as being inconsistent with itself and as being inconclusive as regards the findings, held that the plaintiff was solely entitled to the management of the Kattalai and to the enjoyment of the lands appertaining thereto. The defendants have appealed.

Before dealing with the contentions raised on either side, it is desirable to state some facts.

The original founder, Chidambaram Pillai, No. 1, is said to have endowed the properties in the beginning of the nineteenth century. After some years, the Board of Revenue took up the management

(1) (1904) I.L.R., 27 Mad., 192.

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of the Kattalai; but in 1857, they restored to two members of the family, Namasivaya and Ambalavana, representing respectively the senior and the junior branches, the management of the Kattalai and the enjoyment of the lands. Disputes soon arose as regards the rights of the other members for a share in the management. Original Suit No. 19 of 1866 was filed by three persons representing both the senior and the junior branches against Namasivaya and Ambalavana and others belonging to both the branches, for the purpose of defining the respective rights of the members of the family. Exhibit A is the judgment in the case, and it shows that the rights of the various parties to the suit were adjusted by giving them definite shares. It may be pointed out that the shares fixed do not exactly correspond with what would have been obtained under the Hindu Law had the Kattalai been regarded as private property.

The next litigation was in 1876 by Ambalavana, Chidambaram Pillai (No. 2) and others, against some of the tenants. A decree was obtained for possession and it is clear that that decree was executed not only by Ambalavana but also by the other plaintiffs to whom shares were allotted in the suit of 1866. It is true that after the execution of the decree against the tenants (vide Exhibit VI series) muchilikas were taken for a number of years by Ambalavana alone. This is not sufficient evidence to show that Ambalavana had ousted the other members of the family from possession or management. The previous suits and the course of events suggest that as a matter of convenience Ambalavana was permitted to manage the Kattalai without prejudice to the rights of the other members of the family.

In 1878, one Muttuswami, son of Kuttala Pillai, one of the plaintiffs in the suit of 1866, transferred his share of management to the Pandara Sannadhi of Dharmapuram (Exhibit B). In 1883, Namasivaya's son, Kanakasabhai, transferred his right to the same Pandara Sannadhi (Exhibit B-1). On the strength of these two documents the Pandara Sannadhi instituted a suit in 1891 for a share in the management of the Kattalai. Arunachala Pillai, who belonged to the second branch, was the first defendant. Somasundaram Pillai, the present plaintiff, was the second defendant. Parameswara Pillai, the original defendant in this suit, was the third defendant. The fourth defendant was the widow

of Ambalavana Pillai. It may be mentioned that, at this time, Arunachala Pillai was in sole management of the Kattalai under a will left by Ambalavana in his favour. The allegation of the Pandara Sannadhi was that the defendants were unlawfully excluding him and his transferors from the management of the Kattalai, that an attempt made by his transferors to obtain possession of the lands under Chapter XII of the Criminal Procedure Code had failed, inasmuch as the Magistrate maintained the possession of the defendants, and that by virtue of the right possessed by his transferors, he was entitled to a share in the management of the Kattalai and the enjoyment of the properties (vide Exhibit C, paragraph 6). The plea of Arunachala in this suit was that the senior branch from whose members the Pandara Sannadhi had obtained the transfer had been totally excluded for over the statutory period, and that therefore the plaintiff had no subsisting right which he could enforce. He pleaded that the management should be in the family of the founder, and that a stranger was not entitled to acquire any rights in it. He accepted the statement that the Magistrate maintained him and his co-defendants in possession of the property as correct (vide Exhibit C-1, paragraph 6). He further stated that he was exclusively managing the Kattalai. The other defendants, including the plaintiff and the original defendant in the present suit, stated that they adopted the contentions of Arunachala (Exhibit C-2). The suit was ultimately compromised by the Pandara Sannadhi receiving back the consideration paid by him to his two transferors and executing a release in favour of Arunachala of all his rights (Exhibit C-5). Arunachala continued in management till 1902. Muchilikas were executed by tenants to him alone (Exhibit VI series). His son Vythilinga succeeded him and died in 1912. He left a will in favour of Parameswara, the original defendant in this case. This suit was instituted in 1913.

We have thus far traced the history of this litigation up to the date of the suit. Now, we shall deal with the contentions put forward on either side. The learned Advocate-General, for the appellant, contended that Ambalavana was in sole management when he willed away his right of management to Arunachala, that Arunachala became solely entitled to it under the

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will as well as by adverse possession for over twelve years, that Vythilinga inherited this right, and that the defendant who claimed under the will of Vythilinga was therefore entitled to the exclusive right of trusteeship and to the possession of the property. We are unable to agree with this contention. So far as Ambalavana is concerned, it is clear that by joining the other members of the family in instituting the suit against the tenants and in taking possession jointly with them of the property from which the tenants were evicted he never intended to set up any right adversely to the members of the family. His management must be taken to have been on behalf of all the members of the founder's family. It is the commonest thing in this part of India for one of the members of a family who happens to be more intelligent than the others to manage charities like the present one. It stands to reason that such management should be regarded as being held on behalf of all the members and not adversely to them. Therefore, we must hold that Ambalavana had not become the sole manager and that he had no right to will away that right in favour of Arunachala. In our opinion, Arunachala also took up the management on behalf of the other members of the family because he was considered to be better fitted than others to conduct the affairs. Arunachala in his own statement in the suit of the Pandara Sannadhi (Exhibit C-1) says that he assisted Ambalavana during his lifetime. It was therefore natural that he should have been selected to continue the management.

As regards the contention that Arunachala himself by exclusive management became solely entitled to it, the facts are against it. In 1888, immediately on the death of Ambalavana, the transferors of the Pandara Sannadhi complained to the Magistrate and asked that Arunachala, the present plaintiff, and the defendant should be restrained from interfering with their possession. The Magistrate held that Arunachala, the plaintiff, and the defendant should be retained in possession. This fact is alleged in the plaint of the Pandara Sannadhi (Exhibit C), and is accepted in the written statement of Arunachala (Exhibit C-1). As we have stated already, the fact that he was solely looking after the affairs of the Kattalai is not, without more, evidence of ouster of the others, in view,

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especially of the fact that they were also maintained in their possession by the order of the Magistrate. We must, therefore, negative the contention that Arunachala had acquired a prescriptive right against the other members of his family. Vythilinga managed only for ten years and we are not prepared to say that his management was adverse to the others. On his death disputes at once arose. In our opinion, it has not been proved that any of the active trustees acquired by prescription the right to exclude the other members of the family through whom the plaintiff claims.

We must now deal with the contention of Mr. Ramachandra Ayyar for the respondent. He argued that the plaintiff, as the seniormost male member in the family of Chidambaram, was entitled to the sole trusteeship. The first answer by the learned Advocate-General to this suggestion was that there is one Kanakasabhai who belongs to the senior branch and who is older than the defendant. If the contention of the respondent that the seniormost male member is entitled to manage to the exclusion of the other members is well-founded, it would have to be considered whether the existence of Kanakasabhai is any bar to such a right, because we find that Kanakasabhai had not only parted with his rights in favour of the Pandara Sannadhi by Exhibit B-1, but that after the suit of the Pandara Sannadhi by a document, dated 7th September 1891 (Exhibit C-6) he and the other members of the senior branch of the family in terms relinquished their rights in favour of Arunachala. But, in our opinion, the contention of the learned vakil for the respondent that the seniormost male is entitled to sole management has not been made out. As pointed out by the Subordinate Judge, during the lifetime of Arunachala and Vythilinga, there were senior members who did not assert their rights to sole management as against the active trustee. The custom or tradition in the family in this behalf has not been established by any cogent evidence. We must overrule this contention.

It was next argued by Mr. Ramachandra Ayyar that, as the plaintiff is now the only male member in the junior branch, he is entitled to the right to the exclusion of the females. He

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relied upon *Purappavanalingam Chetti v. Nullasivan Chetti*(1) and on *Chenna Kesavaraya v. Vaidelinga*(2), for the proposition that the office of a trustee in a public institution is indivisible and that succession to it must be regulated as in the case of impartible estates. However much one may wish that such a rule of law should obtain in regard to the management of trusts, we are of opinion that the course of decisions in this Presidency, which has the sanction of the Judicial Committee, is opposed to this principle. In *Ramanathan Chetty v. Murugappa Chetty*(3), Sir V. BHASHYAM AYYANGAR, J., pointed out that the right of trusteeship in a public institution possessed by the members of a family, when it is hereditary, descends in the same manner as the right to the enjoyment of ordinary family property. In that case, the founder who was the last trustee, had two wives. Both the wives had a number of sons. The dispute was as regards the right of management among the sons. The Madras High Court holding that the senior branch had lost its right owing to adverse possession decided that the arrangement among the members of the junior branch to manage the trust by rotation must be upheld. The matter was taken up to the Privy Council and in the very opening sentence of the judgment delivered by Lord MACNAGHTEN in *Ramanathan Chetti v. Murugappa Chetti*(4), it is pointed out that it was a public trust and that the right of management has devolved upon all the members of the family. This decision of the Judicial Committee has been applied to public trusts in a very large number of cases in this Presidency, and *Purappavanalingam Chetti v. Nullasivan Chetti*(1) and *Chenna Kesavaraya v. Vaidelinga*(2), quoted by the learned Vakil, have never been regarded as binding authorities. Mr. Ramachandra Ayyar laid stress on certain observations contained in *Sethuramaswamiar v. Meru-swamiar*(5), in the course of which Sir WALTER PHILLIMORE, who delivered the judgment of the Judicial Committee, referred to *Ramanathan Chetti v. Murugappa Chetti*(4), as relating to a private trust. These observations, which were purely

(1) (1883) 1 M.H.C.R., 415.

(2) (1877) I.L.R., 1 Mad., 343.

(3) (1904) I.L.R., 27 Mad., 192.

(4) (1906) I.L.R., 29 Mad., 283 (P.C.).

(5) (1918) I.L.R., 41 Mad., 296 (P.C.).

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obiter, appear to have proceeded on some misconception as to the facts of that case, as it cannot be contended that the trusteeship of a public temple is a private trust. The decision of the Judicial Committee in *Ramanathan Chetti v. Murugappa Chetti*(1), proceeded on the view that such a trust was a public trust, and applying that decision to the present case we must hold that in this case also the trusteeship devolved on the general body of the founder's heirs, of whom the plaintiff is one. The learned Vakil for the plaintiff-respondent also contended that the second defendant, the widow of the first defendant, Parameswara, who is now in possession and management through her son-in-law, the third defendant, is disqualified by reason of her sex. He relied upon the judgments in the suits of 1866, 1871, etc., which speak of the descendants of the founders as being entitled to the management. We have looked into the original and the language is 'Vamshasta' which is not accurately translated as 'descendant.' Even otherwise we fail to see, except when it is established by cogent evidence that there is custom to that effect, how the widows and daughters of a divided member can be excluded from the management of charity property. Even in regard to religious offices, this Court has held in a Full Bench decision that the widows of divided members cannot be superseded by the reversioners [*Annaya Tantri v. Ammakka Hengau*(2)]. *A fortiori* in the case of a secular office like the present, there is absolutely no justification for the contention that they are not entitled to manage. The evidence as to usage has been fully discussed by the Subordinate Judge and we agree with his conclusion that it has not been shown that females are not entitled to manage this Kattalai.

The result of the above discussion is that the plaintiff is one of the persons entitled to manage the Kattalai along with the second defendant and any other members of the family who have not lost their right. One of them, who has not been made a party to the suit, is the widow of Vythilingam. There may be others about whom the record is silent.

The question on these facts is whether the plaintiff is entitled to any relief, and if so, to what. The learned Advocate-General

(1) (1906) I.L.R., 29 Mad., 283 (P.C.). (2) (1918) I.L.R., 41 Mad., 886 (F.B.).

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contended that as the plaintiff had not brought a suit for settling a scheme of management, his suit should be dismissed. We are unable to see the force of this contention. The fact that the persons entitled to the office of the trustee may not be able to work harmoniously together is not a ground for dismissing a suit by one of the heirs of the founder for a declaration of his right to share in the management and for joint possession of the trust properties with the heir who is now in possession and management. If it is found that a scheme of management is necessary in the interests of the institution, such a scheme may be settled either by the heirs themselves or by resort to the Court. In the absence of such a scheme the plaintiff is entitled to the rights of the joint management and possession claimed in the plaint. We must, therefore, in modification of the decree of the Court below, declare that the plaintiff is entitled to manage the trust along with the second defendant who is now in possession. It is unnecessary to decide anything as to the rights of Vythilinga's widow or other members of the family to share in the management of the Kattalai.

In the circumstances of the case, each party must bear his own costs. No portion of the costs should come out of the charity property.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Odgers.

1930,
July 21 and
22.

VENKATACHARYULU, MINOR BY NEXT FRIEND VENKATA
LAKSHMAMMA (PLAINTIFF), APPELLANT,

v.

MOHANA PANDA AND TWO OTHERS (DEFENDANTS NOS. 2 TO 4),
RESPONDENTS.*

Hindu Law—Son's liability—Pious obligation—Unascertained debt of father—Money collected by father as an agent and subsequently misappropriated by him—Liability of sons for such sums—Principal and agent—Suit against agent, who died pending suit—Continuance of suit against his sons as legal representatives—Liability of latter for moneys actually collected as well as moneys not collected owing to negligence of the agent.

* Second Appeal No. 1746 of 1918.

Where a suit was instituted by a principal against his agent for an account and for recovery of moneys to be found due on the taking of accounts, but the agent died pending the suit which was continued against his sons as his legal representatives,

Held, that, under the Hindu Law, the sons were liable to pay their father's debt out of the joint family property in their hands, although the amount of his indebtedness had not been ascertained;

that it was no answer to a claim based on an antecedent civil liability to plead a subsequent criminal act, and that consequently, the sons were liable, under the Hindu Law, to pay moneys collected by their father as an agent and subsequently misappropriated by him.

Held, also, that the sons were liable not only for moneys proved to have been actually received by their father and not duly accounted for but also for moneys which he negligently failed to collect.

SECOND APPEAL against the decree of B. C. SMITH, District Judge of Berhampur, in Appeal Suit No. 239 of 1916, preferred against the decree of K. SAMBASIVA RAO, Principal District Munsif of Berhampur, in Original Suit No. 637 of 1914.

The material facts are set out in the Judgment.

V. Ramesam, T. R. Venkatarama Sastri and B. Jagannadha Doss for appellant.

C. Sambasiva Rao, T. Srinivasa Gopala Acharya and T. Subba Rao for respondents.

SPENCER, J.—This suit was brought by the proprietor of a certain inam in the Ganjam district against his agent for an account of the collections made by him in two villages, Agu and Konabhagu. During the continuance of the suit, after the issues were framed, the agent (the first defendant) died, and his legal representatives, defendants Nos. 2 to 4, were brought on record and the suit continued against them. The District Munsif found that the first defendant had failed to account for a sum of Rs. 282 and odd per annum and gave the plaintiff a decree for a lump sum of Rs. 4,691-14-0 being the sum misappropriated or not accounted for, for ten years at the rate of Rs. 282 and odd per annum. The District Judge thought that the suit though filed against the agent stood upon a different footing when it was continued against his representatives. He observed that

"plaintiff was bound to prove by positive evidence that defendant had received the money for which they (his representatives) are to be held responsible."

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Acting on the evidence afforded by the receipts filed in the suit he reduced the amount to be paid by the defendants to Rs. 941 and odd and decreed accordingly. The plaintiff appeals.

I think that the District Judge was mistaken in thinking that the plaintiff was bound to prove actual receipt of all the monies which he seeks to recover. Even as against the representatives of an agent, the principal is entitled to a decree for sums actually due to him on account of the agent having received and failed to account for them and also for sums which he negligently failed to collect when it was his duty to collect. This is made clear by the observations of the Calcutta High Court in *Kumeda Charan Bala v. Asutosh Chattopadhyaya*(1), and in another case in the same volume, *Maharaj Bahadur Sing v. Basunta Kumar Roy*(2), the latter being one where, as here, the agent died pending the suit and the suit was continued against his legal representatives. At page 9, it is observed that the only difference in substance between a suit for an account against an agent and the same suit against the agent's representatives will be that the burden of proof will be upon the plaintiff to establish his case. At page 697 it is observed that the estate of the deceased agent

"is liable for any sum which he may be found to have been owing or liable to make good at the date of his death."

In this case issues 2 and 3 have been inartistically drawn up. It would have been sufficient to have had one issue:

"Whether the first defendant and his estate are liable to the plaintiff on taking accounts and, if so, how much is owing."

The respondents' advocate raised two points in reply. First, he argued that until the amount of the father's indebtedness was ascertained it was not a debt under the Hindu Law for which the joint family estate could be made liable; and secondly, that if the father incurred debts by some criminal act the sons were not responsible by a pious duty to pay such debts. The first contention is a novel one, and we have not been shown any authority for the theory that the sons are not liable upon contracts and quasi-contracts entered into by their father or upon other similar obligations legally incurred. The second contention is equally untenable, and was not advanced as a

(1) (1913) 17 C.W.N., 5.

(2) (1913) 17 C.W.N., 695.

defence to the suit in the lower Courts. The respondents' advocate relied upon *McDowell & Co. v. Ragava Chetty*(1) and *Pareman Dass v. Bhattu Mahton*(2). These cases may be distinguished on the ground that where there is a breach of civil duty even though it may involve some tort or crime the sons are liable to make it good out of the family property. This is made clear in *Kumeda Charan Bala v. Asutosh Chattopadhyaya*(3), where the observations of Lord Justice Cotton in *Concha v. Murrietta, De Mora v. Concha*(4) are quoted, that

"although no action for a tort could be revived or commenced against the representatives of the person who committed it, yet the case was different where the act was not a mere tort but was a breach of a quasi-contract, where the claim was founded on breach of a fiduciary relation or on failure to perform a duty."

In *Garuda Sanyasayya v. Nerella Murthenna*(5), the representatives of a trustee were made liable for collections not accounted for for a period of twelve years with the observation that

"it was the duty of the trustees to collect the income and their subsequent misappropriation of it does not affect the liability to account which they incurred by reason of the collection. The fact that the misappropriation amounted to a criminal offence appears to be irrelevant."

It is no answer to a claim based on an antecedent civil liability to plead a subsequent criminal act.

The District Judge, therefore, misdirected himself when he held that the plaintiff was bound to prove that the agent had actually received money, for the representatives to be held responsible for that money. The representatives are liable equally with their father, the only difference being that while the agent's first duty is to be constantly ready with his accounts and to be always prepared to explain them and support them with vouchers, his representatives should not be required to attempt the impossible and explain matters of which they have no personal knowledge or to assist the plaintiff in the investigation of the management of his estate of which they are wholly ignorant. The Judge, however, came to the conclusion that the

(1) (1904) I.L.R., 27 Mad., 71.

(2) (1897) I.L.R., 24 Cal., 972.

(3) (1912) 17 C.W.N., 5.

(4) (1889) 40 Ch.D., 542.

(5) (1918) 35 M.L.J., 661.

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District Munsif was fully justified in accepting Exhibit D as a correct statement of the yearly demand, and he says that it would be a fair inference in a suit against the first defendant personally that he had collected the difference between the sum accounted for by him and the demand as shown in Exhibit B.

I have felt some doubt whether in consideration of the frame of the issues a fresh finding should not be called for from the District Judge. But I think his intention was clear that the first defendant, if alive, would have been responsible for paying the sum decreed in the District Munsif's judgment and that only his death was the reason for reducing that amount. If this was his intention, he was clearly wrong and he ought to have held the respondents liable for the full amount which the first defendant had failed to account for. As my learned brother agrees, we must set aside the decree of the District Court and restore that of the District Munsif with costs here and in the Lower Appellate Court.

ODGERS, J. ODGERS, J.—I agree.

K.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Seshagiri Ayyar.

1920,
July 30
and
August 2.
POLEPEDDI VENKATA SIVAYYA, MINOR BY NEXT FRIEND AND
MATERNAL UNCLE KONDURI VENKATA KRISHNAYYA
(PLAINTIFF), APPELLANT,

v.

POLEPEDDI ADEMMA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act (IX of 1908), art. 118 and sec. 9—Suit for declaration that an adoption is untrue or invalid—Nearest reversioner's consent to adoption for a bribe—No suit by nearest reversioner—Suit by remoter reversioner, more than six years after adoption came to knowledge of the nearest reversioner—Plaintiff born after adoption and before suit barred—Bar of limitation.

A suit for a declaration that an alleged adoption is untrue or invalid, instituted by a remoter reversioner, more than six years after the adoption came to the knowledge of the nearest reversioner, is barred under article 118 of the Limitation Act.

* Appeal No. 229 of 1919.

Neither the fact that the nearest reversioner did not himself bring such a suit, because he had been bribed to give his consent to the adoption, nor the fact that the remoter reversioner who sued was born after the alleged adoption and before the suit became barred under article 118, gives the latter any fresh cause of action or stops time running which had begun to run against the whole body of reversioners from the date of adoption.

APPEAL against the decree of S. VENKATASUBBA RAO, the Additional Temporary Subordinate Judge of Guntūr, in Original Suit No. 11 of 1918 (Original Suit No. 54 of 1917 on the file of the Temporary Sub-Court, Guntūr).

The material facts are set out in the Judgment.

P. Narayanamurti for appellant.

V. Ramesam and *K. N. Kumaraswami Ayyar* for defendants.

The Court delivered the following JUDGMENT:—

We think the Subordinate Judge was right in holding that this suit was barred under article 118 of the Indian Limitation Act, IX of 1908. It is now settled by the Full Bench decision in *Varamma v. Gopaladasayya*(1), that a suit for a declaration that an adoption is invalid is a representative suit which the nearest reversioner is entitled to bring on behalf of the whole body of reversioners, born and unborn, within the period prescribed in the article.

Time begins to run from the time the adoption becomes known to the plaintiff, and here the adoption came to the knowledge of the next reversioners as soon as it took place in 1902. Time, therefore, began to run against the whole body of reversioners from that date, and the present suit not having been brought within six years, is barred. It is said that the nearest reversioner did not bring the suit because he had been bribed to give his consent to the adoption. That might have been a good reason for allowing another reversioner to sue within the prescribed period, if there had been one able and willing to do so. It did not prevent the next reversioner from suing himself, if so minded, or prevent the whole body of reversioners being barred if no suit was brought within the prescribed period. The fact that the plaintiff was born after the alleged adoption and before the suit had become barred

(1) (1918) I.L.B., 41 Mad., 659 (F.B.).

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under article 118, did not give him any fresh cause of action or stop time running which had begun to run against the whole body of reversioners from the date of the adoption. To hold otherwise would be opposed to the express provisions of section 9. All that COUTTS TROTTER, J., as we understand him, intended to lay down in the Full Bench case, *Varamma v. Gopaladasayya*(1), was that a decree against the next reversioner obtained by fraud or collusion would not be binding on the other reversioners. These observations do not support Mr. Narayanamurti's contention that time would not run under the article against the general body of reversioners if the nearest reversioner abstained from suing from interested motives. The appeal fails and is dismissed with costs.

K.R.

APPELLATE CIVIL.

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

1920,
August 11.

VENKATACHALA NAIDU (PLAINTIFF), APPELLANT,

v.

ETHIRAJAMMAL (THIRD DEFENDANT), RESPONDENT.*

Madras Estates Land Act (I of 1908), sec. 6 (1)—Explanation—Trespasser in possession on the date of the Act, not entitled to occupancy right.

Where a landholder bought in execution of his decree for arrears of rent his tenant's right in a ryoti land before the date of the commencement of the Estates Land Act, but the tenant continued in actual possession of the land on that date.

Held, that the tenant was then a mere trespasser and did not acquire occupancy rights by virtue of the explanation to section 6, clause (1) of the Act. *Sivapada Mudali v. Thyagaraja Chettiar* (1914) 27 M.L.J., 685, not followed.

SECOND APPEAL from the decree of P. A. BOOTY, District Judge of North Arcot, in Appeal No. 771 of 1917, filed against the decree of C. GOMAJI RAO, District Munsif of Sholinghur, in Original Suit No. 642 of 1916.

(1) (1918) I.L.R., 41 Mad., 659 (F.B.).
* Second Appeal No. 1775 of 1919.

The first defendant in the suit is the landholder of items 1 and 2 which were once owned by Swaminatha Pillai as tenant. For arrears of rent due, the first defendant obtained a decree in Original Suit No. 531 of 1894 and attached them in 1901 and himself purchased the same in court auction on 6th November 1907, and afterwards sold them to the plaintiff in 1914. The plaintiff brought this suit for possession against the first defendant, the vendor, and against defendants Nos. 2 to 9 who were in possession. The defendants Nos. 2 and 3 pleaded that Swaminatha Pillai usufructually mortgaged item 1 to the second defendant in 1892 and sold the same to the third defendant in 1902, that part of the consideration for the sale went to discharge the mortgage, that second defendant was in possession of item 2 and third defendant was in possession of item 1 on the date of the commencement of the Estates Land Act and that they were therefore entitled to occupancy rights under section 6 of the Act. The other defendants were *ex parte*.

The District Munsif held that both the defendants Nos. 2 and 3 were bound by the decree for rent and the subsequent rent sale, that defendant No. 2 was only a trespasser as regards item 2, that defendant No. 3 acquired a right to be treated as a tenant by the sale of 1907, and accordingly he passed a decree for possession in favour of the plaintiff for item 2 only. On appeal by the plaintiff as regards item 1 the District Judge confirmed the decree, holding that there was no proof of any attachment existing before the sale of 1902, and that even if the sale was invalid, the purchaser was entitled to remain in possession being entitled to be subrogated at least to the rights of the mortgagee. The plaintiff appealed.

K. Raja Ayyar, Mussalappa Reddi and D. Srinivasa Rao for appellant.

C. Narasimha Achariyar for respondent.

OLDFIELD, J., delivered a separate Judgment on 19th August 1920, having expressed his concurrence with ABDUR RAHIM, J., on 11th August 1920.

ABDUR RAHIM, J.—I must hold that the learned District Judge is not right in saying that there was no proper proof of the existence of attachment at the date of the purchase by the

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third defendant. As a matter of fact we have got the attachment list of 1902 to show that the property was under attachment, and if at the time of the purchase by the third defendant, which was in 1902, the attachment had been raised, it was for him to prove it. The learned District Judge ought to have proceeded on the assumption that the attachment continued. That being so, the purchase by the third defendant can be of no avail against the first defendant or his vendee. But it is argued that under section 6 of the Madras Estates Land Act the tenant of the third defendant acquired a permanent right of occupancy when the Act came into force, i.e., in 1908, although the holding had been sold before that date and purchased by the first defendant, the landlord, in execution of his decree for rent. In support of this position a ruling of a division Bench of this Court has been put forward—*Sivapada Mudali v. Thyagaraja Chettiar*(1). No doubt that decision supports the contention of the respondents, but with all respect to the learned Judges I find myself unable to agree with them. The first step in the reasoning in that judgment is that a ryoti land although brought to sale by the landlord and purchased by him does not cease to be ryoti land. I am prepared to accept that proposition. But I am unable to see how the next step in the reasoning is made out, namely, that a tenant whose holding has already been sold and who had therefore no interest whatever left in the holding acquired any right by virtue of section 6. Before section 6 can be applied—apart from the explanation which I shall presently consider—it must be shown that the man in possession is a ryot within the meaning of the Act; and a ryot has been defined as a person who holds agricultural land paying rent to the landlord. Here it is not suggested that after the holding of the third defendant had been sold he either paid rent or in any other way attorned to the landlord. He remained in possession after his holding was sold merely as a trespasser. Reliance is placed on explanation to section 6. In my opinion, the explanation does not extend the scope of the section itself to the extent claimed. The explanation is to this effect:—

“For the purpose of this sub-section, the expression ‘every ryot now in possession’ shall include every person who, having

(1) (1914) 27 M.L.J., 665.

held land as a ryot, continues in possession of such land at the commencement of this Act.”

If we are to give any force to the phrase “having held land as a ryot,” it must mean a person whose interest in the land has continued till the commencement of the Act, at least as a tenant at will, and who is actually in possession at that date. To give any other meaning to this explanation would be conferring very valuable rights on persons whose possession is that of mere trespassers and who have no sort of right in the land recognized by the law at all. In this case, the third defendant continuing in possession of the land even after the sale was not only a trespasser but was acting in defiance of the law. It must be conceded that if there had been a final decree declaring that the third defendant had no occupancy rights passed before the Act came into force, section 6 would not help him at all as the land would be exempt from the operation of section 6 as ‘old waste.’ Can it be said that where the holding itself has been sold and the tenant has ceased to have any more interest in the land he is in a better position? The fact that the land does not lose its ryoti character has undoubtedly this effect, that if the landholder thereafter lets any other tenant into possession for the purpose of cultivation then that tenant will acquire occupancy rights in accordance with the provisions of the Act. That is to say, by the purchase the landlord does not add to his home farm lands and the land remains a ryoti land throughout. The decision of the Full Bench in *Kanakayya v. Janardhana Padhi*(1), does not, in my opinion, in any way touch the present question, for there the only question was whether a decree of the Court of trial is a final decree within the meaning of the definition of ‘old waste’ in section 3 before the time for appeal has expired. The other decision referred to in *Sivapada Mudali v. Thyagaraja Chettiar*(2) is *Markappuli Reddiar v. Thandava Kone*(3), but the judgment is very brief. We do not find that the facts are fully given there. We do not know from whom the first purchase was made, whether from the original ryot or somebody else. In my opinion

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(1) (1913) I.L.R., 36 Mad., 439 (F.B.). (2) (1914) 27 M.L.J., 665.
(3) (1914) M.W.N., 799.

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therefore, the defence of the third defendant under section 6 of the Estates Land Act is bad.

When the third defendant bought the land in dispute there was a usufructuary mortgage outstanding in favour of the second defendant and that mortgage was paid off with the purchase money. That being so, the learned District Judge finds that the third defendant must be held to be subrogated to the rights under the usufructuary mortgage, and by virtue thereof he would be entitled to possession of the land until he is redeemed. The learned vakil for the appellant thereupon applies to us for leave to amend the plaint so that the plaintiff may have a decree for redemption in this suit. No such application was made to either of the lower Courts and we do not think that in the circumstances of the case we should be justified in allowing an amendment of the plaint at this stage. It is not suggested that the right of redemption will in any way be barred. It will be open to the plaintiff to institute a separate suit for redemption if he so chooses. We also considered whether the plaintiff might not be entitled to recover the purchase money from the first defendant as the consideration for the sale was paid to him. But as the first defendant has not been made a party to this appeal, we cannot grant the appellant any such relief.

The result is the Appeal must be dismissed with costs.

OLDFIELD, J. OLDFIELD, J.—The facts as I take them are that appellant, plaintiff, is purchaser of the item now in dispute from first defendant, who bought the saleable interest in it of his defaulting tenant in a rent sale in 1907. First defendant gave a delivery receipt, but did not obtain actual possession, probably because in 1892 the land had been transferred to the possession of second defendant by a mortgage, Exhibit V, which with reference to section 38, Act VIII of 1865, and *Rajagopal v. Subbaraya*(1), was not affected by the rent sale, and had been sold in 1902 by Exhibit VI to third defendant who is now in possession, part of the purchase money having been paid to second defendant in discharge of his mortgage. Plaintiff's contentions are that third defendant has no right to retain possession or alternatively that he should surrender it on being reimbursed what he spent in

respect of the suit item on redeeming Exhibit V, the necessary amendment of the plaint being permitted. I agree with my learned brother that the former is unsustainable and deal only with the main argument, with which third defendant has resisted the latter, that because he was in possession at the commencement of Act I of 1908, he is entitled under the Explanation to section 6 (1) thereof to resist plaintiff's suit for possession on the ground that he has acquired an occupancy right.

The period for which third defendant has retained possession since the rent sale falls short of any by which plaintiff's right to sue for possession or redemption can be barred; and there is no question of estoppel. The argument is then, that the character of the possession referred to in the Explanation to section 6 (1) being undefined, even such possession as third defendant's or a defaulter's (for no attempt has been made to show that third defendant is in a better position than his transferor) will confer occupancy right. To take first the case of a defaulter, who has lost his interest in the land by a rent sale and continues in possession in disregard of its result, there is every reason why he should not profit by his conduct; and a construction of the Explanation, which would enable him to do so, should, if possible, be avoided. True, such a construction was adopted in *Sivapada Mudali v. Thyagaraja Chettiar*(1). But it was supported only by reference to a dictum contained in the referring order in *Kanakayya v. Janardhana Padhi*(2), and to the landholder's obligation under section 8 (1) to hold the land as landholder notwithstanding his purchase of the occupancy right. With all respect, these reasons seem to me insufficient. *Kanakayya v. Janardhana Padhi*(2) was not decided with reference to section 6 or the Explanation now in question and the dictum referred to is only a general warning against confusion between possession and title, not an attempt to interpret the former expression with reference to its context in that explanation or the intention of the legislature. Section 8 (1) no doubt entails that the land after the landholder's purchase remains ryoti; but it does not purport to affect the

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(1) (1884) I.L.R., 7 Mad., 31 (F.B.)

(1) (1914) 27 M.L.J., 665. (2) (1913) I.L.R., 36 Mad., 439 (F.B.).

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character of the possession referred to in section 6 (1) or its Explanation and cannot do so.

As regards the intention of the legislature in the latter provision there is every reason against supposing that the result already referred to was contemplated by it. In the context the body of the section refers to ryots in possession or to be admitted by the landholder in the future, and it is to be supposed that the explanation refers to possession of a similar kind and to cases of a similar legal origin, such as those of holding over and the like. Certainly such an interpretation is preferable to one by which it would not merely specify one class of cases already described in mere general terms, but would extend the scope of the substantive provision in a different direction; and I therefore agree with my learned brother that we must adopt it.

The foregoing proceeds on the assumption which was made in argument, that third defendant is in the same position as the defaulter, his transferor, would have been in, if he had retained possession. But his actual position has been stated and, since he cannot plead his purchase against plaintiff's rent sale, his possession must for the present purpose be regarded as authorized only by the mortgage, which he discharged; and then the objection to the application in his favour of the principle of the decision in *Sivapada Mudali v. Thyagaraja Chettiar*(1) is no less. For, whether or no the learned Judges were consistent in conceding, as they did, that rights in the kudivaram interest as between rival claimants other than the landlord are not intended to be affected by section 1, there is still the fact that the equity of redemption of the mortgage must have been included in the saleable interest of the defaulter, which the landholder bought, and will be unenforceable, if third defendant's construction prevails. The result would be that a mortgagee with possession, perhaps with a portion of his term still outstanding, at the commencement of the Act would in virtue of that possession acquire a new title, by which his liability to redemption would be extinguished; and, in the absence of anything clearly or directly abrogating the established mortgage law in such cases, that cannot be accepted.

(1) (1914) 27 M.L.J., 665.

Plaintiff's right being to obtain possession on payment to third defendant of the amount spent by the latter in redeeming the mortgage on this item, it cannot, I agree with my learned brother, be exercised in these proceedings. I therefore concur in dismissing the Appeal with costs.

N.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Seshagiri Ayyar.

UNNI MOIDIN (FIRST DEFENDANT), APPELLANT,

v.

POCKER AND OTHERS (PLAINTIFF'S AND SECOND DEFENDANT'S
LEGAL REPRESENTATIVES), RESPONDENTS.*

*Civil Procedure Code (V of 1908), O. XXI, rr. 98, 99, 101—Scope of
suit under rule 103.*

The scope of a suit under rule 103 of Order XXI, Civil Procedure Code, filed to contest an order made under either rule 98, or rule 99 or rule 101 is not the determination of the mere question of possession of the parties concerned but the establishment of the right or title by which the plaintiff claims the present possession of the property.

Nabadwipendra Mookerjee v. Madhu Sudan Mandal (1912) 16 I.C. 741, (Calo.), followed.

SECOND APPEAL against the decree of A. NARAYANAN NAMBIYAR, Subordinate Judge of the Temporary Sub-Court of Palghat at Calicut, in Appeal No. 18 of 1915, preferred against the decree of A. VERGHESE, District Munsif of Parapanangudi, in Original Suit No. 226 of 1913.

The facts are set out in the Judgment.

C. Madhavan Nayar for appellant.

K. P. M. Menon for respondents.

The Court delivered the following JUDGMENT:—

The plaintiff resisted the execution of a decree for possession of the suit lands, and having had an order made against him under Order XXI, rule 98, instituted the present suit under

* Second Appeal No. 2043 of 1915.

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UNNI MOIDIN v. POCKER. rule 103 "to establish the right which he claims to the present possession of the property," failing which the right would have been lost under the terms of the rule. The plaintiff, who based his case both on possession and on title, alleged that the conveyance executed by him in 1899 in favour of the first defendant never took effect, and that, if it did, he had acquired a title by adverse possession before the date of the order against him under rule 98. The District Munsif dismissed the suit on the ground that the title passed to the first defendant by the conveyance of 1899. The Subordinate Judge allowed the appeal and decreed the suit, holding that the plaintiff, having, as he found, been in possession at the date of the order under rule 98, could not be ousted in execution of a decree to which he was not a party, and that under the rule the Court was concerned with possession only. The view that in a suit of this kind the Court has merely to ascertain whether the plaintiff was in possession at the date of the order against him under rule 98 is based on a misconception of the scope of this rule. If he was, then the Court ought not to have passed the summary order against him under rule 98 but ought to have dismissed the decree-holder's application against him under rule 99. The effect of the order having been made under rule 98 was to oblige him to sue under rule 103 on pain of losing his right, whereas if the application had been dismissed under rule 98 the decree-holder would have had to institute the suit under the like penalty. The suit referred to in the rule, by whichever party instituted, is a suit to establish the right which he claims to the present possession of the property. In a suit by the decree-holder, if it were shown that the defendant was in possession at the date of the order under rule 99, the decree-holder could only succeed by proving his title, because a person in actual possession has a possessory title against the world and can only be dispossessed by the true owner and those claiming under him. So, too, in the present suit, if it be found that the plaintiff was in possession at the date of the summary order against him under rule 98, he is entitled to succeed by virtue of that possession unless the defendant (decree-holder) proves a subsisting title carrying with it the right to present possession.

The object of these provisions is to secure the speedy settlement of questions of title raised in execution, as explained by the Privy Council in *Sardhari Lal v. Ambika Pershad*(1), with reference to the similar procedure prescribed with regard to claim petitions, and this is effected by requiring the unsuccessful party in the summary proceedings to file a suit within the year to establish his right on pain of losing it. In support of the Subordinate Judge's view reliance has been placed on the fact that the suit referred to in rule 103 is a suit to establish the right which he claims to the present possession of the property, whereas the suit referred to in rule 63 is a suit to establish the right which he claims to the property in dispute. This does not show that a suit under rule 103 is concerned only with the question of actual possession at the date of the summary order. The suit is to establish the right which the plaintiff claims to the present possession of the property, and this right may be established without showing that the plaintiff was in actual possession at the date of the summary order against him. Decree-holders and auction-purchasers against whom an order has been made under rule 99 are never in possession at the date of the summary order, and yet they are allowed and even required to maintain the suit; and the scope of the suit must be the same whether the order against the unsuccessful party in the summary proceedings was made under rules 98, 99 or 101. *Nabadwipendra Mookerjee v. Mathu Sudan Mandal*(2), the only authority we have been referred to, is in accordance with this view. The Subordinate Judge has not recorded any clear finding as to whether the plaintiff has established the right which he claims to the present possession, and the decree must be reversed and the appeal remanded to the District Judge to enable him to do so in the light of the above observations. Costs to abide.

N.B.

(1) (1888) I.L.R., 15 Cal., 521 (P.C.) at 525. (2) (1912) 16 I.C., 741 (Calo.).

APPELLATE CIVIL.

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

1920,
August
4, 5 and 17.

TELLICHERRY PICHU NAIDU (DEFENDANT), APPELLANT,

v.

C. JEFFERSON (PLAINTIFF), RESPONDENT.*

Lease for a term—Covenant for renewal of lease from time to time, whether void for perpetuity—Transfer of Property Act (IV of 1882), sec. 14—Covenants for renewal and for pre-emption, distinction between.

A covenant, in a lease for a term, for its renewal from time to time at the option of the lessee, is not void as being in violation of the rule against perpetuities; section 14, Transfer of Property Act, applies only to transfers and not to covenants such as covenants for renewal of lease.

Covenants for the renewal of a lease are not similar to covenants for pre-emption with regard to the application of the rule against perpetuities.

Kolathu Ayyar v. Rangu Vadhyar, (1915) I.L.R., 33 Mad., 114, distinguished.

SECOND APPEAL against the decree of K. SUNDARAM CHETTIYAR, Temporary Subordinate Judge of Nellore, in Appeal No. 90 of 1919 (Appeal Suit No. 18 of 1919 on the file of the District Court of Nellore), preferred against the decree of P. VENUGOPAL, the District Munsif of Nellore, in Original Suit No. 1563 of 1916.

The material facts are set out in the Judgment.

K. Krishnaswami Ayyangar for appellant.

T. V. Ramanatha Ayyar for respondent.

The Court delivered the following JUDGMENT :—

The plaintiff had a lease of the land in dispute from the defendant for a period of five years for mica mining purposes on the 6th May 1903 with the following clause :—

"I bind myself to give you such leases as you may require from time to time after the expiration of this agreement on same conditions. Should I fail to do so, I bind myself to pay you all the expenses that you incur."

The plaintiff entered into possession according to the terms of the lease and erected certain structures on the land with a view to carry on the mining operations. But sometime in 1915

the defendant obtained a decree for possession of the land inasmuch as the present plaintiff had not on the expiry of the term mentioned in the lease taken out any renewal. Thereupon the plaintiff called upon the defendant, on 4th November 1916, to execute a lease for five years with the clause for renewal in the terms set out above but the defendant refused to grant any such renewal. The lessee then instituted this suit.

Both the lower Courts have held that the plaintiff is entitled to such a lease as he asked for and gave a decree for specific performance. It was argued before the District Munsif that the decree in the suit of 1915 operated as *res judicata* but he held that in that suit no question as to the plaintiff's right to renewal was decided and that therefore the present suit was not barred. No argument has been addressed to us on this plea. Another defence set up was that the plaintiff was guilty of laches in not asking for the renewal of the lease since the expiry of the first term in 1908, until 1916. But then he was in possession and was willing to carry out his part of the agreement and he was never called upon to take a renewal. The lower Appellate Court has discussed this question fully and is right in holding that the plaintiff's right to enforce the agreement has not been lost by laches.

The point, however, which was pressed before us with great persistence was that the agreement was in violation of the rule against perpetuities as laid down in section 14 of the Transfer of Property Act. That section enacts the well-known rule that no interest in property can be created to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some persons who shall be in existence at the expiration of that period. The short answer to this argument is that the agreement in question cannot properly be said to be a transfer of property which is defined by section 5 of the Act as

"an act by which a living person conveys property, in present or in future, to one or more other living persons or to himself and one or more other living persons."

Here there is no conveyance of property after the expiry of the term of five years. The agreement in question is only a covenant to renew at the option of the lessee. A covenant like this is a covenant running with the land and is not subject to any

* Second Appeal No. 1721 of 1919.

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rule against perpetuities. In Halsbury's Laws of England, Volume 18, para. 935, it is pointed out that a covenant for perpetual renewal is enforceable if the intention in that behalf is clearly shown. The nearest case that has been cited in support of the appellant's contention is *Kolathu Ayyar v. Ranga Vadhyar*(1), where a contract of pre-emption was held to offend against the rule against perpetuities for it fixed no time within which the agreement to convey was to be performed. Even there the contract was sought to be enforced against the heirs of the person who had entered into it and not, as here, against the lessor himself. But apart from that a contract of pre-emption stands on a different footing from a covenant to renew from time to time which has always been recognized both in England and here as a perfectly valid and enforceable contract. The Second Appeal must be dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr.
Justice Seshagiri Ayyar.

CHAMIYAPPA THARAGAN (FIRST DEFENDANT), APPELLANT,
v.
RAMA AYYAR AND EIGHT OTHERS (PLAINTIFF AND DEFENDANT),
RESPONDENTS.*

Attachment in execution of a money-decree—Section 64, Civil Procedure Code, Act (V of 1908)—Sale of the same properties under a mortgage decree against the same judgment-debtor, effect of an attachment—Extinguishment of attaching creditor's right to redeem—Attachment whether constituting lis pendens—Suit on mortgage—Attaching creditor whether proper party—Subsequent agreement to sell to another by judgment-debtor pending application for re-attachment but without notice—Order to re-attach whether res judicata against person agreeing to buy—Execution sale under money decree—whether conveying also the right of attaching creditor to redeem—Sections 85 and 91, Transfer of Property Act (IV of 1882).

A Court-sale of the judgment-debtor's interest in attached property puts an end to the attachment and incidentally to the attaching creditor's right of redemption under section 91 of the Transfer of Property Act.

(1) (1915) I.L.R., 38 Mad., 114.

* Appeal No. 303 of 1919.

It makes no difference that the Court-sale was in execution of a mortgage-decree and that the attaching creditor was not a party to the suit on the mortgage. CHAMIYAPPA THARAGAN v. RAMA AYYAR.

An attaching creditor is not a proper party to such a suit.

A private sale pursuant to an agreement entered into after an application for attachment but before notice is good as against the auction purchaser in the Court-sale held pursuant to the attachment. After such agreement, the private purchaser is not represented by the judgment-debtor and is not bound by the order of sale made against him.

Held further that a purchaser in execution of a money decree obtained only the right, title and interest of the judgment-debtor and not also any right of the attaching decree holder which was purely personal to him, e.g., a right to redeem.

Kashy Nath Roy Chowdhry v. Surbanand Shaha, (1886) I.L.R., 12 Cal., 817, followed.

Venkata Seetharamayya v. Venkataramayya, (1914) I.L.R., 37 Mad., 418, dissented from.

Held rather by WALLIS, C.J. (SESHAGIRI AYYAR, J., dissenting) that a purchaser in execution of a money decree, was not entitled to sue for redemption without setting aside the prior sale of the same properties held in execution of a mortgage-decree.

Lala Ganpat Lal v. Bindbasini Prasad Narayan Singh, (1920) 47 I.A., 91; s.c., 39 M.L.J., 108, discussed.

Held also, by WALLIS, C.J. (SESHAGIRI AYYAR, J., dissenting) that, in the circumstances of the case, the attachment effected by the holder of the money-decree must be deemed to have been abandoned and was not subsisting on the date of the Court-sale held under the mortgage-decree.

Puddomonee Dossee v. Roy Muthooranath Chowdhry, (1873) 12 Beng. L.R., 411 (P.C.), followed.

APPEAL against the revised decree of T. V. NARAYANAN NAYAR, Subordinate Judge, in Original Suit No. 67 of 1915, on the file of the Subordinate Court of South Malabar at Palghat.

The facts are set out in the Judgments.

T. R. Ramachandra Ayyar, with *P. V. Parameswara Ayyar*, for the appellant.—The plaintiff is not entitled to redeem as his so-called purchase of the equity of redemption was legally invalid. The attachment under which the sale was held must, on the facts of this case, be deemed to have been abandoned; see *Hafiz Suleman v. Sheikh Abdullah*(1), *Puddomonee Dossee v. Roy Muthooranath Chowdhry*(2) and *Kishnen Lal v. Charat Singh*(3). Even if the attachment subsisted plaintiff did not acquire by the Court-sale the equity of redemption as on the date of his purchase the judgment-debtor had

(1) (1894) I.L.R., 16 All., 138. (2) (1873) 12 Beng. L.R., 411.
(3) (1901) I.L.R., 28 All., 114.

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ceased to be its owner by reason of the prior sale thereof under the mortgage-decree for sale against the same judgment-debtor. An attachment invalidates only private alienation and not a Court-sale: see section 64 and Form 24, Appendix E, Civil Procedure Code, and *Kashy Nath Roy Chowdhry v. Surbanand Shaha*(1). After the sale, the attachment ceased to exist. Hence the judgment-debtor can then re-purchase the property from the auction-purchaser freed from the effect of the previous attachment. If the attachment ceased to exist the attaching creditor had thereafter no right to redeem. Attachment does not create any interest in immoveable property; compare the language of clauses (a) and (b) of section 91, Transfer of Property Act, with that of clause (f) and Order XXXIV, rule 1, Civil Procedure Code. An attaching creditor need not be made a party to a mortgage suit. The view taken in *Venkata Seetharamayya v. Venkataramayya*(2) is not sound. The plaintiff is not entitled to redeem without first setting aside the sale under the mortgage-decree: see *Lala Ganpat Lal v. Bindbasini Prasad Narayan Singh*(3). By the execution-sale under the money-decree the plaintiff acquired the right, title and interest only of the judgment-debtor and not also the right of the attaching creditor to redeem the mortgage which is purely a personal right conferred on him by section 91.

C. V. Anantakrishna Ayyar, with P. S. Narayanaswami Ayyar, for the respondent.—There was in fact no abandonment of the attachment. Moreover, the purchase under the mortgage-decree being after the filing of the application for execution against this property the purchase is affected by *lis pendens*. As the purchaser can claim only through the judgment-debtor, an order to sell made against the latter in execution of the money-decree operates as *res judicata* against the purchaser. The attachment of 1907 affected the property subsequently re-purchased by the judgment-debtor and thereafter conveyed to the defendant. Even if there is no right before attachment but one is acquired afterwards, that right is affected: *Umes Chunder Sircar v. Zahur Fatima*(4). An attachment creates a charge: it gives the attaching creditor a right to redeem: see section 91,

(1) (1888) I.L.R., 12 Calo., 317. (2) (1914) I.L.R., 37 Mad., 418.
(3) (1920) 47 I.A., 91; s.c., 39 M.L.J., 108 (P.C.).
(4) (1891) I.L.R., 18 Calo., 164 (P.C.).

Transfer of Property Act; *Suraj Bansi Koer v. Sheo Pershad Singh*(1), *Sankaralinga Reddi v. Kandaswami Tevan*(2), *Venkata Seetharamayya v. Venkataramayya*(3) and *Veyindramuthu Pillai v. Maya Nadan*(4). Not having been made a party to the execution proceedings in the mortgage-decree, the attaching creditor is not bound by the sale and is therefore entitled to redeem: *Umes Chunder Sircar v. Zahur Fatima*(5), *Chinnu Pillai v. Venkatasamy Chettiar*(6), *Matru Lal v. Durga Kunwar*(7), *Lakshpat Rai v. Fakhr-ud-din*(8) and *Bunsee Das v. Gena Lal Jha*(9). As the plaintiff, or the attaching creditor through whom he claimed, was not a party to the sale proceedings he can redeem without setting aside the sale. The case of *Lala Ganpat Lal v. Bindbasini Prasad Narayan Singh*(10) is distinguishable as the sons were represented in that case by the father, though the latter alone was made a party.

T. R. Ramachandra Ayyar in reply.—An order passed in execution against a person who had already agreed to sell the property to another, especially before he had notice of the execution proceedings, cannot have the effect of *res judicata* as against the purchaser, as the vendor cannot then be said to represent the vendee; any subsequent attachment does not prevail against the vendee's right to get a conveyance: *Madan v. Rebati*(11), *Savithri Ammal v. Ramasami*(12), *Venkata Reddi v. Yellappa Chetty*(13), and *Mina Kumari Bibi v. Bijoy Singh Dudhuria*(14). On the other hand, the proceedings taken in execution of the mortgage-decree against the judgment-debtor operate as *res judicata* against the auction-purchaser in the money decree. There can be no *lis pendens* as there was no suit concerning this property.

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(1) (1880) I.L.R., 5 Calo., 148 (P.C.).

(2) (1907) I.L.R., 30 Mad., 418.

(3) (1914) I.L.R., 37 Mad., 418. (4) (1920) I.L.R., 43 Mad., 696.

(5) (1891) I.L.R., 18 Calo., 164 (P.C.). (6) (1917) I.L.R., 40 Mad., 77.

(7) (1920) 47 I.A., 71; s.c., I.L.R., 42 All., 384 (P.C.).

(8) (1917) I.L.R., 39 All., 536. (9) (1911) 14 C.L.J., 530, 536.

(10) (1920) 47 I.A., 91; s.c., 39 M.L.J., 108 (P.C.). (11) (1916) 28 C.L.J., 115.

(12) (1898) 8 M.L.J., 286. (13) (1917) 5 L.W., 234.

(14) (1917) I.L.R., 44 Calo., 662 (P.C.).

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money-decree in O.S. No. 341 of 1894 in the Palghat District Munsif's Court against the present seventh defendant and the other members of his family. The decree was transferred for execution to the Palghat Subordinate Court which attached the immoveable properties of the family including the properties now in suit, on 9th September 1895. The attachment was struck off on 4th November following for want of process, and the decree went back to the Munsif's Court, where the decree-holders recovered certain sums by way of rateable distribution in 1896 and 1897, and thereafter kept the decree alive by applications to that Court for execution against the person until 5th March 1907, the day before the decree would have become barred, when the transferee of the decree made a fresh application to the Subordinate Court in E.P. No. 81 of 1907 attachment and sale of the properties. There was no fresh attachment, but sale was ordered after overruling the objections raised by the counter-petitioner, the present seventh defendant, and the attached properties were sold in Court auction on 9th November 1908 to a purchaser through whom the plaintiff claims.

To understand his case it is necessary to see what had happened to the attached properties between September 1895, the date of the attachment, and November 1908, the date of his purchase. It is sufficient to say that they had been sold free of encumbrances on 7th February 1906 at a Court-auction to one Raman Kutti in execution of a decree in O.S. No. 299 of 1903 on one of several mortgages subsisting at the date of the attachment; and on 8th July 1907 Raman Kutti sold the suit properties, which were some of the properties so acquired by him, to the present seventh defendant, one of the judgment-debtors. On 24th July 1907 the seventh defendant agreed to sell the property to the present first defendant who instituted a suit for specific performance of the agreement in October 1907, obtained a decree in January 1908, and a Court conveyance on 2nd February 1909. In July 1907 when the seventh defendant agreed to sell he had no notice of E.P. No. 81 of 1907, as notice to him was not ordered until 19th August 1907.

The contest is, therefore, between the plaintiff claiming through the auction purchaser in execution of the money-decree of 1895, and the first defendant, a transferee from the seventh defendant, who after the sale of his equity of redemption in the

suit properties under the mortgage-decree in O.S. No. 299 of 1903, bought them back from the auction purchaser and contracted to sell them to the first defendant before he had any notice of the application which had then been filed for the execution of the old money-decree of 1895. It will be most convenient to deal with the grounds on which Mr. Ananta-krishna Ayyar for the respondents endeavoured to support the decree for redemption passed by the lower Court. He contended that the effect of the attachment of September 1895 was to prevent the seventh defendant from alienating the attached properties to the first defendant and to render the alienation void. Even if this were not so, he contended in the alternative, that, as the attaching decree-holders in O.S. No. 341 of 1894 were not made parties to the mortgage suit, their statutory right under section 91 (f) of the Transfer of Property Act to redeem the mortgaged properties was not affected, and passed to the auction purchasers in that suit through whom the plaintiff claims. He further contended that by reason of the proceedings in E.P. No. 81 of 1907 the defendant's claim was barred by *res judicata* and the doctrine of *lis pendens*.

Mr. T. R. Ramachandra Ayyar who appeared for the appellants denied that the attachment of 1895 had any of the effects contended for. In the first place, he argued that it was no longer subsisting in July 1907, when the seventh defendant agreed to sell to the first defendant, as it must be deemed to have been abandoned having been struck off because the decree-holders failed to proceed with it and nothing having been done on it for nearly twelve years. Even if this were not so, the sale in execution of a decree obtained on a mortgage created prior to the attachment put an end to the attachment, and it was no longer subsisting when the present seventh defendant bought back the suit properties from the auction purchaser under the mortgage-decree and did not therefore disable him from making an alienation in favour of the first defendant. As regards the alleged right of redemption by virtue of the attachment, he denied that the attaching decree-holders in O.S. No. 341 of 1894 were necessary parties to the mortgage suit for sale, assuming the attachment to have been subsisting when it was filed, or that the attaching creditors retained any right of redemption after the sale of the properties in execution of the mortgage-decree

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which put an end to the attachment and all rights arising under it. Further, the attaching decree-holder's right of redemption under section 91, Transfer of Property Act, did not pass to the auction purchaser under the decree. Again, the plaintiff was not entitled to a decree for redemption without setting aside the Court sale under the mortgage-decree which he did not seek to do. The plaintiff was not entitled to rely on *res judicata* or *lis pendens*, but the defendants were.

As regards the first point, there is in my opinion much to be said for the view that the facts of the case raise a presumption that the attachment was abandoned, as held by the Privy Council in *Puddomonee Dossee v. Roy Muthooranath Chowdhry*(1), where the facts do not appear to me to have been any stronger. It was an attachment by a Court to which the decree had been transferred for execution. It was struck off by that Court a few days after it was ordered, and the decree was then sent back to the Court which passed it. It was then kept alive for the statutory period and nothing further was done in the Subordinate Court for nearly twelve years, and then on the last available day, an application was made to the Subordinate Court for a fresh attachment and sale. It is, however, unnecessary to base my decision on this ground as I think the appellants are entitled to succeed on other grounds.

The next question is, whether the attachment of 1895 and the attaching decree-holder's right of redemption under it subsisted after the sale in February 1906 of the attached property free of encumbrances under the mortgage decree in Original Suit No. 299 of 1903. This question must be considered with special reference to the position of an attaching creditor in India, where execution against immoveable property is by attachment and Court sale instead of by *elegit* and *fieri facias*. An attachment is an order prohibiting and restraining the defendant from transferring or charging the attached property by sale, gift or otherwise, and all persons from so receiving it (Appendix B, Form 24); and section 64 of the Code of Civil Procedure provides that any private transfer or delivery of the property attached shall be void against all claims

enforceable under the attachment. As has been often held, its effect is to prevent alienation and not to confer title by way of charge or otherwise on the attaching decree-holder. Further it is only aimed at private alienations. Conformably with these principles it has been held that where the same property has been attached in execution of two money decrees and brought to sale under the later attachment the sale is unaffected by the existence of the prior attachment in the other suit: *Kashy Nath Roy Chowdhry v. Surbanand Shaha*(1). In that event, as the learned Judges observed, the prior attachment fell to the ground. Similarly, an attachment must equally fall to the ground as soon as the attaching creditor has brought the judgment-debtor's interest to sale in execution of his decree and that interest has passed to the auction purchaser free of attachment.

I think the view that a Court sale of attached property altogether releases it from attachment is the right view and that full effect must be given to it. Attachments preventing private alienation by the judgment-debtor are granted solely for the purpose of protecting the attaching creditor's right to bring to sale in execution the right, title and interest, in the attached property of the judgment-debtor, and there is no reason for holding that they continue to affect the attached property in any way when the interest of the judgment-debtor is no longer realizable in execution of the attaching creditor's decree because it has passed by a Court sale to an auction purchaser who with his assigns takes it free from the attachment and with unrestricted rights of alienation.

The judgment-debtor's interest having gone the attachment goes with it. If, as in the present case, he re-acquires the attached property from the auction purchaser or his assignees, he acquires a fresh interest which may be made the subject of a fresh attachment, but is not in my opinion affected by the earlier attachment. It would give rise to great hardship and seriously affect Court sales if we were to hold that persons claiming through an auction purchaser at a Court sale were liable to be deprived of the property for which they had paid, because one of the intermediate transferees from the auction

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(1) (1873) 12 Beng. L.R., 411

(1) (1886) 1 L.R., 12 Cal., 317.

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purchaser had been a defendant in a suit in which the properties had been attached before the Court sale.

Coming now to the attaching creditor's alleged right to redeem any mortgage there may be on the attached property, it follows that this right must also come to an end together with the attachment itself on the sale to the auction purchaser in execution of the decree. Thereafter the attaching creditor has no concern with the property, while on the other hand the auction purchaser has acquired any equity of redemption, or right to redeem the mortgaged property, that the judgment-debtor may have had in the property, and there is no necessity or justification for holding that the attaching creditor's right to redeem is transferred to the purchaser in the Court sale in execution of his decree. The right to redeem conferred on an attaching creditor by section 91 of the Transfer of Property Act is not, it seems clear, based on any charge on the attached property for the amount of his debt putting him in the position of a subsequent mortgagee, as, it is now perfectly well settled that in India he acquires no such charge by the attachment. He is merely allowed, while the attachment is in force, to exercise any right of redemption the judgment-debtor may be entitled to for the purpose of bringing the judgment-debtor's interest to sale in execution of his decree more advantageously than if it were sold subject to the mortgage. His position is quite different from that of a judgment-creditor in England whose right to redeem land is based on the fact that the sheriff's return "vests the legal estate in the creditor"—per MELLISH, L.J., in *Hatton v. Haywood*(1).

Applying these conclusions to the present case, I hold that the attaching creditor's attachment, and with it his right of redemption, came to an end on 7th February 1906, when the suit properties were sold in execution of a decree for sale against the judgment-debtors on a prior mortgage, although the attaching creditor was not a party to the mortgage suit; and that, even if there had been no such decree, the attachment and the attaching decree-holder's right of redemption would have come to an end on 9th November 1908, when he brought the judgment-debtor's interest to sale and it was acquired by the auction purchaser through whom the plaintiff claims.

(1) (1874) L.R., 9 Ch., 229, 236.

A different view has no doubt been taken on the first question in *Venkata Seetharamayya v. Venkataramayya*(1), but that decision has been dissented from by SESHAGIRI AYYAR, J., in *Veyindramuthu Pillai v. Maya Nadan*(2), and I am unable, with great respect, to accept the reasoning on which it is based.

The learned Judges observed that section 91 of the Transfer of Property Act recognizes an attaching creditor as one who by virtue of his interest in the property is entitled to redeem, and consequently held him to be a necessary party to the mortgage suit under section 85 of the Transfer of Property Act, and that his rights were not affected by a decree made in his absence. With great respect, this appears to me to be just what section 91 does not do because it does not deal with an attaching creditor as "a person having any interest in or charge upon the right to redeem the property" within the meaning of section 91 (b) which, as I have pointed out, would be the position of a judgment-creditor in England after the Sheriff's return, but puts him in a category by himself in sub-section (f) as having no such interest. The natural inference appears to be that the legislature did not regard him as entitled to redeem by virtue of an interest in the property, which he does not possess, but on other grounds, such as have been suggested above. Coming now to section 85 of the Transfer of Property Act, now Order XXXIV, rule 1, there is, I think, no sufficient reason for giving a wider construction to the words "interest in the property comprised in the mortgage" in section 85, or to the words "having an interest either in the mortgaged security or the right of redemption" in Order XXXIV, rule 1. They are in *pari materia* with section 91, and the word "interest" should bear the same construction in both. An attaching creditor, it seems to me, is sufficiently protected by being allowed to come in and redeem before the Court sale puts an end to his attachment and to his character of attaching creditor, and he should not be allowed merely on the ground that he was not made a party to the mortgage suit to disturb the title of the auction purchasers and their assignees who, speaking generally, do not know, and have no means of knowing, whether the mortgaged property was under attachment in execution of money decrees at the date of

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(1) (1914) I.L.R., 37 Mad., 418.

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the mortgage suit. No registers of attachments are kept and in the present case it took several months in 1907 to satisfy the Subordinate Court that it had ever ordered the attachment in question. Different considerations would arise if an attaching creditor acquired a charge of his own on the attached property by virtue of his attachment, but it is clear that he does not.

Mr. T. R. Ramachandra Ayyar also argued that the plaintiff could not in any view be allowed to redeem without setting aside the Court sale in the mortgage decree, and cited the recent decision of the Privy Council in *Lala Ganpat Lal v. Bindbasini Prasad Narayan Singh*(1). In that case, property which was the subject of a mortgage created by a father for an antecedent debt had been brought to sale in a mortgage suit to which the son was not a party; and the son afterwards filed a suit for redemption in which he did not question the validity of the mortgage or the decree for sale in the mortgage suit but claimed to redeem after the property had been brought to sale. In these circumstances it was held that he could not be allowed to redeem without setting aside the sale, because, so long as the sale stood, the right to redeem was extinguished. I can find no sufficient reason for refusing to apply that decision to the present case, in which also the plaintiff is not in a position to question either the mortgage or the decree for sale; but, as I have already said, I think the plaintiff's case fails on the broader grounds already mentioned. I do not consider it necessary to discuss the effect of the recent decision except in so far as it affects the present case.

The remaining points may be briefly dealt with. It was argued by Mr. Anantakrishna Ayyar, for the respondent, that the filing of Execution Petition No. 81 of 1907 created a *lis* or contest between the attaching creditor and the judgment-debtor, seventh defendant, and that consequently the first defendant to whom the seventh defendant agreed to sell the attached properties after the filing of the petition but before notice had been directed to the seventh defendant was bound by the order for sale which was eventually made. Now, at the date of the filing of the execution petition, the properties, as already held,

were no longer under attachment, and the execution petition asked for a fresh attachment and sale. It has never, so far as I know, been held that a mere application for execution by attachment and sale of the judgment-debtor's interest in the property specified in the petition is the commencement of the active prosecution of a contentious proceeding in which a right to immoveable property is directly and specifically in question, so as to make any alienation by the judgment-debtor voidable under section 52 of the Transfer of Property Act.

If Mr. Anantakrishna Ayyar's contentions were well-founded an attachment would be unnecessary, as the mere filing of the execution petition would be sufficient to prevent alienation. It appears to be a sufficient answer to say that the attaching decree-holder's right to bring to sale any interest which the judgment-debtor might have in the attached property was *res judicata* by virtue of the decree and that the mere filing of a petition for the execution of the decree did not give rise to any fresh contentious proceeding of the kind contemplated in section 52. There is, if possible, even less foundation for the contention that the defendants are barred by *res judicata*. When the seventh defendant, the judgment-debtor, agreed to sell to the first defendant the property was not under attachment, and the first defendant acquired by virtue of the contract a right which was enforceable against the seventh defendant and all claiming through him, including the auction purchaser of the seventh defendant's interest in execution of the money decree against him. In these circumstances the first defendant cannot be held to have been represented by the seventh defendant in the execution proceedings which in no way affected his right to have the property conveyed to him.

This judgment disposes of the plaintiff's claim with the exception of a one-fourth share in items 1 and 2 which the plaintiff acquired by an independent title, as alleged by him in paragraph 9 of the plaint. We think he should be granted in the present suit a partition of this one-fourth interest as against the defendants in whom the remaining three-fourths are vested. It is alleged for the defendants that, since their purchase, they have redeemed certain mortgages on the items, and this fact, if established, will have to be considered in

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(1) (1920) 47 I.A., 91; s.c., 39 M.L.J., 108 (P.C.).

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working out the partition. Except as regards items 1 and 2 the suit will be dismissed. As regards items 1 and 2 there will be a preliminary decree for partition of the respective shares of the plaintiffs and defendants. The plaintiff must pay the first defendant's costs throughout. The memorandum of objections is dismissed.

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SESHAGIRI AYYAR, J.—I agree. This Appeal arises out of a suit for redemption. The facts are somewhat complicated. The property in suit belonged to the seventh defendant in this case and his brothers, who were known as Tharagans. There were five mortgages on it. The first, second, third and the fifth were in favour of one Subramaniam Chetty. The fourth was to one Narayana Aiyar on 1st February 1894. We are only concerned with this mortgage.

Original Suit No. 349 of 1894 was instituted by one Ramakrishna Pattar against the Tharagans for money in the District Munsif's Court. A decree was obtained on it and the equity of redemption in the suit property was attached in 1895 in the Sub-Court. The application was struck off for default in November 1895. The records were then sent back—whether it was at the request of the decree-holder or by the Court *suo motu* does not appear—to the Munsif's Court. In that Court, proceedings were taken for rateable distribution and by April 1897 a sum of Rs. 215 and odd was realized. Subsequent applications were made in that Court, one in 1897, another in 1900 and so on, in order to keep the decree alive; the last application was on 5th March 1907 in the Sub-Court and it expressly prays for an attachment, proclamation and sale of the property. This application was returned for amendment on a number of occasions. It was ultimately presented in a form which the Court considered proper on 19th August 1907. Notice was then ordered to the judgment-debtors. The seventh defendant filed various objections, one of them being that on the date of the application for attachment the property was not his. The objections were overruled and the property was sold on 30th June 1908. The present plaintiff claims under the Court sale.

I shall now deal with the proceedings connected with the fourth mortgage. A suit was instituted on it in 1903. To this suit, the attaching creditor in the money decree was not a party. The usual mortgage-decree was passed and the property was sold in October 1905. One Ramakutti Nair became the purchaser. Two of the items were sold by him privately to Subramaniam Chetty. The seventh defendant in the present suit and one of the judgment-debtors purchased the other items. After the application for attachment and sale of the property in March 1907 he entered into an agreement with the first defendant to sell it to him. This was on 25th July 1907. On this agreement a suit was instituted on 23rd October 1907, and the Court conveyed the property to the first defendant on 2nd February 1909.

The Subordinate Judge on the first occasion held that the plaintiff was not entitled to sue for redemption. An appeal was taken to this Court, and this Court reversed the decision and remitted the case back to the Subordinate Judge for trial on the merits. He has now given a decree for redemption. The first defendant has preferred this Appeal.

Mr. T. R. Ramachandra Ayyar, for the appellant, has put forward the following contentions: (1) that the sale to Raman Kutti in the mortgage suit put an end to the attachment in the money suit and that consequently the plaintiff acquired no title to the property; (2) that as the fourth mortgage was merged in the decree the plaintiff is not entitled to sue for redemption without setting aside the decree and the Court-sale following it; (3) that the attaching creditor is not a necessary party to a mortgage suit and has no right to question the proceedings connected with it; (4) that plaintiff by his inaction for a period of at least nine years has abandoned the first attachment, that when the mortgage suit was instituted he had no claim to be made a party, and that therefore the sale in the mortgage suit conferred a valid title, and (5) that even if the attaching creditor had a right to re-open the sale, the auction purchaser under the money decree was not entitled to stand in his shoes.

I shall first refer to the contentions of Mr. Anantakrishna Ayyar who appeared for the respondents, as he contended that it

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would be unnecessary to consider the points raised by the appellant if his contentions were upheld. The learned Vakil asked us to hold that as the seventh defendant was a party to the proceedings which resulted in the Court-sale under the money decree, he and the first defendant, who claimed title under him, were bound either by the principle of *res judicata* or by the doctrine of *lis pendens*, and it was not open to the first defendant to question plaintiff's right to redeem.

I am unable to accept this view. As regards *res judicata*, on the facts I have mentioned, it is clear that the seventh defendant did not represent the first defendant in the execution proceedings. Before notice went to him he had agreed to sell the property to the first defendant. It was held in *Savithri Ammal v. Ramasami*(1), *Madan v. Rebati*(2), and *Venkata Reddi v. Yellappa Chetty*(3), that a person in whose favour an agreement to sell was executed acquired such a right as would enable him to compel the purchaser with notice of the agreement to take the property subject to his right. This principle receives support from the provisions of the Specific Relief Act, section 27, and from section 91 of the Trusts Act. Although section 54 of the Transfer of Property Act in terms enacts that an agreement to sell does not convey any *interest* in the property, it seems well established that the person in whose favour such an agreement is executed has at least the right to compel persons purchasing the property with notice of it to take it subject to the possibility of his right being perfected by a regular conveyance. When notice went to the seventh defendant he was contesting the suit of the first defendant although he finally consented to a decree. In these circumstances the seventh defendant did not represent the first defendant. The observations of the Judicial Committee in *Mina Kumari Bibi v. Bijoy Singh Dudhuria*(4) support this view.

On *lis pendens*, the broad question is whether on the presentation of an application for the sale of immoveable property there arises a contentious proceeding in which any right to immoveable property is directly and specifically raised so as to attract the provisions of section 52 of the Transfer of Property Act. I am

(1) (1898) 8 M.L.J., 266.

(3) (1917) 5 L.W., 284.

(2) (1915) 23 C.L.J., 115.

(4) (1917) I.L.R., 44 Cal., 662 (P.C.).

not able to take this view. No doubt, where, after notice, objections are raised on the ground that the property does not belong to the judgment-debtor, the proceedings may be said to relate to a right in immoveable property directly and specifically. Till then, the application does not in any way affect that right. I hold that there is no force in the contention that the purchase by the first defendant was affected by the doctrine of *lis pendens*.

Now I shall deal with the contentions of the learned Vakil for the appellant. On the question whether the attaching decree-holder must be taken to have abandoned the attachment, I am of opinion that the contention is not well founded. Up to 1897, the decree-holder certainly prosecuted his claim. He realized moneys in the District Munsif's Court. In the subsequent applications—there were at least three—he always referred to the fact that there was a first application for attachment. In the last of the applications in 1907, he distinctly stated that the property was attached in 1895. It is true that the application of 1895 was struck off, but as was pointed out by AYLING and HANNAY, JJ., in *Peetiyaikkal Vetakke Pureyil Mullahi v. Marakkarakath Ahammad*(1), the practice in this Presidency has been to regard the order "striking off" as one made for statistical purposes; such orders do not ordinarily put an end to the attachment. My experience both at the Bar and on the Bench, is that these orders are never seriously considered as having the effect of dismissing an application properly made. Further, as was held in *Mohamedsha Khan Sahib v. Srinivasulu*(2), the mere fact that there is a new prayer for attachment is not a ground for holding that the applicant intended to give up his rights under the original attachment. When one remembers that these applications are drafted by vakil's clerks who have no idea of the principles governing execution, courts should not attach too much importance to statements like the one contained in the present application. It will not be irrelevant in this connexion to remark that it is a pity that such applications are inaccurately worded. It is largely due to the fact that under the rules made by the various High Courts the fee payable to a practitioner on an execution application is very inadequate.

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(1) (1914) M.W.N., 798.

(2) (1908) 18 M.L.J., 221.

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Judges spend more labour and time in disposing of these applications than in disposing of Appeals and Second Appeals. If the remuneration were more attractive, it is very likely that practitioners would bestow more time and care in their preparation and thereby save the time of the Court. This is only by the way. I have made these remarks with a view to dissuading Courts from attaching undue importance to statements like the one we are dealing with. It was contended by Mr. Ramachandra Ayyar that this case is governed by the principle enunciated by the Judicial Committee in *Puddomonee Dossee v. Roy Muthoocranath Chowdhry*(1). The facts are materially different. There, the application was struck off after a long lapse of time during which the applicant took no steps to enforce any of his remedies; and the fact that a new application was put in in which there was a prayer for attachment was considered as strengthening the inference that the petitioner intended to give up the original application. Here, there was active prosecution and constant renewal of the application. I hold that there has been no abandonment.

One other contention of Mr. Ramachandra Ayyar with which I am unable to agree was that without setting aside a Court-sale a suit for redemption is not maintainable. This contention was based largely upon the observations contained in *Lala Ganpat Lal v. Bindbasini Prasad Narayan Singh*(2). In that case, a decree was passed against a father on a mortgage. Subsequently, the sons sued to redeem the property on the ground that they were not properly represented in the suit and that their rights of redemption were not affected. Lord Moulton in delivering the judgment of the Judicial Committee points out that a prayer for setting aside the sale was deliberately abandoned, that it was conceded in the Courts below that the debt for which the mortgage was executed was binding on the son and that the decree obtained on the mortgage could not be impeached on any of the grounds open to a Hindu son. On these facts and admissions the Judicial Committee held that without setting aside the sale the plaintiffs were not entitled to redeem the property. The *ratio decidendi* of the decision I take to be this: That as

(1) (1873) 12 Beng. L.R., 411. (2) (1920) 47 I.A., 91; s.c., 39 M.L.J., 108 (P.C.).

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the father represented the sons and was competent in that capacity not only to part with his interest but also with the interests of his sons, unless the sons could bring their claims within the principles recognized by Hindu Law as enabling them to impeach such a transaction, they should not be allowed to redeem the property. I do not regard the decision as holding that in all cases where a mortgage is merged in a decree and sale follows on it, unless the sale is set aside, there can be no suit for redemption. This would cut at the very root of section 85 of the Transfer of Property Act and Order XXXIV, rule 1, of the present Code of Civil Procedure. Mr. Ramachandra Ayyar did not hesitate to contend that even in the case of puisne encumbrancers, if they are not made parties to the suit, they cannot seek to redeem the property without seeking to set aside the sale. This view is opposed to the decision of the Judicial Committee in *Matru Lal v. Durga Kunwar*(1). In that case, a puisne encumbrancer brought a suit on the ground that he was not a party to the suit by the previous encumbrancer, and a decree in his favour was given. The learned Vakil for the appellant tried to explain away the decision by saying that the point whether a suit for setting aside the sale should have been brought was not considered by the Judicial Committee. I do not think that this explanation is satisfactory. In *Umes Chunder Sircar v. Zahur Fatima*(2), it was recognized by the Judicial Committee that without setting aside a sale a suit for redemption can be maintained. In the teeth of the language of section 85 of the Transfer of Property Act and of Order XXXIV, rule 1, I find it impossible to hold that where a person has an interest in the property and is not made a party to the suit on the mortgage, he is not entitled to ask for redemption without setting aside the sale. The decision of the Judicial Committee in *Lala Ganpat Lal v. Bindbasini Prasad Narayan Singh*(3) must be restricted to the class of cases where the law presumes a valid representation by the father of the interest of his son. This would be clear from a reference to *Sheo Shankar Ram v. Jaddo Kunwar*(4).

(1) (1920) 47 I.A., 71; s.c., I.L.R., 42 All., 384 (P.C.).

(2) (1891) I.L.R., 18 Calc., 164 (P.C.).

(3) (1920) 47 I.A., 91; s.c., 39 M.L.J., 108 (P.C.).

(4) (1914) I.L.R., 36 All., 383 (P.C.).

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Mr. Ramachandra Ayyar further contended that a judicial sale puts an end to the attachment. There is the authority of the Calcutta High Court in *Kashy Nath Roy Chowdhry v. Surbanand Shaha*(1) in favour of this contention. The language of section 64, Code of Civil Procedure, is also in his favour. That section provides that where there is an attachment, a private purchaser of the property takes it subject to the result flowing from the attachment. Section 52 of the Transfer of Property Act by its last clause preserves the rights of a purchaser under the orders of the Court. The property being the subject of a litigation in Court the law is jealous against a private alienation of that property. That is the reason for the rule contained in section 64 of the Code of Civil Procedure, and that is the reason why under section 52 of the Transfer of Property Act orders of the Court directing the sale are left unaffected. I am, therefore, inclined to agree with the view taken in *Kashy Nath Roy Chowdhry v. Surbanand Shaha*(1) on this question.

The next contention of the learned Vakil was that an attaching creditor is not a necessary party. There is some conflict of opinion on this question. On examining the provisions of the Transfer of Property Act relating to the rights conferred on the attaching creditor and contrasting them with the provisions of the Code of Civil Procedure relating to the array of parties, it seems to me that there is no ground for holding that an attaching creditor is a necessary party to a mortgage suit. Section 91 of the Transfer of Property Act enumerates the persons entitled to redeem. In the first two clauses, persons having an interest in the property are mentioned. The other clauses deal with those who have got a personal right to redeem. There is much force in the contention of Mr. Ramachandra Ayyar that in the latter category of cases the right of redemption is given as an incident to the enforcement of the right which they possess to bring the property to sale. It is not an interest in property. Now, if we turn to section 85 of the Transfer of Property Act and to Order XXXIV, rule 1, we find it laid down that all persons having an interest either in the mortgage security or in the right of redemption should be made parties. The language is not "all persons who are entitled to redeem the

(1) (1886) I.L.R., 12 Calo., 817.

mortgaged property should be made parties." Therefore, while on the one hand, the legislature enjoins that persons who have an interest in the property should be before the Court in order that their independent rights to the property may be effectually and completely determined, it does not insist that every person who may have a right to the surplus sale-proceeds should be before the Court. Under the scheme of rateable distribution embodied in section 73 of the Code of Civil Procedure after paying the first mortgagee the subsequent encumbrancers are to be paid. And then, not only will the attaching creditor be given a share in the surplus proceeds, but every person who before realization had applied for execution will be entitled to it. It is thus clear that the attaching creditor is only the instrument by which the property is brought before the Court. He secures no higher rights than any other money decree-holder in the distribution of the assets. It seems to me, therefore, that an attaching creditor is not a necessary party. To this extent I respectfully dissent from the view taken in *Venkata Seetharamayya v. Venkataramayya*(1), *Kishen Lal v. Charat Singh*(2), and *Lakshpat Rai v. Fakhr-ud-din*(3). I may point out that in the two Allahabad cases, the point was not considered. Having regard to the principle which the Judicial Committee have repeatedly recognized [vide *Raghunath Das v. Sundar Das Khetri*(4) and *Mina Kumari Bibi v. Bijoy Singh Dudhuria*(5)], that an attaching creditor secures no interest by the fact of his attachment and having regard to the provisions of the law which I have examined, there is no ground, in my opinion, for holding that an attaching creditor is on the same footing as a puisne encumbrancer. Further, if we look at the obvious inconveniences which a contrary view would land the parties in, I am not prepared to hold that the legislature intended to include an attaching creditor among the persons who have an interest in the property. An attachment may be in a Munsif's Court, the subsequent mortgage suit may be in a Sub-Court. It would be absurd to expect the mortgagee to inquire into the existence of attachments on the property before he institutes his suit. The title which an auction-purchaser acquires under the

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(1) (1914) I.L.R., 37 Mad., 418.

(2) (1901) I.L.R., 23 All., 114.

(3) (1917) I.L.R., 39 All., 536.

(4) (1915) I.L.R., 42 Calo., 72 (P.O.). (5) (1917) I.L.R., 44 Calo., 682 (P.O.).

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mortgage-decree would be exceedingly precarious, if it subjects him to the necessity of acquainting himself with particulars regarding previous attachments. So far as I am aware, such information cannot be easily gathered. When we remember that the Judicial Committee in a very recent case [*vide Tilakdhari Lal v. Khedan Lal*(1)], after a very elaborate examination of the provisions of the Registration Act, have come to the conclusion that even registration is not notice, I am not prepared to hold that an auction-purchaser under a mortgage decree is affected by the existence of a previous attachment under a money-decree on the equity of redemption.

This leads me to the consideration of the last question whether even granting that the attaching creditor has an interest in the property, that interest was transmitted to the auction-purchaser. I agree with Mr. Ramachandra Ayyar on this question also. What the auction-purchaser acquires is not the right of the attaching creditor, but the right, title and interest of the judgment-debtor. It is common knowledge that the certificate of sale to an auction-purchaser under a money decree statedly refers only to the right, title and interest of the judgment-debtor. How does the certificate, which is the basis of the title of the auction-purchaser, convey to him the personal right which the judgment-creditor had of redeeming the mortgage? An auction-purchaser takes ordinarily only the rights of the judgment-debtor, and I fail to see how he can claim to stand in the shoes of the judgment-creditor for purposes of enforcing the rights under section 91, clause (f), of the Transfer of Property Act. *Lakhpal Rai v. Fakhr-ud-din*(2) no doubt takes the contrary view: but I am unable to follow it for the reason given. Our attention was drawn to *Shananda Chandrapal v. Basanta Narain Singh*(3), where a different view was taken. The learned Judges of the Calcutta High Court have not adverted to the aspect of the case which has influenced me in holding that nothing but the judgment-debtor's right passes to the auction-purchaser; but their conclusion supports my view. I am, therefore, of opinion that the present plaintiff who is only an auction-purchaser is not entitled to sue for redemption. I agree with the order proposed by the learned Chief Justice.

N.R.

(1) (1920) 39 M.L.J., 243 (P.C.).
(2) (1917) I.L.R., 39 All., 536.
(3) (1912) 17 O.W.N., 871.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Odgers.

KARNAM KANDASAMI PILLAI (PLAINTIFF), APPELLANT,

1920,
August
20 and 30.

CHINNABBA alias SUBBAROYA PILLAI AND THREE
OTHERS (DEFENDANTS), RESPONDENTS.*

Mortgagor and mortgagee—Discharge of debt—Oral arrangement—Mortgagee in possession as full owner for more than twelve years after arrangement for discharge of debt—Suit by mortgagor after twelve years to redeem—Bar—Adverse possession of mortgagee—Proof of nature of possession.

Where, under an oral arrangement between the mortgagor and the usufructuary mortgagee, the latter retained possession of a portion of the mortgaged property in full ownership in satisfaction of the mortgage debt, and enjoyed it as full owner for more than twelve years after the arrangement, on a suit being instituted by the mortgagor to redeem the property more than twelve years after the arrangement.

Held, that the mortgagee had acquired by adverse possession an absolute title to the property, and that the mortgagor's right to redeem the property was barred by limitation.

Uman Khan v. Dasanna, (1914) I.L.R., 37 Mad., 545; *Govindu v. Mallayya*, L.P.A. No. 207 of 1915 (unreported); and *Farada Pillai v. Jeevarathnammal*, (1920) I.L.R., 48 Mad., 244 (P.C.), followed.

Ariyaputhira v. Muthukomaraswami, (1914) 37 Mad., 423, dissented from.

SECOND APPEAL against the decree of P. A. BOORY, District Judge of North Arcot, in Appeal Suit No. 556 of 1917, preferred against the decree of K. SAMBASIVA RAO, District Munsif of Chittoor, in Original Suit No. 4 of 1916.

The material facts are set out in the Judgment.

T. L. Venkatarama Ayyar for the appellant.—The defendant got into possession as mortgagee, and that being so he cannot set up a title by adverse possession, when the sale is invalid: *Ariyaputhira v. Muthukomaraswami*(1). His possession can be referred to his lawful title as mortgagee, and a trespasser's possession cannot be presumed in his favour: *Khizarajmal v. Daim*(2), *Rajai Tirumal Raju v. Pandla Muthiah Naidu*(3),

* Second Appeal No. 1755 of 1919.

(1) (1914) I.L.R., 37 Mad., 423. (2) (1905) I.L.R., 32 Cal., 296 (P.C.).
(3) (1913) I.L.R., 35 Mad., 114.

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CHINNABBA. *Byari v. Puttanna*(1). According to SADASIVA AYYAR, J., even oral evidence to show the nature of possession under the invalid sale is inadmissible: *Ariyaputhira v. Muthukomaraswami*(2).

M. S. Venkatarama Ayyar for *S. Jagadisa Ayyar* for respondent.—On the point of admissibility of evidence *Ariyaputhira v. Muthukomaraswami*(2) is not law after *Govindu v. Mallayya* (3). See also *Varada Pillai v. Jeevarathnammal*(4). Though the oral sale is invalid, there is nothing to prevent possession under it from being adverse: *Usman Khan v. Dasanna*(5), *Narasayya v. Obula Reddi* (6).

T. L. Venkatarama Ayyar in reply.—*Varada Pillai v. Jeevarathnammal*(4) is not in point, because it is not a case of change of character of possession but of trespass *ab initio*. *Muthukaruppan Samban v. Muthu Samban*(7) is in point. The observations in *Narasayya v. Obula Reddi*(6) are obiter.

AYLING, J. —This Second Appeal arises out of a suit for redemption. Plaintiff's father and three others mortgaged the suit lands and certain other properties to defendant in 1871. In 1885 an arrangement was made between the mortgagors and mortgagee by which the latter was to give up the other lands and retain possession of the suit lands in full ownership in satisfaction of the mortgage debt and certain other debts. This arrangement was given effect to, the other lands were relinquished and defendant has remained in enjoyment of the suit lands ever since. Plaintiff now sues to redeem his own share of the suit lands.

The District Munsif dismissed the suit on the ground that "the suit lands were conveyed to defendant by an oral sale more than 30 years ago and that defendant has been in possession all this time as owner." The District Judge on appeal found the above facts (which were not seriously contested) to be true and held that defendant had been holding as owner for more than twelve years. He rejected the chief argument addressed to him that these lands being service inam were inalienable and dismissed the appeal.

(1) (1891) I.L.R., 14 Mad., 88.

(2) 1914 I.L.R., 37 Mad., 423.

(3) L.P.A. No. 207 of 1915 (unreported). (4) (1920) I.L.R., 43 Mad., 244 (P.O.).

(5) (1914) I.L.R., 37 Mad., 545.

(6) S.A. No. 1560 of 1916 (unreported).

(7) (1914) I.L.R., 38 Mad., 1163 at 1161, 1162.

Before us, no argument was based on the service character of the lands, but it was contended that the transaction of 1885 was of the nature of an oral sale, that as such it was invalid and could not be proved, that the defendants' possession must be treated as that of a mortgagee and that plaintiff was entitled to redeem.

In support of his contention, appellant's main reliance was on *Ariyaputhira v. Muthukomaraswami*(1). This was a case very similar to the one before us in which the learned Judges (MILLER and SADASIVA AYYAR, JJ.) held that the transaction amounted either to a sale or conveyance and was in either case void for want of a registered instrument, that oral evidence to prove it was inadmissible, and that it could not be set up as a bar to the mortgagor's right of redemption. This seems to me to be as far as one of the learned Judges (MILLER, J.) went. SADASIVA AYYAR, J., does consider to some extent the aspects of the case with which we are pressed on respondents' behalf, namely, that although it may be impossible to set up the oral sale (to use a convenient term) as a valid transaction putting an end to the equity of redemption, yet the evidence of it is nevertheless admissible to show the position of the parties and the nature of respondents' subsequent possession that is, to show that respondents' subsequent possession was in the capacity of a full owner, not a mortgagee, that he should be regarded as prescribing for a full title; and that his possession if continued for over twelve years would ripen into a full title and bar the mortgagor's right to redeem.

This aspect of the case is very briefly dealt with by SADASIVA AYYAR, J., in a short paragraph at pages 430 and 431 and his decision is in favour of the mortgagor. No reasons are given, apart from the quotation of four cases which (speaking with all respect) do not appear to me to support the learned Judge's view. It is, however, unnecessary to discuss that case further because the question has been authoritatively determined by a bench of three Judges of this Court in *Govindu v. Mallayya*(2). That appeal arose out of a difference of opinion between PHILLIPS and SPENCE, JJ., in *Thotakura Govindu v. Repakayala*

(1) (1914) I.L.R., 37 Mad., 423.

(2) L.P.A. No. 207 of 1915 (unreported).

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Malayya(1), in which *Ariyaputhira v. Muthukomaraswami*(2) was considered and doubted by PHILLIPS, J., and the learned Judges who decided the Letters Patent Appeal must have had that case prominently in their minds. They say :

" But the question whether possession is adverse or not depends upon the intention or animus of the parties. In the circumstances of this case, whether the defendants entered upon possession of the property at first under the clause in the deed of mortgage or not, their possession certainly since the date of the alleged oral sale was in their own absolute title. The principle of law that a mortgagee who enters into possession in his capacity as such cannot acquire any right by adverse possession against his mortgagor is not applicable to a case where the possession of the mortgagee was treated by the mortgagor himself as being in absolute right and not as mortgagee. Here, the mortgage was a simple and not a usufructuary mortgage and that being so, the decision cited before us, that is, *Khizarajmal v. Daim*(3), does not apply."

This seems to me to be conclusive of the point with which we are dealing in the present case and we are bound to follow this pronouncement in preference to the ruling in *Ariyaputhira v. Muthukomaraswami*(2). Apart from authority, however, I am in respectful agreement with the view of the learned Judges in *Gorindu v. Mallayya*(4) and may refer to my judgment in *Narasayya v. Obula Reddi*(5) in which my learned brother PHILLIPS, J., concurred. I may also cite *Usman Khan v. Dasanna*(6) to the same effect. Lastly, I would rely on the decision of the Privy Council in *Varada Pillai v. Jevarathnammal*(7) in support of the proposition that although it may, in consequence of section 123 of the Transfer of Property Act, and section 91 of the Indian Evidence Act, be impossible to prove a transfer of property, yet nevertheless evidence of its nature may be adduced to show the character of the subsequent possession of the property and to prove that that possession ripened into a title by prescription. Their Lordships in that case were dealing with a gift effected without registered instrument. They say :

(1) (1915) 31 I.C., 678.

(2) (1914) I.L.R., 37 Mad., 423.

(3) (1905) I.L.R., 32 Cal., 298 (P.C.).

(4) L.P.A. No. 207 of 1915 (unreported).

(5) S.A. No. 1560 of 1916 (unreported).

(6) (1914) I.L.R., 37 Mad., 545.

(7) (1920) I.L.R., 43 Mad., 244 (P.C.).

" It was not contended before the Board that the above transactions effected a valid gift of the property to Duraisa ; 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 defendants' 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 successor, and accordingly that the plaintiff's 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."

Applying this principle to the case before us, the transaction of 1885, by whatever name it be called, cannot be set up as a transaction having effect of itself to transfer any interest in the property, but it is permissible to consider it, as showing the nature of defendants' subsequent possession—that it was not as mortgagee, but as full owner. That being established, it would, after the expiry of twelve years, ripen into a full title and bar plaintiff's right of redemption. *Muthukaruppan Samban v. Muthu Samban*(1), on which appellant relies, cannot be followed in this connexion, after the Privy Council ruling just referred to. I would dismiss the Second Appeal with costs.

ODGERS, J.—This was a suit for redemption of an usufructuary mortgage, dated 1st April 1871. The defendant pleads that his possession as mortgagee continued till 1885 and that then there was an oral arrangement that the mortgagor and others should sell part of the mortgaged property to the defendant and that the latter should give up part and put the mortgagor in possession. This was done and the defendant has been in possession of the suit lands as owner under this oral sale (so-called) since 1885.

The learned District Judge finds as a fact that the defendant has for over twelve years been in possession as owner.

(1) (1914) I.L.R., 38 Mad., 1158.

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The only argument for the appellant before us is that the oral sale being clearly invalid, there can be no change in the character of the possession of the defendant as mortgagee and that therefore he can be redeemed. Of the cases relied on by the appellant I do not think *Byari v. Puttanna*(1) helps him. The question in that case was in fact whether anything passed by the sale at all. It has no bearing on the case before us.

The case most relied on by the appellant was *Ariyaputhira v. Muthukomaraswami*(2). The defence there was adverse possession on the part of the mortgagee for more than twelve years, the mortgage having been extinguished by an oral arrangement (similar to the one pleaded here) between the parties. MILLER, J., there held that the intention to discharge the mortgage in that case involved the intention to make certain transfers and that it could not be said that if those transfers failed both parties nevertheless intended to discharge the mortgage. He does not discuss the admissibility of the evidence. SADASIVA AYYAR, J., held that if the mortgagee in question continued to hold as mortgagee, owing to the alleged sale having been ineffectual to convey to him the equity of redemption, he could not by merely asserting possession as owner under the invalid sale convert his possession as mortgagee into possession as owner, even granting that the mortgagee knew and acquiesced in his assertion. He also held that oral evidence of the alleged discharge was inadmissible. This was doubted by PHILLIPS, J., in *Thotakura Govindu v. Repakayala Malayya*(3), where he held that oral evidence of a sale by the mortgagor to the mortgagee is admissible to prove discharge though the sale is invalid and does not effect any legal transfer of the property. His view was approved in the Letters Patent Appeal preferred against that decision. There, the Court held that the question whether possession was adverse or not depends on the intention or animus of the parties and that the principle of law that the mortgagee who enters into possession in his capacity as such cannot acquire any right by adverse possession against his mortgagor is not applicable to a

(1) (1891) I.L.R., 14 Mad., 38.
(3) (1915) 31 I.C., 678.

(2) (1914) I.L.R., 37 Mad., 423.

case where the possession of the mortgagee was treated by the mortgagor himself as being in absolute right and not as mortgagee.

In *Rajai Tirumal Raju v. Pandla Muthiah Naidu*(1), the ruling in *Khiarajmal v. Daim*(2), was quoted:

"As between mortgagor and mortgagee neither exclusive possession by the mortgagee for any length of time short of the statutory period of 60 years nor any acquiescence of the mortgagor not amounting to a release of the equity of redemption will be a bar or a defence to a suit for redemption if the parties were otherwise entitled to redeem."

The question has also been considered by this Court in *Narasayya v. Obula Reddi*(3) where the learned Judges say:

"But there is nothing to prevent the mortgagor and mortgagee from agreeing between themselves that the future possession of the mortgagee should be adverse to the mortgagor and if thereafter the said possession endures to the statutory period, a good title is acquired by the mortgagee."

This is most clearly laid down by SUNDARA AYYAR and SADASIVA AYYAR, JJ., in *Usman Khan v. Dasanna*(4). In the last-mentioned case it was said that there is no principle of law which prevents both parties from agreeing what the character of the possession of the mortgagee should be from a certain date.

The Privy Council decision, *Khiarajmal v. Daim*(2), was considered in both *Narasayya v. Obula Reddi*(3) and in *Govindu v. Mallayya*(5) and held not to apply. On the facts of that case their Lordships of the Privy Council held that no possession adverse to the mortgagor's had been proved and consequently the possession of the property had been that of the mortgagee throughout. Further, the Privy Council in *Varada Pillai v. Jeevarathnammal*(6) has held that where a gift is invalid as not being by registered instrument, nevertheless the instrument might be referred to as explaining the nature and character of the possession of the alleged donee, and that though the latter may have acquired no legal title under the transactions referred to she in fact took possession of the property when it was transferred to her name and retained such possession

(1) (1912) I.L.R., 35 Mad., 114. (2) (1905) I.L.R., 32 Cal., 296 (P.C.).
(3) S.A. No. 1560 of 1916 (unreported). (4) (1914) I.L.R., 37 Mad., 545.
(5) L.P.A. No. 207 of 1915 (unreported). (6) (1920) I.L.R., 43 Mad., 244 (P.C.).

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till her death, after which date it passed to defendant as her successor, and accordingly plaintiff's claim was barred by upwards of 12 years' adverse possession.

It seems to me that this case together with *Usman Khan v. Dasanna*(1), lays down the correct principle to be followed, and that where it is found (as here) that the defendant has been in possession for over twelve years as owner and that that title can be ascribed to an arrangement come to between the parties in 1885—whether it be by invalid sale or otherwise—it is now too late to disturb it and the defendant must be taken to have acquired a good title by prescription. I should add that, in my opinion, *Muthukaruppan Samban v. Muthu Samban*(2), has now been overruled by the Privy Council in *Varada Pillai v. Jeerathammal*(3).

I agree in dismissing the Second Appeal with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Odgers.

MAREYYA (DEFENDANT), APPELLANT,

v.

RAMALAKSHMI (PLAINTIFF), RESPONDENT.*

Hindu Law—Adoption of an orphan—'Factum valet', applicability of.

The adoption of an orphan is invalid under the Hindu Law and the doctrine of 'factum valet' cannot be invoked to validate it.

Lakshmappa v. Ramaya, (1875) 12 Bom., H.C.R., 364, at 398 and *Ganga Sahai v. Lakhraj Singh*, (1887) I.L.R., 9 All., 253 at 297, followed.

SECOND APPEAL against the decree of G. GANGADHARA SOMAYAJULU, Temporary Subordinate Judge of Ellore, in Appeal No. 424 of 1917, filed against the decree of V. PUENAYYA, Additional District Munsif of Narasapur, in Original Suit No. 88 of 1916.

This was a suit brought by the respondent for a declaration that the alleged adoption of the appellant by the respondent's deceased husband was not true, and even if true was invalid in

law on the ground that the appellant was an orphan at the time of adoption, and for possession of certain properties. The defendant contended that the adoption was true and valid. The Lower Courts held that though the adoption did in fact take place, it was invalid in law as the appellant was an orphan at the time of the adoption and accordingly passed a decree as prayed for. The defendant preferred this Appeal.

V. Ramadoss for appellant.

P. Narayanamurti and A. Satyanarayana for respondent.

The Court delivered the following JUDGMENT:—

The sole question for decision in this Appeal is whether it is proper to apply the doctrine of "*factum valet*" to the adoption of an orphan. The facts are admitted. Appellant, Mareyya, was in fact adopted by Narasimhayya, respondent's husband, in 1910. Mareyya was at the time an orphan and was given in adoption by his elder brother. It is conceded on his behalf that the adoption was, strictly speaking, illegal—vide *Vaithilingam v. Natesa*(1). Can it be nevertheless upheld on the maxim "*factum valet quod non fieri debuit*"?

In our opinion it cannot be so upheld. The doctrine is one which must always be applied with great caution and we do not think we should be justified in applying it here. In *Subbaluvammal v. Ammakutti Ammal*(2) the learned Judges rejected the argument that the maxim of "*factum valet*" could be applied to the adoption of an orphan, and set aside the decision of the Sadar Amin based on that doctrine. They also rejected the contention that an orphan could be validly given in adoption by his elder brother. This is one of the cases quoted by the learned Judges in *Vaithilingam v. Natesa*(1) in support of their decision, and we observe that in the latter case no attempt was made to apply the doctrine of "*factum valet*," although the fact that the adoption was made more than thirty years before suit and had been treated as valid by the family was brought prominently to the notice of the Judges and is referred to in their judgment. *Bhagwat Pershad v. Murari Lal*(3) is, no doubt, an exactly similar case to

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August 20,
23 and 31.

(1) (1914) I.L.R., 37 Mad., 545.

(2) (1914) 38 Mad., 1158.

(3) (1920) I.L.R., 48 Mad., 244 (P.C.).

* Second Appeal No. 16 of 1920.

(1) (1914) I.L.R., 37 Mad., 539.

(2) (1864) 2 M.H.C.R., 129.

(3) (1910) 15 C.W.N., 524.

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the present, in which the doctrine of "*factum valet*" was applied to an adoption of an orphan given in adoption by his brother. The learned Judges say they apply it "not without considerable hesitation" and lay stress on the lapse of 48 years after the adoption and on the grave injustice which would be done to the adopted son by destroying his civil status after it had been so long accepted. These considerations have no application to the case before us, where the adoption took place only six years before suit. *Chinna Gaundan v. Kumara Gaundan*(1) is quoted as a case in which the doctrine was applied to the case of an adoption of an only son; and indeed it does seem to have largely induced the decision of the learned Judges, that the adoption of an only son, once made, was valid in law. But their Lordships of the Privy Council in *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma*(2), while endorsing the correctness of the decision in that case, certainly do not put it on the ground of "*factum valet*." On the contrary, they are at pains to point out at page 423 the inapplicability of such a doctrine and the conclusion they arrive at is that the adoption is not contrary to Hindu Law.

The true limits of the applicability of the doctrine of "*factum valet*" as regards adoption are laid down by WESTROPP, C.J., in *Lakshmappa v. Ramava*(3) thus :

"To us it appears that its application must be limited to cases in which there is neither want of authority to give or to accept nor imperative interdiction of adoption."

The views of WESTROPP, C.J., in this connexion are expressly endorsed by the Privy Council in the last quoted case (page 423). See also MAHMOOD, J., in *Ganga Sahai v. Lekhraj Singh*(4):

"The capacity to give, the capacity to take and the capacity to be the subject of adoption seem to me to be matters essential to the validity of the transaction, and, as such, beyond the province of the doctrine of *factum valet*."

As an instance of the proper application of the doctrine we may refer to *Wooma Dass v. Gokoolanund Dass*(5). There, the

(1) (1862) 1 M.H.C.R., 54. (2) (1899) I.L.R., 22 Mad., 398 (P.C.).

(3) (1876) 12 Bom. H.C.R., 364 at 398.

(4) (1887) I.L.R., 9 All., 253 at 297.

(5) (1878) I.L.R., 3 Calc., 587 (P.C.).

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maxim of "*factum valet*" is relied on as supporting the view of their Lordships that the adoption which they were considering was legal and valid. But the only objection to the adoption there was that the rule of preference of a brother's son had been disregarded, and it was held that this view was not so imperative as to have the force of law. If that case be compared with the case before us in the light of the tests suggested by WESTROPP, C.J., and MAHMOOD, J., it will be seen how inapplicable the doctrine is to the case we have to deal with.

The only other case to which we shall refer is *Bashetiappa Bin Bastingappa v. Shivalingappa Bin Ballappa*(1). The learned Judges in that case, WESTROPP, C.J., and NANASHAH HARIDAS, J., held that the adoption of an orphan, even when given by an elder brother with the authority of parents given before their death, was invalid and they add the pithy remark that to allow such an adoption .

"would leave it in the power of an elder brother to thin the ranks of his fellow paragoners by bestowing his younger brothers in adoption in a manner highly detrimental to the interests of the latter."

We must hold that the adoption of an orphan is not only contrary to Hindu Law but that the doctrine of "*factum valet*" cannot be invoked to support it.

The Second Appeal is therefore dismissed with costs.

N.B.

(1) (1878) 10 Bom. H.C.R., 238.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Bakewell.

RAGHUNATHA ROW (CLAIMANT), APPELLANT,

v.

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

1919,
September 8
and 9.

Land Acquisition Act (I of 1894)—Acquisition of land for quarrying—Principle of compensation—Value of prospective gravel.

When a piece of land is compulsorily acquired for quarrying purposes, its special adaptability for quarrying is an element for consideration in fixing the amount of compensation, in spite of the fact that no one but the local authority for which the acquisition was made, ever made any demand for the land as a quarry; and it is not right to award compensation for it only as cultivable land. *Daye Khushal v. Assistant Collector, Surat*, (1914) I.L.B., 38 Bom., 87, followed. Judgment of MOULTON, L.J., in *In re Lucas and Chesterfield Gas and Water Board*, [1909] 1 K.B., 16 at 30 and 31, distinguished.

The amount of compensation to be awarded is the present value of all the gravel that might be expected to be realized in the future.

APPEAL against the award of E. P. WALSH, District Judge of Tinnevely, in Compensation Reference No. 7 of 1918, on the file of the District Court of Tinnevely.

The necessary facts are set out in the Judgment.

T. M. Krishnasawmi Ayyar for appellant.

The Government Pleader for respondent.

The Court delivered the following JUDGMENT:—

The main question in this Appeal is whether the Lower Court was right in awarding compensation for the land acquired as cultivable land and not as a gravel quarry. The Lower Court refused to award compensation as for a gravel quarry on the ground that the only demand for the produce of the land as a quarry, came from the District Board, a public body, on account of which the acquisition was made, and it referred to proviso 1 of section 24 of the Land Acquisition Act and the Judgment of Lord

MOULTON in *In re Lucas and Chesterfield Gas and Water Board* (1). We need not say much regarding this part of the case, because the learned Government Pleader has not disputed that the Lower Court erred in refusing to consider the character of the land as a gravel quarry. It is sufficient to refer to a quotation from the judgment of Mr. Justice GROVE in *In re Countess Ossalinsky and Manchester Corporation* (Brown and Allan's Law of Compensation, 2nd Edition, page 659) extracted in the judgment of VAUGHAN-WILLIAMS, L.J., at page 26, in the case referred to by the District Judge:

"The only one of those that can apply to this case is the latter one, that the arbitrator has acted *ultra vires*; in other words, that he has made an element of his calculation of the value of this land that which legally cannot or ought not to be an element of his calculation, namely, the enhanced value of the land on account of its capability of being used for diverting and impounding water for being converted into a reservoir, or for any useful purpose for which persons would pay a substantial price. It appears to us that that in itself is not an objection to the award, and that the arbitrator ought to take that into consideration. If the land has what we may call an adventitious value, that is, something beyond its mere agricultural or normal value (and that is a marketable value in this sense, that persons wishing, for a purpose for which the land is peculiarly applicable, to purchase that land would give a higher price for that land), then the arbitrator has a fair right to take that into consideration; it is a matter no doubt contingent, but still it is a matter which is not to be ignored or put out of consideration by an arbitrator."

The portion of Lord MOULTON's judgment to which the learned District Judge refers must be with reference to the circumstances of the acquisition, which was then under contemplation. That acquisition was of a piece of land which was of no value for agricultural or other purposes to any one except to the public authority which was proposing to use it for the construction of a reservoir. The circumstances in the present case are different, because the compensation is really being given for the gravel, the commodity which the land proposed to be acquired contains and which has had in the past and must be considered as having in the future a market value

* Appeal No. 92 of 1919.

(1) [1909] 1 K.B., 16 at 30 and 31.

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independently of the fact that its permanent acquisition is now under consideration. In *re Lucas and Chesterfield Gas and Water Board*(1) was referred to in *Daya Khushal v. Assistant Collector, Surat*(2), and we respectfully agree with the conclusion reached in that case, that when a piece of land is compulsorily acquired for quarrying purposes, its special adaptability for quarrying is an element for consideration in fixing the amount of compensation. This conclusion entails dissent from the decision of the Lower Court.

We have then to decide what is the proper amount to be awarded on the basis that the land is to be compensated for as a quarry. Firstly, there is before us no finding regarding the amount of gravel on the land. But as it is not suggested that the land will be of value for any other purposes if it is used as a quarry, we can found our award on the amount of gravel which can be realized. The witnesses estimate the amount of gravel at 2,000 to 3,000 cart-loads of gravel per acre. This evidence is of course indefinite. The witnesses in fact say that they are merely guessing; but we think that they probably mean that they are making the best estimate they can. It is suggested that we can reach no conclusion on this evidence, because it includes nothing to show that any accurate method of estimating was adopted by any witness. It is true that there is nothing regarding the depth of the gravel at any particular place. We find, however, that the question was fully in issue before the lower Court, and if the witnesses were not cross-examined with regard to the manner in which they made their estimates, or with regard to their failure to ascertain the depth of the gravel, that is the fault of the Government. Moreover, on the side of Government there is no counter-evidence. We therefore act on such evidence as is available and, taking the lowest figure spoken to by any of the witnesses, we find that there are 2,000 cart-loads of gravel per acre.

The next question is as to the valuation of this quantity of gravel. There is some, very vague evidence as to the value of a cart-load of gravel from the claimant's witnesses and there is some evidence from the Government witnesses as to the price

paid by Government for gravel at a quarry four miles distant and as to the cost of transporting that gravel. It is clear, however, that better evidence must be available, because we know that the Government has recently been buying gravel from the quarry now under acquisition and it should be possible to prove the price which the Government actually paid for gravel from it. That evidence would clearly be the best; and we must express our surprise that it was not laid before the Lower Court. As the record stands, we do not feel able to come to any satisfactory conclusion on this part of the case. There is moreover another point, which does not seem to have been considered on the evidence but which should have a material bearing on the conclusion. The price, which ought to be allowed for a cart-load of gravel must be influenced by the extent of the District Board's demand for it in the near future. For the value of the available gravel at the rate actually paid in the past could not be adopted without disregard of the District Board's loss of the use of the purchase money, which they will have to pay in a lump sum at once, or to put it from the point of view of the owner of the land, the value to him is the price of the cart-loads of gravel to be extracted from time to time for a certain number of years, not the total value of the whole amount available paid at once. That is, it is the present value of what might be expected to be realized in the future. We must therefore call for a finding from the Lower Court as to the rate per cart-load at which compensation should be paid for the gravel on the land in the light of the foregoing. Fresh evidence may be taken. The finding is due in six weeks and seven days will be allowed for filing objections.

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(1) [1909] 1 K.B., 16 at 80 and 81. (2) (1914) I.L.R., 38 Bom., 87.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Odgers.

1920,
September
2, 3 and 10.

R. SINGARIAH CHETTY (THIRD DEFENDANT), APPELLANT,

v.

CHINNABBI ALIAS MUNI REDDI AND FIVE OTHERS (PLAINTIFFS
AND DEFENDANTS NOS. 2, 4 AND 5), RESPONDENTS.*

*Civil Procedure Code (V of 1908), O. XXI, r. 63—Mortgagee, filing claim petition—
Petition dismissed—Suit to establish right dismissed—Subsequent suit by mort-
gagee to enforce his mortgage—Suit against mortgagor and purchasers in
execution of a decree in another suit by the same creditor—Order on claim
petition, whether conclusive.*

An order on a claim petition which has not been set aside in a suit by the claimant under Order XXI, rule 63, Civil Procedure Code, becomes conclusive not only for the purpose of the execution of the decree in connection with which the claim was preferred, but also of the execution of other decrees, between the same parties.

The establishment of the decree-holder's right to bring property to sale free from a claimant's alleged right involves the right of the purchaser at the sale to get a title to the property free from such right. *Ramasamy Chetty v. Aligiri Chetty*, (1905) 27 I.C., 800, followed; *Umesh Chunder Roy v. Raj Bullubh Sen*, (1832) I.L.R., 8 Cal., 279, dissented from.

SECOND APPEAL against the decree of P. N. SATAGOPA NAYUDU, Subordinate Judge of North Arcot, in Appeal Suit No. 153 of 1917 (Appeal Suit No. 364 of 1917 on the file of the District Court of North Arcot), preferred against the decree of T. ANANTA ACHARIYAR, District Munsif of Tirupati, in Original Suit No. 198 of 1916.

The facts are set out in the Judgment.

C. V. Anantakrishna Ayyar for appellant.

N. C. Vijayaraghava Achariyar, C. Padmanabha Ayyangar and T. K. Srinivasa Tata Achariyar for respondents.

AYLING, J.—This appeal arises out of a suit on a mortgage bond executed by the guardian of defendants Nos. 1 and 2 in favour of plaintiffs. Before its institution the mortgaged property

had been brought to sale by fifth defendant in execution of a decree obtained by him against defendants 1 and 2 (Original Suit No. 69 of 1914 on the file of the District Munsif of Tirupati) and purchased by defendants 3 and 4. The latter opposed the suit alleging (1) that the spit mortgage was only a fictitious document without consideration, and (2) that the suit was otherwise not maintainable. The first defence, though successful in the court of first instance, was found against by the Subordinate Judge in Appeal: and we are not now concerned with it. The Subordinate Judge, however, in giving a decree for plaintiffs omitted to consider the objections to the maintainability of the suit: and it is with these, which have been pressed on us by Mr. Anantakrishna Ayyar on behalf of third defendant, the present appellant, that we have to deal.

The main objection is based on Order XXI, rule 63, Civil Procedure Code, and was considered and rejected by the District Munsif on issue 2.

The facts are these—Prior to Original Suit No. 69 of 1914, fifth defendant had instituted another suit against defendants 1 and 2, Original Suit No. 872 of 1913, and had effected an attachment before judgment of the suit property under Order XXXVIII, rule 6. Plaintiffs preferred a claim based on their mortgage. This was dismissed. Thereupon, plaintiffs filed a suit, Original Suit No. 919 of 1914, for a declaration of their mortgage rights and for a declaration that these would not be affected by the attachment.

* This suit (Original Suit No. 919 of 1914) was eventually dismissed. The plaintiffs were first granted leave to withdraw it conditionally on payment of the costs of defendants; but as they failed to do this within the time allowed, this suit stood dismissed.

Appellant contends that on the dismissal of this suit, the order on the claim petition became conclusive under Order XXI, rule 63; and that the result is to preclude plaintiffs from enforcing their mortgage on the suit property under any circumstances whatever.

It has been held by a Full Bench of this Court in *Prasada Nayudu v. Virayya*(1), that Order XXI, rule 63, applies to orders

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(1) (1918) I.L.R., 41 Mad., 849 (F.B.).

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on claims preferred to property attached before judgment; and if appellant had purchased the property in execution of the decree in Original Suit No. 872 of 1913, there could be no room for doubt.

This is, of course, a suit to enforce the mortgage not to contest the order on the claim petition under Order XXI, rule 63. But that makes no difference. If plaintiffs are concluded from setting up their mortgage in connexion with any proceedings taken against the property in pursuance of Original Suit No. 872 of 1913, and this effect at least must be given to the word "conclusive" in rule 63, then it would be ridiculous to contend that they might nevertheless enforce it against a purchaser of the property in execution of the decree: vide *SADASIVA AYYAR, J., Velu Padayachi v. Arumugam Pillai*(1). Mr. Padmanabha Ayyangar, however, for plaintiffs, seems to distinguish the case on the ground that appellant purchased in execution of another decree altogether, and that the order on the claim petition is only conclusive as regards the parties to the same and for the purpose of the suit or execution in connexion with which the claim was preferred. The correctness of this argument of course depends on the meaning to be attached to the word "conclusive" in rule 63 of Order XXI.

On behalf of respondents, we are referred to *Umesh Chunder Roy v. Raj Bullubh Sen*(2), *Ibrahimhai v. Kabulabhai*(3), and *Kamini Kant Roy v. Ram Nath Chuckerbutty*(4). The first of these certainly appears to be authority in respondents' favour. The learned Judges say:

"The finding of the Court in the execution department that the sale was invalid only meant that the sale was invalid as against the judgment-creditor, and as against any purchaser who might purchase at a sale held in execution following that attachment"

The other two cases have no direct bearing on the point. In *Kamini Kant Roy v. Ram Nath Chuckerbutty*(4), the learned Judges only considered sections 13 and 373 of the old Civil Procedure Code—not section 283 which corresponds to Order XXI, rule 63. In the Bombay case the decision turned on the necessity of bringing a suit to contest a claim order on an attachment which was raised. So also in a case of this Court, *Gollamapalli*

(1) (1920) 38 M.L.J., 397.
(3) (1889) I.L.R., 13 Bom., 72.

(2) (1882) I.L.R., 8 Cal., 279.
(4) (1894) I.L.R., 21 Cal., 265.

Subbayya v. Shankara Venkataratnam(1). In both these cases the learned Judges may be said to discuss the matter as if the effect of the claim order did not go beyond the proceedings in connexion with which it was passed; but the dominating factor of their decision is the release or withdrawal of the attachment.

On the other hand, we are referred to a decision of this Court, *Ramasamy Chetty v. Aligiri Chetty*(2), which is just as strong an expression of opinion as *Umesh Chunder Roy v. Raj Bullubh Sen*(3), but the other way. The learned Judges say:

"The statutory suit under Order XXI, rule 63, is to establish the right which the attaching plaintiff claims in the property in dispute. This, in our opinion, is the right to attach the property in question as the property of the defendant whenever it may be his interest to do so, and the effect of not suing would be to debar him from claiming to attach such property at any future time."

As far as the cases go, we have therefore practically a decision of our own Court against one of the Calcutta High Court; and we should, by preference, follow the former. I think, moreover, that a consideration of the rule with reference to the facts of the present case leads to the same conclusion. The right in litigation in the claim petition and in Original Suit No. 919 of 1914 was the right of fifth defendant to treat this suit property as the property of defendants 1 and 2 in opposition to the mortgage right therein set up by plaintiffs. The dismissal of plaintiffs' claim petition followed by the dismissal of their suit, Original Suit No. 919 of 1914, had the effect of conclusively settling this question as between plaintiffs and fifth defendant. It seems to me unreasonable to suggest that the result was only conclusive as regards the particular suit (Original Suit No. 872 of 1913) out of which the decision arose and that it was open to plaintiffs in spite of this decision again to contest the same person's right of proceeding against the same property in another suit. If they could not do so, then neither could they seek to enforce their mortgage against an auction purchaser in the second suit. For, as *SADASIVA AYYAR, J.*, has so clearly pointed out in *Velu Padayachi v. Arumugam Pillai*(4), the one is the necessary consequence of the other:

(1) (1917) M.W.N., 851.
(3) (1882) I.L.R., 8 Cal., 279.

(2) (1915) 27 I.C., 800.
(4) (1920) 38 M.L.J., 397.

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"The conclusive establishment of the decree-holder's right to bring the property to sale free from the claimant's alleged encumbrance involves the right of the purchaser at the sale to get a title to the property free from such encumbrance."

I would therefore hold that the order on plaintiffs' claim petition is conclusive and that the suit mortgage is not enforceable against the items of property dealt with therein. The decree of the lower Appellate Court should be modified accordingly. Plaintiffs should pay the costs of defendants 3, 4 and 5 throughout.

ODGERS, J. — The facts are fully set out in the judgment of my learned brother and I agree that Mr. Anantakrishna Ayyar's contention, that the rights of the plaintiffs are now gone, must prevail by the terms of Order XXI, rule 63, Civil Procedure Code. The effect of this rule combined with the fact that the suit No. 919 of 1914 was dismissed as the plaintiffs did not pay the costs, will, in my opinion, debar the plaintiffs from re-agitating their rights again even though the proceeding be, as here, a regular suit on the mortgage. In other words, once the order became "conclusive" in the words of the rule, a suit on the mortgage is barred at any time. It is, however, strenuously contended by Mr. Padmanabha Ayyangar, for the plaintiffs, that the order is not conclusive against the auction-purchaser in another proceeding and he relies on *Umesh Chunder Roy v. Raj Bullubh Sen*(1). There, a claim was rejected in the attachment in execution of a decree for rent, the judgment-debtor paid off the decree and no sale was held. The effect of this was that the attachment ceased and any rights of the claimant became valid and she had no need to bring a suit to establish them. The learned Judges based their decision on the fact that the decree was paid off, and in fact differed on that ground from the lower Court. Were it otherwise, the case may be said to be conclusive only as to the proceedings to which it relates. Reference may here be made to the passage in the judgment of SADASIYA AYYAR, J., in *Velu Padayachi v. Arumugam Pillai*(2). He says at page 402 :

"The auction purchaser is entitled to take advantage of the order against the claimant in such a case (if it is not set aside by a suit

(1) (1882) I.L.R., 8 Calo., 279.

(2) (1920) 38 M.L.J., 397.

within one year) not because the purchaser is the representative of the decree-holder but because the order which established the right of the decree-holder to bring the property to sale against the claim of the claimant cannot be given effect to otherwise and was clearly intended by the legislature to have the effect of precluding the claimant from putting forward his claim again in opposition to the auction-purchaser at the sale held in pursuance of the order against the claimant."

In *Ramasamy Chetty v. Alagiri Chetty*(1), it is clearly laid down by WALLIS, C.J., and SESHAGIRI AYYAR, J., that the effect of omitting to bring a suit is to bar the remedy. That was a case of attachment before judgment and the learned Judges say :

"The statutory suit under Order XXI, rule 63, is to establish the right which the attaching plaintiff claims in the property in dispute. This, in our opinion, is a right to attach the property in question as the property of the defendant, whenever it may be his interest to do so and the effect of not suing would be to debar him from claiming to attach such property at any future time. The fact that the attachment effected by him would, if it had not been raised previously, have come to an end by the dismissal of the suit does not affect his right to sue under Order XXI, rule 63."

I agree with my learned brother in preferring to follow the Madras decision, especially having regard to the grounds on which in my opinion the Calcutta decision was based. It is not necessary to discuss the point taken as to limitation and I therefore agree with the order proposed.

K.R.

(1) (1915) 27 I.C., 800.

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APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Odgers.

1920, September, 13.

SWAMINATHA ODAYAR (PETITIONER), PETITIONER,

v.

SUNDARAM AIYAR (RESPONDENT), RESPONDENT.*

Section 46 (5), Madras Estates Land Act (I of 1918)—Application to Receiver of an estate, for conferring occupancy right, validity of.

An application by a non-occupancy ryot under section 46 of the Madras Estates Land Act, for the acquisition of occupancy right in an estate, can be made only to or against the owner of the estate and not to a Receiver in charge of the estate.

CIVIL REVISION PETITION under section 115, Civil Procedure Code, and section 107, Government of India Act, to revise the orders of J. R. HUGGINS, Collector of Tanjore, in Revision Petition No. 8 of 1919 filed against the order of T. SEKHARA KURUP, Deputy Collector of Kumbakōnam, in Miscellaneous Application No. 31 of 1918.

The facts are given in the Judgment.

K. Raja Ayyar for petitioner.—A Receiver is a “landholder” and also an owner within section 46 (5) of the Madras Estates Land Act. The order appointing the Receiver gives him full powers as owner and to conduct all proceedings under the Act. “Landholder,” as defined in section 3, will include even limited owners such as lessees, and usufructuary mortgagees. The use of the word ‘owner’ in section 46 (5) is to exclude such limited owners; but not a Receiver who has all the powers of an owner and represents the real owner. A Receiver is a ‘landholder’ entitled to admit a tenant: *Narayanaswami Nayudu v. Subramanyam*(1). Even a limited owner has been regarded as ‘owner’ within section 7 of the Easements Act: *Koyyammu v. Kuttiammoo*(2); see also *Manindra Chandra Nandi v. Secretary of State for India* (3). A Receiver in law represents the real owner: *Jagat Tarini Dasi v. Naba Gopal Chaki*(4).

* Civil Revision Petition No. 643 of 1919.

(1) (1916) I.L.R., 39 Mad., 683, 686. (2) (1919) I.L.R., 42 Mad., 567, 575.

(3) (1907) I.L.R., 34 Cal., 257, 273.

(4) (1907) I.L.R., 34 Cal., 305 at 315.

S. Varada Achariyar, for *S. Srinivasa Ayyangar*, for the respondent—A distinction is clearly drawn in section 46 between landholder and owner. Similarly in section 200; and section 46 (5) allows proceedings only against owners and a Receiver is not an owner.

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ABDUR RAHIM, J.—These cases arise out of an application made by certain tenants of the Tanjore Palace Estate which is under the management of a Receiver appointed by the Court for the compulsory acquisition of occupancy rights under section 46 of the Estates Land Act. The Revenue authorities decided against the ryots on the ground that section 46 precludes any application being made under it to a Receiver appointed by the Court as distinguished from the beneficial owner of the property. We have not found it necessary to decide the preliminary objection raised that no revision lies against the orders of the Revenue authorities as on the merits we are clearly of opinion that sub-section (5) of section 46 is a bar to the present application of the ryots in the case. While in the main clauses of that section the word “landholder” alone is used, in clause 5 at the end, the legislature has added:

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“The sums payable under this section for the acquisition of the occupancy right shall be paid to the landholder who is the owner of the estate or part thereof and any application or proceeding under this section shall be made only to or against such landholder” which means the landholder who is the owner of the estate. Landholder as defined in section 3, clause (5), would include not only the owner of an estate but also persons who are entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessor in title or of any order of a competent Court or of any provision of law. This definition, therefore, would include a Receiver appointed by the Court as a landholder within the meaning of the Act. Therefore, sub-section (5) to section 46, when it says that any application or proceeding under this section shall be made only to or against such landholder “who is the owner of the estate” clearly intended to exclude persons like a Receiver of the estate from the purview of that section. There is another section brought to our notice by Mr. Varada Achariyar, the learned Vakil for the respondent, in which the same definition is found, namely, section 200.

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It is argued by Mr. Raja Ayyar that a Receiver exercises all or most of the powers of the landholder with reference to the management of the property and therefore in several connexions he has been held to stand in the shoes of the owner. That may very well be, but here we have to consider the express words of a statute which clearly show that the legislature intended to confine these proceedings against persons who are owners of the estate as distinguished from persons who may be entitled to collect the rents of the estate and to do other acts contemplated by the Act as landholder. It is not for us to speculate as to what the object of the legislature was in drawing this distinction and in restricting the rights given to the ryots by section 46 to cases where the owner himself is in management of the property. The frame of this section, like that of several other sections of the Act is somewhat peculiar, but there is no escape from its language which admits of no doubt as to the intentions of the legislature.

The result is that Civil Revision Petitions Nos. 643 and 644 are dismissed with costs.

ODGERS, J.

ODGERS, J.—I agree. There is no doubt that a Receiver falls within the definition of a landholder in section 3, sub-section (5) of the Madras Estates Land Act: see *Receiver of Ammayyanaihanur v. Suppen Chetty* (1). It is equally clear that the meaning of 'landholder' as defined in section 3, sub-section (5), has been restricted by the words in section 46, sub-section (5), for the purposes set forth in that section. Section 46, sub-section (5), is very clear and lays down that any application or proceeding under this section shall be made only to or against such landholder. Such landholder being defined just previously as the person 'who is the owner of the estate or part thereof.' The difficulty in construing this section arises, in my opinion, from the fact that the definition of landholder for the purposes of the section has been relegated to the last sub-section instead of being clearly stated in the first. In view of the clear and unequivocal words of section 46, sub-section (5), no good purpose is served by referring to decisions under other Acts in which the word 'owner' has been held not to mean necessarily a beneficial owner, as for instance section 7 of the Easements Act. The construction I put upon sub-section (5) of

(1) (1907) I.L.R., 30 Mad., 505.

section 46 of the Madras Estates Land Act is further strengthened by the distinction drawn between a landholder who is an owner and a landholder who is not an owner in section 200 of the same Act.

I therefore think that the decisions of the Revenue authorities are right and that the Civil Revision Petitions Nos. 643 and 644 must be dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice
Sadasiya Ayyar.

RAJA OF RAMNAD (PLAINTIFF), APPELLANT,

v.

PONNUSAMI TEVAR AND ANOTHER (DEPENDANTS),
RESPONDENTS.*

Limitation Act (IX of 1908), ss. 8, 10—Receipt of interest by a mortgagee from a trustee knowing mortgage to be in breach of trust—Suit by beneficiary for such interest against mortgagee—Applicability of section 10 to such suit—Cause of action for beneficiary to recover such interest—No new cause of action on beneficiary attaining majority.

Interest received by a mortgagee from a trustee in respect of a mortgage executed by the latter in breach of trust to the knowledge of the mortgagee is not 'property' vested in the mortgagee 'in trust for any specific purpose' within section 10 of the Limitation Act. If on the dates of payment of interest the beneficiary be a minor, his cause of action to recover the same arises from such dates and if he sues for the recovery of such interest after attaining majority he is bound to sue within the time limited by section 6 of the Act; and he does not get a fresh cause of action on attaining majority.

APPEAL against the decree of T. SRINIVASA AYYANGAR, Subordinate Judge of the Temporary Subordinate Court of Rāmnād at Madura, in Original Suit No. 9 of 1917.

This is a suit instituted by the present Raja of Rāmnād to recover a sum of Rs. 81,174 and odd being the sum alleged to have been paid by the late Diwan, Trustee of the Rāmnād

* Appeal No. 148 of 1918.

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Zamindari, to the first defendant who was a mortgagee under a deed executed by the trustee on 8th June 1898. The material facts leading up to the transaction were as follows:—The late Raja, who was the father of the plaintiff, had executed a settlement deed, dated 12th February 1895, by which he divested himself of the estate and appointed a Diwan Trustee for the management of it; by the deed provision was made for the payment of certain monthly allowances to himself and other members of the family. This deed was a trust for the payment of creditors and for the due preservation of the estate which was to be handed over to the present Raja when he came of age. The Diwan Trustee, who was negotiating for a large English loan on behalf of the estate, had to get the consent of the late Raja and other allowance holders; and as consideration for getting such consent, the Diwan Trustee undertook to pay the personal debt of the late Raja incurred subsequent to the settlement deed of 1895. The Trustee executed a mortgage of part of the trust estate to the first defendant for a lakh of rupees which was paid over to the late Raja. The first defendant had received several payments towards interest on this bond out of the trust estate on several occasions between 1898 to 1902. The first defendant had sued to recover the amount due on the bond in Original Suit No. 110 of 1914 on the file of Rāmnād Sub-Court, Original Suit No. 80 of 1915 on the file of Sub-Court of Madura. The above suit was dismissed, following the decision of the Privy Council in a similar case of a mortgage for four lakhs in favour of another creditor of the late Raja. The plaintiff (the present Raja of Rāmnād) brought the present suit on 10th July 1916, to recover from the mortgagee the moneys paid towards interest on the mortgage bond, on the ground that the bond was void as in breach of trust, that the payment of interest thereon was also in breach of trust of which the first defendant was aware, and contended that the first defendant was a trustee in respect of the moneys received by him, and that the suit fell under section 10, Limitation Act, and was not barred. The Subordinate Judge held that the suit was barred by limitation as more than three years had elapsed from the date of attainment of majority by the plaintiff. The plaintiff preferred this Appeal to the High Court.

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The Hon'ble the *Advocate-General* (K. Srinivasa Ayyangar) and *R. Krishnama Acharya* for appellant.—The first defendant is a party to the breach of trust by the Diwan Trustee. First defendant was aware of the breach of trust; he is therefore a trustee for the amount received by him as interest and bound to hand over the amount to the plaintiff who is the beneficiary. Section 10 of the Limitation Act applies to the case and there is no bar of limitation. The language of section 10, Limitation Act (IX of 1908), is similar to section 25 of the Judicature Act. Under the English decisions, express trustee includes a person who participated in a breach of trust by the trustee, as in this case. Section 63, Indian Trusts Act (II of 1882), declares that a person in possession of trust money wrongfully is an express trustee. If a person participates in a breach of trust, he is an express trustee: see *Soar v. Ashwell*(1) and *Perry on Trusts*, section 860.

The second point is that even if section 10, Limitation, Act, does not apply, the plaintiff had a fresh cause of action when he was placed in possession of his estate on his attaining majority. Article 120, Limitation Act, will apply. A cause of action arises in favour of the beneficiary (plaintiff), after the trust ceases to exist, i.e., on his being placed in possession of his estate. The cause of action which a beneficiary has during the continuance of the trust is different from that which he has on getting the property for himself after the trust ceases: see *Saroda Pershad Chattapadhyaya v. Brojo Nauth Bhattacharjee*(2) which holds that the cause of action arises against the trustee, executor or administrator after the beneficiary gets possession of the estate in his own right. During the existence of the trust, the suit will be for payment to the trust, now the suit is for payment to the present plaintiff personally.

A. Krishnaswami Ayyar for respondent.—The fact that section 10, Limitation Act, refers to assignees for value, shows that assignees for value are not trustees. *Subbaiya Pandaram v. Muhamad Musthapa Maracayar*(3) shows that an assignee for value is not a trustee under section 10. See also *Balaswamy Ayyar v. Venkataswamy Naicken*(4). If alienee for value had no notice of the trust, no question of limitation arises: see

(1) [1898] 2 Q.B., 390.
(3) (1917) 32 M.L.J., 35.

(2) (1880) I.L.R., 5 Calc., 910.
(4) (1917) I.L.R., 40 Mad., 745.

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section 64, Indian Trusts Act. Section 3, Indian Trusts Act, defines a trustee as a person in whom confidence is reposed by the author of the Trust. Sections 63 and 64, Indian Trusts Act, only refer to the right of following trust money: see *In re Hallett's Estate*. *Knatchbull v. Hallett*(1), which lays down the principle of tracing trust property in the hands of third parties. This principle is reproduced in section 63, Indian Trusts Act.

In England, trusts were dealt with by the Courts of Equity. There was no statute of limitation applicable to them: see section 2 of the Judicature Act. *In re Cross*. *Harston v. Temison*(2) shows that section 25 of the Judicature Act was declaratory of the old law. *Barnes v. Addy*(3) and *Soar v. Ashwell*(4) show that a person becomes a constructive trustee only if the trust money passes into his hands with knowledge of the breach of trust. Reference was made to the following:—*In re Blundell*, *Blundell v. Blundell*(5), *Underhill on Trusts*, page 185; *Lewin*, page 794. The cases and text books call such a person only a constructive trustee.

Second point: following up trust money. The Privy Council applied article 120, Limitation Act, to such a suit, six years from date of receipt of money: see *Gurudas Pyne v. Ram Narain Sahu*(6). Under the Indian Trusts Act, section 63 gives only a right to follow trust property and there is no other section giving any other cause of action. There are no two causes of action, for no new cause of action springs up on his attaining majority. Section 6, Limitation Act, applies and the suit is barred: see *Chidambaranatha Thambiran v. Nallasiva Mudaliar*(7); *Subramanian Chettiar v. Rajeswara Dorai*(8); *Subramanian Chettiar v. Raja Rajeswara Dorai*(9); *Carson v. Sloane*(10); *Reeves v. Butcher*(11).

The Court delivered the following JUDGMENT:—

This is an appeal from the decree of the Temporary Subordinate Court of Madura, dismissing, as barred by limitation,

(1) (1879) 13 Ch.D., 696.

(2) (1882) 20 Ch.D., 109 at 121.

(3) (1874) 9 Ch.App., 244.

(4) [1898] 2 Q.B., 390.

(5) (1888) 40 Ch.D., 370.

(6) (1884) I.L.R., 10 Cal., 860 (P.C.) at 865.

(7) (1918) I.L.R., 41 Mad., 124.

(8) (1909) I.L.R., 32 Mad., 490.

(9) (1916) I.L.R., 39 Mad., 115 (P.C.).

(10) (1884) 13 L.R. 1r., 139.

(11) [1891] 2 Q.B., 509.

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the suit instituted in 1916 by the plaintiff, the present Raja of Rāmnād, to recover from the defendants certain payments made by the trustee of the estate under a trust created by the Raja's father between the years 1898 to 1902 by way of interest on a mortgage of part of the estate created by the trustee in favour of the first defendant, a transaction which may be taken to have been a breach of trust by the trustee of which the first defendant had notice. It is said to follow that the payment by the trustee of interest on the mortgage was also a breach of trust and that the first defendant having taken these payments with knowledge of the breach of trust, the suit is not barred by limitation as it comes within the provisions of section 10 of the Limitation Act. The learned Advocate-General cited several English cases to show that the bar of limitation would not be applied in a similar case in England, but in my opinion those decisions have no application in this Court. In matters of equitable jurisdiction, such as trusts, the English Courts have never regarded themselves bound by the statutes of limitation, and as regards trusts have refused to allow limitation to be pleaded as regards breaches of express trusts, whilst following the analogy of the statute as regards constructive trusts. The application of this rule has been discussed by Lord Justice BOWEN in his well-known judgment in *Soar v. Ashwell*(1), where he distinguishes between express and constructive trusts in the following passage:

"An express trust can only arise between the cestui que trust and his trustee. A constructive trust is one which arises when a stranger to a trust already constituted is held by the Court to be bound in good faith and in conscience by the trust in consequence of his conduct and behaviour. Such conduct and behaviour the Court construes as involving him in the duties and responsibilities of a trustee, although but for such conduct and behaviour he would be stranger to the trust. A constructive trust is therefore, as has been said, a trust to be made out by circumstances."

Here it may be observed that in our own Trusts Act constructive trusts are not treated as trusts, but in a supplemental chapter as "obligations in the nature of trusts." The learned Lord Justice goes on to show that the English Courts

(1) [1898] 2 Q.B., 390, 396.

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have refused to apply the bar of limitation on the analogy of the statute in certain cases which appear to come within his definition of constructive trusts, and this is the class of cases on which the learned Advocate-General relied. That was a matter well within their powers, but in this country we are bound by the provisions of section 10 of the Limitation Act, which though founded no doubt on the equitable rule as to express trusts already cited, does not refer in terms to express trusts except in the marginal note, but provide that

"no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration)" shall be barred by any length of time. It is in my opinion impossible to hold that the payments which in this case were made by the trustee of the estate for interest due to the defendant as mortgagee under a mortgage of estate property created by the trustee became vested in the mortgagee on trust, specifically for the beneficiaries of the trust of which the mortgagor was trustee. That was not the intention of either party to the transaction. On the contrary, the payments were made as lawful debts due to the mortgagee and at the most he could only have incurred with regard to them obligations in the nature of a trust under chapter IX of the Indian Trusts Act. Section 10 has clearly no application to such a case. It has also been contended that the present plaintiff, as beneficiary under the trust deed, acquired a fresh cause of action on attaining majority. We are unable to accept this contention. The causes of action, if any, accrued to the plaintiff on the dates of the payments and after attaining majority he was bound to sue within the time limited by section 6. The appeal fails and is dismissed with costs.

K.R.

PRIVY COUNCIL.*

NATARAJA THAMBIRAN (DEFENDANT),

v.

KAILASAM PILLAI (PLAINTIFF), RESPONDENT
[AND TWO CONNECTED APPEALS].

[On Appeal from the High Court at Madras.]

1920,
June 7.

Religious endowment—Mutt—Head of mutt—Trustee of temples—Appointment of successor—Compromise to avoid prosecution—Invalidity—Code of Civil Procedure (XIV of 1882), sec. 539.

By the usage of a mutt the pandara sannidhi, or head, had power to appoint his successor, and was trustee of the endowments of certain dependent temples. In 1894 the pandara sannidhi appointed the appellant as chinna pattam, or junior head, with a right to succeed as head. This appointment was not made bona fide in the interests of the mutt, but under a compromise whereby he had avoided a threatened prosecution for forgery of a will purporting to be that of his predecessor and appointing him as successor. The appellant having succeeded as pandara sannidhi, suits were instituted in 1905 to remove him from being trustee of the mutt properties and of the temple properties.

Held, that the appellant's appointment as head of the mutt was invalid and that consequently he never became trustee of the temples; but that on the finding which was not challenged on appeal, that there was no evidence that the head of the mutt was a trustee of the mutt properties, the suit to remove him from the headship of the mutt could not be maintained under section 539 of the Code of Civil Procedure, 1882.

Ramalingam Pillai v. Vythilingam Pillai, (1898) L.R., 20 I.A., 150; I.L.R., 10 Mad., 490 (P.C.), followed and applied.

CONSOLIDATED APPEALS from a judgment and decree (December 15, 1918) of the High Court affirming the decree and reversing another decree, both dated March 31, 1913, of the Temporary Subordinate Judge of Rāmnād.

The litigation related to the Tiruvannamalai Mutt, situate in the district of Madura, and certain dependent devastanams or temples. The present appeal arose out of a suit (No. 1 of 1905), against the present appellant, Nataraja, and two others claiming a declaration that none of the defendants was a lawful trustee of the mutt or the devastanams and a second suit (No. 2 of 1905),

* *Present*: Lord BUCKMASTER, Lord DUNEDIN, Sir JOHN EDGE and Mr. AMERU ALI.

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brought by other plaintiffs against Nataraja and another, claiming a declaration that neither was the lawful trustee of the devastanams.

The District Judge, who tried the suits, found that Nataraja was not a trustee of the mutt or of the devastanams. He was however of opinion, upon the authorities, that the pandara sannidhi as head of the mutt was a corporation sole and that section 539, Civil Procedure Code, did not apply. On that ground, and without recording any evidence, he dismissed both suits; in suit No. 2 he held that so long as Nataraja was head of the mutt he was by its usage the rightful dharmakarta of the temple.

Upon appeals by the plaintiffs to the High Court, MUNRO and ABDUR RAHIM, JJ., held that there was no reason why the properties belonging to the devastanams should not be protected if waste or mismanagement, which were alleged, were proved. They accordingly allowed the appeal in Original Suit No. 2 of 1905; they adjourned the appeal in Original Suit No. 1 of 1905 pending the answer to a reference which they made to the Full Bench, "Does the head of a mutt hold the properties constituting its endowment as a life tenant or as trustee?" The Full Bench held [see *Kailasam Pillai v. Nataraja Thambiran*(1)] that the head of the mutt was not a trustee save in so far as it was shown that he held particular properties in trust: at the same time they refused to regard him as a life tenant. Upon the case coming again before MUNRO and ABDUR RAHIM, JJ., they said:

"The general reply given by the Full Bench is that, in the absence of evidence to the contrary, the head of a mutt is not a trustee. The appellant contends that he should be allowed to adduce evidence on the point and we think that contention reasonable. We therefore reverse the decree of the District Judge and remand the suit" (i.e., No. 1 of 1905) "for disposal according to law."

The two cases after the remand were transferred to the Temporary Subordinate Judge of Rāmnād. They were tried by him, together with a third suit (No. 19 of 1912) brought by a different plaintiff for a declaration that he had been duly elected head of the mutt by the thambirans or disciples. In that suit the

following issue, which was not specifically raised in either of the two suits of 1905, was framed amongst others:

"Whether the appointment of the defendant to chinna pattam of Tiruvannamalai Adhinam Mutt by the late Thandavarayan Desikar was made mala fide to serve his own purposes and therefore invalid?"

The facts with regard to that issue appear from the judgment of their Lordships.

All these suits were tried together and were dismissed; and with regard to suit No. 19 of 1912 there was no appeal. As regards suit No. 1 of 1905, the Subordinate Judge found that there was no evidence to show that the pandara sannidhi was a trustee of the mutt properties, and he dismissed the suit, holding that it was not maintainable under section 539 of the Code of Civil Procedure. With regard to suit No. 2 of 1905, he held that it was maintainable under that section, as relating only to the devastanam properties. He, however, found that Nataraja had been appointed chinna pattam, with the right to succeed as pandara sannidhi, as the result of a bona fide compromise of disputes between him and Thandavarayan, and that the appointment was valid.

Appeals in the two suits of 1905 were heard together by the High Court, which affirmed the decree in suit No. 1 so far as it referred to the office of pandara sannidhi and its endowments, and reversed it in other respects; the decree in suit No. 2 was reversed, and it was declared that Nataraja was not a lawful trustee of the devastanams and the endowments thereof, and ordered that he be removed and that the lower Court should appoint a fresh trustee. The learned Judges (WALLIS, C.J., and NAPIER, J.) were of opinion that the lower Court having found that there was no evidence that the head of the mutt was a trustee, and that finding not being disputed, suit No. 1 of 1905 was properly dismissed, under the decision already given, so far as it referred to the mutt and mutt properties. They found, however, upon the evidence, that the appointment of Nataraja was made not in the interests of the mutt but in furtherance of the appointing pandara sannidhi's own interests, and that it was therefore invalid; they held accordingly that Nataraja was not a trustee of the temple properties, there being, in their view, nothing in their decision upon the first point which

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(1) (1910) I.L.B., 83 Mad., 265 (F.B.).

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precluded the Court from so holding. The learned judges further held that the suits were not barred by limitation, rejecting a contention that time began to run under article 120 of Schedule I, of the Indian Limitation Act, from the date of the appointment of Nataraja as chinna pattam and not from that of his succession as pandara sannidhi.

Nataraja appealed from the decree in suit No. 2, and both parties appealed from the decree in suit No. 1.

Upjohn, K.C., and *Kenworthy Brown*, for the appellant.—Both suits should have been dismissed. The pandara sannidhi as head of the mutt is a corporation sole and as such is entitled to hold the endowments; he is entitled to the trusteeship of the temples according to the custom governing the institution. Section 539 of the Code of Civil Procedure, 1882, has no application to either suit. There was no such express or constructive trust as is referred to in that section. Reference was made to *Vidyapurna Tirthi Swami v. Vidyamidhi Tirthi Swami*(1), *Kailasam Pillai v. Nataraja Thambiran*(2), and *Shanmuga Chettiar v. Narayana Ayyar*(3). The High Court should not have reversed the finding of the Subordinate Judge as to the motive of Thandavarayan in appointing the appellant. The evidence showed that the appointment was in the interests of the mutt as it was a settlement of the disputes with regard to the succession. The appellant was ordained and consecrated as chinna pattam, and in 1902 the general body of tambirans recognized and adopted him as pandara sannidhi, affirming his right to the office, to which the trusteeship of the temples is attached by custom.

De Gruyther, K.C., and *Dubé*, for the respondent.—The evidence shows that the appointment of the appellant was made in order to avoid the threatened prosecution; it was not made in the interests of the mutt but for indirect and personal motives, and is consequently bad: *Ramalingam Pillai v. Vythilingam Pillai*(4). The head of the mutt holds the properties both of the mutt and of the temples in trust, and the suits were maintainable under section 539 of the Code of Civil Procedure, 1882, in respect of both trusts. But even if the suit with regard to

(1) (1904) I.L.R., 27 Mad., 455. (2) (1910) I.L.R., 38 Mai., 265 (F.B.).

(3) (1917) I.L.R., 40 Mad., 743.

(4) (1893) L.R., 20 I.A., 150; I.L.R., 16 Mad., 490 (P.C.).

the headship of the mutt and its properties could not be maintained, it was rightfully held that the appellant was not trustee of the temple property.

Upjohn, K.C., in reply.—There being no evidence that the mutt properties were held in trust, the cross-appeal fails. The appellant remaining head of the mutt, he should not have been removed from the trusteeship of the temple properties. Considerable inconvenience will arise from the severance. Under section 539, the Court was not bound to remove the appellant from the trusteeship, and should not have done so, seeing that no mismanagement by him was proved.

The JUDGMENT of their Lordships was delivered by

Sir JOHN EDGE.—These are three consolidated appeals. One of the appeals is from a decree of the High Court of Madras made in a suit (No. 1 of 1905) in which Shunmugam Pillai and Kailasam Pillai were the plaintiffs, and Nataraja Tambiran, Ramalinga Tambiran and Sankaralinga Tambiran were the defendants. That suit was instituted in the District Court of Madura on May 1, 1905, and by it the plaintiffs sought a declaration that none of the defendants was a lawful trustee of the Tiruvannamalai Mutt and of certain dependent devastanams or temples, and other reliefs. Another of the consolidated appeals is a cross-appeal from the decree of the High Court in that suit. The other of the consolidated appeals is an appeal from a decree of the High Court made in a suit (No. 2 of 1905), in which Kaliawara Gurukal, Vadugauatha Gurukal, and Suppiah Gurukal were the plaintiffs, and Nataraja Tambiran and Sankaralinga Tambiran were the defendants. The latter suit was instituted in the District Court of Madura on July 2, 1905, and by it the plaintiffs sought a declaration that neither of the defendants was the lawful trustee of the same devastanams, or the endowments of those temples, and other reliefs. The consent in writing of the Advocate-General for Madras was obtained under section 539 of the Code of Civil Procedure, 1882, for the institution of each of these suits. The main contention in each suit was whether Nataraja was a trustee or held in some other capacity. On March 14, 1906, the District Judge found that Nataraja was not a trustee of the mutt or of the devastanams, and that no suit lay under section 539 of the Code

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of Civil Procedure, 1882, in respect of the mutt or of the devastanams, which in his opinion went with the mutt, and by his decree dismissed the suits. From those decrees there were appeals to the High Court. In each of the appeals the High Court set aside the decree of the District Judge and remanded the suit for trial.

On the remand the suits came on for trial before the Temporary Subordinate Judge of Ramnad, who will hereafter be referred to as the trial Judge, by whom they were by consent tried together with a suit which was instituted in 1912 by one Ponnambala Desika against Nataraja, alleging that he and not Nataraja was the lawfully appointed head of the mutt. Separate issues were framed in each of the three suits, and evidence was recorded. The trial judge by his decree dismissed the suit of 1912; that decree was not appealed against and became final.

The trial Judge found in suit No. 1 of 1905 that there was no evidence to show that the head of the mutt was a trustee of the mutt or of its properties, and by his decree dismissed that suit. The trial Judge apparently considered that, so far as that suit was concerned, it was not necessary to find whether Nataraja was a trustee of the devastanams and the properties with which they were endowed. That decree in suit No. 1 of 1905 was appealed to the High Court, and neither on that appeal, nor in these consolidated appeals was any attempt made to challenge the correctness of the finding of the trial Judge in suit No. 1 of 1905, that there was no evidence to show that the head of the mutt was a trustee of the mutt or its properties. The devastanams and their endowments were not property of the mutt, but admittedly they are held as trust property by the person who is for the time lawfully the pandara sannidhi or head of the mutt, and the pandara sannidhi holds them as a trustee of religious and charitable trust properties, to which section 539 of the Code of Civil Procedure, 1882, would apply. The trial Judge also by his decree dismissed the suit No. 2 of 1905. That decree was appealed to the High Court.

The appeal to the High Court in suit No. 1 of 1905 was numbered 317 of 1913 in the High Court file, and the appeal

in Suit No. 2 of 1905 was numbered 318 in that file. The appeals were heard together by the High Court, and all the evidence which had been recorded in those suits and in the suit of 1912 was before the learned Judges before whom the appeals in the suits of 1905 came for hearing. The High Court by its decree in Suit No. 1 of 1905 confirmed the decree of the trial Judge, in so far as it dismissed the plaintiffs' suit in respect of the office of pandara sannidhi of the mutt and its endowments, and reversed that decree in other respects, and by its decree in Suit No. 2 of 1905 reversed the decree of the trial Judge, and declared that Nataraja was not the lawful trustee of the devastanams and the endowments thereof, and directed the lower Court to appoint a fresh trustee of the said devastanams, and to place the trustee so appointed in possession of the said devastanams and endowments.

In 1894 Thandavarayan Desikar, who was the then pandara sannidhi or head of the mutt, and had as such head of the mutt the right to appoint his successor, appointed Nataraja, a defendant to the suits, as his successor, and chinna pattam or junior head of the mutt. The only question which their Lordships consider necessary to decide in these appeals is whether that appointment was a valid appointment. Admittedly, the head of the mutt holds the devastanams and the properties with which they were endowed as a trustee, whether he is to be considered as a trustee of the mutt itself or not. Thandavarayan Desikar died in 1902.

The validity of the appointment of Nataraja was questioned in the suits of 1905, mainly on the allegations in the plaints in those suits that Thandavarayan was a trespasser, and had not been appointed head of the mutt by Arumuga Desikar who had died in 1893 and was the head of the mutt. The validity of the appointment of Thandavarayan as head of the mutt has been established and cannot now be questioned. It was, however, alleged in the plaint in each of the suits that Thandavarayan in 1893 appointed Nataraja as his successor "out of fraudulent and sinister motives." The meaning of that allegation is that the appointment of Nataraja was an invalid appointment as not made bona fide in the interests of the mutt, and was made by Thandavarayan in furtherance of his own interests, and an appointment so made would not be an

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appointment made in the bona fide exercise of the powers of the head of the mutt, and would be invalid: see *Ramalingam Pillai v. Vythilingam Pillai*(1). Inferentially, but not expressly, the allegation that the appointment of Nataraja had been made from fraudulent and sinister motives by Thandavarayan was denied by Nataraja in his written statement. In the latter of the suits of 1905 Nataraja in his written statement alleged that the appointment "was made with the best motives and in the best interests of the institution," that is, of the mutt. A direct issue as to the validity of the appointment of Nataraja should have been framed in each of the suits of 1905, but was not. The omission of such a framed issue did not, however, take any of the parties by surprise. Documentary evidence from which it might be inferred that the appointment of Nataraja had been made by Thandavarayan not bona fide in the interests of the mutt but for his own protection was filed and subsequently witnesses were called to speak to facts, whose evidence if reliable led to the conclusion that the appointment was not made in a bona fide exercise of the power to appoint a successor. Briefly stated, the motive which influenced Thandavarayan to appoint Nataraja as his successor was alleged to have been Thandavarayan's desire to avoid the risk of being prosecuted on a charge of murder and a charge of forgery of a will, charges which Nataraja was making, and to avoid the question raised by Nataraja that Thandavarayan himself had not been appointed the head of the mutt. It is not necessary to consider whether those charges were or were not well founded.

The Subordinate Judge considered that the witnesses who gave evidence in support of the case that the appointment of Nataraja was not made bona fide in the exercise by Thandavarayan of his power of appointment were interested witnesses, and found that the appointment was not the result of a corrupt bargain between Thandavarayan and Nataraja, but was made in bona fide settlement of disputes of doubtful claims in respect of a certain place.

On Appeal to the High Court, the learned Chief Justice in his judgment said:

(1) (1898) L.R., 20 I.A., 150; I.L.R., 18 Mad., 490 (P.O.).

"In the plaint, as already stated, the plaintiffs attacked the first defendant's (Nataraja's) appointment on the ground that Thandavarayan under whom he now claims was not himself the lawful pandara sannidhi and also on account of the circumstances under which the first defendant's appointment was made. This last question, though distinctly raised in the pleadings, was not, to say the least, very clearly taken in the issues in these two suits (the suits of 1905), but it was the subject of the fourth issue in the third suit (the suit of 1912) which was tried with them: 'Whether the appointment of the first defendant to the chinna pattam by the late pandara sannidhi was made mala fide to serve his own purpose, and therefore invalid?' It is, I think, clear that the parties in these two suits also went to trial on this issue, and that we are bound to deal with it."

NAPIER, J., in his judgment in the appeals to the High Court said on the same subject:

"I am satisfied that the matter was treated as an issue in the present suits (the suits of 1905), and that the non-existence of a specific issue at the trial was not considered of any importance, that being the issue in the other suit,"

that is, in the suit of 1912. It appears to their Lordships that the learned Judges of the High Court were justified in treating the question whether Nataraja's appointment as head of the mutt was or was not a valid appointment as an issue upon which the parties to the suits of 1905 went to trial, and that for determining that issue the learned Judges were entitled to look at the evidence which was recorded in the suit of 1912 and was before them.

The Chief Justice found that the appointment of Nataraja by Thandavarayan was not in bona fide settlement of doubtful claims, and was in pursuance of an arrangement between them of a very different character, by which Thandavarayan agreed to exercise his powers of appointment for the purpose of obtaining an advantage to himself and in furtherance of his own interests.

NAPIER, J., after a careful review of the evidence, found:

"In the result I am satisfied that Thandavarayan would not have appointed Nataraja his opponent, as his successor, were it not for his desire to secure himself from further opposition. In my opinion, he did not appoint him in the true interests of the mutt. He consented to an arrangement of an unusual character under

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which he parted with a considerable portion of his temporal rights with an eye solely to his own security, and under pressure of great danger to himself."

Their Lordships find as facts that Arumuga Desikar, who was in 1893 pandara sannidhi, or head of the mutt, died on May 23rd 1893, and that Thandavarayan at once claimed the succession to the headship of the mutt, alleging that he had been appointed on May 22, 1893, by Arumuga as his successor, and also alleging that his appointment had been confirmed by Arumuga by his will of that date. That claim was at once challenged by Nataraja, who alleged that he himself had been appointed by Arumuga as his successor, that Thandavarayan had not been appointed, and that the will was a forgery. Thandavarayan presented the alleged will for registration. The registration of the will was successfully opposed by Nataraja on the ground that it was a forgery; Nataraja also alleging that Thandavarayan had murdered Arumuga. The Registrar found that the will was not genuine. Nataraja threatened to prosecute Thandavarayan. Thandavarayan asked the witness Narayanasami Desikar to get Nataraja to compromise and not prosecute. This witness met Nataraja and asked him not to prosecute, as prosecution was a big matter, and would bring disgrace to both sides. Nataraja insisted that if a compromise was to be effected he should be made chinna pattam, that is, junior head of the mutt, with a right to succeed to the position of pandara sannidhi or head of the mutt, and be given sufficient properties to maintain his position. This witness said that he advised Thandavarayan to comply with Nataraja's demands. Chockalinga Thambiran, who was one of Nataraja's witnesses, admitted in cross-examination that Nataraja "was arranging to take further proceedings after the registration of the will was refused." Those further proceedings must have been criminal proceedings. There is abundant other evidence from which it is to be inferred that Nataraja was threatening to institute criminal proceedings against Thandavarayan. Chockalinga also admitted in cross-examination that one Ramasami Ayyar brought Nataraja to Thandavarayan and settled the disputes between them.

Their Lordships entertain no doubt that the appointment of Nataraja as his successor in the office of pandara sannidhi, or head of the mutt, was not made in the interests of the mutt by

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Thandavarayan, but was made by him solely in his own interests as the result of a compromise by which he avoided the risks of a criminal prosecution for a forgery of the alleged will of Arumuga, of which he had unsuccessfully attempted to procure registration. Their Lordships consequently hold that Nataraja never was validly appointed head of the mutt, and never having been the lawful head of the mutt, the trusteeship of the devastanams and their endowed properties did not vest in him, and that the decrees of the High Court, the subjects of these two consolidated appeals, are right.

Their Lordships will humbly advise His Majesty that the appeals should be dismissed with costs, and that the cross-appeal should be dismissed without costs.

Solicitor for appellant: *Douglas Grant.*

Solicitor for respondents: *H. S. L. Polak.*

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PRIVY COUNCIL.*

RADHAKRISHNA AYYAR AND ANOTHER (APPELLANTS),

v.

SWAMINATHA AYYAR (RESPONDENT).

[On Appeal from the High Court of Judicature at Madras.]

1920,
December 3.

Procedure—Appeal to Privy Council—Certificate of High Court—Code of Civil Procedure (V of 1908) sec. 109 (c), O. XLV, r. 3—Madras Estates Land Act, 1908, sec. 52, sub-sec. (3)—Puttah decreed under earlier Act—Res judicata—Special leave to appeal refused.

A certificate granted by a High Court upon a petition under Order XLV, rule 3, Code of Civil Procedure, for leave to appeal to the Privy Council should show clearly whether it is intended to certify merely that the case falls within section 110 of the Code or that it falls within section 109 (c) and section 110 as a case otherwise fit for appeal.

Upon a petition under Order XLV, rule 3, for leave to appeal from a decree of the High Court in a suit for the recovery of Rs. 4,605 rent, the High Court certified "that as regards the subject matter and the nature of the questions involved, the case fulfils the requirements of sections 109 and 110 of the Code of Civil Procedure, and that the case is a fit one for appeal to His Majesty in Council."

* Present: Lord BUCKMASTER, Lord PHILLIMORE, Sir JOHN EDGE, Mr. AMERY ALI and Sir LAWRENCE JENKIN.

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Held, that the appeal could not be maintained, since the value of the subject matter was under Rs. 10,000, and there was nothing in the certificate to show that the discretion conferred on the High Court by section 109 (c) was invoked or exercised.

Held, further, that a contention that the provision in section 52, sub-section (3) of the Madras Estates Land Act, 1908, for the remaining in force of decreed puttahs and muchalkas referred only to puttahs and muchalkas decreed under that Act, was not of sufficient weight to justify their Lordships in granting special leave to appeal.

APPEAL from a judgment and decree (4th November 1916) of the High Court (OLDFIELD and PHILLIPS, JJ.) varying a decree of the District Judge of Tanjore, which decree varied a decree of the Revenue Divisional Officer of Kumbakonam.

The suit was instituted by the respondent in the Revenue Court under the Madras Estates Land Act (I of 1908), section 77, to recover from the appellants, occupancy ryots, Rs. 4,560 as rent for three years. The appellants had refused to accept puttahs which had been tendered to them; they disputed the basis upon which the rent was provided for and denied that they were bound to accept puttahs in the terms decreed in a former suit brought against the predecessors under the repealed Madras Rent Recovery Act (VIII of 1865). Issues were framed with regard to the basis upon which the rent was payable.

The Revenue Court gave the respondent a decree for Rs. 4,367; upon appeal to the District Court the amount was reduced to Rs. 3,953; upon a further appeal to the High Court the decree of the Court of First Instance was restored. The High Court held that under section 52, sub-section (3), of the Madras Estates Land Act, 1908, the terms of the puttah which had been decreed under Madras Act VIII of 1865 were binding upon the appellants.

The appellants having presented a petition to the High Court under Order XLV, rule 3, praying for the grant of a certificate to enable them to appeal to His Majesty in Council, the High Court made an order in the terms set out in their Lordships' judgment.

De Gruyther, K.C., and *Parikh* for the respondent, took a preliminary objection to the hearing of the appeal, contending that the certificate was insufficient. They referred to the Code of Civil Procedure, 1908, sections 109 and 110, Order XLV, rule 8, and the two cases mentioned in their Lordships' judgment.

Kenworthy Brown for the appellant, contended that, having regard to the nature of the dispute, the value of the subject matter was over Rs. 10,000; further, that there was involved a substantial question of law, and that the certificate was intended to cover both classes of requirements referred to in sections 109 and 110. He further prayed that if the certificate were insufficient the appellants should have special leave to appeal upon the ground stated in their Lordships' judgment.

The JUDGMENT of their Lordships was delivered by

Lord BUCKMASTER.—In this case a preliminary objection is taken to the appeal on behalf of the respondent based upon the ground that no proper certificate of appeal has been granted, and that the appeal is consequently incompetent.

The conditions that regulate the granting of certificates for leave to appeal have been clearly stated in the cases referred to by Counsel for the respondent, namely, *Banarsi Perashad v. Kashi Krishna Narain*(1) and *Radha Krishen Das v. Rai Krishen Ohand*(2). It is not necessary to examine them again, for the principle which they establish is plain and cannot be questioned. That principle is this: that as an initial condition to appeal to His Majesty in Council, it is essential that the petitioners should satisfy the Court that the subject matter of the suit is Rs. 10,000, and in addition that in certain cases there should be added some substantial question of law. This does not cover the whole grounds of appeal, because it is plain that there may be certain cases in which it is impossible to define in money value the exact character of the dispute; there are questions, as for example, those relating to religious rights and ceremonies, to caste and family rights, or such matters as the reduction of the capital of companies as well as questions of wide public importance in which the subject matter in dispute cannot be reduced into actual terms of money. Sub-section (c) of section 109 of the Civil Procedure Code contemplates that such a state of things exists, and rule 3 of Order XLV regulates the procedure. It is there provided that the petition for appeal should state the grounds of appeal, and pray for a certificate that either as regards

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(1) (1900) L.L.R., 28 All., 227; L.R., 28 I.A., 11.

(2) (1901) L.L.R., 28 All., 415; L.R., 28 I.A., 182.

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amount or value and nature, the case fulfils the requirements of section 110, or that it is otherwise, i.e., under section 109, sub-section (c), a fit case for appeal to His Majesty in Council." When any certificate is granted under that Order, it is in their Lordships' opinion of the utmost importance that the certificate should show clearly upon which ground it is based, and they regret to find that the certificate in this case is at least ambiguous. It runs in these terms :

"It is hereby certified that, as regards the value of the subject matter and the nature of the question involved, the case fulfils the requirements of sections 109 and 110 of the Code of Civil Procedure, and that the case is a fit one for appeal to His Majesty in Council."

There is no indication in the certificate of what the nature of the question is that it is thought was involved in the hearing of this appeal, nor is there anything to show that the discretion conferred by section 109 (c) was invoked or was exercised. Their Lordships think it should be brought to the attention of the Indian Courts that these certificates are of great consequence, that they seriously affect the rights of litigant parties, and that they ought to be given in such a form that it is impossible to mistake their meaning upon their face.

Counsel for the appellants has asked that even though the amount in value in this suit is beneath the proper appealable amount, as it undoubtedly is, his clients should be granted special leave to appeal upon the ground that an important question of law affecting the whole community is raised under the Madras Estates Land Act, 1908, a question which has not hitherto been the subject of judicial interpretation. That question was this: Section 52, sub-section 3, provides that:

"Puttahs and muchalkas accepted, exchanged or decreed for any revenue year shall remain in force until the commencement of the revenue year for which fresh puttahs or muchalkas are accepted, exchanged or decreed; provided that where a puttah or muchalka has continued in force for more revenue years than one, no fresh puttah or muchalka for the same holding shall take effect until the commencement of the revenue year next succeeding that in which it is tendered, accepted, exchanged or decreed."

He desires to contend on behalf of the appellants that "decreed" in that section means decreed under that Act and that no former decree could have any operation. Their

Lordships have considered this contention, but they do not think it of sufficient weight to justify granting special leave to appeal.

They will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs as incompetent, and that special leave to appeal should not be granted.

Solicitor for the appellants: *Douglas Grant.*

Solicitor for the respondent: *Chapman Walker and Shephard.*

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PRIVY COUNCIL.*

SAYYAPUREDDI CHINNAYYA AND OTHERS (APPELLANTS),

1920,
December 9.

v.

THE KING-EMPEROR (RESPONDENT).

[On Appeal from the High Court at Madras.]

Criminal law—Sentence exceeding legal maximum—Transportation for term of years—Practice of Judicial Committee—Remitter to High Court to revise sentence—Indian Penal Code (Act XLV of 1860), ss. 59, 304.

Section 59 of the Indian Penal Code authorizes a sentence of transportation for life, but not one of transportation for a term of years exceeding the maximum term of imprisonment which can be awarded for the offence.

The appellants were convicted by a Sessions Judge under the Indian Penal Code, section 304, of culpable homicide not amounting to murder and were liable under that section to a sentence of imprisonment for a term not exceeding ten years. They were sentenced to three years' rigorous imprisonment. Upon appeal to the High Court the conviction was affirmed, and upon a petition for revision the sentences were enhanced to fourteen years' transportation.

Held, that ten years was the maximum term of years to which the appellants could be sentenced to transportation, and that the cases should be remitted to the High Court with instructions to pass sentences according to law.

CONSOLIDATED APPEALS by special leave from a judgment (December 2, 1919) of the High Court (BAKEWELL and PHILLIPS, JJ.) affirming a conviction of the appellants under the Indian Penal Code, section 304, by the Sessions Judge of Vizagapatam (August 12, 1919), and (upon an application by the Public Prosecutor for revision) enhancing the sentences passed upon them from three years' rigorous imprisonment to fourteen years' transportation.

* Present: Viscount CAVE, Lord MOULTON, Lord SUMNER and Sir JOHN EDGAR.

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Special leave to appeal to His Majesty in Council was granted on June 11, 1920.

Dunne, K.C., and *Narasimham* for the appellants.—The High Court had no jurisdiction to pass the sentences which they did. The only power to impose a sentence of transportation for a term of years was that given by section 59 of the Indian Penal Code (XLV of 1860), since neither section 121-A nor section 124-A applied. Upon the true construction of section 59, if a sentence of transportation is for a term of years and not for life, the period cannot exceed the maximum term of imprisonment to which the prisoner could have been sentenced. There is a course of decisions in India to that effect: *Queen v. Rughoo*(1), *Queen v. Joseph Merian*(2), *Queen v. Naiada*(3). The maximum term of imprisonment which could be awarded under section 304 for the offence was ten years. The sentences were therefore illegal and should be set aside. The matter cannot be remitted to the High Court, since that Court is *functus officio*; there is no statutory provision under which the High Court or the Sessions Court has further jurisdiction. [As to the revisional powers of the High Court reference was made to the Code of Criminal Procedure (V of 1898), sections 419, 423, 439.]

Sir *Erle Richards*, K.C., and *Kenworthy Brown* for the Crown.—The High Court admittedly could have transported the appellants for life. Even if, therefore, the sentences given were irregular there was no such substantial injustice or miscarriage of justice as, according to the authorities, would render the case one in which the Board would advise an interference.

Their Lordships referred to *Dal Singh v. King-Emperor*(4) and *Ibrahim v. Rex*(5).

It is, however, submitted that the construction placed in India upon section 59 is erroneous, and that section authorizes transportation for life or for a shorter period. If that is so, effect should now be given to the true construction of the section. If the Board is of opinion that the appeal should be allowed, the

(1) (1864) Gap Number W.R. (Crim.), 30.

(2) (1868) 10 W.R. (Crim.), 10.

(3) (1875) I.L.R., 1 All., 43 (F.B.).

(4) (1917) I.L.R., 44 Cal., 876 (P.C.); L.R., 44 I.A., 137.

(5) [1914] A.C., 599.

question arises how the matter should be dealt with. It would be an impossible result that the appellants should go free. There are three possible alternatives. First, that the order made on revision should be set aside, leaving standing affirmed the conviction and the sentence passed by the Sessions Judge. Secondly, that the Board should remit the case to the High Court, indicating their view of the law; that course is frequently taken in civil matters. In analogous circumstances arising under the jurisdiction of the House of Lords in criminal appeals that procedure was followed in *Rex v. William Henry Ball*(1). That was a stronger case because by writ of error the whole conviction and sentence only could be set aside. Thirdly, the Board could itself advise His Majesty to reduce the sentence to ten years' transportation.

Dunne, K.C., in reply.—This being a matter of want of jurisdiction it is no answer to say that no substantial injustice was done.

The JUDGMENT of their Lordships was delivered by

Viscount CAVE.—The appellants were convicted under section 304, sub-section (1), of the Indian Penal Code, of culpable homicide not amounting to murder, and were sentenced by the Sessions Judge of Vizagapatam to rigorous imprisonment for three years. On appeal to the High Court of Judicature at Madras, that Court affirmed the conviction and, on the application of the Public Prosecutor for revision of the sentences, enhanced the sentences to transportation for fourteen years. Leave to appeal to His Majesty in Council having been obtained, it was contended on behalf of the appellants that the High Court had no jurisdiction to impose a sentence of transportation for fourteen years.

Section 304, sub-section (1), of the Penal Code authorizes a sentence of "transportation for life or imprisonment of either description for a term which may extend to ten years"; and section 59, which applies to every case where an offender is punishable with imprisonment for a term of seven years or upwards, authorizes the Court which sentences such offender, instead of awarding sentence of imprisonment, to sentence the offender to transportation for a term not less than seven years

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(1) [1911] A.C., 47.

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and not exceeding the term for which by the Code he is liable to imprisonment. These provisions have been considered in several cases in India, and it has been uniformly held that, while they authorize a sentence of transportation for life, they do not empower a Court to impose a sentence of transportation for a term of years exceeding the maximum term for which a sentence of imprisonment can be imposed, namely, ten years. Their Lordships agree with these decisions, and it remains for them to consider what advice they should tender to His Majesty in the present case.

Their Lordships were invited by Counsel for the Crown to apply the rule which has been repeatedly laid down by the Board, that

"His Majesty will not be advised to review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise substantial and grave injustice has been done."

[*In re Abraham Mallory Dillet*(1)], and to say that, as the offence in this case was grave, and the appellants might justly have been sentenced to transportation for life, the sentence of transportation for fourteen years, though irregular, should be allowed to stand. But it appears to their Lordships that as in this case the sentence is found not to be authorized by law they must hold that there has been substantial injustice, for the sentence may involve the incarceration of the appellants during many years without legal authority. Although the crime committed was no doubt of a very grave character, and it may be that the High Court, if the legal objection to a sentence of transportation for fourteen years had been brought to their notice, would have passed a life sentence, their Lordships cannot assume that this would have been done, and it is no part of their duty to consider whether a higher sentence than that actually passed should or might justly have been inflicted.

Their Lordships will humbly advise His Majesty that the case be remitted to the High Court of Judicature at Madras with instructions to pass a sentence according to law.

Solicitor for appellants: *Douglas Grant*.

Solicitor for Crown: *Solicitor, India Office*.

A.M.T.

BOOKS AND PUBLICATIONS OF THE LEGISLATIVE
DEPARTMENT OF THE GOVERNMENT OF
INDIA FOR SALE.

*List of Books and Publications for Sale which are
less than two years old.*

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 p. 9 (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

- Act VIII of 1911 (Indian Army), as modified up to 1st August 1918. In Urdu. As. 4 p. 6. (Anna 1.)
 Act VIII of 1911 (Indian Army), as modified up to 1st August 1918. In Nagri. As. 4 p. 6. (Anna 1.)
 Act I of 1918 (Forest Amendment). In Urdu. Pies 3. (Anna 1.)
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 Act VII of 1918 (Income-tax). In Urdu. Anna 1 p. 3. (Anna 1.)
 Act VII of 1918 (Income-tax). In Nagri. Anna 1 p. 3. (Anna 1.)
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- Act VIII of 1919 (Negotiable Instruments Amendment). In Urdu. Pies 3. (Anna 1.)
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 Act XX of 1919 (The Indian Arms Amendment). In Nagri. Pies 3. (Anna 1.)
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Index to Indian Statutes, Chronological Tables and Index to Indian Statutes, Vol. II, Edition 1911. Rs. 5. (As. 12.)

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 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 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.)

V.—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 (Ondh 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 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 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 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.)
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 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.)
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 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.)
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 Act VII of 1904 (Ancient Monuments Preservation). In Urdu. Pies 9. (Anna 1.)
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 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.)

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- 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 1905 [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. As. 2. (As. 6.)
- Act V of 1908 (Code of Civil Procedure). In Nagri. 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.)

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- 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.)
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- Act IX of 1910 (Indian Electricity). In Nagri. Anna 1 p. 9. (Anna 1.)
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- Act XIII of 1910 [Prisons (Amendment)]. In Nagri. Pies 3. (Anna 1.)
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- Act X of 1911 (Prevention of Seditious Meetings). In Nagri. Pies 3. (Anna 1.)
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- Act XIV of 1911 [Court-fees (Amendment)]. In Urdu. Pies 3. (Anna 1.)
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 Act V of 1914 [Negotiable Instruments (Amendment)]. In Urdu. Pies 3. (Anna 1.)

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- Act VI of 1914 [Provincial Small Cause Courts (Amendment)]. In Urdu. Pies 3. (Anna 1.)
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 Act VIII of 1915 [Assam Labour and Emigration (Amendment)]. In Urdu. Pies 6. (Anna 1.)
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 Act XIII of 1915 (North-West Frontier Constabulary). In Urdu. Pies 9. (Anna 1.)
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 Act I of 1916 (Indian Trusts Amendment). In Nagri. Pies 3. (Anna 1.)

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- Act II of 1916 (Defence of India Amendment). In Urdu. Pies 3. (Anna 1.)
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- Act X of 1917 (Indian Army Amendment). In Nagri. Pies 3. (Anna 1.)
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 Regulation I of 1915 (Excise). In Nagri. Anna 1 p. 6. (Anna 1.)

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O. XXI, R. 90 AND 92, CL. (3)—Application to set aside sale for material irregularity or fraud, dismissed as barred.—Sale confirmed prior to application.—Suit to set aside sale on some ground whether maintainable.] Where a judgment-debtor failed to file an application to set aside the sale under Order XXI, rule 90, Civil Procedure Code, within the time allowed by law, and the sale was confirmed, he cannot institute a suit to set aside the sale on the ground of material irregularity or fraud in the publication or conduct of the sale. Dictum of SADASIVA AYYAR, J., in *Payidanna v. Lakshminarasamma*. (1915) I.L.R., 38 Mad., 1078, dissented from.

Brahmayya v. Appayya Sastri (1921) I.L.R., 44 Mad.,

O. XXII, R. 1—Probate and Administration Act (V of 1881), sec. 89—"Personal injuries not causing the death of the party," meaning of.—Suit for malicious prosecution.—Death of defendant more than a year after prosecution.—Whether right to sue survives.] Where, in a suit for malicious prosecution, the defendant dies more than a year after the prosecution in question and before judgment is given in the suit, the right to sue does not survive within the meaning of Order XXII, rule 1 of the Code of Civil Procedure. The expression "personal injuries not causing the death of the party" in section 89 of the Probate and Administration

Act does not mean injuries to the body merely, but all injuries which do not necessarily cause damage to the estate of the person wronged. *Punjab Singh v. Ramchar Singh* (1919) 4 Patna L.J., 676, followed; *Krishna Behari Sen v. The Corporation of Calcutta*, (1904) I.L.R., 31 Cal., 993, dissented from. The Legal Representatives' Suits Act (XII of 1855) makes no provision for the continuation of suits already begun by the wronged against the wrong-doer in the event of the death of either party. *Haridas Ramdas v. Ramdas Mathuradas*, (1889) I.L.R., 13 Bom., 697, and *Ramchode Doss v. Rukmany Bhoy*, (1805) I.L.R., 28 Mad., 487, followed.

Rustomji Dorabji v. Nurse ... (1921) I.L.R., 44 Mad. (F.B.), 357

CONTRACT ACT (INDIAN) (IX OF 1872), SEC. 23.—*Principal's illegal contract with a stranger—Money recovered by agent from stranger under the contract—Right of principal to recover from agent money realized.* The illegality of a contract between the principal and a stranger, under which an agent recovers money due to the principal is no bar to the principal recovering the money so realized from the agent.

Palaniyappa Chettiar v. Chockalingam Chettiar (1921) I.L.R., 44 Mad., 334

DISTRICT MUNICIPALITIES (MADRAS) ACT (IV OF 1884), SS. 72 AND 73 (2).—*Theatre unfit for use and unused owing to removal of part of roofing—Exemption from tax.* A building cannot be held to be "completely demolished or destroyed" within section 73 (2) of the Madras District Municipalities Act (IV of 1884) so as to completely exempt it from liability to tax, simply because part of its roof is removed for the purpose of effecting repairs and the building is thus rendered unfit for use. As a building actually unused, it is liable for half the usual tax under section 72 of the Act.

Municipal Council of Tanjore v. Krishna Pillai, (1921) I.L.R., 44 Mad., 354

MALABAR LAW—Kanom—Lease or mortgage—Deed of taraga, construction of—Attestation of deed, necessity for—Transfer of Property Act, ss. 59 and 60—Anomalous mortgage—Civil Procedure Code (V of 1908), O.I., B 9—Non-joinder of parties—Decree against parties in appeal. A Kanom is an anomalous mortgage falling under section 98 of the Transfer of Property Act, with certain well-known incidents attached to it under the customary law of Malabar, and a kanom-deed, to be valid, must be attested as a mortgage-deed under section 59 of the Act. The fact that the document is described as a taraga or royal grant or that the kanom amount is exceedingly insignificant does not alter the nature of the transaction.

Kanna Kurup v. Sankara Varma Rajah ... (1921) I.L.R., 44 Mad., 34

SURVEY AND BOUNDARIES ACT (IV OF 1897), SEC. 12, SUB-SEC. (3), AND SEC. 13.—*Decision of a Survey officer—Finality of decision—Decision, whether final for all or for what purposes—Effect of word "final" in sec. 12, sub-sec. (3).* The effect of section 12, sub-section (3) of the Survey and Boundaries Act is to make the orders of a Survey officer in cases falling under that section, final for the purposes of the survey, but it does not go so far as to preclude the land-owners altogether from afterwards disputing its correctness in a Court of law, unless there was a dispute before the

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Survey officer and the order is one to which section 18 of the Act applies.
Muthirulandi Poosari v. Sethuram Aiyar, (1919) I.L.R., 42 Mad., 425 (F.B.), explained.

Ohinna Venkatrayudu v. Ramamurti ... (1921) I.L.R., 44 Mad., 840

TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 6 (H)—*Settlement for concubinage—Immoral object carried out—Right to annul the settlement.*] It is a well-established rule of equity that a person who has transferred a property to another for an illegal or immoral purpose cannot get it annulled if the intended purpose has been carried out, and section 6, clause (h) of the Transfer of Property Act has not the effect of modifying it. *Ayerst v. Jenkins*, (1878) D.R., 16 Eq., 275, followed. *Per* OLDFIELD, J.—It is the sense of the community as a whole that decides whether a certain purpose is immoral; the fact that in a certain section of the community concubinage is allowed and is not regarded as immoral does not make a settlement made by a member of such community in consideration of concubinage any the less immoral.

Deivanayaga Padayachi v. Muthu Reddi ... (1921) I.L.R., 44 Mad., 329

ss. 60, 61, 62—*Mortgage with possession and charge on the same property in favour of the same person—Assignment of equity of redemption—Breach of contract by mortgagor—Loss to mortgagee—Right of assignee of equity of redemption to redeem mortgage with possession without paying amount due on the charge and the loss sustained by mortgagee.*] A mortgagor has a statutory right under section 62 (b) of the Transfer of Property Act to redeem a usufructuary mortgage on property which is also subject to a simple mortgage, without redeeming the latter also. Therefore where a person mortgaged some of his properties with possession and regained possession of them by executing a rental agreement giving a charge thereon and on other properties for all arrears of rent, held that the mortgagor could redeem the properties mortgaged with possession alone without being obliged to pay at the same time any amount due under the simple mortgage; *Tajjo Bibi v. Bhagwan Prasad*, (1894) I.L.R., 16 All., 295, followed. The losses which the mortgagee might have sustained by reason of breach of contract committed by the mortgagor and which were not specifically charged on the mortgaged properties are recoverable only from the mortgagor and not from the mortgaged properties in the hands of his assignee. *Bohra Thakur Das v. Collector of Aligarh* (1910) I.L.R., 32 All., 612, (P.C.) followed. *Per* WALLIS, C.J.—*Quare* whether in India a mortgagor has the right to redeem one mortgage on his property without at the same time paying off another mortgage on the same and other properties as well. *Per* SESHAGIRI AYYAR, J.—Whatever may be the rights of a mortgagee in India to compel the mortgagor to consolidate mortgages upon the same property, the rule is not applicable against purchasers of the equity of redemption. The rule in *Vint v. Padget*, (1858) 2 De G. & J., 611; s.c., 44 E.R., 1126, is not applicable to India.

Ramarayanimgar v. Maharajah of Venkatagiri ... (1921) I.L.R., 44 Mad., 301

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Seshagiri Ayyar.

PANAGANTI RAMARAYANIMGAR (FIRST DEFENDANT),
APPELLANT,

1920,
April 19.

v.

MAHARAJAH OF VENKATAGIRI AND THREE OTHERS
(SECOND PLAINTIFF AND DEFENDANTS NOS. 2 TO 4),
RESPONDENTS.*

Transfer of Property Act (IV of 1882), ss. 60, 61, 62—Mortgage with possession and charge on the same property in favour of the same person—Assignment of equity of redemption—Breach of contract by mortgagor—Loss to mortgagee—Right of assignee of equity of redemption to redeem mortgage with possession without paying amount due on the charge and the loss sustained by mortgagee.

A mortgagor has a statutory right under section 62 (b) of the Transfer of Property Act to redeem a usufructuary mortgage on property which is also subject to a simple mortgage, without redeeming the latter also. Therefore where a person mortgaged some of his properties with possession and regained possession of them by executing a rental agreement giving a charge thereon and on other properties, for all arrears of rent, held that the mortgagor could redeem the properties mortgaged with possession alone without being obliged to pay at the same time any amount due under the single mortgage; *Tajjo Bibi v. Bhagwan Prasad* (1894) I.L.R., 18 All., 295, followed. The losses which the mortgagee might have sustained by reason of breach of contract committed by the mortgagor and which were not specifically charged on the mortgaged properties are recoverable only from the mortgagor and not from the mortgaged properties in the hands of his assignee. *Bohra Thakur Das v. Collector of Aligarh* (1910) I.L.R., 32 All., 612, (P.C.), followed.

Per WALLIS, C.J.—*Quære* whether in India a mortgagor has the right to redeem one mortgage on his property without at the same time paying off another mortgage on the same and other properties as well.

Per SESHAGIRI AYYAR, J.—Whatever may be the rights of a mortgagee in India to compel the mortgagor to consolidate mortgages upon the same property, the rule is not applicable against purchasers of the equity of redemption. The rule in *Vint v. Padget* (1858) 2 De G. & J., 611, is not applicable to India.

APPEAL against the decree of T. S. TYAGARAJA AYYAR, Subordinate Judge, in Original Suit No. 99 of 1915, on the file of the Sub-Court of North Arcot.

The Raja of Kalahasti executed a mortgage with possession (Exhibit A) on 18th March 1909 in favour of the Zamindar of Tuni

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for eleven lakhs of rupees on the security of three sets of villages comprised in schedules A, B and C and a small plot of land comprised in schedule D. The eleven lakhs were to be advanced for the following purposes: 2½ lakhs for redeeming an already existing mortgage on A schedule properties in favour of the Raja of Venkatagiri, 2½ lakhs for redeeming an already existing mortgage on B schedule properties in favour of Raja Venugopal, and 6 lakhs of rupees for getting a reconveyance of C schedule properties from Raja Narasinga Girji, a Sowcar of Hyderabad. The mortgagor covenanted to pay interest at ten annas per mensem for every hundred rupees and to redeem the mortgage by payment at the end of four years. The mortgagor wrongly described one of the villages in A schedule as jirayati (rent-paying) while in fact it was inam (rent-free). On the same date as the mortgage, the mortgagor executed a lease deed (Exhibit I) in favour of the mortgagee in respect of the A schedule properties, agreeing to pay a certain rent and to give a charge on A schedule properties and his other properties in respect of all arrears of rent. The mortgagee soon afterwards redeemed the first mortgage on A schedule properties by payment of about 2 lakhs of rupees and put the mortgagor in possession, but he could not redeem the B and C schedule properties, as the mortgagor's right therein been previously sold in execution of other decrees against him. The mortgagor neglected to pay the Government revenue in respect of one of the villages which he had taken on lease and whose revenue he had covenanted to pay under the lease, with the result that the village was sold in revenue auction and bought by a stranger. The mortgagee having died in 1913 his widow transferred all his rights to the first defendant in December 1913. The mortgagor's right in A schedule properties was sold in Court auction in execution of a money decree against him and purchased by the plaintiff in October 1915. The plaintiff then brought the present suit for redemption of A schedule properties by paying only the amount paid by the mortgagee to the prior mortgagee with interest. The first defendant pleaded *inter alia* that the plaintiff was entitled to redeem only after paying the amount due to him for all arrears of rent and for all losses sustained by him by reason of the mortgagor's neglect to pay Government revenue and by his misdescription of a village in the mortgage deed. The Subordinate Judge rejected the contentions of the defendant

and passed a decree as prayed for by the plaintiff. The first defendant preferred this Appeal.

T. V. Venkatarama Ayyar, with *T. Ranga Acharya*, *T. R. Vaidyanatha Ayyar* and *S. Tulasi Doss*, for appellant.—Exhibits A and I must be regarded as one transaction and as Exhibit I stipulates that arrears of rent shall also be a charge on the mortgaged properties, such arrears should also be paid before redeeming the property: see section 61 of the Transfer of Property Act, *Altaf Ali Khan v. Lalta Prasad*(1), *Madhwa Sidhanta Onahini Nidhi v. Venkataramanjulu Naidu*(2), *Abdullah Khan v. Basharat Husain*(3), *Juggeewundas Keeka Shah v. Ramadas Brijbookundas*(4), *Chimman Lal v. Bahadur Singh*(5), *Khula Bakhsh v. Alim-un nissa*(6), *Harihara Mangalath v. Ibrayan Kutti*(7), *Vasudevan Atisseripad v. Govinda Menon*(8), and *Vepa Kamesam v. Varigonda Narasimham*(9).

The mortgagor before redemption is also bound to pay all losses sustained by the mortgagee by reason of the mortgagor's breach of contract: see section 65 of the Transfer of Property Act and *Ramakrishnama Chetty v. Vuvvati Chengu Aiyar*(10).

The Advocate-General (S. Srinivasa Ayyangar) with *A. Krishnaswami Ayyar*, *T. Prakasam*, *P. Chenchayya*, *D. Appa Rao* and *P. Venkataramana Rao* for the respondents.—The loss said to have been sustained by the mortgagee is not true, and even if true the loss is recoverable as damages for breach of contract only from the original mortgagor and not from the plaintiff who is his assignee. The loss cannot be added to the mortgage amount: *Bohra Thakur Das v. Collector of Aligarh*(11), *Subbiah v. Rami Reddi*(12), *Srinivasa Chari v. Gnanaprakasa Mudaliar*(13), *Syed Ibrahim Sahib v. Arumugathayee*(14).

The properties said to have been charged for arrears of rent are not only those comprised in Exhibit A but also other

- (1) (1697) I.L.R., 19 All., 496. (2) (1903) I.L.R., 26 Mad., 682 at 686.
(3) (1913) I.L.R., 35 All., 48 (P.C.).
(4) (1841) 2 M.I.A., 487. (5) (1901) I.L.R., 23 All., 338.
(6) (1905) I.L.R., 27 All., 313 at 318.
(7) (1917) M.W.N., 275. (8) (1915) 2 L.W., 853.
(9) (1916) 34 I.C., 701 (Mad.). (10) (1914) 27 M.L.J., 494.
(11) (1910) I.L.R., 32 All., 612 at 619 (P.C.).
(12) (1916) I.L.R., 39 Mad., 959. (13) (1907) I.L.R., 30 Mad., 67.
(14) (1915) I.L.R., 38 Mad., 18.

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properties of the mortgagor; hence Exhibit A and Exhibit I do not form one transaction. The mortgagee with possession could have given the lease to any one he pleased and not necessarily to the mortgagor: see *Abdullah Khan v. Basharat Husain*(1). The cases quoted by the other side on this point are distinguishable on their facts, and in some of them, such as *Altaf Ali Khan v. Lalta Prasad*(2), there was an express charge, on the mortgaged properties for arrears of rent. I rely on *Partab Bahadur Singh v. Gajadhar Bakhsh Singh*(3), *Khuda Bakhsh v. Alim-un-nissa*(4), and the case attached as footnote to *Chimman Lal v. Bahadur Singh*(5). Moreover, *Altaf Ali Khan v. Lalta Prasad*(2) has on this point been dissented from in later cases, even in that Court. Exhibit I does not give a charge for rent; even if Exhibit I gives a charge, the mortgagor can redeem and get possession by paying merely the amount due under Exhibit A which is a usufructuary mortgage, without being obliged to pay at the same time any amount due under Exhibit I. Exhibit A is expressly termed a usufructuary mortgage for interest, viz., *vaddhi bhogiam*: see section 62 of the Transfer of Property Act, which does not contain the words "in the absence of a contract to the contrary". There cannot be a consolidation of a imple and a usufructuary mortgage: *Tajjo Bibi v. Bhagwan Prasad*(6), *Khuda Bakhsh v. Alim-un-nissa*(4). Section 61 does not help the other side, but is in my favour, as the charge created by Exhibit I is not on the same property as is comprised in Exhibit A, but on other properties as well: *Jennings v. Jordan*(7), *Pledge v. White*(8), *Ganga Rai v. Kirtarath Rai*(9), *Vint v. Pudget*(10), *Minter v. Car*(11), *Sharp v. Richards*(12).

T. V. Venkatarama Ayyar in reply.—In Exhibit A there is a period fixed for redemption and there is also a covenant to pay; it is not a mere usufructuary mortgage, but is a combination of that and a simple mortgage; it is an anomalous mortgage, hence redemption can be only according to its terms; see

(1) (1913) I.L.R., 35 All., 48 (P.C.). (2) (1897) I.L.R., 19 All., 496.

(3) (1902) I.L.R., 24 All., 521 at 530 (P.C.).

(4) (1905) I.L.R., 27 All., 318 at 318.

(5) (1901) I.L.R., 23 All., 338 at 341 footnote case.

(6) (1894) I.L.R., 16 All., 295.

(7) (1881) 6 App. Cas., 698.

(8) [1896] A.C., 187.

(9) (1911) I.L.R., 33 All., 893.

(10) (1858) 2 De G. & J., 611; s.c. 41 E.R., 1128.

(11) [1894] 3 Ch., 498.

(12) [1899] 1 Ch., 109.

Madhwa Sidhanta Onahini Nidhi v. Venkataramanjulu Naidu(1), *Kangaya Gurukul v. Kalimuthu Annavi*(2), *Jawahir Singh v. Someshwar Dat*(3), and *Syed Ibrahim Sahib v. Arumugathayee*(4).

WALLIS, C.J.—This is an appeal from a decree of the Subordinate Judge of North Arcot in a suit for redemption brought by the first plaintiff as assignee of the mortgagor, the Raja of Kalahasti, now impleaded as the third defendant, against the first defendant who is the assignee of the original mortgagee, the Raja of Tuni. The mortgage deed, Exhibit A, provided for an advance of 11 lakhs on a usufructuary mortgage of the properties comprised in Schedules A, B, C and D, but the Schedule D property may be disregarded as it is of small value and was only included with a view to registration in the district in which it is situated. A decree for sale had been obtained by the mortgagees against the properties comprised in Schedules A, B and C and the properties comprised in Schedules B and C had actually been sold by the mortgagees, but proceedings were pending as to setting aside the sales. In the case of the Schedule C properties the sales were not ultimately set aside and the advance of 6 out of 11 lakhs which was to be contingent on setting aside the sale was never made, and we have no concern with them. Of the remaining 5 lakhs the recital shows that Rs. 2,50,000 was to be applied for the satisfaction of the decree against the A Schedule properties and Rs. 2,50,000 was to be retained by the mortgagee and applied partly in payment into Court of the entire debt due by the mortgagor under the decree of O.S. No. 7 of 1899 by which the 23 villages included in B Schedule had been ordered to be sold. At the date of the mortgage the villages had been sold, but the sales had been set aside and an appeal against the order setting them aside was then pending and subsequently was successful. The balance of the Rs. 2,50,000 was to be applied for the expenses of this litigation, and for the mortgagor's expenses. The mortgagee paid Rs. 1,93,617 into

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(1) (1903) I.L.R., 26 Mad., 662.

(2) (1904) I.L.R., 27 Mad., 526 (F.B.).

(3) (1906) I.L.R., 28 All., 225 (P.C.).

(4) (1915) I.L.R., 38 Mad., 18.

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Court in satisfaction of the decree in O.S. No. 7 of 1899, and incurred certain expenses in connexion with the litigation. There was a provision in the mortgage deed entitling the mortgagee, in the event of the sales being confirmed, to draw the amount deposited in Court by the auction purchasers. The sales were afterwards confirmed by consent of the mortgagor on 31st January 1911, and the mortgagee's widow on 20th March 1911 sued to establish her right to the money deposited in Court by the auction purchasers, at the same time alleging that the consent given by the mortgagor to the setting aside of the sales was fraudulent. This suit was settled and an order made for payment out, but it is disputed whether the money so drawn on 24th April 1912 was Rs. 1,81,412-10-0 or Rs. 1,80,412-10-0 (Exhibit H4).

In the present suit the defendant has sought to recover on this head not only the difference between the sum paid into Court and the sum drawn out by him, namely Rs. 12,000, and the expenses he incurred in connexion with the litigation, but also the balance with interest of the Rs. 2,50,000 which was never advanced to the mortgagor at all, on the ground that it must be deemed to have been kept by the mortgagee at the mortgagor's disposal. The Subordinate Judge declined to deal with these claims as he considered that this sum of Rs. 2,50,000 was not charged on the Schedule A properties which it is now sought to redeem, but was the subject of a separate mortgage effected in the same instrument on the Schedule B properties. It is however expressly provided in the deed that the properties in the four schedules were mortgaged for the whole eleven lakhs, and were to be put in the possession of the mortgagees. Again, there is provision that the 5 lakhs lent on the properties A, B and D Schedules, with which alone we are concerned, were not to be paid for four years, namely, until 18th March 1913, and that if the "entire amount" was then paid the mortgagee was to put the mortgagor in possession of the properties. A different period of redemption, six years, was fixed for the C Schedule properties if they come under the mortgage, and there was also a provision that if the sale of four other villages which had been confirmed was set aside, they should be mortgaged against an advance of the auction-purchase money (about 2 lakhs) "in the same way as

the villages mentioned in B Schedule herein." There is really nothing in these provisions when properly understood to cut down the plain words of the instrument by which the properties in the four schedules were charged in respect of the whole mortgage debt. The further fact, on which the Subordinate Judge relies, that the mortgagee's widow sued to establish her right to the money deposited in Court has really no bearing on the question. We have, therefore, come to the conclusion that the decree must be modified by including in the mortgage debt the difference between the amount paid into Court by the mortgagee and the amount drawn by him under Exhibit H4, as also his expenses in connexion with that litigation. As regards the balance, the mortgagor in his written statement in O.S. No. 13 of 1911, dated 27th July 1911, Exhibit H1, alleged that the mortgagee had failed to pay Rs. 53,226-13-11 and that there had been a failure of consideration to that extent. It was not suggested that anything had been advanced to the mortgagor except the money paid into Court and the expenses of litigation, and as regards the balance, we think there has been a clear failure of consideration and that the defendant is not entitled to recover.

The next question is whether compound interest is provided for. The mortgage is an anomalous mortgage, as it stipulates that, in case of non-payment within two years of the period prescribed for payment and six years from the date of the mortgage, interest is to run at 1 rupee per mensem, as to which the rents and profits are to be reckoned at 10 annas.

"Further it is agreed that in the event of a failure to pay the mortgage money within six years as per the terms of the document, you shall enjoy the income of the lands in respect of 10 annas out of the 1 rupee per mensem payable by us for interest, and that as regards the additional 6 annas we (that is the mortgagors) shall add it to the principal and pay it on the security of the mortgaged properties."

It is said for the mortgagee that the intention was that the interest being added to the principal should bear interest as such. Effect may be given to the provision about adding the interest to the principal by holding that it was intended not only to negative any liability on the part of the mortgagor to

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pay interest as it fell due, but also to prevent redemption without payment of the interest. There is no provision for annual rests, and compound interest would have to be allowed with monthly rests if at all. Seeing that this additional 6 annas is a penal *post diem* rate, I think it would be going too far to infer an agreement to pay compound interest from the language of the instrument.

The A Schedule villages were leased by the mortgagee under Exhibit I, which was of even date with the mortgage deed, Exhibit A, but was not to take effect until the beginning of the next fasli. I agree with the Subordinate Judge that the defendant has not shown that the mortgagee did not get possession until the beginning of the fasli and that he has no claim on that head. The mortgagor, however, did not pay the rent reserved by the mortgagee under the lease, Exhibit I, and two questions arise: (1) whether the arrears of rent and interest thereon are charged on the mortgaged property, and (2) whether such charge is enforceable against the mortgagor's assignee in a suit brought by such assignee for redemption. There is no express charge in Exhibit A, and there has been considerable discussion as to the meaning of the Telugu words in Exhibit I, on which the first defendant relies as imposing a charge. It is common ground that the arrears of rent are charged on the produce and fruits of the villages included in the lease, which are the identical villages in Schedule A of the mortgage, and that they are also charged on the other lands of the mortgagor-lessee not included in Schedule A. The contest is, as to whether the words mean that arrears are charged on the income of the villages leased and on the other properties of the mortgagor-lessee as well as the villages leased, or whether they are charged on the other lands of the mortgagor-lessee exclusive of the villages leased. In spite of the ingenious arguments of the learned Advocate-General for the plaintiff it seems to me most unlikely that it was the intention to charge these arrears on all the other lands of the mortgagor-lessee including the other lands in the mortgage, Exhibit A, but excluding only the lands out of which the arrears arose, which it is very usual to charge in such cases. The learned Government Pleader and Mr. Nagabhushanam, two of the most experienced Telugu practitioners in this Court, who

kindly came to our assistance, are clearly of opinion that this is not the meaning, and the Chief Interpreter, whose own language is Telugu, though inclined to take the other view, does not deny that the words are susceptible of this meaning. The Telugu word "Gaka" he says means "besides" or "excepting" according to the context. Applying that test, I have no hesitation in holding that here it means "besides," and that the lands out of which the arrears were to arise were charged in the usual way as well as the mortgagor's other lands, which appear to have been charged by way of additional security.

The next question is whether the mortgagor would be bound to pay off the charge for arrears of rent before recovering possession of the mortgaged property, and if so, whether the plaintiff as assignee of the mortgagor is under the like obligation. Any rights of the kind which the mortgagee may have against the mortgagor are *prima facie* enforceable on general equitable principles against the assignee of the equity of redemption, as explained by Lord SELBORNE, L.C., in *Jennings v. Jordan*(1). The decision of the Privy Council in *Bohra Thakur Das v. Collector of Aligarh*(2) does not, I think, affect this rule in any way. In that case there was a provision in the mortgage deed that the usufructuary mortgagee in possession should pay any subsequent enhancement of revenue on the mortgaged properties out of the rents and profits and deduct the amount so paid from the malikhana or allowance which was payable by him out of the said rents and profits to the mortgagor. He duly paid the enhancement on some of the mortgaged properties to Government, but paid the malikhana to the mortgagor without making the deduction. In these circumstances the Judicial Committee held that it would be inequitable to allow him to charge this sum against the assignees of the equity of redemption of other properties included in the mortgage when they sought to redeem those properties. The mortgagee had incurred the loss by paying the malikhana in full when he was not bound to do so, and there was no reason for charging this loss against the assignee of the equity of

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(1) (1881) 6 App. Cas., 698.

(2) (1910) I.L.R., 32 All., 612 (P.C.).

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redemption. I think that the observations in some of the cases of their Lordships about applying this doctrine to assignees, which were referred to by my learned brother, related to the consolidation of mortgages as abolished in the absence of a contract to the contrary. The rule did not arise under *Vint v. Padget*(1), as is pointed out in that case.

The question whether the mortgagee is entitled to resist redemption unless he is paid these arrears, which are charged by Exhibit I not only on the properties mortgaged by Exhibit A but also on the other properties of the mortgagor, has been argued with reference to the provisions of sections 61 and 62 of the Transfer of Property Act. Section 61 reproduces without material alteration section 17 of the Conveyancing Act, 1881, which is described in the marginal note as "restriction on consolidation of mortgages." Under the doctrine of consolidation the mortgagee was entitled to insist against the mortgagor and the assignees of the equity of redemption that they should not be allowed to redeem the properties mortgaged under one mortgage without at the same time redeeming other mortgages created by the mortgagor in favour of the mortgagee or his assignors or which had become vested in them, subject to this: that, where redemption was sought by assignees of the equity of redemption, the other mortgages must have vested in the assignee at the date of such assignment: *Jennings v. Jordan*(2) and *Pledge v. White*(3). The section provides that a mortgagor seeking to redeem any mortgage shall be entitled to do so without paying any money due under any separate mortgage made by him "on property other than that comprised in the mortgage which he seeks to redeem." It abolished, in the absence of a contract to the contrary, the consolidation of distinct mortgages on separate properties, and is often spoken of as having abolished the consolidation of mortgages, as in *Kay and Elphinstone's Precedents in Conveyancing*, Volume 2, page 60, 5th Edition. The mortgagee's right to insist as against the mortgagor and the assignees of the equity of redemption that the other mortgages on the properties actually sought to be redeemed should be discharged, whether or not such mortgages comprised

(1) (1868) 2 De G. & J., 611; s.c., 44 E.R., 1126.

(2) (1881) 6 App. Cas., 898.

(3) [1896] A.C., 187.

other properties as well, was probably regarded as a case of tacking rather than of consolidation. The reconveyance, which in England is an incident of redemption, could scarcely be claimed so long as the property was subject to any mortgage in favour of the mortgagee against whom redemption was sought, and his right to insist on the property sought to be redeemed being fully cleared appears to be preserved by section 17 of the Conveyancing Act. This was the view of the section taken by Mr. Justice WRIGHT in *In re Salmon. Ex parte The Trustee*(1). Though all the incidents of mortgages in England and in India are not the same, there is some difficulty in the way of holding that the Indian Legislature, when reproducing section 17 in section 61 of the Transfer of Property Act, intended it to have a different operation in India. The marginal note to section 61 which is "right to redeem one of two properties separately mortgaged" shows that the right of separate redemption does not arise under the section, when, as here, the property sought to be redeemed is also included in another mortgage. Assuming this to be so, the question is whether in India the mortgagor or his assignee should be allowed to redeem one mortgage without paying off the other mortgage, which comprises the same properties and other properties as well. In *Ganga Rai v. Kirtarath Rai*(2), STANLEY, C. J., was of opinion that he might, but the decision in *In re Salmon. Ex parte The Trustee*(1), was not cited before him. There are also observations in *Tajjo Bibi v. Bhagwan Prasad*(3) which question whether any right of consolidation at all is recognised in section 61. I do not consider it necessary to decide this question, because in that case, which was followed in *Khuda Bakhsh v. Alim-un-nissa*(4), it was decided that, where it is sought to redeem a usufructuary mortgage on properties which are also subject to a simple mortgage, the mortgagor has an express statutory right under section 62 (b) of the Transfer of Property Act to recover possession of the mortgaged properties without paying off the simple mortgage. The fact that the property usufructuarily mortgaged is also the subject of a simple mortgage, apparently, in the opinion of the legislature, affords no reason why the

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(1) [1908] 1 K.B., 147.

(3) (1894) I.L.R., 18, All, 295.

(2) (1911) I.L.R., 33, All., 898.

(4) (1905) I.L.R., 27 All., 318.

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mortgagee should be entitled to retain possession if the mortgagor is in a position to discharge the usufructuary mortgage; and I think that to this extent we should follow *Tajjo Bibi v. Bhagwan Prasad*(1) and *Khuda Bakhsh v. Alim-un-nissa*(2). Exhibit A no doubt is not a simple usufructuary mortgage, as it contains certain provisions as to interest, and also a covenant to pay, but that affords no reason why possession should not be given without insisting on the redemption of the simple mortgage created by Exhibit I.

Mr. Venkatarama Ayyar further contended, for the appellants, that the mortgage, Exhibit A, and the lease, Exhibit I, containing the charge for arrears, which were executed on the same day, really form one transaction, and referred to the recent decision of the Privy Council [*Abdullah Khan v. Basharat Husain*(3)] where a mortgage and a lease were treated as one transaction, and contended that the decision of the Allahabad Court in *Khuda Bakhsh v. Alim-un-nissa*(2), must be treated as overruled in so far as it treated the mortgage and the lease imposing a charge for arrears of rent as separate transactions. If this be so, he contended that the arrears form part of the principal due under the anomalous mortgage created by Exhibit A and Exhibit I taken together, and that redemption ought not to be allowed until the whole principal is paid. Assuming, however, that Exhibit A and Exhibit I formed part of the same transaction, it was a transaction by which the suit properties were usufructuarily mortgaged for the principal debt under Exhibit A and were further made the subject of a simple mortgage for the arrears of rent with interest at 10 annas per cent. The mortgagee's enjoyment of the usufruct was in lieu of part of the interest on the principal due under Exhibit A, and had no reference to the simple mortgage created by Exhibit I for arrears of rent and the interest thereon.

In these circumstances I have come to the conclusion, though not without some hesitation, that effect ought to be given to the principle recognized in section 62 (b) of the Transfer of Property Act, and that the plaintiff ought to be allowed to recover possession of the property usufructuarily mortgaged under Exhibit A

(1) (1897) I.L.R., 16 All., 295. (2) (1905) I.L.R., 27 All., 313.
(3) (1918) I.L.R., 35 All., 48 (P.O.).

without discharging the simple mortgage created by Exhibit I. The claims regarding the misdescription of a village, the fact that one of the villages was allowed to be sold for arrears of revenue, and the alleged fraudulent compromise of the litigation as to setting aside the sale of the villages in Schedule B are all claims for breach of contract sounding in damages. Such damages are not charged upon the mortgaged property, and the appellant in my opinion has failed to show why the assignee of the equity of redemption should be required to pay them in as a condition of redemption. I concur with the order proposed by my learned brother.

SESHAGIRI AYYAR, J.—This is a suit for redemption and the very large number of questions which it has given rise to render it necessary that the facts should be stated at some length. The original owner of the property was the Raja of Kalahasti. He mortgaged under Exhibit A the suit property and three other sets of property to the Raja of Tuni. At the time of the mortgage, decrees had been obtained by the Raja of Venkatagiri against the properties comprised in Schedule A to the deed of mortgage. The amount of the decrees was nearly two lakhs and fifty thousand rupees. This sum was paid by the Raja of Tuni to satisfy the decrees. Decrees had also been obtained by Raja Venugopaul, a member of the Venkatagiri family, to the extent of two lakhs of rupees on B Schedule properties and four other villages. At the time of the mortgage all the 27 villages had been sold in Court auction. The judgment-debtor applied to set aside these sales. The first Court confirmed the sales of four villages and set aside the sales as regards the other villages. Against the order setting aside the sales as well as against the order confirming the sales appeals were preferred to the High Court. It was in this state of things that the deed of mortgage was executed. It provided that in case the order of the first Court setting aside the sales was confirmed, these 23 villages should be given as security for a further sum of two lakhs and fifty thousand rupees. In the High Court the order of the Court below as regards the 23 villages was reversed and sales were confirmed. The purchasers paid into Court about a lakh and eighty thousand rupees. At the time of the mortgage the Raja of Tuni paid into Court

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one lakh and ninety-one thousand rupees believing that the order of the lower Court would be confirmed by the High Court. The mortgagor, the Raja of Kalahasti, was also indebted to one Narasingirjee, a sowcar of Hyderabad, to the extent of six lakhs of rupees. The condition in the deed of mortgage is that if this sum is paid by the Raja of Tuni to the sowcar, the properties comprised in Schedule C, which were under mortgage to the sowcar, should be included in Exhibit A. Schedule D refers to a small property in Tuni which apparently was included in order that the Registrar of Tuni may have jurisdiction to register the deed. Exhibit A was dated 13th March 1909. The mortgagee did not pay the Hyderabad sowcar. Consequently, the C Schedule properties never formed part of the mortgage. As regards the B Schedule properties they were also excluded from the mortgage as the sales in respect of them were confirmed by the High Court. So the only properties which remained as security to the mortgagee were properties comprised in Schedules A and D. The Raja of Tuni, the mortgagee, died in December 1913 and in December 1913 his widow transferred the rights under Exhibit A to the first defendant. Against the mortgagor a decree was subsequently obtained by the Mahant of Tirupati in execution of which the equity of redemption in A Schedule properties was put up to sale. The plaintiff in this case purchased the said equity on 22nd of October 1915. He has instituted this suit to redeem the A Schedule properties from the first defendant. So the parties before the Court are not the original mortgagor and mortgagee, but persons who have acquired title from them either by Court sale or private transfer.

The plea of the first defendant is that the A Schedule properties are security not only for two lakhs and fifty thousand rupees advanced to pay off the encumbrances on them but also for all the monies received by the mortgagor at the time of the mortgage. He has made further claims for the payment of large sums of money by way of damages, etc., due to the default of the mortgagor.

The Subordinate Judge held that three separate mortgages were constituted by the document and that each set of properties was liable only for the particular amounts which were advanced

to pay off the encumbrances on them. As regards the various payments claimed, he practically disallowed them all.

The first question in the appeal is whether the learned Subordinate Judge was right in splitting up Exhibit A into three separate mortgages. I agree with the learned vakil for the appellant that the process adopted by the Subordinate Judge is against the plain language of the document. After setting out the items of consideration, the document provides :

"It is agreed that interest on this at the rate of Re. 0-10-0 per cent per mensem be given. *For this we have mortgaged the properties in the schedule herewith attached.*"
A little lower down it is stated :

"We agree that these mortgaged properties do stand security for the entire amount of this deed."

Again after referring to the possibility of the auction in respect of the 23 villages being confirmed, the document continues :

"And this mortgage document is executed after making you believe that, in case, we act contrary to the aforesaid condition, our entire estate *including these mortgaged properties* and all the moveable and immoveable properties shall stand security."

As against these provisions, the learned Advocate-General who appeared for the plaintiff drew our attention to another clause which says :

"When these four villages are adjudged in our favour either in the appeal in the High Court or in the Privy Council, we shall give them also to you for mortgage for the money of the auction sale along with the villages mentioned in Schedule B herein."

The contention was that there was an intention to create a separate mortgage in respect of the B Schedule properties. I do not think that this implication follows from the language used. It is clear that this clause contemplated a further advance in excess of the eleven lakhs already secured and contemplated the execution of a new deed of mortgage which would be supplemental to Exhibit A. The fact that the four villages should be a sort of annexe to the B Schedule properties is not a reason for holding that there was a distinct and separate mortgage on the said B Schedule properties alone. It seems to me, having regard to the provisions to which I have referred, that the mortgage must be taken to have been indivisible, and that whatever monies went into the hands of the mortgagor were

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chargeable upon the properties which the mortgagee took possession of. In this view, it becomes necessary to ascertain the actual sum the mortgagor appropriated out of the money paid to pay off the decrees on the B Schedule properties. As I said before, the mortgagee paid into Court Rs. 1,93,617-0-0. The amount realized by the sale of the twenty-three villages in Court auction was Rs. 1,81,419-10-0 (Vide Exhibit H2). But although this was the amount that the purchasers paid into Court it is not clear whether the whole of it was drawn out by the mortgagee. The amount that he paid in was received by the decree-holder. Exhibits H4, H5 and H6 show that a cheque for Rs. 1,80,412-10-0 was given to him on 24th of April 1912. The records do not show what became of the balance. It was suggested that the balance might have been drawn by the mortgagee earlier. The other side disputed this suggestion. Therefore there must be a finding by the lower Court regarding the amount paid to the Raja of Tuni from out of the sale amounts deposited in Court. In my opinion, to the extent of the difference between the sum paid by him and the sum drawn out by him he was entitled to a charge upon the A Schedule properties, and to that benefit the first defendant is entitled. This disposes of the first contention.

[His Lordship next dealt with the defendant's claim for certain sums said to have been expended by him on behalf of the mortgagor, and continued:]

Now I shall deal with the claims put forth in Schedule B to the written statement. One item may be disposed of in a few words. It is the last item. A sum of Rs. 5,000 is claimed as the costs incurred by the mortgagee in contesting the appeal which was presented to the High Court against the order of the lower Court setting aside the sales of the 23 villages comprised in the B Schedule. In Exhibit A there is this clause—

"Whatever disputes may arise with reference to the rights of the estate, we shall ourselves bear the charges that may be incurred and if it happens that you spend that amount, we shall pay you the same with interest at the rate of Rs. 0-10-0 per cent per mensem on the security of these properties."

That is a clear provision that if the mortgagee should incur expenses in securing his rights under the mortgage, the mortgagor should pay him that amount, and that he should charge it

on the properties mortgaged. However, the question whether any money was spent by the mortgagee or his transferee in the litigation has not been enquired into. There must be a finding on the question whether any, and if so what, amount was spent by the first defendant or his assignor in the litigation relating to the B schedule properties.

I shall next deal with the question whether the plaintiff is bound to pay the sum of Rs. 13,000 mentioned in Schedule B. This claim was put forward under the following circumstances. In Schedule A to Exhibit A among the jiroiyati lands the village of Muchivoyi is included. It was conceded that this was not a jiroiyati village but an inam village. The case for the first defendant is that by the inclusion of Muchivoyi among the jiroiyati villages he and his transferor had suffered damages to the extent of Rs. 13,000, and that amount must be made good by the plaintiff. Before the Subordinate Judge a number of defences founded on facts and on law were put forward with great insistence: on the facts he came to the conclusion that the story of the first defendant should not be accepted. I do not think it necessary to examine the grounds on which this opinion was based, because in my opinion, the question can be disposed of on a point of law. Granted that the first defendant was damnified by this wrong description of the village, the claim arising therefrom is not recoverable as against the purchaser of the equity of redemption. The decision of the Judicial Committee in *Bohra Thakur Das v. Collector of Aligarh*(1) seems to be conclusive on the question. In that case, the point was whether the enhanced revenue paid by the mortgagee in possession could be recovered against the purchaser of the equity of redemption. Their Lordships say, in page 619:

"In the present suit it is not the mortgagor who is seeking to redeem the property and it seems to their lordships that any equity that might have been invoked against him does not arise against the plaintiffs."

The arguments of counsel on both sides related specifically to the question whether the assignee is liable, and the portion of the judgment I have extracted dealt with that argument. The

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(1) (1910) I.L.R., 33 All., 612. (P.C.)

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case before the Board related to the right which the mortgagee in possession had under section 65, clause (c). The same principle is applicable to rights arising under clause (a) of the section. There are other authorities bearing upon the same question, namely, *Subbiah v. Rami Reddi*(1), *Srinivasu Chari v. Gnanaprasada Mudaliar*(2) and *Syed Ibrahim Sahib v. Armugathayee*(3). In Foa's Landlord and Tenant, 5th Edition, page 406, the same rule is enunciated. Reliance was placed on behalf of the appellant on *Ramakrishnama Chetty v. Vuvvati Chengu Aiyar*(4) in which it was stated that an assignee of the mortgagor is liable to all the charges which the mortgagor himself was bound to pay. It seems to me that this proposition has been too broadly stated. There is no reference to *Bohra Thakur Das v. Collector of Aligarh* (5) in that case at all. Therefore, in my opinion, the Subordinate Judge is right in holding that whatever may be the first defendant's rights in this matter against the Raja of Kalahasti, he is not entitled to enforce them against the plaintiff. The same observations apply *mutatis mutandis* to the claim of four thousand rupees alleged to be due in consequence of the mortgagor having allowed the assessment on the village of Velanpudi to fall into arrears. A further claim of Rs. 50,000 said to be due "on account of the mortgagor compromising with the purchasers confirming the sale of 22 villages of B schedule," stands on the same footing. If this claim is well-founded to any extent it can be enforced only against the mortgagor and is not claimable against the plaintiff for the reasons already given.

Another claim was for interest at the enhanced rate of one per cent. The document provides for repayment within four years and grants a further period of two years by way of indulgence. Then comes a clause which provides:

"And it is agreed that if on the said date we do not pay in one lump sum the entire amount as per the terms of the document, we do pay interest on the entire amount that may be found due to you till then as per the terms of the document at the rate of Re. 1-0-0 per cent per mensem calculated from then until payment of the whole amount to you."

(1) (1916) I.L.R., 39 Mad., 959.

(2) (1907) I.L.R., 30 Mad., 87.

(3) (1915) I.L.R., 38 Mad., 18.

(4) (1914) 27 M.L.J., 494.

(5) (1910) I.L.R., 32 All., 612 (P.C.).

'It was contended for the appellant that the enhanced interest commenced from the end of the fourth year and not from the end of the sixth year. After having had the vernacular document read to me, and having regard to the context, I feel no hesitation in holding that the enhanced interest was to commence at the end of the sixth year and not at the end of the fourth year. Therefore that claim goes. Then, it was argued that the first defendant is entitled to compound interest from the end of the sixth year upon the additional interest of six annas. I am unable to agree with this contention either. The language of the document is that this additional interest of six annas should be added to the principal. No doubt it was open to the draftsman to have inserted a clause that if it was not paid regularly it shall bear interest. But that is not the language of the document. I see no reason for spelling out a provision for compound interest unless there is an express stipulation therefor. There is no provision so far as I am aware for the payment of interest annually, and consequently you cannot say from what period interest upon interest is to be calculated; and again there is no provision as regards the rate of the compound interest. It was argued before us, that this rate must be one per cent, because after the end of the sixth year the clause relating to enhanced interest was expected to come into operation. That again is a matter for speculation. In my opinion, the Subordinate Judge was justified in saying that unless there is an express stipulation for compound interest, the Courts are not at liberty to read into a document conditions in that behalf, not only as regards the period of rests but also as regards the rate of interest.

Now I come to the claim which I have purposely refrained for consideration to the end, because it raises very many difficult questions. This claim is said to arise thus. On the date of Exhibit A the mortgagor took a lease of the A schedule properties under Exhibit I. The annual rent stipulated was Rs. 18,750 payable by instalments. There is a provision for interest if instalments were not regularly paid. Then comes the clause in dispute. The question is whether this clause makes only the income of the A schedule properties security for the amount of rent or whether it makes the corpus also security. The Subordinate Judge has held that only the income was charged.

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The Bench Clerk of this Court was of the same opinion. The Chief Interpreter practically agreed with the Bench Clerk. I requested two leading Telugu vakils to give their translation of the clause. They do not quite agree among themselves; but they practically differ from the interpretation placed by the Bench Clerk. I am not myself unfamiliar with the language, but as I felt that I should not take upon myself the responsibility of giving the translation, I tried my best to get some authoritative interpretation of the clause. I must confess that I am no better now than I was at the outset. Everything depends upon the meaning to be attached to the word "gaka" in the clause. In the dictionary it is translated into "besides" and "except." As the learned Chief Justice humorously remarked in the course of the argument, one meaning would have the effect of including the mortgaged properties, and the other that of excluding the same. Very learned arguments were advanced on both sides on the construction of this clause. I prefer not to express any opinion finally, as in the view I am taking its interpretation is not necessary for the disposal of the case. I have purposely refrained from indicating my view as the question may again come up in some form or other and I would be hampering the Judge who may have to hear such a case by indicating my opinion. I shall, for the present, assume that a charge is created by Exhibit A upon the corpus of the A schedule properties and proceed to deal with the case on that footing. The effect of this assumption is that there are two mortgages, one under Exhibit A and the other under Exhibit I. It is common ground that the rent agreed to be paid under Exhibit I was not paid. For a portion of it a decree has been obtained and the other portion is outstanding. The question is whether the first defendant can compel the plaintiff to pay this decree amount and balance of amount outstanding before redeeming the A Schedule properties. One minor contention was raised by the learned Advocate-General in respect of the decree amount. He contended that as the first defendant's transferor had chosen to take a personal decree he must be deemed to have waived his right to charge the same upon the property. I do not think that this contention is well-founded. Under Order XXXIV, rule 14, notwithstanding that a decree has been obtained, it is open, to

a mortgagee to claim a charge in respect of it by a separate suit, and I think that that right he can exercise by compelling the mortgagor to pay it before redemption. One other question which was argued at some length need not be considered very minutely. That question was whether Exhibits A and I form one transaction. It is a mixed question of fact and law. In the document Exhibit A, it is stated :

"So that henceforth, you yourself may as you please effect Amarakam and all other things."

Thus it was left to the option of the mortgagee to grant a lease of the property to whomsoever he pleased. As was pointed out by the Judicial Committee in *Abdullah Khan v. Basharat Husain* (1) even if the lease had been provided for in Exhibit A itself, there would be no question of accountability as between the mortgagor and the mortgagee. The same view was taken by the Board in *Partab Bahadur Singh v. Gajadhar Bakhsh Singh* (2). In *Khuda Bakhsh v. Alim-un-nissa* (3), where the rent was made a charge upon the property, it was held that the mortgagee cannot compel the mortgagor to pay it before redeeming the property. In the cases quoted on the other side, the Courts construed the documents before them as simple mortgages. *Madhwa Sidhanta Onahini, Nidhi v. Venkataramanjulu Naidu* (4) *Juggeewundas Keeka Shah v. Ramdas Brijbookundas* (5) and *Vasudevan Atisseripad v. Govinda Menon* (6). It may be open to argument whether those documents should not have been regarded as usufructuary mortgages. But the decisions were based upon the view that they were simple mortgages. Therefore, those cases do not help the appellant at all. As regards *Attaf Ali Khan v. Lalla Prasad* (7), it is enough to say that in all the subsequent cases in that Court this decision was regarded as having turned upon the particular facts of the case. Therefore, we start with this proposition that notwithstanding the mortgagor is himself the lessee it is not a necessary presumption that the lease is a part of the transaction of the mortgage. Consequently, ordinarily no question of the payment of the lease amount would

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(1) 1913 I.L.R., 85 All. 48 (P.C.). (2) (1902) I.L.R., 24 All., 521 (P.C.).
(3) (1905) I.L.R., 27 All., 313. (4) (1903) I.L.R., 26 Mad., 662 at 666.
(5) (1941) 2 M.I.A., 487. (6) (1915) 2 L.W., 853.
(7) (1897) I.L.R., 19 All., 498.

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arise before redeeming the mortgage. But in this case the question is complicated by the assumption I have made that there is a second mortgage upon the property created by Exhibit I. This second mortgage must be regarded as a simple mortgage. The further point to be considered is whether Exhibit A creates a usufructuary mortgage. Because if it is such a mortgage, then under section 62, clause (b), of the Transfer of Property Act the mortgagor can by paying the principal money alone redeem it. There are two clauses in the document which require attention, before pronouncing an opinion upon its nature. The first is where a provision is made for the payment of the mortgage amount within six years. I do not think this provision is inconsistent with Exhibit A being regarded as a usufructuary mortgage. Under the definition clause in section 58, sub-clause (d), where the mortgagor delivers possession and authorizes the mortgagee to retain such possession until payment of the mortgage money, the mortgage will be regarded as usufructuary. If we turn to section 62, clause (b), we find it contemplates a term being prescribed for the payment of the mortgage money. As was pointed out in the course of the argument, the fixing of the term is not necessarily synonymous with covenanting to pay at a particular time. If we turn to the history of the legislation, it is clear that section 58, clause (d), is modelled upon what is known as a Welsh mortgage. In a Welsh mortgage (see Fisher on Mortgages, sections 10 to 12) there is a conveyance to the creditor and there is a provision for the enjoyment of rents and profits by the mortgagee *either until payment of interest and principal or in lieu of interest*. That is exactly what the Indian Legislature has provided for in the Transfer of Property Act, and as I understand the document to have provided only for the payment of principal and interest within a particular time, there is no covenant for payment by this clause. The document, in all its essentials, is a usufructuary mortgage. The words *Vaddi boghyam* are almost conclusive as to what the parties intended. The same cannot so easily be said of another clause. That is in these terms:

"And ourselves, our heirs, and our representatives, do stand liable along with the security of these mortgaged properties and other properties, and shall discharge the amount of this document fully as per all the terms contained in this document."

Does this clause provide for a covenant to repay? In Coote on Mortgages, Volume I, page 120, the usual form of a covenant to repay is given thus:

"That in consideration of the sum advanced by the mortgagee or mortgagees, the receipt of which is acknowledged, the mortgagor covenants with him or them for payment of the principal on a fixed day with interest in the meantime."

In the document in question there are no doubt words which say "We shall discharge the amount of this document fully as per all the terms contained in the document." Whether that is only the explanation of the security clause or whether it should be construed as an independent covenant to pay is a matter of some doubt. On the whole, I am inclined to the view that this is a usufructuary mortgage. In the pleadings, it has throughout been assumed that this is a usufructuary mortgage, and no question was raised in the Court below that it should not be so regarded. The words *Vaddi boghyam* are very strong and indicate that the parties intended to execute such a mortgage.

Even granting that this clause should be construed as a covenant to repay, I am not satisfied that the document as a whole should not be regarded as a usufructuary mortgage. In Fisher on Mortgages, in dealing with Welsh mortgages, the law is thus stated in paragraph 12:

"Although in an ordinary Welsh mortgage, there is usually no covenant for payment, yet the existence of an express covenant to pay the principal and interest on demand is not inconsistent with a provision that the mortgagee shall hold until payment, nor does it affect such a provision so as to lead to forfeiture, or to let in foreclosure."

Therefore, the existence of a clause like the one we find in Exhibit A is not inconsistent with the whole document being regarded as a usufructuary mortgage. That would have been the construction placed upon a Welsh mortgage, and I fail to see why the same should not apply to a usufructuary mortgage. After all what we have to see is whether the essential provisions of a document are such as to constitute it a deed of usufructuary mortgage. A penal clause should not be construed as affecting the main character of the document.

The large number of cases quoted to show that where there is a covenant to repay in a usufructuary mortgage the document

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should be construed as an anomalous mortgage, do not much help the solution of the problem. In those cases the question was whether a suit for sale would lie at the instance of a usufructuary mortgagee. The learned Judges in almost every one of them held that the covenant for payment enabled the mortgagee to sue for sale. They were not considering the question whether this clause would destroy the essential nature of the document. I do not, therefore, refer to these decisions.

Granting for a moment that Exhibit A should be regarded as an anomalous mortgage, the further question is whether the plaintiff should be compelled to consolidate the amounts due under it and under Exhibit I. The right of redemption is given by sections 60, 61 and 62, of the Transfer of Property Act. Section 60 enables the mortgagor on payment or tender, at the proper time and place, of the mortgage money, to require the mortgagee to deliver the mortgage deed and to deliver possession of the mortgaged property. This section has been construed to mean that there should be no fractional redemption. But where the amount due on a particular mortgage is either tendered or paid the mortgagor's right to demand possession of the property is clear. Section 61, as I read it, secures a further right to the mortgagor. What it says is that a mortgagor should not be compelled, in seeking to redeem one mortgage, to pay money due upon another mortgage. Notwithstanding, the contention of the learned Advocate-General I am prepared to hold that the converse is implied in section 61. If it is not a mortgage on property other than that comprised in the mortgage, a mortgagee may ask that the money due to him upon the same property in respect of another mortgage should also be paid to him. Apparently, this rule applies only to cases of mortgages of the same description. It was held in *Tajjo Bibi v. Bhagwan Prasad*(1) by Sir JOHN EDMOND, C.J., and BURKITT, J., that a mortgagee has no right to compel a mortgagor to consolidate a usufructuary and a simple mortgage. Even if Exhibit A is regarded as an anomalous mortgage, and Exhibit I a simple mortgage, the principle of that decision would apply. Upon the question as to what meaning should be attached to

(1) (1894) I.L.R., 16 All., 295.

the word 'on property other than that comprised in the mortgage,' I think it unnecessary to express any opinion. I am inclined to think that it is a case of omission by the legislature to provide for cases where the whole or a portion of the mortgaged property comprised in the first mortgage is added to in the second mortgage. *Ganga Rai v. Kirtarath Rai*(1), relied on by the learned Advocate-General, seems on the facts to contemplate cases where the second mortgage comprised property included in the first mortgage. But there is no clear judicial pronouncement on the question and therefore I am not prepared to regard it as any authority. On the other hand, the opinion of WRIGHT, J., stated with some hesitation, in *In re Salmon. Ex parte The Trustee*(2) suggests a different conclusion.

Section 62 deals solely with usufructuary mortgages. If section 61 applies, the further question would be whether, when the equity of redemption in both the mortgages has passed to a third party, he can be compelled to redeem both the mortgages. In England, it was held in *Vint v. Padget*(3), that where the equity of redemption has passed to a stranger, he is bound by the same equities as the mortgagor. This decision was followed in some later cases. However, very soon eminent Judges began to doubt the soundness of the rule established in that case. Lord WATSON in *Jennings v. Jordan*(4), says

"The doctrine appears to me to have its root in equity. If A has separately mortgaged two estates to B, it seems to be just and reasonable that a Court of equity should decline to aid A in redeeming one of these estates, except upon condition of his paying to B. The other mortgage debt, which might be insufficiently secured. But the equitable character of the considerations which have led to the growth and the development of the doctrine, as against purchasers of the mortgagor's equity of redemption, is by no means so apparent."

In *Menter v. Carr*(5), LINDLEY, L.J., stated that the rule subjecting the assignee of the equity to the same limitation as the mortgagor is a harsh one and should not be extended by analogy. In *Pledge v. Carr*(6), Lord HERSCHELL stated,

(1) (1911) I.L.R., 38 All., 898. (2) [1908] 1 K.B., 147.
(3) (1858) 2 De G. & J., 611, s.c., 44 E.R., 1126.
(4) (1881) 6 App. Cas., 698 at 721. (5) [1894] 3 Ch., 498.
(6) [1895] 1 Ch., 51.

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"we cannot overrule *Vint v. Padget*(1), for that was the decision of a Court co-ordinate in jurisdiction with ourselves."

The matter was taken to the House of Lords in *Pledge v. White*(2). There can be no doubt from the judgment of the learned Lords that they did not regard *Vint v. Padget*(1), as justifiable on principle. Lord HALSBURY, the Chancellor said

"I confess I lament the conclusion to which it has been found necessary to come, although I believe the strict principle upon which it rests is founded in our law at present, and in dealing with a technical system it is better to adhere to a principle when once established, than to create a greater confusion by dissenting from it."

Lord WATSON stated :

"for my own part, I should have desired if possible to decide otherwise; but I am compelled to say that I concur with the reasonings and the conclusions of my noble and learned friend."

Lord DAVEY, who delivered the leading judgment in the case, stated :

"I am of opinion that the application of the doctrine of consolidation to a case like the present has been too long considered part of the equitable jurisprudence of this country to be altered at the present time, and it is not so unreasonable as to demand a reversal of it by this House."

More recently, Mr. Justice NEVILLE stated in *Sharp v. Rickards*(3) :

"I do not think that the case of *Vint v. Padget*(1), has any general application. It stands on a very peculiar footing. It was upheld in *Pledge v. White*(2), but it appears from the judgment of Lord DAVEY that this was only because it had stood so long that the House of Lords thought it might do harm to reverse it, not because they approved any principle which it established."

While such is the view held in England, is there any justification for importing such a technical rule of law into this country. If we examine the course of development which the English and the Indian law has undergone on this question, it will be clear that the principle of *Vint v. Padget*(1), should not be extended to India. In England the right of redemption

itself was regarded as an equitable right, because there was a conveyance to the mortgagee which vested the property in him. Before his legal ownership is displaced, a conveyance is necessary. Having regard to this view of the rights of the mortgagor and mortgagee, it was first held that a mortgagor may be compelled to redeem all the mortgages he had executed to the same mortgagee, whether it be on the same or on different properties.

The cases base this right on the well known principle that he who seeks equity must do equity. In one case it was stated that a mortgagee had a right to consolidate because by allowing the redemption of any one mortgage his securities in respect of others may be impaired. This principle was found to be irreconcilable with the theory that there should be no clog on the equity of redemption. Gradually, eminent Judges leaned to the view that consolidation of mortgages on different properties should be discouraged. The legislature stepped in and by section 17 of the Conveyancing Act restricted the right of consolidation to mortgages on the same property. Before the intervention of the legislature, cases like that of *Vint v. Padget*(1), extended the obligation to assignees of the equity of redemption. Therefore, it was held by the House of Lords that the principle of *stare decisis* should be applied to this class of cases.

Now, what do we find in this country? Here, the mortgagee is not the legal owner of the property. In the majority of cases, there is no conveyance to him. The Regulations before the Transfer of Property Act did not recognize the legal ownership of the mortgagee. The common law of the country, apart from legislation, regarded the mortgaged property as a bare security. The vernacular expressions denoting mortgages connote a pledge and no more. Therefore, the right of redemption is and has been a legal right in India. There is no question of the mortgagor being required to do equity. Consequently, it would ordinarily be a denial of an undoubted right to compel the mortgagor to redeem other mortgages. Of course, if the legislature has so prescribed, considerations based

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(1) (1858) 2 De G. & J., 611; s.c., 44 E.R., 1126.

(2) [1896] A.C., 187.

(3) [1909] 1 Ch., 109.

(1) (1858) 2 De. G. & J., 611; s.c., 44 E.R., 1126.

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on prescriptive rights can have no bearing on the subject. From what I have stated above, it must be clear that whereas in England gradually the right of consolidation is being curtailed, as being inconsistent with the theory that no clog should be placed on the right of redemption, we would be enlarging in this country the right to consolidate which is purely the creature of the legislature. Bearing these facts in mind, I find no reason for importing the rule of *Vint v. Padget*(1), into India. Section 61 only speaks of the mortgagor and the mortgagee. In my opinion, whatever may be the rights of the mortgagee to compel the mortgagor to consolidate mortgages upon the same property before redemption, the rule is not applicable against persons who are the purchasers of the equity of redemption. In the present case, neither the mortgagor nor the mortgagee are before the Court. In both cases we have the transferees. I would therefore hold that the first defendant cannot compel the plaintiff to pay the amount due under Exhibit I before he is allowed to redeem the property comprised in Exhibit A. Before we finally dispose of this case, there must be findings on the two points indicated by me. [Their Lordships accordingly called for findings from the lower Court on receipt of which the High Court passed a final judgment on 19th April 1920.]

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(1) (1858) 2 De G. & J., 611, S.C., 44 E.R., 1128.

APPELLATE CIVIL.

*Before Mr. Justice Abdur Rahim and Mr. Justice Oldfield.*DEIVANAYAGA PADAYACHI (FIRST DEFENDANT),
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and 30.MUTHU REDDI AND TWO OTHERS (PLAINTIFFS AND SECOND
DEFENDANT), RESPONDENTS.**Transfer of Property Act (IV of 1882), sec. 6 (h)—Settlement for concubinage—
Immoral object carried out—Right to annul the settlement.*

It is a well-established rule of equity that a person who has transferred a property to another for an illegal or immoral purpose cannot get it annulled if the intended purpose has been carried out, and section 6, clause (h) of the Transfer of Property Act has not the effect of modifying it.

Ayerst v. Jenkins, (1873) L.R., 16 Eq., 275 followed.

Per OLDFIELD, J.—It is the sense of the community as a whole that decides whether a certain purpose is immoral; the fact that in a certain section of the community concubinage is allowed and is not regarded as immoral does not make a settlement made by a member of such community in consideration of concubinage any the less immoral.

SECOND APPEAL against the decree of T. RAJARAM RAO, Subordinate Judge of the Additional Temporary Subordinate Judge's Court of Cuddalore, in Appeal No. 5 of 1918, preferred against the decree of S. G. SRINIVASA RAGHAVA ACHARIYAR, in Original Suit No. 220 of 1917, on the file of the District Munsif of Panruti at Cuddalore.

The first defendant by a deed of settlement, dated 30th January 1910 settled on the second defendant, Sadachi Ammal, his concubine, a small house and 60 cents of land for her maintenance. The two defendants lived together for about five years, and the second defendant on 10th June 1915 executed a usufructuary mortgage of the land in favour of the two plaintiffs. The plaintiffs, alleging that the first defendant obstructed their possession and trespassed in October 1915, brought this suit in 1917 for possession, against the two defendants. The second defendant was *ex parte*. The first

* Second Appeal No. 508 of 1919.

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defendant pleaded, inter alia, that the deed of settlement was not given effect to, that he was always in possession, that he never trespassed on the land, and that the deed having been executed for an immoral purpose cannot be enforced, and that the plaintiffs derived no title under the mortgage. The District Munsif held that though the deed was given effect to, it cannot be enforced as being one for an immoral purpose and accordingly dismissed the suit. On Appeal the Subordinate Judge held that the deed was given effect to, and that it should be enforced, as in the community to which the defendants belonged concubinage was allowed and was not regarded as immoral. He accordingly allowed the plaintiffs' suit. The first defendant preferred this Second appeal.

K. S. Krishnaswami Ayyangar, for appellant.

A. Ramaswami Ayyar for C. Padmanabha Ayyangar, for respondent.

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RAHIM, J.

ABDUR RAHIM, J.—There can be no doubt that the settlement as it is called, Exhibit B, was made with the object and in consideration of the donee cohabiting with the settlor. This can be plainly inferred from the terms of the document itself. The plaintiffs, who are usufructuary mortgagees of the property, obtained the mortgage from the donee, Sadachi Ammal. The first defendant who is the appellant before us is the settlor. His case is that the settlement or transfer to Sadachi having been made for immoral considerations, the transaction is void altogether and the plaintiffs can have no title under the mortgage executed by Sadachi Ammal.

The facts are that this woman was kept by the first defendant who made a gift of the property to her with the object that she should continue to be his mistress. She did in fact remain in his keeping and lived with him as contemplated by Exhibit B and to that extent therefore the immoral purpose which the donor had in view was attained. It is well established that when a transaction is entered into for an unlawful or immoral purpose and that purpose has been achieved, the Court would not interfere at the instance of the *particeps criminis* to relieve him from the legal effects of the transaction. In the decided cases it is well settled that a person who entered into such a transaction is estopped

from disputing the nature of the transaction, if the immoral purpose for which it was entered into has been carried out.

The leading authority on the law on this subject is the case of *Ayerst v. Jenkins* (1). The entire law is elaborately discussed in the judgment which was delivered by Lord SELBORNE, L.C., and he sums up at page 282 the propositions which are established by the authorities. Then he proceeds to point out the distinction between cases of executory contracts and executed contracts. He says :

"In the present case relief is sought by the representative not merely of a *particeps criminis* but of a voluntary and sole donor on the naked ground of the illegality of his own intention and purpose; and that, not against a bond or covenant or other obligation resting *in fieri* but against a completed transfer of specific chattels, by which the legal estate in those chattels was absolutely vested in trustees, ten years before the bill was filed, for the sole benefit of the defendant."

He states further on :

"But the voluntary gift of part of his own property by one *particeps criminis* to another, is in itself neither fraudulent nor prohibited by law, and the present is not the case of a man repenting of an immoral purpose before it is too late and seeking to recall, while the object is yet unaccomplished, a gift intended as a bribe to iniquity. If public policy is opposed (as it is) to vice and immorality, it is no less true, as was said by Lord TRURO in *Benyon v. Nettlefold* (2) that the law in sanctioning the defence of *particeps criminis* does so on the grounds of public policy, viz., that those who violate the law must not apply to the law for protection."

Then referring to a dictum of Lord Chancellor CAMPBELL in *Coulson v. Allison* (3) and a decree of Vice-Chancellor STUART in *Wootton v. Wootton* he observes that

"It may be that the door of this Court is not closed against persons repenting of such an unlawful connexion, and desirous of extricating themselves from fetters, which if relief were refused, might practically bind them to it."

The case referred to here is one of mutual settlement made on the occasion of a fictitious marriage, and the observation in this part of the judgment applies to cases of executed transfers

(1) (1873) L.R., 16 Eq., 275.

(2) (1850) 3 Mac. & G., 91, 102.

(3) (1860) 2 De. G.F. & J., 521, 525.

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for an unlawful purpose in which the Court will interfere to relieve the transferor but only when the unlawful or immoral purpose has not been accomplished and the transferor repents of his action in time. The law as propounded here has been followed in India in many cases, but it is sufficient to refer to only some of them: *Sidlingappa v. Hirasa*(1), *Petherpermal Chetty v. Muniandy Servai*(2), *Ram Sarup v. Kishan Lal* (3), *Thasi Muthukannu v. Shanmugavelu Pillai*(4) and *Tayaramma v. Sitaramasami Naidu*(5).

It is, however, argued by the learned pleader for the appellant that section 6 (h), clause 2, of the amended Transfer of Property Act has made a difference in the law in this country. That section says that 'no transfer can be made for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act'. The argument based on this clause is that the transfer for such an object or consideration is *ipso facto* void and therefore the transferor can come to Court and ask its assistance in getting back the property. I do not think that such a far-reaching effect as the annulling of an established rule of law as laid down in *Ayerst v. Jenkins*(6) and followed consistently in the Indian courts could have been intended by this clause. It may be pointed out here that so far as the amendment goes, that is the changing of the words "illegal purpose" into "unlawful object," its sole object was to amend the law on a minor point with respect to an actionable claim. It would have been far from the object of the legislature to think of modifying the well established rules of equity as propounded in *Ayerst v. Jenkins*(6) by an indirect amendment of this nature. However that may be, the words of this clause do not necessarily bear out the extreme contention of the appellant. That clause does not lay down in what classes of cases the Court will or will not assist a person *particeps criminis*. All that it says is that a transfer for an unlawful consideration cannot be made. The language is certainly not very happy. But all that was intended was that the Court will not enforce a transfer which would have the effect of carrying out its unlawful object. That is quite

consistent with the well-established doctrine of law already referred to. But we do not see that a further inference can be drawn that a person who made such a transfer for an immoral consideration and who has achieved his object by that transfer can say "Now I have achieved my unlawful and immoral object, the Court must give me back the property." That would be going directly against the policy which this very clause seeks to enunciate. We must overrule this contention and the appeal must be dismissed with costs.

OLDFIELD, J.—I agree and only desire to notice one of the grounds for the lower appellate Court's decision. The lower appellate Court held that the suit document was executed in consideration of future cohabitation between the first defendant and second defendant; but it went on to hold that such an agreement was not for an immoral purpose, because concubinage is not usually regarded as immoral in the caste to which the parties belong. We do not think that that is a proper test. It is not suggested by the lower Court that there is any question of concubinage in this case being regarded as equivalent to marriage. And no reason has been shown why we should so regard it. The lower Court was not at liberty to rely on the sentiment of one section of the community as decisive with reference to a matter of ordinary morality. On such a matter, the law must have regard to the sense of the community as a

e.

N.R.

(1) (1907) I.L.R., 31 Bom. 405.

(2) (1908) I.L.R., 35 Cal., 551 (P.C.).

(3) (1907) I.L.R., 29 All., 327.

(4) (1905) I.L.R., 23 Mad., 413.

(5) (1900) I.L.R., 23 Mad., 613.

(6) (1878) L.R., 16 Eq., 275.

APPELLATE CIVIL.

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

PALANIYAPPA CHETTIAR (PLAINTIFF), APPELLANT,

v.

CHOCKALINGAM CHETTIAR (DEFENDANT), RESPONDENT.*

Indian Contract Act (IX of 1872), sec. 23—Principal's illegal contract with a stranger—Money recovered by agent from stranger under the contract—Right of principal to recover from agent money realized.

The illegality of a contract between the principal and a stranger, under which an agent recovers money due to the principal is no bar to the principal recovering the money so realized from the agent.

SECOND APPEAL against the decree of V. PANDRANG RAO, Acting District Judge of Rāmnād at Madura, in Appeal Suit No. 753 of 1918, preferred against the decree of A. NARAYANA NAMBIYAR, Subordinate Judge of the Temporary Subordinate Court of Sivaganga, in Original Suit No. 4 of 1918.

The facts are set out in the judgment of ABDUR RAHIM, J.

S. Srinivasa Ayyangar for A. Krishnaswami Ayyar, for appellant.—If under an illegal or void contract, an agent receives money for his principal from the opposite party, then in a suit by the principal against the agent for the recovery of the money, the agent cannot plead the illegality of the contract: see *Bhola Nath v. Mul Chand*(1), *Bridger v. Savage*(2) and *Nagendrabala Dassi v. Guru Doyal Mukerji*(3).

K. Bashyam Ayyangar for the respondent.—Where the creation of the agency itself is for an illegal purpose, then the illegal purpose is a bar to recovery. In the present case the contract between the principal and the agent had the effect of evading Order XXI, Rule 16, Civil Procedure Code. Where a person employed to bet, refuses to bet, the principal cannot recover damages from the agent for his refusal. Reference was made to sections 23 and 218 of the Contract Act, Pollock and Mulla, 4th Edition, page 717, *Sykes v. Beadon*(4), *Balasubramania Pillai*

* Second Appeal No. 790 of 1919.

(1) (1903) I.L.R., 25 All., 639.

(2) (1885) 15 Q.B.D., 363.

(3) (1903) I.L.R., 30 Cal., 1011.

(4) (1879) 11 Ch.D., 170, 192 to 197.

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ABDUR RAHIM, J.—The plaintiff's suit has been dismissed on the ground that, according to section 23 of the Contract Act, the agreement on which the suit is based as contained in Exhibit A is illegal and that therefore the plaintiff cannot recover the money which the defendant had collected under certain decrees. The plaintiff himself is the judgment-debtor under the decree and he apparently asked the defendant to take an assignment of the decree on his behalf and to execute the decree against the other judgment-debtors and the defendant realized in execution certain assets. By Exhibit A it is provided that the defendant will submit accounts to the plaintiff of the amount spent in collecting the money, and of the amount realized, and after deducting a commission of 20 per cent pay over the balance to the plaintiff.

Order XXI, rule 16, Civil Procedure Code, says that

“Where a decree for the payment of money against two or more persons has been transferred to one of them it shall not be executed against the others.”

It is not contended that on such transfer, the liability under the decree becomes altogether discharged but that the decree shall not be enforced in execution; it is open to the judgment-debtor who has obtained a transfer of the decree to sue his co-debtor upon it for contribution, as held in *Anant Vinayak v. Nagappa Subraya*(6). In this case the judgment-debtors did not raise any objection to execution on the strength of Order XXI, rule 16. The defendant must be taken to be an agent of the plaintiff for the actual realization of the money. But it is argued on behalf of the respondent that it was the duty of the Court to refuse execution and the Court would have done so if it had been brought to its notice that the defendant was merely an agent or

(1) S.A. No. 878 of 1918 (unreported).

(2) (1795) 6 Term Rep., 405; s.c., 101 E.R., 619.

(3) (1884) I.L.R., 8 Bom., 398 at 401.

(4) (1818) 3 Madd., 110; s.c., 56 E.R., 451.

(5) (1869) 11 W.R., 395.

(6) (1908) I.L.R., 32 Bom., 195.

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benamidar of the plaintiff, who was one of the judgment-debtors. Having regard to the language of Order XXI, rule 16, we may proceed on the assumption that if the facts were known to the executing Court, it would have been bound to reject the application for execution.

Then it is contended that if the Court were now to help the plaintiffs in recovering the moneys realized by the defendant by means of the execution of the decree in spite of the prohibition of the law, that would be a violation of the rule laid down in section 23 of the Contract Act. Mr. Bhashyam Ayyangar in support of the judgment of the lower Court has referred us to a number of rulings of the English Courts. The English authority on which much emphasis was laid was the case of *Sykes v. Beadon*(1). There JESSE, M.R., upheld the proposition that the Court of law or equity will not lend its assistance in any way towards carrying out an illegal contract; therefore such a contract cannot be enforced by one party to it against the other, either directly by asking the Court to carry it into effect, or indirectly by claiming damages or compensation for breach of it. The case before us does not fall within the proposition laid down in *Sykes v. Beadon*(1). In the first place the purchase of a decree by one of the judgment-debtors is not illegal, and in the second place this case comes within the class of cases mentioned in the judgment of the Master of the Rolls, page 106—

“but in cases where the contract is actually at an end, or is put an end to, the Court will interfere to prevent those who have, under the illegal contract, obtained money belonging to other persons on the representation that the contract was legal, from keeping that money.”

If the plaintiff in the present suit were suing the defendant to enforce the contract and to compel him to execute the decree against the co-judgment debtors or to recover damages for having failed to do so, it would be asking the Court to carry out an illegal contract. But that is not the case here. The same answer is to be given *Booth v. Hodgson*(2) and *Battersby v. Smyth*(3). On the other hand, this case in my opinion is

governed by the class of cases of which *Bridger v. Savage*(1), is a leading example. There the plaintiff had employed the defendant for a commission to make bets for him on horses. The defendant accordingly made such bets, and he received the winnings from the persons with whom he had so betted. In an action by the plaintiff for the amount which the defendant had so received, it was held that 8 & 9 Vic., c. 109, s. 18, which makes null and void all contracts by way of wagering, did not apply to the contract between plaintiff and defendant and that, therefore, notwithstanding that statute the plaintiff was entitled to recover in respect of the bets which had been so paid to the defendants. The learned Judges of the Court of Appeal point out that the principle is that a

“person who has received money from another under an illegal contract cannot be allowed to retain it,”
to quote the language of EYRE, C.J., in *Tenant v. Elliott*(2). BOWEN, L.J., observed as follows in *Bridger v. Savage*(1):

“If the person who has betted pays his bet he does nothing wrong, he only waives a benefit which the statute has given to him, and confers a good title to the money on the person to whom he pays it. Therefore, when the bet is paid the transaction is completed and when it is paid to an agent, it cannot be contended that it is not a good payment for his principal. If not, how monstrous it would be that the agent who has received the money which belonged to his principal and which he received for his principal, and only on that account should be allowed to say that the payment was bad and void. The truth is that the contract under which he received the money for his principal is not affected by the collateral contract under which the money was paid to him.”

It seems to me that these observations apply to the present case. I may also point out that in *Bridger v. Savage*(1), which was argued by eminent counsel on both sides, *Sykes v. Beadon*(3) was not cited at all as establishing a contrary proposition nor the cases in Term Reports cited by the respondent. So far as the Indian Courts are concerned, there are two decisions directly against the contention of the defendant: *Bhola Nath v. Mul Chand*(4), and *Nagendrabala Dassi v. Guru Doyal Mukerji*(5).

(1) (1885) 15 Q.B.D., 363.

(2) (1787) 1 Bosc. and P., 3 at 4; s.c., 128 E.R., 744.

(3) (1879) 11 Ch.D., 170.

(4) (1903) 1 L.R., 25 All., 639.

(5) (1903) 1 L.R., 30 Calc., 1011.

(1) (1879) 11 Ch. D., 170.

(2) (1795) 6 Term Rep., 405; s.c., 101 E.R., 619.

(3) (1818) 3 M. & C., 110; s.c., 5 E.R., 451.

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In the former decision, STANLEY, C.J., takes the law as quite settled on the authority of the English decisions. On the other hand, we have been referred to a decision of the Bombay High Court in *Gosvami Shri Purushothamji Maharaj v. B. Robb*(1). But as I read the case, it does not lay down anything different from the law enunciated in *Bridger v. Savage*(2). All that it lays down is that a suit could not be sustained for levying a cess prohibited by law.

I am therefore of opinion that the judgments of the lower Courts are wrong. I must reverse them and remand the case to the Court of first instance for disposal on the other issues. Costs will abide the result. The Court fees paid on the Second Appeal Memorandum and on the appeal to the lower Appellate Court will be refunded to the appellant.

OLDFIELD, J.

OLDFIELD, J.—If it were necessary to consider whether section 23 of the Contract Act were applicable to the contract between the plaintiff and the defendant, I should have no difficulty in holding that the plaintiff's object, which he has unlawfully accomplished, was to defeat the provisions of Order XXI, rule 16. It is not disputed that the defendant entered into the contract with full knowledge of the circumstances and of the character of the plaintiff's intention in making it. That, however, is not enough to justify the defendant in repudiating the liability for what he realized on plaintiff's behalf. His agency to execute a decree was, it should be remembered, in itself innocent. His knowledge that the execution of the decree on plaintiff's behalf might defeat Order XXI, rule 16, will no more make his agency guilty than did the similar knowledge of the brokers referred to in *Bhola Nath v. Mul Chand*(3), that they were engaged in wagering transactions. See also *Nagenrabala Dassi v. Guru Doyal Mukerji*(4). Mr. Bhashyam Ayyangar for respondent has put the case in this way. The creation of an agency by the plaintiff was part of the machinery, by which he intended to deceive the Court and thus to secure the successful execution of his unlawful design. That he contends is enough to bring the

agency and the contract, by which it was created, within the principle of section 23 and to make the latter unenforceable. He cited in support of this *Booth v. Hodgson*(1), *Battersby v. Smyth*(2) and *Sykes v. Beadon*(3), besides Indian cases of less importance. It does not seem to me that these authorities go to the length which he requires. In them the relation between the parties was not merely the means employed to carry out the unlawful transaction, but it was the transaction itself. In the three English cases, the material fact was that something was done by a number of persons, which according to law either could not be done by that number of persons without some formality being complied with or could not be done by that number of persons at all. It was the association, which was in fact the unlawful element and which made the transaction unlawful. Here, there is nothing of that sort, because the contract by which the parties were associated, one of agency, was not in itself unlawful and was not what made the whole transaction unlawful, since the unlawfulness would have been the same had plaintiff succeeded in carrying through his execution himself without ever employing the defendant at all.

For these reasons I agree with my learned brother and concur in the order proposed by him.

N.R.

(1) (1795) 6 Term Rep., 405; s.c., 101, E.R., 619.

(2) (1818) 3 Madd., 110; S.C. 56 E.R., 451. (3) (1879) 11 Ch.D., 170.

(1) (1884) I.L.R., 8 Bom., 398.

(2) (1885) 15 Q.B.D., 363.

(3) (1903) I.L.R., 25 All., 639.

(4) (1903) I.L.R., 30 Cal., 1011.

APPELLATE CIVIL

Before Sir John Wallis, Kt., Chief Justice, and
Mr. Justice Sadasiva Ayyar.

1920,
September
20, 21 and 22.

BATCHU CHINNA VENKATRAYUDU AND TWO OTHERS
(DEFENDANTS NOS. 3 TO 5), APPELLANTS,

v.

DUVVURI RAMAMURTI AND TWO OTHERS (DEFENDANTS
NOS. 1 AND 2 AND PLAINTIFF), RESPONDENTS.*

*Survey and Boundaries Act (IV of 1897), sec. 12, sub-section (3) and sec. 13—
Decision of a Survey officer—Finality of decision—Decision, whether final
for all or for what purposes—Effect of word "final" in section 12, sub-
section (3).*

The effect of section 12, sub-section (3) of the Survey and Boundaries Act, is to make the orders of a Survey officer in cases falling under that section, final for the purposes of the survey, but it does not go so far as to preclude the land-owners altogether from afterwards disputing its correctness in a Court of law, unless there was a dispute before the Survey officer and the order is one to which section 13 of the Act applies.

Muthirulandi Poosari v. Sethuram Aiyar, (1919) I.L.R., 42 Mad., 425 (F.B.), explained.

APPEAL against the decree of K. KRISHNAMA ACHARIYAR, the Temporary Subordinate Judge of Cocanada, in Original Suit No. 25 of 1916.

The plaintiff, the Zamindar of Pittapur, sued for a declaration that the suit lands were his jeroyiti lands and not the inam lands of the first defendant, who admittedly owned five acres as inam and of which he had sold three acres to a third person. The Subordinate Judge found that the first defendant had added the jeroyiti lands in his possession to his inam lands. There was a survey of the lands in 1895 and 1903, in which the lands in dispute were mostly included as inam lands. The lower Court passed a decree in favour of the plaintiff in respect of all the lands claimed in the suit. The defendants preferred this Appeal and contended, inter alia, that the decision of the Survey officer as to the boundary was conclusive.

T. Prakasam and K. Kamanna, for appellant.—The boundary fixed by the Survey officer is conclusive under the Survey and

Boundaries Act (IV of 1897). The old Act was the Boundaries Act (XXVIII of 1860). Sections 9 to 11, 12, sub-section (3), and section 13 make it clear that the decision is final and conclusive. No suit was brought under section 13. Therefore the decision as to boundary was conclusive. See section 12, sub-section (3), of the Act. See also *Muthirulandi Poosari v. Sethuram Aiyar*(1).

S. Srinivasa Ayyangar, A. Krishnaswami Ayyar, V. Ramadoss and V. Krishna Mohan for respondents.—Where there is no dispute, the decision is not a judicial decision at all. It is only an executive order. It need not be set aside. It may be of evidentiary value. Where there is dispute, a suit lies and must be brought under section 13 of the Act; where there is no dispute, the decision need not be set aside. The word 'final' in section 12, sub-section (3), means that there is no further appeal. The language in section 13 is "conclusive." Final under section 12, sub-section (3) means final before Survey officers; it is not conclusive between parties in a Civil Court. The effect of the finality under section 12 is that the boundary cannot be altered. Reference was made to the following cases :—*Vasu Velan v. Paramasiva Mudaliar* (2); *Marulaveera Pathan v. Venkataadri Muthirian* (3); *Municipal Council of Kumbakonam v. Rajarama Ayyar* (4). So far as the Survey and Boundaries Act is concerned, it has been assumed in several decisions cited above, that the Act does not apply when there is no dispute. When there is no dispute, the order is not a judicial order but only an executive order which need not be set aside. It may be cogent evidence against the party but not conclusive in a Civil Court.

The Court delivered the following JUDGEMENT :—

This is an appeal from a decree giving the plaintiff, the Zamindar of Pittapur, a declaration that the suit lands are his jeroyiti lands and not the inam lands of the first defendant.

(1) (1919) I.L.R., 42 Mad., 425 (F.B.).

(2) S.A. No. 1915 of 1915 (unreported).

(3) S.A. No. 1902 of 1908 (unreported).

(4) S. A. No. 22 of 1915 (unreported).

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[Their Lordships dealt with the evidence and proceeded as follows :—]

On the whole we see no reason to differ from the conclusion of the Subordinate Judge that there has been a wrongful transfer by the first defendant of the jeroyiti lands held by him in the zamindari to his inam lands in the same village. The Subordinate Judge has given the plaintiff a declaratory decree for the whole extent of the lands claimed by him and it is admitted that he has failed to make any allowance to the extent of the inam lands in the village which the first defendant undoubtedly is entitled to. The question then is what is the inam area to which he should be held entitled. As we have said the whole area of his family inam was shown in the inam register (Exhibit P) at about five acres of which he retained two acres. There is some evidence given by the karnam that his family was cultivating for a long time thirteen acres and it is of course possible that there has been some encroachment for some time. On the whole we have come to the conclusion that making a liberal allowance in favour of the first defendant, the plaintiff is entitled to a declaration that Survey No. 298 consisting of 29.48 constitutes his jeroyiti lands.

Objection was taken by Mr. Prakasam that the boundaries are conclusive under section 12, sub-section (3) of the Survey Act. We were at first considerably impressed by that objection. We see, however, that the Full Bench in *Muthirulandi Poosari v. Sethuram Aiyar*(1) limited themselves to deciding that the decision by the Survey officer in boundary cases was conclusive under section 13 only where there has been a dispute and they said nothing about the effect of the word 'final' in section 12, sub-section (3). Sections 11 and 12 deal also with cases where there is no dispute at all about the boundaries and cases where the registered owners do not take the trouble to go and point them out, and those sections direct that, in such cases, where there is no dispute, the Survey officer is to fix the boundary as pointed out, and where parties do not attend he is to fix the boundaries as best as he may from the records and his order fixing the boundaries is to be notified to the parties interested,

(1) (1919) I.L.R., 42 Mad., 425 (F.B.).

and they have a right of appeal, and if they do not appeal or if the appeal is decided against them, then the original order or the order in appeal is to be final under section 12, sub-section (3). On a further consideration of the matter, we think that sufficient effect is given to that provision by holding it to mean that there can be no further dispute about that boundary, that is, the boundary that has to go into the survey. But it seems to be going too far to say that that boundary is to be binding for all purposes so that it cannot be questioned by either of the parties. In the present case it looks as if there had been carelessness at least on the part of the zamindar's agents in allowing the boundary to be settled in this way. It would be hard that a boundary of that sort should be made conclusive upon a party who neglected to attend, and whose neglect had been taken advantage of by the other side to point out the wrong boundaries. But, however that may be, we think that it is sufficient to hold that the effect of section 12, sub-section (3), is to make the boundary final but that it does not go so far as to preclude the land-owners altogether from afterwards disputing the correctness of the boundary in a Court of law. That also seems to have been the view taken in some of the unreported cases to which we have been referred.

Another question was raised by Mr. Prakasam who appeared for defendants Nos. 3 to 5 who were mortgagees from the first defendant as to their mortgage. We are not concerned to decide anything in this case about their rights against the mortgagor, the first defendant, and those claiming through or under him.

The Appeal will in part be allowed and the decree must be modified accordingly.

K.R.

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APPELLATE CIVIL.

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

KANDIYIL PARKUM VANIA PUTHUKKUTTI
KANNA KURUP (THIRD DEFENDANT), APPELLANT,

v.

SANKARA VARMA RAJAH AVERGAL AND SEVEN OTHERS
(PLAINTIFFS 1 TO 3 AND LEGAL REPRESENTATIVES OF FIRST DEFENDANT
AND DEFENDANTS NOS. 2, 37, 154 AND 112), RESPONDENTS.*

*Malabar Law—Kanom—Lease or mortgage—Deed of taraga, construction of—
Attestation of deed, necessity for—Transfer of Property Act, sections 59 and
98—Anomalous mortgage—Civil Procedure Code (V of 1908), O. 1, rule 9—
Non-joinder of parties—Decree against parties in appeal.*

A kanom is an anomalous mortgage falling under section 98 of the Transfer of Property Act, with certain well-known incidents attached to it under the customary law of Malabar; and a kanom-deed, to be valid, must be attested as a mortgage-deed under section 59 of the Act.

The fact that the document is described as a taraga or royal grant or that the kanom amount is exceedingly insignificant does not alter the nature of the transaction.

SECOND APPEAL against the decree of K. V. KARUNAKARA MENON, Additional Temporary Subordinate Judge of North Malabar, in Appeal Suit No. 175 of 1919, preferred against the decree of P. M. ANANTANARAYANA AYYAR, Principal District Munsif of Badagara, in Original Suit No. 273 of 1917.

The first defendant, who was the jenmi and the Valia Rajah of Kadathnad, executed a kanom deed, dated 30th April 1904, in favour of the third defendant. Subsequently, the first defendant executed a melkanom under Exhibit B, dated 23rd June 1913, in favour of the first plaintiff. The first plaintiff granted a sub-demise to the second and third plaintiffs and the second defendant. The other defendants are sub-mortgagees and other demisees under the third defendant. The suit is to redeem and recover possession of the lands from the defendants. The plaintiffs instituted this suit on 20th July 1916 on their title as Melkanomdars, under Exhibit B. The defendants pleaded, inter alia, that Exhibit B was a mortgage and as it was not attested by

* Second Appeal No. 1478 of 1919.

witnesses, it was invalid in law, and no title could be based on it. The terms of Exhibit B were as follows :

EXHIBIT B.

Taraga executed as per orders.

No. 116 of 1898.

To Mr. Sankara Varman Tampan of Aylancheri Kovilagam of
Puramsi Amsam and Desam, Kurumbranad taluk.

The shops, fairs and other portion of Badagara Kottaparamba excluding the Munsif Court, the travellers' khana and bungalow, stable and kitchen, which is the Jenm of an Kuttiprath Kovilagam and the boundaries, measurements and particulars of which are described in the subjoined schedule, (2) the portion of the land to the north-west of the Kotta, and (3) the waste land to the east of the Kotta, known as Pnthiavalappa paramba, having been thus granted under a taraga, you are to have trade carried on there, and have sufficient number of trees planted on the open space, you are to enjoy the Melbhagam (the upper produce) on these properties, and exclusive of the old kanom of Rs. 3 on these items, the interest on that, the Government revenue of Rs. 5-2-0 and the Local Fund dues thereon, you are to pay 45 fanams free of revenue in respect of Kottaparamba, six fanams, etc. Fifty-two fanams equivalent to Rs. 10-6-5. This amount of Rs. 10-6-5 should be paid every year in the month of September-October at Kuttiprath Kovilagam and a receipt taken therefor. In default of paying the aforesaid revenue according to kist at the amsam and taking a receipt therefor, it should be paid with interest at the rate of 12 per cent.

Yadasth.—It is agreed that under the Marapats obtained from Kandle Pooleri Kannan as 112 of 1879 in respect of paramba item No. 1, etc., the properties are to be recovered by direct suit at Tampan's expense after paying kanom and the value of Kushikoor and Chamayam; that future porapad to be paid by Tampan and the same is to be realized from the tenants; and the taraga is this day issued accordingly.

Taraga granted by Kuttiprath Kovilagam.

The District Munsif decreed the suit in favour of the plaintiffs, directing the defendants severally to deliver possession of the lands in their possession on payment by the plaintiff of the value of improvements due to them in respect of the lands delivered by them. The third defendant preferred an Appeal to the District Court, and impleaded only defendants Nos. 1, 2, 37, 112 and 154 and the three plaintiffs as party-respondents to his Appeal. The Subordinate Judge, who heard the Appeal, confirmed the decree and dismissed the Appeal. He agreed with the Munsif in holding that the document of melcharth (Exhibit B) was an improvement lease and not a kanom-mortgage and did not require to be attested as a mortgage. The third defendant preferred this Second Appeal. The further facts and contentions are set out in the judgment of SADASIVA AYYAR, J.

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C. Madhavan Nayar for appellant.

K. P. M. Menon, C. V. Anantakrishna Ayyar and K. Govinda Marar for respondents.

SADASIVA AYYAR, J.—The third defendant whom I shall call the mortgagee is the appellant before us. The plaintiff is a melkanomdar and he got his melkanom from the jenmi, the first defendant, who was then the stanom-holder of a desam. The suit was for redemption of the third defendant, the mortgagee under the kanom deed Exhibit A, dated 1904, and all the sub-mortgagees and other demisees under the third defendant were also made parties. The second and third plaintiffs and the second defendant may be treated as claiming under sub-mortgages created by the plaintiff. The first Court held that the melcharth or melkanom to the first plaintiff granted by the first defendant was not a kanom, but an improvement lease and that it did not require therefore to be attested by two witnesses (as a mortgage is required to be attested by section 59 of the Transfer of Property Act). Then it found the value of improvements due to the third defendant and his sub-mortgagees and lessees and gave an elaborate decree from which I shall make the following extracts:

"This Court doth order and declare that the amount due to the third defendant on account of kanom is Rs. 1-8-0 and the value of improvements is Rs. 4,047-3-11; to the fourth defendant is Rs. 204-7-6"

and so on up to the hundred and seventh defendant; and then the decree says that

"if the plaintiffs pay into Court the amount so declared due on or before 12th February 1919, the defendants shall deliver up to the plaintiffs all documents in their possession or power relating to the mortgaged properties and shall put the plaintiffs in possession of the properties."

This decree means that each of the particular defendants mentioned in the first portion of the decree to whom a specified amount is declared to be due by the plaintiffs shall put the plaintiffs in possession of the particular properties in his possession. Then, the third defendant preferred an appeal and he made only the defendants Nos. 1, 2, 37, 112 and 154 and the three plaintiffs, party-respondents to his appeal. The main points taken by him in the appeal were (1) that the melcharth Exhibit B, in favour of the first plaintiff, was invalid for want

of proper attestation; (2) that Exhibit B was a mortgage and ought to be attested as a mortgage and not as a mere lease.

These were the two principal contentions in the Appeal before the Subordinate Judge.

The plaintiffs-respondents did not take the objection before the Subordinate Judge that the appeal was bad for non-joinder of the other defendants who had been parties in the first Court. The learned Subordinate Judge held that Exhibit B might be considered as an improvement lease and not a kanom and that therefore it did not require attestation as a mortgage and hence he dismissed the appeal.

In Second Appeal before us the same points are taken, namely, that Exhibit B was a kanom document and therefore was not properly attested and was wholly invalid; and then there is also a point taken about compensation for a well in plot B, and for tank and well in plot D. The first defendant (the stanomdar who granted the melcharth and the original kanom, Exhibit A) died after the date of the decision of the lower Appellate Court, and the third defendant brought the next stanomdar on record in this Second Appeal as the legal representative of the first defendant.

The first question for consideration is whether Exhibit A is a mortgage document and whether it ought to be attested as such to have legal validity. The plaint is worded as a suit for redemption of the kanom mortgage, and Court fees have been paid on the principal mortgage amount as in a suit for the redemption of mortgage. The document of which Exhibit A is a counter-part, and the document Exhibit B are no doubt called *Taragas* or *Royal grants*, but that should make no difference in their construction. What we have to look to is not the form but the substance of the documents. The contention that they are not kanoms but leases is based on the circumstance that the kanom amount is only Rs. 3 and that reference is made to the planting of trees on some vacant sites forming portions of the demised premises. Reliance is placed on two decisions of this Court in support of the above contention, and especially on *Meppatt Kunhamad v. Chathu Nair*(1). That was a case in which the document was described as a kanom deed, but it is also recited in the document that "kanom and kuzhikanom

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right" was granted of the Neetukotta mala (that is hill) and the grounds included therein. The amount of the kanom was only Rs. 5, and the full yearly rent was to be given to the demisor, and the demisee was asked to reclaim the aforesaid forest sites and make improvements thereon. The property demised was evidently forest jungle land, whose measurements even could not be entered in the deed. The learned judges held that the transaction must be regarded in substance as a lease having regard to the small amount of the kanom. Reliance was again placed upon *N. V. Silapani v. V. M. Ashtamurti Nambudri*(1). The Full Bench decision states that for purposes of limitation

"the object for which the tenure was created must be regarded." "In some cases it may be a mere lease, a sum being advanced as security for the rent or for proper cultivation to be repaid on the expiry of the term. In other cases, and most frequently, it is created as a lease *by way of mortgage to secure a loan advanced to the jenmi* (proprietor)."

This is a very old case decided before the Transfer of Property Act came into force. I think the principle to be deduced from the decisions pronounced after the Transfer of Property Act came into force is that a kanom partakes of the nature of a usufructuary mortgage and a lease, and that it is an anomalous mortgage falling under section 98 of the Transfer of Property Act. I do not think it either convenient or even practicable to embark in each case on an enquiry as to whether the amount advanced is so insignificant having regard to the necessities and position of the grantor of the kanom that the transaction should be viewed only as a lease and not as a mortgage. In *Gopalan Nair v. Kunhan Menon*(2), BENSON, J., states that where the document on the face of its recitals purports to evidence a kanom demise, it is an anomalous mortgage within the meaning of section 98 of the Transfer of Property Act "with certain well-known incidents attached to it by the customary law of Malabar." I think that this is the only safe ground on which to determine the character of such a document. If *Meppatt Kunhamad v. Chathu Nair*(3) (the judgment in which is very short) intended to lay down a different proposition, I respectfully dissent therefrom. Holding therefore that Exhibit B,

(1) (1880) I.L.R., 3 Mad., 382 (F.B.). (2) (1907) I.L.R., 30 Mad., 300.
(3) (1904) I.L.R., 27 Mad., 373.

the melcharth relied on by the plaintiff, is a mortgage, it requires for its legal validity to be attested in the manner provided for in section 59 of the Transfer of Property Act. On the finding that it has not been so attested, it is wholly invalid and the plaintiffs have no right to sue for redemption.

It was however contended that the Appeal by the third defendant to the lower Appellate Court ought to have been dismissed for non-joinder of most of the defendants and the Second Appeal to this Court ought also to be dismissed on the same ground. The objection as to non-joinder was not taken in the lower Appellate Court. I agree with the appellant's counsel that under Order I, rule 13, the objection not being taken at the earliest possible opportunity, namely, in the lower Appellate Court, it cannot be allowed to be taken here. Of course, if non-joinder is fatal to the consideration of a suit or appeal, say where a sharer is not joined in a partition suit, the objection will be an attack on the maintainability of the suit itself against some persons only. Also, perhaps under the old Code, whenever there is an imperative provision of law as to the necessity for the joinder of certain parties and such an imperative provision is not complied with, the suit might be liable to be wholly defeated for non-joinder of such necessary parties even though the rights as between the parties on record can be determined. Section 31 of the old Civil Procedure Code provided that no suit shall be defeated by reason of mis-joinder of parties and did not specifically provide for cases of non-joinder. Order I, rule 9, however, states that "no suit shall be defeated by reason of mis-joinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it." Hence, though the (alleged) legal representative of the first defendant and the defendants Nos. 2, 37, 154 and 112 and the plaintiffs have alone been made respondents in this Second Appeal by the third defendant, I think that we are entitled to deal with the rights of the parties before us leaving the decrees of the lower Courts intact so far as possession is decreed to the plaintiffs of the lands in possession of those defendants who are not parties to the Second Appeal, and as regards the amounts made payable to those defendants as a condition to the plaintiffs' obtaining possession from them. On the finding, that the plaintiffs have no right to redeem the third

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defendant, I would modify the decrees of the lower Courts by dismissing the suit so far as the redemption of the properties in possession of the defendants Nos. 3, 37, 154 and 112 is concerned.

As regards the first defendant's alleged legal representative, who is the fourth respondent before us, I would declare that the question whether he is liable under any transaction entered into by his predecessor in the stanom is not determined, nor his rights to question any such transaction affected by his having been made a party to this Second Appeal or by anything which has occurred in this litigation.

The parties to this Second Appeal will bear their respective costs of this Second Appeal. On the question of the nature of a kanom, I shall add the following observations. I have no doubt that in very old times a Malabar Jenmi (who was originally of course a Numbudri Brahman) would consider himself to be insulted if he was considered a borrower who was under a necessity to resort to a creditor and to give security for the loan wanted, simply because he graciously accepted a kanom perquisite from a non-Brahman dependent of his and allowed him to enjoy his land as a kanomdar (the etymology of the word "Kanom" is interesting in this connexion). But it is too late to decide such questions on such ancient history, and I think a kanom ought to be treated by Courts in modern days always as a mortgage of land secured for the amount borrowed, however small it may be.

NAPIER, J. NAPIER, J.—I agree. I wish to add only a few words on the question of the construction of this document. The proposition contended for by Mr. Anantakrishna Ayyar, that the Court should in every case examine the terms of the document and the surrounding circumstances for the purpose of ascertaining whether the transaction is a mortgage or a lease, is certainly attractive. But I agree with my learned brother that it would lead the Court into inquiries which might in many cases be perfectly fruitless and introduce an element of uncertainty as to the effect of these documents. It is most important to my mind that people who are in the habit of executing these documents should be thoroughly assured of the results of the transactions which they enter into, and I cannot imagine anything more dangerous than a feeling that many years after their execution

Courts might be led into an inquiry for the purpose of determining whether the document was a mortgage or a lease. It may be that the decisions of this Court compel us to hold that, where the transaction has reference to the reclaiming of absolutely waste land and the amount of the kanom is very small, we are compelled to hold that the transaction is a lease. I express no final opinion on that point. But I am clear that where such a condition does not exist it is advisable that a rigid and standard rule should be enunciated for the guidance of persons who wish to put their transactions in this form, that such documents are mortgages. With regard to the present case no inference can be drawn from the fact that the document was intentionally not witnessed, because it appears that this style of expression is due not to any doubt as to the necessity of witnessing, but to some absurd pretensions to semi-royal prerogatives which cannot of course be allowed to derogate from the provisions of statutes and should, I think, be now recognized by such persons to be out of date.

I entirely agree with my learned brother in his decision on the other points raised.

K.B.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Odgers.

KALINADHABHOTLA BRAHMAYYA (FIRST DEFENDANT),
APPELLANT,

v.

MARLA APPAYYA SASTRI, MINOR BY GUARDIAN
VENKATARATNAM AND TWO OTHERS (PLAINTIFFS
AND SECOND DEFENDANT), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XXI, rr. 90 and 92, cl. (3)—Application to set aside sale for material irregularity or fraud, dismissed as barred—Sale confirmed prior to application—Suit to set aside sale on same grounds, whether maintainable.

Where a judgment-debtor failed to file an application to set aside the sale under Order XXI, rule 90, Civil Procedure Code, within the time allowed by

* Civil Miscellaneous Appeal No. 65 of 1920.

KANNA
KURUP
v.
SANKARA
VARMA
RAJAH.
—
NAPIER, J.

1920,
October 6.

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SASTRI.

law, and the sale was confirmed, he cannot institute a suit to set aside the sale on the ground of material irregularity or fraud in the publication or conduct of the sale.

Dictum of SADASIVA AYYAR, J., in *Payidanna v. Lakshminarasamma*, (1915) I.L.R., 38 Mad., 1076, dissenting from.

APPEAL against the order of S. NILAKANTAM PANTULU, Subordinate Judge of Kistna at Ellore, in Appeal No. 34 of 1918, preferred against the decree of M. KRISHNAMA ACHARIYAR, District Munsif of Tanuku, in Original Suit No. 533 of 1917.

The material facts are set out in the judgment.

P. Somasundaram for appellant.

ABDUR
RAHIM, J.

ABDUR RAHIM, J.—This suit was instituted in order to have an auction sale held in execution of a decree of the plaintiff's property set aside, on the ground of irregularity and fraud. The sale was held on 20th March 1917. The present plaintiff, the judgment-debtor, applied on 25th April 1917 under Order XXI, rule 90, of the Code of Civil Procedure, to set aside the sale on the very same grounds as are now raised in the plaint. The application was dismissed as it was made after the expiry of the thirty days allowed by law and we may point out that the sale had been confirmed under Order XXI, rule 92 (1), on the day previous to the application. Then the plaintiff filed an appeal and the Appellate Court remanded the application for fresh disposal on the ground that the Court had inherent jurisdiction to set aside the sale even after the expiry of the period of limitation and after the confirmation of the sale.

The present suit was filed on 27th August 1917, i.e., during the pendency of the appeal against the order dismissing the present plaintiff's application under rule 90.

The question arises whether the present suit is maintainable. Order XXI, rule 92 (3) states that

"no suit to set aside an order under this rule shall be brought by any person against whom such order is made."

Rule 90 provides for the question being decided by the Court upon an application made to it for setting aside the sale if the sale is vitiated by material irregularity or by fraud in publishing or conducting it. In this case these are the very grounds for impeaching the sale and the legislature has specially laid down that a sale cannot be impeached when once it has been confirmed on such grounds except in accordance

with the procedure provided by Order XXI, rule 90, and that no suit shall lie after the sale has been confirmed.

The lower Appellate Court held that the suit was maintainable solely relying on some general observations of Mr. Justice SADASIVA AYYAR in the case *Payidanna v. Lakshminarasamma* (1). These observations, whatever might have been their application to the facts of the case before the learned Judge, have no application to the present case, inasmuch as the plaintiff had a clear remedy under section 90 and failed to avail himself of it during the time allowed by law, so that the sale became absolute under section 92. The policy of the legislature is quite obvious that all questions of this character should be decided by the executing Court and not by a separate suit.

The judgment of the Subordinate Judge should be set aside and that of the District Munsif restored with costs here and in the Court below.

ORDERS, J.—I agree. It is quite clear to my mind that the lower Appellate Court is wrong in holding that a suit lies in the present case. The matter is clearly concluded by the words of Order XXI, rule 92 (3). The lower Appellate Court, however, has considered itself bound by certain observations of SADASIVA AYYAR, J., in *Payidanna v. Lakshminarasamma* (1). Not only do I think those observations have no application to the present case, as erroneously stated by the lower Appellate Court, but, with respect to the learned Judge, I find myself quite unable to agree with him when he says that in a case under Order XXI, rule 90.

"the Court without setting aside the sale can give an injunction to the Court auction-purchaser to reconvey the property to the judgment-debtor."

If the learned Judge meant that relief can be afforded in execution to the judgment-debtor outside the provisions of the Code of Civil Procedure, I am unable, with respect, to follow him. The learned Judge also observes that

"the hands of Courts of justice are not tied in these matters simply because, to support the grant of a particular appropriate relief, no exact precedent could be quoted."

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—
ORDER, J.

By that I assume the learned Judge to mean that reliefs can be granted in certain cases, although such reliefs may not be afforded by any provision of law, or by the practice of the Courts. If that be the meaning of the learned Judge, I, respectfully but emphatically, dissent from it.

I agree with my learned brother as to the order to be made in this case.

K.R.

APPELLATE CIVIL

*Before Mr. Justice Sadasiva Ayyar and Mr. Justice
Coults Trotter.*

1920,
November 17.

THE MUNICIPAL COUNCIL OF TANJORE
(PLAINTIFF), PETITIONER,

v.

KRISHNA PILLAI (DEFENDANT) RESPONDENT.*

Madras District Municipalities Act (IV of 1884)—ss. 72 and 73 (2) Theatre unfit for use and unused owing to removal of part of roofing—Exemption from tax.

A building cannot be held to be 'completely demolished or destroyed' within section 73(2) of the Madras District Municipalities Act (IV of 1884) so as to completely exempt it from liability to tax, simply because part of its roof is removed for the purpose of effecting repairs and the building is thus rendered unfit for use. As a building actually unused, it is liable for half the usual tax under section 72 of the Act.

PETITION under section 25 of Act IX of 1887, praying the High Court to revise the decree of S. RANGANATHA MUDALIYAR, Subordinate Judge of Tanjore, in Small Cause Suit No. 201 of 1918.

A building which was once used as a theatre was partly covered by zinc sheets and partly by a thatched roof. For effecting repairs, the thatched roof was removed and the building thus became unfit for use and was not used as a theatre or for any other purpose for the two years 1915-16 and 1916-17. The Municipality of Tanjore, within which the theatre was situated, brought this suit against the owner of the theatre for Rs. 223-5-4, being the full amount of tax payable for the two years. The Court of Small Causes dismissed the suit holding

that the defendant was exempt from liability to pay any portion of the tax under section 73 (2) of the Madras District Municipalities Act. The plaintiff, the Municipality, preferred this Revision Petition.

T. Ethiraja Mudaliyar for the petitioner.

V. K. Venkatarama Ayyar for the respondent.

The Court delivered the following JUDGMENT:

This is a petition asking this Court to revise the judgment of the Subordinate Judge of Tanjore in a suit between the Municipal Council of that town and the defendant.

The short point is whether the defendant who owned a building in Tanjore which was used as a theatre, is liable for taxation during the period in which the building was regarded as unfit for use. The zinc roofing has not been removed but the thatched portion of the roofing has been removed. There was no covering but the whole frame was standing. It may be assumed for the purpose of argument that while the roof was off and until a new one could be put on, the building would not be available for use as a theatre.

Now, it appears to be conceded that the defendant is liable for half tax at most, and not for the full tax, because the building was in any event unoccupied during the period. He contends that he is liable for no taxation at all, because he comes within the protection of section 73 (2) of the District Municipalities Act (IV of 1884). There are two sub-sections to section 73. The first was relied upon in the Court below, but the argument on that is not pressed here. It is clear that the sub-section relates to the case either of a new house being built where there was one before, or of a new house being built on a vacant site, or of a house being enlarged, in each case the duty being thrown upon the holder of the building to give notice to the Municipality so that it may assess the tax leviable in the first two cases, or enhance the assessment in the third case.

But the defendant says that he relies on sub-section (2). It begins thus:

"When any building is completely demolished or destroyed, the owner thereof may give notice to the chairman of such demolition or destruction,"

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* Civil Revision Petition No. 488 of 1919.

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and concludes

"If the said notice is given within the first two months of a half year, no tax shall thereafter be levied in respect of the building and any tax which may have been levied for that half year shall be refunded."

The argument is that by taking off the roof of this building and thereby rendering it incapable of use as a theatre, it was within the meaning of the section "a building destroyed." We are quite unable to accede to that argument, because an owner might render, by a very slight removal of some ordinary feature necessary for the purpose, the building incapable of use for the purpose for which it was intended without doing anything which could possibly be described as destruction or demolition. We think that what the section refers to is physical destruction of the building so that it is no longer a building but merely a heap of building materials. It is not necessary that no stone should be left standing on another, but that, in the ordinary and usual acceptance of such language, it should cease to exist as a building and not merely as a building designed for particular purposes. We think that the learned Judge was wrong in accepting the artificial construction of the wording of the section which he did accept and that the defendant is clearly liable during the period in question for half the tax.

An argument was at one time raised as to whether the proper course was not to make the defendant pay the whole tax in the first instance and get it back under section 72. Mr. Ethiraja Mudaliyar, on behalf of the Tanjore Municipality, very wisely does not press for that, and he is content that the judgment should be against the defendant for the net-amount of tax, namely, half the tax for which he is prima facie liable. The decree will be for Rs. 111-10-8 and the defendant will pay the costs.

N. R.

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Ayling, Mr. Justice Coutts Trotter and
Mr. Justice Kumaraswami Sastriyar.*

RUSTOMJI DORABJI (PLAINTIFF), APPELLANT,

v.

W. H. NURSE AND PARTHASARATHI NAIDU
(EXECUTORS UNDER THE WILL OF DECEASED FIRST DEFENDANT),
RESPONDENTS.*

1920,
Decem-
ber 6
and 20.

Civil Procedure Code (V of 1908), O. XXII, r. 1—Probate and Administration Act (V of 1841), sec. 89—"Personal injuries not causing the death of the party," meaning of—Suit for malicious prosecution Death of defendant more than a year after prosecution—Whether right to sue survives.

Where, in a suit for malicious prosecution, the defendant dies more than a year after the prosecution in question and before judgment is given in the suit, the right to sue does not survive within the meaning of Order XXII, rule 1, of the Code of Civil Procedure.

The expression "personal injuries not causing the death of the party" in section 89 of the Probate and Administration Act, does not mean injuries to the body merely, but all injuries which do not necessarily cause damage to the estate of the person wronged.

Punjab Singh v. Ramautar Singh (1919) 4 Patna L.J., 676, followed; *Krishna Behari Sen v. The Corporation of Calcutta* (1904) I.L.R., 31 Cal., 993, dis-
sented from.

The Legal Representatives' Suits Act (XII of 1935) makes no provision for the continuation of suits already begun by the wronged against the wrong-
doer in the event of the death of either party.

Haridas Ramdas v. Ramdas Mithuradas (1889) I.L.R., 13 Bom., 667, and
Ramchoda Doss v. Rukmany Bhoj (1905) I.L.R., 23 Mad., 487, followed.

ON APPEAL from the order of the Hon'ble Mr. Justice PHILLIPS, sitting on the Original Side of the High Court of Judicature at Madras, in Civil Suit No. 527 of 1919.

The plaintiff filed a suit for malicious prosecution against (1) Rajah Venugopal Bahadur and (2) W. H. Nurse. The second defendant as the agent of the first defendant filed on 15th January 1919 a criminal complaint against the plaintiff in the Presidency Magistrate's Court, Egmore, under section 471, I.P.C. The Magistrate added some more charges and committed plaintiff to the Sessions where he was unanimously

* Original Side Appeal No. 74 of 1920.

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acquitted on 17th April 1919. The plaintiff then filed a suit for malicious prosecution against both the defendants and issues were settled. The first defendant died on 25th June 1920 leaving a will under which he appointed the present Respondents as his executors. The plaintiff applied to bring on record these two executors but PHILLIPS, J., held that the suit against the first defendant had abated and dismissed the suit. Plaintiff appealed against this order and the Appeal was first heard by WALLIS, C.J., and SADASIVA AYYAR, J., who made the following

ORDER OF REFERENCE.

WALLIS, C.J.—The question in this appeal is whether, as held by PHILLIPS, J., the suit for malicious prosecution instituted against the deceased first defendant, the late Rajah Venugopal, abated on his death, as it must be held to have done under Order XXII, rule 1, unless “the right to sue” survived. In England the right to sue admittedly does not survive by virtue of the rule embodied in the maxim *actio personalis moritur cum persona*. That rule, which is of post classical origin and is referred to in Pollock on Torts as barbarous, is far from embodying the principles of justice, equity and good conscience in so far as it deprives an injured party of redress if the alleged wrong doer happens to die, as in the present case, before a decree has been obtained against him. It has not been applied to contracts, and has been limited by statute as regards torts affecting property. The Indian Legislature by Act XII of 1855 attempted to remedy this injustice and did so at any rate to this extent that it made the estate of the deceased wrong doer liable in the hands of his legal representative for all wrongs committed by him within one year of his death. This enactment has been held in *Haridas Ramdas v. Ramdas Mathuradas*(1) and *Ramchode Doss v. Rukmany Bhoy*(2), not to abolish the rule altogether with regard to the death of the alleged wrong doer in respect of the wrongs dealt with in the section so as to make the injured party’s right to sue survive and so bring the case within the operation of Order XXII, rule 1, but as leaving the maxim to extinguish the original right to sue and giving the injured party a fresh right to sue against the representatives of the deceased. These rulings appear to have

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the undesirable result that an injured party who sues the wrong doer during his life time has all his costs thrown away if the wrong doer dies before judgment and has to file a fresh suit against the executors. In *Krishna Behari Sen v. The Corporation of Calcutta*(1), HENDERSON, J., whose decision was reversed on appeal, says that it was admitted at the Bar that this Act was inapplicable where the wrong doer had himself been sued and had died before judgment. There is nothing in the language of the Act to support this view, and it would have the strange result of putting an injured person who sued the wrong doer during his lifetime in a worse position than if he sued after the wrong doer’s death. I cannot help thinking that in the decisions to which I have referred too narrow a construction was placed on the language of the section which is now Order XXII, rule 1. In 1879 the words “right to sue” were substituted for “cause of action” in this section with the object it seems to me of getting rid of mere technicalities as to the precise identity of the causes of action and substituting the common sense test, can the representatives sue and be sued on the same facts. If so, it would be an abuse of processual law to drive the parties to a fresh suit. The defendant in this case appears to have died more than a year after the prosecution alleged to have been malicious, and the appellants have relied mainly on the provisions of section 89 of the Probate and Administration Act, 1881, which was first enacted as section 268 of the Indian Succession Act, 1865. These Acts have not repealed the provisions of Act XII of 1855, and the two enactments have to be read together and to be construed so far as possible as to be consistent with one another. Section 89 so far departs from the maxim *actio personalis moritur cum persona* as to provide that the general rule applicable to contracts as well as torts should be that the cause of action should not die but should survive to and against the executors or administrators of the deceased, except in the case of the particular torts specified in the section which is in the following terms:

“All demands whatsoever, and all rights to prosecute or defend any suit or other proceeding, existing in favour of, or against a person at the time of his decease, survive to and against his

(1) (1889) I.L.R., 13 Bom., 677.

(2) (1905) I.L.R., 28 Mad., 487.

(1) (1904) I.L.R., 31 Cal., 993.

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executors or administrators, except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party, and except also cases where after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory."

In construing this section it must be borne in mind that it affects the reasonable as well as the unreasonable operation of the maxim, viz., the rule that actions for personal injuries to a deceased person cannot be instituted or proceeded with after his death, as well as the unreasonable part of the rule which prevents the injured party from recovering any damages for the wrong done to him after the death of the wrong doer which was remedied, though incompletely by Act XII of 1855, as already mentioned.

Here the question is, is malicious prosecution included in the words "causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party"? I cannot say that the framers of the section have expressed themselves very happily, and I am not surprised that these words should have given rise to a conflict of decisions. If we endeavour in the first instance to construe the words in their natural meaning, it may be said that the mention of assault as defined in the Indian Penal Code, which is the lightest of the offences against the human body dealt with in Chapter XVI of that Code, followed as it is by the words "or other personal injuries not causing the death of the party," goes to show that it was only intended to except defamation, assault and other injuries to the human body not causing death, and I was for sometime inclined to take this view which was adopted in *Krishna Behari Sen v. The Corporation of Calcutta*(1). But what we have to do is, if possible, to find out what the legislature was aiming at, and one difficulty of this view is that there appears to be no good reason why the executors should be prevented from suing for the defamation of the deceased but allowed to sue for his malicious prosecution. Some light is thrown, I think, on the language of the section by a reference to 3 Blackstone's commentaries, page 119, where he makes a general distribution of injuries into "such as

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affect the rights of persons and such as affect property." He then goes on to classify "injuries which affect the personal security of individuals" into injuries "against their lives, their limbs, their bodies, their health, or their reputation," the last class including both defamation and malicious prosecution. Injuries affecting the life of man he passes by as not falling under his present contemplation, no doubt because until the passing of Lord Campbell's Act they did not give any cause of action to any one. That Act which is re-enacted in India as Act XIII of 1855 gives a fresh cause of action to the widow and near relations, but that is not a cause of action which can be said to survive from the deceased who never had it, and this accounts for the omission of injuries causing death from the present section. Blackstone next deals with injuries affecting the limbs or bodies of individuals, distinguishing between threats, assault and battery in a passage which may possibly have suggested the expediency of referring in the section under consideration to assault as defined in the Indian Penal Code. I do not think the classification of injuries in the Limitation Act of 1871, and the subsequent Acts, throw any light on the language of a section which was first enacted in 1865. In the Limitation Act of 1859, section 2, the words are "suits for damages for injury to the person and personal property, or to the reputation."

If the language of the exception had been "assault as defined in the Indian Penal Code, defamation and other personal injuries not causing the death of the party" it would have created no difficulty, as malicious prosecution equally with defamation and assault is a personal injury according to Blackstone's classification. The fact that, for whatever reason, the offences are mentioned in a different order is not, I am inclined to think on a consideration of the whole question, a sufficient reason for giving them a different construction and as at present advised, I am inclined to agree with the decision in *Marwadi Mothiram v. Samnaji*(1) and *Punjab Singh v. Ramaular Singh*(2) rather than with *Krishna Behari Sen v. The Corporation of Calcutta*(3), that malicious prosecution must be held to be

(1) (1916) 31 M.L.J., 772.

(2) (1919) 4 Patna L.J., 676.

(3) (1904) I.L.R., 31 Calc., 993.

(1) (1904) I.L.R., 31 Calc., 993.

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one of the wrongs excepted by the section. As regards the effect of the death of the injured party, this interpretation is in accordance with the provisions of the first part of section 1 of Act XII of 1855 which entitles the representatives of a deceased person to sue for any wrong committed within a year of his death "which has occasioned pecuniary loss to his estate," which appears to include Blackstone's category of injuries to property which are clearly not within the operation of the exception in sections 268 and 89. It also resembles the limitation put upon the maxim by statute in England with regard to injuries to chattels and to real property.

As regards the second part of section 1 of Act XII of 1855 dealing with the death of the alleged wrong doer, there is no doubt a variance if this construction of section 89 is the right one. Section 89, however, lays down a general rule applicable to all contracts and to all torts excepting those specified, whereas the second part of section 1, Act XII of 1855, applies only to a particular class of torts, viz., those committed within a year of the death of the alleged wrong doer. Applying the ordinary rules of construction, I think the legislature cannot have intended by this subsequent enactment to modify in any way the beneficial provisions of this part of Act XII, which were designed to correct to a limited extent the unfairness of the rule embodied in the maxim *actio personalis moritur cum persona*, or to introduce a different rule as to executors or administrators from that still prescribed by Act XII of 1855 as regards other legal representatives. When however Act XII of 1855 does not apply, all we have to see is whether the right to sue survives under section 89.

In these circumstances, in view of the conflict of decisions, and of the fact that my learned brother is disposed to follow the decision in *Krishna Behari Sen v. The Corporation of Calcutta*(1), it is desirable to make a reference to a Full Bench both for the decision of the present case and for the purpose of ascertaining the present state of the law with a view to its amendment, if necessary, so as to put it on a satisfactory footing. I would accordingly refer the following question: "If the

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defendant in a suit for malicious prosecution dies more than a year after the prosecution in question and before judgment is given in the suit does the right to sue survive within the meaning of Order XXII, rule I, so as to prevent the abatement of the suit?"

SADASIVA AYYAR, J.—I am inclined to hold that the personal injuries referred to in section 89 of the Probate and Administration Act mean "physical," "corporal" or "bodily" injuries, injuries to the "person" as opposed to injuries to property or reputation, having regard to the context which mentions "assault" immediately before, and "not causing death" immediately afterwards. I think that the previous history of the Indian Legislation relating to this question is in favour of this construction. Act XII of 1855 is entitled "An Act to enable Executors, Administrators or Representatives to sue and be sued for certain wrongs."

The preamble is:

"Whereas it is expedient to enable executors, administrators or representatives in certain cases to sue and be sued in respect of certain wrongs which, according to the present law, do not survive to or against such executors, administrators or representatives."

As under the then existing law (evidently following the English precedents), the right to sue and the liability to be sued, as the case may be, did not survive on the death of the wronged person and the person who committed the wrong respectively to or against the executors, administrators or representatives, Act XII of 1855 was enacted, in order to make the right to sue survive and so to enable suits to be brought. The Act contained only two sections. The first paragraph of the first section allowed an action to be maintained by the executors, etc., for the wrong committed to a deceased person within a year before his death, the action to be brought within one year after the death of such person. The second paragraph of section 1 allowed an action to be maintained against the wrong-doer's executors, etc., if the wrong was committed within one year before his death and if the suit was brought within two years after the committing of the wrong. Section 2 is in my opinion very important as it says:

"No action commenced under the provisions of this Act shall abate by reason of the death of either party."

(1) (1904) I.L.R., 31 Cal., 993.

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Thus, even actions commenced against the executors, etc., could not abate. The Act no doubt does not expressly say that an action commenced by the wronged person against the wrong doer himself shall not abate on the death of either party. But having regard to the policy underlying section 2 and the implication of the preamble, I find it difficult to escape from the conclusion that an action commenced against the wrong doer himself during his lifetime by the wronged party could not be intended by the legislature to finally abate by the death of the wrong-doer, or wronged party, when the right to sue clearly *survived* to the executors, administrators or representatives and the liability to be sued survived against the executors, administrators and representatives. It is impossible to hold that the suit brought by the wronged person against the wrong-doer during their lifetime could finally abate by the death of either when the wronged person's right to sue survived to his executors, administrators and representatives. If it survived to enable the executors to bring a suit of their own, it clearly survived to enable them to revive the suit brought by the deceased wronged man. According to the old procedure (following the English procedure), every suit probably abated at once *in all cases* by the death of the plaintiff or the defendant and had to be revived by application; or a fresh suit might be brought on the same cause of action if the right survived in executors, etc. (I know of no definite codes for Procedure and Limitation before Acts VIII and XIV of 1859, though there were one or two local Limitation Regulations in force in Bengal and Bombay dealing with a few special cases). Act XII of 1855 clearly implied that suits instituted during the lifetime of the person having the right to sue, and of the person liable to be sued, could not abate so as to be incapable of revivor against the defendant's executors, etc., at the instance of the plaintiff (where the defendant died *pendente lite*) or at the instance of the plaintiff's executors, etc. (where the plaintiff died *pendente lite*). Even if an application for revivor was not made, a fresh suit could be brought on the same cause of action if the right to sue was not finally extinguished. A final abatement took place under the old law only in cases where the right to sue and the liability to be sued did not survive according to substantive law. But the preamble of Act XII of 1855 indicates that the law as to such

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right and liability becoming extinguished once for all was intended to be abrogated by the Act. If the law as to non-survival of the right is superseded by the substantive provisions of the Act, the processual law, which caused the final abatement of a suit by reason of the non-survival of the right under the law existing when Act XII of 1855 was enacted, was altered *ipso facto* and the suits which before Act XII of 1855 were treated as having finally abated could not so abate by the death of either party thereafter, and could therefore be revived. When Procedure Codes were enacted providing that death alone shall not cause a suit to abate until the time for an application to bring in legal representatives expired, it followed that the application could not be dismissed on the ground of non-survival of the right to sue.

As regards the provisions as to limitation enacted in sections 1 and 2 of Act XII of 1855, it is well known that the provisions as to procedure and limitation were mixed up in many of the earlier enactments. The provisions as to limitation of the suits to be brought under Act XII of 1855 were repealed by the Indian Limitation Act IX of 1871, which Act and the subsequent Acts of themselves enacted provisions (see articles 22 to 29 of the present Limitation Act) fixing periods of limitation in respect of those suits. (The later Civil Procedure Code and Limitation Acts were usually enacted and amended in the same years, provisions as to limitation being more and more confined to the limitation enactments.)

Along with Act XII of 1855, Act XIII of 1855 was enacted giving a right of suit to the executor, administrator or representative of a deceased person whose death was caused by a wrong, the right to be exercised for the benefit of the wife, husband, parent and child (if any), of the deceased person and the suit to be for recovery of compensation for damages caused by the death. Then ten years afterwards, the Indian Succession Act was enacted. Section 268 of that Act is as follows:—

"All demands whatsoever and all rights to prosecute or defend any action or special proceeding, existing in favour of or against a person at the time of his death, survive to and against his executors or administrators; except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after

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the death of the party, the relief sought could not be enjoyed or granting it would be nugatory.

Illustrations.

"(a) A collision takes place on a railway in consequence of some neglect or default of the officials and a passenger is severely hurt, but not so as to cause death. He afterwards dies without having brought any action. The cause of action does not survive.

"(b) A sues for divorce. A dies. The cause of action does not survive to his representative."

It will be seen that while Act XII of 1855 mentioned executors, administrators or representatives, section 268 of the Indian Succession Act mentions only executors or administrators. Again, while Act XII of 1855 enacted the survival of the right to sue for all kinds of tort, section 268 of the Indian Succession Act excluded causes of action for (1) defamation, (2) assault as defined in the Indian Penal Code, (3) other personal injuries not causing the death of the party, and (4) cases where the relief sought could not be enjoyed or granting it would be nugatory (as in the case of divorce). Illustration (a) also indicates, in my opinion, that the legislature thought that other personal injuries not causing the death of the party meant corporal or physical injuries. So far as (1) defamation and (2) assault are concerned, no illustration was deemed necessary. As the other two kinds of tort mentioned in section 268, viz. (3) personal injuries not causing the death of the party, and (4) cases where relief sought could not be enjoyed, etc., contained words of general import, the legislature gave two illustrations in respect of those two classes. If the clause (3) "other personal injuries not causing death" included all other cases of tort not causing death (including adultery, seduction, etc.,) the fourth clause, of cases where after the death of the party the relief sought could not be enjoyed or granting it would be nugatory, would also be clearly included in the third clause. Why then were these cases specially provided for in a fourth clause after the third clause relating to personal injuries not causing death? This seems also a cogent argument, in my opinion, to show that personal injuries not causing death were not intended to include everything which may be technically called "personal wrongs" by Blackstone or other English authorities, but injuries to the body not causing death other than the bodily injury of assault defined

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in the Indian Penal Code. That the phrase "personal injuries," though it may be used occasionally by lawyers to include all kinds of torts other than torts to property, is usually employed to mean bodily injuries is shown by the interpretation put on it by the three learned Judges who decided *Krishna Behari Sen v. The Corporation of Calcutta* (1). Again, in Collett on Torts, paragraph 394, the phrase "personal injuries" is used in the sense of bodily injuries as distinguished from injuries like slander of title and libel and slander dealt with in previous paragraphs. Again, articles 19 to 21 of the Limitation Act deal with suits for compensation for wrongful imprisonment and suits under the Act of 1855. Then article 22 deals with compensation for "any other injury to the person." Then article 24 deals with libel, 25 with slander, and 26 to 29 with other torts not causing injury to the body. This also shows that "injury to the person" or personal injury is usually used even in legal enactments to mean bodily or corporal injury.

Section 268 of the Indian Succession Act also shows that a suit brought during the lifetime of the wrong-doer or the wronged person does not abate by the death of either party (except the wrongs specially excepted) as it talks of "rights to prosecute" which include rights to continue suits already brought. Thus so far as "executors" and "administrators" are concerned, the suit brought by the deceased was intended to finally abate in the excepted cases of tort and a limitation was thus imposed on the extended right conferred in all cases of tort by Act XII of 1855 so far as executors and administrators are concerned.

Section 89 of the Probate and Administration Act merely reproduced the words of section 268 of the Indian Succession Act with one omission. The Legislature thought that illustration (b) to section 268 of the Indian Succession Act was not necessary and omitted it in section 89 of the Probate and Administration Act. In construing the provisions of section 268 of the Indian Succession Act and section 89 of the Probate and Administration Act, we have to remember that they intended to limit the right given by Act XII of 1855 which abrogated (subject to limitations of time) a barbarous legal

(1) (1904) I.L.R., 31 Cal., 993.

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maxim, and hence the language of the provisions in the later Acts should be construed strictly and not liberally. Thus, having regard to the history of the legislation, I am inclined to think that as the right to sue was intended by the legislature in 1855 to survive in cases like the present, there can be no final abatement of a suit already commenced after Act XII of 1855 was enacted, and no abatement after the enactment of the Civil Procedure Code except under the provisions contained in the Civil Procedure Code and the Limitation Act (see articles 176 and 177), that is, till an application to bring in legal representative on the record becomes barred and the delay is not excused. The Full Bench Case of *Krishna Behari Sen v. The Corporation of Calcutta*(1) fully supports my view, though it does not deal with the provisions of Act XII of 1855. It is to my mind difficult to hold that the legislature when enacting Act XII of 1855 intended that an action already commenced during the lifetime of both the parties should abate by the right to sue or the liability to be sued not surviving, and that only a new statutory right should be created in favour of or against executors and administrators and representatives. The preamble expresses that the rule of law then in force, namely, that the right to sue and the liability to be sued for certain wrongs do not survive, was intended to be abrogated by the Act. I, therefore, am disposed to dissent from the decision in *Ramchode Doss v. Rukmany Bhoj*(2). The question of abatement depends now on the Civil Procedure Code. Order XXII, rule 1, says generally that where the right to sue survives, the suit does not abate. Act XII of 1855 says that the right to sue does survive to the executors, administrators and representatives. The Civil Procedure Code itself does not enact anything against the provisions of Act XII of 1855. I, therefore, am unable to follow the argument that because Act XII of 1855 does not directly deal with a suit brought during the lifetime of the wronged person or of the wrong-doer, the right to sue does not survive in the case of such a suit. The anomaly pointed out by my Lord in his judgment is, in my opinion, a sufficient answer to that reasoning. As regards *Marwadi Mothiram v. Samnaji*(3), the observations

(1) (1904) I.L.R., 31 Cal., 998.

(2) (1905) I.L.R., 23 Mad., 487.

(3) (1916) 31 M.L.J., 772.

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are obiter, as the learned Judges relied in the first place on another ground of decision, namely, that section 89 of the Probate and Administration Act had no direct application to the facts of that case. In the next place, the learned Judges admit that the language used in section 89 would be rather strange if their interpretation is adopted, namely, that injuries caused by malicious prosecution are included in the words "other personal injuries not causing death"; (thirdly) Act XII of 1855 is not referred to in the judgment and the limitation made so far as the rights of executors and administrators are concerned by the Indian Succession Act on the provisions of Act XII of 1855 and the advisability of construing the language of such limitation strictly.

If I may say so with respect, the decisions which are contrary to the view in *Krishna Behari Sen v. The Corporation of Calcutta*(1) seem to have been influenced mainly by the idea that the maxim *actio personalis moritur cum persona* is such a sacred one that we should try even to give unusual meanings to expressions in statutes [see *Marwadi Mothiram v. Samnaji*(2)] so that the sacredness of that maxim may be affected as little as possible. But as pointed out in the judgment of my Lord, the maxim has been always considered as an unfair and even barbarous maxim, especially when applied to a case where the injured party is denied redress because the wrong-doer died. I may add that it seems to me to be based upon no principle of justice, equity or good conscience, and that the technical common law rules as to forms of action and the distinction between real and personal actions might have had much to do with its survival in modern days, notwithstanding that many statutory exceptions have been grafted on it even in England.

On general principles, I am of opinion, that no final abatement should take place whether the plaintiff or the defendant dies whenever the suit involves a claim by the plaintiff for actual pecuniary damages, or whenever costs have been incurred by the plaintiff before the death of either party. After the plaintiff's death, damages by way of solace to the plaintiff's feelings should not, on principle, be granted to his representatives

(1) (1904) I.L.R., 31 Cal., 998.

(2) (1916) 31 M.L.J., 772.

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(it is doubtful on principle, whether it could be given to himself). As regards what are called vindictive or penal damages, they ought not on principle to be granted against the defendant's representatives and their grant even against the defendant seems clearly opposed to principle. The grant of vindictive and penal damages is based on the unsound view that an action for damages for tort is a quasi criminal proceeding. If the plaintiff in this case has claimed such vindictive and penal damages apart from claiming actual pecuniary loss, and if he presses such claim against the legal representatives also, I hope that he will get very little sympathy from the Court so far as such additional amounts are claimed. But, all this has not much bearing on the abstract question of the survival of the right to sue when actual pecuniary damages have been incurred and claimed by the plaintiff in the suit or costs have been incurred by him before his death or the death of the defendant.

However, I think the questions involved are difficult enough to require further arguments at the Bar and further consideration by a Full Bench, especially as several Judges of this Court have expressed a different view. I, therefore, agree that the questions arising in this case may be so referred to a Full Bench and I agree to such reference being made in the words formulated by my Lord.

ON THIS REFERENCE—

M. H. Hakim for the appellant.—The suit having been filed within one year from the date of the prosecution does not abate: see Act XII of 1855. This Act applies to all torts: vide Preamble. Section 89, Probate and Administration Act, does not except suits for malicious prosecution. "Other personal injuries" mean injuries to the body: see *Krishna Behari Sen v. The Corporation of Calcutta*(1), a decision of three Judges.

V. V. Srinivasa Ayyangar and *V. Raghunath Sastri* for respondents.—Act XII of 1855 does not apply. It makes no provision for the continuation of suits by representatives: see *Ramchode Doss v. Rukmany Bhoj*(2) and *Haridas Ramdas v. Ramdas*

(1) (1904) I.L.R., 31 Cal., 993. (2) (1905) I.L.R., 28 Mad., 497.

Mathuradas(1). Section 89, Probate and Administration Act, provides that such suits abate. "Other personal injuries" include all torts: see *Punjab Singh v. Ramautar Singh*(2), *Marwadi Mothiram v. Samnaji*(3), *Gadiji Mareppa v. Firm of Marwadi Vannajee Vajanjee*(4).

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COURTS TROTTER, J.—The judgment I am about to pronounce is that of myself and my brother AYLING. The sole question we have to decide is what is the true construction of section 89 of the Probate and Administration Act of 1881. Mr. Hakim at one time tried to argue that Act XII of 1855 must be deemed not only to give a fresh cause of action for and against representatives of those who had committed or suffered civil wrongs, but also by necessary implication to have prohibited the abatement of suits commenced by the wronged against the wrong-doer during the lifetime of both by reason of the death of either party. It may have been an omission of the legislature, but a close scrutiny of the text makes it reasonably clear that no provision was made in that enactment for the case of a suit already pending when one of the parties dies. We are thus left to the construction of section 89 of the Act of 1881 which runs as follows:

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"All demands whatsoever, and all rights to prosecute or defend any suit or any other proceeding, existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators, except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party, and except also cases where, after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory."

There are two possible constructions, and each has commended itself to an Indian Bench. The Calcutta High Court has held that the words "personal injuries not causing the death of the party" should be taken to mean "bodily injuries of a higher degree than assault." The Bombay Court, and more than one Judge of this Court, has interpreted "personal injuries" as meaning "wrongs to the person which do not necessarily cause damage to the estate of the person wronged."

(1) (1889) I.L.R., 13 Bom., 677. (2) (1919) 4 Patna L.J., 676.
(3) (1916) 31 M.L.J., 772. (4) (1917) 33 I.C., 823.

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In that case, the section would practically reproduce the maxim of the English common law—*actio personalis moritur cum persona*—with its statutory modifications.

With great reluctance, we feel compelled to accede to the latter view. The principle that is involved in the maxim is one that obviously works great injustice and its adoption into the common law has been regretted by eminent English Judges. The draftsman of the statute of 1831 could easily have drafted a section which abolished the rule and all its consequences, and preserved causes of action in tort notwithstanding the death of either the wronged or the wrong-doer. That he certainly did not do, for in express terms he excludes from preservation causes of action for assault or defamation. If it was not intended to abolish the maxim, how much of it was intended to be preserved? On the appellant's construction, there was intended to be preserved a wholly arbitrary selection of the possible cases, guided by no logical principle whatever. It is impossible to see why defamation should be in the one category and malicious prosecution and false imprisonment in the other.

We are therefore driven to the conclusion that the Act must be supposed to have envisaged a logically coherent class of causes of action, and that result can only be achieved by construing "personal injuries" as meaning not "injuries to the body" merely, but injuries to the person in Blackstone's sense, other than those which either cause death or tangibly affect the estate of the deceased injured person or cause an accretion to the estate of the deceased wrong doer. In effect, we think that the words which we have to construe are *ejusdem generis* not merely with the last preceding word "assault," but with the two preceding words "defamation" and "assault." SADASIVA AYYAR, J., who has taken the opposite view, thinks that the Judges who felt constrained to differ from the conclusion of the Calcutta High Court were influenced by a superstitious veneration of the English common law rule. We venture to suggest that the more proper object of his criticism would be the draftsman of the Act of 1831, who with a clear field before him, not only abstained from boldly abolishing the rule of the English common law, which SADASIVA AYYAR, J., justly characterises as "barbarous," but reproduced it in language so ambiguous that while it was certain that he had

retained it in part, it was uncertain whether he had retained it as a whole. If we could see any logical line of demarcation between what is suggested to have been retained and what was rejected, we would gladly accept the view that only part was retained; but we are unable to do so.

In the result, we hold that the suit abates as against the first defendant.

KUMARASWAMI SASTRI, J.—The question referred to us for decision is "If the defendant in a suit for malicious prosecution dies more than a year after the prosecution in question and before judgment is given in the suit does the right to sue survive, within the meaning of Order XXII, rule 1, so as to prevent the abatement of the suit?"

The maxim "*actio personalis moritur cum persona*" is with certain limitations as old as the English Law, and the maxim has been inflexibly applied to actions essentially based on tort. The rule of common law is that you could not sue executors for a wrong committed by the testator for which you could only recover unliquidated and other damages. In *Phillips v. Homfray*(1), Lord BOWEN who delivered the judgment of Lord Justice CORRON and himself deals fully with the application of the maxim and its limitations. He observes (at page 454):

"The only case in which, apart from the question of breach of contract express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appears to be those in which property or the proceeds or value of property belonging to another have been appropriated by a deceased person and added to his own estate or moneys."

In such cases, whatever the form of action, it is in substance brought to recover property or its proceeds or value and the amendment could be made to suit in form as well as in substance. In such cases the action arising out of a wrongful act does not die with the person. The property or the proceeds or value which, in the lifetime of the wrong doer, could have been recovered from him can be traced after his death to his assets and recaptured by the rightful owner then. But it is not every wrongful act by which the wrong-doer indirectly benefits that falls under this

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head if the benefit does not consist in the acquisition of property or its proceeds or value. When there is nothing amongst the assets of the deceased that in law or equity belongs to the plaintiff and the damages which have been done to him are unliquidated and uncertain, the executors of a wrong doer cannot be sued merely because it was worth the wrong doer's while to commit the act which is complained of and an indirect benefit may have been reaped thereby. After giving two illustrations of the distinction he observes :

"This line of demarcation has drawn itself in conformity with the classifications of forms of action known to English Law. As long as the maxim *actio personalis moritur cum persona* is preserved by the law of this country, the line drawn is neither inconvenient nor unreasonable. If every wrongful act that was attended consequentially and indirectly with advantage to the wrong doer or his pocket were to warrant an action against executors it would be impossible to know whether executors were liable or not and the maxim would in fact become a source of litigation. We have not now to consider the policy of the maxim. It is part of the law and while it is so ought not to be fritted away."

As regards actions brought by personal representatives the law was considerably altered by 4 Ed. III, Ch. 7. The Statute provides that executors shall have an action against trespassers in respect of goods and chattels of their testators carried away during their life, and recover damages in like manner as their testators if they were alive. As observed by BRAMWELL, J., in *Twycross v. Grant*(1) the Act has been construed as extending to all torts except those relating to free holds and those where the injury done is of a personal nature. As regards real and personal estate the Civil Procedure Act of 1833 allowed an action of trespass or trespass in the case to be maintained by executors of an administrator of a deceased person for any injury to his real estate committed in his lifetime for which he might if alive have maintained an action, if the wrong was committed within six months before his death. The Act provides for no remedy for an act committed to the person, such as false imprisonment.

(1) (1878) 4 O.P.D., 40, 45.

When a tort resulted in the death of a person there was no remedy till the Fatal Accidents Act (1846), commonly known as Lord Campbell's Act, gave a right of action by executors or administrators for the benefit of the relatives specified in the Act. In India the Fatal Accidents Act (XIII of 1855) provides for such cases. The cause of action was a new one arising upon and out of a person's death and does not really affect the maxim.

Turning to the law as applied in India, it is clear that the common law rule was applied in all its strictness by Courts, except where a remedy was given to or against the executors, administrators, or personal representatives by statute law. The first legislative enactment was the Legal Representatives' Suits Act (XII of 1855). The preamble states that it is expedient to enable executors, administrators or representatives in certain cases to sue and be sued in respect of certain wrongs, which according to the present law do not survive to or against such executors, administrators or representatives. The applicability of the maxim to India is thus recognized. Section 1 enacts that an action may be maintained by the executors, administrators or representatives of a deceased person for any wrong committed in the lifetime of such person, which has occasioned pecuniary loss to his estate, for which wrong an action might have been maintained by such person, provided that the wrong was committed within one year before his death. The damages so recovered were to be part of the personal estate of the deceased. A right of action was given against the executors, administrators, heirs or representatives of a deceased person for any wrong committed by him in his lifetime for which he would have been subject to action if such wrong was committed within one year before his death. Section 2 provides that no action commenced under the provisions of the Act shall abate by reason of the death of either party, but may be continued by or against the executors, administrators or representatives of the party deceased, provision being made for the plea of want of assets.

It will be seen that clause 2 of section 1 of the Indian Act of 1855 is wider in its scope than the English Civil Procedure Act of 1833. Suits by executors, etc., have to be for an injury to the real estate of the deceased person, and suit against executors, etc., are in respect of a wrong committed in respect of another's

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property—real or personal. The period of limitation is six months and the form of action was to be an action of trespass or trespass in the case.

The remedy given by the Indian Act of 1855 is, however, confined to suits brought subsequent to the death of the person, and did not enable suits brought by him to be continued after his death. In *Haridas Ramdas v. Ramdas Mathuradas*(1), the plaintiffs sued to recover damages for wrongful arrest and malicious prosecution. The defendant died pending suit and the plaintiff sought to continue the suit against the executors of the deceased or his legal representatives. The objection taken was that the suit abated. It was held by HARIDAS and PARSENS, JJ., that Act XII of 1855 did not apply as it related only to suits brought against the heirs of a deceased person for wrongs committed by him in his lifetime. The decision was followed by SUBRAHMANIA AYYAR and BENSON, JJ., in *Ramchode Doss v. Rukmany Bhoj*(2). The suit was one for damages for malicious prosecution and the defendant died pending suit. The plaintiff applied for leave to bring her executors on record as legal representatives and MOORE, J., held that the suit abated. Reliance was placed on appeal on the second clause of section 2 of Act XII of 1855, but the learned Judges observed :

"A similar argument was urged in *Haridas Ramdas v. Ramdas Mathuradas*(1) followed by the learned Judge, and was overruled. We agree with the Bombay High Court that clause 2 of section 1 of the Act XII of 1855 does not apply to an action commenced against the defendant in his lifetime, but only to actions commenced against the executors, administrators or other representatives of a deceased wrong-doer."

With all respect, I am unable to agree with SADASIYA AYYAR, J. that section 2 enables the continuance of suits already filed, as the section distinctly states that "no action commenced, under the provisions of the Act shall abate." The learned Judge and NAPIER, J., took the opposite view in *Subramania Iyer v. Venkataramier*(3), where they held that Act XII of 1855 only applied to suits filed by the legal representatives, and not to suits filed by the deceased and sought to be continued by them.

(1) (1889) I.L.R., 13 Bom., 677.

(2) (1905) I.L.R., 28 Mad., 487.

(3) (1915) 31 I.C., 4.

If the legislature intended that suits already filed were to be continued by the executors, administrators or legal representatives, apt words would have been used in the Act. The Preamble refers only to suits to be filed after death and if suits already instituted were intended to be covered by the Act, section 2 would have referred to actions commenced by the deceased or by his representatives under the provisions of section 1.

Though the legislature went much further than the English Act of 1833 when it enacted clause (2) of section 1 of Act XII of 1855 and gave a fresh right of suit, it confined demands and rights to prosecute or defend suits or special proceedings by executors or administrators in the Succession Act of 1865 to suits other than causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party, and also cases where the death of the party rendered the granting of any relief useless. As the Succession Act did not apply to Hindus, Muhammadans or Buddhists a similar provision was also enacted in the Probate and Administration Act 1881, section 89 of which runs as follows :—

"All demands whatever and all rights to prosecute or defend any suit or other proceeding existing in favour of or against a person at the time of his decease survive to and against his executors or administrators except causes of action for defamation, assault as defined in the Indian Penal Code or other personal injuries not causing the death of the party and except also cases when after the death of the party the relief sought could not be enjoyed or granting it would be nugatory."

It cannot be said that when the legislature enacted the Succession Act of 1865 or the Probate and Administration Act of 1881 it had not before it the earlier enactment, Act XII of 1855. Though there was no exception as regards causes of action in section 1, clause 2, of the Act of 1855 which would cover suits excepted by the Acts of 1865 and 1881 it was thought necessary to make some exceptions in the latter Acts. It would be unreasonable to suppose that the legislature out of the large number of personal injuries actionable in law made a random selection of defamation on the one side and assault and other physical injuries not resulting in death on the other, and left

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several personal wrongs more serious than simple assault unprovided for. If the words "other personal injuries not causing the death of the party" be read *ejusdem generis* only with assault the executors or administrators of a person who wrongfully restrains another (without assaulting him) for a few minutes would be liable to be proceeded against in the suit while those of one who committed grievous bodily harm not severe enough to cause death would escape. It should be remembered that assault as defined in the Indian Penal Code includes the most trivial forms of personal violence and no reasonable explanation can be given for the legislature picking out some offences and excluding others, some of which are of a serious nature. It would have been easy to use the word physical injuries instead of the word personal injuries or to add the word "and" before assault, if only acts of personal violence were intended to be excluded.

The words "personal injuries" represent a classification well known to law and in ordinary legal phraseology are not confined to merely physical injuries. Blackstone in dealing with private wrongs observes,

"Personal acts are such whereby a man claims a debt or personal duty or damages in lieu thereof and likewise whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts and the latter upon torts or wrongs. Of the former nature are all actions upon debt or promises; of the latter all actions for trespass, nuisances, assaults, defamatory words and the like."

He then proceeds to deal with injuries which affect the personal security of individuals and divides them into injuries against their lives, their limbs, their bodies, their health or their reputation, and in the last class includes both defamation and malicious prosecution (Bk. III, clause 8). He divides all injuries into injuries without force or violence, as slander, and others coupled with force or violence, as batteries. As pointed out by Pollock and Maitland in the History of the English Law and by Street in his work on the Foundations of Legal Liability (Volume 1, page 327) malicious prosecution was regarded only as an aggravated form of defamation.

Bearing in mind this classification and having regard to the fact that in the English Civil Procedure Act of 1833 the remedy

was confined to injuries to the real or personal estate of the deceased and not to purely personal wrongs as understood in English Jurisprudence, and that the same limitation is placed by section 1, clause 1, of Act XII of 1855, and the anomalies that would result if the legislature picked out arbitrarily some personal wrongs and excluded them and desired to include at the same time wrongs of a much less serious character, I think the intention of the legislature in 1865 and 1881, when the Succession and the Probate and Administration Acts were passed, was to assimilate the law in India as far as possible to what it was in England and to exclude from the operation of sections 268 of the Succession Act and 89 of the Probate and Administration Act suits which by the law as administered in England would fall under the maxim *actio personalis moritur cum persona*. If the words were simply "all personal injuries not causing the death of the party" and omitted defamation or assault, it may be argued that personal meant only physical and that causes of action for defamation and other similar injuries survived. The legislature took two types of personal injuries, one physical and the other not, and used them by way of illustration of what it meant to exclude. In this view, the words "other personal injuries not causing the death of the party" must be read with "defamation" and "assault."

There has been a conflict of authority on the question referred. In *Punjab Singh v. Ramautar Singh*(1) it was held by the Patna High Court that the words "other personal injuries not causing the death of the party" in section 89 of the Act are *ejusdem generis* not only with assault but also with defamation and include malicious prosecution. The same view has been held by the Madras High Court in *Gadiji Mareppa v. Firm of Marwadi Vannajee Vajanjee*(2) and *Marwadi Mothiram v. Samnaji*(3). A contrary view was taken in *Krishna Behari Sen v. The Corporation of Calcutta*(4) where the learned Judges differed from Justice HENDERSON, the trial Judge, and held that to use the words other personal injuries not resulting in death in connexion with an action for defamation or malicious prosecution would be

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(1) (1919) 4 Patna L.J., 678.

(3) (1916) 31 M.L.J., 772.

(2) (1917) 38 I.C., 823.

(4) (1904) I.L.R., 31 Cal., 993.

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straining the language used by the legislature and placing on it an unnatural and forced construction. In *Punjab Singh v. Ramautar Singh*(1), Dass, J., who was a member of the Calcutta Bar for several years observes that in his experience the case has never been followed subsequently in the Calcutta High Court.

I would follow *Punjab Singh v. Ramautar Singh*(1) and *Marwadi Mothiram v. Samnaji* (2), and hold that a suit for damages for malicious prosecution abates.

Messrs. King and Partridge, Solicitors for the appellant.

M. H. H.

(1) (1919) 4 Patna, L.J., 676.

(2) (1918) 31 M.L.J., 772.

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right to the quarries and minerals did not pass to the grantees; (2) that the terms of the grant being in evidence neither the inam title-deeds nor the land acquisition proceedings were evidence as to its effect; (3) that having regard to Madras Act VIII of 1869, the inam title-deed could not vest in the inamdars a subject-matter not vested in them by the grant; (4) that consequently the Government was entitled to impose royalties on stone quarried in the village. An inam grant may be no more than an assignment of revenue, and even where it is or includes a grant of land, what interest in the land passed must depend on the language of the instrument and the circumstances of the case.

The Secretary of State for India in Council v. Srinivasa Chariar

(1921) I.L.R., 44 Mad. (P.C.), 421

MADRAS ACT (VIII OF 1869):—See INAM 421

MAJORITY ACT (INDIAN) (IX OF 1875), SEC. 3:—See HINDU LAW 446

MURDER—Circumstantial evidence—No ground for imposing lesser sentence.]

If the Court is satisfied beyond reasonable doubt that the accused is guilty of murder and the circumstances require the imposition of the death penalty, the fact that the conviction is based on circumstantial evidence is not a reason for passing the lesser sentence allowed by law.

Public Prosecutor v. Paramandi (1921) I.L.R., 44 Mad., 443

PENAL CODE, SEC. 323—Death of person injured—Abatement of proceedings—

Probate and Administration Act (V of 1881), sec. 89.] A criminal prosecution under section 323 of the Indian Penal Code does not abate by reason of the death of the person injured. The words "to prosecute . . . any proceeding" in section 89 of the Probate and Administration Act do not refer to criminal prosecutions but to civil actions only. *Rama Nand v. Emperor*, (1917) 40 I.O., 1008 (Punjab) and *Labhu v. Emperor*, (1919) 52 I.O., 797 (Punjab), dissented from.

Muhammad Ibrahim Sahib v. Shaik Davood (1921) I.L.R., 44 Mad., 417

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), SEC. 30—Indian Contract Act (IX of 1872), sec. 135—Surety—Dubash of a Company, guaranteeing customers—Part-payment of debt by surety to creditor—Insolvency of debtor—Composition effected by insolvent-debtor with creditors—Subsequent approval by Court and annulment of insolvency—Right of surety to refund of money paid to creditor—Composition and annulment, whether under section 80 of the Act.] The dubash of a Company stood surety for customers introduced by him and deposited with them certain Government promissory notes as security. One of such customers failing in business, the Company sold the notes and appropriated the proceeds in part-payment of the debt of the customer. Both the customer and the dubash were adjudicated insolvents. The customer entered directly without the Official Assignee's intervention into a composition with his creditors with a view to obtain the approval and sanction of the Insolvency Court, and subsequently applied to the Court for approval of the composition and annulment of the insolvency. The Court annulled the insolvency but the order did not embody the terms of the composition, as required by section 30 of the Presidency Towns Insolvency Act. The Company had agreed to the composition without the consent of

the dubash and received a dividend on the full amount of their debt, without giving credit for the money which was appropriated. The Official Assignee, acting on behalf of the insolvent dubash, applied to the Court to direct the Company to refund the value of his Government Promissory Notes appropriated by them. Held, that a creditor was entitled to prove for the full amount of his debt in the insolvency of the principal debtor, notwithstanding that the surety had paid a portion of the debt: and that the surety could not prove, until he had paid the full amount for which he was liable: *Ellis v. Emmanuel* (1876) 1 Ex. D., 157 and *In re Sass. Ex parte National Bank of England* [1896] 2 Q.B., 12, followed; that the fact that the creditor entered into a composition which the principal debtor without the surety's consent, did not entitle the latter to a refund of payments already made by him to the creditor, although it might release him from future liability; that the irregularities in the procedure did not vitiate the Court's approval of the terms of the composition and the consequent annulment of the insolvency, under section 30 of the Insolvency Act; and that the discharge of the principal debtor, in such a case, being by operation of law and not by act of the creditor, the surety would not be discharged from his obligation to the creditor under section 135 of the Indian Contract Act. *Ex parte Jacobs, In re Jacobs* (1875) 10 Ch. App., 211, followed. On the question whether the fact that the creditor had given receipts in full settlement of the debt, without waiting until the composition was sanctioned by the Court discharged the creditor. Held, by SESHAGIRI AYYAR, J. (WALLIS, C.J., not deciding the point) that where after notice to the surety the composition was accepted by the Court it became an act of the Court and the surety was not discharged from liability.

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PROBATE AND ADMINISTRATION ACT (V OF 1881), SEC. 89:—See PENAL CODE, SEC. 323 417

REGISTRATION ACT (XVI OF 1908), ss. 2 AND 17 (ii), CL. 5—Lease—Agreement to lease—Instrument not registered—Lessee setting up counter-claim for specific performance of agreement to lease or for damages for its breach by lessor.] An agreement to lease, which does not operate as an immediate demise of the property, does not fall within the definition of "lease" contained in section 2 of the Registration Act (XVI of 1908) and is admissible in evidence without registration. The question whether an agreement to lease operates as an immediate demise should be determined on the facts of each case. *Hemanta Kumari Debi v. Midnapur Zemindari Company* (1920) I.L.R., 47 Cal., 485 (P.O.); s.c., I.L.R., 46 I.A., 240, followed; *Narayana Chetty v. Muthiah Serval* (1913) I.L.R., 35 Mad., 68 (F.B.), not followed.

Suaminatha Mudaliar v. Ramaswami Mudaliar ... (1921) I.L.R., 44 Mad., 399

SUCCESSION ACT (INDIAN) (I OF 1885), ss. 101, 102, 111 AND 126:—See HINDU LAW 446

APPELLATE CIVIL.

*Before Sir John Wallis, Kt., Chief Justice and Mr. Justice
Seshagiri Ayyar.*

THE BOMBAY COMPANY, LIMITED, (RESPONDENT) APPELLANT,

v.

THE OFFICIAL ASSIGNEE OF MADRAS (PETITIONER),
RESPONDENT.*

1920,
November,
4, 5 and 10.

Presidency Towns Insolvency Act (III of 1903), s. 30—Indian Contract Act (IX of 1872), sec. 135—Surety—Dubash of a company, guaranteeing customers—Part-payment of debt by surety to creditor—Insolvency of debtor—Composition effected by insolvent-debtor with creditors—Subsequent approval by Court and annulment of insolvency—Right of surety to refund of money paid to creditor—Composition and annulment, whether under section 30 of the Act.

The dubash of a company stood surety for customers introduced by him to them and deposited with them certain Government promissory notes as security. One of such customers failing in business, the company sold the notes and appropriated the proceeds in part-payment of the debt of the customer. Both the customer and the dubash were adjudicated insolvents. The customer entered directly without the Official Assignee's intervention into a composition with his creditors with a view to obtain the approval and sanction of the Insolvency Court, and subsequently applied to the Court for approval of the composition and annulment of the insolvency. The Court annulled the insolvency but the order did not embody the terms of the composition, as required by section 30 of the Presidency Towns Insolvency Act. The company had agreed to the composition without the consent of the dubash and received a dividend on the full amount of their debt, without giving credit for the money which was appropriated. The Official Assignee, acting on behalf of the insolvent dubash, applied to the Court to direct the Company to refund the money of the dubash appropriated by them.

Held, that a creditor was entitled to prove for the full amount of his debt in the insolvency of the principal debtor, notwithstanding that the surety had paid a portion of the debt; and that the surety could not prove, until he had paid the full amount for which he was liable: *Ellis v. Emmanuel*, (1876) 1 Ex. D., 157 and *In re Sass, Ex parte National Bank of England* [1898] 2 Q.B., 12, followed;

that the fact that the creditor entered into a composition with the principal debtor without the surety's consent, did not entitle the latter to a refund of

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payments already made by him to the creditor, although it might release him from future liability;

that the irregularities in the procedure did not vitiate the Court's approval of the terms of the composition and the consequent annulment of the insolvency, under section 30 of the Insolvency Act; and

that the discharge of the principal debtor, in such a case, being by operation of law and not by act of the creditor, the surety would not be discharged from his obligation to the creditor under section 135 of the Indian Contract Act. *Ex. parte Jacobs. In re Jacobs* (1875) 10 Ch. App., 211, followed.

On the question whether the fact that the creditor had given receipts in full settlement of the debt, without waiting until the composition was sanctioned by the Court discharged the creditor.

Held by SESHAGIRI AYYAR, J. (WALLIS, C.J., not deciding the point) that where after notice to the surety the composition was accepted by the Court it became an act of the Court and the surety was not discharged from liability.

APPEAL against the judgment of COUTTS TROTIER, J., dated 24th October 1919, made in the exercise of the Original Insolvency Jurisdiction of the High Court in Insolvency Petition No. 181 of 1915 in the matter of the insolvent P. Sithapati Ayyar.

One P. Sithapati Ayyar was a dubash, originally of Dymes & Co., and subsequently of the Bombay Company, which took over the business of the former Company. The dubash under his dubash agreement guaranteed the due performance of contracts entered into with the Company by customers introduced by him, and for that purpose had deposited with the Company certain Government promissory notes. One of such customers, V. V. Somasundaram Chetti, failing in business, the Company sold the notes and realized Rs. 17,000, and this sum together with another sum of Rs. 10,000 and odd representing commission earned by the dubash and credited to him in the Company's account was appropriated by the Company towards the losses sustained by them in their dealings with Somasundaram Chetti. Sithapati Ayyar and Somasundaram Chetti were adjudicated insolvents. The latter, without the intervention of the Official Assignee, entered into a composition with his creditors, including the Bombay Company, agreeing to pay six annas in the rupee. He paid the Bombay Company at that rate, and obtained two receipts from them in full settlement of their claim against him, before the terms of the composition were submitted to the Insolvency Court for approval and sanction. The proceedings showed that the composition was made with a view to obtain the approval and sanction of the Court and to

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have the order of adjudication annulled. Subsequently, Somasundaram Chetti applied to the Court for approval of the terms of the composition and for annulment of the order of adjudication. The Court approved of the terms of the composition and annulled the insolvency, but the order did not embody the terms of the composition. The Official Assignee, acting as representative of the insolvent Sithapati Ayyar, moved the Court for an order directing the Bombay Company to refund the insolvent dubash's moneys which were said to have been appropriated by the Bombay Company towards the debt due to them from Somasundaram Chetti. The learned Judge (COUTTS TROTIER, J.) held that the composition was not under section 30 of the Act, that the discharge of the debtor (Somasundaram Chetti) was not by operation of law, but by voluntary act of the creditor (Bombay Company), and that the surety, Sithapati Ayyar, was discharged from his obligation, and that the Bombay Company was bound to refund to the Official Assignee on behalf of the insolvent, Sithapati Ayyar, the amount of the surety's money appropriated by them towards the debt of their principal debtor. Against this order, the Bombay Company preferred this Appeal. The further facts and contentions are set out in the judgments.

D. Chamier for appellant.—The surety's money was appropriated by the Bombay Company in 1915, in any event in 1917, before the receipt was given in November 1918 to Somasundaram Chetti in settlement of their claim against him. The Official Assignee asks for refund of the amount of the surety's money which had been appropriated by the Bombay Company long before their composition with the insolvent principal debtor. Where the creditor consents to a composition with the principal debtor *under the sanction of the Insolvency Court*, there is no release of the surety. The acceptance by the Court of the terms of the composition makes the composition not an act of the debtor falling under section 135 of the Indian Contract Act but a composition under the Insolvency Act, and the principal debtor is discharged by operation of law, to which the provisions of section 135 of the Indian Contract Act do not apply. In English Law there is a specific provision to that effect in the English Bankruptcy Act, 1890. In India the

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matter is governed by section 135 of the Indian Contract Act. The appropriation by the creditor was made in July 1917; the subsequent composition in 1918 or 1919 with the principal debtor, though it might affect the further liability of the surety, cannot affect the previous payment by him or appropriation of his moneys by the creditor.

The orders of the Insolvency Court, approving the terms of the composition and annulling the insolvency, were under the provisions of section 30 of the Presidency Towns Insolvency Act (III of 1909). The formalities under sections 29 to 31 of the Act were complied with, notices were given to the creditors, the Official Assignee had knowledge of the whole matter and submitted reports, and he dispensed with the public examination. It is the ordinary practice in the Official Assignee's office in Madras to allow the insolvent to arrange and negotiate the terms of composition directly with the creditors, and then move the Court through the Official Assignee for approval and sanction by the Court.

The creditor can prove for the whole debt in the insolvency of the principal debtor, notwithstanding part-payment by the surety: see *In re Sass, Ex parte National Bank of England*(1).

The surety gets a vested right to get the money from the principal debtor on his payment to the creditor, which is not affected by the subsequent release of the debtor by the creditor: see Rowlatt on Suretyship, page 289. Subsequent discharge of the principal debtor does not release the surety: *Reade v. Lowndes*(2), *Ex parte Bishop. In re Fox Walker & Co.*(3), *Davies v. Humphreys*(4). The creditor is entitled to prove for the whole amount: *Ellis v. Emmanuel*(5).

Nugent Grant for the respondent.—There was in fact no appropriation by the Bombay Company before the discharge of the principal debtor; if there was one, it was a fraud on Sithapati Ayyar and Somasundaram Chetti. The composition arrangement and the release of the principal debtor were prior to the proceedings in bankruptcy. The composition here is a

(1) [1896] 2 Q.B., 12.

(3) (1880) 15 Ch. D., 400.

(2) (1857) 23 Beav., 561.

(4) (1840) 6 M. & W., 153; s.c., 151 E.R., 361.

(5) (1876) 1 Ex. Div., 157.

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private one and not one under the Insolvency Act. There was no compliance with procedure under sections 28 to 31 of the Act.

Long before the submission of the composition even to the Official Assignee or the Court, the composition was accepted by the creditor, who had discharged the principal debtor, by giving him a receipt for the payment of a lump sum in settlement of their entire claim against him. There was no application to the Court to approve the terms. This was a private composition, followed by an application for annulment of the adjudication.

Under the English Bankruptcy Act, 1890, section 28, clause (4), special provision is made to the effect that the surety will not be released, even though the insolvent is discharged by the creditor. The creditor in this case released the debtor before the composition was brought before the Official Assignee or the Court. The receipt, by the creditor, which released the debtor was dated 8th November 1918, and the annulment of the adjudication was on 3rd April 1919.

There was no appropriation in this case. There was an entry of sale-proceeds of Government promissory notes credited to Sithapati in his account (ledger), and no entry of appropriation or credit in Somasundaram (debtor's) account. There being no specific appropriation to specific debts, there is no valid appropriation and the Official Assignee, on behalf of Sithapati, can get that amount. The composition was independent of the bankruptcy proceedings: see *Ex parte Bishop. In re Fox Walker & Co.*(1).

WALLIS, C.J.—This is an Appeal from an order of Mr. WALLIS, C.J. Justice Courts Trotter in the insolvency of one Sithapati Ayyar, who was formerly a dubash of Messrs. Dymes & Co. and afterwards of the Bombay Company who took over the business, directing the Bombay Company to repay to the Official Assignee as representing the estate of the insolvent Rs. 27,243-13-0, which the Bombay Company had appropriated out of monies belonging to him in reduction of the loss the above firms had sustained in transactions with one V. V. Somasundaram Chetti which Sithapati had guaranteed under his dubash agreement.

(1) (1880) 15 Ch.D., 400, 403.

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The ground upon which the refund was directed was that the effect of the arrangement entered into by the Bombay Company with Somasundaram Chetti was to release the dubash from his liability as surety. Assuming for the moment that the effect of this agreement was to release the surety from all further liability, I am not satisfied, and no authority has been cited to show that this surety also became entitled to recover the monies which he had already paid under his contract of suretyship. But before dealing further with this point it will be as well to set out the facts as they appear in the evidence.

On June 15th, 1915, as appears from Exhibit II, the Bombay Company terminated Sithapati's employment as dubash and about the same time, as appears from the same Exhibit and their accounts, Exhibit C (3), they realized the promissory notes deposited with them and appropriated the proceeds and the other monies standing in their books to the dubash's credit, some Rs. 33,940 in all, to the losses they had sustained on the various transactions for which he was responsible. There was no specific appropriation to the various heads of loss, but, assuming the other losses to have been met in full, this balance of Rs. 27,000 remained and must have been appropriated to the loss sustained in the transactions with Somasundaram.

Somasundaram and Sithapati both became insolvents, and Mr. Rao on behalf of the Bombay Company, in January 1916 tendered proofs in Somasundaram's insolvency for the full amount of his indebtedness to Dymes & Co., and the Bombay Company, which eventually came to some Rs. 54,000 in all without making any reduction on account of the appropriation from the dubash's account. This, as will be seen, he was entitled in law to do.

Somasundaram after his insolvency carried on business successfully, and on 14th September 1918 he filed an affidavit in support of an application to dispense with his public examination on the ground that his creditors with the exception of the Bombay Company had accepted his friend's offer to pay 6 annas in the rupee and that the Bombay Company had also agreed to settle out of Court, but Mr. Rao, the Managing Director, was away in Calcutta and the real loss account had not been adjusted. The Official Assignee who, as appears from his letters,

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was fully alive to the fact that the money was coming not from the insolvent's friends but from his own earnings in the business which he had carried on after his insolvency and which were at his disposal until the intervention of the Official Assignee, and applied for the public examination of the insolvent Somasundaram, with a view to seeing if better terms could not be arranged. Before this question came before the Court, the contemplated settlement with the Bombay Company had been arrived at with Mr. May, an assistant of the Company, and on the 8th November 1918 the Company gave Messrs. Moonuswami Chetty & Sons, who were acting for Somasundaram, two receipts for Rs. 12,545 and Rs. 6,580 or Rs. 19,125 in full settlement of two debts of Rs. 36,211-12-10 and Rs. 18,989-11-1, or Rs. 55,201-7-11 in all.

Rs. 19,125 is 6 annas in the rupee on Rs. 51,000 and in his reply affidavit of 28th August 1919 the present insolvent states that he was informed and believed that it was agreed that Rupees 51,000 was to be taken as the total sum due to the two companies and a composition of 6 annas in the rupee was accepted thereon. What apparently happened—Mr. May's evidence on the point is not very clear—is that 6 annas on Rs. 51,000 was tendered, and that Mr. May refused to accept Rs. 19,125 on that basis, as the debt in his books was considerably over Rs. 51,000, but agreed in the circumstances to accept Rs. 19,125 in full settlement of the whole debt standing in the books and the receipts were made out on that basis.

On 9th December 1918 the present insolvent Sithapati wrote Exhibit D to the Bombay Company taking exception to their having discharged Somasundaram without reference to him and without his knowledge.

Having satisfied his creditors in this manner, which whatever may be thought of it, appears not to have been unusual in Madras, Somasundaram next approached the Official Assignee with a view to having his composition with his creditors approved and the insolvency annulled, and the Official Assignee pursuant to section 28 (2) of the Act sent out letters to the creditors on 16th December 1918 informing them of the position and summoning a meeting of creditors to consider the situation and state whether they agreed to the annulment of

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the insolvency. The meeting of creditors was held on 8th January, and there was no opposition except from the present insolvent Sithapati who was not one of the creditors who had proved in the insolvency. On 6th March 1919 the Official Assignee presented to the Court a report, Exhibit III-A, in which he stated Sithapati's objection to the Bombay Company having given a discharge for the full amount of the debt without taking into account the Rs. 27,000 of his which had been appropriated in reduction of it, and also suggested a public examination of the insolvent. The learned Judge dealt with this question in his order, dated 23rd March 1919, Exhibit VIII, and came to the conclusion that a public examination was not necessary, that the creditors, who included several of the leading firms in Madras, knew their own business best, and stated that when the question came before him formally in that shape he should allow Somasundaram Chetti to effect the settlement and get himself discharged from his bankruptcy. A notice pursuant to section 29 (i) of the Act on behalf of the insolvent, Exhibit VII, supported by an affidavit, Exhibit VI, was then issued to creditors of an application for the annulment of the insolvency.

The Official Assignee presented a further report (Exhibit III) on 15th April 1919 stating that he had summoned a meeting of creditors and that no one appeared except himself on behalf of Sithapati and agreeing to the annulment subject to security being given to meet any claim of Sithapati. On this, the formal order of annulment was made on 22nd April 1919, and there can, in my opinion, be no doubt that in making this order the learned Judge was acting under the powers given him by section 30 (i) of the Act, to approve the insolvent's proposals and annul the insolvency.

The section requires the terms, if approved, to be embodied in the order with a view to making it executable as a decree as provided in sub-section (2). Possibly, because the payments under the composition had already been made, this provision of the section was not complied with, as it should have been when the formal order was drawn up in the Insolvency office. This, in my opinion, was a mere formal defect which might be amended at any time and in no way affected the Court's approval of the terms of the composition and the consequent annulment of the insolvency.

The learned Judge, whilst expressing some doubts on the last question, preferred to rest his decision on the broader ground that the transaction at the date when it was carried out was not a composition within the meaning of the material sections of the Act. Now the payment of Rs. 19,125 was tendered solely for the purpose of getting the consent of the company to the annulment of the insolvency and to arriving at terms of settlement to be approved of by the Court, with a view to annulment. Mr. May was admittedly informed that the other leading firms had accepted a composition of six annas, and was tendered a sum which amounts to six annas on Rs. 51,000, and which must have been tendered as such, as there is no other explanation as to how the figure of Rs. 19,125 was arrived at. As he did not accept Rs. 51,000 as representing the correct amount of the insolvent's indebtedness, whilst deciding in the interests of the company to accept the sum tendered, he insisted that it should be received as a lump sum in respect of the debts mentioned in the receipts. These receipts were communicated to the Official Assignee at his request and he did not, as representing the estate of the present insolvent Sithapati, take any objection to the fact that the composition shown in the receipts was less than six annas. His only objection as representing the estate of the present insolvent was that the Bombay Company in giving the receipts had ignored the Rs. 27,000 received from the present insolvent. That was not a question which the Court was then called on to go into, and the Court, in my opinion, must be taken to have approved the terms arrived at and to have sanctioned the annulment of the insolvency as suggested by the Official Assignee, or behalf of Sithapati's estate, on Somasundaram giving security to the satisfaction of the Official Assignee for Rs. 9,000 in respect of any dividend which the present insolvent Sithapati might prove entitled to claim in Somasundaram's insolvency in consequence of Rs. 27,000 appropriated by the Bombay Company from his monies in payment of Somasundaram's debt to them not having been taken into account when the Bombay Company accepted Rs. 19,125 in full discharge of the debts of Somasundaram shown in the receipts. What he accepted was a composition which was intended to be and was submitted for the approval of the Court. In these circumstances,

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Rs. 19,125 paid to the Bombay Company, must, in my opinion, be taken to have been sanctioned by the Court. That, however, does not dispose of the question whether the fact of the Bombay Company having given receipts in full settlement of the debt without waiting for the composition to be sanctioned by the Court did not thereby discharge the surety from liability by virtue of the provisions of section 135 of the Indian Contract Act, as the learned Judge has held. If they had waited for the approval of the Court, and the Court had approved of the composition and annulled the insolvency, then it is clear on the authority of *Ex parte Jacobs. In re Jacobs*(1), that there would have been a discharge by operation of law which would in no way have affected the creditors' remedies against the surety, because in that case it is the insolvency law and not the creditor that discharges the insolvent. It is unnecessary for the purposes of the present case to decide the question whether a formal full discharge granted to the insolvent on receipt of a composition paid with a view to getting the approval of the Court and the annulment of the insolvency, before such approval and annulment has the effect of relieving the surety from further liability under section 135 of the Indian Contract Act [as to which see *Cragg v. Jones*(2)], because whether it has that effect or not, it affords the surety, in my opinion, no ground for claiming a refund of the monies already paid in performance of his contract of suretyship. Section 135 of the Indian Contract Act merely provides that

"a contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to or not to sue, the principal debtor, discharges the surety unless the surety assents to such contract";

but it by no means follows, nor has any authority been cited to show, that conduct of the creditor which releases the surety from all further liability makes the creditor liable to return payments already made to him by the surety. Part-payment by the surety is part-performance of the contract and a partial discharge thereof and a surety who has made such a part-payment has no further liability as to that part of the contract from which he could be discharged. As regards such part-payment he is no longer the surety but the

(1) (1885) 10 Ch. App., 211.

(2) (1873) L.R., 8 Exch., 81.

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principal creditor, as the effect of the part-payment is to transfer to him so much of the cause of action against the principal debtor. This cause of action against the principal debtor is not ordinarily affected by any composition which the principal creditor may subsequently accept from the debtor, and it can therefore give him no cause of action for the return of the money already paid. When, however, the debtor becomes insolvent not only is the surety debarred from suing by the insolvency, but his right of proof is restricted. If he is liable for the whole debt, he is not allowed to prove until he has paid the whole debt. If he is liable for any part of the debt, he cannot prove until he has paid all that he is liable to pay, in which case he is entitled to prove for the amount of the debt which he has paid and the principal creditor's proof must be reduced accordingly. These propositions, must, in my opinion, be considered settled by the judgment of VAUGHAN WILLIAMS, J., a Judge of great experience in Bankruptcy Law, in *In re Sass. Ex parte National Bank of England*(1). The result, it appears to me, must be that in such a case, as regards his part-payments, the surety is of necessity represented in the insolvency by the principal creditor who proves for the whole debt, just as a sub-partner is represented in the liquidation of a partnership by his principal partner, with whose conduct of the liquidation he is not entitled to interfere. If the principal creditor misconducts himself in the insolvency to the prejudice of the surety who has made payments in partial discharge of the debt, the latter may have a remedy of the same nature against him as a sub-partner would have against a partner, but there appears to be no reason for holding, and no authority has been cited in support of the proposition, that the acceptance of a composition by the principal creditor during the insolvency after part-payments by the surety would entitle the surety to a refund of such part-payments. On the other hand, as I have already said, the part-payments were a part-performance of the contract of suretyship and so put an end to the relation of principal creditor and surety and to all the incidents arising from that relation. Any other view would involve great hardship, as it has done in the present case, where the principal creditor has been ordered

(1) [1898] 2 Q.B., 12.

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to refund in consequence of adopting a course which far from prejudicing his surety in any way had the effect of seriously reducing the balance of the debt which he could be called upon to pay. Assuming that the acceptance of the composition freed the surety from *further* liability under section 135 of the Contract Act, that is surely a sufficient, not to say excessive, remedy for the purely imaginary injury which he may be deemed to have received by the acceptance of the composition.

For these reasons I would allow the Appeal, reverse the order and dismiss the summons with costs throughout on the Original Side scale.

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SESHAGIRI AYYAR, J.—I agree. The facts and dates necessary for appreciating the arguments addressed to us may be thus shortly stated.

P. Sithapati Ayyar was employed as a dubash in the Bombay Company on the terms embodied in Exhibit 1, dated 27th April 1915. He was apparently similarly employed by Dymes & Co. He introduced customers to both these firms. Very soon a good number of them made default in payment. Somasundaram, one of the principal customers, was in embarrassed circumstances. The Bombay Company sold the Government promissory notes deposited by Sithapati and realized about Rs. 17,000 in July 1915. To his credit with the Bank there was a sum of Rs. 10,000 due to him for commission already earned. The total sum of Rs. 27,000 and odd was originally held in deposit in the books of the Company against losses which were sustained by the two firms by the non-payment in time by the customers introduced by Sithapati. I am clear that in July 1915, the money realized was not appropriated towards the debt due from any particular customer.

In August 1915, Somasundaram applied to be adjudicated an insolvent. Soon after, Sithapati also applied for the benefit of the Act. Both the estates vested in the Official Assignee. Exhibit II, dated 28th January 1916, a letter from Sithapati, shows that, on that date, he had no information as to what particular debt the money realized by the sale of the promissory notes was appropriated, either by the Bombay Company or by Dymes & Co. The statement of Mr. Rao of Dymes & Co., dated 6th February 1916, also shows that no appropriation was made till then.

Then we come to the attempt made by Somasundaram to settle with creditors. It is common ground that in the beginning of 1918, Somasundaram privately approached his creditors and offered to pay them six annas in the rupee. He apparently induced them to accept the composition and obtained receipts. Then he approached the Bombay Company with a similar request. The two receipts filed in the case, dated 8th November 1918, show that the Bombay Company received a sum of Rs. 19,125 both for themselves and on behalf of Dymes & Co.

There has been some controversy as to whether this represented six annas on the total debt. Mr. Grant contended that Mr. May who acted in this matter did not accept the composition of six annas in the rupee, but received the money in full satisfaction of all that was due to the two companies from Somasundaram. The evidence of Mr. May has two sides, if I may say so, the one side speaking to actual facts and the other referring to impressions and beliefs. He says in his evidence that as he had already appropriated Rs. 27,000 and odd towards the total indebtedness of Rs. 54,000, he did not consider it necessary to acquaint himself regarding the exact proportion which the sum covered by Exhibits A and B bore to what was due. In another place he says that by 31st July 1917, the company had appropriated Rs. 27,000 towards the amount due from Somasundaram. Reading his evidence as a whole, my opinion is that the sum of Rs. 27,000 and odd was appropriated by the Bombay Company towards the debt due from Somasundaram, at least before granting the two receipts A and B. I do not accept the suggestion of Mr. Chamier that this money was appropriated in July 1915. For the reasons already given, and in view of the evidence given by Mr. May, that suggestion must be ruled out. But I see no reasons for not accepting the evidence of Mr. May that before the date of Exhibits A and B, the appropriation had been made.

I tried to understand why Somasundaram paid the Company the odd sum of Rs. 19,125. Some clue to its significance is gatherable from the statement of Sithapati that Somasundaram was indebted to the two companies only in the sum of Rs. 51,000. In paragraph 6 of the reply affidavit, dated 28th August 1919, Sithapati says, "I am informed and believed that on the 8th November 1919, it was agreed that the sum of Rs. 51,000

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was to be taken as the total amount due to the two companies by Somasundaram Chetti & Co. and Mr. Goff accepted a composition of six annas in the rupee thereon." Very likely Mr. May was led to think that the total indebtedness on which he was entitled to the composition was Rs. 51,000, and without caring to look into the account, he accepted the suggestion made by Sithapati or by some one else in the office. Apparently Mr. May when he gave his deposition did not remember these facts.

After giving my full consideration to the evidence in the case, it seems to me that the only reasonable hypothesis for explaining the receipt of the odd figure of Rs. 19,125 is to regard that as the equivalent of the six annas in the rupee for what was at that time regarded as the total indebtedness of Somasundaram.

Then, after obtaining the two receipts from the Bombay Company, Somasundaram made endeavours to get his adjudication annulled. He first made an application to the Insolvency Commissioner for an order in that behalf. Apparently that application was adjourned pending a report from the Official Assignee. Then, in December 1918, the Official Assignee informed the Bombay Company that he intended holding a meeting of the creditors of Somasundaram Chetti "to consider the situation and to state whether they agree to the annulment of adjudication." A meeting was held on 8th January 1919. Everybody agreed to the composition excepting Sithapati. By this time the Official Assignee was acting for Sithapati. In Exhibit G, the Official Assignee wrote to the solicitors of the Bombay Company asking them to produce a receipt as to whose account they appropriated the Rs. 27,000 realized on behalf of Sithapathi. A reply was sent on 10th January stating that Rs. 27,000 had been appropriated to Somasundaram's account. On 11th January, the Official Assignee disputed this right of the Bombay Company. After some further correspondence, on 6th March 1919, the Official Assignee submitted a report to the Court. In that he stated, "the Bombay Company subsequently settled with the insolvent at the rate of six annas in the rupee but not on the sum of Rs. 27,000 which was really due to them; but on the full sum of Rs. 54,000 and they granted him a receipt in full satisfaction

of their claim of Rs. 54,000." Then he says, "it would be well for me to settle the question of whether the six annas was or was not a fair settlement, and in order to do this it is necessary for me to examine the insolvent with a view to ascertaining what profits he has made." This was really a report against dispensing with the public examination of Somasundaram as requested by him. On 23rd March 1919, Mr. Justice Courts-Trotter, after considering the report and the application, came to the conclusion that Somasundaram need not be publicly examined. On 31st March a formal application was presented by Somasundaram for the annulment of his insolvency. Notice went to all the creditors. A further report was submitted by the Official Assignee on 15th April 1919. He said in that "I called a meeting at which no one opposed except one P. Sithapati Ayyar, or rather myself on his behalf. He was the guarantee broker of the Bombay Company, Limited, and Rs. 27,343 of his money was taken by them to the credit of this insolvent's account. In spite of this they again took six annas in the rupee on the full account of this insolvent and this insolvent now refuses to recognize Sithapati Ayyar as a creditor or that the Bombay Company have taken his Rs. 27,000." Then at the end of his report, he said, "I am entitled for the benefit of Sithapati Ayyar estate to six annas in the rupee on Rs. 27,000 from this insolvent and I ask that the annulment be made conditional upon this." Thereupon the learned Judge ordered that on the insolvent's giving security for Rs. 9,000 the order adjudicating Somasundaram an insolvent be annulled. This was on the 22nd day of April 1919. No appeal was preferred against this order.

The present application was filed on 26th March 1919 by the Official Assignee for a direction that the Bombay Company should pay to him Rs. 27,000 and odd, which they had realized out of the deposit made by Sithapati with them. The learned Judge has made the order and this appeal is against it.

I give the learned Judge's reasons for his conclusion in his own words; firstly "my order (referring to the annulment) provided for annulment of the adjudication and did not embody the terms of the proposal," secondly, the arrangement which led up to the annulment "was not at the date on which it was carried out a composition within the meaning of the material

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section," and thirdly "that the Bombay Company, after giving the discharge which they did, could never have been heard to say that their debt was not extinguished as between themselves and Somasundaram Chetti, even though all the other creditors had rejected his overtures and had declined to settle with him."

The fact that the order did not contain the particulars which under section 30 of the Insolvency Act should be contained in it is not a ground for holding that the order is infructuous. It is true that the arrangement for the composition emanated from Somasundaram; it is also true that he dealt with the creditors himself. No doubt the proper procedure was to have approached these creditors through the Official Assignee. That is what section 28 of the Act contemplates. But we have evidence to show that for a long time, it has been customary in Madras to allow insolvents to adjust matters with the creditors and then to report the settlement to the Official Assignee to enable him to take action. It may be that the procedure is irregular, but I am not satisfied that there is anything illegal in what had been done. Having regard to the fact that subsequently the Official Assignee summoned the creditors and submitted a report on which the final order was passed by the learned Judge, I am of opinion that the action taken by Somasundaram may be regarded as having been done by him as the agent of the Official Assignee. Even though there was no authorization at the outset, the insolvent's action was accepted and ratified by the Official Assignee by the subsequent steps he took in the matter.

The remarks of Lord Justice RIGBY in *In re Izod*(1) have been quoted by the learned Judge and have been strongly relied on by Mr. Grant in this Court. In the first place that case relates to the rescinding of a receiving order. In the second place, notwithstanding the adverse remarks of the learned Lord Justice, the decision of the Court was that the order should be rescinded, although the initial steps were taken by the insolvent himself. It is unnecessary to consider whether the strictures passed by the Lord Justice in allowing the insolvent to deal with creditors behind the back of the

(1) [1898] 1 Q.B., 241.

Official Assignee are applicable in their entirety to circumstances in this country. As was pointed out by the learned Chief Justice, in very many cases, even in England, settlement with creditors with a view to composition are begun by persons interested in the insolvent. There is nothing immoral in such a procedure; and especially as the act makes provision for the public examination of the insolvent if it is desired by any of the parties, I see no reason for holding that the procedure adopted vitiates the whole proceeding.

It was open to Mr. Justice COUTTS TROTTER to have refused to annul the adjudication on the ground that the composition was not at the instance of the Official Assignee; on the other hand, the learned Judge, after full consideration of all the circumstances, dispensed with the public examination of Somasundaram and directed the annulment. That order has not been appealed against and is binding upon all the parties who appeared before the learned Judge.

The circumstance that the office did not embody the terms of the composition as required by section 30 does not in my opinion make the order a nullity. With great respect, I am unable to agree with the learned Judge that it was open either to him or to us to go behind the order.

Now this disposes of the first two reasons given by the learned Judge for re-opening the annulment.

It was strenuously contended by Mr. Grant that there was no appropriation of Rs. 27,000 towards the debt due from Somasundaram at the date when Exhibits A and B were passed. I have already given reasons for holding that the evidence of Mr. May should be accepted. It is true that Mr. May says that at the time he gave the receipt he had not made himself acquainted with the law which would enable him to claim a dividend on the whole amount, notwithstanding that the surety had paid a portion of it. But that is no ground for not accepting his statement that he, as a matter of fact, made the appropriation. Even if we take it that Rs. 27,000 was not appropriated for the debt due from Somasundaram alone but was retained by the Bombay Company as part payment towards the general indebtedness of their dubash, I fail to see how the Official Assignee is entitled to a refund of Rs. 27,000. The

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suggestion of the learned counsel that even after the passing of Exhibits A and B, the money was held in suspense to the credit of Sithapathi is not borne out by any record before us. Either that money was appropriated to the debt of Somasundaram or was debited to the general account of Sithapathi. In either case, on the date of the receipts A and B, there was no money to the credit of Sithapathi.

On the general question whether a creditor is entitled to claim a dividend in a composition in respect of the whole amount, notwithstanding a portion of the debt has been received from a surety, the law is well settled. In *In re Sass. Ex parte National Bank of England*(1), VAUGHAN WILLIAMS, J., enunciated this proposition very distinctly, and it has never since been questioned. In *Ellis v. Emmanuel*(2), the same view was taken. That was a suit by the surety against the principal creditor for receiving a proportionate share of the dividend received by the latter in the insolvency of the principal debtor. It was held that the creditor was entitled to retain not only the amount of the dividend but also the amount received from the surety. That case goes even further than *In re Sass. Ex parte National Bank of England*(1). It is clear that there is nothing in the Presidency Towns Insolvency Act which in any way detracts from the principles enunciated in the cases already referred to.

Therefore, I am of opinion that as Rs. 27,000 was appropriated before the grant of receipts A and B, the two receipts did not operate to extinguish the entire debt owed by Somasundaram to the two companies. Even otherwise, I agree with the learned Chief Justice that the Official Assignee is not entitled to a refund of the amount appropriated by the Bombay Company for debts due. The learned counsel for the respondent contended that as the composition had been completed behind the back of the surety by the Bombay Company, the surety was discharged and was entitled to a refund of the amount. It may be that if there was a private composition and the matter did not come before the Insolvency Court, such a dealing with the principal debtor behind the back of the surety may have the effect of discharging the surety, but where after,

(1) [1896] 2 Q.B., 12.

(2) (1876) 1 Ex.D., 157.

notice to the surety, the composition was accepted by the Court, it becomes an act of the Court and the principle of sections 134 and 135 can have no application.

For all these reasons, I agree that the order of the learned Judge should be reversed and that the petition of the Official Assignee should be dismissed with costs on the Original Side scale.

Solicitors for appellant : *Messrs. King and Partridge.*

Solicitors for respondent : *Messrs. Grant and Greatorex.*

K.R.

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APPELLATE CIVIL.

*Before Sir John Wallis, Kt., Chief Justice, and
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A. SWAMINATHA MUDALIAR (DEFENDANT), APPELLANT,

1920,
November 10.

v.

S. V. RAMASWAMI MUDALIAR (PLAINTIFF), RESPONDENT.*

Registration Act (XVI of 1908) ss. 2 and 17 (ii), clause (5)—Lease—Agreement to lease—Instrument not registered—Admissibility of instrument in evidence—Suit by lessor to eject lessee—Lessee setting up counter-claim for specific performance of agreement to lease or for damages for its breach by lessor.

An agreement to lease, which does not operate as an immediate demise of the property, does not fall within the definition of "lease" contained in section 2 of the Registration Act (XVI of 1908) and is admissible in evidence without registration.

The question whether an agreement to lease operates as an immediate demise should be determined on the facts of each case.

Hemanta Kumari Debi v. Midnapur Zamindari Company, (1919) 46 I.A., 240, followed *Narayanan Chetti v. Muthiah Servai*, (1912) I.L.R., 35 Mad., 63 (F.B.), not followed.

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ON APPEAL from the judgment of KUMARASWAMI SASTRI, J., in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Original Suit No. 848 of 1919.

This was a suit by plaintiff, who was the owner of the suit premises, to recover possession of them from the defendant to whom they had been leased on a monthly rental of Rs. 300. The plaintiff alleged that he had given to the defendant a valid notice to quit the same by the end of October 1919, but that the defendant wrongfully refused to quit, setting up an agreement to lease the premises for three years ending on 31st October 1921, and relying on certain letters that passed between the parties in 1918. The plaintiff contended that these letters did not evidence any concluded agreement on his part to grant a lease, and that even if they did, they were not admissible in evidence, nor did they confer any right on the defendant, and could not be relied upon by the defendant in bar of the suit. The defendant pleaded, *inter alia*, that these letters formed a concluded agreement to lease for three years ending with October 1921, that he had continued in possession thereunder, that the letters did not require to be registered and were admissible in evidence, and that the plaintiff's suit should therefore be dismissed. The defendant filed a counter-claim for specific performance of the agreement to lease or, in the alternative, for Rs. 10,000 as damages for breach of the agreement by plaintiff. The learned Trial Judge (KUMARASWAMI SASTRI, J.) held (1) that, if the letters can be said to evidence a contract to lease for three years, it was invalid for want of registration; (2) and that a counter-claim either for specific performance of the agreement or for damages for its breach by the plaintiff, was not sustainable; and that consequently the plaintiff was entitled to recover possession of the suit premises. He accordingly decreed the suit and dismissed the counter-claim. The defendant preferred this appeal.

K. Ramachandran for the appellant.—The agreement to lease is to be gathered from the correspondence between the parties, contained in several letters that passed between them in 1918. To an agreement constituted by several letters, the ruling in the Full Bench case of *Rama Ayer v. Palaniappa Chetty*(1) does not apply. The letters, though none of them are registered, are

(1) (1912) I.L.R., 85 Mad., 63.

admissible in evidence. Though a document creating a gift, being unregistered, is inadmissible as a deed of gift, it is still admissible to show the nature of possession of the person holding the property: see *Varatha Pillai v. Jeevarathammal*(1).

The decision of the Full Bench in *Narayanan Chetty v. Muthiah Servai*(2) is no longer good law after the decision of the Privy Council in *Hemanta Kumari Debi v. Midnapur Zamindari Company*(3). The counter-claim for damages is not barred under the ruling of the Full Bench in *Narayanan Chetty v. Muthiah Servai*(2). Claim for damages in such cases is still governed by *Rajah of Venkatagiri v. Narayana Reddi*(4). In this case possession was continued under the agreement to lease for three years, and effect was given to the arrangement set up by the defendant.

Venkatasubba Rao for the respondent.—The agreement to lease cannot be proved by unregistered letters. In *Panchanan Bose v. Chandi Charan Misra*(5), and in *Hemanta Kumari Debi v. Midnapur Zamindari Co.*(6) which was taken on appeal to the Privy Council as *Hemanta Kumari Debi v. Midnapur Zamindari Company*(8) the lease was contingent and no present demise was effected by the document. In the first case, there was only an agreement to give a patta and in the latter case there was an agreement to give a lease contingent on success in a litigation. Here, there is an agreement, if at all, to lease immediately, and not on a future contingent event. Further, the correspondence does not establish a concluded agreement, but only a negotiation for an agreement, which fell through. Even in the case of agreements inferred from correspondence, the whole correspondence must be registered: see *Morgan & Son v. Fernandes*(7). There is a conflict of decisions on this point: see *Chitravelu Servai v. Samanna Iyer*(8), and *Sheikh Elahi v. Sheikh Hukum*(9). The Full Bench case, *Narayanan Chetty v. Muthiah Servai*(2), was not placed before

(1) (1920) I.L.R., 48 Mad., 244 (P.O.); s.c., I.L.R., 46 I.A., 285.

(2) (1912) I.L.R., 85 Mad., 63 (F.B.).

(3) (1920) I.L.R., 47 Calc., 485 (P.O.); s.c., I.L.R., 46 I.A., 240.

(4) (1894) I.L.R., 17 Mad., 456 (F.B.).

(5) (1910) I.L.R., 37 Calc., 808. (6) (1914) 19 C.W.N., 347.

(7) (1916) 30 M.L.J., 519. (8) (1916) 35 I.C., 108.

(9) (1918) 18 C.W.N., 88.

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WALLIS, C.J. WALLIS, C.J.—I agree that the case should go back. The words "agreement to lease" which were included in the definition of "lease" at least as far back as the Registration Act of 1866, long before the enactment of the Transfer of Property Act, and were apparently intended to guard against the possibility that Courts in India might otherwise extend the same degree of recognition to agreements to lease that is extended to them pursuant to equitable principles in England, have apparently received a restricted construction in the recent decision of the Privy Council in *Hemanta Kumari Debi v. Midnapur Zamindari Company*(1), which approves of the construction put upon them by Sir LAWRENCE JENKINS, C.J., in *Panchanan Bose v. Chandi Charan Misra*(2), and it appears necessary to reconsider, in the light of these decisions and on the facts of the case, whether there was here any agreement to lease within the meaning of the definition in section 2 of the Indian Registration Act. If there was, we are still bound by the decision in *Narayanan Chetty v. Muthiah Servai*(3).

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SESHAGIRI AYYAR, J.—This is a suit in ejectment. The defendant had a lease of the premises, which expired in the beginning of October or November 1919. Negotiations began for the renewal of the lease. The parties failed to agree. Thereupon the plaintiff gave notice to terminate the tenancy and brought this suit.

The defendant filed a counter-claim in which he asked that damages should be awarded to him for failure to give the lease as agreed upon.

KUMARASWAMI SASTRI, J., came to the conclusion that, as there was no registered lease deed, the plaintiff was entitled to possession. On the counter-claim the learned

Judge was of opinion that, as the correspondence at best only amounted to an agreement to lease and as such an agreement was inadmissible in evidence for want of registration, the defendant was not entitled to have that considered in the suit. Hence this appeal.

Mr. Venkatasubba Rao argued a preliminary question that as the correspondence did not evidence a completed contract the learned Judge was right in dismissing the counter-claim. Reading the letters that passed between the parties, it seems to me that Exhibit G, the reply of the defendant, dated 6th October 1918, is a valid acceptance of the proposal contained in Exhibit E. The sentences that follow, containing a request that the lease should commence on a particular date and terminate on another date, do not affect the acceptance contained in the early portion of the letter. The learned Judge himself seems to have proceeded upon the footing that there was a completed agreement to lease. The question as to whether this agreement amounted to a present demise will depend to some extent at least upon the evidence as to when the previous lease terminated and whether the defendant continued to occupy the premises on the strength of the correspondence that passed between the parties. The only question that need be decided at present is whether the learned Judge was right in holding that an agreement to lease should, under all circumstances, be registered and whether the view taken in *Narayanan Chetty v. Muthiah Servai*(1) should be followed. The difficulty arises because of the decision of the Judicial Committee in *Hemanta Kumari Debi v. Midnapur Zamindari Company*(2). In this Court, acting on *Narayanan Chetty v. Muthiah Servai*(1), it was held in *Streeramulu Naidu v. Ramaswami Mudaliar*(3) that an unregistered agreement to lease should not be considered even with reference to a question for damages for breach of contract. It is therefore necessary to examine with some minuteness the pronouncement of the Privy Council on this question. *Hemanta Kumari Debi v. Midnapur Zamindari Company*(2) was an appeal from the decision of MUKERJEE and BEACHCROFT, JJ., in *Hemanta Kumari Debi v.*

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(1) (1920) I.L.R., 47 Calc., 485 (P.C.); s.c., L.R., 46 I.A., 240.
(2) (1910) I.L.R., 37 Calc., 808. (3) (1912) I.L.R., 35 Mad., 63 (F.B.).

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(2) (1920) I.L.R., 47 Calc., 485 (P.C.); s.c., L.R., 46 I.A., 240.
(3) (1917) 83 M.L.J., 596.

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Midnapur Zamindari Co.(1). Mr. Justice MUKERJEE, whilst pointing out that an agreement to lease was not affected by section 17 (ii) (5), held that it was not excluded by section 49 of the Act when a question relating to specific performance of the contract arose for decision. Mr. Justice BEACHCROFT put it on a slightly different ground. Lord BUCKMASTER, in delivering the judgment of the Privy Council, referred to the definition section and held that an agreement to lease was included in the term "lease." His Lordship also held, agreeing with Justice MUKERJEE, that section 17 (ii) (5) was inapplicable. Then he proceeded to say that

"if the document in question can be regarded as a lease within the meaning of this definition, it could not be received in evidence. Their Lordships were of opinion that it cannot be so regarded. An "agreement for a lease" which a lease is by the statute declared to include, must, in their Lordships' opinion, be a document which effects an actual demise and operates as a lease. They think that JENKINS, C.J., in *Panchanan Bose v. Chandi Charan Misra*(2) correctly stated the interpretation of section 17 in this respect."

Turning to *Panchanan Bose v. Chandi Charan Misra*(2) we see that the Chief Justice held that the document he was considering did not come within section 17 (i) (d) of the Registration Act and that consequently it was affected by the rule contained in clause 2 (5). In fact the conclusion was that unless an agreement to lease had the effect of operating as an immediate demise of the property it need not be registered. It may be urged that this view practically destroys the difference between a lease and an agreement to lease, but apparently the position created by the definition section has become very anomalous and Courts have been at pains to devise a way out of the difficulty; and as the solution has emanated from such a high authority as Sir LAWRENCE JENKINS and has the approval of the Judicial Committee, I feel that we should accept it unreservedly. I am not prepared to regard the pronouncement of the Judicial Committee as an *obiter dictum* which it is open to us to ignore, having regard to the Full Bench decision of this Court. The question was directly before the Board and they pointedly drew attention to the decision of the Chief Justice of the Calcutta High

Court on the matter. I feel no compunction in respectfully accepting this view, and in holding that *Narayanan Chetty v. Muthiah Servai*(1) should no longer be regarded as good law; otherwise it would result in perjured evidence being let in to prove a supposititious oral agreement in such cases.

In the Transfer of Property Act, the legislature has expressly provided that an agreement to sell does not confer any interest in the property. There is no reason, justice or principle, why an agreement to lease should be on a higher footing than an agreement to sell. Apparently, as was suggested by the learned Chief Justice in the course of the argument, the definition section in the Registration Act included "an agreement to lease" in the term "lease," on the principle of English Courts that equity regards that as done which ought to be done. If we turn back to the earliest Registration Act, we still find that a "lease" includes "an agreement to lease." The framers of the Transfer of Property Act attached less importance to this principle of equity in enacting that an agreement to sell did not create an interest in the property, and their failure to enact a similar provision in respect of leases was probably due to a desire to leave the law as contained in the Registration Act untouched, as it has withstood the test of time for a considerable period. If I may say so with respect, there is an obvious inconsistency between the position of sales and leases, and it is desirable that both of them should be placed on the same footing by the legislature. However that may be, we must now exclude from the definition of agreements to lease, all instruments which do not operate as an immediate demise. Therefore, the decision of the learned Judge should be reversed and the case should be sent back to him for further consideration.

The question as to whether, in the present case, the agreement amounts to a present demise will depend to some extent upon the evidence that may be adduced. On the correspondence as it stands, without knowing when the old lease terminated and whether the defendant was in possession under the old lease or under the new arrangements, when notice to evict him took effect, it is not possible to decide the appeal. Therefore the case must go back to the learned Judge.

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(1) (1914) 19 C.W.N., 347.

(2) (1910) I.L.R., 37 Cal., 808.

(1) (1912) I.L.R., 35 Mad., 63 (F.B.).

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There is another question of equal importance, that is, whether, even supposing that the agreement to lease contained in the correspondence did amount to a present demise whether it should be registered because the contract has to be spelled out of the correspondence that passed. There has been a conflict of opinions on this question in this Court. There is first of all the decisions of the Judicial Committee in *Port Canning Land Investment Reclamation and Dock Co. v. Smith*(1), which was given under the old Registration Act. There has since been a change in the language of the Act to which Mr. Justice NAJEEB has drawn attention. How far this change impairs the authority of the ruling of the Judicial Committee has to be considered. Perhaps, it may be necessary to refer the question for the decision of a Full Bench in view of the two decisions of this Court, *Morgan and Son v. Fernandez*(2) and *Chitravelu Servai v. Samanna Iyer*(3). Under these circumstances, I do not think it desirable to express any decided opinion on this question.

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APPELLATE CIVIL.

Before Sir John Wallis, Chief Justice, and Mr. Justice
Ramesam.

SHAW WALLACE & CO. (PETITIONERS), APPELLANTS,

v.

K. M. SUBBIE & SONS (RESPONDENTS), RESPONDENTS.*

Arbitration Act (Indian) (IX of 1899), sec. 9—Appointment of arbitrators—Notice by one party to the other to appoint his arbitrator—No appointment by the former of his own arbitrator before giving notice—Default by latter to name his arbitrator on notice—Right of former to appoint both arbitrators under the contract—Section 9 of the Act, whether applicable—Proviso to section 9, whether applicable to set aside appointments under contract—Refusal of arbitrator to grant adjournment—Misconduct—Award, whether invalid.

The provisions of section 9 (b) of the Indian Arbitration Act, 1899, do not apply to a case where by the contract between the parties a different course is

(1) (1874) L.R., 1 I.A., 124.

(2) (1916) 30 M.L.J., 519.

(3) (1916) 35 I.O., 108.

* Original Side Appeal No. 84 of 1920.

provided for the appointment of arbitrators and as to what is to happen if the party to whom notice is given makes default in making the appointment; and the proviso to the same section, which empowers the Court to set aside the appointment, does not apply to an appointment made under the contract.

Where the arbitrators, appointed under the contract and not under section 9 of the Act, refused to grant an adjournment so as to enable one of the parties to apply to the Court to set aside their appointment, they were not guilty of misconduct, and the award was not liable to be set aside.

ON APPEAL from the judgment of KUMARASWAMI SASTRI, J., in exercise of the Ordinary Original Civil Jurisdiction of the High Court in the matter of the Indian Arbitration Act, IX of 1899, and in the matter of an arbitration between Messrs. Shaw Wallace & Co. and Messrs. K. M. Subbier & Sons.

This Appeal arises out of an application for execution filed in the High Court, Original Side, under the provisions of the Indian Arbitration Act, 1899. The petitioners, Messrs. Shaw Wallace & Co., entered into a contract with the defendant company for sale of some bales of yarn which had to be shipped and delivered at certain times specified in the contract. Under clause 12 of the contract, any dispute as to the interpretation of the contract, or any matter in connexion therewith or carrying out thereof, was to be submitted to the arbitrament of an arbitrator to be appointed by the Madras Chamber of Commerce, or to the arbitrament of two European merchants or their European Assistants, one to be appointed by each party. The clause further provided, that if either party omitted to nominate an arbitrator within seven days of the receipt of notice calling on him to do so, the other party should be at liberty to nominate both arbitrators, and that the arbitration shall be conducted in accordance with the provisions of the Indian Arbitration Act, IX of 1899. (The arbitration clause is set out in the judgment.) Under clause 5 of the contract, the petitioners were protected from responsibility for late shipment in consequence of events beyond their control. The respondents did not take delivery of certain bales that had arrived in connexion with their contracts alleging that the petitioners did not act in accordance with the terms of their contract by reason of late shipment. The petitioners wrote to the respondents that they desired to have the dispute decided by the arbitrator to be appointed by the Madras Chamber of Commerce, but did not name the date for arbitration or the terms of reference. After some correspondence on the

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subject, the petitioners called upon the respondents to name their arbitrator within seven days. But they had not nominated their own arbitrator previous to their calling on the respondents to name theirs. The respondents omitted to name their arbitrator within the time but asked for time to do so, and asked the petitioners to let them know the name of their arbitrator. The petitioners replied by saying that they had appointed two persons as the respondents had failed to nominate one in spite of repeated letters.

The respondents protested against such appointment and stated that they would not be bound by their award. The arbitrators sent notice to the respondents of the hearing before them on 9th July 1919. On 8th July the arbitrators received a letter from the respondents requesting a fortnight's adjournment as they disputed the validity of their appointment and wished to apply to the High Court to set it aside, but the adjournment asked for was refused. The arbitrators proceeded to decide the dispute *ex parte*, and passed an award that the respondent should take delivery of the bales and pay damages on account of their default. They held that the petitioners were protected by clause 5 of the contract, though some of the bales were shipped late. The petitioners applied to the High Court on its Original Side for execution of the award under the Indian Arbitration Act, 1899. The respondents pleaded, *inter alia*, (1) that the appointment of both arbitrators by the petitioners was illegal, as under section 9 of the Act, a party is empowered to appoint both arbitrators only on his appointing an arbitrator and giving notice to the other party of the appointment, and then waiting for seven days: and such a procedure was not followed in this case; and (2) that the arbitrators were guilty of misconduct in not granting an adjournment to enable the respondents to move the High Court to set aside the appointment under the proviso to section 9 of the Indian Arbitration Act. The learned trial Judge (KUMARASWAMI SASTRI, J.) held that section 9 of the Arbitration Act governed the case, as "a different intention" within the meaning of the section was not contained in clause 12 of the contract. His Lordship also held that the arbitrators, though they acted bona fide, when they refused the adjournment, did not exercise their discretion properly and should have granted

the adjournment, and were not justified in proceeding with the inquiry as they did. His Lordship held that the award was not enforceable and dismissed the application for execution. The plaintiffs preferred this Appeal.

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D. Chamier for appellants.—Section 9 of the Indian Arbitration Act does not apply to this case. There is a contract showing a contrary intention in this case. Under the contract, one party is entitled to appoint both the arbitrators when the other improperly refuses to appoint one on notice given to him by the former. The section mentions that the former party is entitled to have his nominee as the sole arbitrator in case of default of the other party, whereas under the contract he is to appoint both arbitrators. The nomination need not be communicated to the other party under the contract. There is no provision in the contract that there should be a nomination by one party, and communication to the other, before the latter is called upon to name his arbitrator. The section permits the making of such a contract, and in such a case the procedure laid down by section 9 cannot be followed. Reference was made to *Thomas v. Fredricks*(1), *Tew v. Harris*(2). There was no misconduct on the part of the arbitrators in refusing to grant an adjournment. The proviso to section 9 does not apply to an appointment made under the contract. The respondents had ample opportunity to apply to the Court.

V. V. Srinivasa Ayyangar for respondents.—The case of *Thomas v. Fredricks*(1) shows that the first party who calls on the other to nominate an arbitrator should notify his nominee to the other party when he calls upon him to make his nomination. In this case there was no appointment in fact by the appellants before they called on the respondents to name their arbitrator. This requirement prescribed by the Arbitration Act is not negated by the contract. "Both arbitrators" in clause 12 of the contract, refer to one already appointed and another to be appointed. The provisions of the Act, where not inconsistent with the contract, should be followed, even though

(1) (1847) 10 Q.B., 775; s.c., 118 E.R., 294.

(2) (1847) 11 Q.B., 7; s.c., 116 E.R., 376.

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there is a contract. Clause (b) of the section of the Act applies to contracts made in substitution of the provisions in clause (b).

The arbitrators were not justified in refusing an adjournment to enable respondents to apply to the High Court to set aside the appointment as invalid. The arbitrators refused the adjournment and passed an award against the respondents *ex parte*, for Rupees three lakhs. The proviso to section 9 applies to this case. Even if it does not apply, the arbitrators should have granted an adjournment in the interests of justice, to give the respondents an opportunity to move the Court. Even assuming that the respondents were wrong in demanding the disclosure of the name of the arbitrator on a wrong construction of section 9 of the Act, still the respondents could apply to the Court to excuse their mistake and allow them an opportunity to name their arbitrator. The request for adjournment was reasonable. They did not judicially consider the application of the respondents. Reference was made to *In re Palmer & Co.*, and *Hosken & Co.*(1), *Thomas v. Fredricks*(2), and *Tew v. Harris*(3).

WALLIS, C.J.

WALLIS, C.J.—This is an appeal from a judgment of KUMARASWAMI SASTRI, J., dismissing a suit brought by the plaintiffs Messrs. Shaw Wallace & Co. against the defendants to enforce an award on two grounds, (1) that the arbitrators were not duly appointed, and (2) that even if they were, they were guilty of technical misconduct, though acting bona fide, when they refused to adjourn the arbitration to allow of an application being made to set aside their appointment under section 9 of the Indian Arbitration Act, 1899. The facts may be very briefly stated. The contract between the plaintiffs, who are referred to as the merchants, and the defendants, who are referred to as the dealers, contains a very wide clause 5 protecting the merchants from responsibility for late shipment in consequence of events beyond their control and also an arbitration clause 12 in the following terms :

“Should any dispute arise as to the interpretation of this contract or any matter in connexion therewith or with the carrying out thereof the same shall be submitted at the option of the

(1) [1898] 1 Q.B., 181.

(2) (1847) 10 Q.B., 775; s.c., 116 E.R., 294.

(3) (1847) 11 Q.B., 7; s.c., 116 E.R., 376.

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merchants either to the arbitrament of an arbitrator to be appointed by the Secretary or other officer or officers of the Madras Chamber of Commerce entitled to make such appointment according to the practice of the Madras Chamber of Commerce or to the arbitrament of two European merchants or their European Assistants one to be appointed by each party or in the event of disagreement between such arbitrators of an umpire to be appointed by them. Should either party omit to nominate an arbitrator within seven days of the receipt of a notice calling on him so to do, the other party shall be at liberty to nominate both arbitrators. The arbitration shall be conducted in accordance with the provisions of the Indian Arbitration Act of 1899 save that the first and second proviso to the first schedule thereto shall not apply. The decision of the arbitrators or of their umpire shall be conclusive and binding on both the parties. The arbitrators to state by whom the cost of the arbitration is to be paid.”

On 30th April 1919 the plaintiffs wrote to the defendants asking them to join in a reference to the arbitration of the Chamber of Commerce of a dispute regarding the late shipment of forty-four bales. The defendants through their vakil returned an evasive answer on May 7th and after waiting another month, the plaintiffs purporting to act under clause 12 of the contract wrote to the defendants on 9th June calling on them pursuant to clause 12 of the contract to nominate a European merchant or his Assistant to act as arbitrator on their behalf, and notifying them, that in the event of their failing to do so within seven days, the plaintiffs would nominate both arbitrators. The defendants did nothing, and the plaintiffs nominated two arbitrators on 27th of June and informed the defendants by their solicitor's letter of 1st July. The arbitrators then gave the defendants notice of the place and time of hearing (July 9th) and the letter was forwarded to the defendants by the plaintiff's solicitors on July 5th. On 8th July, the day before the hearing, the defendants wrote to the arbitrators taking exception to their appointment, and asking for an adjournment to enable them to apply to the High Court, after the re-opening on 14th July to set aside the appointment. The award sets out that in view of the fact that ample time had been given the dealers to appoint an arbitrator, the arbitrators had replied that they could find nothing in the correspondence which warranted

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the postponement of the hearing and that it would be held on the day fixed. They accordingly proceeded in the absence of the defendants and found that in the circumstances of the case the plaintiffs were protected by clause 5 of the contract from responsibility for the late shipment.

The parties to a contract are at liberty to make any agreement they like as to the appointment of arbitrators and as to what is to be done if one of the parties omits to appoint an arbitrator as provided in the contract. Because, however, contracts may fail to provide what is to be done in such an event, section 9 of the Indian Arbitration Act, which substantially reproduces a section of the Common Law Procedure Act, 1854, and of the English Arbitration Act, enacts that

"where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, unless a different intention is expressed therein,"
then clause (b):

"if one party fails to appoint an arbitrator within seven days after the other party having appointed his arbitrator has served the other party with a written notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference."

This section in my opinion has no application where, as in the present case, the parties by their contract have provided that a different course should be adopted in the event of one of the parties failing to nominate because the section is not to apply where a different intention is expressed in the contract. In the present case the contract provides:

"Should either party omit to nominate an arbitrator within seven days of the receipt of a notice calling on him to do so the other party shall be at liberty to nominate both arbitrators;"

in other words, in the event of a dispute arising, either party to the contract is to be at liberty in the first instance to call upon the other to nominate an arbitrator within seven days of the receipt of the notice calling upon him to do so, and if the other party fails to do so then to nominate both arbitrators himself. Not only is he to appoint both arbitrators but the nomination of both is to be after the failure of the other party to appoint. There is, therefore, no room for the application of the section which provides that "unless a different intention is expressed," a party

desiring arbitration is first to appoint his own arbitrator then give notice to the other party to appoint an arbitrator, and on his failing to do so appoint the arbitrator he had himself appointed to be the sole arbitrator. That is an entirely different procedure which is excluded by the terms of the contract, with the result that section 9 which was intended to supplement and not to override the contract of the parties has no application to the present case. Where the contract provides otherwise, an appointment cannot be made under section 9, clause (b), and it also follows that the proviso enabling the Court "to set aside any appointment made in pursuance of clause (b)" has no application. Similarly, in *Gumm v. Hallet*(1), it was held, with reference to the corresponding section 13 of the Common Law Procedure Act, 1854, that it had no application to a contract which provided that either party should appoint one arbitrator and a third be chosen by the two so appointed. The learned Judge appears to have been influenced by the proviso in clause 12 of the contract that the arbitration is to be conducted in accordance with the provisions of the Indian Arbitration Act, but this is not to be read as varying the express provision of the contract as to the appointment of arbitrators, especially as under the Act itself the provisions of clause (b) of section 9 do not apply where a different intention is expressed in the contract.

As regards the second ground in holding that the refusal of the arbitrators to grant an adjournment to allow of the High Court being moved to set aside the appointment under the proviso to section 9 which as we have seen has no application to the case, the learned Judge has relied upon the decision of the Court of Appeal, in *In re Palmer & Co. and Hosken & Co.*(2). In that case the arbitrators had refused an adjournment to enable one of the parties to apply to the Court to direct the arbitrators to state a special case for the opinion of the Court on an important point of law which had arisen in the course of the arbitration. Under section 19 of the English Arbitration Act, which is not reproduced in our Act, the Court has power at any stage of the proceedings to direct such a case to be stated, and

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(1) (1872) L.R., 14 Eq., 555.

(2) [1898] 1 Q.B., 131.

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the Court of Appeal were of opinion that this section impliedly conferred upon the parties a right to apply to the Court to direct a case to be stated which the arbitrators were bound to respect. They accordingly held that it was *prima facie* misconduct on the part of the arbitrators to refuse to state a case themselves or grant an adjournment for the purpose of enabling the parties to apply to the Court, but LINDLEY, M.R., added, that, even in such a case, if the application for a special case or an adjournment were frivolous and made merely for the purposes of delay an arbitrator would be perfectly right to refuse it and would be upheld by the Court in so doing. That case relates to misconduct in the course of the arbitration itself, and is no authority for the proposition that arbitrators are bound to postpone the hearing whenever one of the parties announces his intention of questioning their appointment in spite of the fact that the appointment had been made in strict accordance with the terms of the contract. Even if we assume that if there had been an appointment under clause (b) of section 9, it might have been the duty of the arbitrators when the case came on for hearing to grant an adjournment to allow of an opportunity of moving to set aside the appointment under the proviso to the section, if the parties had not had a reasonable opportunity of so moving before the hearing of the arbitration and unless they were of opinion that the application was merely made for purposes of delay, the duty would only arise when there had been an appointment under clause (b) which could be set aside under the proviso, which as I have already held, is not the present case. Further the defendants had been informed on July 1st of the appointment of the arbitrators and on July 5th that the hearing had been fixed for the 9th, and it is not shown that they could not have moved the Vacation Court before the hearing if so minded.

In the circumstances, I do not think there was any misconduct on the part of the arbitrators in refusing the adjournment. I think they were fully justified in holding no sufficient cause had been shown for granting it. In this view it is unnecessary to consider whether an objection of this kind would be a sufficient answer to a suit on the award when the award had not been set aside. The Appeal must be allowed, the decree reversed and the suit decreed with costs throughout.

RAMESAM, J.—This Appeal arises out of an application filed by the appellants seeking to execute an award under section 15 of the Indian Arbitration Act, 1899. The award was passed by two arbitrators, appointed by the appellants. It is contended for the respondents that the appointment was not validly made. The decision of this contention depends on the construction of clause 12 of the contract between the parties, which runs as follows:

"Should any dispute arise as to the interpretation of this contract or any matter in connexion therewith or with the carrying out thereof, the same shall be submitted, . . . to the arbitrament of two European merchants or their European Assistants one to be appointed by each party. . . . Should either party omit to nominate an arbitrator within seven days of the receipt of a notice calling on him so to do, the other party shall be at liberty to nominate both arbitrators. The arbitration shall be conducted in accordance with the provisions of the Indian Arbitration Act of 1899."

It is conceded for the respondent that, in the absence of the last of the sentences above set forth, the meaning of the clause would be that any party can nominate both the arbitrators after the failure of the other to nominate an arbitrator within seven days of the receipt of a notice by the former calling on the latter so to do. But it is contended that the last sentence attracts the provisions of the Indian Arbitration Act, section 9 (b) of which requires that the party serving notice on the other calling upon him to nominate should previously have "appointed his arbitrators." The appellant, in reply, relies on the words in section 9 "unless a different intention is expressed therein." It is conceded by Mr. V. V. Srinivasa Ayyangar, the learned vakil for the respondents, that so far as two arbitrators are contemplated by clause 12 in the place of the sole arbitrator referred to in section 9 (b) a "different intention" is expressed, but not in so far as section (9) (b) requires the previous "appointment of his arbitrators" by the party calling on the other to make his appointment. I am unable to agree with this contention. The words "*shall be at liberty to nominate both the arbitrators*" do, in my opinion, express a different intention and are inconsistent with any obligation on the part of the nominating party to appoint an arbitrator before calling on the other party to do so. In this view it is unnecessary to consider *Thomas v.*

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Fredricks(1) and *Tew v. Harris*(2), relied on by the respondent. I therefore hold that the arbitrators were validly appointed.

It is next contended by the learned vakil for the respondent that the arbitrators were guilty of misconduct in that they refused the respondent's request that the arbitration proceedings may be adjourned to enable him to apply to the Court to set aside the appointment of the arbitrators under the proviso to section 9 of the Act. In support of this position, he relied on *In re Palmer & Co. and Hosken & Co.*(3). That case is a decision on section 19 of the English Act, 52 and 53 Vict., c. 49, on which the Indian Act is based. That section provides that arbitrators "shall if so directed by the Court or a judge, state in the form of a special case for the opinion of the Court, any question of law, etc." It imposes a duty on the arbitrators and impliedly confers on the parties to an arbitration the right to apply to the Court for an order directing the arbitrators to state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference. The learned Judges (LINDLEY, M.R., and CHITTY, L.J.) who decided the case infer from this right a further duty on the part of the arbitrators to delay the award until the party can apply to the Court for an order directing a special case and hold that, if the arbitrator refuses to comply with the request to delay his award, he is guilty of misconduct. CHITTY, L.J., points out that such requests must be made in good faith and on reasonable grounds. In this case, the proviso to section 9 imposes no duty on the arbitrators. Moreover, the appointment of the arbitrators in this case was made not under section 9 (b) but under clause 12 of the contract between the parties which displaced section 9 and the proviso does not apply. It cannot be said that there is any reasonable ground for moving the Court to set aside the appointment of the arbitrators. I therefore hold that the arbitrators are not guilty of misconduct in proceeding with the arbitration, and that the award is valid.

In the result the appeal will be allowed with costs throughout.

Solicitors for appellants : *Messrs. Short Bewes & Co.*

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(1) (1847) 10 Q.B., 775; s.c., 116 E.R., 294.

(2) (1847) 11 Q.B., 7; s.c., 116 E.R., 276. (3) [1898] 1 Q.B., 131.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Coutts Trotter.

MUHAMMAD IBRAHIM SAHIB, PETITIONER,

v.

SHAIK DAVOOD (FIRST ACCUSED), FIRST RESPONDENT.*

Penal Code, sec. 323—Death of person injured—Abatement of proceedings—Probate and Administration Act (V of 1881), sec. 89.

A criminal prosecution under section 323 of the Indian Penal Code does not abate by reason of the death of the person injured.

The words "to prosecute . . . any proceeding" in section 89 of the Probate and Administration Act do not refer to criminal prosecutions but to civil actions only.

Rama Nand v. Emperor (1917) 40 L.C., 1008 (Punjab) and *Labhu v. Emperor* (1919) 52 L.C., 797 (Punjab), dissented from.

PETITION under sections 435 and 439 of the Code of Criminal Procedure (189*) praying the High Court to revise the order of T. L. KESAVA RAO, Stationary Second-class Magistrate of Nega-patam, in Calendar Case No. 387 of 1919.

The police charged the present respondent together with two others for an offence under section 304-A or 326, Indian Penal Code, the accusation being that they caused the death of one Sultan Marakkayar by hitting him with their fists on 17th February 1919. Sultan Marakkayar died on 21st February 1919. The Subdivisional Magistrate, before whom the charge sheet was filed, returned it on the ground that the facts pointed only to an offence under section 323 or 325, Indian Penal Code, triable by a Second-class Magistrate. The Police then laid the charge sheet before a Second class Magistrate who discharged one of the accused under section 253, Indian Penal Code, and charged the present respondent and another under section 323, Indian Penal Code. Subsequently the Magistrate was transferred and a *de novo* trial was ordered by his successor, who also framed charges against them under section 323, Indian Penal Code, but after the close of the defence evidence he held, that

* Cr.E.C. No. 367 of 1920 and Cr.R.P. No. 297 of 1920.

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"owing to the death of the person hurt the charge against the accused abates and accordingly I close the case without any judgment."

The son-in-law of the deceased Sultan Marakkayar filed a Revision Petition.

Jayaram Ayyar for petitioner.

V. Narasimha Ayyangar for respondent.

V. L. Ethiraj for Public Prosecutor for the Crown.

AYLING, J.

AYLING, J.—In this case the police preferred a charge sheet against two persons, Shaikh Davood and Muhammad Abu Bakar, for offences under sections 304-A or 326 of the Indian Penal Code by beating one Sultan Marakkayar and causing his death. The magistrate after hearing the prosecution evidence held that death was not the result of the beating and framed a charge under section 323 of the Indian Penal Code only. Accused entered on their defence and adduced evidence. After the close of the defence evidence the defence pleader drew the magistrate's attention to a ruling of the Punjab Chief Court, *Labhu v. Emperor*(1), and argued that owing to the death of the person injured the charge against the accused must be held to have abated. The magistrate accepted this contention and closed the case without recording any judgment of conviction or acquittal.

The present Revision Petition is filed by one Muhammad Ibrahim Sahib, son-in-law of the deceased Sultan Marakkayar. He was examined as fourth prosecution witness in the case and it was he who reported the occurrence to the village munsif and to the police (vide Exhibits C and D) on 18th February 1919, the day after the occurrence. Sultan Marakkayar died on 20th February 1919. The police charged the case on 21st March 1919.

It was found impossible to serve the second accused, Muhammad Abu Bakar, and with the consent of petitioner, the petition in so far as it affected him was dismissed on 29th October 1920. It remains to consider what orders should be passed as regards the case against the first accused, Shaikh Davood.

(1) (1919) 52 I.C., 797 (Punjab).

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With all respect to the two learned Judges of the Punjab Chief Court, who have held otherwise in *Rama Nand v. Emperor*(1) and *Labhu v. Emperor*(2), I must dissent from the view that a criminal prosecution under section 323 of the Indian Penal Code abates by reason of the death of the person hurt. It appears to be based on what seems to me a mistaken reading of section 89 of the Probate and Administration Act (V of 1881), which runs thus :

"All demands whatsoever, and all rights to prosecute or defend any suit or other proceeding, existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators, except causes of action for defamation, assault as defined in the Indian Penal Code or other personal injuries not causing the death of the party, and except also cases, where after the death of the party the relief sought could not be enjoyed, or granting it would be nugatory."

This provision has no reference to criminal prosecutions, but to civil actions only. The right to institute criminal proceedings, subject to certain limitations contained in sections 195 to 199 of the Criminal Procedure Code with which we are not concerned in this case, is common to any person cognisant of the commission of the offence, and does not exist merely in favour of the person injuriously affected by the offence. The word "prosecute" which occurs in the section implies no connexion with criminal proceedings, but is used in the same sense as in sections 14 and 16 of the Limitation Act. The use of the term "causes of action," a phrase unknown to the criminal law, is clearly indicative of the scope of the section. Section 89 of the Probate and Administration Act being inapplicable, it makes not the slightest difference whether the offence is compoundable or not.

This is in accordance with the views expressed in *In re Ganesh Narayan Sathe*(3), *Emperor v. Sultan Singh*(4), and by this Court in *In re Gangamma Dorayya*(5).

I have already referred to the provisions of sections 195 to 198 of the Criminal Procedure Code as provisions with which we are not now concerned, but I would not be understood as

(1) (1917) 40 I.C., 1008 (Punjab). (2) (1919) 52 I.C., 797 (Punjab).
(3) (1889) I.L.R., 13 Bom., 600. (4) (1909) I.L.R., 31 All., 606.
(5) (1892) 2 Weir, 418.

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suggesting that the death of the complainant after the institution of the proceedings caused any abatement even in such cases. It was held by this Court in *In re Gowdar Kottra*(1), that in the case of a criminal prosecution for adultery, the death of the husband after he had instituted the prosecution did not cause the prosecution to abate.

I would therefore direct the Magistrate to restore the case to his file and to dispose of it according to law as against first accused, Shaik Davood.

COUTTS
TROTTER, J.

COUTTS TROTTER, J.—I entirely agree and I only add a few words of my own, because there are two reported decisions of the Punjab Chief Court which countenance the view that section 89 of the Probate and Administration Act (V of 1881) applies to criminal as well as to civil proceedings. AYLING, J., has pointed out several considerations that appear to me completely to dispose of such a contention, but there is a further one which reduces it to a positive absurdity. By the section, "all rights to prosecute or defend any suit or other proceeding . . . survive to and against his executors or administrators," with certain defined exceptions. So that if the Punjab view is correct, an executor or administrator can be put in the dock to answer for the criminal acts of his testator. This of course cannot have been pointed out to the learned Judges; but it ought to have occurred to the reporters, who put these decisions in the volumes of reports, and who had ample leisure to consider what was involved in them. With six High Courts, overburdened with work, putting forth a heavy outturn of judgments which they have no time to consider at length except in cases of special importance, some responsibility of discrimination ought to rest on the reporters as to what they select for publication. The present indiscriminate system of reporting everything throws an unnecessary burden on both Bench and Bar; and these cases seem to me to afford a signal instance of the mischief.

M.H.H.

(1) (1869) 4 M.H.C.R., LV.

PRIVY COUNCIL.*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
(APPELLANT),

1920,
December 16.

v.

SRINIVASA CHARIAR AND OTHERS (RESPONDENTS).

[On Appeal from the High Court of Judicature
at Madras.]

Inam—Shrotriyam—Construction of grant—Conveyance of minerals—Enfranchisement, effect of—Royalties on quarried stone—Madras Act VIII of 1869.

A village was granted as a shrotriyam inam in A.D. 1750 by the Nawab of the Carnatic. The grant, the terms of which appeared from a translation produced from a Government register, provided that its purpose was that the grantee having appropriated to his own use the produce of the seasons each year, might pray for the prosperity of the Empire, and that he should pay a fixed yearly sum to the Sirkar. The inam was enfranchised in 1865, there being given to the inamdars title-deeds which purported to convert the tenure into a permanent freehold upon payment of a quit-rent. After the enfranchisement the Madras Government requiring stones acquired part of the village from the shrotriyamdars under the Land Acquisition Act. In or about 1905 the Madras Government imposed and levied upon the shrotriyamdars royalties in respect of stone which they had quarried in the village.

Held (1) that upon the true construction of the grant the full right to the quarries and minerals did not pass to the grantee; (2) that the terms of the grant being in evidence neither the inam title-deeds nor the land acquisition proceedings were evidence as to its effect; (3) that having regard to Madras Act VIII of 1869, the inam title-deed could not vest in the inamdars a subject-matter not vested in them by the grant; (4) that consequently the Government was entitled to impose royalties on stone quarried in the village.

An inam grant may be no more than an assignment of revenue, and even where it is or includes a grant of land, what interest in the land passed must depend on the language of the instrument and the circumstances of the case.

APPEAL from a judgment and decree of the High Court (ABDUR RAHIM, Offg. C.J., SESHAGIRI AYYAR and PHILLIPS, JJ.), dated March 7, 1916, affirming a decree of the District Judge of South Arcot (August 18, 1910) which affirmed a decree of the District Munsif of Tirukkōyilūr.

The suit was instituted in the Court of the District Munsif against the appellant by the respondents who were shrotriyamdars

* Present:—Lord MOULTON, Lord PHILLMORE, Sir JOHN EDGE, Mr. AMERU ALI, and Sir LAWRENCE JENKINS.

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of the village of Kuloor. They claimed a declaration of their full rights to the rocks and hills within the village (except as to a portion acquired from them by the Madras Government in 1887), a refund of Rs. 89 paid by them for royalties levied by the Madras Government in respect of stone quarried from the village, and for other reliefs.

The respondents' title was based upon a shrotriyam grant made in 1750 by the Nawab of Carnatic to their predecessor-in-title. By their plaint, respondents further relied upon title-deeds granted by the Inam Commissioner, and upon the fact that in 1887 the Government being in need of stone had acquired part of their land under the Land Acquisition Act. They also pleaded that they had a prescriptive right, but upon that issue there were concurrent findings of fact against them.

The appellant by his written statement denied that there was any conveyance of the right of the State in regard to minerals by the original grant; he denied that there had been any recognition by the Government of an exclusive right to the minerals; he further submitted that it was not competent to the Inam Commissioner to concede to the shrotriyamdars any rights in excess of those originally granted.

Of the issues framed the two which were material to the Appeal appear from the judgment of their Lordships.

The respondents did not produce the original grant, but the appellant produced a register from the office of the Collector of South Arcot, an extract from which formed Exhibit I. This Exhibit included a translation of the parwana of A.D. 1750, stated in the extract to bear the seal of Nawab Anvur-ud-din, and to have been written at a date corresponding to A.D. 1750. The translation was as follows:—

“To the aumels present and future of the purgunna of Tricoloor, sirkar of Nesserut Ghur (Genjee). Be it known:—It has been represented to us that the entire village of Kuloor, in the purgunna aforesaid, has been established and enjoyed for a length of time by way of ‘shrotrium,’ for the yearly sum of 110 gory chuckrums, according to the sunnads of former princes, as a subsistence to Letchmi Narasumachary, zunardar (1) and that these sunnads have

(1) Wilson's Glossary: “Zannardar, the wearer of the characteristic thread or cord, especially a Brahman.”

been lost; wherefore it is written, that the said village, provided it has been enjoyed according to the ‘mamool sheedamed’ shall be restored to the said zunardar, that, having appropriated to his own use the produce of the seasons, each year, he may be assiduous in offering up prayers for the lasting prosperity of the Empire, and let him pay regularly to the Sirkar the established amount of the ‘shrotrium.’”

The Exhibit included a translation of a further document purporting to be of a date corresponding to A.D. 1793 by which the village was stated to have been established as a “perpetual shrotriyam,” and to be thereby restored.

The Inam Register under date October 21, 1861 (Exhibit J), in the column “Description of inam” stated:

“for the personal benefit of the holders. The register of 1815 also states that the grant was made for subsistence. The terms of the parwana are ‘darooje maddah maish.’ (1)”

The three inam title-deeds (Exhibit A) were all dated July 22, 1865. Two of them (which referred to lands which had been alienated from the family of the original grantee) contain the following clause, inserted in consideration of an increased quit-rent:—

“The inam is confirmed to you in freehold. In other words, the land will be your own absolute property to hold or dispose of as you think proper, subject only to the payment of the abovementioned quit-rent.”

The third title-deed referred to land still in the possession of the family of the grantee and contained the following passages:

“(2) This inam is subject to a jodi or quit-rent of Rs. 293-12-5 per annum and is hereditary, but it is not otherwise transferable; and in the event of the failure of lineal heirs, it will lapse to the State. (3) On your agreeing to pay an annual quit-rent of Rs. 360, three hundred and sixty, inclusive of the jodi already charged on the land as abovestated, your inam tenure will be converted into a permanent freehold; in which case the land will be your own absolute property to hold or dispose of as you think proper, subject only to the payment of the abovementioned quit-rent.”

Each of the title-deeds gave the grantee the option of commuting the quit-rent at 20 years' purchase and the third title-deed

(1) I.e., “for personal subsistence.”

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contained a statement that whereas the tenure had been converted into a freehold on the terms offered in clause (3) the inam was thereby confirmed to the holder "as freehold in perpetuity subject only to the payment of the annual quit-rent."

By Madras Act VIII of 1869 it was enacted that :

" nothing contained in any title-deed heretofore issued to any inamholder shall be deemed to define, limit, infringe, or destroy the rights of any description of holders or occupiers of the lands from which any inam is derived or drawn, or to affect the interests of any persons other than the inamholder named in the title-deed; and nothing contained in Madras Act IV of 1862 or in Madras Act IV of 1866 shall be deemed to confer on any inamholder any right to land which he would not otherwise possess."

The respondents or their predecessors-in-title had by the year 1903 begun to lease for money the right of quarrying. In or about the year 1905, the Government of Madras insisted on seigniorage being paid in respect of stone so quarried in accordance with their rules relating to minerals, and refused to allow quarrying without permission being obtained from Government; thereupon, the respondents on March 16, 1908, instituted the present suit.

The District Munsif passed a decree in favour of the respondents. While inclined to hold on the first issue that the original grant by implication carried with it the right to the stone-quarries and minerals in the village, he held that there was nothing in that grant to prevent the State from claiming its share of the produce of the minerals by way of revenue.

On the second issue he held that at the time of the inam settlement the demands of the State by way of revenue were fixed by agreement for all time and could not thereafter be increased, and that, as the agreement was within the powers of the Inam Commissioner, it gave the respondents freedom from further taxation by way of revenue.

An Appeal by the appellant to the District Court of South Arcot was dismissed on the ground that as Government was estopped by the inam title-deeds from denying the respondents' title to the lands in question, issues (1) and (2) must be found against the appellant.

The appellant then appealed to the High Court, but the two judges who heard the appeal differed, SPENCER, J., being of opinion

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that the Appeal should be allowed, and SADASIVA AYYAR, J., being of opinion that it should be dismissed. Accordingly under section 98, sub-section (2), of the Civil Procedure Code, the Appeal stood dismissed. SPENCER, J., agreed with the District Munsif's finding on the first issue, and pointed out that, having regard to Madras Act VIII of 1869, all that the Inam Commissioner could effect by the act of enfranchisement in 1862 was to exchange the reversionary right of Government for a quit-rent and to give an indefeasible right to property, and that his action could not affect the rights of Government over minerals. SADASIVA AYYAR, J., agreed with the judgment under Appeal, holding that the inam title-deeds gave or recognized a freehold title to land which left Government no right to impose further revenue burdens on the inam estate, whether as royalty or assessment.

The appellant appealed to the full Court under clause (15) of the Letters Patent, but the Appeal was dismissed on August 7, 1916. SESHAGIRI AYYAR, J., with whose judgment ABDUR RAHIM, Offg. C.J., and PHILLIPS, J., agreed, held that the effect of the grant of 1750 was to pass to the grantee all interest that the grantor had in the soil; he was, however, of opinion that if the grant did not convey the whole interest, the enfranchisement did not enlarge the rights of the holders.

The judgments in the High Court are reported in I.L.R., 40 Mad., 268.

Dunne, K.C., and E. B. Raikes for the appellant.—The grant of 1750 did not convey the minerals, including stone quarries, to the grantees, or deprive the Nawab of the right to levy dues upon stone quarried there. The grant was merely of the annual produce of the soil for the subsistence of successive shrotriyamdars; it was inalienable, leaving a reversionary interest in the grantor. The minerals did not pass under the grant in the absence of express words: *Hari Narayan Singh v. Sriram Chakravarti*(1), *Durga Prasad Singh v. Braja Nath Bose*(2), *Sashi Bhushan Misra v. Jyoti Prasad Singh Deo*(3), *Raghunath Roy Marwari v. Raja of Jheria*(4). The judgment appealed from erroneously treated the inamdars as being in the

(1) (1910) L.R., 37 I.A., 186; s.c., I.L.R., 37 Cal., 723 (P.C.).

(2) (1912) L.R., 39 I.A., 133; s.c., I.L.R., 39 Cal., 696 (P.C.).

(3) (1916) L.R., 44 I.A., 46; s.c., I.L.R., 44 Cal., 585 (P.C.).

(4) (1919) L.R., 46 I.A., 153; s.c., I.L.R., 47 Cal., 95 (P.C.).

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same position as zamindars. It was assumed that zamindars have the unrestricted right to minerals in their zamindaris, but that has never been admitted by the Government. The present case depends entirely upon the construction of the grant of 1750. If the grant did not convey the minerals the inam title-deeds could not do so, having regard to Madras Act VIII of 1869. By the enfranchisement the Government merely gave up its reversionary rights in exchange for the payment of a quit-rent. The enfranchisement affected the quality of the inamdars' title in the subject-matter conveyed to them by the grant, but did not add subject-matter not previously conveyed. The acquisition of stone by the Government cannot affect the real rights of the parties. (Reference was also made to Wilson's Glossary, s.v. "shrotriyam.")

De Gruyther, K.C., and *Kenworthy Brown* for the respondents.—With regard to the ownership of the minerals the inamdars were in the same position as zamindars. They had an absolute hereditary and alienable right. The inam register shows that the inamdars were registered under section 15 of Madras Regulation XXXI of 1802; their rights were those of Lakhiraj proprietors in Bengal [Reference was made to Madras Regulation XXV of 1802, sections 8, 12; Field's Bengal Regulations, page 36, section 33; *Collector of Trichinopoly v. Lekkamani*(1).] The grant was not merely a grant of the royal revenue, because there was no person paying revenue; further, under such a grant there is no right to possession. The shrotriyamdars being in the position of zamindars, the four decisions of the Board referred to for the appellant show that the minerals passed to them, since the basis of those decisions is that the zamindars were entitled to the minerals. Those decisions are not authorities with regard to the construction of the grant because they were cases of leases. There was in this case a great preponderance of judicial opinion in India that the grant, carried the minerals, although according to Indian decisions there was a presumption that the grant was merely of the royal revenue; under recent decisions of the Board that presumption does not exist: *Suryanarayana v. Patanna*(2), *Upadrashta*

(1) (1874) L.R., 1 I.A., 282.

(2) (1918) L.R., 45 I.A., 209; s.c., I.L.R., 41 Mad., 1012 (P.O.).

Venkata Sastrulu v. Divi Seetharamudu(1). Even if the original grant did not vest the soil of the village in the shrotriyamdars the inam title-deeds did so. Having regard to the statute 32 and 33 Vict., c. 29, the deeds gave them a statutory title. The terms of Madras Act VIII of 1869 do not preclude the title-deeds from being construed as conveying an estate greater than that previously held. Reference was also made to *Vaman Janardan Joshi v. The Collector of Thana and the Conservator of Forests*(2); *Gunnaiyan v. Kamakchi Ayyar*(3); Board of Revenue Standing Orders, 1890, Schedule 1, Order 15; and to the Inam Commission Rules, II of 1859, rules 2, 3, 5, 12, 24, 28.

Dunne, K.C. in reply.—The decisions of the Board which have been referred to cannot be treated as authorities that zamindars have, as against the Government, the right to minerals. The Government was not a party in any of the cases. The appendix to the record in *Durga Prasad Singh v. Braja Nath Bose*(4) shows that the attitude of the Government then was that it did not wish to interfere, even if it had the right to the minerals; accordingly it was held to be unnecessary to join the Government as a party. The contention based upon the inamdars being registered under Madras Regulation XXXI of 1802 was not pleaded or argued below; the entries in the inam register do not show that these lands were revenue free. Reference was made to rule 5 of the Inam Commission Rules.

The JUDGMENT of their Lordships was delivered by

Sir LAWRENCE JENKINS.—The suit out of which the present Appeal arises was brought by the shrotriyamdars of the village Kulloor in the Madras Presidency in order to establish their unfettered right to quarry stone in the lands of the village without payment of any royalty in respect thereof. Their claim has succeeded in all the Indian Courts, and the present Appeal has been preferred from an appellate decree of the Madras High Court, dated March 7, 1916, by the defendant to the suit, the Secretary of State for India in Council.

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(1) (1919) L.R., 46 I.A., 123; s.c., I.L.R., 43 Mad., 166 (P.O.).

(2) (1869) 6 Bom. H.C.R. (A.C.J.), 191. (3) (1903) I.L.R., 28 Mad., 839.

(4) (1912) L.R., 39 I.A., 133; s.c., I.L.R., 39 Cal., 696 (P.O.).

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The title alleged by the plaintiffs in their plaint is a grant about 160 years ago of the village as inam to their predecessors-in-title by the Government that existed prior to the British Government. The plaint then alleges undisputed enjoyment, an admission of their title at the time of the inam settlement of the village, the acquisition of a prescriptive right, and proceedings under the Land Acquisition Act.

On the strength of this grant, and these subsequent events, they claimed a decree "establishing the full rights of the plaintiffs, the shrotriyamdars of the said village" to the rocks and hills within its boundaries. The defendant, by his written statement did not dispute that there was a grant of the village, but he traversed the statement that there was any conveyance of the right of the State to the minerals in the village. He also contested the other matters on which the plaintiffs relied.

In these circumstances the suit came on for settlement of issues, and it was ordered that the following issues should be tried:

"(1) Was there an outright grant of Kulloor village as inam to the plaintiff's predecessors-in-title by the Government prior to the British rule as alleged, and did the grant include the right in regard to minerals also in the village? And is this grant, if true, binding on the defendant? (2) Was the exclusive right to take the minerals in the village free of taxation conferred expressly or by implication on the plaintiffs' predecessors-in-title at the time of the inam settlement; if this right had been conceded by the Inam Commissioner in excess of what had been allowed by the original grant, was it within the scope of the authority of the Inam Commissioner to have done so; if not, whether the action of the Inam Commissioner is binding on the defendant?"

There were other issues, but they need not now be considered.

The findings of the Courts on these issues, and their decrees, are in the plaintiff's favour, and in accordance with them the appellate decree of March 7, 1916, was passed.

The burden of establishing the grant is on the plaintiffs, by whom it is asserted, and it is for them to show that it contained terms apt to vest in their predecessors the quarries, and the full right to work them. Though the grant is not disputed by the defendant, when it came to proving its terms at the trial, the plaintiffs were in this difficulty, that the original

grant could not be produced by them. The defendant, however, produced a register containing an English translation of a parwana which purports to be a copy of a parwana written in 1750 (Exhibit I). Its genuineness is conceded and the document was properly admitted in evidence by the Court of first instance as evidence of the terms of the original grant. In the circumstances of this case it is the best evidence of those terms, and it is on the true construction of the terms so evidenced that the rights of the plaintiffs must depend. And in so saying their Lordships do not overlook what has been urged as to the effect of subsequent proceedings and conduct.

The document recites (1) that the entire village Kulloor had been enjoyed for a length of time by way of shrotriyam for a yearly sum; (2) that it was so enjoyed according to the sanads of former princes; (3) that it was granted as a subsistence to Letchmi Narasumachary, zannadar; and (4) that the original sanads had been lost. It then records that the village was restored to the said zannadar, and that the purpose of the restoration was that, having appropriated to his own use the produce of the seasons each year, the zannadar might be assiduous in offering up prayers for the lasting prosperity of the Empire. The obligation was then imposed on him of paying regularly to the sirkar, the established amount of the shrotriyam. It was a condition of this restoration that the village had been enjoyed according to the mamool sheedamed.

Can then the plaintiffs successfully claim that under these terms the full right to the quarries and minerals passed to them?

Their Lordships think not. The grant was of a village in inam, and the rules of English law as to real property in England can afford no guidance as to what passed. A grant of this description may be no more than an assignment of revenue, and even where it is or includes a grant of land, what interest in the land passed must depend on the language of the instrument and the circumstances of each case. There is nothing here to suggest that the original grant contained words sometimes employed in Indian documents, where it is the intention that the inam grant of a village should create such an interest in land as would vest the minerals in the grantee. Nor does

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the language suggest that any further benefit to the grantee was contemplated or intended than such as might be derived from the ordinary use of the land for the purposes of cultivation. It was not a complete transfer for value of all that was in the grantor; the interest bestowed was merely something carved out of his larger interest which still remained in him as a reversion: the grantor was the ruling power, the grantee a Brahman whose assiduous prayers were engaged: a jodi was reserved and the purpose of the grant was to ensure the subsistence of the grantee by the appropriation to his use of "the produce of the seasons each year."

The interest thus created was inalienable and heritable only by lineal heirs, so that on any occasion of forfeiture or extinction of lineal heirs the grantor or someone deriving title under him would come in by virtue of the reversion which had not been transferred. It does not accord with the scheme of such a grant that any person taking under it should have the power to consume its subject-matter by quarrying operations, even if an interest in land was created.

But then it is urged that subsequent events show that the shrotriyamdars acquired in one way or another an interest in the land of the village that entitles them to work the quarries without any obligation to make any payment to the Government. In support of this argument their Lordships' attention has been drawn to many matters and in particular to the title-deeds of the "A" series of Exhibits, the extract from the inam register (Exhibit J), the regulations, acts and standing orders relating to inams and a land acquisition proceeding. Had these materials stood alone they might well have been urged as suggesting an inference that the original grant was in terms that supported the plaintiffs' claim as to what passed under it. But in the clearer light afforded by Exhibit I they lose their evidentiary value and leave the terms as shown by that Exhibit in no degree obscured. No doubt words are to be found which are in a sense appropriate to the plaintiffs' claim, but they are used in a context to which they do not belong. Thus, to speak of "freehold" in the connexion in which it appears, is merely a piece of inapt drafting, and cannot be regarded as a correct description of the plaintiffs' rights in this village.

Even in this litigation there is the same incorrect use of words used, as where the payment demanded by the Government is spoken of as assessment, whereas the demand is for a payment in the nature of royalty for the use and consumption of that which belongs to the Government. Inaccuracies of this class can in no way assist the plaintiffs.

Apart from the contention that these materials furnish evidence of the terms of the grant, it is contended that a title was thereby created in the shrotriyamdars to the quarries. But it was rightly decided by the final Appellate Bench of the High Court that the title-deed of the Inam Commissioners conferred no higher title than was originally granted. There is language in the Act of 1862 that might possibly be read as having the effect for which the plaintiffs contend, but this was corrected by Act VIII of 1869, and it is now clear that though a larger interest was created, nothing done under the Inam Commission could vest in the inamdars a subject-matter not already belonging to them.

The land acquisition proceedings do not carry matters any further, for even without any title to the quarries it may well have been thought expedient, especially in the view then held, to proceed under the Act for the purpose of acquiring such interest as the shrotriyamdars might have in the surface. And at most these proceedings can amount to no more than action taken under a misapprehension of the Government's legal rights, and this could not make the law one way or the other, nor could it affect the Government's title. As affecting the quarries none of these matters had any creative or disentitling force.

It must be conceded that expressions, which are ambiguous and to some extent compromising, are used, and the reason for this is not far to seek. The Government of Madras have not always adhered to the view they now hold. Thus in the Standing Orders (Ed. 1890), it is declared that "the State lays no claim to minerals in enfranchised inam lands." But this view was changed, and in the edition of 1907 it is laid down that "claims should be made to the State's share in all mineral produce in lands held on inam tenure" of the description there given.

Authorities dealing with the relative rights of a zamindar in Bengal and those holding by subordinate tenure from him

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were brought to their Lordships' notice, and were claimed by the appellant as conclusive in his favour. They refrain, however, from discussing them as this case turns on the true construction of the particular grant which is the foundation of the plaintiffs' claim in this suit.

Their Lordships therefore hold that this Appeal should be allowed. The ordinary consequence would be that the costs here and in the Indian Courts should be thrown on the unsuccessful respondents. But there are circumstances in this case which induce their Lordships to depart from this rule. The value of the subject-matter in litigation is far below the appealable value and it was as a matter of favour that the defendant was permitted to appeal, as this apparently was regarded as a case of general importance. Moreover, the respondents' resistance to the Government's demand was not unreasonable in view of the latter's earlier attitude in reference to minerals.

Their Lordships therefore think that there should be no order as to the costs either here or below.

Their Lordships accordingly will humbly advise His Majesty to allow this Appeal, and to dismiss the suit. There will be no order as to the costs of this Appeal or of the lower Courts, except that each side must bear its own.

Solicitor for appellant: *Solicitor, India Office.*

Solicitor for respondents: *Douglas Grant.*

A.M.T.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield and Mr. Justice Sadasiva Ayyar.

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January 21.

v.

CHINTAPALLI AOHI REDDI (DEFENDANT).*

Madras Estates Land Act (I of 1908)—Arrears of rent—Transfer of interest in "the estate"—Suit for recovery of arrears—Revenue or Civil Court—Jurisdiction.

The Revenue Court alone has jurisdiction to try a suit for arrears of rent which accrued due to a "landholder" under the Madras Estates Land Act, even though before the date of the filing of the suit plaintiff's interest in "the estate" had been transferred.

Forbes v. Maharaj Bahadur Singh, (1914) I.L.B., 41 Cal., 926 (P.C.), distinguished.

Per SADASIVA AYYAR, J.—Even a bare assignee of the arrears of rent from the owner of "an estate" or a part thereof is a landholder within the meaning of the Act for the purpose of pursuing the remedies of a "landholder" under the Act.

PETITION under section 115 of Act V of 1908, praying the High Court to revise the order, dated 29th March 1909, of the Deputy Collector, Headquarter Division, Cocanada, in Land Suit No. 118 of 1918.

This was a suit filed on 29th October 1918, under section 77 of the Madras Estates Land Act (I of 1908) for the recovery of arrears of rent for faslis 1325, 1326 and 1327. The plaintiff's interest in the estate had, however, been sold in Court auction on 19th April 1918. Defendant contended that the Revenue Court had no jurisdiction, as plaintiff was not a landholder within the meaning of section 3, clause (5) of the Act. The Deputy Collector agreeing with this contention returned the plaint for presentation to a Civil Court. On presentation to the Subordinate Court, the Judge held that he had no jurisdiction. The

* Civil Revision Petition No. 623 of 1919.

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plaintiff then filed this Civil Revision Petition, which first came on for hearing before NAPIER and KRISHNAN, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

NAPIER, J.—This is a petition under section 115 of Act V of 1908 to revise the order of the Deputy Collector of Cocanada Division returning a plaint on the ground that he had no jurisdiction to entertain the suit. The plaintiff was admittedly at one time a landholder within section 3, clause (5), of Madras Act I of 1908 and the defendant admittedly ryot of that estate at the date of the suit. The suit was under section 77 to recover an arrear of rent and at the date when the rent is alleged to have been due the plaintiff was admittedly the landholder. Since that date and before date of suit the plaintiff's interest in the estate had been sold in an auction sale held by the Sub-Court of Cocanada. The Deputy Collector takes the view that the plaintiff cannot now sue in a Revenue Court under section 77. The position of a landholder after he has parted with his estate was carefully considered by a Bench of this Court in *Sundaram Ayyar v. Kulathur Ayyar*(1). In that case the point was whether a lessee of an estate whose term had expired could attach the holding under Chapter VI of the Act. SESHAGIRI AYYAR, J., held, that he was "a person entitled to collect the rents" within the language of section 3, clause (5), and could therefore distrain the moveables, but he held that though a landholder he could not attach the holding. Mr. Justice SPENCER took the view (as I understand the learned Judge) that a person who has parted with his estate is no longer a landholder. In my opinion the point is covered by the opinion expressed by the Privy Council in *Forbes v. Maharaj Bahadur Singh*(2), on the analogous rights of a landlord under the Bengal Tenancy Act, VIII of 1885. The definition of a landlord in that Act is "a person immediately under whom a tenant holds." Their Lordship say on page 938:

"The governing idea throughout the multifarious provisions contained in Chapter VIII to regulate the respective rights and

obligations of landlords and tenants is the subsistence of the relationship that gives rise to those rights and obligations."

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Chapter VIII of the Bengal Act deals with rent, the rate of rent, alteration in the rate, payment of and receipts for rent, sale of holding and ejectment for arrears, valuation of produce for division in cases of grain rent, and payment of rent without notice of a transfer of the interests in the land. The corresponding provisions in the Madras Estates Land Act are to be found in Chapters III, V, VI and X. The present suit is brought under the provisions of Chapter VI. Their Lordships' dictum would therefore, in my opinion, govern this suit unless there are words in the definition of landholder which introduce a new element. The words relied on are "and includes every person entitled to collect the rents of the whole or any portion of the estate . . . by virtue of any provision of law." SESHAGIRI AYYAR, J., thinks that these words cover an ex-landlord. In my opinion they do not. I cannot read the words "entitled to collect the rents" as covering also a person "entitled only to sue for an arrear of rent." I think that the words denominate a class which might not but for those words be held to come within the earlier words in the definition "a person owning an estate." That is the meaning which has, I think, been hitherto attached to them. It seems to me a false method of interpretation to add to what is an explanatory definition, a definition extending the operation of the term explained, that is to say, to add the words "ex-owner" to "owner." For these reasons I am of opinion that the plaintiff in this case is not entitled to sue in the Revenue Court, but I think that in view of the importance of the point, and the divergence of opinion, it is advisable to refer to a Full Bench the following questions:—

1. Does section 3, clause (5), of the Madras Estates Land Act cover a person who but for the fact that he has transferred the estate would admittedly come within the definition?
2. Has the Revenue Court or the Civil Court jurisdiction to try the suit?

KRISHNAN, J.—The only question for our decision in this case is whether the plaintiff's suit lies in the Revenue Court or the Civil Court. Plaintiff was the owner of an estate falling within

(1) (1916) I.L.R., 39 Mad., 1018. (2) (1914) I.L.R., 41 Cal., 826 (P.C.).

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the Estates Land Act and arrears of rent are alleged to have become due to him from the defendant, who is a ryot. Before the present suit for such arrears was brought plaintiff's estate was sold in Court auction and purchased by a third party. It is conceded that but for this sale plaintiff's suit would have been properly brought under section 77 of the Act in the Revenue Court and in that Court only. But it is argued that the plaintiff having lost his estate ceased to be a landholder and is consequently not entitled to enforce the special remedies provided by the Act for the benefit of landholders to recover arrears of rent, one of which is the right to sue in a Revenue Court, and that he can only sue in the Civil Court now. For this contention reliance is placed on the reasoning of the Privy Council in *Forbes v. Maharaj Bahadur Singh*(1), and on *Sundaram Ayyar v. Kulathu Ayyar*(2), and the opinion of SPENCER, J., in that case, the other side relying on the opinion of SESHAGIRI AYYAR, J., in the same case.

In the Madras case, what was actually decided was that a person in plaintiff's position had no right to attach the holding under section 111 of the Act. But it is argued that no distinction can properly be made between the right to attach on the one hand, and the right to distrain and the right to sue on the other hand, as all these rights are given to landholders by the Act, and if plaintiff is a landholder for one purpose he is equally a landholder for the other purposes and vice versa. I am inclined to think this contention is correct and the distinction made by my learned brother SESHAGIRI AYYAR, J., between sections 77 and 111 on the point is, with all respect to him, untenable; in fact it has not been supported at the Bar by either side. My learned brother bases his view mainly on section 127 of the Act; but I am unable to see how that section has any bearing. The section is not inconsistent with the attaching landholder not being the owner of the estate, when clause (c) does not come into play. That clause applies if there is such a balance as is dealt with by it but it seems to me that we cannot infer from the existence of the clause that only landholders to whom such a balance can become due are included in section 111.

(1) (1914) I.L.R., 41 Cal., 926 (P.O.). (2) (1916) I.L.R., 39 Mad., 1018.

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Section 127 deals with the distribution of the sale-proceeds when a holding is sold and it has in my opinion no bearing on the question as to who can get the holding sold.

Nevertheless, I am inclined to think that the decision in *Sundaram Ayyar v. Kulathu Ayyar*(1), that a person in the position of the plaintiff is not entitled to take advantage of the remedies given by the Act to recover rent, requires re-consideration. The learned Judges were of opinion that the *ratio decidendi* of the Privy Council ruling required that they should take the *Forbes v. Maharaj Bahadur Singh*(2) view that they did. But with all respect it seems to me that the differences between the Bengal Tenancy Act under which that ruling was given and our Estates Land Act are so great and so material on the point before us, that it is very doubtful if we can properly base our judgment on the observations of the Privy Council. The learned Judges have pointed out the differences themselves and I need not repeat them. The decision of the case before us really turns on the definition of the term 'landholder' as given by our Act and we have to see whether plaintiff comes within that term. The Bengal Act does not use the term at all. The definition of the corresponding term "Landlord" in it is that he is "a person immediately under whom a tenant holds", and it is thus materially different from the definition of landholder which we have in section 8, clause (5) and which includes besides the owner of the whole or part of an estate, persons entitled to collect rents of the estate by virtue of a transfer, or of an order of Court, or by any provision of law. In view of this marked difference between the two Acts on the very point we have to consider, it seems to me, with all respect, difficult in construing the Madras Act to rely on the general observations of the Privy Council. Furthermore, no provision exists in our Act similar to section 148 (h) on which considerable reliance was placed by the Privy Council.

On the question whether plaintiff did or did not continue to be a landholder for the purpose of recovering his rent by suit in the Revenue Court, I am inclined to agree with SESHAGIRI AYYAR, J., that he did so continue notwithstanding that his

(1) (1916) I.L.R., 39 Mad., 1018. (2) (1914) I.L.R., 41 Cal., 926 (P.O.).

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estate had been lost to him before the date of suit; for I think the definition of the term "landholder" in section 3, clause (5), is wide enough to include him as a person entitled to collect the rents due to the estate by virtue of a provision of law, which is part of that definition. As plaintiff retained in himself the right to collect the rent due on the estate for the suit fasli when he lost the title to the land, it seems difficult to say that he does not fall within that part of the definition abovementioned. Our attention was drawn to the recent Full Bench ruling in *Marina Veeraswami v. Bayanapalli Venkatrayudu*(1), where this Court had to consider the meaning of the term landholder, but that decision does not seem to have any bearing on the present question. I am inclined to think the Revenue Court is the proper forum for the present suit.

It has also been argued before us that even if plaintiff had ceased to be a landholder at the date of suit, as he was admittedly a landholder when the cause of action accrued to him, his right to sue in the Revenue Court which had also accrued to him prior to the loss of his estate should not be held to have been taken away. It is not necessary to consider that point as I am inclined to think that he continued as landholder.

As however my learned brother is of opinion that the question should be referred to the Full Bench, I agree to that course in view of the conflict of opinion on the point before us between the two learned Judges in the Madras case and also between us.

I, therefore, agree to the questions proposed by my learned brother being submitted to the Full Bench.

ON THIS REFERENCE—

P. Narayanamurti for petitioner.—Plaintiff is still a landholder within the meaning of section 3, clause (5). Reference was made to sections 4, 5, 77, 127, 132 and 200.

[*OLDFIELD, J.*—Supposing *A* who is owner sells the estate to *B*. Some time later both *A* and *B* apply for sale—*A* for arrears of rent prior to sale and *B* for arrears after sale. Who is to be satisfied?]

(1) (1920) 29 M.L.J., 225 (F.B.).

In such a case there must be rateable distribution. The policy of the Act is that such suits should be brought in the Revenue Courts and the Civil Courts have no jurisdiction. If an "owner" farms out his "estate" after he has acquired a right for arrears of rent it cannot be said that he loses his rights of summary procedure. The right of suit having accrued in a Revenue Court no act of the landholder, such as transfer of the estate, could take away from him that right.

N. Rama Rao for respondent.—The question is, is he a landholder any longer. He must be entitled at the time of suit to sue for the rents, i.e., he must own an estate or part thereof. By the transfer he has ceased to be a landholder. Reference was made to sections 3 (5) and 189, *Sundaram Ayyar v. Kulathu Ayyar*(1), *Venkata Lakshmanma v. Sestayya*(2), and *Forbes v. Maharaj Bahadur Singh*(3).

WALLIS, C.J.—In this case the Civil and the Revenue Courts have both declined jurisdiction over a suit, instituted by the plaintiff after he had parted with his estate, to recover rent which had accrued due to him while he was still the owner of the estate and, as such, a "landholder" as defined in section 3, clause (5), of the Madras Estates Land Act. One of the principal changes effected by that Act was that on grounds of policy it took away from the Civil Courts and transferred to Revenue Officers jurisdiction to try rent suits instituted by "landholders" against "ryots" as defined in the Act. Section 189 confers jurisdiction on a Collector, or other Revenue Officer specially authorized, to try this and the other suits and applications specified, and expressly prohibits any Civil Court from taking cognizance in the exercise of its original jurisdiction.

"of any dispute or matter in respect of which such suit or application might be brought or made."

This cause of action when it arose was one which the Revenue Court was empowered to try and the Civil Court was prohibited from trying. It was one which in the interest of the landholders and the ryots, and especially of the ryots, the

(1) (1916) I.L.R., 39 Mad., 1018. (2) (1920) I.L.R., 43 Mad., 786.
(3) (1914) I.L.R., 41 Cal., 928 (P.C.).

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legislature considered should be disposed of by the Revenue Court; and the real question in this case appears to me to be, whether, looking at the Act as a whole, it was the intention of the legislature that the parties should be deprived of the appointed forum for this class of suits by reason of the fact that, after the cause of action accrued and before the institution of the suit, the plaintiff parted with his estate and ceased to come within the definition of "landholder" as "owner" of the estate.

One of the questions referred to us is whether the fact that after the transfer he was entitled to collect certain arrears brought him within the second part of the definition as a person "entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessor in title or of any order of a competent Court or of any provision of law."

Assuming for the moment it did not, that would not, it appears to me, conclude the further question in the reference as to the jurisdiction of the Revenue Court over a suit for such arrears, which is really the only question arising on the facts of the case. The undoubted effect of section 189 of the Act is to confer on the Revenue Court exclusive jurisdiction to try suits for rent accruing due to a landholder from a ryot on his estate and to prohibit the Civil Courts from entertaining them. The Revenue Court having thus become seized with exclusive jurisdiction over this cause of action when it arose, I can find no sufficient reason for holding that the Revenue Court became divested of this exclusive jurisdiction by reason of a transfer of ownership after the cause of action arose. The subsequent transfer in no way affects the cause of action or the reasons which moved the legislature to confer exclusive jurisdiction on the Revenue Court, and it would, in my opinion, be opposed to the scheme and policy of the Act to hold that it had the effect of taking away the suit from what in the opinion of the legislature is undoubtedly the more appropriate forum. Further, by section 210 read with the schedule to the Act, the legislature has provided special periods of limitation for suits and applications under the Act in the Revenue Courts, periods which do not apply to suits in the Civil Courts. In this case, No. 8 in the schedule, the special period is

"three years from the date when the arrears become due, or where there has been a suit or other proceeding for the purpose of ascertaining the rent, the date of the decree or order by which the rent is finally ascertained whichever date may be the later," whereas under article 110 of the Limitation Act which would have to be applied by the Civil Court in a suit for arrears of rent time begins to run "when the arrears become due." If it be said that the schedule to the Estates Land Act merely reproduces the decisions as to the effect of article 110 of the Limitation Act, this cannot be said as to the provisions of section 210 which make some of the general provisions of the Limitation Act inapplicable to this class of suits. Thus, the result of holding that the effect of the transfer of ownership was to transfer jurisdiction to the Civil Court might be to render a suit not barred which had already become barred in the Revenue Court. These difficulties are avoided by holding that the legislature intended to give exclusive jurisdiction once for all to the Revenue Court in suits for arrears of rent which accrued due to a landholder as defined in the Act. Such an owner appears to me to be in much the same position as an assignee of an arrear from the landholder. Assuming such an assignee not to become a landholder by virtue of the definition, it is none the less clear, in my opinion, that the suit to recover the assigned arrear could only be presented in the Revenue Court. No such question of competing jurisdictions arises under the Bengal Tenancy Act, and the decision of the Privy Council on the terms of that Act, in *Forbes v. Maharaj Bahadur Singh*(1), is in my opinion wholly inapplicable to the present case. It was a decision on a question of some difficulty arising under that Act and depending entirely on the terms of that Act, and should be applied with great caution to questions under this Act which differs from it in many important matters. My answer to the second question is that the Revenue Court and not the Civil Court has jurisdiction to try the present case.

It is therefore unnecessary to answer the first question, whether a plaintiff whose right to recover arrears of rent is incident to his former ownership of the land can be considered to be a person entitled "to collect the rents of the whole or any

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(1) (1914) I.L.R., 41 Cal., 928 (P.C.).

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portion of the estate by virtue of any provision of law," words which are an amplification and extension of the words "and all persons farming lands from the above persons" in section 1 of the Madras Rent Recovery Act, VIII of 1865. To answer this question in the affirmative it would be necessary to hold that the words "the rents" mean any rents, and that the fact of the accrual of rent being incident to the ownership of the land is a "provision of law" within the meaning of the definition.

OLDFIELD, J. OLDFIELD, J.—I agree.

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SADASIVA ATTAR, J.—I respectfully agree with my lord the Chief Justice throughout.

I am further inclined to hold that the language of section 3, clause (5), of the Madras Estates Land Act, defining "landholder" as including a person "entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner" makes even a bare assignee of an arrear of rent from the owner of the estate, or even a part thereof, a landholder for the purpose of enabling him to pursue his remedies under the Act as a "landholder." That there could be several "landholders" at the same time under the Madras Estates Land Act has been established by the decisions of this Court. Having regard to the policy of the Madras Estates Land Act gatherable from its provisions read as a whole, I think that the legislature could not have intended that the jurisdiction to entertain and decide a suit for rent should change from the Revenue Court to the Civil Court because the plaintiff entitled to an arrear of rent has lost the ownership of the estate, or is an assignee from the owner of the estate and is not the owner of the estate at the time of the suit. The word "transfer" in section 3, clause (5), is not qualified by any words indicating that the transfer of the total estate or part of the estate (to which interest the right to collect rents is appurtenant) is alone intended and that it does not include the transfer of even the bare right to collect an arrear of rent or future accruing rent.

In *Venkata Lakshamma v. Seetayya*(1) there is an observation by me (which observation is an *obiter dictum*) that a person who does not hold the present position of landlord is

(1) (1930) I.L.R., 43 Mad., 786.

not entitled to pursue the summary remedy under the Act for recovery of rent due to him, and I quoted the Privy Council in *Forbes v. Maharaj Bahadur Singh*(1) in support of that *dictum*. Having further considered the matter in this case, I consider that opinion unsound as I think that I failed to give sufficient weight to the differences both in language and policy found on a comparison of the provisions of the Bengal Tenancy Act and the Madras Estates Land Act.

M.H.H.

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APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Krishnan.

THE PUBLIC PROSECUTOR (PETITIONER).

v.

PARAMANDI (RESPONDENT).*

1921,
February 10.

Murder—Circumstantial evidence—No ground for imposing lesser sentence.

If the Court is satisfied beyond reasonable doubt that the accused is guilty of murder and the circumstances require the imposition of the death penalty, the fact that the conviction is based on circumstantial evidence is not a reason for passing the lesser sentence allowed by law.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to enhance the sentence of transportation for life passed on the accused by P. SUBBAYYA MUDALIYAR, Additional Sessions Judge of Coimbatore, in Sessions Case No. 61 of 1920.

The facts are set out in the judgment.

The Public Prosecutor for the Crown.

P. G. Krishna Ayyar for accused.

The Court delivered the following JUDGMENT:—

Accused in this case was convicted of the murder of a boy of 8 years of age for the sake of the latter's jewels and sentenced to transportation for life. There is evidence to show that

(1) (1914) I.L.R., 41 Cal., 926 (P.C.).

* Cr. R.C. No. 694 of 1920 and Cr. R.P. No. 580 of 1920.

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the boy left his village shortly before sunset on Thursday, April 22nd, in the company of accused; that his body was found two days later in a well near the village with a stone tied to it and all the jewels missing; that death was the result of strangulation; and that accused on the day after the disappearance sold articles similar to or identical with the missing jewels in a village 3 or 4 miles away. It is also in evidence that when questioned by the boy's mother accused denied that he had taken the boy—a denial which is certainly false if the evidence of prosecution witnesses 2 to 5 is true.

We can find no ground for discrediting any of this evidence. The medical and other evidence leaves no doubt that the child was murdered by some one for the sake of his jewels; and although the evidence of prosecution witnesses 2 to 5 as to seeing him depart in company with accused is inconclusive, on the other hand the evidence of prosecution witnesses 7 to 10, as to the disposal of the jewels seems to place his guilt beyond doubt. Two bangles and a waist cord M.Os. IV, IV (a) and IV (b) are actually identified both as among the jewels worn by the child and as part of the property sold by accused, and although the other articles were melted down before the arrival of the police, yet the fact that accused offered for sale five different articles corresponding with the five articles worn by the boy, even although some of them may now be unidentifiable, is sufficient. These witnesses identified accused at a parade held only three days later, and we see no reason to distrust their identification and truthfulness.

Accused's only defence is a blank denial and he cites no witnesses.

We agree with the Sessions Judge and assessors that the guilt of the accused has been proved beyond all reasonable doubt and we have no hesitation in confirming the conviction.

As regards sentence we have a Revision Petition filed by the Public Prosecutor asking for the enhancement of the sentence to one of death.

We have given most careful consideration to the facts and circumstances of this case; and are forced to the conclusion that only a death sentence would be adequate and that however loath we may be to use our powers of Revision to such an end, it

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is our duty to do so in this case. The murder in this case was a most brutal and sordid one—and one of a type unfortunately only too common. The evidence leaves no room for doubt that accused enticed away a child of eight, and deliberately murdered him for the sake of his petty trinkets. Absolutely no extenuating circumstances are indicated either by the Additional Sessions Judge or by the learned vakil who argued the case before us for accused. The sole ground assigned by the Sessions Judge for passing the lesser sentence allowed by law is that the conviction is based on circumstantial evidence. It has been repeatedly pointed out by this Court that this should be no factor in determining the sentence to be imposed. Provided the Court is satisfied beyond reasonable doubt that the accused is guilty of murder and that the circumstances of the case require the imposition of a death sentence, it is absolutely immaterial whether the conviction is based on direct or circumstantial evidence. It is only where the evidence leaves room for reasonable doubt on either point that the accused is entitled to the benefit of it. That is not so here.

We confirm the conviction, but in place of the sentence of transportation for life imposed by the lower Court, we direct that accused be hanged by the neck till he be dead.

M.H.H.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and
Mr. Justice Ramesam.

1920,
December 16.

S. SOUNDARARAJAN AND TWO OTHERS (PLAINTIFFS),
APPELLANTS,

v.

C. M. NATARAJAN AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Hindu Law—Will—Testator, resident in Presidency town of Madras—Bequest to unborn persons, validity of—Rule of Hindu Law, whether abrogated by Hindu Wills Act (XXI of 1870), or by Hindu Transfers and Bequests Act, Madras (I of 1914)—Latter Act whether ultra vires of provincial legislature—Indian Councils Act, 1861, ss. 22 and 42—Indian High Courts Act, 1861, sec. 11—Supreme Court Charter, cl. 22—Rule of perpetuity—Indian Succession Act (X of 1865), ss. 101, 102, 111 and 126—Bequest to daughters and on their death their shares to be taken by their children who shall attain 21 years—Indian Majority Act (IX of 1875), sec. 3—Bequest, whether void for perpetuity—Absolute gift followed by settlement on children—Failure of settlement—Reversion to original donee as absolute estate.

A testator, resident in the City of Madras, executed at Madras a will in 1897 disposing of his properties situate mostly therein, and died in 1904. By the will, after directing the formation of a fund for the payment of a monthly sum to his widow during her life, the testator provided that "the residuary trust funds are vested in trustees in trust to apportion the fund into as many equal shares as there may be daughters of mine living at the time of my decease or who having predeceased shall have left issues her or them and no surviving, and to pay the income of each equal share to my said daughters respectively during their lives and thereafter to stand possessed of the share in trust for all the children of the deceased daughter who shall attain the age of twenty-one in equal shares, etc." Only some of the grandchildren were born before the testator died. On a suit being brought on the Original Side of the High Court by some of the grandsons after the death of testator's widow and his three daughters, for a construction of the will and a declaration of the rights of the parties,

Held, that the rule of Hindu Law that gifts and bequests in favour of unborn persons are invalid, had not been abrogated, by the Hindu Wills Act (XXI of 1870); and that Madras Act (I of 1914) Hindu Transfers and Bequests Act, 1914), which validates such dispositions, was ultra vires of the

* Original Side Appeal No. 15 of 1920.

legislative powers of the provincial legislative councils in so far as it purports to affect the law administered on the Original Side of the High Court, having regard to the Indian Councils Act, 1861, sections 22 and 42 and the Indian High Court Act, 1861, section 11; and that therefore the bequests to the unborn persons in the will were void;

that the bequests were void under section 101, Indian Succession Act, made applicable by the Hindu Wills Act to Hindu Wills executed in Presidency Towns, because the vesting of the property under the will in the grandchildren, *might be delayed, beyond* the life-time of the daughters and the minority of the grandchildren by whom the property was to be taken, and the provisions of the Indian Majority Act (IX of 1875), extending minority to twenty-one years, in certain events, did not affect the construction of section 101 of the former Act;

that the bequests in favour of some of the grandchildren failing under section 101 of the Act, the bequest in favour of the whole class of grandchildren, including those born in the life-time of the testator, also failed under section 102 of the Act;

that the bequest to the grandchildren did not fall within the terms of section 111 of the Indian Succession Act and was not affected by its provisions;

that under section 126 of the same Act, which embodies the rule laid down in *Lassence v. Tierney* (1 Mac. & G., 551), where there is an absolute gift to a legatee and the provisions that follow in the will are in the nature of a settlement of that gift, then the settlement, if it is effectual, will have operation and reduce what appears to be an absolute gift into a life estate; if however the settlement for any reason fails, then in so far as it fails there is no intestacy but the person who was the object of the original gift takes the property absolutely;

that on the true construction of the provisions of the will, there was a clear intention to confer an absolute estate on each of the daughters followed by a settlement in favour of her children within the meaning of the rule referred to;

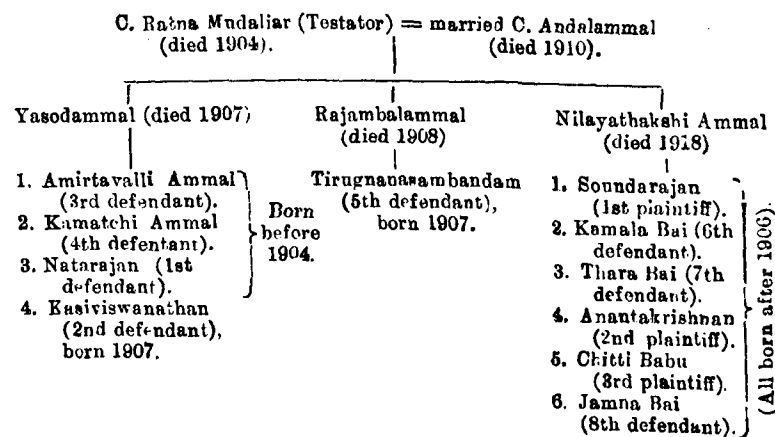
and that, consequently, on the failure of the bequest to the grandchildren, the original absolute gift in favour of each of the daughters remained good; and the share of each of the daughters passed on her death to her heirs.

APPEAL against the judgment of COUTTS TROTTER, J., passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 235 of 1918.

This Appeal arises out of a suit instituted on the Original Side of the High Court for the construction of the will of one C. Ratna Mudaliyar, deceased, and for declaration of the rights of the parties to the suit, who were the grandsons and granddaughters of the testator, being the sons and daughters of the testator's daughters. The will was executed in 1897 by the testator, who died in 1904, leaving his widow, Andalammal, three daughters, Yesodammal, Rajambalammal and Neelayathakshi.

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Ammal, and two granddaughters and a grandson by Yesodammal. The following table shows the position of the parties to the suit :—



The three sons of Nilayathakshi instituted this suit in November 1918 after the death of Nilayathakshi in April 1918, impleading all the other grandsons and granddaughters of the testator. The will was as follows :—

Exhibit A.

"This is the last will and testament of one Colatoor Ratna Mudali, residing in No. 31, Sambier Street in the Black Town of Madras. I appoint T. Kandaswami Mudali and P. Devaraja Mudali (hereinafter called 'my trustees') to be the executors and trustees of this my will and whereas I am possessed of certain self-acquired property and effects and have no ancestral property of any kind whatsoever, I give, devise and bequeath all my estate and effects, immovable and moveable unto my trustees upon trust that my trustees shall sell, call in and convert into money the same or such part thereof as shall not consist of money, and shall with and out of such proceeds of such sale, calling in, and conversion and with and out of my ready money pay my funeral and testamentary expenses and debts and shall stand possessed of the residue of such proceeds upon trust, to set apart thereout and invest in promissory notes of the Government of India such a sum of money as when so invested as aforesaid will produce by the income thereof a monthly sum of rupees one hundred, and to pay such income monthly to my wife C. Andalammal during her life, and from and after her decease to stand possessed of the said sum and the investments for

the time being representing the same upon the trusts hereinafter declared concerning the residue of my estate; and as to the residue of my estate, I direct that my trustees shall at their discretion invest the same in any of the modes of investment in which trustees are by law authorized to invest trust funds, and shall stand possessed of the said residuary trust moneys and the investments for the time being representing the same (hereinafter called 'the residuary trust fund'), in trust to apportion the residuary trust fund into as many equal parts or shares as there may be daughters of mine living at the time of my decease or who having predeceased me shall have left issue her or them and me surviving, and to pay the income of each of such equal parts or shares to my said daughters respectively during their respective lives, and from and after the decease of each of my said daughters to stand possessed of the share of the residuary trust fund so appropriated as aforesaid to such daughter, upon trust for all the children of such daughter who shall attain the age of twenty-one years in equal shares and if there shall be only one such child the whole to be in trust for that one child, and in the event of any of my said daughters dying without leaving lawful issue her or them surviving, I direct that my trustees shall stand possessed of the share or shares so appropriated to her as aforesaid upon trust for all the children of the other or others of my said daughters who shall attain the age of twenty-one years as tenant-in-common in equal shares *per stirpes*, provided always and I hereby declare that if any daughter of mine shall die in my life-time leaving lawful issue at the time of my death, such issue as shall attain the age of twenty-one years shall take and if more than one as tenants-in-common in equal share *per stirpes* the share which would have been so appropriated as aforesaid to such daughter of mine and her issue if she had survived me; and I declare that my trustees may postpone the sale and conversion of any part of my real and personal estate for so long as they shall think fit, and that the rents and property and income to accrue from and after my decease from such part of my estate as shall remain unsold and unconverted shall after payment thereout of all incidental expenses and outgoings, be paid and applied to the person or persons and in the manner to whom and in which the proceeds of such sale and conversion would be applicable under this my will if such sale and conversion had been actually made. In witness whereof I have hereunto set my hand this 24th April 1897."

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The material contentions of the plaintiffs before the Original Court were that the bequests in favour of the grandchildren were void as being gifts to unborn persons, that the bequests were void under the rule of perpetuity contained in section 101 of the Indian Succession Act, and that the bequests in favour of the whole class of grandchildren were void under section 102 of the same Act; that the bequests were also void under section 111 of the same Act, that sections 101, 102 and 111 were made applicable to Hindu wills executed by residents in the Presidency Town of Madras by the Hindu Wills Act. They contended that the Hindu Transfer and Bequests Act (Madras Act I of 1914) was *ultra vires* on the ground that the Provincial Legislature had no power under the legislative powers to make laws for the order and good Government of the province given by the Indian Councils Act, 1861, to alter the rule of Hindu Law as to invalidity of bequests to unborn persons. The learned trial Judge (Courts Trotter, J.) held (1) that the rule of Hindu Law as to the invalidity of bequests to unborn persons had been abrogated by Madras Act I of 1914, which the Provincial Legislature was competent to enact under the general powers above referred to; (2) that the bequest in favour of grandchildren was not void as offending the rule against perpetuity laid down by section 101, Indian Succession Act, or by section 5 of Madras Act I of 1914; that the Indian Majority Act (IX of 1875) had altered the age of minority for purposes of section 101 of the Indian Succession Act from 18 to 21 years; that the bequests were not void under section 111 of the Indian Succession Act; and he accordingly held that *all the bequests in favour of the grandchildren in Ratna Mudali's will were valid* and passed a decree "declaring that the legacies in favour of the grandchildren shall vest in them on their attaining the age of twenty-one years, and that the period of distribution is multiple, i.e., that there is a distribution *pro tanto* as and when each of the said children reaches the age of 21 years, and that the final distribution is to take place when the last of the children attains the age of 21 years or dies." Against this decree the plaintiffs preferred this Appeal.

The Advocate-General (K. Srinivasa Ayyangar), A. Krishna-swami Ayyar and S. Aravamuthu Ayyangar for appellants.—

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The question is as to the construction of the will of a testator who executed the will in 1897 in Madras and died there in 1904. The will gives a monthly income to his widow for her life, and then the residue is to be disposed of by executors or trustees appointed under the will. The will gives a life estate to the testator's daughters, and then the corpus is to be divided among the grandchildren of the testator. The Hindu Wills Act (XXI of 1870) applies to this will as it was executed in Madras. By virtue of that Act, sections 101, 102, 103 and 111 of the Indian Succession Act (X of 1865) are applicable to this will. The bequest to the grandchildren is void under these sections, as also under the rule of Hindu Law, as to gifts to unborn persons. The will lays emphasis on the children of the daughters attaining 21 years. The time of distribution is the date of the death of the testator or each of his daughters in respect of her share. At that time there were no grandchildren who had attained the age of 21 years. Under section 111 of the Indian Succession Act, the bequest fails as the contingency did not happen before the fund was distributable, which was on the date of the death of each of the testator's daughters in respect of her share: see *Norcondra Nath Sircar v. Kamalbasini Dasi*(1).

Next, the bequest to the grandchildren is void under section 101, Indian Succession Act, which contains the rule against perpetuity similar to section 23, Transfer of Property Act. The mere possibility of violation of the rule under the section is alone to be taken into account. The vesting may be delayed beyond the minority of the person taking the bequest. Section 3 of the Indian Succession Act defines minority as extending to 18 years. The Indian Majority Act (IX of 1875) does not control the interpretation of section 101, Indian Succession Act. The Indian Majority Act simply says that in certain contingencies the minority is extended to 21 years. Those contingencies may not occur in the case of the bequests made in the will, and so minority may not have to be extended under the Majority Act. In any event there is a possibility of the 18 years rule applying, and any possibility of delay beyond 18 years is enough to vitiate the bequest under section 101, Indian Succession Act. The Indian

(1) (1896) I.L.R., 23 Calc., 563 (P.C.).

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Majority Act does not require that minority under section 101 should be read as 21 years in all cases.

Reference was made to the following cases :—

Chunilal Parvatishankar v. Bai Samrath(1), *Jehangir Dada-bhoy v. Kaikhusru Kavasha*(2), *Bhupendra Krishna Ghose v. Amarendra Nath Dey*(3), *Ward v. Brown*(4), *Sivasankara Pillai v. Soobramania Pillai*(5), *P. V. Subramania Pillai v. P. V. Murugesu Pillai*(6).

A. Krishnaswami Ayyar for appellant *continued*.—The will offends against the rule of Hindu Law by which a gift or bequest to unborn persons is void. This rule was laid down in the *Tagore Case*(7). This rule has not been abrogated, as regards wills executed in Presidency towns and other places to which the Hindu Wills Act applies, by the provisions of the same Act. The decision of WILSON, J., in *Alangamonjori Dabee v. Sonamonee Dabee*(8) to the effect that the rule as to bequests to unborn persons was abrogated by the Hindu Wills Act was overruled on appeal: and the other High Courts have not followed the view of WILSON, J.: *Alangamonjori Dabee v. Sonamoni Dabee*(9), *Cally Nath Naugh Chowdhury v. Chunder Nath Naugh Chowdhury*(10), *Jairam Narronji v. Kuverbai*(11), *Yethirajulu Naidu v. Mukunthu Naidu*(12), *Bhagabati Barmanya v. Kali-charan Singh*(13).

This rule again has not been *validly* abrogated by the recent enactment of the Provincial (Madras) legislature, namely, the Hindu Transfers and Bequests Act (Madras Act I of 1914), commonly known as "Seshagiri Ayyar's Act." This Act no doubt purports to apply to wills executed in the Presidency town of Madras, but the Act, in so far as it purports to apply to wills in the Presidency town of Madras, is *ultra vires* of the powers of the Provincial legislature. Only the Imperial legislature, if at all, can pass such an Act, so as to prevent the

(1) (1914) I.L.R., 38 Bom., 399 (P.C.).

(2) (1915) I.L.R., 39 Bom., 298 (P.C.).

(3) (1916) I.L.R., 43 Cal., 432 (P.C.).

(4) [1916] 2 A.C., 121.

(6) (1912) 17 C.W.N., 488 (P.C.).

(8) (1882) I.L.R., 8 Cal., 157.

(10) (1882) I.L.R., 8 Cal., 378.

(12) (1905) I.L.R., 28 Mad., 363.

(5) (1908) I.L.R., 31 Mad., 517.

(7) (1872) 9 B.L.R., 377 (P.C.).

(9) (1882) I.L.R., 8 Cal., 637.

(11) (1885) I.L.R., 9 Bom., 491.

(13) (1911) I.L.R., 38 Cal., 408 (P.C.).

rule of Hindu Law from being applied by the High Courts to cases of wills executed in the Presidency towns within the ordinary Original jurisdiction of the High Court. The Supreme Court, under its Charter of 1800, clause 22, had to apply Hindu Law as between Hindus (called Gentoos). Under the High Courts Act, 1861, section 11, the provisions of the Charter of the Supreme Court were made applicable to the High Courts constituted by Letters Patent issued under the authority of the above Act, which abolished the Supreme Court. Under section 9, the jurisdiction of the Supreme Court became vested in the High Court; under section 11 the provisions of the old Charter became applicable to the High Court and to the Judges thereof, "subject to the legislative powers of the Governor-General of India in Council" in relation to the matters aforesaid.

Thus, under the Indian High Courts Act, 1861, section 11 (24 and 25 Vic., c. 104), which is an Act of Parliament, the Governor-General of India in Council alone had power to modify the provisions of the Charter of the Supreme Court, which were made applicable to the High Court by the same Act. Under the Indian Councils Act, 1861 (24 and 25 Vic., c. 67) also the same result is reached; under section 22 and proviso to section 42 of the latter Act (Indian Councils Act), the local legislature is expressly prohibited from making any laws, which should "in any way affect any of the provisions of this Act or of any other Act of Parliament in force or hereafter to be in force in the Presidency."

Thus, only the supreme legislature can pass an Act so as to affect the powers and jurisdiction conferred on the High Court by the High Courts Act, 1861. The Hindu Transfers and Bequests Act, 1914, passed by the Provincial legislature is therefore *ultra vires*, so far as regards the powers and jurisdiction exercised by the High Court under the High Courts Act, 1861.

T. R. Venkatarama Sastri, R. Gnanasambandham and K. S. Sankara Ayyar for respondents 1, 2 and 5.—As regards section 111, Indian Succession Act, the argument of the appellants assumes that the date of distribution is the date of the death of each of the daughters of the testator in respect of her share. That assumption is not correct. The period of distribution should be gathered from the will.

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Section 111 does not apply to this case. The section implies two points of time, viz., (1) one for distribution of the assets, and (2) one for the happening of the contingency. In this case there is only one point of time; hence the section does not apply to this case. The testator directs the trustees to keep the assets for the children of a deceased daughter at any time until they attain the age of twenty-one years.

As regards section 101, Indian Succession Act, under the English Law originally minority was the limit, afterwards 21 years in gross was fixed by decisions. Here, in India, the Indian Majority Act (IX of 1875) gives two periods of majority; the longer period should be taken in construing section 101, Indian Succession Act. A guardian has been appointed for one of the grandchildren, namely, the fifth defendant. The Indian Majority Act, section 3, by referring expressly to the Indian Succession Act, imports 21 years into section 101 of the Act.

As regards Seshagiri Ayyar's Act (Madras Act I of 1914), this Act is not ultra vires *firstly*, because *testamentary succession*, as distinguished from inheritance, is not a matter specially reserved for the supreme legislature; *secondly*, the local legislature is competent to repeal or amend an Act of the supreme legislature under section 42 of the Indian Councils Act, 1861. In this case the Indian legislature had, by the Hindu Wills Act, already dealt with the Hindu Law rule as to invalidity of gifts and bequests to unborn persons, inasmuch as section 1 of the Hindu Wills Act applies sections 98 to 101, and several other sections, of the Indian Succession Act to Hindu wills. Under section 42 of the Indian Councils Act, the Provincial legislature can repeal or amend an Imperial Act such as the Hindu Wills Act. Section 3 of the Hindu Wills Act cannot be construed to preserve the Hindu Law rule as to unborn persons: see *Alangamonjori Dabee v. Sonamonee Dabee*(1). No doubt, the view of WILSON, J., was overruled on appeal in *Alangamonjori Dabee v. Sonamonee Dabee*(2), and has not been followed in Calcutta and Bombay; and though some cases in Madras have not followed the view of WILSON, J., see the opinion of MOORE, J., in *Yethurajulu Naidu v. Mukunthu Naidu*(3), and the remarks of

(1) (1892) I.L.R., 8 Calc., 157.

(2) (1882) I.L.R., 8 Calc., 637.

(3) (1905) I.L.R., 28 Mad., 363.

SUBRAHMANYA AYYAR, J. in *Subba Reddi v. Doraisami Bathen*(1), the Privy Council has left the point as still open: see *Ranimoni Dasi v. Radha Prasad Mullick*(2). There is no course of decisions in Madras as in the other High Courts. If the capacity of a donee under the Hindu Law has been brought under the Indian legislative enactment, a Provincial legislature can repeal or modify such Indian legislative enactment.

Under section 42, clause 5 of the Indian Councils Act, 1861, the local legislature can with the previous sanction of the Governor-General in Council make laws affecting religion and religious rights and usages of any class of Her Majesty's subjects in India; and the law of succession is to Hindus a religious matter, and comes under this provision.

Lastly, the laws and usages of the Gentoos under the Charter of the Supreme Court, means Hindu Law as it existed at any time as modified by the legislature Imperial or Provincial.

Assuming the bequest to unborn children is bad in law or the bequest to the grandchildren is void for any of the reasons under sections 101, 102, or 111, Indian Succession Act, the daughters of the testator take an absolute estate, on the failure of subsequent bequests. There is an absolute estate given under the will in favour of the daughters. The use of the words "appropriate," "apportion" and the way in which the share of each is spoken of even after her death, show that an absolute estate was granted; the subsequent interest given by the will to the grandchildren is in the nature of a settlement. Under such circumstances the rule of law is laid down in section 126, Indian Succession Act, which is applicable to presidency towns under section 1 of the Hindu Wills Act. Section 126 reproduces what is known as the rule in *Lassence v. Tierney*(3). If the subsequent limitations fail, the original absolute gift prevails. Reference was also made to the cases quoted in the judgment of RAMESAM, J.

Radhakrishnayya for third and fourth respondents.—The three grandchildren by Yasodammal were born before the testator died in 1904. The bequest to the grandchildren is not a gift to a

(1) (1906) 16 M.L.J., 491.

(2) (1914) I.L.R., 41 Calc., 1007 (P.C.).

(3) (1849) 1 Mac. & G., 551; s.c., 41 E.R., 1379.

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class, but a gift to each in the class, which will not fail as to all, on account of failure as to some of the class. If there is a gift to a class, it should not be so construed as to include persons who are born after the testator's death; but only as including those who are born between the date of the will and the death of the testator: see *Bhagabati Barmanya v. Kalicharan Singh*(1) and *Dias v. De Livera*(2).

Next, the provisions of section 102, Indian Succession Act, do not apply to this case, because the bequest here is void under the rule of Hindu Law as being gifts to unborn persons, and not under section 100 or 101 of the Indian Succession Act; section 102 will apply only in cases where sections 100 and 101 are applicable. All these sections (100, 101 and 102) imply validity of gifts to unborn persons. Here the bequest is held void already under the Hindu Law rule as to gifts and bequests to unborn persons. The rule in *Leake v. Robinson*(3), embodied in section 102, should not be followed, if it is possible to get round the section by adopting a construction of the will. If the gift is void under the Hindu Law rule, section 102 does not apply: see *Rai Bishanchand v. Mussumat Asmai-la Koer*(4), *Ram Lal Sett v. Kanai Lal Sett*(5) and *Bhagabati Barmanya v. Kalicharan Singh*(6). Though some persons were not specially named, still those who can take under the terms of the will, will be allowed to take, though the bequest may fail as to others: *In re Colman and Jarrom*(7).

A. Krishnaswami Ayyar in reply.—Section 111, Indian Succession Act, is applicable in terms to this case. Attaining age of twenty-one years is a contingent event. The section should not be construed in the light of the English decisions. Illustrations to section 111 may be a guide but are not conclusive in construing the section, and illustrations to another section, such as section 101, are no guide.

As regards the contingent minority created by the Indian Majority Act, a guardian need not be appointed as a matter of

- (1) (1911) I.L.R., 38 Calc., 468 (P.C.). (2) (1879) 5 App. Cas., 123.
(3) (1817) 2 Mer., 363. (4) (1884) I.L.R., 6 All., 560 (P.C.).
(5) (1886) I.L.R., 12 Calc., 663 (P.C.) at 668.
(6) (1911) I.L.R., 38 Calc., 468 (P.C.) at 473.
(7) (1876) 4 Ch.D., 165.

course. A guardian may be appointed or not for some or all the minors. Possibilities, and not actualities, should be taken into account in construing section 101.

This is a gift to a class: see section 102 illustration (b).

As regards section 126, Indian Succession Act, there must be an absolute gift to a person, i.e., a primary absolute gift to a donee; then, if there are subsequent trusts or obligations superimposed to effectuate the original gift and these fail, the original absolute gift prevails. This is the rule in *Lassence v. Tierney*(1) and has been embodied in section 126 of the Indian Succession Act: see *Kellet v. Kellet*(2), *Hancock v. Watson*(3) and *In re Hancock Watson v. Watson*(4). Suppose property is given to A absolutely, subject to payment of debts which become barred, then the absolute property can be retained by A: see *Jarman on Wills*, pages 1183, 1184 and 1459 (6th Edition). Subsequent limitations show that no absolute gift was intended to be given to the original donee: *Scawin v. Watson*(5) and *Rucker v. Scholefield*(6).

The words "share," "appropriate" and "apportion" refer to the income. There are no words of gift of the *corpus* as distinguished from income in favour of the daughters. Use of these words is not conclusive. As to "appropriate," see *Scawin v. Watson*(5), where it was held that use of the words "share" and "appropriate" did not make the estate given an absolute estate: see also *Whitehead v. Rennett*(7). The existence of contingent trusts and limitations is an important test as to whether the prior gift was one for life or an absolute gift: *Savage v. Tyers*(3). A series of limitations over and limitations to others than the primary donee's children (as in this case) are indications that only a life estate was intended. The cases quoted by the respondents are distinguishable as there were words of absolute gift of the *corpus* in those cases.

- (1) (1819) 1 Mac. & G., 551; s.c., 41 E.R., 1379.
(2) (1868) L.R., 3 H.L., 160. (3) [1902] A.C., 14 at 22.
(4) [1901] 1 Ch., 482.
(5) (1847) 10 Beav., 200; s.c., 50 E.R., 559.
(6) (1862) 1 H. & M., 37; s.c., 71 E.R., 16.
(7) (1853) 22 L.J. Ch., 1020. (8) (1872) 7 Ch. App., 356.

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Though this will was drafted by an English solicitor, it is still a Hindu will: though construed as an English will there may be a gift of an absolute estate to the daughters, still as the will of a Hindu, it ought to be construed only as giving a limited estate to a daughter: see *Radha Prasad Mullick v. Ranee Mani Dasee*(1). Particular phrases should not be the overriding test; see *Narasimha v. Parthasarathy*(2).

Wallis, C.J.

WALLIS, C. J.—This is an appeal from a Judgment of Courts Trotter, J., upholding the provisions of the will of the late C. Ratna Mudali which have been questioned on the ground that they are opposed to the Hindu Law notwithstanding the passing of Madras Act I of 1914, and also as infringing the provisions of section 101 and section 111 of the Indian Succession Act which have been applied by the Hindu Wills Act, 1870, to wills made by Hindus in a Presidency town. The case has been very fully argued before us and the appellants have taken the fresh ground that Madras Act I of 1914, if not wholly *ultra vires*, is *ultra vires* in so far as it purports to affect the Presidency town where the rules of Hindu Law as to succession and inheritance were made applicable by the Supreme Court Charter which could only be modified by the legislative authority of the Governor-General in Council under the provisions of the Indian Councils Act, 1861, read with section 11 of the Indian High Courts Act, 1861. The respondents on the other hand have put forward the fresh contention that, assuming the disposition in the will to be invalid, it shows an intention on the part of the testator to make an absolute gift of her share to each of his three daughters and to sever such share from his estate, and that consequently the disposition comes within section 126 of the Indian Succession Act, which embodies what is sometimes referred to as the rule in *Lassence v. Tierney*(3). Mr. Radhakrishnayya also raised the contention on behalf of some of the daughter's daughters who were born during the life-time of the testator that they were in any view entitled to take under the will, but it

(1) (1908) I.L.R., 35 Calc., 896 (P.C.). (2) (1914) I.L.R., 37 Mad., 199 (P.C.).
(3) (1849) 1 Mac. & G., 651; s.c., 41 E.R., 1379.

will be unnecessary to go into this question in the view we take of the case.

The material provisions of the will are as follows:—

"They (the residuary trust funds) are vested in trustees, in trust to apportion the residuary trust funds into as many equal parts or shares as there may be daughters of mine living at the time of my decease or who having predeceased me shall have left issue her or them and me surviving and to pay the income of each of such equal parts or shares to my said daughters respectively during their respective lives and from and after the decease of each of my said daughters to stand possessed of the share of the residuary trust funds so appropriated as aforesaid to such daughter upon trust for all the children of such daughter who shall attain the age of twenty-one years in equal shares and if there shall be only one such child the whole to be in trust for that one child and in the event of any of my said daughters dying without leaving lawful issue her or them surviving I direct that my trustees shall stand possessed of the share or shares so appropriated to her or them as aforesaid upon trust for all the children of the other or others of my said daughters who shall attain the age of twenty-one years as tenants in common in equal shares *per stirpes*, provided always and I hereby declare that if any daughter of mine shall die in my life-time leaving lawful issue living at the time of my death, such issue as shall attain the age of twenty-one years shall take and if more than one as tenants-in-common in equal shares *per stirpes* the share which would have been so appropriated as aforesaid to such daughter of mine and her issue if she had survived me."

This disposition undoubtedly infringes the established rule of Hindu Law as to gifts to unborn persons, and I agree with the learned Judge that according to the current of decisions in India this rule was not affected by the Hindu Wills Act, and that the observations of Lord Moulton in *Ranimoni Dasi v. Radha Prasad Mullick*(1), even if they be taken to show that the question may still be open before the highest tribunal, afford this Court no sufficient ground for refusing to follow the current of Indian decisions on this question until they are overruled by higher authority.

The next question is as to whether this objection is cured by Madras Act I of 1914. The objection that that Act was

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WALLIS, C.J. altogether *ultra vires* of the local Legislature, which the learned Judge rejected, has not been pressed before us. The words "peace and good Government" or "peace, order and good Government" are to be found in the early commissions authorizing the summoning of legislative assemblies in the colonies as well as in the later statutes for the larger colonies, and according to their well understood meaning confer general legislative competence. It is unnecessary to pursue the subject further.

The objection to the recent Act in so far as it affects the Presidency Town, which was not taken at the trial, is of a more serious character. Article 22 of the Charter of the Supreme Court whose jurisdiction was confined to the Presidency town provided—

"That the said Supreme Court of Judicature at Madras shall have full power to hear and determine all suits and actions that may be brought against the inhabitants of Madras. Yet nevertheless, in the cases of Muhammadans or Gentoos, their inheritance and succession to lands, rents and goods, and all matters of contract and dealing, between party and party, shall be determined, in the case of the Muhammadans, by the laws and usages of the Muhammadans; and, where the parties are Gentoos, by the laws and usages of the Gentoos, or by such laws and usages as the same would have been determined by, if the suit had been brought, and the action commenced in a Native Court; and where one of the parties shall be a Muhammadan or Gento, by the laws and usages of the defendant."

Section 11 of the High Courts Act, 1861, applied the provisions of the Supreme Court Charter to the High Court consistently with the provisions of the Act itself and the Letters Patent to be issued under it, and

"subject to the Legislative powers in relation to the matters aforesaid of the Governor-General in Council."

Thus by this Statute of the Imperial Parliament, the Governor-General in Council or the Indian Legislature was made the proper authority to alter the provisions of the Charter. It was only under the provisions of this section of the High Courts Act that the Indian legislature could have altered the provisions of the Supreme Court Charter, as it was expressly prohibited by section 22 of the Indian Councils Act, 1861, from modifying the provisions of the Indian High Courts Act. The local legislature also, was expressly prohibited from

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WALLIS, C.J. doing so by the *proviso* to section 42 of the Indian Councils Act, which provided that it should not have the power of making any laws or regulations which should in any way affect any of the provisions of this Act, or of any other Act of Parliament in force, or hereafter to be in force in the Presidency, words which clearly include the Indian High Courts Act.

It is unnecessary to refer to the provisions of the consolidating Government of India Act, 1915, further than to say that it substantially reproduces in section 112 the provisions of the Supreme Court Charter now in question. Now it seems clear that under the Indian Councils Act and the High Court Act of 1861 it was within the legislative competence of the Governor-General in Council to alter the rules of Hindu Law as to succession and inheritance within the Presidency towns, as was done to some extent when the provisions of certain sections of the Indian Succession Act were made applicable to Hindu Wills in the Presidency towns. It seems equally clear that it was not within the legislative competence of the Governor in Council of a Presidency to pass such a measure. The only logical position appears to me to be that rules of Hindu Law as to succession and inheritance in force in the Presidency towns were beyond the legislative competence of the local legislature and that consequently Madras Act I of 1914 was *ultra vires* in so far as it purported to affect the Presidency town. We have not been referred to any decided case in which this point was considered, but that the difficulty was realized appears from the saving clause in Madras Act I of 1902, nor is there any reason to assume that it was overlooked by the learned lawyer who introduced the Bill into the Legislative Council.

It follows that this disposition cannot take effect as regards all the beneficiaries who were born after the testator's death.

Even if it could be held that this objection to the disposition incurred by Madras Act I of 1914, there remains the still more fatal objection that it contravenes the provisions of section 101 of the Indian Succession Act, which Madras Act I of 1914 does not purport to affect, and consequently cannot take effect at all under section 102 of the Act, as held by this Court in *Sivasankara Pillai v. Soobramania Pillai*(1), which must be taken to

(1) (1908) I.L.R., 31 Mad., 517.

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WALLIS, C.J. have been affirmed by the Privy Council for the same reasons, as Lord MACNAUGHTEN merely stated that the appeal would be dismissed. In that case a disposition not differing materially from this, except in one respect, was held bad as infringing the provisions of section 101. In the present case, the vesting is postponed for the lifetime of persons living at the testator's death and a period of twenty-one years, whereas, under the section, the vesting may only be delayed for such lifetime "and the minority of some person who shall be in existence at the expiration of that period." "Minority" is defined in section 3 as the status of a "person who shall not have completed the age of eighteen years." The present disposition, therefore, offends against the section, unless, as held by the learned trial Judge, the effect of the Indian Majority Act has been to alter the age of minority referred to in the section and make it twenty-one years. Now all that the Indian Majority Act does is to provide that

"Every minor of whose person or property or both a guardian, other than a guardian for a suit within the meaning of Chapter XXXI of the Code of Civil Procedure has been or shall be appointed or declared by any Court of Justice before the minor has attained the age of eighteen years, and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards before the minor has attained that age, shall, notwithstanding anything contained in the Indian Succession Act (X of 1865) or in any other enactment be deemed to have attained his majority when he shall have completed the age of twenty-one years and not before."

Now, giving the fullest effect to this section and even reading it as modifying the definitions of "minor" and "minority" in section 3 of the Indian Succession Act, I can see no sufficient grounds for holding that the construction of section 101 is affected thereby. Section 101 invalidates any disposition by which the vesting "may be delayed" beyond the lifetime of a person living at the testator's death and the minority of some person who shall be in existence at the expiration of that period. Now even under the modified definition of minority, the vesting now in question will be delayed, unless every one of the minors in whose favour the disposition is made has a guardian appointed or has his property taken under the management of the Court of

Wards before he attains the age of eighteen. At the time of the testator's death it was of course possible that such an event might happen, but it was possible, not to say probable, that it would not. In these circumstances I find it impossible to say that the disposition is not one by which the vesting "may be delayed" beyond the prescribed period. I am therefore unable, with great respect, to agree with the learned Judge that section 3 of the Indian Majority Act as amended must be read as re-enacting a fresh age of majority for section 101 of the Indian Succession Act, and as providing, as regards Hindus generally, that the vesting may be postponed for lives in being and three years after the minority of the persons referred to. The result under section 102, which is in accordance with the rule established in English cases cited in *Hancock v. Watson*(1), is that the whole disposition in favour of the daughter's children fails. •

In these circumstances it is unnecessary to consider at any length the further objection under section 111, a rather unfortunate section which was enacted to give statutory effect to the decision in *Edwards v. Edwards*(2), which was in part overruled after the passing of the Indian Succession Act by the House of Lords in *O'Mahoney v. Burdett*(3) and *Ingram v. Soutten*(4). I may say that I am not, as at present advised, prepared to accept the contention of the appellants that the present disposition should be regarded as giving a legacy "if a specified uncertain event shall happen" and as mentioning "no time for the occurrence of that event" within the meaning of the section. The construction contended for would avoid dispositions which are recognized as valid in section 101, and would admittedly make illustration (c) to that section bad law. The present disposition would be perfectly free from objection in England and I am not satisfied that it is invalid in India except by virtue of the more stringent provisions of section 101 of the Indian Succession Act or the rules of Hindu Law.

(1) [1902] A.C., 14.

(2) (1852) 15 Beav., 857; s.c., 51 E.R., 576.

(3) (1874) L.R., 7 H.L., 388.

(4) (1874) L.R., 7 H.L., 478 at 421.

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It only remains to deal with the contention put forward for the first time at the hearing of the Appeal by Mr. Venkatarama Sastri, for the respondent, that the case comes within section 126 of the Indian Succession Act, which provides

"Where a testator absolutely bequeaths a fund, so as to sever it from his own estate, but directs that the mode of enjoyment of it by the legatee shall be restricted so as to secure a specified benefit for the legatee, if that benefit cannot be obtained for the legatee, the fund belongs to him as if the will had contained no such direction."

The section is intended to embody what is known as the rule in *Lassence v. Tierney*(1), and Mr. Venkatarama Sastri, for the respondent, and Mr. Krishnaswami, for the appellant, have taken us through all the cases in which the Court of Chancery has applied or refused to apply the rule. I shall not attempt to discuss or distinguish them, but shall respectfully follow what was said by RIGBY, L.J., in *In re Hancock. Watson v. Watson*(2):

"I think there is to be gathered from the general line of authority one clear principle that if a gift is absolute in the first instance, and the provisions that follow are a mere settlement of that gift, then the settlement, if it is effectual, will have operation, reducing what appears to be an absolute gift to a life estate only. If, however, the settlement for any reason fails, then in so far as it fails, there is no intestacy, but an interest in the nature of a reversion to the person who is the object of the previous absolute gift."

The rule is explained in the same way by PAGE-WOOD, V.C., in *Rucker v. Scholefield*(3), a case decided in 1862, and illustration (a) to section 126, which was enacted in 1865, expressly deals with a gift of the residue to the testator's daughters with a direction that their shares shall be settled upon themselves respectively for life and be paid to their children after their death. To bring the case within the rule there must be an absolute gift and a settlement of that gift on the donee, and there may be such a settlement even where there is a gift over on failure of issue of the donee. Thus in the case already

(1) (1849) 1 Mac. & G., 551; s.c., 41 E.R., 1379. (2) [1901] 1 Ch., 482.

(3) (1862) 1 H. & M., 37; s.c., 71 E.R., 16.

cited, *In re Hancock. Watson v. Watson*(1), which was affirmed by House of Lords in *Hancock v. Watson*(2), there was a gift to Susan Drake, and the property was settled on trust to pay the income to her for life and after her death on trust for her children who should attain twenty-five, and then upon trust for the children of the testator's brother Charles. It was held in that case that there was an absolute gift to Susan Drake which upon her death passed to her representatives, in consequence of the failure of the settlement to take effect. To ascertain whether there is such an absolute gift the whole will must be looked at. As to this Lord DAVEY observed at page 22:

"Of course as Lord COTTENHAM pointed out in *Lassence v. Tierney*(3) if the terms of the gift are ambiguous you may seek assistance in construing it—in saying whether it is an absolute gift or not—from the other parts of the will including the language of the engrafted trusts."

Applying these tests to the present case we find that the trustees are to stand possessed of the residuary trust funds on trust, to apportion them into as many equal parts or shares as there are daughters, and to pay the income of each of such shares to his daughters respectively, and from and after the decease of each of the said daughters to stand possessed of the share of the residuary trust funds so appropriated as aforesaid to such daughter upon trust for all the children of such daughter who shall attain the age of 21 years, in equal shares. Then in the event of one of such daughter dying without issue there is a gift over of the share so appropriated to her in trust for the children of the testator's other daughters.

Seeing that the residuary trust funds are thus to be apportioned into as many equal shares as there are daughters, and that each daughter is referred to as having had a share appropriated to her, I think the words of the will are sufficient to show an intention to confer an absolute gift on each of the daughters in the first instance, followed by a settlement of each such daughter's share on her for life, and after her on all her children attaining 21, with a gift over if this last disposition fails. It has been said that this is a Hindu will and must be

(1) [1901] 1 Ch., 482.

(2) [1902] A.C., 14.

(3) (1849) 1 Mac. & G., 551; s.c., 41 E.R., 1379.

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construed as such, but so construing it, I think it shows a clear intention to confer an absolute gift on each daughter and to make a settlement in regard to it. It seems to me exactly the sort of settlement a modern Hindu would be inclined to make upon his daughters.

In these circumstances effect must be given to the section which has been made applicable to Hindu wills in the Presidency towns. The result is that the plaintiffs take no interest in the shares of their mother's sisters, and that the third and fourth defendants would be entitled to inherit the share of their mother Yasodammal but for the compromise they have entered into with their own brothers, the first and second defendants; that the fifth defendant succeeds to the share of his mother Rajammal; and that if they had appealed the sixth, seventh and eighth defendants would have been entitled to succeed to the share of their mother Nilayathakshi Ammal but for the compromise, which has been sanctioned, with their brothers, the first, second and third plaintiffs.

After the arguments had been closed and judgment reserved, an application was made to us on behalf of the plaintiffs to allow an issue to be raised as to whether the defendants were estopped from contending that their mothers each took more than a life estate on the ground that they had accepted counsel's opinion to that effect and entered into a family arrangement to abide by it. Paragraphs 11 and 12 of the plaint merely state that the testator's widow and daughters had been in enjoyment of the estate and that after the widow's death in 1910 it had been in the possession of the testator's only surviving daughter, Nilayathakshi Ammal, who after her mother's death is alleged in paragraph 12 to have received and kept all the income derived from the estate as the devisee of the income of one-third of the properties under the will and as the heir at law to her deceased father the testator. There is no allegation of any family settlement having been arrived at, and paragraph 19 merely prays that the Court will construe the will of the testator and declare the rights of the parties thereto. In these circumstances I am of opinion that there would be no sufficient grounds for allowing a fresh issue to be raised even if the affidavit disclosed a stronger case than it does for the

existence of such a family arrangement. The Appeal will be dismissed and costs will be payable out of the estate in the same way as the costs of the suit.

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RAMESAM, J.—This is an appeal against the judgment of COURTTS TROTTER, J., in a suit brought for the construction of the will of one Ratna Mudaliyar. The testator died at Madras in 1904 leaving a widow and three daughters and most of the properties affected are situate in Madras. The will is Exhibit A, dated 24th April 1897, is in English and is printed at page 1 of the documents and is also quoted at length in the judgment of my Lord the Chief Justice. It is therefore unnecessary to set it forth fully. The intentions of the testator regarding the residue of his estate after the death of his widow are, apart from legal difficulties, clear enough, and are admitted on all hands. At present it is sufficient to state them generally as that his property should be divided into three parts and each share is to be allotted for the benefit of a daughter and, on their attaining the age of twenty-one, of her children. The main question is whether there are any legal obstacles to the carrying out of his intentions and this depends on various subsidiary questions of law.

Before dealing with these, I will briefly narrate the subsequent events up to the date of suit (1918). The widow died in 1910. The first daughter Yasoda died in 1907, leaving two sons (first and second defendants) and two daughters (third and fourth defendants). Of these, the two daughters and the elder son were born before the testator's death. The testator's second daughter Rajam died in 1908, leaving an only son (fifth defendant) and no daughters. The third daughter Nilayathakshi died in 1918, leaving three sons, the plaintiffs, and three daughters (defendants Nos. 6 to 8). None of the children of the second and third daughters was in existence at the death of the testator and all of them are still minors. Thus, out of the eleven grandchildren of the testator, eight of them were not in existence at his death. Throughout the rest of my judgment, I shall refer to these as the eight younger grandchildren and to the other three as the three elder grandchildren.

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RAMESAM, J. I will now proceed to deal with the various questions of law in their logical order as far as possible. The first question is whether the rule of Hindu Law which was laid down in the *Tagore Case*(1), namely,

"that a person capable of taking under a will must be such a person as could take a gift *inter vivos* and, therefore, must either in fact or in contemplation of law be in existence at the death of the testator"

and which has been always recognized as applicable to the Madras Presidency [as in *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*(2), *Ramasami Pattar v. Chinnan Asari*(3) and by implication in *Sivasankara Pillai v. Soobramania Pillai*(4)] has been abrogated, in the case of Hindu wills governed by the Hindu Wills Act (XXI of 1870) by section 2 of that Act which, by extending to such wills sections 100 and 101 of the Indian Succession Act (X of 1865), seems to recognize the validity of bequests to persons unborn at the death of the testator, apart from those sections, notwithstanding section 3 of the former Act which seems to aim at keeping up the disabilities of Hindu testators. That it was so abrogated, was the opinion of WILSON, J. (afterwards Right Honourable Sir ARTHUR WILSON) in *Alangamonjori Dabee v. Sonamoni Dabee*(5). But the opposite view has prevailed [vide the extra judicial opinion of PONTIFEX, J., in *Cally Nath Naugh Chowdhury v. Chunder Nath Naugh Chowdhury*(6), *Alangamonjori Dabee v. Sonamoni Dabee*(7) reversing WILSON, J.'s decision in *Alangamonjori Dabee v. Sonamoni Dabee*(5), *Jairam Narronji v. Kuverbai*(8) and *Yethirajulu Naidu v. Mukunthu Naidu*(9)]. Mr. Venkatarama Sastri, the learned vakil who appeared for defendants 1, 2 and 5, invited us to reconsider the point, having regard to the doubts expressed by MOORE, J., in *Yethirajulu Naidu v. Mukunthu Naidu*(9) and the remarks of SUBRAHMANYA AYYAR, J., in *Subba Reddi v.*

(1) (1872) 9 B.L.R., 377 (P.C.) at 400.

(2) (1900) I.L.R., 23 Mad., 271 (P.C.) at 281.

(3) (1901) I.L.R., 24 Mad., 449 at 468.

(4) (1908) I.L.R., 31 Mad., 517 at 521.

(5) (1882) I.L.R., 8 Cal., 157.

(6) (1882) I.L.R., 8 Cal., 378.

(7) (1882) I.L.R., 8 Cal., 637.

(8) (1885) I.L.R. 9 Bom., 491 at 506.

(9) (1905) I.L.R., 28 Mad., 368.

Doraisami Bathen(1) and to adopt the view of WILSON, J. If one of my slight judicial experience may venture to express an opinion differing from that of that eminent Judge whose great authority is entitled to the utmost deference and weight, I am inclined to follow the above decisions. The gist of his criticism, at page 163, of the other view, is that sections 99, 100 and 101 of the Succession Act remain inoperative.

As to this I may observe that so far as section 101 is concerned, to hold that the rule in the *Tagore Case*(2) has not been affected by the Hindu Wills Act does not necessarily amount to making section 101 inapplicable to a Hindu will as was supposed by WILSON, J. Cases of bequests to a class may well be conceived in which, while the bequests to some members of the class is void on the ground that they were not in existence at the testator's death, the bequests to the whole class including those in existence at the testator's death is void under section 101 of the Indian Succession Act. Such a case actually occurred in *Sivasankara Pillai v. Soobramania Pillai*(3) where Sir V. Bhashyam Ayyangar's argument that section 101 does not apply was negatived and the learned Judges (WHITE, C.J., and SANKARAN NAYAR, J.) actually applied sections 101 and 102 to a Hindu will and held the whole disposition in favour of the grandsons void, though it was clear that the disposition was also void under the Hindu Law rule so far as such of the testator's grandsons who were unborn at his death were concerned. This case, *Sivasankara Pillai v. Soobramania Pillai*(3), was affirmed by their Lordships of the Privy Council in *P. V. Subramania Pillai v. P. V. Murugesu Pillai*(4). Later on, it will be seen that this case itself affords another illustration of the successive application of the Hindu Law rule and sections 101 and 102 of the Indian Succession Act.

It need not be assumed that the Hindu Law rule will exist for all time. As a matter of fact we now know that Madras Act I of 1914, apart from the question of *ultra vires* considered *infra* (for the Madras Presidency) and India Act XV of 1916 (for the rest of India) have done away with the rule in the *Tagore Case*(2) and there is free scope for the application

(1) (1906) 16 M.L.J., 491 at 497.

(2) (1872) 9 B.L.R., 377 (F.C.) at 400.

(3) (1908) I.L.R., 31 Mad., 517 at 521.

(4) (1912) 17 C.W.N., 488 (P.O.)

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of sections 99, 100 and 101 of the Succession Act and they need not remain inoperative any more in the case of Hindu wills.

I may mention that, although Lord MOULTON seems to leave the point open in *Ranimoni Dasi v. Radha Prasad Mullick*(1), Lord MACNAUGHTEN refers in *Bhagabati Barmanya v. Kalicharan Singh*(2) to "the well-known doctrine of Hindu Law that a gift to an object not in existence is absolutely void." The case was from Bengal (where the Hindu Wills Act applies) and went throughout on the footing that the gift to the sister's sons (born after the testator's death) was void. There is also the anomaly that a Hindu will relating to properties outside the Presidency town is to be governed by the Hindu Law rule or not according as he died in Madras or not, if the respondents' contention is accepted.

I now pass on to the question whether Madras Act I of 1914 (commonly called Mr. Seshagiri Ayyar's Act), which purports to get rid of the Hindu Law rule relating to unborn persons in the Madras Presidency is *ultra vires* of the local legislature. The first ground of the argument that legislation of this character is not "for the peace and good government" as required by section 42 of 24 and 25 Vict., c. 67, has been only formally raised here and was not elaborately argued. For the reasons given by the learned Judge I agree that there is nothing in this contention. But a second ground has been addressed to us which was not raised before the learned Judge, who had therefore no opportunity of considering it. But this fact does not preclude the appellant from raising it before us. The argument before us seeks to make the Act *ultra vires*, only so far as the presidency town of Madras is concerned, and may be stated as follows: The Government of India Act, 39 and 40 Geo. III, c. 70, section 2, authorizes the establishment at Madras by Royal Charter of a Supreme Court having jurisdiction over the presidency town of Madras. The charter was issued on 26th December 1800. In clause 22 of the said charter, there is a direction that all matters of inheritance and succession shall be determined, where the parties are Gentoos (an archaic term for Hindus) by the laws and usages of Gentoos. The High Court

of Madras was constituted by Letters Patent issued under the authority conferred by 24 and 25 Vict., c. 104, section 1 and under section 8 of the same Act the Supreme Court was abolished. Under section 9, the High Court was vested with the jurisdiction of the abolished Court. Under section 11 the provisions of the Charter of the Supreme Court became applicable to the High Court and to the Judges thereof "subject to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council." Thus the local legislature has no power to modify the provisions of the Charter. The same result is obtained by sections 22 and 42 of The Indian Councils Act, 1861 (24 and 25 Vict., c. 67) which define respectively the powers of the Governor-General in Council and of the Governor of Madras in Council. The proviso to section 42 says that the Governor in Council shall not have power of making any laws or regulations which shall in any way affect any of the provisions of the Act or of any other Act of Parliament in force or hereafter to be in force in such presidency. The enactment by the local legislature of Madras Act I of 1914 would be to affect, so far as the presidency town of Madras is concerned, section 11 of the Indian High Courts Act (24 and 25 Vict., c. 104). The learned vakil for the respondents attempted to meet this argument in three ways:—

(a) Under section 42 of 24 and 25 Vict., c. 67, taken with section 5 of the amending Act, 55 and 56 Vict., c. 14, the local legislature may repeal or amend any law made by the Governor-General in Council, so far as it affects this presidency and Madras Act I of 1914 only amends Hindu Wills Act XXI of 1870. The reply to this argument is it does not amend Act XXI of 1870; but, whether it does so or not, it certainly affects section 11 of the High Courts Act.

(b) Under section 43, clause 5 of the Indian Councils Act the local legislature may, with the sanction of the Governor-General, make laws affecting the religion or religious rights and usages of any class of Her Majesty's subjects in India and the law of succession is, to Hindus, a religious matter and this is the reason for the policy underlying clause 22 of the Charter and similar legislation in 21 Geo. III, c. 70, section 17 (for the Supreme Court of Fort William) and 37 Geo. III, c. 142,

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(1) (1914) I.L.B., 41 Calo., 1007 (P.C.) at 1011.

(2) (1911) I.L.B., 38 Calo., 438 (P.C.) at 472.

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section 13 (for the Recorder's Court of Madras). He relies on Ilbert's Government of India, page 354. The reply to this is that it is doubtful whether legislation of this character falls under clause 5 of section 43. But assuming that it does fall, section 43, which is a permissive provision cannot override section 42. Section 108 of Sir C. Ilbert's Digest in his "Government of India," which has since become section 112 of the consolidating Act, 5 and 6 Geo. V, c. 61, is against the contention;

(c) "The laws and usages of the Gentoos" in clause 22 of the Charter means Hindu Law as it exists at any time and as modified by even the local legislature. But this assumes that the local legislature can affect the clause in the Charter and thus affect section 11 of Act of Parliament. The fallacy of this argument is patent and it has not been even seriously pressed

Thus I hold that Madras Act, I of 1911 is *ultra vires* of the local legislature in so far as the presidency town is concerned. The result is that the bequest over to the eight younger grandchildren of the testator fails. The bequest to the three elder grandchildren, however, remains unaffected.

The next contention raised by Mr. Krishnaswami Ayyar, the learned vakil for the appellant who argued this portion of the case, relates to the construction of section 2 of Mr. Seshagiri Ayyar's Act. He contends that the Act ought not to be construed so as to apply retrospectively to wills made before the Act, even for the purpose of validating dispositions in such wills that may become vested after the Act.

In the view I have taken, that Mr. Seshagiri Ayyar's Act is *ultra vires* of the local Legislature in so far as the presidency town of Madras is concerned, it is unnecessary to consider this question, which may not be of much importance hereafter.

The next grounds (urged by the learned Advocate-General), attacking the bequests over to grandchildren are two in number and are based on,

- (1) sections 101 and 102 of the Indian Succession Act, and
- (2) section 111 of the Indian Succession Act.

I will first take up the contention based on sections 101 and 102 of the Succession Act. Section 101 enacts what is generally known as the rule against perpetuity and section 102

enacts for India the rule in *Leake v. Robinson*(1). It is conceded on all hands that the words "may be delayed" in the section refer to possibility and not to the actual events that may happen: see *Sivasankara Pillai v. Soobramania Pillai*(2). The difference between the rival contentions of the parties turns on the construction of the word "minority" which has been defined in the Succession Act to mean the status of a person who shall not have completed the age of eighteen years (section 3). Under section 6 of the Hindu Wills Act this definition controls the meaning of the term "minority" in section 101 even when the section is applied to Hindu wills.

But it is contended for the respondent that, as the Indian Majority Act (IX of 1875), section 3, makes it possible that certain individuals may attain their majority at the age of 21 and not at the age of 18, the word "minority" in section 101 of the Succession Act should be construed as the age of 21. Now it may be conceded, that, having regard to the words "notwithstanding anything contained in the Indian Succession Act (X of 1865) or in any other enactment" in section 3 of Act IX of 1875, that the words "beyond the life-time of one or more persons living at the testator's decease, and the minority of some person, etc.," may, in the cases of certain persons, mean when they attain the age of 21. But this is only a possibility. The fact that in certain events some persons may attain majority at the age of 21 instead of at the age of 18 cannot lead to a construction of the word "minority" in section 101 of the Succession Act as equivalent to the "age of 21." In the present case all the eight younger grandchildren of the testator are minors and it is conceded that in the case of seven of them, guardians have been appointed nor the Court of Wards has assumed superintendence of their properties so as to alter the age when they can attain majority, from 18 to 21. I am of opinion that there is a great possibility that the vesting of the bequest to the eight younger grandchildren under the terms of the will may be delayed beyond their minority, and that being so the bequest to them is void on this ground also. If so, section 102 of the Indian Succession Act makes the bequest over to all the

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(1) (1817) 2 Mer., 363.

(2) (1908) I.L.R., 31 Mad., 517.

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"But however this may be, it has been assumed throughout that the testator intended children born after his death to be included in the gift. And their Lordships propose to deal with the case on that assumption,"

I do not think the case supports the contention. The conclusion in that case in favour of those in existence at the testator's death was reached on the ground that the failure of the bequest over to the others was due only to the Hindu Law rule and does not attract the application of the rule in *Leake v. Robinson*(4) (section 102 of the Succession Act). There was no suggestion, in that case, of the application of section 100 or section 101 of the Succession Act. This contention therefore fails. I must therefore hold—and I regret my having to differ from Courts TROTTER, J., on this point—that the bequest over to all the testator's grandchildren fails as it offends the rule against perpetuity.

The next contention of the learned Advocate-General is based on section 111 of the Succession Act. I may premise by saying that the discussion of this contention is academic and does not arise unless a view of section 101 different from mine ultimately

(1) (1908) I.L.R., 31 Mad., 517.

(2) (1911) I.L.R., 38 Calc., 468 (P.C.).

(3) (1879) 5 App. Cas., 123.

(4) (1817) 2 Mer., 368.

prevails. As the point has, however, been fully argued I shall state my conclusions on the applicability of the section. The section is based, as has been pointed out by their Lordships of the Privy Council in *Bhupendra Krishna Ghose v. Amarendra Nath Dey*(1), on *Edwards v. Edwards*(2). This last case was afterwards partly overruled by the House of Lords in *O'Mahoney v. Burdett*(3) which was commented on by Lord SHAW of Dufferlin in *Chunilal Parvatishankar v. Bai Samrath*(4) "as one which emerged through a thicket of technical decisions to a ground of plain and pre-eminent good sense." But in the circumstances of this case, unlike *Chunilal Parvatishankar v. Bai Samrath*(4) which was a case arising in Surat and was not governed by the Hindu Wills Act, the learned Advocate-General is within his rights in asking us to abandon the "ground of plain and pre-eminent good sense" and to apply section 111 of the Succession Act. It is conceded on both sides that at least so far as the eight younger grandchildren are concerned, the attaining of the age of 21, is a specified uncertain event within the meaning of this section. The dispute centred round the meaning of the phrase "the period when the fund bequeathed is payable or distributable." Now it will be noticed that in each of the wills in the five illustrations to the section [all of which are based on the rules stated by ROMILLY, M.R., in *Edwards v. Edwards*(2)] the last legacy is of an alternative character substituting, in certain events, a different legatee in the place of the legatee in the immediately preceding bequest. With reference to this fact the learned vakil for the respondent contended that the section must be limited to legacies which may be termed substitutional. He also relied on the remarks of ROMILLY, M.R., in *Edwards v. Edwards*(2), where he says,

"The principle which regulates such cases is to be found in the often expressed decisions of the Court to avoid a contention so inconvenient as one which must suspend the absolute vesting of the subject of the gift during the whole life of the legatee or devisee, etc.,"

(1) (1916) I.L.R., 43 Calc., 432 (P.C.) at 440.

(2) (1852) 15 Beav., 357; s.c., 51 E.R., 576.

(3) (1874) L.R., 7 H.L., 388.

(4) (1914) I.L.R., 38 Bom., 399 (P.C.) at 413.

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on the remarks of Lord SELBOURNE in *O'Mahoney v. Burdett*(1), where the noble Lord says,

"It is manifest that when a testator [as in *Galland v. Leonard* (2)] has directed payment or distribution to be made at a certain time so that a trust intended by him to continue until that time shall then come to an end and has proceeded to substitute other devisees or legatees through the medium of the same trustees, etc. . . . " and on the language of the same noble Lord in *Ingram v. Soutten*(3), where he refers to "alternative divesting clauses." He also contends that in case the section is applicable "The period when the fund bequeathed is payable or distributable" is, for each daughter's one third either when the eldest or the youngest grandchild attains the age of 21 [vide. LINDLEY, L.J., in *In re Holford. Holford v. Holford*(4)] or if the fund is to be taken distributively, for each grandchild's fraction, when he or she attains the age of 21. In support of this he relies on illustration (c) to section 101 of the Act. The appellant, on the other hand, objects to the reference to the English cases for throwing light on the section. He relies on Lord MACNAUGHTEN's remarks in *Norendra Nath Sircar v. Kamalbasini Dasi*(5), relying on *Bank of England v. Vagliano*(6). He contends that the period of distribution is, in the case of each daughter's one-third, her death. The case of *Monohaur Mukerjee v. Kasiswar Mukerjee*(7) is like the case in illustration (c) to section 111, and does not help him. •

Now I am willing to adopt the mode of construction contended for by the appellants, but I come to the conclusion sought for by the respondent. The period of payment in the section is in my opinion the period when the last payment (which is not of an alternative character) is directed in the will. Before the appellants can say that the daughter's death is the period of payment or distribution contemplated in the section, they must point out a direction in the will to pay on the daughter's death. There is none such in this will, as there is in illustrations (a) and (b) to the section, where there is a bequest to B on the death

(1) (1874) L.R., 7 H.L., 388. (2) (1818) 1 Swans., 161; s.c., 36 E.R., 389.
(3) (1874) L.R., 7 H.L., 408 at 421. [4] [1894] 3 Ch., 30 at 45.
(5) (1896) I.L.R., 23 Calc., 568 (P.C.). [6] [1891] A.C., 107.
(7) (1897) 3 C.W.N., 478.

of A. I may point out that this construction of section 111 leads to (1) in the case of substitutional legacies, as in the illustrations to the section, the results arrived at in *Edwards v. Edwards*(1), results intended by the Legislature, however undesirable they may be and (2) in cases where there are no substitutional legacies, to a reading which is somewhat tautological but which, on that ground is not absurd but on the other hand, leads us to the ground of pre-eminent good sense. My conclusion is supported by illustration (c) to section 101 where the "time for the division of the fund" is said to arrive at the latest at the expiration of 18 years from the death of B. I may add that the period of payment or distribution may be the time when a person attains a certain age is also shown by illustration (c) to section 111 and *Monohaur Mukerjee v. Kasiswar Mukerjee*(2).

Even assuming that section 111 should be construed in the way desired by the appellant, I am not satisfied that, so far as the three elder grandchildren are concerned, the time of their attaining the age of 21, can be said to be a specified uncertain event within the meaning of the section. The uncertainty or certainty of an event, as contemplated by the section is with reference to the time of its happening and not with reference to the question whether it will happen at all. As Romilly, M.R., points out in *Edwards v. Edwards*(1), death is the most certain of all things and can only be made contingent by reference to its taking place before a particular period. That the uncertainty is with reference to time is shown by the words "and no time is mentioned in the will for the occurrence of that event." It may be, one is uncertain how long the three elder grandchildren will live, but if they live long enough the time when each of them will attain the age of 21 was known with absolute certainty at the date of the testator's death. The idea of mentioning a time for the occurrence of an event, when one knows with absolute certainty the time of its happening, provided it happens at all, is incongruous. On this ground, I hold that, on any construction, section 111 cannot affect the legacies to the three elder grandchildren.

(1) (1852) 15 Beav., 357; s.c., 51 E.R., 576. (2) (1897) 3 C.W.N., 478.

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The last contention to be noted in the case was raised by the respondent and was based on section 126 of the Succession Act. This section and the next section (127), which may be described as supplementing it, together enact in India what is called the rule in *Lassence v. Tierney*(1); the former section laying down what may be called the positive branch of it and the latter section the negative branch. Each side diligently collected all the English cases in which a conclusion similar to the one sought was reached and relied on them in support of the present contention. Thus the respondent relied on *Whittel v. Dudin*(2), *Hulme v. Hulme*(3), *Ring v. Hardwick*(4), *Gerrard v. Butler*(5), *Kellett v. Kellett*(6), *In re Mercer's Trusts. Davies v. Mercer*(7), *Cooke v. Cooke*(8), *In re Hancock. Watson v. Watson*(9), affirmed by the House of Lords in *Hancock v. Watson*(10), *In re Currie's Settlement. Rooper v. Williams*(11), *In re Connell's Settlement. In re Bennett's Trusts. Fair v. Connell*(12), *In re Harrison. Hunter v. Bush*(13), *Moryoseph v. Moryoseph*(14), *Administrator-General of Bengal v. Apcar*(15) and *Haliburton v. Administrator-General of Bengal*(16).

The appellant relied on the following cases. *Lassence v. Tierney*(1), *Scawin v. Watson*(17), *Kay v. Winder*(18), *Whitehead v. Rennett*(19), *Rucker v. Scholefield*(20), *Savage v. Tyers*(21), *Harris v. Newton*(22), *Re Richards. Williams v. Gorvin*(23), *In re Houghton. Houghton v. Brown*(24) and also *Jarman on Wills*, pp. 1188, 1184 and 1459.

I think the decisions in most of the above cases are consistent, but there is a conflict between some of the dicta very often

- (1) (1849) 1 Mac. & G., 551; s.c., 41 E.R., 1379.
 (2) (1620) 2 J. & W.; s.c., 37 E.R., 634. (3) (1839) 9 Sim., 644.
 (4) (1840) 2 Beav., 352; s.c., 48 E.R., 1217.
 (5) (1855) 20 Beav., 541; s.c., 52 E.R., 712. (6) (1868) L.R., 3 H.L., 160.
 (7) (1876) 4 Ch. D., 182. (8) (1888) 38 Ch.D., 202.
 (9) [1901] 1 Ch., 482. (10) [1902] A.C., 14.
 (11) [1910] 1 Ch., 329. (12) [1915] 1 Ch., 867.
 (13) [1918] 2 Ch., 59. (14) [1920] 2 Ch., 33.
 (15) (1878) I.L.R., 3 Cal., 553.
 (16) (1894) I.L.R., 21 Cal., 488.
 (17) (1847) 10 Beav., 200; s.c., 50 E.R., 559.
 (18) (1850) 12 Beav., 610; s.c., 50 E.R., 1194.
 (19) (1858) 22 L.J. Ch., 1020. (20) (1862) 1 H. & M., 37; s.c., 71 E.R., 16.
 (21) (1872) 7 Ch. App., 356. (22) (1877) 46 L.J. Ch., 268.
 (23) (1884) 50 L.T., 22. (24) (1884) 53 L.J. Ch., 1018, 1020.

only apparent. Instead of attempting the futile task of reconciling all the observations and reasonings in the above cases I shall content myself with a few observations. (When I say the rule I mean the positive branch of the rule.)

(a) Where there is a distinct positive gift of an absolute estate in favour of the prior devisee in terms and the intention is express, the rule certainly applies.

(b) Where the will in terms gives clearly a life estate only, it does not apply, e.g., *Scawin v. Watson*(1).

(c) The difficulty arises only where the words of bequest in favour of the prior devisee are ambiguous and are apparently consistent with either an absolute estate or a life estate, but have to be construed as conferring a life estate with reference to the settlements that follow if and when they are valid [*per Lord COTTENHAM in Lassence v. Tierney*(2)]. In such a case if the words of bequest can be construed, apart from the settlements that follow, as conferring an absolute estate and the latter clauses relating to the settlement are used to cut down that absolute estate into a life estate for the purpose of giving effect to them, then the rule applies [see *per RIGBY, L.J.*, in *In re Hancock. Watson v. Watson*(3)]. In all such cases other circumstances in the will are taken hold of as a guide, e.g. :—

(1) The fact that the prior devisee shall have the income only for his life does not prevent the application of the rule [Lord DAVEY in *Hancock v. Watson*(4)].

(2) The fact that there is a connected series of settlements following the first devisee may be a ground for not applying the rule [PAGE-WOOD, V.C., in *Rucker v. Scholefield*(5)]. But I should think that where there are plain words conferring an absolute estate earlier, as was conceded by PAGE-WOOD, V.C., in that case at page 41 where he says "If these words stood alone they would suffice to vest the absolute estate in the five daughters," the series of settlements ought not to matter for they only "cut down" the absolute estate [to use the phrase of RIGBY, L.J., in *Hancock v. Watson*(4) and MALINS, V.C., in *In re Mercer's Trusts. Davies v. Mercer*(6)].

- (1) (1847) 10 Beav., 200; s.c., 50 E.R., 559.
 (2) (1849) 1 Mac. & G., 551 at 567 and 568.
 (3) [1901] 1 Ch., 482 at 498. (4) [1902] A.C., 14 at 28.
 (5) (1862) 1 H. & M., 37; s.c., 71 E.R., 16.
 (6) (1876) 4 Ch.D., 182.

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(3) The mere fact that there is a gift over to some person other than a child of the first devisee does not prevent the application of the rule [*Hancock v. Watson*(1), where Charles was unconnected with Susan.]

(4) Where the gifts over exhaust all possible contingencies, that may furnish a reason for not applying the rule [*per* Lord COTTENHAM in *Lassence v. Tierney*(2)], and if they do not, the rule may be applied [*Kellet v. Kellett*(3), *per* Lord CAIRNS.]

In the present case it is admitted that no provision is made in the will for the contingency when the daughter's children do not reach the age of 21.

(5) Though the fact that the medium of trust was employed by the testator was used as a reason for not applying the rule in *In re Houghton. Houghton v. Brown*(4), it is now settled that the fact does not matter (see *In re Harrison. Hunter v. Bush*(5), *per* YOUNGER, J.).

(6) This intention to sever completely from the testator's estate is an important reason for applying the rule [see SERGEANT, J., in *In re Connell's Settlement. In re Bennett's Trusts. Fair v. Connell*(6), and Lord DAVEY in *Hancock v. Watson*(1)]. The language of section 126 of the Act as contrasted with section 125 is significant in this connexion.

(7) I concede there must be some dispositive words in favour of the prior devisee. The words in *Ring v. Hardwick*(7) are "make a division between all and every of my four children." I think the word "apportion" in the present will is a stronger word than "make a division" even though not followed by the words "between or to my daughter," as "apportion" involves the idea of allotting a portion to certain persons.

(8) The fact that the share allotted to the prior devisee is referred to in the later settlements as his or her share is also a good ground for applying the rule: *Ring v. Hardwick*(7). In the present case the one-third apportioned to the daughter was referred to lower down in three places as the share appropriate

to the daughter [PAGE-WOOD, V.C., concedes in *Rucker v. Scholefield*(1) that this word "appropriate" confers an absolute estate].

(9) An express statement that the subject matter should, on failure of the bequest over, come back to the residue of the testator's estate is a reason for not applying the rule [*per* Lord HATHERLY in *Savage v. Tyers*(2)], but if the provision is meaningless it can be disregarded and the rule ought to be applied: *In re Currie's Settlement, Rooper v. Williams*(3).

(10) In *Harris v. Newton*(4) (a decision of MALINS, V.C.), there was no gift to the daughter in case she was not married.

(11) In *Whitehead v. Rennet*(5) (decided by KINDERSLEY, V.C.) though there was an investment for the benefit of the daughter, the estate of the daughter had necessarily to be construed as a life estate as the gift over to the daughter's children as to a moiety was valid and only that to the grandchildren failed for remoteness. The same remarks apply to *Re Richards. Williams v. Gorvin*(6) (PEARSON, J.) explained by ROMER, J., in *In re Wilcock. Kay v. Dewhurst*(7) and *Kay v. Winder*(8).

(12) The whole provisions of the will may be taken together [*per* Lord COTTENHAM in *Lassence v. Tierney*(9) and Lord DAVEY in *Hancock v. Watson*(10)].

Applying these tests, I am unable to distinguish the present case from *Hancock v. Watson*(10).

The appellant finally contended that this is a Hindu's will and that he could not have intended to give an absolute estate to the daughters, and he relied on *Mahomed Shumsool v. Shewukram*(11), *Radha Prasad Mullick v. Ranees Mani Dasees*(12) and *Narasimha v. Parthasarathy*(13). Apart from the fact that the notions of Hindus with respect to estates to be conferred on

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(1) [1902] A.C., 14 at 23.

(2) (1849) 1 Mac. & G., 551 at 567 and 568.

(3) (1868) L.R., 3 H.L., 160 at 169. (4) (1884) 53 L.J. Ch., 1018, 1020.

(5) [1918] 2 Ch., 59 at 63. (6) [1915] 1 Ch., 867 at 880.

(7) (1840) 2 Beav., 852; s.c., 48 E.R., 1217.

(1) (1862) 1 H. & M., 37; s.c., 71 E.R., 16.

(2) (1872) 7 Ch. App., 356.

(3) [1910] 1 Ch., 329.

(4) (1877) 46 L.J. Ch., 268.

(5) (1853) 22 L.J. Ch., 1020.

(6) (1884) 50 L.T., 22.

(7) [1898] 1 Ch., 95.

(8) (1850) 12 Beav., 612; s.c., 50 E.R., 1194.

(9) (1849) 1 Mac. & G., 551 at 569; s.c., 41 E.R., 1379.

(10) [1902] A.C., 14.

(11) (1874) L.R., 2 I.A., 7.

(12) (1908) I.L.R., 35 Calc., 896 (P.C.).

(13) (1914) I.L.R., 37 Mad., 199 at 222 (P.C.).

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Hindu females especially daughters have undergone considerable change in this presidency during the last forty years and this Court has, in several cases, construed gifts to females simply as absolute estates, I think that in this particular will there are enough indications of the testator's mind that the daughters in the first instance or daughter's daughters (if the gifts over are valid) should be given absolute estates. The daughter's daughters and the daughter's sons are treated alike and all are referred to generally as daughter's children [*Sivasankara Pillai v. Soobramania Pillai*(1)]. The fact that the testator gives to daughter's children (not sons only), *per stirpes* (not *per capita*) also shows this. The result will be that each daughter's one-third passed to her heirs, that is, in the case of the first and third daughters of testator to their daughters, who get the limited estate of a Hindu female in inherited property, and in the case of the second daughter to her son, fifth defendant, absolutely. But it may be observed that so far as Yesoda's one-third is concerned, the sons and daughters have entered into a compromise and we sanctioned the compromise. A similar arrangement has also been made with respect to the third daughter's share between her sons (plaintiffs) and her daughters (sixth to eighth defendants) and we have sanctioned this compromise also. In fact the main object of this litigation is to cut down the fifth defendant's one-third share to one-sixth which is all that he will get if appellant's contention succeeds as daughter's sons take by inheritance *per capita* and not *per stirpes*. I agree with the learned Chief Justice that the application made by the Advocate-General after the close of the case for sending it back for inquiry on the ground that the daughters, having taken legal opinion, enjoyed only life estates by mutual agreement, is an afterthought and ought not to be allowed. The Appeal will be dismissed. I agree with the order as to costs in the judgment of my Lord the Chief Justice.

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(1) (1908) I.L.R., 34 Mad., 517.

the first *Pitru bandhu* could come in. The only convenient and logical principle seems to me to so bring in all the Atma bandhus, though removed to the extreme limit of five degrees from the propositus, before bringing in a Pitru bandhu, though the latter may be removed by a less number of degrees from the propositus, and (by the same analogy) to bring in all the Pitru bandhus even up to the fifth degree before a Matru bandhu, though the latter is removed by less than five degrees. The table given in Mayne, paragraph 579, is clearly inaccurate, and it is misleading in some particulars. It puts down the maternal grandfather as No. 17 and the maternal uncle as No. 9, whereas *Krishnayya v. Pichamma*(1) and *Chinnammal v. Venkatachala*(2) contain clear dicta that the maternal grandfather ranks higher than a maternal uncle when the question of heirship is involved. Mayne's table puts the maternal uncle's son again as No. 10 and the maternal aunt's son as No. 11 which is opposed to *Appandai Vathiyar v. Bagubali Mudaliyar*(3). Again, Mr. Mayne does not carry the three classes of bandhus up to the fifth degree from the propositus in most cases and hence his list is incomplete. I am therefore inclined to agree with the learned leader writer in 9 Madras Law Journal at page 69 who states that the 32 Atma bandhus (10 in the line of the propositus, 11 in that of the propositus' father and 11 in that of the propositus' grandfather) should be exhausted before the maternal grandfather (the first of the Atma bandhus *ex parte materna* or the maternal uncle (the second of the Atma bandhus *ex parte materna*) could come in as heir. The plaintiff in this case, belonging to one of the 11 Atma bandhus *ex parte paterna*, comes in therefore before the maternal uncle. I am fortified in this view by *Sundarammal v. Rangasami Mudaliar*(4) and *Ram Bharos Ram Parshad*(5). This is, therefore, the law which I as a Judge feel myself bound to lay down, though it is not the shastra according to my view. In the very recent case, *Buddha Singh v. Lattu Singh*(6), the learned Judges held that the word 'son' is usually used in the Mitakshara so as to include 'son' 'grandson' and

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(1) (1888) I.L.R., 11 Mad., 287.

(3) (1910) I.L.R., 38 Mad., 489.

(5) (1908) 3 A.L.J., 461.

(2) (1892) I.L.R., 15 Mad., 421.

(4) (1895) I.L.R., 18 Mad., 193.

(6) (1912) I.L.R., 34 All., 668.

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'great-grandson' and if so, the paternal aunt's son's son will come within the term 'paternal aunt's son' and must therefore come before the maternal uncle and his santanam. The Mitakshara contravenes the shastras (and ordinary rationalistic principles) in two ways: (a) by bringing in as heirs very remote agnates before near bandhus, like the sister and sister's son, and (b) by excluding all females (except the daughter) from succession as bandhus till males are exhausted. In finding out the order of succession, therefore, according to the Mitakshara, these two irrational principles become the foundation of all further reasoning, and it is no wonder that this branch of law based upon reasons themselves founded upon unreason is most unsatisfactory. The obvious course of remedying the confused and unshastraic character of this branch of law is by resort to legislation which must be initiated by the enlightened Hindu members of the Bar and of the Legislative Council. The uncertainty and confusion at present existing no doubt favours the cultivation of the legal acumen of the Bar and the Bench [see the very acute judgment, if I may be permitted to say so, of PIGGOT, J., in *Buddha Singh v. Lattu Singh*(1) but it is clearly detrimental to the permanent interests of the Hindu public.

In the result I agree in the orders proposed by my learned brother in the matter of the disposal of this Appeal.

K.R.

(1) (1912) I.L.R., 34 All., 663.

APPELLATE CIVIL.

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

CHINNA PICHU IYENGAR ALIAS K. VEERARAGAVA
IYENGAR (PLAINTIFF), APPELLANT,

1920,
July 29.

v.

PADMANABHA IYENGAR AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Hindu Law—Inheritance—Bandhus—Heritability, test of—Sapinda relationship—Mutuality—Paternal grandfather's sister's great-grandson, whether a heritable bandhu.

Under the Mitakshara Law, the great-grandson of the paternal grandaunt of the last male owner is not a heritable bandhu of the latter.

Umaid Bahadur v. Udoi Chand, (1881) I.L.R., 6 Cal., 119 (F.B.) and *Babu Lal v. Noulla Ram*, (1895) I.L.R., 22 Cal., 339, followed; *Buddha Singh v. Lattu Singh*, (1915) I.L.R., 37 All., 604 (P.C.), distinguished; *Subramania Mudaliar v. Ranganathan Chettiar*, (1921) I.L.R., 44 Mad., 114, referred to.

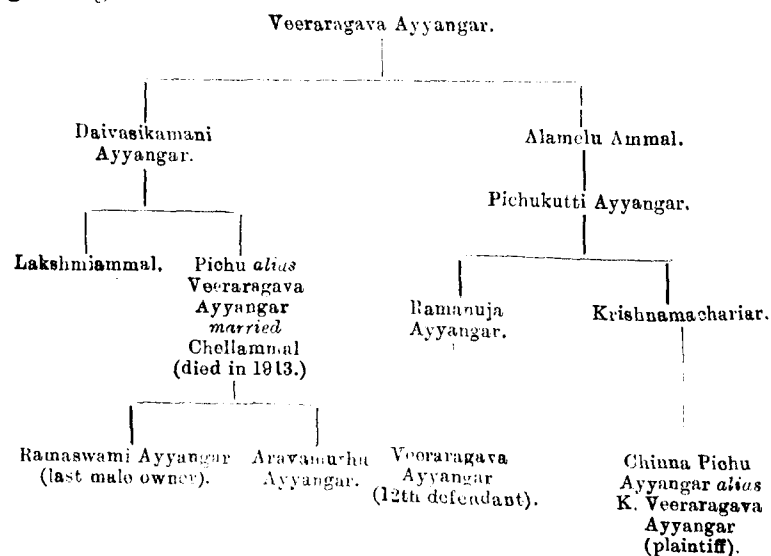
SECOND APPEAL against the decree of MUHAMMAD FUZZL-UD-DIN, Subordinate Judge of Tinnevely, in Appeal No. 53 of 1917, preferred against the decree of T. N. KRISHNAMURTI VAJAPAYAR, Additional District Munsif of Tinnevely, in Original Suit No. 266 of 1914.

This is a suit by the plaintiff for recovery of certain properties as the reversionary heir, along with the twelfth defendant, to the estate of one Ramaswami Ayyangar, who was the last male owner of the suit properties, and died issueless leaving as his heir his mother who died in 1913. The suit was to recover a half-share in the suit properties on the death of the mother, who had inherited the properties from her son, and alienated some of them to some of the defendants. The defendants contended inter alia, that the plaintiff was not a heritable bandhu who can succeed to the last male owner under the Hindu Law. Both the lower Courts upheld this contention and dismissed the suit. Plaintiff preferred this Second Appeal.

* Second Appeal No. 330 of 1919.

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The relationship of the parties is shown by the following genealogical tree:—



K. B. Rangaswami Ayyangar for the appellant.—The plaintiff is a heritable bandhu within the meaning of the Mitakshara and comes under the category of bandhus specifically mentioned therein. The plaintiff is the father's father's sister's son of the propositus and is specifically mentioned under the class of 'Pitru bandhus.' The term 'son' in this text of the Mitakshara must be taken to include grandson and great-grandson. The Privy Council has held in *Buddha Singh v. Lattu Singh*(1), that the term 'Putra' as used in the Mitakshara must be construed as including sons and grandsons wherever it occurs in the chapter on Inheritance. Though *Buddha Singh v. Lattu Singh*(1) related to agnatic collateral succession, the reasoning is general and is applicable to bandhu succession. This rule of interpretation was applied by SADASIYA AYYAR, J., to a case of bandhu succession, even before the abovementioned decision of the Privy Council: see *Subramania Mudaliar v. Ranganathan Chettiar*(2).

Even if the plaintiff is not included among the heirs specifically mentioned in the Mitakshara, he is a bandhu of the deceased within heritable limits; the bandhus mentioned

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(1) (1915) I.L.R., 37 All., 604 (P.C.) at p. 616. (2) (1921) I.L.R., 44 Mad., 114.

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<i>Cheda Lal v. Lachman Prasad.</i> (1917) I.L.R., 39 All., 267	529
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CIVIL PROCEDURE CODE (V OF 1908), SEC. 47:— <i>See</i> MORTGAGE	483
—(V OF 1908), SEC. 115, O. XXI, r. 89.—Private sale by judgment-debtor after Court auction—Application to set aside Court sale—Whether purchaser in private sale or judgment-debtor entitled to apply—Dismissal of petition as of person not entitled to apply—Powers of High Court—Revision.]	
A judgment-debtor who, after the Court sale, transfers his interest in the properties sold in execution of a decree retains sufficient "interest" within the meaning of O. XXI, r. 89, to allow him to apply under the rule. <i>Subbarayudu v. Lakshminarasamma</i> (1915) I.L.R., 38 Mad., 775, overruled; <i>Pandurang Laxman v. Govind Dala</i> (1916) I.L.R., 40 Bom., 557, and <i>Museemat Dhanwati Kuer v. Sheo Sankar Lal</i> (1919) 4 Patna L.J., 340; s.c., 52 I.C., 873 (Patna), followed; <i>Ishar Das v. Asaf Ali Khan</i> (1912) I.L.R., 34 All., 186, dissented from. The purchaser of such properties after Court sale is precluded from applying under the rule. <i>Lakshmi Ammal v. Sankaran Nair</i> (1918), 24 M.L.J., 205, overruled. The High Court can interfere in revision if an application under O. XXI, r. 89, has been dismissed on the ground that it was made by a person who was not entitled to apply. <i>Sundaram v. Mause Mavuthar</i> (1921) I.L.R., 44 Mad. (F.B.), 554	
ESTATES LAND ACT (MADRAS), I OF 1908, SEC. 148—Second crop of paddy, raised by ryot with landlord's water—Landlord's right to extra rent—Usage or contract disentitling landlord to extra rent—Proof of—Burden of proof on tenant—Heir of registered pattadar—Right to be recognized as ryot—Defaulter under the Act, meaning of—Mere receipt of rent from a person, whether landlord bound to accept as ryot.]	
The landlord is <i>prima facie</i> entitled to claim extra rent for second crop of paddy raised, with the landlord's water, by the tenant on his wet holding, in the absence of proof of an established usage or an express or implied contract disentitling the landlord to the same, the burden of proving such usage or contract being on the tenant. The landlord is bound to recognize the heir of the registered pattadar as the ryot under the Madras Estates Land Act in the place of the deceased pattadar; and, if a suit under the Act is instituted by a person claiming as heir to be recognized as the ryot, the question whether he is the heir or not must be determined by the Court, and if the heirship is established or admitted, the suit must be held to be competent. Mere receipt by the landlord of the rent due upon the holding from any person, cannot bind him to recognize the latter as the ryot. "Defaulter" in the Estates Land Act denotes only the man who is the registered pattadar or his heir or the person whom the landholder has become bound to recognize as the ryot under section 148 of the Act. <i>Midnapore Zemindary Company, Ltd. v. Muthappudayan</i> (1921) I.L.R., 44 Mad., 53	
HINDU LAW—Self-acquisition of father—Undivided son—Suit on promissory note after death of father—Whether succession certificate necessary.]	
An undivided Hindu son acquires the self-acquired properties of his deceased father by inheritance and not by survivorship. Observation in <i>Nams Tewker v. Rameshchandra Tewker</i> , (1909) I.L.R., 32 Mad., 377, dissented from. In a suit by the son for the recovery of money which was the self-acquired	

property of the deceased father a succession certificate must be produced before a decree can be given in his favour. <i>Venkataramanna v. Venkayya</i> , (1891) I.L.R., 14 Mad., 377, followed. <i>Vairavan Chettiar v. Srinivasachariar</i> (1921) I.L.R., 44 (F.B.), 499	Page
INCOME-TAX ACT (VII OF 1918)—Rule 1 framed by Government of Madras under section 43 (2) (c)—Company incorporated in England with branches in India and elsewhere—"Total profits"—Whether income-tax and excess profits duty payable in England and income-tax payable elsewhere to be excluded.]	
Rule 2 framed by the Government of Madras under section 43 (2) (c) of the Income-tax Act provides that the profits of the Indian Branch of a foreign company may be assumed for income-tax purposes to bear the same proportion to the total profits of the company as its receipts bear to the total receipts. A company incorporated in England with branches in India and elsewhere cannot, in calculating the total profits for the purposes of this rule, claim deduction of the excess profits duty and the income-tax payable by it in England and elsewhere. <i>Chief Commissioner of Income-tax, Madras v. The Eastern Extension Australasia and China Telegraph Co., Ltd.</i> (1921) I.L.R., 44 Mad., (Spl. B.), 489	
LIMITATION ACT (IX OF 1908), sec. 30—Mortgage decree against mortgagor and purchaser of the equity of redemptions.—Payment of interest as such by the purchaser, effect of.]	
A purchaser of the equity of redemption is a person liable to pay the mortgage debt within section 20 of the Limitation Act; hence, if under a mortgage decree for sale of the mortgage property, to which he is a party, though exempted from personal liability, he pays interest as such, such payment gives a fresh period of limitation for execution of the decree, <i>Bolding v. Lane</i> , (1868) 1 De G.J. & Sm., 122, and <i>Ohinmery v. Evans</i> , (1864) 11 H.L. Cas., 115 at 135, followed. <i>Aikaram Soukar v. Venkataswami Naidu</i> (1921) I.L.R., 44 Mad., 544	
MALABAR LAW— <i>Taraga</i> lease for reclamation and improvement by a stanomdar for twelve years with a clause for renewal for another twelve years, validity of.]	
A <i>taraga</i> lease in Malabar given for reclaiming and improving lands contained the following clause by the lessee:—"I shall well improve this paramba and plant, etc.; when the improvements have survived the period of decay and the cocoanut trees begin to bear their first fruits, I shall take a <i>taraga</i> after fixing the rent in accordance with the local custom on an inspection of <i>Kubikanoms</i> ." Held that the clause entitled the lessee to a renewal of the lease for twelve years from the expiry of the first term of twelve years at an enhanced rent to be determined in accordance with it. <i>Gopalan Nair v. Kunshan Menon</i> , (1907) I.L.R., 30 Mad., 300, distinguished. A stanomdar is entitled to grant a lease so as to last beyond his life-time and to bind his successors provided the lease is beneficial to the estate. <i>Kuttiyak v. Unnamamma</i> (1921) I.L.R., 44 Mad., 509	
MORTGAGE—Sale in execution—Sale certificate—Property sold—Conclusiveness of certificate in a subsequent suit—Code of Civil Procedure (V of 1908), sec. 47.]	
Certificates of sale are documents of title which ought not to be lightly regarded or loosely construed. Where upon a sale under a mortgage decree	

the purchaser has been given a sale certificate which plainly includes certain property and has been put into possession of that property, it is not open to a Court in a subsequent suit by the mortgagor's representative to hold by reference back to the mortgage deed that the property in question was not sold under the decree. The title of the purchaser can be questioned only by a petition in the execution proceedings under section 47 of the Code of Civil Procedure and not at all where that remedy is barred by limitation. Judgment of the High Court reversed.

Ramabhadra Naidu v. Kadiriyasami Naicker. (1921) I.L.R., 44 Mad. (P.C.), 483

PROVINCIAL INSOLVENCY ACT (III OF 1907), ss. 3, 16, 18, 36 AND 37—*Order of adjudication—Appointment of Receiver by District Court—Sale in execution of money decree held by District Munsif's Court, subsequent to appointment of Receiver—Application by Receiver to the District Court for cancellation of sale and for delivery of possession—Application whether competent—Jurisdiction of District Court.*]

Where after the appointment of a Receiver for the estate of an insolvent had been made by a District Court, some of the properties of the insolvent were sold in auction by a District Munsif's Court in execution of a decree for money passed by the latter Court prior to the order of adjudication. Held, it was competent to the Receiver to make an application to the District Court for annulment of the sale and for delivery of possession of the properties from the purchaser, under section 18, clause (3) of the Provincial Insolvency Act (III of 1907).

Official Receiver, Tinnevely v. Sankaralinga Mudaliar ... (1921) I.L.R., 44 Mad., 524

ss. 18, 20 (A) (E) AND 23—*No vesting order in favour of Receiver—Order to Official Receiver to adjudicate and administer the insolvent's estate, effect of.*]

On an application for adjudication of insolvency the District Court passed the following order:—"The petition is transferred to the Official Receiver for adjudication and for the administration of the estate." After adjudication by the Receiver no separate order vesting the insolvent's estate in the Receiver was passed by the District Court under section 18 of the Provincial Insolvency Act. Held, that by the combined effect of section 20 (a) and (e) and section 23 of the Act, the order to administer the estate empowered the Receiver to sell the insolvent's estate. *Muthuswami Swamiar v. Somoo Kandiar*, (1920) I.L.R., 43 Mad., 869, distinguished.

Subba Aiyar v. Ramaswami Aiyangar ... (1921) I.L.R., 44 Mad., 547

TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 6 (E)—*Assignment of a decree passed for immovable property and for ascertainment of mesne profits—Transferee's right to be made a party and to mesne profits.*]

Where the right to mesne profits has been declared by a decree, but the exact amount has been left to be ascertained at a future stage in the same suit, a transfer of such right is not invalid under section 6 (e) of the Transfer of Property Act as the transfer of a "right to sue."

Venkatarama Aiyar v. Ramaswami Aiyar ... (1921) I.L.R., 44 Mad., 559

PRIVY COUNCIL. *

RAMABHADRA NAIDU (DEFENDANT),

1921,
February 25.

v.

KADIRIYASAMI NAICKER (PLAINTIFF).

On appeal from the High Court at Madras.

Mortgage—Sale in execution—Sale certificate—Property sold—Conclusiveness of certificate in a subsequent suit—Code of Civil Procedure (V of 1908), sec. 47.

Certificates of sale are documents of title which ought not to be lightly regarded or loosely construed. Where upon a sale under a mortgage decree the purchaser has been given a sale certificate which plainly includes certain property and has been put into possession of that property, it is not open to a Court in a subsequent suit by the mortgagor's representative to hold by reference back to the mortgage deed that the property in question was not sold under the decree. The title of the purchaser can be questioned only by a petition in the execution proceedings under section 47 of the Code of Civil Procedure and not at all where that remedy is barred by limitation.

Judgment of the High Court reversed

APPEAL (No. 125 of 1919) from a judgment and decree of the High Court (March 7 and December 19, 1917) varying a decree of the Temporary Subordinate Judge of Rāmnād at Madura.

The material facts giving rise to the suit are stated in the judgment of the Judicial Committee.

The suit was instituted on September 27, 1911, on behalf of the present respondent, the son of the mortgagor, under the mortgage of September 15, 1893, and was continued by him upon his attaining his majority. The defendant was the present appellant, the assignee of the mortgage decree of October 1, 1901, and the purchaser (by leave) at the auction sale held on April 22, 1907, under that decree. By his plaint, so far as was material to the present appeal, the plaintiff (respondent) alleged in paragraph 3 that the property mortgaged was defined by the area (9,470 kulis) of the garden lands stated in the mortgage deed, that the boundaries given in the deed which included the whole zamindari of 33,000 kulis were immaterial, and that the

* Present: Lord BUCKMASTER, Lord SHAW and SIR JOHN EDGE.

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lessor acreage alone was sold. By paragraph 8 he alleged that pannai lands measuring about 226 kulis did not belong to the mortgagor at the date of the mortgage, but vested in him in 1902 only. The plaintiff claimed a decree, if the decree of October 1901 and the sale were held to be binding upon the plaintiff, for all the lands other than garden lands referred to in paragraph 3. The defendant by his written statement pleaded that the mortgage extended to the whole zamindari, and that the sale certificate did so also, and that the whole property had been delivered to him thereunder. It was also pleaded that the plaintiff as a party, or representative of a party, to the suit of 1907 was not entitled in a separate suit to raise any question relating to the execution, discharge, or satisfaction of the decree, reference being made to section 47 of the Code of Civil Procedure. With regard to the 226 kulis it was further pleaded that they formed part of the zamindari in 1893, there having been no legal transfer of the property itself to the late zamindar's widow.

The Subordinate Judge, by his judgment delivered on January 4, 1915, held that it was the intention that the whole zamindari should be charged by the mortgage of 1893, but that until the widow died in 1907 the zamindar had no interest in the 226 kulis of pannai land which he could alienate. It was, however, clear, in his opinion, that the defendant bought at the sale all the pannai lands including the 226 kulis, and that the plaintiff's remedy (if any) was only in the execution proceedings and under section 47 of the Code of Civil Procedure, and not by a separate suit.

The hearing of an Appeal to the High Court was delayed by an application not material to this report; judgment was delivered on March 7, 1917, varying the decree of the Subordinate Judge and giving the plaintiff a decree for 158 kulis out of the 226 kulis of pannai lands.

The judgment of the High Court was delivered by SRINIVASA AYYANGAR, J., ABDUR RAHIM, J., concurring. The learned Judges agreed with the view of the Subordinate Judge that the mortgage did not include the 226 kulis. The judgment continued as follows:—

"It would, therefore, follow that under the description contained in the decree which was presumably followed in the sale

proclamation and the sale certificate, the first defendant could not have purchased and did not purchase the 226 kulis which were in the possession of Kamalu Ammal, the former zamindar's widow. It is, no doubt, true that on the date of the decree and on the date of the sale, Kadiriya Sami, the mortgagor, and his heir, the present plaintiff, respectively were in possession of the 226 kulis; for Kamalu Ammal had died after the institution of the suit and before the decree. But the pannai lands in the possession of the mortgagee or his representatives, referred to in the decree and in the sale proclamation obviously refer to the lands which were in the possession of the mortgagor on the date of the mortgage and not to the properties of which he subsequently obtained possession."

After pointing out that in the above view it was unnecessary to decide whether the mortgagor had any interest vested or contingent in the 226 kulis at the date of the mortgage, the learned Judge said:

"I think the sale certificate, which presumably followed the sale proclamation, should if possible, be construed so as to convey only the properties which the Court had jurisdiction to sell under the decree. I therefore come to the conclusion that the sale did not include the 226 kulis."

The judgment then pointed out that the lands on which there were encumbrances were placed in the possession of the first defendant under section 319 of the Code of Civil Procedure; and that they included 68 odd kulis which had been mortgaged out of the 226 kulis after the decree for the purpose of paying the decree-holder. It was held that inasmuch as by an order of the Court the first defendant had been placed in possession of the 68 kulis in the purported execution of the sale certificate, the only Court which could determine whether the lands so delivered were included in the sale certificate or not was the Court which was executing the previous decree. It was further held that a petition under section 47 of the Code of Civil Procedure, 1908, being barred by limitation, the Court should not give leave under that section to treat the present suit as a petition. It was accordingly held that the defendants were entitled to retain the 68 odd kulis, but that the plaintiff was entitled to a decree for the balance of 158 kulis. The decree in accordance with the judgment was dated December 19, 1917.

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De Gruyther, K. C., and Kenworthy Brown for the appellant.—The 226 kulis were within the terms of the decree, the sale proclamation and the sale certificates; it cannot be contended that they were not in fact sold. That being so, under section 47 of the Code of Civil Procedure, 1908, the plaintiff's remedy (if any) is by a petition in the execution proceedings and not by a separate suit: *Prosunno Coomar Sanyal v. Kali Das Sanyal*(1), *Ganapathy Mudaliar v. Krishnamachariar*(2). A petition is now barred under Article 181 of Schedule I of the Indian Limitation Act, 1908; that being so, as the High Court held in reference to the 68 kulis, the suit could not properly be treated as a petition under the section. The appellant also contends that having regard to the nature of the widow's interest in the 226 kulis they passed under the mortgage; it is not necessary to consider that question further if he succeeds on section 47.

Narasimham for the respondent.—The suit could under sub-section (2) of section 47 have been treated as a petition in the execution proceedings, and should have been so treated. The present plaintiff was a minor and the period of limitation was consequently extended by section 6, sub-section (1) of the Limitation Act, 1908. That sub-section in terms applies only to the bringing of a suit or the taking of execution proceedings, but it should be construed liberally and applied to a petition under section 47 of the Code.

[Sir JOHN EDGE.—Can that be so when the minor has been represented by a guardian in the suit in which the decree was obtained?]

Yes, since the time for executing the decree is in terms extended. Further the plaint assigns a cause of action on August 24, 1911, when it alleges a trespass on the lands.

The JUDGMENT of their Lordships was delivered by

LORD BUCK-
MASTER.

LORD BUCKMASTER.—The father of the respondent in this Appeal was formerly the owner of a small zamindari known as Doddappa Nayakanur, and on 15th September 1898 he executed a mortgage of the property in favour of one Sabhapati

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Chetti. The mortgagee took proceedings in 1901 in the Subordinate Court of Madura against the mortgagor and against the respondent, who was his son, to enforce the mortgage, and obtained in October 1901 a decree for the amount of the mortgage money and, in default, for sale of the mortgaged properties. The mortgagee, in 1906, assigned his decree in favour of the present appellant, who brought the mortgaged properties to sale in execution of the decree, and having obtained leave to bid, purchased them on 22nd April 1907. The sale was confirmed on 1st July of the same year, and delivery was made to the appellant on 3rd, 14th and 15th August 1907. The questions that have arisen upon this Appeal depend entirely upon the determination of what was actually purchased by the respondent. The facts that give rise to the dispute may be shortly stated. The mortgage included in its parcels "the pannai lands in certain named villages which belong to me, and which are in my enjoyment." At the date of the mortgage certain pannai lands to the extent of 226 kulis were not in the enjoyment of the mortgagor at all. They were in fact in the enjoyment of the widow of the previous zamindar of the property, who had been in possession of them since 1877 by an arrangement made with her husband.

The learned Judge of the Subordinate Court of Madura and the Judges of the High Court at Madras, from whom this Appeal has been brought, have alike decided that in these circumstances these 226 kulis were not included in the mortgage. Their Lordships are in entire agreement with this opinion, and they have nothing to add by way of emphasis or further reasons to the arguments stated by the learned Judges as those which lead to their conclusion.

The widow died in June 1901, and at the date of the decree in October 1901 in execution of the mortgage, the mortgagor and his heir were in possession of these properties. The decree for the realization of the mortgage set out the villages and hamlets, and directed their sale with all "the pannai lands belonging to the defendants and in their enjoyment," and the sale proclamation followed the words of the decree. The property was actually sold on 22nd April 1907, and objections were taken to the sale, among other things, upon the ground not that the pannai lands were outside the mortgage and excluded

(1) (1892) I.L.R., 19 Calc., 683 (P.C.); s.c., L.R., 19 I.A., 166.

(2) (1918) I.L.R., 41 Mad., 408 (P.C.); s.c., L.R., 45 I.A., 54.

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from the sale proclamation, but because there ought to have been a list of the pannai lands which contained by measurement 500 acres; these objections were disallowed and the sale was, by order of the Subordinate Court, confirmed on 1st July 1907, and this order was supported on Appeal. The sale certificate was dated 25th July of the same year, and it included "the whole of the pannai lands belonging to and enjoyed by the sons of the first defendant, who acquired them as legal representatives of the first defendant" and all incomes, rights and privileges attached to the zamindari.

It is in their Lordships' opinion impossible to construe this sale certificate as limiting in any way the extent of the pannai lands to which it referred.

At the time when it was issued, the whole of the lands in dispute were in fact in the enjoyment of the sons of the mortgagor, who had acquired them as his representatives. The learned Judges of the High Court appear to regard the words set out as capable of explanation and limitation by reference back to the mortgage itself; but their Lordships are unable to accede to this contention. There is no ambiguity in the words of the certificate that are capable of explanation by such means, and the object of the sale certificate would be defeated if it were possible to change its plain meaning by reference to other documents. The rights of the mortgagors, however, need not have been taken away by this fact, as they were at liberty to have taken proceedings in the suit in order to raise the contention that they now put forward under section 47 of the Code of Civil Procedure, 1908, but this they have never done and it is now too late. The atthakshi followed the words of the sale certificate and consequently of these lands possession was duly given.

The learned Judges of the High Court took a different view, holding that the general words in all the documents must be limited by reference back to the mortgage, but that of the 220 kulis 68 were actually delivered owing to the reference to the encumbrances in the document directing delivery of possession of the property. Their Lordships would agree with this conclusion if they placed the same construction on the sale certificate as that accepted by the learned Judges of the High Court, but this they are unable to do. The sale certificate was

in their opinion plain, and its meaning was accepted by all parties at the time, showing that even if they misunderstood the operation of the mortgage they were under no misapprehension as to that of the certificate. Certificates of sale are documents of title which ought not to be lightly regarded or loosely construed. There is full opportunity for challenge of all proceedings in the execution of mortgage decrees at the time, and except in clear cases a purchaser ought not to be harassed in his possession by disputes arising years after his purchase. They are consequently unable to assent to the view taken by the High Court, that any part of the pannai lands should be excluded from the sale certificate, and they think that the Subordinate Judge was right in holding that they were all bound by the decree and included in the sale.

For these reasons their Lordships will, therefore, humbly advise His Majesty that this Appeal should be allowed with costs, and the decree of the Subordinate Judge restored.

Solicitor for appellant: *Douglas Grant.*

Solicitor for respondent: *H. S. L. Polak.*

A.M.T.

APPELLATE CIVIL—SPECIAL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield and Mr. Justice Kumaraswami Sastri.

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(REFERRING OFFICER),

v.

THE EASTERN EXTENSION AUSTRALASIA AND
CHINA TELEGRAPH CO., LTD. (ASSESSOR).*

Income-tax Act (VII of 1918)—Rule 1, framed by Government of Madras under section 48 (2) (c)—Company incorporated in England with branches in India and elsewhere—"Total Profits"—Whether Income-tax and Excess Profits Duty payable in England and Income-tax payable elsewhere to be excluded.

Rule 2 framed by the Government of Madras under section 48 (2) (c) of the Income-tax Act provides that the profits of the Indian Branch of a foreign company may be assumed for income-tax purposes to bear the same proportion to the total profits of the Company as its receipts bear to the total receipts.

* Referred Case No. 11 of 1920.

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A Company incorporated in England with branches in India and elsewhere cannot, in calculating the total profits for the purposes of this rule, claim deduction of the Excess Profits Duty and the Income-tax payable by it in England and elsewhere.

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CASE stated under section 51 of the Income-tax Act of 1918, by the Chief Commissioner of Income-tax, Madras.

This was a reference by the Board of Revenue and the material portions of the Letter of Reference are as follows :—

* * * * *

"2. The Eastern Extension Australasia and China Telegraph Company, Limited, which is incorporated in England, has branches in India and elsewhere. Under section 33 of the Income-tax Act, VII of 1918, and the rules framed thereunder the Company is assessable in India on a proportionate share of its profits worked out in the ratio of its Indian receipts to the total receipts. In accordance with these rules, the Collector of Madras assessed the company for the year 1919-20 on a net income of Rs. 10,98,643. The Company has appealed to the Board against the assessment, and claims the following deductions from the assessable profits :

	£
I. Excess Profits Duty payable in England ...	760,364
II. Income-tax payable in England ...	96,356
III. Income-tax paid at stations outside British India ...	5,775
Total ...	862,495

"3. None of the deductions claimed seem to be admissible under the Income-tax Act, 1918. The term 'profits' used in section 9 of the Act means the gross receipts less such deductions as are specifically allowed by the section. Income-tax and Excess Profits Duty payable or paid in the United Kingdom or elsewhere are not necessary for earning the profits of the business and are not otherwise allowable as a charge under the section. On the other hand, the instructions in Form D prescribed by the Local Government under the Act specifically exclude Income-tax and Super-tax from the admissible charges.

"4. The Company's contention is that if it were taxed in England, the Excess Profits Duty payable would be deducted before the Income-tax is charged there (section 35 of the Finance Act, II of 1915) and that section 20 of the Indian Excess Profits Duty Act

(X of 1919), also provides for such a deduction. In regard to this it may be observed that the Excess Profits Duty referred to in Act X of 1919, is that paid in British India in respect of the Indian profits and that it has no bearing on the Excess Profits Duty payable or paid in England.

"5. The Company also urge that the words 'the total profits of the Company' occurring in the rule issued under section 33 of the Income-tax Act, 1918, and mentioned above should be construed to mean net divisible profits after all deductions, including Income-tax and Excess Profits Duty (except Indian Income-tax) are made. This position does not appear to be tenable. The words 'the profits of the Indian branch' occurring in the same rule do not include Indian Income-tax among the admissible deductions, as this is never allowed as a charge, and there is no reason to suppose that the word 'profits' occurring again in the same sentence is used in a different sense.

"6. It may also be noted in this connexion that neither the superseded Indian Super-tax Act (VIII of 1917) nor the present Act (XIX) of 1920 allows any deduction on account of Excess Profits Duty paid in England, though under executive instructions of the Government of India⁽¹⁾ such a deduction is allowed as a special case. The fact that the concession is made under executive orders tells strongly against the Company's claim for a legal deduction. The concession is restricted to Super-tax and does not extend to Income-tax.

"7. The present reference is made at the instance of the appellants who desire the decision of the High Court on the points raised. I am accordingly directed to request that the case may be placed before the High Court under section 51 of the Income-tax Act and their decision communicated."

(1) Copy of Letter from the Government of India, Finance Department, No. 1183-F., dated 14th April 1920.

I am directed to refer to the Honourable Finance Member's speech of the 22nd March 1920 in connexion with the Bill to amend the Super-tax Act, and to request that, in view of the undertaking then given, executive instructions may, with the permission of His Excellency the Governor in Council, be issued to the Collectors of Income-tax to the effect that Excess Profits Duty levied in England in respect of Indian profits liable to Indian Super tax under the Super-tax Act, 1920, should be treated for Super-tax purposes as working expenses, and not taken into account in calculating taxable income.

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R. N. Ainger for the assessee.—Profits for the purposes of Income-tax are the commercial profits, and the Super-tax as well as the Income-tax paid by me must be deducted. Reference was made to Sander's Income-tax and Super-tax, 2nd edition page 231, *Stevens v. Durban-Roodeport Gold Mining Company*(1), section 33 (1), Income-tax Act and rule 2, Income-tax Manual, page 76, Murray and Carter, page 237, and *Usher's Wiltshire Brewery Limited v. Bruce*(2). Under the Finance Act (II of 1915), section 35, Excess Profits Duty is deducted for the purposes of Income-tax. A similar provision is to be found in section 20, Excess Profits Duty Act (X of 1919). Under them I claim deduction of Excess Profits Duty paid by me.

Government Pleader for the Referring Officer.—We are not concerned with the total profits of the Company but with the amount of the income to be taxed in India. Does the claim of the Company come within the deductions allowed by the Act? It can only come within the clause dealing with "necessary expenditure," and is Income-tax paid in England within that clause? Reference was made to Schedule D, rule 3 of the English Statute, *Ashton Gas Company v. Attorney-General*(3), and *Rover v. South African Breweries*(4). Income-tax is a part of the profits. In India we are taxing only on the income arising in India. *Pari materia* you should not deduct Income-tax paid elsewhere. In England the rule is that the Company pays on the world profits after deducting the Income-tax paid elsewhere. Here we are concerned only with the ratio. In rule 2 the word "profits" in the beginning of the sentence includes Income-tax and the same meaning must be given to the word when used a second time in the same rule.

WALLIS, C.J.

WALLIS, C.J.—This reference raises a question as to the interpretation of a rule made by the Government of Madras under section 43 (2) (c) of the Indian Income-tax Act which enables it to

"prescribe the manner in which and the mode by which the taxable income of persons not resident in British India or of persons deemed to be assesseees in respect thereof, shall be arrived at."

(1) (1909) 100 L.T., 481.
(3) [1908] A.C., 10.

(2) [1915] A.C., 483.
(4) [1918] 2 Ch., 283.

Such persons under section 33 are made liable to be taxed on profits or gains which are deemed to arise or accrue in India. Rule 1 provides that the profits in India for assessment purposes may be calculated on such percentage of the turnover of the business in India as the Collector may consider reasonable. Rule 2, with which we are concerned, is as follows:

"In cases in which the method of assessment on a percentage of turnover is inapplicable—as for example, the case of an Indian Branch of a Foreign Insurance Company—the profits of the Indian Branch may be assumed for Income-tax purposes to bear the same proportion to the total profits of the Company as its receipts bear to the total receipts."

The question referred to us is whether or not in arriving at the "total profits" for the purposes of the rule, Income-tax and Excess Profits Duty payable in England, and Income-tax payable at stations outside British India, are to be deducted. Mr. Ainger for the appellant, has referred us to *Stevens v. Durban-Roodeport Gold Mining Company*(1), and to certain dicta in *Scottish, etc., Insurance Company v. New Zealand Land Company*(2), and *Rover v. South African Breweries*(3), which support the proposition that in England when profits arising abroad are liable under the English Income-tax Act to pay Income-tax in England, a deduction is allowed in respect of the income or similar tax levied on such profits in the places where they arose; and if it were a question here of taxing under section 3 (1) of the Act profits arising outside British India on the ground that they were received in British India, those authorities would be applicable, but in my opinion they have no application to the present case. What have to be ascertained are the assessable profits arising in British India of the Eastern Extension Australasia and China Telegraph Company, which is incorporated in England and has branches in India and elsewhere. But for the rule in question, those profits would be ascertained by taking the Indian receipts and debiting against them the expenditure necessary to earn them, and in such a calculation the amount of the tax itself would not be allowed as a deduction. The taxes levied locally on the assessable profits arising in other countries would not

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enter into the calculation at all. As, however, it would be difficult if not impracticable in the case of a business such as this to ascertain the expenditure properly debitable against the Indian receipts, the Government in the exercise of its statutory powers has provided that the assessable profits of the Indian branch, without deduction of the Indian Income-tax, shall be deemed to bear the same proportion to the total assessable profits of the Company as the Indian receipts bear to the total receipts. As the Indian assessable profits are to be ascertained without deduction of the local Income-tax it must necessarily be the intention of the rule, that the total assessable profits of the business should be arrived at in the same way, viz., without the deduction of the several local Income-taxes, and Excess Profits taxes which are enhanced income-taxes. Otherwise, the whole basis of comparison would be gone; and, as observed in paragraph 5 of the Letter of Reference, the opposite construction would involve holding that the word "profits" was used in two different senses in the same rule. The answer to the Reference must be that the deductions claimed are not allowable.

Costs Rs. 250 to be paid by the assessee to Government.

OLDFIELD, J. OLDFIELD, J.—I agree. It is no doubt satisfactory that, as my lord has shown, the construction claimed by the Crown corresponds with a reasonable result. But in the circumstances it seems to me, with all due deference, that we need not go beyond the wording of the rule in order to reach our conclusion. It is impossible in accordance with the ordinary canons of construction to give to the word "profits" a different meaning in the two places, in which it occurs; and, as where it occurs first it is used statelier of profits on which the tax has to be ascertained, that is, of profits before they have been taxed, it must be similarly used where it occurs again and where its meaning is disputed. This entails acceptance of the argument for the Crown, and, as it is not disputed that foreign Super-tax and Income-tax stand on the same footing, an answer to the Reference that the deductions claimed are inadmissible.

KUMARA-
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SASTRI, J.

KUMARASWAMI SASTRI, J.—The question referred to us for decision is, whether the Eastern Extension Australasia and

China Telegraph Company, Limited, which is incorporated in England and has branches in India and elsewhere is, under section 33 of the Income-tax Act and the rules framed thereunder, entitled to deduct from the assessable profits Excess Profits duty payable in England, and Income-tax payable in England and stations outside British India. Section 33 of the Income-tax Act renders persons residing out of British India taxable in respect of profits or gains "accruing or arising to such persons, whether directly or indirectly through or from any business connexion in British India" which is deemed to be income accruing or arising in British India. As it is not possible to ascertain accurately the profits made in British India of such firms, rules were framed under the statutory power conferred by section 43 (2) (c) which enables the Government to frame rules

"prescribing the manner in which and the procedure by which the taxable income of persons not resident in British India or of persons deemed to be assesseees in respect thereof, shall be arrived at."

One of the rules runs as follows:—

"In cases in which the method of assessment on a percentage of turnover is inapplicable—as for example, the case of an Indian Branch of a Foreign Insurance Company—the profits of the Indian Branch may be assumed for purposes of Income-tax to bear the same proportion to the total profits of the Company as its receipts bear to the total receipts."

The total profits of the Company will be the profits made in British India and also outside British India, and so far as the profits made in India are concerned it is clear that Income-tax paid during the previous year or likely to be assessed during the current year cannot be deducted. Section 9 of the Act, which relates to income derived from business and which provides for the mode in which such income shall be computed, specifies the deductions that can legally be made, and it is clear that Income-tax paid for the previous year cannot be deducted to arrive at an estimate of the profits on which Income-tax is to be assessed.

In *Ashton Gas Company v. Attorney General*(1), Lord HALSBURY observed:

(1) [1906] A.C., 10.

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"Now the profit upon which the Income-tax is charged is what is left after you have paid all the necessary expenses to earn that profit. 'Profit' is a plain English word, that is, what is charged with Income-tax. But if you confound what is the necessary expenditure to earn that profit with the Income-tax which is a part of the profit itself one can understand how you get into the confusion which has induced the learned counsel at such very considerable length to point out that this is not a charge on the profits at all. The answer is that it is. The Income-tax is a charge on the profits; the thing that is charged is the profit that is made and you must ascertain what is the profit that is to be made before you deduct the tax. You have no right to deduct the Income-tax before you ascertain what the profit really is."

These observations have to be kept in mind in construing the word "profit" in the rule.

The rule in question merely provides the formula for ascertaining the income arising out of the business in British India, which is so mixed up with the income arising out of business carried on outside British India that you cannot estimate it with mathematical accuracy. By the very nature of the case the rule is artificial and provides a rough and ready method of arriving at a taxable income. As there can be no deduction of the Income-tax in arriving at the Indian assessable profits if the Indian income were attempted to be arrived at in the usual way, namely, by taking the Indian receipts and deducting the expenditure necessary for the carrying on of the Indian business, having regard to the provisions of section 9 of the Income-tax Act, it seems to me that the word "profit" cannot be used in two senses in the rule, so as to exclude Income-tax where one item of the total, namely, Indian income is concerned, and to include it as regards other items.

The main contention of Mr. Ainger for the Company was that "profit" for the purposes of Income-tax must be the same as commercial profit except to such extent as may be controlled by the Act, that where a Company is assessed in England on profits made both in England and the Colonies a deduction is allowed for foreign Income-tax paid, and that Income-tax paid outside British India stands exactly on the same footing as necessary expenses incurred for the carrying on of the business. He also argues that unless there is something in the Income-

tax Act prohibiting the taking into account of Income-tax paid outside British India, the mere fact that it is a deduction not specified in section 9, would make no difference and that in any event it will fall under section 9, clause (ix), as being "expenditure incurred solely for the purpose of earning such profits." Reference has been made to *Stevens v. Durban-Roodeport Gold Mining Company*(1), *Scottish, etc., Insurance Company v. New Zealand Land Company*(2), *Rover v. South African Breweries*(3) and to *Usher's Wiltshire Brewery Limited v. Bruce*(4).

In *Stevens v. Durban-Roodeport Gold Mining Company*(1), the only question that arose for decision was as to how the Imperial tax, which was imposed during the last of the three years on the average profits of which Income-tax was levied, should be treated and it was held that the amount could only be allowed as an outgoing, spread as an average over the three years and not as a deduction from the ascertained profits of the individual year. As it was conceded that the New Imperial Tax "was to come in somehow" the only question was how credit was to be given. This case is no authority when the question for decision is whether a tax paid outside British India can be taken into consideration in assessing Income-tax in British India. In *Scottish, etc., Insurance Company v. New Zealand Land Company*(2), the question was whether the preference share-holders of a Company, registered in the United Kingdom, but carrying on business in a Colony, who have received their full dividend are as between themselves and the Company entitled to participate in the allowance granted by the Government under section 43 of the Finance Act, which allows a rebate of 1 shilling 6 pence out of 5 shillings. The answer to the question depends on the construction of section 43 of the Finance Act, 1916. In considering the question whether the Colonial Income-tax can be said to have been paid by the preference share-holders, Lord FINLAY observed:

"The Colonial Income-tax had to be paid in the Colony and the profits could not be remitted to the United Kingdom without paying it. It stands exactly on the same footing with any expenses

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necessarily incurred in the business of the Company in the colonies . . . Payment of the Colonial Income-tax was part of the expense of carrying on the business in Australasia or New Zealand and the profits were necessarily diminished by the amount so paid, just as by any business expenses incurred in the ordinary course."

There was no question in the case as to how Income-tax was to be assessed, and where the only question was as to who should get the benefit of the rebate, there was no reason why the word "profits" should not be used in the ordinary commercial sense of the sum that remains to be divided after meeting all necessary expenses. On whatever amount you may calculate profits for the purposes of Income-tax, profits, so far as the shareholders are concerned, will always be the sum that remains after deducting the tax paid. In *Rover v. South African Breweries*(1) the question was similar to that in *Scottish, etc., Insurance Company v. New Zealand Land Company*(2) referred to above ASHBURY, J. observed :

"As regards the share-holders in this country the Colonial tax is not a duty charged within the meaning of section 54, but an outgoing of the Company on the same footing as any other administrative expense in the Colony which has to be satisfied before any profits can be ascertained and distributed by way of dividend."

The decision of ASHBURY, J., that the English Company cannot deduct the full amount of 5 shillings but only the net British Income-tax it has actually borne, was overruled by the House of Lords in the *Scottish Insurance Company's* case. The decision in *Usher's* case does not touch the present question. It was held that when a deduction was proper and necessary to be made, in order to ascertain the balance of profits it ought to be allowed provided there is no prohibition in the Income-tax Act or rules against such an allowance.

There can be little doubt that as a matter of accountancy and book-keeping, and as between share-holders entitled to a dividend and the Company, Income-tax paid is always entered as an expense which has to be deducted before the amount divisible as profits can be ascertained, and enters into the debit charges in the same way as any other item of expenditure. It is equally clear that, for the purpose of levying Income-tax you cannot deduct

(1) [1918] 2 Ch., 238.

(2) () 89 L.J., 220 (P.C.).

the amount paid or payable as Income-tax on the ground that it is only what remains that goes to the person carrying on the business. The fact that as between the share-holders and the Company you would estimate profits in a particular way is no ground for estimating profits on which Income-tax has to be calculated in a similar manner.

In enacting the rule in question for the purpose of ascertaining profits in India, I am of opinion that what was intended was that you must take the profits in each centre on which Income-tax was charged or chargeable, total up such profits and estimate the profits in British India by ascertaining the ratio which the total receipts in India bear to the total receipts.

I would answer the question in the negative.

Solicitors for the assessee. — Messrs. King and Partridge.

M.H.H.

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APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice
Oldfield and Mr. Justice Kumaraswami Sastri.

VAIRAVAN CHETTIAR, REPRESENTED BY RAMASAMI
CHETTIAR (DEFENDANT), APPELLANT,

v.

SRINIVASACHARIAR (PLAINTIFF), RESPONDENT.*

Hindu Law—Self-acquisition of father—Undivided son—Suit on promissory note after death of father—Whether succession certificate necessary.

An undivided Hindu son acquires the self-acquired properties of his deceased father by inheritance and not by survivorship.

Observation in *Nana Tawker v. Ramachandra Tawker*, (1909) 1 L.R., 32, Mad., 877, dissented from.

In a suit by the son for the recovery of money which was the self-acquired property of the deceased father a succession certificate must be produced before a decree can be given in his favour. *Venkataramanna v. Venkayya*, (1901) 1 L.R., 14 Mad., 377, followed.

* Second Appeal No. 933 of 1919 (F.B.).

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SECOND APPEAL against the decree of T. K. SUBBA AYYAR, Third Temporary Subordinate Judge of Tanjore at Mayavaram, in Appeal No. 97 of 1919 (Appeal Suit No. 681 of 1918, District Court, Tanjore), preferred against the decrees of R. V. KRISHNA AYYAR, District Munsif of Negapatam, in Original Suit No. 400 of 1917.

Plaintiff was the assignee of a promissory note in favour of one Veeraraghava Aiyangar. Veeraraghava Aiyangar died and it was alleged in the plaint that the minor adopted son, Narasimha Aiyangar, succeeded to all his properties by survivorship, and that the widow, the adoptive mother, had made an endorsement on the note that plaintiff was to collect the principal and interest. The defendant inter alia contended that the widow adopted the son after the death of Veeraraghava Aiyangar, that the suit promissory note was the self-acquired property of the deceased, and that in the absence of a succession certificate the suit was not maintainable. Both the Lower Courts gave a decree in favour of the plaintiff. The defendant thereupon filed this Second Appeal which came on for hearing before SADASIVA AYYAR and SPENCER, JJ., who made the following :

ORDER OF REFERENCE TO A FULL BENCH.

Many difficult questions of law (each question itself implying subsidiary legal questions) are involved in this case. One of them is (1) whether an adopted son, adopted by the last owner's widow after his death gets an interest in the property just before the moment of the last owner's death as if he (the adopted boy) was then in his adoptive mother's womb and was a co-parcener of his father, and whether he accordingly thus obtains the whole property by survivorship at the moment of the last owner's death; or whether he takes it only as heir on the date of adoption.

(2) Another question is whether a Hindu son under the Mitakshara Law is a co-parcener with his father in the latter's self-acquired properties also, notwithstanding the fact that he cannot enforce partition of those properties against his father and notwithstanding that the father has uncontrolled power over them just as the owner of an impartible estate had before the Statute Law deprived him of that power.

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(3) Whether even if those two questions are answered in the plaintiff's favour, the production by the plaintiff of a succession certificate is necessary (a) either because the suit was brought on a negotiable instrument or (b) because the instrument sued on does not, on its face, purport to be executed in favour of any person other than the obligee mentioned therein.

We think therefore that this case is a fit one for decision by a Full Bench and we refer it accordingly to such a Bench for decision.

This reference was heard by WALLIS, C.J., OLDFIELD, and SESHAGIRI AYYAR, JJ., who made the following

ORDER.

Before disposing of this case finally we think it necessary that the lower Appellate Court should be called upon to return findings on the following questions :—

(a) Whether Narasimha Aiyangar was adopted during the life-time of Veeraraghava Aiyangar?, or was adopted after the latter's death by his widow, and if so, when?

(b) Whether the note sued on represented family property in the hands of Veeraraghava Aiyangar, or was his self-acquired property?

Parties to be at liberty to adduce fresh evidence. Finding will be submitted within a month after the reopening of the Lower Court after summer recess and seven days will be allowed for filing objections.

[In compliance with this Order the Subordinate Judge returned the findings (a) that "the adopted boy Narasimha Aiyangar was taken in adoption during the life-time of Veeraraghava Aiyangar" and (b) that the suit promissory-note was not the family property of Veeraraghava Aiyangar but was his self-acquisition.]

ON THIS REFERENCE—

B. Sitarama Rao and *A. V. Viswanatha Sastri* for appellant.—
In view of the findings question (1) in the Order of Reference does not require an answer. Since the property is self-acquired property the father can dispose of it to the utter

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exclusion of the son: *Balwant Singh v. Rani Kishori*(1), *Subbaya v. Surayya*(2), *Nagalingam Pillai v. Ramachandra Tavar*(3), *Muddun Gopal Thakoor v. Ram Buksh Pandey*(4), *Sittal v. Madho*(5) and *Jugmohandas Mangaldas v. Sir Mangaldas Nathulhoy*(6). If he can dispose of it a succession certificate is necessary: *Venkataramanna v. Venkayya*(7), *Vaidyanatha Ayyar v. Chinnaasami Naik*(8), *Perayya v. Ahmad Abdul Rahiman Sait*(9), *Rajah of Kalahasti v. Achigadu*(10). Reference was also made to *Fakirappa v. Yellappa*(11), *Raja Chelikani Venkayamma v. Raja Chelikani Venkataramayamma*(12), *Rania Rao v. Rajah of Piltapur*(13) and Sircar's Hindu Law.

T. R. Venkatarama Sastri for respondent.—The son takes the property by survivorship and therefore no succession certificate is necessary: *Nana Tawker v. Ramachandra Tawker*(14). Hindu Law makes no distinction between ancestral and self-acquired property. What we have to see is the character of the succession and that depends on his relationship to the father: Mitakshara, Chapter 1, section 1, verses 2, 3 and 27, Ghose's Hindu Law, page 79.

OLDFIELD, J.

OLDFIELD, J.—In this reference, Second Appeal No. 982 of 1919 and all questions of law arising in it are before us. The finding we have obtained in favour of the adoption of Narasimha Aiyangar by Veeraraghava Aiyangar, not by his widow, leaves only two such questions for decision. Plaintiff is suing as assignee from the guardian of Narasimha Aiyangar of a promissory note in favour of Veeraraghava Aiyangar, which represented at the date of its execution the latter's self-acquisition. Veeraraghava Aiyangar and Narasimha Aiyangar died undivided. The questions for decision are whether plaintiff is exempt from the obligation to produce a succession certificate either because he sues as an assignee from Narasimha Aiyangar, the person

- (1) (1898) I.L.R., 20 All., 267 (P.C.). (2) (1887) I.L.R., 10 Mad., 251.
 (3) (1901) I.L.R., 24 Mad., 429. (4) (1863) W. R. (Civil Rulings), 71.
 (5) (1877) I.L.R., 1 All., 394. (6) (1886) I.L.R., 10 Bom., 528, at p. 578.
 (7) (1891) I.L.R., 14 Mad., 377. (8) (1894) I.L.R., 17 Mad., 108.
 (9) (1914) 1 L.W., 812. (10) (1907) I.L.R., 30 Mad., 454.
 (11) (1898) I.L.R., 22 Bom., 101, at p. 103.
 (12) (1902) I.L.R., 29 I. A., 156; s. c., 12 M.L.J., 300 (P.C.), 329.
 (13) (1918) I.L.R., 41 Mad., 778 (P.C.). (14) (1900) I.L.R., 32 Mad., 377.

entitled to the debt, or because Narasimha Aiyangar should be regarded as having become entitled to the debt by survivorship.

The first question can be answered shortly. The Act is, as its preamble states, intended to "afford protection to parties paying debts to the representatives of deceased persons." The reference in section 4 is generally to persons "claiming to be entitled to the effects of the deceased person or any part thereof," and under section 6 (1) the applicant for a certificate must specify in his application the debts in respect of which he applies. All this indicates that the succession certificate procedure is obligatory on any person claiming debts or a debt, the property of the deceased, not only by succession but under any title whatsoever. If the cases of assignment from the deceased's legal representatives were excluded, evasion of the Act would be easy and the protection afforded to the debtor would be illusory. This question must be answered in the negative.

It is then conceded that the plaintiff must obtain a certificate to entitle him to sue, unless Narasimha Aiyangar, from whose guardian he obtained his assignment, became owner of the debt by survivorship, not inheritance. The authorities regarding the manner in which an undivided son becomes entitled to the self-acquisition of his deceased father, are set out in the judgment of KUMARASWAMI SASTRI, J., which I have had the advantage of reading. Their result is that, when the issue was raised directly, as it was in the line of cases beginning with *Venkataramanna v. Venkayya*(1), the succession of the undivided son by inheritance was regarded as beyond doubt. And the other decisions relied on by plaintiff do not affect this. For neither those, which, like *Raja Chelikani Venkayamma v. Raja Chelikani Venkataramayamma*(2), indicate as joint ancestral the nature of the estate to which a son or sons succeed, nor those, which, like *Fakirappa v. Yellappa*(3), *Ramappa Naicken v. Sithammal*(4) and *Nana Tawker v. Ramachandra Tawker*(5), are directly concerned only with the order of succession as between sons, undivided and

- (1) (1891) I.L.R., 14 Mad., 377.
 (2) (1902) L.R., 29 I.A., 156; s.c., 12 M.L.J., 300 (P.C.).
 (3) (1898) I.L.R., 22 Bom., 101. (4) (1879) I.L.R., 2 Mad., 182 (F.B.).
 (5) (1909) I.L.R., 32 Mad., 377.

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divided, are in point, when, as here, the question is of the manner, survivorship or inheritance, by which such succession takes place. The rule regarding the order of succession, that undivided are preferred to divided sons, whatever its exact basis and the possibility of reconciling it with other parts of the Mitakshara system, must be regarded as established since the decision of a Full Bench of this Court in the second of the cases last mentioned. But adherence to it need not involve any inference that the succession of the undivided sons is of one kind rather than the other. For the estate they take may be joint, in whichever way they acquire it. It is true that in *Nana Tarker v. Ramachandra Tarker*(1), although only the order of succession was in dispute, it was said that

"the succession to the undivided property of the father would, where there was an undivided son, be by survivorship rather than inheritance;"

but this dictum was unnecessary to the conclusion and should not in my opinion be followed. For the fact that property is taken by undivided sons as joint tenants is no reason for assuming a prior joint tenancy in respect of it between them and their father, with which its character as self-acquisition would have been inconsistent until his death; and, unless such an assumption can be made, the argument for survivorship must fail. Following *Venkataramanna v. Venkayya*(2), I would answer the second question also in the negative. My opinion is that plaintiff cannot succeed without producing a certificate and that the Second Appeal should therefore be allowed.

KUMARASWAMI
SASTRI, J.

KUMARASWAMI SASTRI, J.—The finding is that the note sued upon was the self-acquired property of the deceased Veeraghava Aiyangar who died leaving a minor adopted son, and the question is whether a succession certificate is necessary before a decree can be passed on the note.

Section 4 of the Succession Certificate Act provides that no Court shall pass a decree against the debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person, or any part thereof, except on production by the person so claiming of a

(1) (1909) I.L.R., 32 Mad., 377.

(2) (1891) I.L.R., 14 Mad., 377.

certificate granted under the Succession Certificate Act and having the debt specified therein, or Probate or Letters of Administration, or any of the certificates specified in the section.

So far as self-acquired property is concerned, the father or other co-parcener has absolute powers of disposition over the same. In *Balwant Singh v. Rani Kishori*(1), their Lordships of the Privy Council held that a father being a member of an undivided family subject to the Mitakshara has full power of disposition at his own discretion over his self-acquisition. The debt in such cases would therefore be a debt in which no other person had an interest during the creditor's life-time, and it is difficult to see how the provisions of section 4 of the Succession Certificate Act are inapplicable. The current of authority is in favour of the view that succession certificate is necessary.

In *Venkataramanna v. Venkayya*(2), it was held that a succession certificate was necessary when the suit was on a bond executed in favour of a deceased person, unless it appeared on the face of the bond that the debt was due to the joint family consisting of the deceased and the person suing. MUTTUSWAMI AYYAR and HANDLEY, JJ., observed:

"A son is *prima facie* taken to succeed to a debt due to his father by right of inheritance unless his succession by survivorship is indicated on the face of the bond creating a debt."

In *Vaidyanatha Ayyar v. Chinnasami Naik*(3), it was held that a succession certificate was necessary where a suit was filed on a promissory note executed in favour of two Hindus carrying on business in partnership, by the surviving partner and the heirs of the deceased partner. In *Rajah of Kalahasti v. Achigadu*(4), it was held that a succession certificate was necessary when the successor to an impartible estate sued on a bond executed in favour of the deceased zamindar, as he derived his title to such debt only on the death of his predecessor as part of his effects. It is, however, now settled that it is not necessary that the fact that the debt was a debt due to the joint family should appear on the face of the bond but that this can be proved *aliunde*: *Subramanian Chetti v. Rakku*

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(1) (1898) I.L.R., 20 All., 267 (P.C.). (2) (1891) I.L.R., 14 Mad., 377.
(3) (1894) I.L.R., 17 Mad., 108. (4) (1907) I.L.R., 30 Mad., 454.

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Servai(1), *Ramanatham Chetty v. Subramaniam Chetty*(2), and *Jagmohandas Kilabhai v. Allu Maria Duskal*(3). In *Raghavendra Madhav v. Bhima*(4), it was held that a succession certificate was necessary, if a decree obtained by one of two undivided brothers was the separate property of the deceased decree-holder, as the surviving brother can only execute as his heir. It is clear from the authorities that the fact that the plaintiff was a member of a joint and undivided family with the deceased, and owned joint properties which passed to him by survivorship, would not prevent the necessity for the production of a succession certificate in regard to the separate property of the deceased, inasmuch as the debt would still be the effects of the deceased person.

The main contention of the respondent is, that even though the deceased father may have had absolute powers of disposal over the debt due to him, there is yet a co-parcenary between himself and his undivided sons, which operates to alter the character of the properties into co-parcenary properties as soon as he dies, and that in such cases a son gets it by right of survivorship. It is contended that under the Mitakshara so far as a person and his undivided sons and grandsons are concerned the heritage is unobstructed, and that whatever may be the nature of the property, whether it is ancestral or self-acquired, in the hands of the deceased, it must always be taken by survivorship. Reliance has been placed on passages in the Mitakshara and on *Nana Tawker v. Ramachandra Tawker*(5), which follows *Fakirappa v. Yellappa*(6).

So far as the text of the Mitakshara dealing with the rights of sons in their father's self-acquisitions is concerned it has been decided by their Lordships of the Privy Council in *Balwant Singh v. Rani Kishori*(7), that the text,

"though immovables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are born and they who are yet unbegotten and they who are still in the womb, require the means of support. No gift or sale should therefore be made,"

(1) (1897) I.L.R., 20 Mad., 232.

(3) (1895) I.L.R., 19 Bom., 338.

(5) (1909) I.L.R., 32 Mad., 377.

(2) (1915) 28 M.L.J., 372.

(4) (1892) I.L.R., 16 Bom., 349.

(6) (1898) I.L.R., 22 Bom., 101.

(7) (1898) I.L.R., 20 All., 287 (P.C.).

is only a moral precept and not a rule of law capable of being enforced. As pointed out in *Muddun Gopal Thakoor v. Ram Buksh Pandey*(1) and *Jagmohandas Mangaldas v. Sir Mangaldas Nathubhoy*(2), the son acquires no legal rights over his father's self-acquisitions by reason of the text of the Mitakshara (Ch. I, sec. I, 27), but his right is an imperfect one incapable of being enforced at law.

It is difficult to see how there can be any co-parcenary between the father and the sons as regards self-acquired property over which the sons have no legal claim or enforceable rights. Co-parcenary and survivorship imply the existence of co-ownership and of rights of partition enforceable at law, and a mere moral injunction can hardly be the foundation of a legal right. As observed by the Privy Council in *Sartaj Kuari v. Deoraj Kuari*(3), the property in the paternal or ancestral estate acquired by birth under the Mitakshara law is so connected with a right to partition that it does not exist where there is no right to it. A contention was raised during the course of the argument before the Privy Council in *Raja Chelikani Venkayamma v. Raja Chelikani Venkataramayyanamma*(4), that sons acquire a right by birth in the father's self-acquired property. Lord MACNAGHTEN stated that he did not quite understand what that right was and observed

"He is his father's son, and if his father does not dispose of it, it will come to him; but is it anything more than a *spes*?"

So far as a father's self-acquisitions are concerned, the son, though undivided, has only a *spes successionis* and he stands in relation to that property in the same position as an heir under Hindu Law. The very essence of the distinction between *apratibandha* and *sapratibandha* *daya* is the existence of an interest in the son in respect of properties got by his father. As observed by West and Buhler in a passage (Book II, Introduction, page 19) which was approved in *Baboo Nund Coomar Lall v. Moulvie Razeeoodeen Hossain*(5), ancestral property may be said to be co-extensive with the objects of *apratibandha* *daya* or unobstructed inheritance.

(1) (1863) W.R. (Civil Rulings), 71. (2) (1836) I.L.R., 10 Bom., 528.

(3) (1888) I.L.R., 10 All., 272 (P.C.).

(4) (1902) L.R., 29 I.A., 156; s.c., 12 M.L.J., 300 (P.C.).

(5) (1872) 10 Beng. L.R., 188.

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Nana Tawker v. Ramachandra Tawker(1) decided that under the law of Mitakshara the self-acquired property of a father is taken by his undivided sons to the exclusion of a divided son. The imperfect right of sons in self-acquisitions of their father, which is incapable of being enforced in law during the father's lifetime, was thought to be sufficient on his death to create a co-parcenary so as to attract the rule of survivorship. With all respect it seems to me that the observation, that

"the succession to the self-acquired property of the father would, where there was an undivided son, be by survivorship rather than by inheritance" requires re-consideration.

Assuming that the imperfect right of the son in his father's self-acquisition may have sufficient efficacy to entitle him to succeed to it to the exclusion of a divided son, it does not follow that the self-acquired property does not form part of his father's "effects" within the meaning of section 4 of the Succession Certificate Act.

I am of opinion that property over which a person has absolute powers of disposal and over which his co-parceners have no power of control forms part of his "effects" so as to attract the provisions of section 4 of the Succession Certificate Act. The Second Appeal must be allowed.

WALLIS, C. J. WALLIS, C.J.—I agree. The Second Appeal is allowed with costs throughout and the suit is remanded to the District Munsif for disposal according to law, with a direction that the respondent be at liberty to produce a succession certificate within two months from this date, or such further time as the District Munsif may allow, and that in default the suit do stand dismissed. Court fee on appeal memorandum will be returned to appellant.

M.H.H.

(1) (1909) I.L.R., 32 Mad., 377.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Odgers.

KAITHAL KUTTIYALI (PLAINTIFF IN ORIGINAL SUIT No. 61 OF 1915 AND FIRST DEFENDANT IN ORIGINAL SUIT No. 16 OF 1915),
APPELLANT IN BOTH SECOND APPEALS,

1920,
Septem-
ber 28.

v.

UMMAMMA AMMA AND OTHERS (DEFENDANTS IN ORIGINAL SUIT No. 61 OF 1915 AND PLAINTIFF IN ORIGINAL SUIT No. 16 OF 1915), RESPONDENTS.*

Malabar Law—Taraga lease for reclamation and improvement by a Stanomdar for twelve years with a clause for renewal for another twelve years, validity of.

A taraga lease in Malabar, given for reclaiming and improving lands contained the following clause by the lessee:—"I shall well improve this paramba and plant, etc.; when the improvements have survived the period of decay and the coconut trees begin to bear their first fruits, I shall take a taraga after fixing the rent in accordance with the local custom on an inspection of Kuzhikanoma." Held that the clause entitled the lessee to a renewal of the lease for twelve years from the expiry of the first term of twelve years at an enhanced rent to be determined in accordance with it. *Gopalan Nair v. Kunhan Menon*, (1907), I.L.R., 30 Mad., 300, distinguished.

A stanomdar is entitled to grant a lease so as to last beyond his life-time and to bind his successors provided the lease is beneficial to the estate.

SECOND APPEALS from the decrees of V. S. NARAYANA AYYAR, Temporary Subordinate Judge, in Appeals Nos. 416 and 417 of 1918, on the file of the Temporary Sub-Court of Tellicherry, preferred against the decrees of V. KUNHIRAMAN NAYAR, Additional District Munsif, in Original Suits Nos. 16 and 61 of 1915, on the file of the Additional District Munsif's Court, Tellicherry, being Original Suit No. 383 of 1914 and Original Suit No. 24 of 1915, in the Principal District Munsif's Court, Tellicherry.

The appellant in these two Second Appeals obtained on lease the plaint property from Purameri Kovilagam and he executed in May 1902 a counterpart of the lease in favour of the lessor, containing the following stipulation:—

"I shall well improve this paramba and plant, etc.; when the improvements have survived the period of decay and the coconut

* Second Appeals Nos. 1365 and 1366 of 1919.

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trees begin to bear their first fruits, I shall take a *taraga* after fixing the rent in accordance with the local custom on an inspection of the Kuzhikanoms."

On the expiry of twelve years the appellant filed Original Suit No. 61 of 1915 for specific performance of the contract and asked for the grant of a lease for another period of twelve years. Some time before this, the Kovilagam granted a melcharth in favour of another to take effect after the expiry of twelve years from the date of the *taraga*. The melcharthar sued for possession (Original Suit No. 16 of 1915.) Both the suits, to which the Kovilagam was made a party, were tried together. The main pleas of the Kovilagam and the melcharthar were that the stipulation in the *taraga* did not entitle the appellant to a renewal of the *taraga* for another twelve years, that the stanomdar of the Kovilagam was not entitled to grant a renewable lease like this so as to bind his successors (the present defendants). Both the Lower Courts held that the stipulation did not entitle the appellant to a renewal and accordingly dismissed his suit and gave a decree in the suit of the melcharthar for possession as against the appellant.

The appellant preferred these two Second Appeals to the High Court.

K. P. M. Menon for appellant.

C. Madhavan Nayar and V. P. Karunakaran Nambiyar for respondents.

The Court delivered the following JUDGMENT:

The main question in these appeals depends on the construction of Exhibit A, which is a lease or rather counterpart of a lease known in Malabar as *taraga*, the purpose of which admittedly was to enable the tenant or the lessee to reclaim the demised land and make improvements thereon. The words of this lease, which was granted by the stanomdar, are these:

"I shall well improve this paramba and plant, etc.; when the improvements have survived the period of decay and the coconut trees begin to bear their first fruits, I shall take a *taraga* after fixing the rent in accordance with the local custom on an inspection of the Kuzhikanoms."

The Subordinate Judge has held that this clause merely gives an option to the landlord to renew the lease if he so chooses.

The appellant, on the other hand, contends that it is a binding covenant for renewal for another term of twelve years beginning from the expiry of the term of twelve years granted, by Exhibit A dated 9th May 1902. These words are almost identical with the words in another *taraga* lease granted to the tenant by the same stanomdar or his predecessor in title in an unreported case *Udayavarama Elaya Raja v. Kannan Nambiar*(1). There, BENSON, J., who had much experience of Malabar law, and BHASHYAM AYYANGAR, J., held that having regard to the well-known tenures and customs of Malabar, the intention of the parties in executing the deed was to agree that the tenant should hold the land for the usual term of twelve years at the rent fixed in the document and should plant up the land during that time in a husbandlike manner, that at the end of that term the rent should be enhanced with reference to the improved state of the land and according to the custom of the country in fixing the rent of such improved land, and that the tenant should pay that rent for a further term of twelve years from the expiry of the first term and execute a document binding himself to do so. They granted a decree to the effect that the tenant was entitled to renew the lease which should bear date the day of the decree and run for the unexpired portion of twelve years from the expiry of the former lease, but without a covenant for further renewal. Having heard Mr. Madhavan Nayar fully, for the respondent, we are inclined to hold that the words quoted above mean that the parties intended that if the tenant made any improvements and those improvements were effective, he would be entitled to a lease for another term of twelve years from the date of the expiry of the prior lease, and the rent was to be revised in view of any larger yield from the land that may accrue, and also having regard to the custom of the country, with respect to such a lease. We have been pressed, however, by Mr. Madhavan Nayar with the decision in *Gopalan Nair v. Kunhan Menon*(2). But that was a case of a *kanom* which is not a lease pure and simple but partakes also of the nature of a mortgage, and further, the learned judges one of whom was BENSON, J., proceeded upon the fact that the terms of the renewed lease were not set out

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(1) Second Appeal No. 1423 of 1901 (unreported).

(2) (1907) I.L.R., 30 Mad., 800.

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in the document. Here, the rent although not fixed is capable of being ascertained with reference to the nature and value of the improvements and the local custom. We are, therefore, of opinion that the appellant is entitled to a renewal for a further term of twelve years.

It was then argued by Mr. Madhavan Nayar that the stanomdar who granted the prior lease, the counterpart of Exhibit A, had no power to bind his successor, that is to say, the lease would be operative only during his lifetime and that this stipulation for renewal does not bind the successor in office. He contended this as an absolute proposition of law, while the very authorities to which he has referred us as set out in Moore's Malabar Law show that the stanomdar is entitled to grant a lease for a term exceeding his own lifetime so as to make it binding on his successor, provided the lease is such as is beneficial to the estate. At page 349, Moore in his Malabar Law cites a dictum of Mr. HOLLOWAY, who was at the time Subordinate Judge of Calicut, to the effect that the proof that the alienation of stanom property is for some purposes tending to the conservation or improvement of the property for those who are to succeed must be clear in order to make such alienation binding. At page 351, a passage from the judgment of INNES and MURRUSWAMI AYYAR, JJ., runs thus :—

"But 'he' (stanomdar or rather stanom-holder) 'is also manager of the family for the time being; if he grants a lease or makes an alienation to endure beyond his lifetime which is for the benefit of the family, it will be upheld as, on the other hand, any such transaction, if prejudicial to the family, will be set aside.'"

Similarly, at page 352, it is laid down in another judgment of this Court—

"It is certainly open to a stani to make a lease of forest land for a term of years, and the mere fact that the alienation is intended to hold good after his lifetime will not invalidate it."

Here, in the written statement, paragraph 5, in Original Suit No. 24 of 1915 (Original Suit No. 61 of 1915 in the Additional District Munsif's Court), a plea was taken that the lease was binding only on the stanom-holder who granted it and not on the succeeding stanom-holders. There is a general issue, No. 1, to this effect "whether the provision in the marupat to grant a renewal is binding on the first defendant." This issue cannot be

said to be very happily worded. But it is capable of meaning that if the lease was beneficial to the family it would be binding on the first defendant in Original Suit No. 24 of 1915, who is the present stanom-holder. That question, however, has not been tried by either of the lower Courts and we think it is necessary in the view we take of the lease, Exhibit A, that this issue should be tried before the two suits could be disposed of. If it be found that the lease is binding on the present stanom-holder, having regard to the provisions of law already set out, then the appellant, plaintiff in Suit No. 61 of 1915, will be entitled to a decree for specific performance in the terms mentioned above, that is, to a renewed lease for twelve years dating from the expiry of the lease of May 1902 without any covenant for a further renewal. The rent will have to be ascertained in accordance with the provisions of Exhibit A. If the plaintiff in Original Suit No. 61 of 1915 succeeds ultimately in obtaining a decree for specific performance, the suit (Original Suit No. 16 of 1915) will have to be dismissed with costs, and his own Suit No. 61 of 1915 will be decreed in his favour.

These Second Appeals therefore are allowed and the judgments of the lower Courts reversed and the suits remanded to the Court of first instance for disposal in the light of the above observations. The appellant will have his costs from the respondent. Only one vakil's fee in both cases.

N.B.

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APPELLATE CIVIL.

Before Mr. Justice Napier and Mr. Justice Krishnan.

1927,
October 6.

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SETHUPATHI, RAJAH OF RAMNAD, BY HIS AUTHORIZED
AGENT, S. TIRUMALAI IYENGAR (PLAINTIFF), APPELLANT,

v.

RAMANATHASWAMI AT RAMESWARAM BY TRUSTEE
V. VENKATASUBBA IYER (DEFENDANT) RESPONDENT.*

Civil Procedure Code (V of 1908), sec. 11—Suit for rent by lessee for a term of a zamindari—Reference to arbitration—Award passed into a decree—Finding of arbitrator, not incorporated in the Judgment—Surrender of lease—Subsequent suit for rent for another year covered by lease instituted by the zamindar—Previous judgment, whether res judicata—Section 11, Civil Procedure Code, whether a rule of jurisdiction or tesoppel.

A decision in a suit for rent, instituted in a Civil Court by the lessee for a term of a zamindari against the tenant, is not res judicata in a subsequent suit for rent, instituted by the zamindar after surrender of the lease by the lessee, even though the rent claimed in the later suit was for a period covered by the original lease.

Surrender by the lessee does not operate as an assignment of the rights of the lessee in favour of the lessor, but determines the tenancy so as to let in the lessor's rights.

SECOND APPEAL against the decree of C. V. VISWANATHA SASTRI, Acting District Judge of Rāmnād, in Appeal Suit No. 141 of 1919, preferred against the decree of S. V. PADMANABHA AYYANGAR, District Munsif of Paramakudi, in Original Suit No. 40 of 1916.

This, and some other connected suits, were instituted by the present Raja of Rāmnād to recover tree-tax, railway cess and road cess, from the defendant who is the trustee of Rameswaram Devastanam in respect of lands held by the Devastanam, included in the plaintiff's Samasthanam. The defendant pleaded that tree-tax could not be recovered for the suit lands, as they were Devadayam lands and as such exempt from such taxes by law and by custom; the defendant also pleaded that the claim was negatived by two sets of previous decisions between the

* Second Appeal No. 1888 of 1919.

parties, and that the present claim was res judicata by reason of the decisions in two suits of 1879 (Original Suits Nos. 288 and 289 of 1879, on the file of the District Munsif's Court of Paramakudi), which were appealed against (Appeals Nos. 243 and 244 of 1880, on the file of District Court of Madura). In a judgment delivered in common in these and other appeals, the District Court held that Devadayam lands were exempt from tree-tax, though the decisions of the District Munsif in the two suits (Original Suits Nos. 288 and 289 of 1879), which had dismissed the zamindar's suit against the Devastanam, were affirmed by the District Court in the appeals therefrom. It was contended by the defendant, however, that the District Court had really meant to allow those appeals and that there was a clerical mistake in giving the numbers of the appeals in those suits.

Another set of decisions relied on by the Devastanam, as constituting res judicata in its favour, were Original Suits Nos. 571 and 572 of 1903, on the file of the Paramakudi District Munsif's Court. Those suits were instituted by the lessees of the Rāmnād zamindari against the Devastanam to recover similar tree tax from the lands in their holding. The whole of the Rāmnād Samasthanam had been leased to two lessees under a deed, dated 20th February 1901, one of whom was also the trustee of the Devastanam; the above suits were referred to arbitration; the arbitrator passed an award holding that the defendant-Devastanam was not liable for tree-tax, and that the matter was also res judicata by reason of the decisions in the abovesaid suits (Original Suits Nos. 288 and 289 of 1879). The Court of the District Munsif accepted the award, overruling the objections raised by the then plaintiff, and passed, in accordance with the award, a decree dismissing the suit. The findings of the arbitrator were not incorporated in the judgment of the District Munsif. The lessees of the zamindari surrendered the lease by a deed, dated 25th October 1911. The present zamindar instituted the present suit and other connected suits on 11th December 1914, for recovery of similar tree-tax as well as road cess and railway cess due for faslis 1922 to 1923. The District Munsif, who tried these suits, held that the plaintiff's claim for tree-tax, etc., was not barred as res judicata by either of the decisions relied on, namely, those in Original Suits Nos. 288 and 289

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of 1879 or in Original Suits Nos. 571 and 572 of 1903, and that the Devastanam was by law and custom bound to pay tree-tax to the Rāmnād zamindar, and he accordingly decreed the sums claimed in the plaint for tree-tax, road cess and railway cess. On appeal by the defendant, the Subordinate Judge held that the claim for tree-tax was barred by *res judicata* and he accordingly modified the decree by disallowing the plaintiff's claim for tree-tax. The plaintiff preferred this Second Appeal.

The Hon'ble the Advocate-General (K. Srinivasa Aiyangar) and S. Sundararaja Ayyangar, for appellant.

T. Rangachari and V. N. Venkatavaradhachari for respondents.

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NAPIER, J.—This Second Appeal arises out of a suit by the Zamindar of Rāmnād to recover theerva from the trustee of the Rameswaram temple for trees growing on the land attached to the temple. The written statement alleged first that the topes belonging to the temple were Devadayam land and that the temple is not liable to any theerva in law or by custom; secondly, that the suit was barred by section 11, Civil Procedure Code, by virtue of two decrees, one that of the District Court of Madura on Appeal in Original Suits Nos. 288 and 289 of 1879, the other the decree in Original Suits Nos. 571 and 572 of 1903 in the Court of the District Munsif of Paramakudi. Issues were framed, the third issue being "whether the plaintiff's claim is barred by *res judicata*?" The District Munsif decided against the defendant in respect of both judgments pleaded as *res judicata* but the lower Appellate Court has reversed that decision holding that both these decisions operated as *res judicata*. This question now comes before us for decision.

With regard to the judgment and decree of the District Judge of Madura, the lower Appellate Court is clearly in error. The ground of his decision is to be found in the concluding words of paragraph 7:

"I have no doubt that the learned Judge referred to Original Suits Nos. 288 and 289 and not to Appeal Suits Nos. 288 and 289 when he passed his judgment."

An examination of the judgment clearly shows that this is an error. We are not concerned with what the intention of the

District Judge was but with the judgment and the decree that he passed. He says in paragraph 12:

"I also find that except in Appeal Suits Nos. 288 and 289 no attempt was made to prove any special right to exemption."

In paragraph 13 he says:

"It is right to mention here that only Nos. 87, 97 and 111 were presented in time, and I only consented to admit the other appeals in order, etc."

Paragraph 14:

"The result is that I dismiss Nos. 87, 97 and 111 with costs and the other appeals except Nos. 288 and 289 without costs."

Paragraph 15:

"Nos. 288 and 289 require special notice. I shall reverse the decrees in those cases."

Exhibits II and III are the suit registers in Original Suits Nos. 288 and 289 of 1879, which decrees the lower Appellate Court has found were reversed. The register shows that both of these appeals were confirmed. It is therefore clear beyond doubt that Appeal Suits Nos. 288 and 289 were the appeals, the decrees in which were reversed, and these appeals were by Ramabhadra Nageswara Iyer and Meerakanni Peer Mahomed, who are not shown to have had any connexion whatsoever with the temple.

Mr. T. Rangachari has practically abandoned the appellate Court's view, but he relies on the fact that Ramaswami Iyer, Receiver of the Rameswaram Devastanam, was the defendant in Original Suits Nos. 288 and 289 and seeks to use the general words as to topes of the pagoda as being *res judicata*. It is of course impossible to found a plea of *res judicata* against the decree in the suit; and as the appeals of the temple trustee were dismissed, we cannot go behind that decision. This plea of *res judicata* by virtue of the judgment of the District Judge therefore fails.

[His Lordship next considered the question whether the findings of an arbitrator upon a reference to arbitration in a pending suit, which were accepted by the Court, but were not incorporated in the Court's judgment were *res judicata* in a subsequent suit, and proceeded:]

In the result I am of opinion that the plea of *res judicata* by virtue of section 11, Civil Procedure Code, is bad. It might be

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that in the circumstances of the case the award and the judgment might operate as a judgment by consent and estop the parties to the award and judgment, but no such question has been raised in this case or urged before us.

The next question is whether, even if the judgment could operate as *res judicata*, the plaintiff here would be bound by the judgment and decree in the arbitration. The plaintiff in that suit was a lessee for 20 years; and it is not contended before us that the decision in that case binds the plaintiff as lessor. What is contended is that as this suit seeks to recover the *theerva* for the years which were covered by the original lease to the lessee in the former suit, the lessor is bound by the decision, he being in the possession of the estate by virtue of a surrender from the lessee. This point was not raised before or considered by the lower Appellate Court. Mr. T. Rangachari contends that the right established by that decision to freedom from the *theerva* enures for the whole term of the lease, although the lease has been surrendered; and he claims that he is entitled to it by analogy with the estoppel provided for in section 41 of the Transfer of Property Act. He was doubtful whether he could put this claim as high as one arising under the words of section 11 which are:

"or between the parties under whom they or any of them claim litigating under the same title."

In my opinion his contention clearly cannot be supported, for the plaintiff is not litigating under the same title, in that he claims as owner, whereas the plaintiff in the previous suit claimed as a lessee under him.

Mr. T. Rangachari suggests however that a surrenderee is in the same position as an assignee; and he relies on the language of the Calcutta High Court in *Raghunath Singh v. Mr. William Cox*(1). The question there was as to the effect of surrender by a ryot on the rights of a mortgagee. The Court quoted with approval the language of CHANNELL, J., in *Walter v. Yalden*(2). In that case, it was decided that where a trespasser had acquired against a lessee a title under the Statute of Limitations the lessee could not surrender the lease and let in

(1) (1914) 19 C.W.N., 268.

(2) [1902] 2 K.B., 304.

the landlord until the expiration of the term for which the lease was granted. The actual decision does not assist him, because, in the English law as well as by the Limitation Act, title is acquired by adverse possession, and such title is for all purposes as good as a conveyance. But he relies on the words used by CHANNELL, J.:

"The law is that a lessee can only give title to his lessor by a surrender to the same extent that he could give it to another person by his assignment."

I do not think that these words used by the learned Judge are to be construed strictly as laying down that a lessor acquires the title of the lessee by surrender. Another case relied on by the learned Vakil was *Seshappaya v. Venkataramana Upadya*(1). That decided that a mulgeni tenant will not be bound by a decision against his lessor, as his interest is not subordinate to that of the lessor, the tenure being a permanent heritable tenure not created subsequent to the decision against his landlord. I do not see how this case helps the defendant.

Mr. T. Rangachari also relies on the language of the Bench in *Suppa Bhattar v. Suppu Sokkaya Bhattar*(2), where the learned Judges speak of "a decree of a Court of competent jurisdiction forming a link in the chain of a party's title." I do not think that this case is of any assistance, for the word "title" used in that case has no possible reference to a decision on the mutual rights of the lessor and lessee under the terms of their contract. Mr. T. Rangachari relied on a phrase used in Foa's *Landlord and Tenant* on page 624, "Title by surrender," but I cannot treat this language as any authority on the point. In Woodfall's *Landlord and Tenant* surrender is treated as one of the modes of the termination of the tenancy, and the same principle is applied in section 111 of the Transfer of Property Act. Sub-section (e) of that section provides that a lease of immoveable property determines by express surrender, that is to say, in case the lessee yields up his interest under the lease to the lessor by mutual agreement between them; and section 115 provides for the effect of surrender on underleases, but there are no further statutory provisions. The

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(1) (1910) I.L.R., 33 Mad., 459.

(2) (1915) 29 M.L.J., 558.

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fundamental error in the contention of the learned Vakil is the assumption that *res judicata* operates on all substantive rights. The result of a decision between parties is at the highest to raise an estoppel between the parties bound by the previous judgment. It in no way affects title nor can it operate in the same manner as a covenant.

It was finally argued that the defendant by the surrender has been deprived of the benefit of the decision. That may be so, but the question of rights between lessor and lessee is not concluded by the failure of the plea of *res judicata*, and further if an under-lessee desires to bind the ultimate landlord by a decision between himself and his lessor it is perfectly open to him to ask the Court to make the landlord a party, in which case the landlord will be bound by the judgment entirely apart from any question of surrender. I am, therefore, clear that neither under section 11, Civil Procedure Code, as pleaded, nor under the general principle applicable to awards of arbitrators operating as estoppel by consent does this award or judgment bind the plaintiff in the present suit.

In the result the judgment of the lower Appellate Court must be set aside except as to road-cess and railway-cess and interest thereon, and the case remanded to be disposed of on the other issues framed in the suit.

KRISHNAN J. KRISHNAN, J.—The only question arising in this case is one of *res judicata*. My learned brother has set out the circumstances in which it arises and I need not repeat them. The issue alleged to be *res judicata* is whether the plaintiff the Raja of Rāmnād is entitled to levy a tax on trees standing on the defendant's Devastanam lands in the Pamban village in Rameswaram or not. It is contended by the defendant that the Raja's claim to such tax is barred (1) by the decision in Original Suits Nos. 288 and 289 of 1879 and (2) by the decision in Original Suits Nos. 571 and 572 of 1903, all on the file of the District Munsif of Paramakudi.

As regards the suits of 1879 the judgment of the Munsif is not filed, but reliance is placed upon Exhibit IV, the judgment of the District Judge on appeal from a batch of cases including Original Suits Nos. 288 and 289. It no doubt appears from

Exhibit IV that the District Judge found(1) that the Raja had the right to levy a tax on trees on the Pamban island generally, but (2) that he had no right to do so as regards trees in Devadayam lands or in topes of the pagoda in this island, as they were exempt from such tax. It is the second finding that the defendant wishes to take advantage of in the present case.

Now it is only in Original Suits Nos. 288 and 289 and in Appeal Suits Nos. 243 and 244 therefrom that the Devastanam was a party and not in any of the other cases. The other cases, including Appeal Suits Nos. 288 and 289, were all between the Raja and third parties. On the face of Exhibit IV the second finding was given effect to only in Appeal Suits Nos. 288 and 289, all the other appeals being dismissed on the first finding, and the decrees of the Munsif in them, giving the Raja the tree-tax claimed, being confirmed. On these facts, it is clear that the defendant's plea of *res judicata* must fail under section 11, Civil Procedure Code, as the finding relied on is not proved to have been arrived at in a matter in issue in a suit between the Raja and the Devastanam. This is so even if we accept Mr. T. Rangachari's argument that because a common judgment was delivered by the District Judge in all the appeals both the findings should be taken to have been embodied in all of them, including Appeal Suits Nos. 243 and 244, for the decrees in them were for payment of tree-tax in spite of the second finding and such an incidental finding unnecessary for the decree cannot be held to make the matter *res judicata* against the successful plaintiff.

To get over this difficulty it was suggested for the Devastanam that when the District Judge reversed the decrees in Appeal Suits Nos. 288 and 289 he really meant to reverse the decrees in Original Suits Nos. 288 and 289 and to dismiss those suits, and that there is a clerical mistake in his judgment and that we should take it that the second finding was really arrived at and given effect to in those suits, and not in the appeals of the same number. This is a very plausible suggestion and it was accepted by the learned Sub-Judge, but I am unable to accept it.

The grounds relied on in support of it are (1) the sameness of the Original Suits Nos. 288 and 289 and of Appeal Suits Nos. 288 and 289 and the consequent ease with which one may

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have been mistaken for the other, (2) the improbability of any one but the Devastanam being concerned with pagoda topes, and (3) the opinion of the arbitrator Mr. Madhu Ayyar in his award in 1903 that such a mistake was made. The arbitrator's opinion is clearly not evidence at all. The other two considerations are after all mere speculations. On the other hand the extracts from the appeal register filed in appeal Exhibits II and III are independent evidence which show clearly that the Munsif's decrees in Original Suits Nos. 288 and 289 were in fact both confirmed on appeal and that there is no mistake on the point in the judgment Exhibit IV. I therefore agree with my learned brother that the plea of *res judicata* based on Exhibit IV is not established.

[His Lordship next considered the question whether the findings of an arbitrator not incorporated in the judgment of the Court were *res judicata* and came to the conclusion that they were.]

The question, however, remains whether that finding binds the present plaintiff, the Raja. The plaintiffs in Original Suits Nos. 571 and 572 of 1903 were the lessees of the Raja, and not the Raja himself, and it is not contended by Mr. T. Ranga Achariyar that a finding against lessees will be binding on the lessor even if the lessees had put forward in the trial the lessor's title and bona fide endeavoured to support it. In fact a lessor as such cannot be held to be a person claiming under the lessees within the meaning of section 11, Civil Procedure Code. But, Mr. T. Rangachari argues that we have here a special case inasmuch as the Raja got his right to sue for the plaint rent by reason of the surrender of their term by the lessees and though he did not derive his title from them, he contends that the Raja should be treated in his capacity of surrenderee as an assignee of the lessees and as such a person claiming under them. This is a difficult question which seems to be *res integra* and which has therefore to be decided on general principles. After careful consideration I think with my learned brother that the contention is untenable. The effect of a surrender of his lease by the lessee is to determine the tenancy and to let in the landlord's rights. This is so stated in section 111 of the Transfer of Property Act, and as regards English Law

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in Woodfall's "Landlord and Tenant." In a surrender there is no transfer of rights from one to the other but only an extinguishment of the lessee's rights. The under-lessees will no doubt not be prejudiced by their lessor's surrender as laid down in section 115, Transfer of Property Act, but that is because to the extent to which the lessee has parted with his rights in the property to his under-lessees his surrender could not take effect. It is this, I think, that is meant by the observation of CHANNELL, J., in *Walter v. Yalden*(1), when his Lordship observed that

"the law is that a lessee can only give title to his lessor by a surrender to the same extent that he could give it to another person by his assignment."

This observation was made with reference to a title created by prescription against the lessee, and cannot be extended to apply to a case of *res judicata* against him, which in my opinion creates no title nor interest in property. We cannot hold that the rule of *res judicata* creates any right or interest in the property though it may indirectly affect the rights of persons against whom it is effective. The rule is a rule of personal estoppel and does not attach itself to property. A lessee may defeat by surrender the advantage of *res judicata* which another has against him; there is nothing to prevent him from doing so, so far as I can see. If the third party had wanted to bind the landlord by the decision he should have taken care to have had him also made a party to the suit. I therefore agree that no estoppel arises from the decision in Original Suit Nos. 571 and 572 of 1903 against the Raja.

Before concluding, I should like to observe that I do not share my learned brother's views on the nature and scope of section 11, Civil Procedure Code. I do not think that the section deals with any question of jurisdiction, as it does not affect the cognisability of suits but only their trial or the trial of issues in them. Though worded as if the Court is prevented from doing certain things we must gather the nature of this rule from the section as a whole, when it will be clear that it is in reality a rule of personal estoppel, of the nature of an estoppel by record in English law. Though the question is not

(1) [1902] 2 K.B., 304.

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important here it may become important, for example, in a case under section 115, Civil Procedure Code, and I wish to guard myself against being misunderstood.

The plea of res judicata failing in toto, I agree to the order proposed by my learned brother.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1920,
October 14.

THE OFFICIAL RECEIVER, TINNEVELLY (PETITIONER),
APPELLANT,

v.

SANKARALINGA MUDALIAR AND THREE OTHERS
(RESPONDENTS), RESPONDENTS.*

Provincial Insolvency Act (III of 1907), ss. 3, 16, 18, 36 and 37—Order of adjudication—Appointment of Receiver by District Court—Sale in execution of money decree held by District Munsif's Court, subsequent to appointment of Receiver—Application by Receiver to the District Court for cancellation of sale and for delivery of possession—Application, whether competent—Jurisdiction of District Court.

Where after the appointment of a Receiver for the estate of an insolvent had been made by a District Court, some of the properties of the insolvent were sold in auction by a District Munsif's Court in execution of a decree for money passed by the latter Court prior to the order of adjudication.

Held, it was competent to the Receiver to make an application to the District Court for annulment of the sale and for delivery of possession of the properties from the purchaser, under section 18, clause 3 of the Provincial Insolvency Act (III of 1907).

APPEAL against the order of E. PAKENHAM WALSH, Acting District Judge of Tinnevely, in I.A. No. 461 of 1918 and Civil Miscellaneous Petition No. 566 of 1918 in I.P. No. 5 of 1917.

* Civil Miscellaneous Appeal No. 127 of 1919.

The material facts are set out in the Judgments

V. C. Sessa Achariyar, Ohidambaram Pillai and Marthandam

Pillai for appellants.

S. Ramaswami Ayyar for respondents.

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OLDFIELD, J.—The lower Court's order against the Official Receiver, in Appeal against order No. 128 of 1919, was passed firstly on the short ground that sections 16, 34, 35 of the Provincial Insolvency Act (III of 1907) specified in the heading of the petition are not "petitioning sections," the meaning being apparently that the proper remedy was not by petition under that Act, but by suit or otherwise under the direct provisions of the Code of Civil Procedure and the appeal is resisted here firstly on that account.

The facts are that, on 23rd September 1914, first to third respondents obtained a compromise decree, Exhibit 1, in the Court of the District Munsif of Ambasamudram against four persons, who were adjudicated insolvents in the lower Court on 23rd March 1917. On 28th June 1918 certain properties of the insolvents were sold in execution of this decree by the District Munsif and purchased by the fourth respondent, after one of the insolvents and the Official Receiver had in circumstances not yet investigated taken objection to the sale proceedings. In the present proceedings the Official Receiver has moved the lower Court, as the Court dealing with the insolvency, to set aside the sale or in the alternative to direct a refund by first to third respondents of their realization in execution. It is not clear whether delivery to fourth respondent has taken place. But there is a further prayer for such other relief as the circumstances may demand, which would cover, if necessary, an order for the return of the property. On these facts, the contentions, as advanced in paragraph 16 of first respondent's counter-petition and in argument before us, are that only the Court which held the sale, can set it aside; that the Insolvency Court has no right to interfere with the proceedings in execution elsewhere; and that the Official Receiver should, as the lower Court held, proceed by suit or otherwise under the Code.

The general question thus raised is whether the Court dealing with an insolvency under the Provincial Insolvency Act has

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either an exclusive jurisdiction or one concurrent with that of the ordinary Courts to deal, for the purpose of the administration of the insolvents' estate, with claims against persons holding it adversely to him, whether they have arisen from purchase at Court sale or otherwise. Before dealing with the provisions of the Act, I observe that such an exclusive jurisdiction is well recognized elsewhere in insolvency systems, which are of longer standing than the Provincial Act, and which are usually referred to in its construction. Reference may be made on this point to the decisions collected under section 105 of the English Bankruptcy Act, 1914, at page 375, William's Bankruptcy Practice, 11th Edition, and to section 7 of the Presidency Insolvency Act (III of 1909) of which the material portion was reproduced from the English Act in force at its date; and it is significant that, although there is no reason for presuming any intention to change the law, the legislature has included a similar provision, as section 4 in the Provincial Insolvency Act (V of 1920), which is now in force. The mention above of concurrent jurisdiction is based solely on *Naginal Chunilal v. The Official Assignee*(1) a case under the Presidency Act, which does not appear to have been followed in any other High Court, which makes no reference to section 8 (2) (o) as affording a remedy in the Insolvency Court and deals with section 7 with very little regard to English authority. The decision in these circumstances is of doubtful authority, and in any case, as it recognizes only a concurrent jurisdiction, it in no degree assists respondents.

To turn to the Provincial Act, it is material first that, as appears from its preamble, its comprehensive character, and the repeal by it of the existing Insolvency Law, sections 341 and 344 to 360-A of the Code in force at its date, it is a special law and its provisions are, except as specially provided under section 4 of the Code of Civil Procedure (Act V of 1908) in force at the date of these proceedings, unaffected by anything therein. Of the provisions in the Act relating to property held actually or colourably against insolvents, sections 36 and 37 merely

prescribe a rule of evidence applicable to two classes of alienations, those completed within particular periods before the adjudication, not, like the sale now in question, after it, and it is material only that they assume and do not confer the power of cancellation, which they imply, but which must be looked for in another place. There are next, sections 34 (1) and 35, the only provisions relating to execution proceedings, the former to assets realized before the insolvency began and still remaining in the executing Court, the latter to cases in which an adjudication has taken place after the issue of execution and property is under some description of attachment. To the application of section 35 (1) to what happened in the present case it will be necessary to return, although it may at once be pointed out that in *Kashi Nath v. Kanhaiya Lal Sharma*(1) proceedings for the recovery of the property subsequently to the sale eventually held were taken by the Receiver in the Insolvency Court without objection to its jurisdiction. The material point at present, however, is that these are the only two provisions in the Act for the intervention of a Court other than the Insolvency Court in the administration of the insolvent's estate; that they deal with the only cases, which have been suggested, in which conflict between the Insolvency Court and another would be inevitable in spite of the former's exclusive jurisdiction; and that the intervention authorized by them consists in no adjudication on the interests in conflict, but is limited to delivery of the assets of the property under the executing Court's control to the Receiver. These sections, the only ones in which an executing Court is referred to, therefore, impose no limitation on the provisions of sections 16 and 18 (1) and (3) which read together confer power on the Insolvency Court to reduce the insolvent's property, which has vested in the Receiver under the former, to his possession. Two observations may be made, that section 16 vests in the Court, and therefore section 18 (1) in the Receiver appointed by it all the property with exceptions not at present material, and that section 18 (3) is subject to the proviso restricting the Court's power of removal

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(1) (1915) I.L.R., 37 All., 452.

(1) (1911) I.L.R., 35 Bom., 478.

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from property of persons whom the insolvent has a present right to remove.

These observations are material in connexion with the suggestion involved in respondents' argument that special considerations apply to titles acquired by third parties at Court sales, and to the first set of authorities relied on by them. It is not necessary for the present purpose to deal with cases in which a Court sale is attacked by the Receiver as collusive or fraudulent, since here he makes no such allegation, but contends only that the sale of property vested in him before its date is a nullity. It has been pointed out that the only provisions of the Act relating to Court sales do not deal with the method available to the Receiver for avoiding them, and there is no provision which places titles acquired at them on any special footing. When, therefore, section 16, on which the vesting in the Receiver under section 18 (1) follows, is exhaustive, there is no ground on which property alleged to have been transferred after adjudication by Court sale can be treated differently from property transferred at that stage in any other way.

The authorities relied on are in fact concerned rather with the application of the proviso to section 18 (3) than with any attempt to distinguish the remedies open to the Receiver with reference to the origin of the title he desires to displace. In *Nilmoni Choudhury v. Durga Charan Choudhury*(1), the Court no doubt held that section 18 (3) was not intended to authorize the removal of any person whom the insolvent could not himself remove without legal proceedings, and in *Maddipoti Peramma v. Gandrapu Krishnayya*(2), BAKEWELL, J., said that it was not intended to confer jurisdiction over a person against whom the insolvent had merely a right enforceable by suit, this view being explained in the former case as authorizing removal of a benamidar, "when the veil was transparent and the insolvent was in substantial beneficial possession." These judgments however do not account for a power being conferred on the Court, which would, if they are correct, be useless, if it were not coercive; or for the present well-established exercise of such a power in cases to which the

(1) (1918) 22 C.W.N., 704.

(2) (1918) 8 L.W., 186.

mere rules of evidence in sections 36 and 37 are applied. In the second case cited, KRISHNAN, J., held that the Court had power under the section to deal with adverse claims by third parties; and that is not inconsistent with *Jagrup Sahu v. Ramnand Sahu*(1), and is supported fully by *Bansidhar v. Kharagjit*(2), in which the question arose directly. The restriction in the proviso of the Court's right to disturb possession will receive full effect, if it is read with reference, not to the method by which the insolvent can regain possession of which it says nothing, but to a qualification of his right to possession, such as an outstanding lease or life estate would involve; and I would respectfully follow the opinion of KRISHNAN, J., and the Allahabad cases cited on the point.

Next, it is material that section 18 (3) empowers the Court to reduce property to the possession only of the Receiver. The existence of the power is accordingly in no way inconsistent with the cases relied on by respondents, in which other persons, in some of them claiming under him, have proceeded by suit or have been held to be entitled to proceed only in that manner. The effect of the first class of cases, for example *Raghunath Das v. Sundar Das Khetri*(3), is in any case only negative. In the second class, it is significant that the power of the Insolvency Court relied on and regarded as inapplicable was not that conferred by section 18 (3) at all, but the general power exercised by it in its ordinary civil jurisdiction as extended to proceedings in insolvency by section 47 (1) and such extension was held unauthorized, because the section allows it only in proceedings under the Act and not in proceedings for which the Code, and not the Act, affords the only warrant. That was statedly the ground of decision in *Maddipoti Peramma v. Gandrapu Krishnayya*(4), already referred to. See also *Bashyam Reddi v. Somasundaram Chetti*(5), and *Cheda Lal v. Lachman Prasad*(6). In *Narasimhaya v. Veeraraghavulu*(7), one statement made in connexion with section 47 is relied on by respondents:

"It would be going too far to say that a judge in insolvency in

(1) (1917) I.L.R., 39 All., 683. (2) (1915) I.L.R., 37 All., 65.
(3) (1915) I.L.R., 42 Cal., 72 (P.C.). (4) (1918) 8 L.W., 186.
(5) (1916) 3 L.W., 251. (6) (1917) I.L.R., 39 All., 267.
(7) (1918) I.L.R., 41 Mad., 440.

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the mufassal has power by a summary proceeding to decide questions of title to property claimed by third persons."

But this does not support their argument, since the proceeding consisted only in an attempt to utilize the obstruction procedure under the Code in a dispute between a third party and the Receiver's transferee, which the Act in no way permitted. Only one case has been cited by respondents, to which the Receiver was a party and in which section 18 (3) could legitimately have been relied on: *Anantharama Iyer v. Kovilamma* (1). In it no doubt the proceedings were taken under Order 21, rule 90, and regarded as under section 47 of the Code of Civil Procedure. But the case was dealt with in revision; it is not clear whether the insolvency and executing Courts were distinct; and no objection to the jurisdiction of the latter or the procedure applied was considered, sections 84 and 85 of the Provincial Insolvency Act being in fact referred to. The decision, therefore, does not assist respondents or affect the conclusion that, when the receiver is the claimant and the property claimed has vested in him, his claim should be made under section 18 (3) in the Insolvency Court.

The Lower Court therefore erred in refusing to enquire into the Receiver's petition. The other point decided in its judgment was that Exhibit I, the compromise decree under execution, was not simply for money, but secured the amount due on particular properties. In terms Exhibit I only provides that the insolvents shall pay an amount agreed on by a specified date, and that in case of their default it shall be recoverable by sale of properties attached before judgment, the attachment before judgment to continue in force until payment is made. The Lower Court's decision purports to be based only on Exhibit I and that document contains none of the characteristics of a decree for a charge and adds nothing to the rights of the first to third respondents as holders of a money decree, in execution of which an attachment has been made. The decision under appeal, however, was based mainly on the conclusion against the procedure adopted by appellant. In setting that decision aside we therefore direct a rehearing in respect of the character of the decree under execution with reference to any considerations other than those referred to, which may be relied on.

(1) (1916) 3 L.W., 504.

At the rehearing the Lower Court will also consider any argument based on the application made by one of the insolvents to the executing Court, in which appellant participated. As the facts are not in evidence, it is not clear whether his participation was by way of an application under section 35 of the Provincial Insolvency Act or otherwise. In any event the effect of the appellant's acquiescence in the adverse order actually passed by the Subordinate Judge on appeal from the order of the executing Court must be considered with reference to section 34 (3) and the good faith of the fourth respondent's purchase.

The Appeal is allowed and the petition remanded for re-admission and rehearing in the light of the foregoing. Costs to date in the Lower Court and here will be costs in the cause and will be provided for in the order to be passed.

SESHAGIRI AYYAR, J.—I agree. The respondents obtained a money decree against the insolvents and some others on 23rd October 1914. On 31st January 1917 an application for adjudication was made. Notice was given on 19th February 1917 to the respondents, and the order of adjudication was made on 28th March 1917. In June, the respondent applied for sale of the insolvents' property. An application to stop the sale was then made. Apparently, the Official Receiver was not a party to the application although he seems to have supported the insolvents' application by a written statement. It also appears that an application to make the Receiver a party was rejected in April 1918. On 6th July 1917 the District Munsif stopped the sale. On appeal the Subordinate Judge reversed that order. There can be no doubt that this order was wrong and it is to this wrong view of the Subordinate Judge that all the subsequent complications are attributable. The sale was made on 28th June 1918. An application to set aside the sale was made by some of the scheduled creditors. Apparently it was not granted. The present application was made on 23rd September 1918 to the District Court to annul the sale. It may be that when the case goes back the petition will have to be amended by asking for possession of the property as well. The District Judge has held that the Official Receiver had no *locus standi* to impeach the sale by means of a petition to the insolvency Court. Hence this Appeal.

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I shall state my conclusions very shortly. Under section 16 of the Provincial Insolvency Act the property vests in the Official Receiver as soon as an order for adjudication is made. Any dealing with that property by any Court without notice to him will be *ultra vires*. *Anantharama Iyer v. Kovilamma*(1), and *Devaraja Aiyangar v. Tirumalasami Naidu*(2), support this view. If the sale held behind the back of the Official Receiver is a nullity, the further question is what is the remedy he is entitled to. Mr. S. Ramaswami Ayyar contended that he must bring a suit in the ordinary Courts to have his rights established. He mainly relied upon the absence of a provision in the Provincial Insolvency Act like section 7 of the Indian Insolvency Act and the corresponding provisions in the English Bankruptcy Act. I do not think this contention is well founded. There was a conflict of decisions in the various High Courts as to whether even without a provision similar to section 7 of the Indian Insolvency Act, the Provincial Insolvency Courts had no jurisdiction to direct delivery of property to the Receiver when it is moved by means of a petition. Section 4 of the present Act has been so altered as to confer such a power. The amendment should not be regarded as if for the first time a new power has been conferred. I am of opinion that section 4 declares what has been the law all through. Apart from this, I think that sections 16 and 18 read together do invest the Insolvency Court with jurisdiction to direct that property in the hands of a third party be delivered over to the insolvent. Mr. S. Ramaswami Ayyar relied upon the analogy of Order XL, Code of Civil Procedure, relating to Receivers. I am prepared to accept the analogy but I do not think that any of the cases quoted by him hold that where a sale is a nullity, the Receiver is not entitled to move the Court for possession being given to him of the property. Reliance was placed upon the express provision in section 37 of the Act for annulling sales made in anticipation of insolvency. It was necessary to give such an express power to set aside a conveyance which *prima facie* vests the property in a third party, but where the property vests in the Official Receiver the legislature apparently did not consider it

(1) (1916) 3 L.W., 504.

(2) (1916) 32 I.C., 489.

necessary that a special provision should be made that his rights should be dealt with in a particular manner. The real question is whether the language of section 18 (3) is not comprehensive enough to confer jurisdiction upon a Court of Insolvency to direct that possession be given to the Receiver. It clearly enacts that the Court may remove the person in whose possession or custody any such property is, from the possession or custody thereof. This implies that the property so removed can be put in possession of the Receiver. The learned vakil for the respondent relied upon the proviso which lays down that the Insolvent himself must have a present right in order that the Official Receiver may exercise the right. The mere fact that there has been a Court sale is not a ground for holding that the insolvent has no present right to the property. The proviso refers to cases where owing to the act of the insolvent the property is substantially on a lease for a particular period, or is under a usufructuary mortgage, or the like. If I am right in the view that the Court sale conferred no right in the property to the purchaser when it was made behind the back of the Official Receiver, it follows that the insolvent as well as his representative, the Official Receiver, has a present right to the possession of the property. The decision in *Nilmoni Choudhury v. Durga Charan Choudhury*(1) dealt with the case of a benamidar. It was held by the learned Judges that an apparent title in a third party cannot be summarily dealt with in the Insolvency Court. That decision does not affect the present case and I therefore do not discuss it further. On the other hand the decisions quoted by Mr. K. V. Sessa Ayyangar, namely, *Raghunath Das v. Sundar Das Khetri*(2), *Anup Kumar v. Kesho Das*,(3) and *Madhu Sudan Pal v. Parbati Sundari Dasya*(4), support his contention.

I therefore agree in holding that the order of the District Judge in Civil Miscellaneous Petition No. 566 of 1918 must be reversed. The question as to whether the Receiver is estopped, and other defences that may be open to the respondents, will have to be considered at the trial. I agree with the order as to costs.

K.R.

(1) (1918) 22 C.W.N., 704.
(3) (1917) I.L.R., 89 All., 547.

(2) (1915) I.L.R., 42 Cal., 72 (P.O.).
(4) (1916) 35 I.C., 643.

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APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice
Sadasiva Ayyar.

1920,
February 8
and 9 and
October 15.

THE MIDNAPORE ZEMINDARY COMPANY, LTD., THROUGH
ITS AUTHORIZED MANAGER P. V. SUBRAMANIA AIYAR
(DEFENDANT), APPELLANT,

v.

MUTHAPPUDAYAN, MINOR, THROUGH HIS MOTHER AND
NEXT FRIEND MUTHAYEE (PLAINTIFF), RESPONDENT.*

*Estates Land Act (Madras), I of 1908, Sec. 146—Second crop of paddy,
raised by ryot with landlord's water—Landlord's right to extra rent—
Usage or contract disentitling landlord to extra rent—Proof of—Burden of
proof on tenant—Heir of registered pattadar—Right to be recognized as ryot—
Defaulter under the Act, meaning of—Mere receipt of rent from a person,
whether landlord bound to accept as ryot.*

The landlord is *prima facie* entitled to claim extra rent for second crop of paddy raised, with the landlord's water, by the tenant on his wet holding, in the absence of proof of an established usage or an express or implied contract disentitling the landlord to the same, the burden of proving such usage or contract being on the tenant.

The landlord is bound to recognize the heir of the registered pattadar as the ryot under the Madras Estates Land Act in the place of the deceased pattadar; and, if a suit under the Act is instituted by a person claiming as heir to be recognized as the ryot, the question whether he is the heir or not must be determined by the Court, and if the heirship is established or admitted, the suit must be held to be competent.

Mere receipt by the landlord of the rent due upon the holding from any person, cannot bind him to recognize the latter as the ryot.

"Defaulter," in the *Estates Land Act*, denotes only the man who is the registered pattadar or his heir or the person whom the landholder has become bound to recognize as the ryot under section 146 of the Act.

SECOND Appeal against the decrees of F. A. COLERIDGE, District Judge of Madura, in Appeal Suits Nos. 145, etc., of 1918, preferred against the decrees of V. RAMASWAMI AYYAR, Special Deputy Collector of Madura, in Summary Suits Nos. 4, etc., of 1917.

* Second Appeal No. 514 of 1919.

The material facts are set out in the judgment.

T. R. Venkatarama Sastri and B. Sita Rama Rao for appellant.

Hon'ble M. D. Devadoss and K. U. Luke for respondent.

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SADASIVA AYYAR, J.—One question is common to all these cases, namely, whether the defendant company, the proprietor of the Kannivadi Zamindari, is entitled in the pattas issued to its tenants to insert a term which makes the tenants liable to pay what is called in the pattas "penal assessment" for a second crop raised on wet lands with the help of water from an irrigation source belonging to the Zamindari. I may at once state that such a vaguely worded obligation to charge what is called "penal assessment" without mentioning the rate of assessment charged ought not to be allowed to be inserted in the patta. But I take it that the landlord charged one half of the usual wet rate of assessment for water taken for second crop, and attached the crops for the recovery of that amount along with the usual amount charged as wet rate for a single crop.

The question is whether the company is entitled to so charge for the second crop. Having regard to *Paythenatha Sastri v. Sami Pandithar* (1), *Thayammal v. Muttia* (2), and *Venkata Rao v. Vaithilinga Udayan* (3), I think the landlord is *prima facie* entitled to claim such an additional rent provided it is not against any established custom of the estate or express or implied contract between the parties. I think it follows from the principles laid down in those cases that the burden of proving that there is such an established usage or implied or express contract lies upon the tenants. There is evidence in these cases to show that there was no such established usage or express or implied contract till about fasli 1252, as I find that the Government when it was in management of the Zamindari between faslis 1226 and 1252 charged extra assessment for kodai crops in several of those faslis. Kodai crop, according to Nelson's Madura District Manual (see Glossary at the end of the book) means,

(1) (1881) I.L.R., 3 Mad., 116.

(2) (1887) I.L.R., 10 Mad., 282.

(3) (1902) 12 M.L.J., 22.

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"extra crop of rice raised either before or after the principal or kalam."

According to Winslow's dictionary Kodaibhogam (கோடையோடு) means,

"the crop grown in the hot season; the produce of cultivation in the hot season."

It is also admitted that for betel and other crops which can be raised only with the use of an extra quantity of water such excess assessment has been levied and paid all along, even after fasli 1252. The learned District Judge has approached this question of the right of the Zamindar from a wrong point of view, as he says in paragraph 8 of his judgment (in the case against which Second Appeal No. 514 of 1919 has been brought), as follows:

"As the custom of levying such a rate is not established though there is a custom to levy extra for betel, etc., I think I must hold that the landlord had not the right to enter the clause as to second crop in the patta."

Thus he throws the burden of proving a custom to levy second crop assessment on the landlord though in the previous paragraph the Judge admits that such a levy is a reasonable and proper demand on the ryots. No doubt, if the defendant proves that to the knowledge of the landlord he has been raising second crops on his wet land for 50 or 60 years and has not been charged additional assessment, it may be some evidence that a usage has sprung up afterwards, after about fasli 1252, by which such extra assessment was not to be levied for second crop though it may be levied for betel, etc., crops. Even then it would not be evidence of a very strong character as it is negative evidence. But still the Court might be entitled to consider it in arriving at its conclusion on the question whether such a custom not to charge has been established. But, as I said, the District Judge has not considered the evidence in that aspect. He has assumed that it was for the defendant to establish that a custom to charge second crop assessment for paddy raised as a second crop prevailed. I would, therefore, remand all these cases for a finding on the question whether by usage or implied contract, the landlord is not entitled to charge extra assessment on a second crop of paddy raised with the Zamindar's water by the tenant on the tenant's wet holding.

Then there are nine suits (out of which Second Appeal Nos. 817 to 825 have arisen) which were dismissed by the learned District Judge on the ground that the plaintiffs in those suits were not registered pattadars and have not established that they are the heirs of the registered pattadars.

As regards one of them, that is, the suit out of which Second Appeal No. 817 of 1919 has arisen, the land holder states in the first paragraph of the written statement that the first plaintiff's father was the person who took water from the defendant's irrigation source for his second wet or kodai crop. The first paragraph seems to assume that the first plaintiff's father was the registered pattadar. Though the landlord under section 146 of the Madras Estates Land Act is not bound to recognize a transfer by the act of the ryot or even in execution of a Civil Court's decree or by the act of a public officer exercising statutory powers of sale, unless both the transferor and transferee give notice to him in writing or the decree or order of the Civil Court establishing the transfer or the sale certificate of a public officer evidencing that transfer is produced, so far as transfer to the heir from the registered pattadar by operation of law is concerned, there is nothing in the Act which absolves the Zamindar from the duty of recognizing such a transferee as the ryot who holds the land under the landlord in succession to the deceased ryot.

If, therefore, any tenant plaintiff in any of these suits contends that he is the heir of the registered pattadar the question whether he is such an heir ought to be gone into by the Lower Appellate Court, and if that is established or admitted, the suit must be held to be competent, brought by a ryot entitled to be recognized as such for the purpose of proceedings taken under the Estates Land Act.

It has been contended by Mr. Devadoss that the landlord has received rent in previous faslis from these plaintiffs. The mere receipt of rent due upon the holding from any person cannot bind the landholder to recognize that person as the "ryot" holding under him, as that person might be merely the agent or servant of the ryot. Unless the person paying the rent has been recognized by the landlord as ryot by the acceptance of a muchilika from him, he is not (though he claims to be a

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transferee from the registered ryot) entitled to bring a suit under section 112 of the Madras Estates Land Act for setting aside attachments as he cannot be a "defaulter" under the Act, that is, a person who owes "rent" and who has made "default." A clear distinction is made in sections 101, 128, 129 and 131, between the person who is strictly the "defaulter" and those who, without being defaulters may, as mere "cultivators" or even "owners" or "sub-tenants" having interests in the holding, be entitled to pay the money due by the defaulter so as to protect their interests. On the analogy of *Subramania Chetty v. Mahalinga Swami Sivan*(1) (though it was decided with reference to the cases of defaults of Government revenue under Madras Act II of 1864), I hold that the expression "defaulter" in the Estates Land Act denotes only the man who is the registered pattadar, or the heir of the registered pattadar, or the person whom the landholder has become bound to recognize by reason of the provisions of section 146. With these observations, these cases also are remanded for findings on the following point: Whether the plaintiffs in these suits are registered pattadars or heirs of the registered pattadars or persons whom the landholder is bound under section 146 to recognize as ryots of the holdings in question.

Further evidence may be adduced on both sides on the points on which the findings are required.

SPENCER, J.

SPENCER, J.—I agree.

[In compliance with this Order the District Judge of Madura submitted findings that no usage or implied contract was proved which disentitled the landlord from claiming extra rent for second crop of paddy raised with the landlord's water; and that the tenants in some cases were proved to be either registered pattadars or their heirs, and in other cases there was no proof that the tenants were registered pattadars or their heirs or persons whom the landholder was bound under section 146 of the Act to accept as tenants.]

These Second Appeals came on for final hearing before WALLIS, C.J., and SPENCER, J., who delivered the following JUDGMENT:

(1) (1909) 19 M.L.J., 627.

We accept the finding and allow appeals Nos. 514 to 560 and 562 to 564 of 1919. In Second Appeals Nos. 514 to 556 of 1919, we dismiss the suits with costs, throughout, and in Second Appeals Nos. 557 to 560 and 562 to 564 of 1919, we modify the decree of the Lower Appellate Court, by restoring the clause in the original patta as to second crop.

The respondents to pay the appellants' costs.

In Second Appeals Nos. 817 to 825 of 1919, we dismiss the Second Appeals with costs. We allow a fee of Rs. 5 in each of the 59 cases.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Seshagiri Ayyar.

VENKATARAMA AIYAR (TWENTY-THIRD DEFENDANT),
APPELLANT,

v.

RAMASAMI AIYAR AND TWO OTHERS (SECOND AND THIRD
PLAINTIFFS AND TWENTY-SECOND DEFENDANT), RESPONDENTS.*

Transfer of Property Act (IV of 1882), sec. 6 (e)—Assignment of a decree passed for immoveable property and for ascertainment of mesne profits—Transferee's right to be made a party and to mesne profits.

Where the right to mesne profits has been declared by a decree, but the exact amount has been left to be ascertained at a future stage in the same suit, a transfer of such right is not invalid under section 6 (e) of the Transfer of Property Act as the transfer of a "right to sue."

APPEAL against the order of C. V. VISWANATHA SASTRI, Subordinate Judge of Kumbakonam, in E.A. No. 291 of 1918 in Original Suit No. 41 of 1909.

First plaintiff and his son, the second plaintiff, in Original Suit No. 41 of 1909 on the file of the Subordinate Judge's Court of Kumbakonam obtained a decree for partition and delivery to

* Civil Miscellaneous Appeal No. 362 of 1918.

1920,
November 1.

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them of their one-third share in the joint family properties belonging to them and to defendants Nos. 1 and 2. An enquiry into mesne profits was also ordered by the decree. The first plaintiff transferred for consideration his one-sixth share in all the moveable and immoveable properties covered by the said decree and also his right to get the mesne profits under the decree. The assignment empowered the assignee to bring himself on record as the transferee in the place of the first plaintiff. The second defendant in the suit having died his widow transferred his rights under the decree to the twenty-third defendant. On an application by the assignee of the first plaintiff to have the mesne profits ascertained and decreed to him the twenty-third defendant objected on the ground that the assignment did not entitle him to that relief. The Subordinate Judge ordered the ascertainment of mesne profits and passed a decree for the amount of mesne profits to be ascertained.

The twenty-third plaintiff preferred this Appeal.

T. M. Krishnaswami Ayyar for appellant.

T. V. Muttukrishna Ayyar for respondent.

SADASIVA
AIYAR, J.

SADASIVA AIYAR, J.—The twenty-third defendant is the appellant before us. The purchaser from the first plaintiff who was entitled to and given a decree for the one-sixth share in certain properties prayed under Order XX, rule 2, to have the mesne profits due to the petitioner by the twenty-third defendant ascertained, the decree in the suit having, as I read it, declared the first plaintiff's right to recover mesne profits from the date of suit against the twenty-third defendant and having only left the actual amount to be ascertained and awarded in a supplemental decree. I do not agree with the contention of the appellant's learned vakil that the sale-deed to the petitioner by the first plaintiff did not transfer the first plaintiff's rights under the decree, but transferred merely a right to claim mesne profits.

The only remaining contention which has to be considered is whether, when a decree declaring such a right has been passed in favour of a litigant against another litigant, such a right can be transferred lawfully and whether the transferee is entitled to have the mesne profits due to his transferor ascertained

by the ordinary procedure in the same suit in the ordinary course. Reliance is placed by the appellant's learned vakil on the decisions beginning with *Shyam Chand Koondoo v. The Land Mortgage Bank of India*(1). See also *Seetamma v. Venkataramanayya*(2), and *Muthu Hengsu v. Netravathi Naiksvi*(3), in which it has been held that a claim for mesne profits is a claim for damages in tort which falls under the heading of "mere right to sue" in section 6 (e) of the Transfer of Property Act and hence cannot be assigned. I am inclined to hold that those decisions are the result of what I consider, with the greatest respect, to be an unnecessarily close adherence to the development of the Law of Torts in English Courts. I think a suit for mesne profits (as pointed out by my learned brother during the course of the argument) partakes more of the nature of a suit for account (along with which it is enumerated in the schedule to the Provincial Small Cause Courts Act). I think also that such a suit has under ordinary circumstances some affinity to a suit for money had and received, and I see no reason why in India, where according to the Privy Council the law of champerty and maintenance as developed in England has very little application, the transfer of a right to claim mesne profits should be held invalid. I think the reasoning in *Ramiah v. Rukmani Ammal*(4), rather points to the conclusion that the transfer of such a right is not invalid. It is, however, unnecessary to express a final opinion on the question whether a claim for mesne profits which has not been declared to exist in the transferor by a decree of Court can be validly transferred or not. Where, however, such a claim has been declared by a decree, and only the exact amount recoverable has been left to be ascertained in future proceedings in the same suit, I think there can be no difficulty in holding that the transfer of such a right is valid, and I find that in *Prasanno Kumar Panja v. Ashutosh Ray*(5), and *Hari Prasad Meiser v. Kodo Marya*(6), the validity of the transfer of such a right has been upheld. Following those decisions, I would dismiss this appeal with costs.

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(1) (1888) I.L.R., 9 Cal., 695.
(3) (1920) 12 L.W., 44.
(5) (1918) 18 C.W.N., 450.

(2) (1915) I.L.R., 38 Mad., 308.
(4) (1913) 24 M.L.J., 313.
(6) (1916) 1 Pat. L.J., 427.

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SESHAGIRI AYYAR, J.—I agree. The question for decision is whether after a preliminary decree which directs enquiry into the mesne profits and after a declaration has been inserted in the final decree regarding the rights of the parties, such a decree can be assigned to a stranger to enable him to execute it against one of the parties to the decree. My learned brother has said that the technicalities of the English Law should not be imported into this country. I take a different view. My complaint is not that we too slavishly follow English Law, but that we have not kept pace with the development of that law during the last few years. I may refer to one of the recent decisions, namely, *Ellis v. Torrington*(1), where the exact import of the expression "a bare right to sue" has been well pointed out. SCRUTTON, L.J., at page 411, says thus:

"But early in the development of the law, Courts of Equity and perhaps the Courts of Common Law also took the view that where the right of action was not a bare right, but was incident or subsidiary to a right in property, an assignment of the right of action was permissible, and did not savour of champerty or maintenance."

BANKES, L.J., takes even a stronger view and says that where a right to profits is appurtenant to the right to property it can be assigned. WARINGTON, L.J., expresses himself similarly. The interpretation here given should govern Courts in India in construing section 6 of the Transfer of Property Act. Applying that principle, there can be no doubt that the right to sue for mesne profits assigned in this case is appurtenant to the right of enjoyment of the property itself and, therefore, that right was an enforceable right. Reference may also be made to one other English case, *Hambleton v. Brown*(2) where it was held that after a decree there can be an assignment of the rights litigated. Therefore, if the English Law were properly applied in this country, there can be no doubt that this case can be decided only in one way, and that is against the appellant.

As regards the cases quoted, I wish to say a word. In my opinion, while *Ramiah v. Rukmani Ammal*(3) is quite in consonance with the view taken in England, *Seetamma v. Venkata-*

ramanayya(1), as well as the decision to which I was a party, viz., *Muthu Hengsu v. Netravathi Naiksavu*(2), do not seem to have recognized the distinction between a bare right to sue and a right which became only subsidiary to the enjoyment of the property itself. I was under the impression that in the case to which I was a party there was an assignment of the mortgage right, and the question was whether after the assignment of the mortgage, by virtue of section 8 of the Transfer of Property Act, the transferee can claim mesne profits which had accrued due before the date of the transfer. If that was the question the decision will be right. But my learned brother has drawn my attention to the fact that in that case there was an actual transfer of the right to mesne profits. Apparently that fact was not brought to our notice at the hearing. If the decision to which I was a party is to be understood as laying down that even in cases of actual transfer of mesne profits as subsidiary to the enjoyment of the property the right cannot be enforced, I am not prepared to stand by it. So far as the present case is concerned, the matter seems to be very clear. Applying section 6 as strictly as possible, the present right cannot be said to be in any way a bare right to sue. The suit had been instituted and the cause of action had become merged in the decree of the Court. Consequently, it was no longer a bare right, the transfer of which is forbidden by section 6, clause (e). The view taken in *Prasanno Kumar Panja v. Ashutosh Ray*(3), and *Hari Prasad Misser v. Kodo Murya*(4), is quite consistent with the strictest enforcement of section 6 of the Transfer of Property Act, and I respectfully follow them. I agree with my learned brother in holding that the appeal should be dismissed with costs.

N.R.

(1) (1915) I.L.R., 38 Mad., 308.
(3) (1913) 18 C.W.N., 450.

(2) (1920) 12 L.W., 44.
(4) (1916) 1 Patna L.J., 427.

(1) [1920] 1 K.B., 899.

(2) [1917] 2 K.B., 98.

(3) (1913) 24 M.L.J., 313.

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APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice
Ramesam.

ASKARAM SOWKAR (DECREE-HOLDER), APPELLANT,

v.

VENKATASWAMI NAIDU AND TWO OTHERS
(JUDGMENT-DEBTORS), RESPONDENTS.*

1920,
November
25.

Limitation Act (IX of 1908), section 20—Mortgage decree against mortgagor and purchaser of the equity of redemption—Payment of interest as such by the purchaser, effect of.

A purchaser of the equity of redemption is a person liable to pay the mortgage debt within section 20 of the Limitation Act; hence, if under a mortgage decree for sale of the mortgage property, to which he is a party, though exempted from personal liability, he pays interest as such, such payment gives a fresh period of limitation for execution of the decree.

Bolding v. Lane, (1863) 1 De. G.J. and Sm., 122 and *Chinnery v. Evans*, (1864) 11 H. L. Cas., 115 at 183, followed.

APPEAL against the order of O. V. VISVANATHA SASTRI, City Civil Judge in the Madras City Civil Court, in Execution Petition No. 110 of 1920, in Original Suit No. 114 of 1916.

The suit was on a mortgage bond executed in August 1914 for the recovery of Rs. 176. Defendants Nos. 1 and 2 were the mortgagors, and the purchaser in Court auction of the equity of redemption was impleaded as the third defendant. A mortgage decree for sale as contemplated by O. XXXIV, rule 5, of the Civil Procedure Code, was passed in April 1916 for Rs. 176 with subsequent interest and costs. The decree which gave three months' time for redemption absolved the purchaser from all personal liability and reserved liberty to the mortgagee to apply against the mortgagors for any balance that might remain unpaid after the sale of the mortgaged property. The final decree in the suit was passed on 7th February 1917. The third defendant privately paid to the decree-holder Rs. 28-13-0 in August 1918, which covered the costs, Rs. 23-12-0, mentioned in the

* City Civil Court Appeal No. 18 of 1920.

decree and interest for three months from the date of the preliminary decree on Rs. 144, the unpaid balance of the mortgage amount. On 30th March 1920 the decree-holder filed this application against all the three defendants for sale of the mortgaged property. Defendants Nos. 1 and 2 were *ex-parte* and on objection by the third defendant, the City Civil Judge dismissed the application holding that it was not proved that any money was paid by the third defendant for interest as such and that even if such payment was made it would not save limitation as against the other defendants. The decree-holder preferred this Appeal.

V. C. Seshachariar, Md. Ibrahim Sahib and G. Ramakrishna Ayyar for appellant.

C. Venkatasubburamiah and S. Alasingarachari for respondents.

The Court delivered the following JUDGMENT:—
This is an Appeal from the Order of the City Civil Court Judge dismissing an application by the decree-holder for execution against the original mortgagors, defendants Nos. 1 and 2 and the third defendant who is the auction purchaser of the interest of the mortgagors. The appeal is only pressed as regards the application against the third defendant, the auction-purchaser. He undoubtedly made a payment of Rs. 28-13-0 on 28th August 1918 for which he obtained a receipt and of this sum Rs. 23-12-0 was due for costs. In order to save limitation this payment must have been made for interest as such but the learned Judge has found that it was not made for interest. No other explanation is given as to why the additional Rs. 5-1-0 was paid and that sum amounts to very nearly three months' interest, which was the amount of interest due up to the time fixed for payment by the decree, and we think that in the circumstances the natural and proper inference is that the payment was made for interest as such. If that be so, we have a payment by the auction-purchaser for interest as such. Now, according to the decisions, he is a person liable to pay within the meaning of section 20 of the Limitation Act, and this has been decided in England with reference to the identical language of the English Statute. It was decided

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in *Bolding v. Lane*(1), and this proposition was affirmed and explained by Lord WESTBURY in *Chinnery v. Evans*(2). It was held in that case that the second mortgagee was the person liable to pay the first mortgagee on the ground that he could only get the property by redeeming the first mortgagee and Lord WESTBURY says:

"What was decided in *Bolding v. Lane*(1) was this: that the words 'the person by whom the same is payable, or his agent' which are practically identical with the words of our section:

"were words of such large import and meaning that they would not only comprehend the mortgagor and his personal representatives, upon whom the contract would be personally binding, but would also include the second or the third mortgagee, by whom the principal and interest due to the first mortgagee might, with propriety, be said to be payable, inasmuch as the estate and right of the second mortgagee was subject and posterior to that of the first mortgagee, and he would be entitled to redeem the first mortgagee upon the payment of the principal and interest."

Now, these words of Lord WESTBURY exactly apply just as much to the case of the auction-purchaser of the mortgagor's interest. We thought it better to go to the fountain head of authority upon which this proposition rests though no doubt there may be abundant later cases upon which the decision might be rested.

For these reasons the Appeal must be allowed and the order set aside and execution directed with costs here and below.

N.R.

(1) (1863) 1 De. G. J. and Sm., 122. (2) (1864) 11 H.L. Cas., 116 at 135.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice
Coutts Trotter.

SUBBA AIYAR (PLAINTIFF), APPELLANT.

v.

T. S. RAMASWAMI AIYANGAR AND ANOTHER
(DEFENDANTS), RESPONDENTS.*

1920,
December 1.

Provincial Insolvency Act (III of 1907), ss. 18, 20 (a) (e) and 23—No vesting order in favour of Receiver—Order to Official Receiver to adjudicate and administer the insolvent's estate, effect of.

On an application for adjudication of insolvency the District Court passed the following order. "The petition is transferred to the Official Receiver for adjudication and for the administration of the estate." After adjudication by the Receiver no separate order vesting the insolvent's estate in the Receiver was passed by the District Court under section 18 of the Provincial Insolvency Act.

Held, that by the combined effect of section 20 (a) and (e) and section 23 of the Act, the order to administer the estate empowered the Receiver to sell the insolvent's estate.

Muthuswami Swamiar v. Sommo Kandiar, (1920) I.L.R., 43 Mad., 860, distinguished.

SECOND APPEAL against the decree of L. G. MOORE, District Judge of Madura, in Appeal Suit No. 534 of 1918, preferred against the decree of A. BHIMESWARA RAO, Acting Subordinate Judge of the Subordinate Court, Madura, in Original Suit No. 30 of 1917.

One Rangachari executed a mortgage in favour of one Ramachandra Aiyar. The mortgagee applied in 1911 to the District Court of Tinnevely to be adjudicated an insolvent; on that, the District Court passed on 3rd January 1912 the following order:

"The petition is transferred to the Official Receiver for adjudication and for the administration of the estate. Parties and pleaders directed to appear before him on 10th January 1912."

The Official Receiver passed an order of adjudication on 23rd January 1912, but no separate order was passed by the Judge, under section 18 of the Provincial Insolvency Act, vesting the property in the Official Receiver. The Official Receiver assigned

* Second Appeal No. 724 of 1920

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the mortgage bond to the plaintiff on 2nd October 1913. Plaintiff brought this suit against the mortgagor and the subsequent mortgagee, to enforce the mortgage. Both of them pleaded, inter alia, that the plaintiff acquired no valid title by the assignment, as there was no order by the District Court of Tinnevely vesting the mortgagee's estate in the Receiver. Both the lower Courts dismissed the suit on this ground relying on *Official Receiver of Trichinopoly v. Somasundaram Chettiar*(1). The plaintiff preferred this Second Appeal.

T. R. Venkatarama Sastri and *K. S. Sankara Ayyar* for appellant.

A. Krishnaswami Aiyar and *P. V. Parameswara Ayyar* for respondent.

The Court delivered the following JUDGMENT:

The appellant in this case bases his claim on an assignment from the Official Receiver of Tinnevely, dated 2nd October 1913. That assignment was made by the Official Receiver purporting to act in his capacity as Official Receiver in whom the estate of one Ramachandra Aiyar, an insolvent, vested. Ramachandra Aiyar filed his petition in 1911 and it came up before the District Judge on 3rd January 1912 when he passed the following order:

"The petition is transferred to the Official Receiver for adjudication and for the administration of the estate. Parties and pleaders directed to appear before him on 10th January 1912."

In due course, on 23rd January 1912, the Official Receiver passed an order of adjudication, but no separate order was passed by the District Judge vesting the property in the Official Receiver, in accordance with the terms of section 18 of the Provincial Insolvency Act. It is therefore contended, and has been successfully contended in the two Courts below, that as the property never vested in the Official Receiver he was unable to effect a valid transfer to the appellant. It has been suggested to us in argument that the order of 3rd January of the District Judge may be construed as an order under section 18 of the Act vesting the property in the Receiver because it is said that though he did not then adjudicate, he made an order which would have the effect, in the event of the adjudication subsequently by the Official Receiver, of vesting

(1) (1916) 30 M.L.J., 415.

the property in him. We are not prepared to say that that argument is unsound. But we think that the case can be decided on a much simpler and clearer ground.

By section 20 of the Act the Receiver is given power to sell all or any part of the property of the insolvent and by subsection (e) "to employ a pleader or other agent to take any proceedings or do any business which may be sanctioned by the Court." By section 23 "where no Receiver is appointed, the Court shall have all the rights of and may exercise all the powers conferred on a Receiver under this Act." Now, assuming that the order of 3rd January 1912 did not amount to a valid order appointing the Receiver and vesting the property in him, the result was that the powers of the Receiver remained in the hands of the Court under section 23. One of those powers was to appoint an agent under section 20 (e) to do any business which is sanctioned by the Court, which under subsection (a) comprises the sale of the property of the insolvent. Therefore, it seems to us that the order of 3rd January amounted to this at any rate, namely, the appointment of the Receiver (who is certainly not less fit than any other person whom the Court might appoint) to do the acts which the Court was empowered to do in the absence of a formal appointment of an Official Receiver *qua* Receiver under the Act. We, therefore, think that the action of the Official Receiver in selling this portion of the estate of the bankrupt to the appellant was a perfectly valid act under the order of the Court.

This Court has had occasion before, in *Muthuswami Swamiar v. Somoo Kandiar*(1), to regret the deficiency of the Act which does not provide that immediately upon adjudication the estate shall vest in the Official Receiver, and we note with regret that that omission has not been rectified in the amendment Act which has been passed. In that case, the omission led to a serious miscarriage of justice and we are glad that in this case owing to the existence of the order of 3rd January 1912 such a consequence does not necessarily follow.

The case will be remanded to the lower Court for disposal after dealing with the remaining issues in the case. Costs will abide the result. The Court fee will be refunded.

N.R.

(1) (1920) I.L.B., 43 Mad., 869.

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APPELLATE CIVIL

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

1920,
October, 22.

ELVARARTI VENKATAPPA CHARYULU AND THREE
OTHERS (PLAINTIFFS), APPELLANTS.

v.

TIRUMALA REDDI ROYAPA REDDI AND OTHERS
(DEFENDANTS), RESPONDENTS.*

Absolute Inam—Confirmation of inam to ensure for two lives by Government—Lands in occupation of tenants since 1818—Resumption of inam and grant of ryotwari patta by Government—Grant of ryotwari patta, whether affects tenants' occupancy rights.

The resumption of an absolute inam by the Government and the grant by them of a ryotwari patta do not put an end to the occupancy rights owned or acquired by the tenants in the land.

SECOND APPEAL against the decree of S. VENKATA SUBBA RAO, Additional Temporary Subordinate Judge of Guntūr, in Appeal Suit No. 152 of 1915, preferred against the decree of the District Munsif of Narasaraopet, in Original Suit No. 603 of 1913.

The material facts are set out in the judgment.

P. Narayanamurti and B. Somayya for appellants.

V. Ramadoss for respondents.

The Court delivered the following JUDGMENT:

The Subordinate Judge has discussed the evidence at some length and in arriving at a finding he has allowed himself, not unnaturally, to be influenced by the decisions of this Court laying down that the presumption in inam grants is that it is the melvaram alone that is granted. The decisions he refers to have since been overruled by the Judicial Committee, vide *Suryanarayana v. Patanna*(1) and *Upadrastha Venkata Sastrulu v. Divi Seetharamudu*(2). We are therefore unable to accept his finding. We must ask the Subordinate Judge to return a fresh finding on issues 3 and 4, in the light of the observations contained in

the judgments of the Judicial Committee. No fresh evidence will be taken. Finding is to be submitted within six weeks and seven days will be allowed for filing objections.

[In compliance with the above order the Subordinate Judge submitted findings to the effect that the plaintiffs had not proved their right to eject the defendants from the suit lands and that defendants had established their occupancy rights in the lands.]

This Second Appeal coming on for final hearing the Court delivered the following JUDGMENT:

We accept the finding. In effect it comes to this, the inam was granted before 1800 by a zamindar: it was a perpetual grant: whether there were tenants on the land at the time of the grant is not clear; but that there can hardly be any doubt that as early as 1818 the land was in the occupancy of tenants, and from 1853 of the present defendants.

Further, on the facts stated by the Subordinate Judge and on his conclusions, we draw the inference that before the Inam Commissioner issued Exhibit F in 1860, the tenants had acquired a right of occupancy. The Subordinate Judge holds that they continued to enjoy the right down to the year 1912 when the Government granted a ryotwari patta to the plaintiff in respect of the land. It should be stated that in Exhibit F, issued by the Inam Commissioner, there was a clause to this effect:

"This inam is tax-free, and confirmed for two lives only, but it is not otherwise transferable; and on the expiration of the limited term above mentioned it will lapse to the estate."

On the expiry of the two lives without direct lineal descendants, the Government issued the ryotwari patta in favour of the plaintiff who was the nearest reversioner to the last male holder; we are clear that the plaintiff should not be regarded as a stranger. The grant to him has the same effect as if it were made to the last male holder.

Now the question is whether the plaintiff is entitled to eject the defendants. The argument strongly pressed before us related to the effect of the grant of the ryotwari patta by Government. Reliance was placed on the judgment of SADASIVA AYYAR, J., in *Subramania Aiyar v. Onnappa Koundan*(1) for the proposition

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* Second Appeal No. 208 of 1919.

(1) (1918) I.L.R., 41 Mad., 1012 (P.C.); L.R., 45 I.A., 209

(2) (1920) I.L.R., 48 Mad., 116 (P.C.); L.R., 46 I.A., 128.

(1) S.A. Nos. 1473 to 1475 of 1917 (unreported).

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that the grant of the ryotwari patta put an end to the occupancy right of the defendant. Before examining the case cited, we shall consider the principle underlying this proposition.

There can be no doubt that the right which an occupancy ryot has is an interest in property. If that is so, ordinarily that right cannot be put an end to by a person holding a co-ordinate interest in that property or by those who acquire or resume such right. Neither the person to whom the rights of the landlord pass, nor the person who acquires the tenant's right can voluntarily terminate the right of the other, nor can the fact that the Government standing in the shoes of the landlord purported to grant a ryotwari patta make any difference. What the Government resumed and could have resumed is only the right of the inamdar. They had given him the option in 1860 to convert the inam into a freehold. In case he failed to exercise the option, they promised, as a matter of grace, to continue the inam for two more lives. Neither the act of resumption, nor the promise to continue the inam for two lives, affect in any way the rights of the tenants. The Government never purported to resume that right. By Act VIII of 1868, the Government removed the misconception which was widely entertained that the grant of an inam patta by the Government affected the rights of tenants or of third parties. That declaration of policy is equally applicable to the present case and is in accordance with the first principles of jurisprudence. In exercising the rights of resumption as against part-owner of a land, the resumer cannot interfere with the rights of the other part-owner. In continuing as a matter of grace the inam for two more lives and in subsequently resuming the inam, the Government could not and did not terminate or resume the rights possessed by the tenants.

Now, as regards the decision quoted, Mr. Justice SPENCER, the other learned Judge, based his conclusion on facts. SADASIVA AYYAR, J., found that the tenants were not on the land when the grant was made, but that they acquired rights of occupancy subsequently. There may be cases where the acquisition by prescription of rights of occupancy will be terminated by the resumption of the inam. For example, if the grant was for a fixed period or for a specified life or lives, then the acquisition of an adverse interest in the property may not affect the right of

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the grantor who is entitled to the property on the termination of the life or at the end of the period. The intermediate acquisition of prescriptive rights could not prejudice his paramount rights. Examples of this kind are to be found in the acquisition by prescription against widows and other life estate owners. *Swaminatha Mudali v. Saravana Mudali*(1) is an illustration in point. In that case, there was a grant for 99 years. It was held that the acquisition of occupancy rights during that period did not affect the rights of the Government when it sought to resume the land at the end of the period. This case does not support the proposition for which SADASIVA AYYAR, J., quoted it. *Hattikudur Narain Rao v. Andar Sayad Abbas Sahib*(2), another of the cases which the learned Judge relied on, proceeded on the principle that the provisions of section 116 of the Evidence Act can in certain cases be also applied conversely. We do not think that *Ammu v. Ramakishna Sastri*(3) and *Subbaraya v. Krishnappa*(4), enunciates any principle derogatory of the rights of persons against whom no resumption was in terms made or indicated. Therefore, if SADASIVA AYYAR, J., intended to lay down that in all cases of prescription, even when the owner of the property in respect of which the adverse holding takes effect is the absolute grantee of the inam, where there is a resumption of the inam by Government and the issue of a ryotwari patta, the rights of the tenants are wiped out, we are unable respectfully to accept the proposition.

Moreover, in *Seturatnam Aiyer v. Venkatachela Goundan*(5) their Lordships of the Judicial Committee held that it is possible to acquire even against a ryotwari pattadar rights of occupancy. It therefore does not necessarily follow that the Government by granting such a patta intended to put an end to the rights of tenants already existing.

We are of opinion that the fact that the plaintiff obtained from Government a ryotwari patta did not enable him to eject the defendants. In this view, the Second Appeal fails and is dismissed with costs.

K.R.

(1) (1917) 33 M.L.J., 370.

(2) (1915) 28 M.L.J., 44.

(3) (1879) I.L.R., 2 Mad., 226.

(4) (1889) I.L.R., 12 Mad., 422.

(5) (1920) I.L.R., 43 Mad., 567 (P.C.).

APPELLATE CIVIL--FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield and Mr. Justice Kumaraswami Sastri.

1931,
February
8 and 22.

SUNDARAM ALIAS MYTHEENBIVI, APPELLANT IN A.A.A.O. No. 41 OF 1919 AND PETITIONER IN NO. 603 OF 1919 ON THE FILE OF THE HIGH COURT, MADRAS (FIRST DEFENDANT), PETITIONER,

MAUSA MAVUTHAR AND SHEIKKASIM MAVUTHAR,
RESPONDENTS IN BOTH, COUNTER-PETITIONERS.*

Civil Procedure Code, sec. 115, O. XXI, r. 89—Private sale by judgment-debtor after Court auction—Application to set aside Court sale—Whether purchaser in private sale or judgment-debtor entitled to apply—Dismissal of petition as of person not entitled to apply—Powers of High Court—Revision.

A judgment-debtor who, after the Court sale, transfers his interest in the properties sold in execution of a decree retains sufficient "interest" within the meaning of O. XXI, r. 89, to allow him to apply under the rule.

Subbarayudu v. Lakshminarasamma, (1915) I.L.R., 38 Mad., 775, overruled; *Pandurang Lazman v. Govind Dada*, (1916) I.L.R., 40 Bom., 557; and *Mussumat Dhanwanti Kuer v. Shoo Sankar Lall*, (1919) 4 Patna L.J., 340; s.c., 52 I.C. 573 (Patna), followed; *Ishar Das v. Asaf Ali Khan*, (1912) I.L.R. 34 All. 186, dissented from.

The purchaser of such properties after Court sale is precluded from applying under the rule.

Lakshmi Ammal v. Bankaran Nair, (1918) 24 M.L.J., 205, overruled.

The High Court can interfere in Revision if an application under O. XXI, r. 89, has been dismissed on the ground that it was made by a person who was not entitled to apply.

APPEAL and petition under section 115 of Act V of 1908 and section 107 of the Government of India Act, to revise the order, dated 6th November 1918, C. KRISHNASWAMI RAO, the District Judge of Rāmnād at Madura, in C.M.A. No. 51 of 1918, preferred against the order, dated 3rd July 1918, T. K. GOVINDA ARYAR, the Principal District Munsif of Srivilliputtūr, in E.A. No. 354 of 1918, in E.P. No. 839 of 1917, in O.S. No. 128 of 1916, on the file of the Additional District Munsif of Srivilliputtūr.

* Appeal against Appellate Order No. 41 of 1919 and O.R.P. No. 603 of 1919.

The facts are set out in the Order of Reference.

The appeal and petition first came on for hearing before ATLING and ODGERS, JJ., who made the following

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ORDER OF REFERENCE TO A FULL BENCH.

The facts of this case are succinctly set forth by the District Munsif:

"The application is one under Order XXI, rule 89. The applicant is the judgment-debtor. He has paid into Court the full amount under the rule. That was on 25th April 1918 and the sale was on 5th April 1918. But he had in the meanwhile sold the property to a third person. That private sale was on 9th April 1918. The price fetched at the Court sale was Rs. 600 whereas the consideration for the private sale was Rs. 1,500. The money that was deposited into Court under rule 89 came out of the private sale by the judgment-debtor. These facts are indisputable and undisputed."

Both the Lower Courts have held, relying on *Subbarayudu v. Lakshminarasamma*(1), that the judgment-debtor had no locus standi to apply under Order XXI, rule 89, and have rejected his application. Against this decision the judgment-debtor appeal.

On behalf of respondent the preliminary objection is taken that no Second Appeal lies. So much appellant is forced to concede: but he relies on a Revision Petition filed by him as an alternative form of relief. To this respondent rejoins that no question of jurisdiction is involved and that we have no power of interference under section 115 of the Civil Procedure Code.

We have, therefore, two questions for decision (1) as to the correct construction of Order XXI, rule 89 (2), as to whether any question of jurisdiction is involved; and in both we have had the benefit of a long argument in which rulings were quoted which are impossible to reconcile.

The law on both points was considered by ABDUR RAHIM, J., in *Gopalakrishna Naicker v. Subramanian Chettiar*(2); and on his motion a Full Bench was constituted to consider them. No opinion was, however, delivered, inasmuch as the facts of

(1) (1915) I.L.R., 38 Mad., 775.

(2) O.R.P. 1916 of 1916 (unreported.)

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that case admitted of a decision on a simpler ground. The applicant there was not a *vendee* subsequent to Court auction sale, but a *mortgagee*; and, as such, clearly not entitled to apply under rule 89. What would be the position of a *vendee* from a judgment-debtor, and which of them—*vendee* or judgment-debtor—could apply, was not considered: nor was the question of jurisdiction considered.

We are, however, confronted in the present case with both problems: and on both, the conflict of authority is such that we feel constrained to make a fresh reference in order to get the question authoritatively decided.

Order XXI, rule 89, runs thus:—

“(1) Where immovable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in Court—

(a) for payment to the purchaser, a sum equal to five per cent of the purchase-money, and

(b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person applies under rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.”

Where the judgment-debtor has sold the property privately subsequent to the auction sale, who is entitled to apply under this rule—the judgment-debtor or his vendee? In *Subbarayudu v. Lakshminarasamma*(1) the learned Judges, SADASIVA AYYAR and SPENCER, JJ., decided that the judgment-debtor in such cases cannot apply: and this is consistent with two other cases, *Gantasola Jagannadhan v. Thathavarthi Ramabrahmam*(2) (decided by the same Judges) and *Lakshmi Ammal v.*

(1) (1915) I.L.R., 38 Mad., 775.

(2) (1920) 54 I.O., 753 (Patna).

Sankaran Nair(1) decided by BENSON and SUNDARA AYYAR, JJ., in which it was held that the vendee can apply.

On the other hand, ABDUR RAHIM, J., in *Gopalakrishna Naicker v. Subramanian Chettiar*(2) has strongly dissented from this view, and has adopted that expressed by a Bench of the Bombay High Court in *Pandurang Laxman v. Govind Dada*(3). In that case, BATCHELOR and SHAH, JJ., arrived at the conclusion that the judgment-debtor was the “owner” contemplated by the rule: and it was he, just as under the previous Code, who could apply. The same conclusion was reached by a Bench of the Patna High Court in *Mussumat Dhanwanti Kuer v. Sheo Shankar Lall*(4).

The conclusion of the Allahabad High Court differs both from that of our own Court on the one hand, and of the Bombay and Patna High Courts on the other. It was held in *Ishar Das v. Asaf Ali Khan*(5) that neither the judgment-debtor nor his vendee could apply in such a case as the present.

No case has been quoted to us from the Calcutta High Court.

For ourselves it is sufficient to say that on the argument addressed to us we are strongly inclined to agree with BATCHELOR, J., in *Pandurang Laxman v. Govind Dada*(3) and to adopt his argument.

It is probably of little practical importance, whether the right of application is decided to be with the judgment-debtor or his vendee—provided that one of them has it and that it is decided authoritatively and beyond all doubt which of them it is. But such a decision is imperatively called for: and in view of the divergence of views expressed we do not think the matter will be satisfactorily set at rest even for this Court, if we merely follow the decision in *Subbarayudu v. Lakshminarasamma*(6). We are therefore constrained to make a fresh Reference.

On the second point, that of jurisdiction, the views expressed in *Lakshmi Ammal v. Sankaran Nair*(1) and *Subbarayudu v. Lakshminarasamma*(6) are clearly at variance. We are inclined to think that, if the judgment-debtor was entitled to apply, the

(1) (1913) 24 M.L.J., 205. (2) C.R.P. 1216 of 1918 (unreported).

(3) (1916) I.L.R., 40 Bom., 557.

(4) (1919) 4 Patna L.J., 340; s.c., 51 I.O., 873 (Patna).

(5) (1912) I.L.R., 34 All., 186.

(6) (1915) I.L.R., 38 Mad., 775.

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Lower Court, in dismissing his application as incompetent, in effect failed to exercise a jurisdiction vested in it by law: and that it would be a case falling under section 115. But here also a Reference to a Full Bench seems desirable—more especially as we are referring the other question.

We therefore refer the following questions for the opinion of a Full Bench:—

1. Where the owner of immovable property sold in execution of a decree, subsequent to the Court sale sells the property to another, does the right to apply under Order XXI, rule 89, to have the sale set aside lie with him, or with his vendee?

2. Does the dismissal of an application under Order XXI, rule 89, on the ground that it was made by a person not entitled to apply, fall within section 115 of the Civil Procedure Code, so as to give this Court the power of revision?

ON THIS REFERENCE—

A. *Krishnaswami* for the appellant and petitioner.—The judgment-debtor who had alienated the property applied to set aside the sale. The contention of the other side is that the purchaser is the only person who can apply and the judgment-debtor cannot. This is in the teeth of the rule. I contend that the right is with the judgment-debtor and not with the purchaser. The latter is as much prohibited as the mortgagee: *Gopalakrishna Naicker v. Viswanatha Aiyar*(1). The old Code had no provision for the mortgagee applying or those who derived title from the judgment-debtor. Before *Gopalakrishna Naicker v. Viswanatha Aiyar*(1) Madras took the view that the purchaser alone could apply. *Lakshmi Ammal v. Sankaran Nair*(2) is the first of the cases in Madras that makes a distinction between the purchaser and the mortgagee. It is not a proper method of construction. I might as well argue that the purchaser has no right because the Code says no notice is to be taken of an alienation between attachment and execution.

[WALLIS, C.J.—The right to set aside a sale is not one of the rights of property inherent in any one. The legislature may give it to any one.]

Yes, and it would be only rational to give it to the judgment-debtor. Reference made to section 310-A, old Code. The

(1) (1920) 12 L.W., 165 (F.B.) (2) (1918) 24 M.L.J., 205 at 207.

process of the change of the language is explained in *Gopalakrishna Naicker v. Viswanatha Aiyar*(1). The object was not to deprive the judgment-debtor of his right. The judgment-debtor has the right at date of sale. The rule does not contemplate that that state of things is to continue up to the time of application. "Owning such property" is merely descriptive. In Bombay and Patna it has been held that the judgment-debtor has the right: *Pandurang Laxman v. Govind Dada*(2), *Maganlal v. Doshi*(3), *Lakshmi Narain v. Kali Prosonno*(4), *Mussumat Dhanwanti Kuer v. Sheo Shankar Lal*(5). The judgment-debtor applies by virtue of being "owner" for all purposes of execution. Private sale between attachment and sale makes no difference: see Order XXI, rules 55, 69 and 88. Section 64 applies also to sale and the object is after attachment to look only to the judgment-debtor. Reading section 64 and Order XXI, rule 89, together we are entitled to say judgment-debtor is still "owner." This would bring us in line with Bombay, Allahabad and Patna.

On the second point referred, I contend there has been a failure to exercise a jurisdiction vested in the Court: *Birj Mohun Thakur v. Rai Uma Nath Chowdhry*(6), *Lakshmi Ammal v. Sankaran Nair*(7), *Balakrishna Udayar v. Vasudeva Ayyar*(8), *Mussumat Dhanwanti Kuer v. Sheo Shankar Lal*(5).

Varadachariar for respondent.—The current of authorities in Madras is that the purchaser and not the judgment-debtor has the right to apply: *Subbarayudu v. Lakshminarasamma*(9), *Gantasola Jagannadhan v. Thathavarthi Ramabrahmam*(10). The same has been held in Allahabad: *Ishar Das v. Asaf Ali Khan*(11). The language in section 311 of the old Code is wider than in section 310-A. As a matter of policy the purchaser and not the judgment-debtor ought to be allowed to apply. "Owning the property" must mean the person to whom the property has been sold by the judgment-debtor by private sale.

(1) (1920) 12 L.W., 165 (F.B.) (2) (1916) I.L.R., 40 Bom., 557.
(3) (1901) I.L.R., 25 Bom., 631. (4) (1919) 52 I.C., 314 (Patna).
(5) (1919) 4 Patna L.J. 340; s.c., 52 I.C., 873 (Patna).
(6) (1898) I.L.R., 20 Cal., 8 at 11. (7) (1913) 24 M.L.J., 205 at 207.
(8) (1917) I.L.R., 40 Mad., 793. (9) (1915) I.L.R., 38 Mad., 775.
(10) (1920) 54 I.C., 753 (Patna). (11) (1912) I.L.R., 34 All., 188.

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On the second point referred reference was made to: *Subbarayudu v. Lakshminarasamma*(1), the Order of ABDUR RAHIM, J., in *Gopalakrishna Naicker v. Viswanatha Aiyar*(2), *Maganlal v. Doshi*(3).

WALLIS, C.J.

WALLIS, C.J.—The interpretation of the words “whose immovable property has been sold,” which were found in section 311 of the Code of 1882 as to setting aside sales for irregularity and were used in section 310-A, enacted subsequently, as to setting aside a Court sale on payment of the decree amount and five per cent on the purchase money, gave rise to much difference of opinion, and were not reproduced in the corresponding rules 90 and 89 of Order XXI of the Code of 1908. As regards section 310-A there was a conflict of opinion as to the nature of the interest which was sufficient to justify an application under the section, and also as to whether a transferee by way of private sale from the judgment-debtor after attachment but before the Court sale, and a similar transferee after the Court sale, were persons authorized to apply under the section. In *Paresh Nath Singha v. Nabugopal Chattopadhyaya*(4) it was decided by a Full Bench in Calcutta, RAMPINI, J., dissenting, that a mortgagee was “a person whose immovable property had been sold.” In *Ramachandra v. Rakhmabai*(5) it was held that a purchaser prior to the Court sale was not entitled to apply whereas in *Srinivasa Ayyangar v. Ayyathorai Pillai*(6) it was held that he could. Again in *Kullar Singh v. Moril Mahton*(7) it was held that a purchaser by private sale after the Court sale was not entitled to apply, whereas a contrary view was taken in *Appaya Shetti v. Kunhati Beari*(8). These difficulties it was endeavoured to meet in the new Code by substituting for “any person whose immovable property has been sold” in section 310-A the words “any person either owning such property or holding an interest therein by virtue of a title acquired before such sale.”

(1) (1915) I.L.R., 38 Mad., 775.

(3) (1901) I.L.R., 25 Bom., 631.

(5) (1899) I.L.R., 23 Bom., 450.

(7) (1895) 1 C.W.N., 24.

(2) (1920) 12 L.W., 165 (F.B.)

(4) (1902) I.L.R., 29 Cal., 1 (F.B.)

(6) (1898) I.L.R., 21 Mad., 418.

(8) (1907) I.L.R., 30 Mad., 214.

On the language of this rule, it was held by BENSON and SUNDARA AYYAR, JJ., in *Lakshmi Ammal v. Sankaran Nair*(1), which was followed on this point in *Subbarayudu v. Lakshminarasamma*(2), that a purchaser subsequent to the Court sale is not precluded from applying, the words “by virtue of a title acquired before such sale” being read as applicable only to the words “holding an interest.” This is no doubt a possible construction of the rule, but it has not been accepted in any other Court and is opposed to *Ishar Das v. Asaf Ali Khan*(3). On the face of the rule, the words in question seem equally applicable to both classes of persons mentioned, and no reason has been suggested why a subsequent transferee by way of sale should be allowed to apply while a subsequent transferee of a lesser interest should not. On the other hand the previous conflict of decisions suggests that the intention of the amendment was to affirm *Srinivasa Ayyangar v. Ayyathorai Pillai*(4) and *Kallar Singh v. Moril Mahton*(5), and to overrule *Bhaiji Bhimji v. Administrator General of Bombay*(6) and *Appaya Shetti v. Kunhati Beari*(7).

Having regard to the natural meaning of the words and the history of the rule, I think we should accept the view that a purchaser subsequent to the Court sale is precluded from applying under the rule, and I would accordingly overrule *Lakshmi Ammal v. Sankaran Nair*(1) and answer this part of the first question accordingly. The same result follows on the view taken in *Pandurang Laxman v. Govind Dada*(8) and in *Mussumat Dhanwanti Kuer v. Sheo Shankar Lall*(9), that the person owning the property is all along the judgment-debtor, as in this view the purchaser subsequent to the Court sale can only come in by virtue of an interest acquired after the sale. I feel however quite unable to accept this construction. Having regard to the previous decisions, I cannot help thinking that if the legislature had meant “judgment-debtor” they would have said so.

The next question involved in the reference is, whether the judgment-debtor retains his right to apply after selling the

(1) (1913) 24 M.L.J., 205.

(5) (1912) I.L.R., 34 All., 186.

(7) (1895) 1 C.W.R., 24.

(9) (1907) I.L.R., 30 Mad., 214.

(2) (1915) I.L.R., 38 Mad., 775.

(4) (1898) I.L.R., 21 Mad., 416.

(6) (1899) I.L.R., 23 Bom., 428.

(8) (1916) I.L.R., 40 Pom., 557.

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property privately subsequently to the Court sale, and in dealing with this question we must not lose sight of the similar question arising under the rule as to the position of a judgment-debtor who has effected a private sale subsequently to the attachment and before the Court sale, and who was held by JENKINS, C.J., in *Maçanlal v. Doshi*(1), to have been none the less entitled to apply under section 310-A as a person "whose immovable property has been sold." This decision would be inapplicable under the new Code if the rulings in *Ishar Das v. Asaf Ali Khan*(2) and *Subbarayudu v. Lakshminarasamma*(3), that a judgment-debtor who effects a private sale subsequently to the Court sale is not entitled to apply, are correct, as the same reasoning will apply to a private sale after attachment but before the Court sale. It seems to me exceedingly unlikely that the legislature intended to alter the law as laid down in *Maçanlal v. Doshi*(1) so as to prevent a judgment-debtor who had effected a private sale either before or after the Court sale from applying, and I agree with the learned Judges in *Pandurang Laxman v. Govind Dada*(4) and *Mussumat Dhanwanti Kuer v. Sheo Shanker Lall*(5) that we should not put such a construction on the rule if it can possibly be avoided. Section 310-A was introduced in the interests of the judgment-debtor to protect him from losing his property by a Court sale at an undervalue, as too often happens. Now, so far as the judgment-debtor's property is concerned, his interest in setting aside the Court sale is just as great when he has effected a private sale after attachment as when he has not. On setting aside the Court sale, if he has not effected a private sale, he gets back the property itself; if he has effected a private sale after attachment, he gets the price into which he has converted the property. If he fails to set aside the Court sale, the private sale goes off and he gets neither the property nor the price. The right to set aside the sale given him by the Code puts him much in the position of a mortgagor, and he loses his equity of redemption unless the sale is set aside. He therefore retains a clear interest in setting aside the sale.

(1) (1901) I.L.R., 25 Bom., 631.

(2) (1912) I.L.R., 34 All., 186.

(3) (1915) I.L.R., 38 Mad., 775.

(4) (1916) I.L.R., 40 Bom., 557.

(5) (1919) 4 Patna L.J., 840; s.c., 52 I.O., 873 (Patna).

The construction of the rule however presents considerable difficulties. It has been suggested that, as all sales after attachment are void under section 65 as against all claims enforceable under the attachment, private sales after attachment should be disregarded and the judgment-debtor treated until confirmation as the person owning the property. The private sales however are good as between the parties to them, and the legislature would not have used the words "owning such property" if they had merely meant the judgment-debtor. Moreover, they appear to have amended the rule with the express object of establishing the right to apply of the purchaser after attachment but before the Court sale, which had been denied in *Bhaiji Bhimji v. Administrator-General of Bombay*(1). If, then, we hold a purchaser before the Court sale to be "a person owning such property" there appears to be no sufficient reason for saying that a purchaser subsequent to the Court sale is not also "a person owning such property", even though he may not be entitled to apply under the rule; and, as there cannot be two persons owning the same property at the same time, it would be impossible on this view to say that the judgment-debtor continues to be the "person owning such property" within the meaning of the rule when he has effected a private sale whether such sale was before or after the Court sale.

On the whole, I have come to the conclusion that the course which appears to present fewest difficulties is to hold that the judgment-debtor whose private sale after attachment is necessarily subject to the setting aside of the Court sale retains, even after the private sale, a sufficient interest acquired before the sale in the property within the meaning of the rule to entitle him to apply, and I would so hold, agreeing in the result with *Pandurang Laxman v. Govind Dada*(2) and *Mussumat Dhanwanti Kuer v. Sheo Shanker Lall*(3) and differing from *Ishar Das v. Asaf Ali Khan*(4), and overruling *Subbarayudu v. Lakshminarasamma*(5). As regards the other question I agree with my learned brothers.

OLDFIELD, J.—I concur in the answer proposed by my Lord to OLDFIELD, J. the first question referred. But I prefer, with all due deference,

(1) (1899) I.L.R., 23 Bom., 428.

(2) (1916) I.L.R., 40 Bom., 557.

(3) (1919) 4 Patna L.J., 840; s.c., 52 I.O. 873 (Patna).

(4) (1912) I.L.R., 34 All., 186.

(5) (1915) I.L.R., 38 Mad., 775.

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OLDFIELD J. to justify that conclusion on the grounds that the judgment-debtor, even after the Court sale and after a subsequent sale to a private purchaser, is still owner of the property, and that such purchaser in the case before us, although he may hold an interest in it, is not within the rule, because his title was not acquired before the Court sale.

That construction of the legal position was adopted by BATCHELOB, J., in *Pandurang Laxman v. Govind Dada*(1); and it is, it seems to me, the only one strictly reconcilable with the prohibition in section 64, Civil Procedure Code, of any private transfer pending the attachment. For, although under that section such a transfer is void, not as between the parties to it, but only against claims enforceable under the attachment, the transferee cannot be regarded as actually the owner of the attached property at the time when the payment has to be made or until the attachment and Court sale have been set aside. No doubt, on this view, the necessity for the reference in rule 89 to "any person owning the property" instead of to "the judgment-debtor" remains without an explanation. The same difficulty was expressed in *Paresh Nath Singha v. Nabogopal Chattopadhyaya* (2) in connexion with the expression "person whose immoveable property has been sold" in section 310-A of the former Code. It is true that there was no question there of a transfer as made by the judgment-debtor after either the attachment or the Court sale; and it is, I agree with my Lord, probable that the words in rule 89, "by virtue of a title acquired before such sale," which, I further agree, qualify both "property" and "interest," were introduced with reference to the cases, to which he refers. But the decision was authoritative, being given by four learned Judges, RAMPINI, J., dissenting; and the judgments turned on the distinction, drawn in language, which anticipated that used in rule 89, between the owner of property and the owner of an interest in it. With that distinction, introduced newly by the rule, we are at present concerned; and it is a fair conclusion that it was introduced to embody explicitly in the law the result of *Paresh Nath Singha v. Nabogopal Chattopadhyaya*(2). It is then significant that the use of the expression "any person whose

(1) (1918) I.L.R., 40 Bom., 557.

(2) (1902) I.L.R., 29 Cal., 1 (F.B.)

immoveable property has been sold" instead of "the judgment-debtor" was explained (vide the judgment of MACLEAN, C.J.) as authorizing the mortgagee, who alone was then in question, to pay the decree amount, and not with reference to any suggestion that after a transfer the transferee was the person owning the property or whose property had been sold, as distinguished from the judgment-debtor, who had merely an interest therein. This decision no doubt supplies no affirmative explanation for the reference to the "owner of the property," which is applicable to the facts before us; and the phrase may have been used without consideration of the position of a transferee of full rights and may have been simply imported from *Paresh Nath Singha v. Nabogopal Chattopadhyaya*(1). But, that case in some degree supports the result, which general principle, I think, involves that the reference in rule 89 to persons holding an interest in the property does not cover the judgment-debtor after a transfer of ownership, and I would therefore reach our conclusion on that basis. This, I may add, involves no expression of opinion as to whether the transferee is such a person, since none is necessary on the present reference, the transfer in question in it having been after the Court sale.

The second question referred is whether the case is one for the exercise of our revisional powers. The answer to it must in my opinion be in the affirmative in accordance with the judgment of the Judicial Committee in *Balakrishna Udayar v. Vasudeva Ayyar*(2), since the lower Court's action consisted in a refusal to deal with the judgment-debtor's petition, a non-exercise of their jurisdiction, not in any conclusion of law or fact, in which the question of jurisdiction was not involved.

KUMARASWAMI SASTRI, J.—I agree in holding that a judgment-debtor who transfers his interest in property subsequent to the Court sale is competent to avail himself of the provisions of Order XXI, rule 89, of the Code of Civil Procedure.

The right was first given to him by section 310-A introduced in the Code of Civil Procedure of 1882 by Act V of 1894, and his alienation of the property subsequent to the Court sale was held

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not to be a bar to his application under the section: *Narain Mandal v. Sourindra Mohan Tagore*(1), *Maganlal v. Doshi*(2) There was a conflict of decisions on matters which did not touch the present question, and the section was redrafted in its present form in the Act of 1908 in order to set at rest the conflict of decisions referred to by MOOKERJEE, J., in *Dulhin Mathura Koer v. Bangsidhari Singh*(3). Though it settled some points in controversy it raised others of a more difficult nature, and there has been a conflict of decisions as to the rights of the judgment-debtor and alienees from him subsequent to the Court sale. In *Ishar Das v. Asaf Ali Khan*(4), it was held that neither the defendant nor the alienee after the Court sale was entitled to apply—the defendant because he had parted with all his interest in the property at the date of the application, and the alienee because he came within the express prohibition of the section. The Bombay High Court in *Panduranga Laxman v. Govind Dada*(5), and the Patna High Court in *Mussumat Dhanwanti Kuer v. Sheo Shankar Lal*(6), and *Lakshmi Narain v. Kali Prosonno*(7), held that the defendant was entitled to apply notwithstanding the alienation by him but that the alienee was precluded by the terms of the section. The view taken in Madras has been that the defendant is incompetent as he had no subsisting interest in the property at the date of the application but that a purchaser from him was entitled. In *Lakshmi Ammal v. Sankaran Nair*(8), BENSON and SUNDARA AYYAR, JJ., were of opinion that the words “by virtue of a title acquired subsequent to the sale” do not refer to the word “owner,” but only to the words “holding an interest therein”, so that while a mortgagee-lessee, or other person holding a lesser interest, was precluded the vendee was competent. In *Subbarayudu v. Lakshminarasamma*(9), SADASIVA AYYAR and SPENCER, JJ., followed *Lakshmi Ammal v. Sankaran Nair*(8), and while holding that the defendant had no right they were of opinion that the subsequent purchaser had. SADASIVA AYYAR, J., was of

(1) (1905) I.L.R., 32 Cal., 107.

(2) (1901) I.L.R., 25 Bom., 681.

(3) (1912) 15 Cal. L.J., 83.

(4) (1912) I.L.R., 34 All., 186.

(5) (1916) I.L.R., 40 Bom., 557.

(6) (1919) 4 Patna L.J., 340; s.c. 52 I.C., 878 (Patna).

(7) (1919) 52 I.C., 314 (Patna).

(8) (1918) 24 M.L.J., 205.

(9) (1915) I.L.R., 38 Mad., 775.

opinion that it was an elementary principle of law that, unless a statute clearly allowed it, a man who has no right in a property on the date of filing a suit or making an application in respect of that property cannot be allowed to file that suit or make that application and that as *Lakshmi Ammal v. Sankaran Nair*(1) allowed the alienee to make the application, there was no reason why the judgment-debtor should also be allowed to make it “in disregard of the plain rule of jurisprudence.” SPENCER, J., expresses no opinion as to whether the purchaser could apply as he was not a party to the application. In *Gantasola Jagannadhan v. Thathavarthi Ramabrahmam*(2), the same learned Judges held that it was not open to the judgment-debtor to apply. In *Gopalakrishna Naicker v. Subramanian chettiar*(3), ABDUR RAHIM, J., without deciding the case, was of opinion that *Lakshmi Ammal v. Sankaran Nair*(1), and *Subbarayudu v. Lakshminarasamma*(4), holding that a subsequent alienee can apply, went against the plain provisions of rule 89 and that there was no reason to limit the words “by virtue of a title acquired before such sale” to the words “holding an interest therein.” The learned Judge was of opinion that *Pandurang Laxman v. Govind Dada*(5) was correct. This case was posted before a Full Bench which, without deciding the larger questions raised, decided that as the applicant was a mortgagee from the defendant after the Court sale he was clearly a person prevented by the rule from applying. AYLING and ODGERS, JJ., in the Order of Reference are strongly disposed to agree with the view of BACHELOR, J., in *Pandurang Laxman v. Govind Dada*(5). In *Sethuramasami Nayani Varu v. Syed Mir Hussain Sahib*(6), SESHAGIRI AYYAR and PHILLIPS, JJ., held that a judgment-debtor, who had executed a sale-deed but not registered it, was competent to apply. They did not decide the question whether the registration would make any difference.

I am unable to agree with the view taken by the Allahabad High Court in *Ishar Das v. Asaf Ali Khan*(7), that neither the judgment-debtor nor his alienee can take advantage of the

(1) (1913) 24 M.L.J., 205.

(2) (1920) 54 I.C., 758 (Patna).

(3) C.R.P. No. 1216 of 1918 (unreported).

(4) (1915) I.L.R., 38 Mad., 775.

(5) (1916) I.L.R., 40 Bom., 557.

(6) (1919) I.L.R., 42 Mad., 508.

(7) (1912) I.L.R., 34 All., 186.

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provisions of rule 89. The main object of the enacting of section 310A was to enable the judgment-debtor to prevent his property from being sold below the market value and he can in most cases only do so by raising money elsewhere as it is not likely that a person able to discharge the decree amount would allow his property to be sold in execution simply for the luxury of his having to pay 5 per cent to the purchaser. When a judgment-debtor sells property in order to avail himself of the provisions of the section, the gain to him is clearly the difference between the consideration he receives and the price at which his property has been sold. There is no reason to suppose that the legislature in enacting rule 89 wanted to deprive him of this, and to penalize his attempt to save himself from loss by raising money when his property has been undersold. The only question is whether the judgment-debtor or his alienees or both can apply.

With all respect I am unable to see why the purchaser from the defendant should be able to apply while the mortgagee or lessee should be precluded as the plain language of rule 89 excludes both, as being transferees after the execution sale. I agree with my Lords, OLDFIELD, J., and RAHM, J., in thinking that the words "by virtue of a title arising subsequent to the sale" apply to the words "owning such property" as well as to the words "holding an interest therein."

So far as the judgment-debtor is concerned it is clear that he had the right to apply at the date of the sale, and I see nothing in rule 89 compelling me to hold that he loses that right because of the alienation. The rule of general jurisprudence as to the necessity of the applicant having an interest in the property at the date of the application would not prevent a judgment-debtor who has parted with his interest from applying under rules 55 and 69 of order XXI. Rule 55 empowers the judgment-debtor to get the attachment raised by paying the decree amount and its removal proclaimed, and under rule 69 he can stop the sale by paying the amount specified in the proclamation. There are no very strong grounds for holding that rule 89 bars him especially when the peculiar position of judgment-debtor as regards the ownership of his property created by sections 64 and 65 of the Code are considered. So far as the decree-holder is concerned the alienation is void, and so far as the Court purchaser

**BOOKS AND PUBLICATIONS OF THE LEGISLATIVE
DEPARTMENT OF THE GOVERNMENT OF
INDIA FOR SALE.**

*List of Books and Publications for Sale which are
less than two years old.*

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, Digests of Indian Law Cases and Index to Enactments have been considerably reduced.

The British Enactments in force in Native States were issued by the Foreign and Political Department.

[The amounts within parentheses where noted are for packing and postage.]

I.—THE INDIAN STATUTE-BOOK.

A.—LOCAL CODES IN THE PRESS.

The United Provinces Code.

The Bombay Code.

B.—STATUTES.

The Government of India Act, 1919 (9 and 10 Geo. 5, ch. 101). As. 8.
(Anna 1.)

The Government of India Act (Being the Act of 1915-16, as amended by the Act of 1919.) Re. 1 as. 4. (As. 2 p. 6.)

C.—RULES AND ORDERS.

Addenda et Corrigenda to the List of General Rules and Orders. List No. I of 1919. As. 2 p. 9. (Anna 1.)

Addenda et Corrigenda to the List of General Rules and Orders. List No. II of 1919. As. 3 p. 3. (Anna 1.)

Addenda et Corrigenda to the List of General Rules and Orders. List No. I of 1920. Anna 1 p. 6. (Anna 1.)

Addenda et Corrigenda to the List of General Rules and Orders. List No. II of 1920.

II.—ACTS, REGULATIONS AND ORDINANCES.

Acts (Unrepealed) of the Governor-General of India in Council and the Indian Legislature from 1919 up to date.

Regulations made under the Statute 5 and 6 Geo. 5 Ch. 61, from 1919 up to date.

Ordinances of the Governor-General of India from 1919 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 XXX of 1852 (Naturalization of Aliens), as modified up to 1st October 1919. As. 2 p. 9. (Anna 1.)
Act XIII of 1859 (Workman's Breach of Contract), as modified up to 1st November 1920. As. 2 p. 3. (Anna 1.)
Act V of 1898 (Code of Criminal Procedure), as modified up to 1st May 1920. Rs. 3 as. 10. (As. 4.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

- Act III of 1919 (Motor Spirit Duties Amendment). In Urdu. Pies 3. (Anna 1.)
Act III of 1919 (Motor Spirit Duties Amendment). In Nagri. Pies 3. (Anna 1.)
Act IV of 1919 (Indian Income-tax Amendment). In Urdu. Pies 3. (Anna 1.)
Act IV of 1919 (Indian Income-tax Amendment). In Nagri. Pies 3. (Anna 1.)
Act V of 1919 (Termination of the Present War, Definition). In Urdu. Pies 3. (Anna 1.)
Act V of 1919 (Termination of the Present War, Definition). In Nagri. Pies 3. (Anna 1.)
Act VIII of 1919 (Negotiable Instruments Amendment). In Urdu. Pies 3. (Anna 1.)
Act VIII of 1919 (Negotiable Instruments Amendment). In Nagri. Pies 3. (Anna 1.)
Act IX of 1919 (Punjab Courts Supplementing). In Urdu. Pies 3. (Anna 1.)
Act IX of 1919 (Punjab Courts Supplementing). In Nagri. Pies 3. (Anna 1.)
Act X of 1919 (Excess Profits Duty). In Urdu. Pies 9. (Anna 1.)
Act X of 1919 (Excess Profits Duty). In Nagri. Pies 9. (Anna 1.)
Act XI of 1919 (Anarchical and Revolutionary Crimes). In Urdu. Anna 1. (Anna 1.)
Act XI of 1919 (Anarchical and Revolutionary Crimes). In Nagri. Anna 1. (Anna 1.)
Act XII of 1919 (Poisons). In Urdu. Pies 3. (Anna 1.)
Act XII of 1919 (Poisons). In Nagri. Pies 3. (Anna 1.)
Act XIV of 1919 (Provident Funds Amendment). In Urdu. Pies 3. (Anna 1.)
Act XIV of 1919 (Provident Funds Amendment). In Nagri. Pies 3. (Anna 1.)
Act XVI of 1919 (Indian Naturalization Amendment). In Urdu. Pies 3. (Anna 1.)
Act XVI of 1919 (Indian Naturalization Amendment). In Nagri. Pies 3. (Anna 1.)
Act XIX of 1919 (Indian Tariff Amendment). In Urdu. Pies 3. (Anna 1.)
Act XIX of 1919 (Indian Tariff Amendment). In Nagri. Pies 3. (Anna 1.)
Act XX of 1919 (The Indian Arms Amendment). In Urdu. Pies 3. (Anna 1.)
Act XX of 1919 (The Indian Arms Amendment). In Nagri. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- Act XXI of 1919 (Indian Coinage Amendment). In Urdu. Pies 3. (Anna 1.)
Act XXI of 1919 (Indian Coinage Amendment). In Nagri. Pies 3. (Anna 1.)
Act XXII of 1919 (Cantonments Amendment). In Urdu. Pies 3. (Anna 1.)
Act XXII of 1919 (Cantonments Amendment). In Nagri. Pies 3. (Anna 1.)
Act XXVII of 1919 (Indemnity). In Urdu. Pies 3. (Anna 1.)
Act XXVII of 1919 (Indemnity). In Nagri. Pies 3. (Anna 1.)
Act I of 1920 (Indian Steam Ships Amendment). In Urdu. Pies 3. (Anna 1.)
Act I of 1920 (Indian Steam Ships Amendment). In Nagri. Pies 3. (Anna 1.)
Act I of 1920 (Indian Army Amendment). In Urdu. Pies 3. (Anna 1.)
Act II of 1920 (Indian Army Amendment). In Nagri. Pies 3. (Anna 1.)
Act IV of 1920 (Indian Census). In Urdu. Pies 3. (Anna 1.)
Act IV of 1920 (Indian Census). In Nagri. Pies 3. (Anna 1.)
Act V of 1920 (Provincial Insolvency). In Urdu. As. 2. (Anna 1.)
Act V of 1920 (Provincial Insolvency). In Nagri. As. 2. (Anna 1.)
Act VI of 1920 (Inland Steam Vessels Amendment). In Urdu. Pies 3. (Anna 1.)
Act VI of 1920 (Inland Steam Vessels Amendment). In Nagri. Pies 3. (Anna 1.)
Act IX of 1920 (Glanders and Farcy Amendment). In Urdu. Pies 3. (Anna 1.)
Act IX of 1920 (Glanders and Farcy Amendment). In Nagri. Pies 3. (Anna 1.)
Act X of 1920 (Indian Securities). In Urdu. Pies 9. (Anna 1.)
Act XII of 1920 (Workman's Breach of Contract Amendment). In Urdu. Pies 3. (Anna 1.)
Act XII of 1920 (Workman's Breach of Contract Amendment). In Nagri. Pies 3. (Anna 1.)
Act XIV of 1920 (Charitable and Religious Trusts). In Urdu. Pies 6. (Anna 1.)
Act XIV of 1920 (Charitable and Religious Trusts). In Nagri. Pies 6. (Anna 1.)
Act XVII of 1920 (Income-tax Amendment). In Urdu. Pies 3. (Anna 1.)
Act XVII of 1920 (Income-tax Amendment). In Nagri. Pies 3. (Anna 1.)
Act XIX of 1920 (Super-tax). In Urdu. Pies 3. (Anna 1.)
Act XIX of 1920 (Super-tax). In Nagri. Pies 3. (Anna 1.)
Act XX of 1920 (Indian Army Suspension of Sentences). In Urdu. Pies 3. (Anna 1.)
Act XX of 1920 (Indian Army Suspension of Sentences). In Nagri. Pies 3. (Anna 1.)
Act XXII of 1920 (Lepers Amendment). In Urdu. Pies 3. (Anna 1.)
Act XXII of 1920 (Lepers Amendment). In Nagri. Pies 3. (Anna 1.)
Act XXIII of 1920 (Indian Rifles). In Urdu. Pies 3. (Anna 1.)
Act XXIII of 1920 (Indian Rifles). In Nagri. Pies 3. (Anna 1.)
Act XXIV of 1920 (Code of Civil Procedure Amendment). In Urdu. Pies 3. (Anna 1.)
Act XXIV of 1920 (Code of Civil Procedure Amendment). In Nagri. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act XXV of 1920 (Negotiable Instruments Amendment). In Urdu. Pies 3. (Anna 1.)
 Act XXV of 1920 (Negotiable Instruments Amendment). In Nagri. Pies 3. (Anna 1.)
 Act XXVI of 1920 (Indian Limitation and Code of Civil Procedure Amendment). In Urdu. Pies 3. (Anna 1.)
 Act XXVI of 1920 (Indian Limitation and Code of Civil Procedure Amendment). In Nagri. Pies 3. (Anna 1.)
 Act XXVII of 1920 (Indian Motor Vehicles Amendment). In Urdu. Pies 3. (Anna 1.)
 Act XXVII of 1920 (Indian Motor Vehicles Amendment). In Nagri. Pies 3. (Anna 1.)
 Act XXX of 1920 (Rouble Note). In Urdu. Pies 3. (Anna 1.)
 Act XXX of 1920 (Rouble Note). In Nagri. Pies 3. (Anna 1.)
 Act XXXI of 1920 (Repealing and Amending). In Urdu. Pies 3. (Anna 1.)
 Act XXXI of 1920 (Repealing and Amending). In Nagri. Pies 3. (Anna 1.)
 Act XXXII of 1920 (Post Office Cash Certificates Amendment). In Urdu. Pies 3. (Anna 1.)
 Act XXXII of 1920 (Post Office Cash Certificates Amendment). In Nagri. Pies 3. (Anna 1.)
 Act XXXIII of 1920 (Identification of Prisoners). In Urdu. Pies 3. (Anna 1.)
 Act XXXIII of 1920 (Identification of Prisoners). In Nagri. Pies 3. (Anna 1.)
 Act XXXIV of 1920 (Indian Passport). In Urdu. Pies 3. (Anna 1.)
 Act XXXIV of 1920 (Indian Passport). In Nagri. Pies 3. (Anna 1.)
 Act XXXVI of 1920 (Indian Coinage Amendment). In Urdu. Pies 3. (Anna 1.)
 Act XXXVI of 1920 (Indian Coinage Amendment). In Nagri. Pies 3. (Anna 1.)
 Act XXXVII of 1920 (Indian Army Amendment). In Urdu. Pies 3. (Anna 1.)
 Act XXXVII of 1920 (Indian Army Amendment). In Nagri. Pies 3. (Anna 1.)
 Act XXXIX of 1920 (Indian Elections Offences and Inquiries). In Urdu. Pies 3. (Anna 1.)
 Act XXXIX of 1920 (Indian Elections Offences and Inquiries). In Nagri. Pies 3. (Anna 1.)
 Act XLI of 1920 (Indian Wireless Telegraphy Shipping). In Urdu. Pies 3. (Anna 1.)
 Act XLIV of 1920 [Indian Income-tax (Amendment No. 2)]. In Urdu. Pies 3. (Anna 1.)
 Act XLIV of 1920 [Indian Income-tax (Amendment No. 2)]. In Nagri. Pies 3. (Anna 1.)
 Act XLV of 1920 (Indian Paper Currency Amendment). In Urdu. Pies 6. (Anna 1.)
 Act XLV of 1920 (Indian Paper Currency Amendment). In Nagri. Pies 6. (Anna 1.)
 Act XLVI of 1920 (Cutchi Memons). In Urdu. Pies 3. (Anna 1.)
 Act XLVI of 1920 (Cutchi Memons). In Nagri. Pies 3. (Anna 1.)
 Act XLVII of 1920 (Imperial Bank of India). In Urdu. Anna 1 p. 9. (Anna 1.)
 Act XLVIII (Indian Territorial Force). In Urdu. Pies 6. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act XLVIII (Indian Territorial Force). In Nagri. Pies 6. (Anna 1.)
 Regulation I of 1919 (North-West Frontier Province Law and Justice Amendment). In Urdu. Pies 3. (Anna 1.)
 Regulation II of 1919 (British Baluchistan Criminal and Civil Justice Amendment). In Urdu. Pies 3. (Anna 1.)
 Regulation IV of 1919 (Hazara Forest Amendment). In Urdu. Pies 3. (Anna 1.)
 Regulation I of 1920 (North-West Frontier Province Validation and Indemnity). In Urdu. Pies 3. (Anna 1.)
 Regulation II of 1920 (British Baluchistan Civil Justice Amendment). In Urdu. Pies 3. (Anna 1.)

V.—TRANSLATIONS OF ORDINANCES OF THE GOVERNOR-GENERAL OF INDIA.

- Ordinance I of 1920 (Treaty of Peace). In Urdu. Pies 3. (Anna 1.)
 Ordinance I of 1920 (Treaty of Peace). In Nagri. Pies 3. (Anna 1.)
 Ordinance IV of 1920 [Treaty of Peace (Austria)]. In Urdu. Pies 3. (Anna 1.)
 Ordinance IV of 1920 [Treaty of Peace (Austria)]. In Nagri. Pies 3. (Anna 1.)

VI.—MISCELLANEOUS PUBLICATIONS.

- Table showing effect of legislation in the Governor-General's Council during 1918. As. 5 p. 6. (Anna 1.)
 Table showing effect of Legislation in the Governor-General's Council during 1919. As. 6 p. 6. (Anna 1.)
 Table showing effect of Legislation in the Governor-General's Council during 1920. (In the Press.)
 Annual Indexes to the Acts of the Governor-General of India in Council for 1918, 1919 and 1920. The price is noted on them.
 Proceedings of the Council of the Governor-General of India for making Laws and Regulations from 1919 and 1920. Super-royal 4to. Annual subscription Rs. 5 (Re. 1): single issue As. 4, including postage.
 Debates of the Council of State and the Legislative Assembly published separately. (The price is noted on each.)
 Manual of Business and Procedure in the Legislative Assembly. Re. 1.
 Manual of Business and Procedure in the Council of State. Re. 1.
 Legislation and Orders relating to the War, Seventh Edition. Royal 8vo, paper. Re. 1. (As. 4.)

DIGESTS—INDIAN LAW CASES.

- A Digest of Indian Law Cases for 1918 containing High Court Reports and Privy Council Reports of Appeals from India. Royal 8vo, cloth. Rs. 4 or 6s. (As. 4.) Reduced to Rs. 2.
 A Digest of Indian Law Cases for 1918 containing High Court Reports and Privy Council Reports of Appeals from India. Royal 8vo, cloth. Rs. 4 or 6s. (As. 5.) Reduced to Rs. 2.

List of Books and Publications for Sale which are more than two years old.

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, Digests of Indian Law Cases and Index to Enactments have been considerably reduced.

[The amounts within parentheses where noted are for packing and postage.]

I.—THE INDIAN STATUTE-BOOK.

A.—CHRONOLOGICAL TABLE AND INDEX TO INDIAN STATUTES.

Vol. I, Chronological Tables. Rs. 4. (As. 7.)

Vol. II, Index. (Out of print.)

B.—RULES AND ORDERS.

General Rules and Orders under enactments in force in British India, consisting of General Rules, Proclamations and Notifications made under Statutes relating to India and General Rules and Orders made under General Acts of the Governor-General in Council with an Index, Edition 1915, Vol. I, Rs. 3, Vol. II, Rs. 4-8-0, Vol. III, Rs. 4, and Vol. IV, Rs. 5.

List of General Rules and Orders under Statutes and General Acts in force in British India. Corrected up to 30th June 1916. Royal 8vo. Rs. 2 (As. 3.)

Addenda et Corrigenda to the above, List No. I of 1916. As. 3 p. 9. (Anna 1.)

Addenda et Corrigenda to the above, List No. I of 1917. As. 3 p. 9. (Anna 1.)

Addenda et Corrigenda to the above, List No. II of 1917. As. 3 p. 9. (Anna 1.)

Addenda et Corrigenda to the above, List No. I of 1918. As. 3 p. 9. (Anna 1.)

Addenda et Corrigenda to the above, List No. II of 1918. As. 3 p. 9. (Anna 1.)

C.—GENERAL ACTS.

General Acts of the Governor-General of India in Council, Vol. I, from 1834 to 1867, Edition 1909. Rs. 6. (As. 10.)

General Acts of the Governor-General in Council, Vol. II, from 1868 to 1878, Edition 1909. Rs. 7. (As. 10.)

General Acts of the Governor-General in Council, Vol. III, from 1879 to 1886, Edition 1909. Rs. 6. (As. 9.)

General Acts of the Governor-General in Council, Vol. IV, from 1887 to 1897, Edition 1909. Rs. 6. (As. 9.)

General Acts of the Governor-General in Council, Vol. V, from 1898 to 1903, Edition 1909. Rs. 6. (As. 9.)

General Acts of the Governor-General in Council, Vol. VI, from 1904 to 1908, Edition 1909. Rs. 7. (As. 12.)

I.—THE INDIAN STATUTE-BOOK—cont.

C.—GENERAL ACTS—cont.

General Acts of the Governor-General in Council, Vol. VII, Fourth Edition, from 1909 to 1913. Rs. 5. (As. 10.)

General Acts of the Governor-General of India in Council, Vol. VIII, 4th Edition, from 1914 to 1919. Rs. 5. (As. 6.)

D.—LOCAL CODES.

The Ajmer Code, Fourth Edition, 1916, Royal 8vo, cloth. Rs. 2 as. 8. (As. 5.)

The Assam Code, 1915, Vol. I, Royal 8vo, cloth. Rs. 3.

The Assam Code, 1915, Vol. II, Royal 8vo, cloth. Rs. 4 as. 8.

The Baluchistan Code, Third Edition, 1914. Rs. 2 as. 4. (As. 3.)

The Bombay Code, Vol. I, Third Edition, 1907. Rs. 4. (As. 8.)

The Bombay Code, Vol. II, Third Edition, 1907. Rs. 6. (As. 8.)

The Bombay Code, Vol. III, Third Edition, 1908. Rs. 5. (As. 8.)

The Bombay Code, Vol. IV, Third Edition, 1909. Rs. 4. (As. 8.)

Volumes I to IV reduced to Rs. 11 per set.

The Burma Code, Fourth Edition, 1910. Rs. 7. (As. 10.)

The Coorg Code, Third Edition, 1908. Rs. 2. (As. 4.)

The Madras Code, 1915, Vols. I and II. Royal 8vo, cloth. Rs. 6 each.

The Punjab and North-West Frontier Code, Fourth Edition, 1916. Royal 8vo, cloth. Rs. 6. (As. 10.)

The United Provinces Code, Vol. I, Fourth Edition, 1906, consisting of the Bengal Regulations and the Local Acts of the Governor-General in Council in force in the United Provinces of Agra and Oudh with a Chronological Table. Rs. 5. (As. 8.)

The United Provinces Code, Vol. II, Fourth Edition, 1906, consisting of the Acts of the Lieutenant-Governor of the United Provinces of Agra and Oudh in Council and lists of the enactments which have been declared in force in, or extended to, the Scheduled Districts of the Province of Agra by notification under the Scheduled Districts Act, 1874, with an Index. Rs. 10 (Rs. 1) for both vols. or Rs. 5 (As. 8) for each volume.

The United Provinces Code, Vols. I and II, reduced to Rs. 7 per set.

The Central Provinces Code, 4th Edn., 1918. Royal 8vo, cloth. Rs. 4 as. 8. (As. 8.)

E.—STATUTES.

A Collection of Statutes relating to India, Vol. I, Edition 1913. Royal 8vo, cloth. Rs. 8. (As. 11.)

A Collection of Statutes relating to India, Vol. II, Edition 1913. Royal 8vo, cloth. Rs. 6. (As. 10.)

The Official Secrets Act, 1911 (1 and 2 Geo. 5, ch. 28). As. 3 p. 3. (Anna 1.)

The Government of India Act, 1915 (5 and 6 Geo. 5, ch. 61). Rs. 1. (Anna 1.)

The Government of India Amendment Act, 1916 (6 and 7, Geo. 5, ch. 37). As. 3. (Pies 9.)

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 1854 to 1918.

Regulations made under the Statute 33 and 34 Vict., Cap. 3, 5 and 6, Geo. 5 Ch. 61, from No. II of 1875 to 1918. 8vo. Stitched.

Ordinances of the Governor-General of India, from 1914 to 1918.

[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 II of 1834 (Secretaries to Government), with footnotes. Anna 1.
(Anna 1.)
- Act IV of 1837 (Property in land), with footnotes. Anna 1 p. 3.
(Anna 1.)
- Act XXV of 1838 (Wills), with footnotes. As. 3 p. 9. (Anna 1.)
- Act XXIX of 1839 (Dower), with footnotes. Anna 1 p. 9. (Anna 1.)
- Act XXX of 1839 (Inheritance). As. 2 p. 3. (Anna 1.)
- Act XXXII of 1839 (Interest), with footnotes. Anna 1 p. 3. (Anna 1.)
- 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).
As. 7. (Anna 1.)
- Act XIX of 1841 [Succession (Property Protection)], with footnotes.
As. 3. (Anna 1.)
- Act XXIV of 1841 (Illusory Appointments and Infants' Property), with
footnotes. As. 2. (Anna 1.)
- Act V of 1843 (Indian Slavery), with footnotes. Anna 1 p. 6. (Anna 1.)
- Act I of 1846 (Legal Practitioners), as modified up to 1st October 1907.
As. 2. (Anna 1.)
- Act XV of 1848 (Supreme Courts' Officers Trading), with footnotes.
Anna 1 p. 3. (Anna 1.)
- Act V of 1850 (Indian Coasting Trade). Anna 1. (Anna 1.)
- Act XII of 1850 (Public Accountants' Default), with footnotes. Anna 1
p. 6. (Anna 1.)
- 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 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
1908. Anna 1 p. 6. (Anna 1.)

III.—REPRINTS OF ACTS AND REGULATIONS, Etc.—cont.

- 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 Chaudidari), 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.)
- Act IV of 1857 [Tobacco (Bombay Town)], as modified up to 1st December
1915. 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 31st Janu-
ary 1919. 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 December 1915.
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 Janu-
ary 1916. As. 4. (Anna 1.)
- Act XXIV of 1859 (Madras District Police), as modified up to 1st Novem-
ber 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 1910,
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 Decem-
ber 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.)

III.—REPRINTS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act III of 1867 (Public Gambling), as modified up to 1st January 1905. As. 4. (Anna 1.)
- Act XXII of 1867 (Sarais and Parasas), as modified up to 1st August 1908. As. 9. (Anna 1.)
- 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 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. 5 p. 6. (Anna 1.)
- Act XXI of 1871 (Dehra Dun), as modified up to 1st October 1913. Anna 1 p. 3. (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 May 1915. 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 VIII of 1873 (Northern India Canal and Drainage), as modified up to 1st December 1917. As. 9. (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 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 VIII of 1878 (Sea Customs), as modified up to 1st August 1918. Royal 8vo, stitched. Re. 1 as. 6 (As. 2 p. 6.)
- Act XI of 1878 (Indian Arms), as modified up to 1st March 1910. As. 5 p. 6. (Anna 1.)

III.—REPRINTS OF ACTS AND REGULATIONS, Etc.—*cont.*

- 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.)
- 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 (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 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. 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 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.)

III.—REPRINTS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act XIV of 1887 (Indian Marine), as modified up to 15th February 1899. As. 8. (Anna 1.)
- 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 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 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 Faroy), 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.)
- Act VIII of 1911 (Indian Army), as modified up to 1st August 1918. As. 14 (As. 2.)
- 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 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 modified up to 1st November 1920. In Urdu. Pies 3. (Anna 1.)
- Act XIII of 1859 (Workman's Breach of Contract), as modified up to 1st November 1920. 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 June 1910. In Urdu. Re. 1 as. 5. (As. 5.)
- Act XLV of 1860 (Indian Penal Code), as modified up to 1st June 1910. 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.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- 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.)
- 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. 9. (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.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—cont.

- 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.)
- 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 1st December 1917. In Urdu. As. 3 p. 3. (Anna 1.)
- Act VIII of 1873 (Northern India Canal and Drainage), as modified up to 1st December 1917. 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), as modified up to 1st September 1909. 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 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 July 1911. In Urdu. As. 2 p. 6. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—cont.

- Act XVIII of 1879 (Legal Practitioners), as modified up to 1st July 1911. 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), as modified up to 1st September 1909. In Urdu. Anna 1 p. 3. (Anna 1.)
- Act XIII of 1880 (Vaccination), as modified up to 1st September 1909. 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), as modified up to 1st May 1911. 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 1st December 1903. In Urdu. As. 3 p. 3. (Anna 1.)
- Act XI of 1886 (Indian Tramways), as modified up to 1st December 1903. In Nagri. As. 3 p. 3. (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.)
- Act VII of 1887 (Suits' Valuation), as modified up to 1st November 1904. In Urdu. Pies 9. (Anna 1.)
- Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December 1900. In Urdu. As. 2 p. 3. (Anna 1.)
- Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December 1900. In Nagri. As. 2 p. 6. (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. 6. (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), with footnotes. In Urdu. Pies 3. (Anna 1.)
- Act II of 1889 (Measures of Length), with footnotes. 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.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—*cont.*

- Act VII of 1889 (Succession Certificate), as modified up to 1st June 1910. In Urdu. Anna 1 p. 9. (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.)
- 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 1909. 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), with footnotes. 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), with footnotes. In Urdu. As. 2 p. 3. (Anna 1 p. 6.)
- Act I of 1894 (Land Acquisition), with footnotes. 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), as amended by Act XIII of 1898. In Urdu. As. 2 p. 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- Act IX of 1894 (Prisons), as amended by Act XIII of 1898. 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.)
- 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), as modified up to 1st February 1910. In Urdu. Anna 1. (Anna 1.)
- Act X of 1897 (General Clauses), as modified up to 1st February 1910. 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 May 1920. In Urdu. Re. 1 as. 4. (As 8.)
- Act V of 1898 (Code of Criminal Procedure), as modified up to 1st May 1920. In Nagri. Re. 1 as. 6. (As 8.)
- Act VI of 1898 (Indian Post Office). In Nagri. As. 3 p. 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*con.*

- Act VI of 1898 (Indian Post Office). In Urdu. 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.)
- 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 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 XII of 1900 (Banker's Books Evidence). In Urdu. Pies 3. (Anna 1.)
- Act XI of 1900 (Banker's Books Evidence). In Nagri. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- 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.)
 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.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- 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.)
 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 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.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—*cont.*

- 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.)
- 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.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—*cont.*

- Act XVI of 1910 (Indian Census). In Nagri. Pies 3. (Anna 1.)
- Act I 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 VIII of 1911 (Indian Army), as modified up to 1st August 1918. In Urdu. As. 4 p. 6. (Anna 1.)
- Act VIII of 1911 (Indian Army), as modified up to 1st August 1918. In Nagri. As. 4 p. 6. (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.)
- 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.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- 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.)
 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.)
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Commission for local investigation—Personal inspection by Judge—Old C do
(Act XIV of 1882), sec. 392—Alteration in language, effect of.] Under Order
XXVI, rule 9, read with Order XVIII, rule 18, of the Civil Procedure Code
a Judge has power to make a local investigation in person in any case in
which he sees fit to do so or he can issue a commission for local investi-
gation if he thinks fit, irrespective of the question whether it is convenient
for himself to conduct the investigation in person. The Privy Council in
Kessowji Issur v. G.I.P. Railway Company (1907) I.L.R., 31 Bom., 391
(P.C.), does not lay down that Judges should under no circumstances hold an
inspection of the site in dispute but only objects to opinions being formed
upon an inspection made under conditions quite different from those which
were material to the question at issue at the trial.

Sabapathy Pathan v. Perumal Padayachi ... (1921) I.L.R., 44 Mad., 640

AND—Presumption of Law—Whether grant is of both melvaram and kudivaram]
Although their Lordships of the Privy Council do not expressly lay down,
in Suryanarayanna v. Patanna (1918) I.L.R., 41 Mad., 1012 (P.C.) and
Venkata Sastri v. Seetharamudu (1920) I.L.R., 43 Mad., 166 (P.C.), that
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kudivaram are included, such an initial presumption is deducible from the
grounds on which these judgments are based.

Muthu Goundan v. Perumal Iyer ... (1921) I.L.R., 44 Mad. (F.B.), 538

LANDLORD AND TENANT—Forfeiture of lease by non-payment of rent—Relief
against forfeiture only on payment of all arrears of rent though barred by
limitation—Transfer of Property Act, sec. 114.] Under section 114 of the
Transfer of Property Act a tenant can be relieved against forfeiture of
lease incurred by non-payment of rent only on payment of all arrears of
rent, including such as may be barred by limitation, together with such
interest as might be legally due thereon. Semble. The arrears of rent so
payable will probably be limited to twelve years.

Vasudeva Ujpa v. Krishna Ujpa ... (1921) I.L.R., 44 Mad., 629

PALAYAM—Unsettled palayam—Alien ability—Land held on service tenure—
Abolition of service—Police duties of land-owner—Effect of sanads.] A
palayam in the Madura district was held originally on military service
tenure and subject to the payment of a tribute to the paramount power.
It was contended that it was also held on condition of rendering police
service to the State. In support of that contention reliance was placed
upon sanads granted in 1797 and 1800, by which the palayagar was bound
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debts incurred by him prior to that date, and in 1900 the villages were
bought by the mortgagees at a sale under a mortgage decree. No
permanent settlement had been made with the palayagar, but in 1905
one was made with the alienees. Held, that the palayam was not by reason
its tenure inalienable, since military service was abolished in the
Madura district by a proclamation in 1801, and since even if it could be

inferred from the sanads that the palayam was held on a tenure of
rendering police service to the State (which it could not) such police
duties by land-holders were abolished before the alienation; and that the
alienees obtained a good title. [Judgment of the High Court approved.]

Appayasami Naicker v. Madanapore Zamindari Company, Ltd. ... (1921)

I.L.R., 44 Mad. (P.C.), 875

SPECIFIC RELIEF ACT (I OF 1877), ss. 15 AND 17—Sale by managing member—
Sale of family property not for necessity—Suit for specific performance—
Specific performance of entire contract whether can be granted—Option of
purchaser for specific performance as regards share of vendor on date of
contract on payment of full consideration—Such share to be specified in
decree.] The managing member of a joint Hindu family, who, for pur-
poses not binding upon the other co-parceners and without their concu-
rence, agrees to convey a specific item of joint family property, cannot
"perform" his contract in its entirety and the case falls within the
provisions of section 15 of the Specific Relief Act. The purchaser in
such a case cannot enforce specific performance of the entire contract.
But Courts will grant specific performance by a conveyance of the share
which the vendor had in the property at the date of the contract, if the
purchaser elects to pay the entire consideration, and the share should be
specified in the decree. Kosuri Bamaraju v. Ivalury Ramalingam (1903)
I.L.R., 28 Mad., 74 and Srinivasa Reddi v. Sivarama Reddi (1909) I.L.R.,
33 Mad., 320, dissented from; Poraka Subbarami Reddi v. Padlamudi
Seshachalam Chetty (1910) I.L.R., 33 Mad., 359, and Nagiah v. Venkatarama
Sastri (1914) I.L.R., 37 Mad., 387, approved.

Baluswami Aiyar v. Lakshmana Aiyar ... (1921) I.L.R., 44 Mad. (F.B.), 605

TRUSTEE OF A TEMPLE—Delegation of powers of the trustee—Power to appoint
and dismiss hereditary temple servants—Delegation of such power to an
agent whether valid—Dismissal of archaka by agent, whether valid.] A
trustee of a temple cannot appoint an agent to do acts which involve
the exercise of judicial discretion by himself. He cannot therefore
delegate to an agent his power of appointing and dismissing hereditary
temple servants, who cannot be dismissed without sufficient cause being
established. Krishnamachari v. Rangachari (1893) I.L.R., 16 Mad., 73,
referred to.

Parasurama Udayan v. Thirumal Row Sahib ... (1921) I.L.R., 44 Mad., 636

UNENFRANCHISED PERSONAL INAM OF LANDS—Attachment in execution of decree,
validity of.] Unenfranchised inam lands granted not for future public or
private services but as a matter of favour for the maintenance of the
dance and his heirs are liable to attachment and sale in execution of a
decree against the holder of the inam. A. Visappa v. A. Ramajogi (1865)
2 M.H.C.R., 343, and Bhanappa Garu v. Kamanna, S. A. No. 1297 of 1918
(unreported), followed

Venkatarama Ayyar v. Chandrasegara Ayyar ... (1921) I.L.R., 44 Mad., 639

is concerned title after confirmation vests in him from the date of purchase and not from the date of confirmation, and unless the sale is set aside it is difficult to see what title the judgment-debtor can convey to his vendee. All he can do is to convey such interest as would vest in him should the sale be set aside, and as rule 89 expressly prevents the alienee subsequent to the Court sale from applying, the only person that can apply must be the judgment-debtor. Where conveyance would pass title only if the vendor can make an application or do a specified act (the purchaser being prohibited by law from doing so), I think the judgment-debtor has a sufficient interest in the property to enable him to apply to have the sale set aside as his alienation is contingent on it.

As regards the jurisdiction of this High Court, I am clearly of opinion that a Court which refuses to entertain an application on the ground that the petitioner has no *locus standi* fails to exercise a jurisdiction vested in it by law. I need only refer to the decision of the Privy Council in *Balakrishna Udayar v. Vasudeva Ayyar*(1), and to *Lakshmi Ammal v. Sankaran Nair*(2), *Mussumat Dhanwanti Kuer v. Sheo Shankar Lall*(3), *Birg Mohun Thakur v. Rai Uma Nath Chowdhry*(4).

M.H.H.

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SASTRI, J.

(1) (1917) 1 L.R., 40 Mad., 793. (2) (1913) 24 M.L.J., 205.
(3) (1919) 4 Patna L.J., 340; s.c., 52 I.C., 878 (Patna).
(4) (1893) 1 L.R., 20 Cal., 8.

PRIVY COUNCIL.*

1921,
March 1,

VENKATADRI APPA RAO AND OTHERS (DEFENDANTS),

v.

PARTHASARATHI APPA RAO (PLAINTIFF), RESPONDENT
[ONE CROSS-APPEAL].[On Appeal from the High Court of Judicature at
Madras.]*Account—Restitution—Principal and interest—Appropriation of payments—Rate of interest—Discretion of High Court—Code of Civil Procedure (V of 1908), sec. 144.*

Upon taking an account of principal and interest due, the ordinary rule as to payments by the debtor unappropriated either to principal or interest is that they are first to be applied to the discharge of interest.

A creditor under the belief that interest was payable with yearly rests, prepared a statement in which payments by the debtor were carried forward to the end of the year with interest, and the amounts so found were then credited against the total sum due. Upon the account being taken with simple interest,

Held, that the creditor had not by this statement appropriated the payments against the principal, so as to be precluded from applying the rule stated above.

The discretion of the High Court when making an order for restitution under section 144 of the Code of Civil Procedure, 1908, to fix the rate of interest payable will not be lightly interfered with. Where in the case of restitution of money paid out by a Receiver under a decree the Court ordered restitution to the opposite party with interest at a rate higher than the Bank rate, an appeal was dismissed.

CONSOLIDATED APPEAL and Cross-appeal (No. 40 of 1919) from a judgment and decree of the High Court (OLDFIELD and SESHAGIRI AYYAR, JJ) (15th December 1916) varying a decree of the District Judge of Kistna at Masulipatam.

The Appeal and cross-appeal related to the amount of principal and interest which the defendants (appellants in the main Appeal) were entitled to recover from the plaintiff (respondent and cross-appellant) by way of restitution in respect of money paid out under a decree of the High Court which had been

* *Present*:—Lord BUCKMASTER, Lord DUNEDIN, Lord SHAW, Sir JOHN EDGE and Mr. AMEEB ALI.

reversed by the Judicial Committee. The facts relevant to the Appeal and cross-appeal appear from the present judgment of the Judicial Committee.

De Gruyther, K.C., Dube, Narasimham, and Palat for the appellants.—The appellants did not, by the statement which they had prepared, appropriate the payments made to principal. There are no appropriations by either party. The ordinary rule applies that the payments should first be applied against the interest due: *Bamundoss Mookerjee v. Omeish Chunder Rase*(1), *Maharaja of Benares v. Har Narain Singh*(2).

Sir Erle Richards, K.C., and Parik, for the respondent and cross-appellant.—When the respondent lost the Medur estate under the order of the Board he had assets to his credit in respect of the Nidadavolu estate. That being so, the ordinary rule as to the application of sums received could not properly be applied. Further, under section 144, of the Code of Civil Procedure, 1908, the High Court had a discretion in the matter, depending upon all the circumstances of the case. The Court was not bound by any rule: *Thompson v. Hudson*(3), *Bower v. Marria*(4). The cross-appeal is on two grounds: First, interest should have been charged against respondent only at the Bank rate, which was lower than 6 per cent. Section 144 is a restitution section; if the money had not been paid over to the respondent, it would not have earned in the Receiver's hands more than the Bank rate. Secondly, the trial Judge was right in holding that interest should run only against so much of the unpaid debt as represented principal.

The JUDGMENT of their Lordships was delivered by

Lord BUCKMASTER.—Their Lordships do not desire to hear counsel for the appellants in reply, nor do they need further time to consider the advice that they will tender to His Majesty, for in their opinion this case is quite plain. It appears that in 1899 the respondent instituted a suit, the defendants to which are represented by the present appellants; he claimed partition of two estates, known as the Nidadavolu estate and the Medur estate, asserting that he was entitled to a one-third share in each. The

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(1) (1856) 6 M.L.A., 289.

(3) (1870) L.R., 10 Eq., 497.

(2) (1905) I.L.R., 28 All., 25.

(4) (1841) 1 Cr. & Ph., 351.

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District Judge, by whom the action was first heard, decreed in the plaintiff's favour with regard to the first estate, but against him with regard to the other. An appeal was taken from that decree to the High Court who varied it by declaring that the plaintiff was entitled to one-third of the second estate as well as of the first. A Receiver having been appointed of the rents of both estates on the 14th February 1907, the plaintiff obtained an order enabling the Receiver to pay over to him his interest in the Medur estate under the judgment of the High Court as it then stood. Unfortunately for him the uncertainties of litigation resulted in a decree of His Majesty in Council on the 19th December 1913 restoring the judgment of the District Judge, and it consequently followed that the share of the property in the Medur estate which he had received from the Receiver was money which he was bound to restore. The representatives of the original defendants accordingly appealed to the District Court for restitution, asking for repayment out of the moneys in the Receiver's hands representing the plaintiff's share in the Nidadavolu estate, and against him personally for the balance. The matter came before the District Judge, who decided that the defendants were entitled to the relief they claimed and made an order on the 31st August 1915, directing that the interest at the rate of 9 per cent with yearly rests was to be charged against the plaintiff, and that so much of the amount due as represented principal should carry simple interest from the date of the order at the rate of 9 per cent.

On 19th October 1916, the High Court varied this order by declaring that the amounts so received should only bear simple interest at 6 per cent, and on the 15th December 1916, the matter being again before them, they directed that the whole amount should carry interest from the date of the order, but that the moneys received should be treated as though they had been received in respect of the principal moneys and not of the interest. An order was accordingly drawn up embodying the decision of the 19th October 1916; that order has been accepted by the appellant, but from the direction given on the 15th December as to appropriation this Appeal has been brought. The reason given by the learned Judges for their judgment was that they regarded the payments already made as

shown in an account filed by the defendants in the District Court on the 25th August 1915, as payments that had in fact been appropriated by the defendants as against principal and that from such appropriation there was no opportunity for them to recede. The account referred to is set out in the record in these proceedings, and it shows that as each sum of money was received it was charged with interest at the rate of 9 per cent and carried forward until the end of the year, when the total amount so found was credited as against the total amount which was due. At no time did the sums so credited do more than cover the claim for interest, and it therefore seems impossible to understand why it was that the money received was regarded as definitely appropriated in respect of the principal. Nothing has been pointed out to their Lordships to lead them to the conclusion that the High Court was right in the assumption that they then made in that respect.

The question then remains as to how, apart from any specific appropriation, these sums ought to be dealt with. There is a debt due that carries interest. There are moneys that are received without a definite appropriation on the one side or on the other, and the rule which is well established in ordinary cases is that in those circumstances the money is first applied in payment of interest and then when that is satisfied in payment of the capital. That rule is referred to by Lord Justice RIGBY in the case of *Parr's Banking Company v. Yates*(1) in these words:

"The defendant's counsel relied on the old rule that does no doubt apply to many cases, namely, that, where both principal and interest are due, the sums paid on account must be applied first to interest. That rule, where it is applicable, is only common justice. To apply the sums paid to principal where interest has accrued upon the debt, and is not paid, would be depriving the creditor of the benefit to which he is entitled under his contract."

Their Lordships can find nothing in this case to take the question outside the general principle referred to by the learned Lord Justice. They, therefore, think that the money received must be applied in the ordinary way, first in the reduction of the interest and when that is satisfied in the reduction of the

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(1) [1898] 2 Q.B., 480 at 466

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principal. So far therefore as the appellants' Appeal is concerned this means that the High Court have been mistaken in the view that they took and that the Appeal should be allowed, but there is before their Lordships a cross-appeal which first of all raises the contention that the interest ought not to be higher than the Bank rate. Their Lordships are not prepared to accede to that contention. They think that the High Court were fully qualified to exercise the discretion which they did in the matter, and they will not lightly interfere with the exercise of such a power. Finally, the respondent contends that the District Judge was right in dividing the amount to be repaid under the order of the 31st August 1915 into the component parts of which it was originally made up, so much as to principal and so much as to interest, and to declare that the interest only runs on such part of the judgment-debt as flowed from the principal sum. Their Lordships agree with the High Court in thinking that no such distinction can be made.

They will therefore humbly advise His Majesty that the Appeal should be allowed with costs, that the cross-appeal should be dismissed with costs, and that in taking the account the moneys received should be applied first towards the payment of the interest and when that is satisfied towards the payment of the capital sum.

Solicitor for appellants: *Douglas Grant*.

Solicitor for respondent: *Edward Walgode*.

PRIVY COUNCIL.*

APPAYASAMI NAICKER (PLAINTIFF),

v.

MIDNAPORE ZAMINDARI COMPANY, LIMITED
(DEFENDANTS).

[On Appeal from the High Court of Judicature
at Madras.]

1921,
March 16.

*Palayam—Unsettled Palayam—Alienability—Land held on service tenure—
Abolition of service—Police duties of land-owner—Effect of sanads.*

A Palayam in the Madura district was held originally on military service tenure and subject to the payment of a tribute to the paramount power. It was contended that it was also held on condition of rendering police service to the State. In support of that contention reliance was placed upon sanads granted in 1797 and 1800, by which the Palayagar was bound to protect the inhabitants from robberies and to deliver up murderers and deserters. In 1895, the Palayagar mortgaged villages of the Palayam for debts incurred by him prior to that date, and in 1900 the villages were bought by the mortgagees at a sale under a mortgage decree. No permanent settlement had been made with the Palayagar, but in 1905 one was made with the alienees.

Held, that the Palayam was not by reason of its tenure inalienable, since military service was abolished in the Madura district by a proclamation in 1801, and since even if it could be inferred from the sanads that the Palayam was held on a tenure of rendering police service to the State (which it could not) such police duties by land-holders were abolished before the alienation; and that the alienees obtained a good title.

[Judgment of the High Court approved.]

APPEAL No. 80 of 1919 from a judgment and decree of the High Court (SIR JOHN WALLIS, C.J. and SPENCER J.) (8th February 1918) reversing a decree of the District Judge of Madura.

The suit was instituted by the appellant and his brother (who was not a party to the Appeal) against the respondent Company and other defendants, claiming possession with mesne profits, of certain villages appertaining to the Palayam of Kannivadi in the Madura district. The claim was based upon the contention that the Palayam was inalienable. The

* Present:—Lord BUCKMASTER, Lord DUNEDIN, Lord SHAW, Sir JOHN EDGE and Mr. ANNEB ALL.

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facts appear from the judgment of the Judicial Committee and from the report of the Appeal to the High Court in I.L.R., 41 Mad., 474.

The plaintiff alleged that the Palayam was an ancient impartible estate descendible to a single heir according to the custom of primogeniture, that it was originally conferred in the sixteenth century upon an ancestor of the appellant as a military fief, and had been since held subject to the obligation to render military and police services to the rulers of the country, that it had never been enfranchised by the Government from these conditions, that having regard to these conditions, and to the family custom, which came into existence in consequence of them, the properties of the Palayam were inalienable by the Palayagar beyond the term of his own life, and that consequently the appellant was not bound by the mortgage or sale, and was entitled to recover the properties.

The respondents by their written statement pleaded (*inter alia*), that under British rule the Palayam had always been held on ordinary zamindari tenure subject only to the payment of a fixed Government revenue, and in every respect on the same terms and conditions as those contained in the sanad granted by Government to the Bank in 1905, that the Palayam had always been alienable in the same way as permanently settled estates, and was in any case so alienable at the time of the alienations in question, and they further submitted that the appellant was bound by the debts and incumbrances created by his father and grandfather and could not in any case recover the Palayam properties without paying such debts in full with interest down to the date of payment.

Among numerous issues settled, the following alone were material to the Appeal:—

(10) Whether the plaintiff mentioned zamindari is inalienable either by custom or by virtue of its tenure? (22) Whether the zamindari was held by the ancestors of the plaintiffs on the tenure and conditions alleged in paragraphs 4, 5 and 6 of the plaint? (23) Whether the estate was held, or continued to be held, on condition of military service and police duties as before on the establishment of British rule as alleged in paragraph 5 of the plaint, or whether as alleged in paragraph 18 of the first

defendant's written statement it was held on ordinary zamindari tenure on the same conditions as are contained in the sanad of 1905?

The suit was transferred for trial to the District Judge of Madura, before whom a large body of evidence was adduced; the plaintiff's case was based, not upon custom, but upon the nature of the tenure. The learned Judge, by his judgment delivered on 11th September 1916, found that up to the time of British rule the estate was held subject to military and police services, and that that tenure was continuing at the date of the purported alienation, no permanent settlement having then been made. He accordingly held that the estate was not alienable beyond the life of the holder, and made a decree in favour of the present appellant.

The respondents appealed to the High Court, which reversed the decree of the trial Judge and dismissed the suit. The judgment of the Court (Sir JOHN WALLIS, C.J., and SPENCER, J.) was delivered by the Chief Justice, and is fully reported at I.L.R., 41 Mad., 744. Shortly stated, it was held, as had been decided in previous cases, that lands held on service tenure were inalienable beyond the life-time of the holder; that the authorities also showed that when the holders of an estate were freed from the liability to perform services, the reason for the inalienability ceased, and the land became subject to the ordinary laws of descent, and that an unsettled Palayam in the Presidency of Madras resembled a zamindari in its character, and was alienable for the debts of the holder, or of previous holders, so as to bind the successors. There was no doubt, their Lordships said, that the Palayam was held before British rule on a military service tenure, but the proclamation of 1st December 1801 unconditionally suppressed military service in connexion with the holding of land in Southern India; the view of the trial Judge that the effect of the proclamation was to abolish military service only upon a permanent settlement being made was dissented from. It was also held that the performance of police service by holders of lands was abolished pursuant to Madras Regulations XXV of 1882 and XI of 1816, Act XXIV of 1859, Act XVIII of 1862, and Madras Act III of 1895.

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Dunne, K.C., and Narasimham, for the appellant.—The estate was inalienable beyond the life-time of the holder by virtue of its being held for military and police services. The inalienability of lands so held is well established: see Mayne's Hindu Law, 8th Edition, article 338, and cases there cited. The judgment of the Board in *The Collector of Trichinopoly v. Lekkamani*(1) laid down no general rule as to the tenure of an unsettled Palayam, but stated that in each particular case its nature depended upon the evidence. It was found by both Courts in the present case that the Palayam of Kannivadi was held at the commencement of British rule for military and police services, and the trial Judge rightly held that that tenure was continuing at the date of the purported alienation. The true effect of the proclamations of 1799 and 1801 was that military service was abolished if, and from the date when, a permanent settlement was made. In this case the alienation was in 1895, and no permanent settlement was made until 1905, when it was made with the alienees. The Madras Legislation abolishing private police service did not alter the tenure upon which the Palayam was held. The evidence shows that after 1801 military services were required of the Palayagar and were rendered. In India the existence of a particular office has never been held as necessary in order to establish that a tenure is a service tenure. Upon the view of the law held in Madras prior to *Sartaj Kuari v. Leoraj Kuari*(2) it was never necessary to raise the present contention with regard to a Palayam, hence the absence of any case analogous to the present one. [Reference was also made to *Naragunty Latchmeedavamah v. Vengama Naidoo*(3) and to Madras Regulation XXV of 1802.]

De Gruyther, K.C., and Kenworthy Brown, for the respondents, were not called upon.

The JUDGMENT of their Lordships was delivered by

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Sir JOHN EDGE.—This is an Appeal from a decree, dated the 18th February 1918, of the High Court at Madras, which reversed a decree dated the 11th September 1916, of the District Judge of Madura.

(1) (1874) L.R., 1 I.A., 282.

(2) (1888) I.L.R., 10 All., 272 (P.C.); s.c., L.R., 15 I.A., 51.

(3) (1861) 9 M.I.A., 66.

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The suit in which this appeal has arisen was brought to obtain, so far as is now material, against the Midnapore Zamindari Company, Limited, hereinafter referred to as the respondent Company, a decree for possession of the properties specified in schedules A and C of the plaint, and for mesne profits. The properties claimed were villages of the Palayam of Kannivadi. The suit was brought by two brothers, sons by different wives of the late Malayandi Appaya Naicker, a Hindu, one of whom only could have obtained a decree if their case had been proved. The first plaintiff on the record was Malayandi Appayasami Naicker, who was the son of Malayandi Appaya Naicker by his first or senior wife; he is the appellant here, and will be hereafter referred to as the appellant. The second plaintiff on the record was the son of Malayandi Appaya Naicker by his second or junior wife, and is by date of birth the elder of the two brothers. They were obviously joined as plaintiffs owing to some doubt as to which of them was entitled on the death of their father in 1911 to succeed to the Palayam by the custom of primogeniture applicable in the family. The second plaintiff did not appear, and was not represented in the High Court, and he is not a party to this Appeal, so need not again be referred to.

In the plaint it was alleged that the Palayam of Kannivadi is an ancient impartible Palayam, descendible to a single heir according to the custom of primogeniture; that the Palayam was conferred as a military fief by a Nayak Ruler of Madura about A.D. 1500 upon an ancestor of the appellant who was placed in charge of one of the principal bastions of Madura Fort; that the Palayagar was by virtue of the tenure liable to be called upon to render military service by furnishing men and other aid, and for police duties and to pay annual tribute to the State; that the Palayam continued to be held by the appellant's family under the same conditions of tenure and service after the assumption of the Dinidigul country by the British; and,

"That the said Kannivadi Palayam is inalienable beyond the life of the Palayagar for the time being, both by reason of the tenure and according to the custom of the family, which custom came into existence in consequence of the character of the tenure."

Briefly stated, the connexion of the respondent Company with the Palayam of Kannivadi according to the allegations in the

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plaint is as follows :—The grandfather and father of the appellant in 1895 mortgaged the Palayam to the Commercial Bank, Limited, of Madras, in respect of debts of theirs which were not binding upon the appellant or upon the Palayam; on that mortgage the Bank obtained a decree, and in execution of that decree brought the Palayam to sale at auction, and at the sales purchased the estate in 1900, and on the 8th January 1909, conveyed all their rights under the decree and under the auction sales to the respondent Company, who have since then been in possession.

Various other matters were alleged in the plaint as to which no arguments were addressed to their Lordships by either side.

The respondent Company in their written statement admitted that the Zamindari of Kannivadi was at the time of the sale to the Bank impartible and was descendible to a single heir according to the custom of primogeniture, but they denied that it had been conferred upon an ancestor of the appellant "for being in charge of a bastion of the Madura Fort"; denied that the estate had been granted or was ever held subject to any obligation of rendering military or police service, or was inalienable, or that the Zamindar had ever held any office by virtue of which he was under any obligation to perform military or police duties; denied that there is any family custom or anything in the tenure of the Kannivadi Zamindari which rendered it inalienable beyond the life of the Palayagar, and alleged that in law the Zamindar for the time being of the Kannivadi Zamindari always possessed an absolute interest in it with full powers of alienation. The respondent Company in their written statement pleaded several other matters, which in the view that their Lordships take of the case are not now necessary to be considered.

There were 27 issues fixed for the trial of the suit, but in their Lordships' opinion the tenth issue was in the circumstances that upon which the decision of this appeal depends. It was :

"X. Whether the plaint mentioned Zamindari is inalienable either by custom or by virtue of its tenure?"

If it was not inalienable either by custom or by reason of its tenure the Palayagar for the time was entitled to mortgage or to transfer absolutely every village in the Palayam according to

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his pleasure. That is the result of the decisions of the Board in cases of impartible estates in India which descend according to a custom of primogeniture. Until the law on this subject was placed by decisions of the Board beyond a doubt, there was a current of judicial decisions in the Presidency of Madras to the effect that a holder of an impartible estate which descended by a rule of primogeniture could not transfer except for his own lifetime any part of the estate unless possibly for necessity.

The suit was tried by the District Judge of Madura. The District Judge states in his judgment that

"the plaintiffs base their case not on custom but on the military and police nature of the tenure and rely on *Sartaj Kuari v. Deoraj Kuari* (1) to establish that if such is its tenure it (the estate) is inalienable. . . . A distinction is also sought to be drawn between the present case and others, in that in them there was a permanent settlement, whereas in the present case the estate was an unsettled Palayam till the Bank obtained a Permanent Sanad in 1905 from the Government."

The District Judge, after an elaborate consideration of all the historical references to the family to which the appellant here belonged, and of reports and proceedings of Officers of the Government, came to the conclusion that the Palayam of Kannivadi was held, down to 1816, for police as well as military service, and that although by 1816 the Government had removed from the Palayagar the duty of police services, the Government had not by the grant of a Zamindari sanad altered the tenure by which the Palayam was held. His final conclusion on the tenth issue is thus expressed :

"It seems to me, therefore, that as I have held the Palayam to have been held on a military and karal (police) tenure, that as it had never been settled and as there was no express putting an end to the military liabilities, the estate must be held to have been held on the old tenure up to the grant of the sanad in 1905 to the Bank, and that therefore up to that date the estate was inalienable. This is my finding on issue 10."

The District Judge made a decree in favour of the appellant here, against the respondent Company. From that decree the respondent Company appealed to the High Court at Madras.

(1) (1888) I.L.R., 10 All., 272 (P.C.); s.c., L.R., 15 I.A., 51.

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The High Court in dealing with the Appeal considered separately the question as to whether the Palayam of Kannivadi was held on military service tenure, and the question as to whether it was held on a tenure of performing for the State police duties. Their Lordships will adopt the same course in dealing with this Appeal. The learned Judges in their judgment referred to the fact that the Board in *Naragunty Lutchmeedavamah v. Vengama Naidoo*(1), which related to the Naragunty Palayam in the District of Chittoor in the Presidency of Madras, had accepted as correct the explanation in Wilson's Glossary that Palayagars were originally petty Chieftains occupying usually tracts of hills or forest country, subject to pay tribute and service to the paramount State, but seldom paying either, and more or less independent; but as having at present, since the subjugation of the country by the East India Company, subsided into peaceable landholders. With reference to that description the learned Judges found that

"There can be no doubt that Kannivadi was a Palayam of this nature."

It has not been suggested at the hearing of this Appeal that that conclusion of the High Court was not correct. The High Court do not state when the Palayam of Kannivadi was first granted to an ancestor of the appellant; there was not on the record any reliable evidence on that point, but they obviously and rightly considered that the grant had been made before Dindigul, in which district Kannivadi is situated, was ceded to the East India Company by the Treaty of Seringapatam, 1792.

It may be accepted as a fact that the Palayam of Kannivadi was originally held on military service tenure and subject to the payment of a tribute to the paramount power. Where lands in British India are held on military service tenure, there is good reason for holding that

"No one of the successive tenants could deal with the land so as to deprive the next holder of the source from which his duties might be discharged."

(See Mayne's Hindu Law, paragraph 337.)

(1) (1861) 9 M.I.A., 66.

"A Palayam is in the nature of a Raj, it may belong to an undivided family, but it is not the subject of partition; it can be held by only one member of the family at a time."

(See the *Naragunty case*(1) cited above.) The question, so far as military service tenure is concerned, is—Did the Palayam continue to be held on military service tenure when the mortgage to the Bank was made in 1895? The High Court held that the military service of Palayagars of the Madura and Tinnevely districts was abolished in 1801 by the Proclamation of the 1st December 1801, of Lord Clive, Governor in Council.

On the 2nd October 1799, in consequence of a rebellion which had been fomented and supported by Palayagars of the Tinnevely district, Major Bannerman, as Military Commandant of the Southern Detachment, had been obliged to issue a Proclamation to the Palayagars, landholders and inhabitants of the Tinnevely district, ordering the Palayagars to destroy all forts in their Palayams and to deliver all guns, gingal pieces, firelocks, matchlocks and pikes in their possession, or in the possession of any of the inhabitants, to the Military Detachments sent to receive them. The Court of Directors in their letter of 11th February 1801, to Fort St. George (the Government of Madras), sanctioned the gradual introduction of a permanent land settlement in the Presidency, but laid down that it was of first importance that

"All subordinate military establishments should be annihilated within the limits subject to the Dominions of the Company."

That must have meant that military service tenures should be abolished in the districts subordinate to Fort St. George.

In consequence of those orders of the 11th February 1801, Lord Clive, Governor in Council, issued the Proclamation of the 1st December 1801, which was addressed to the Palayagars of the Madura and Tinnevely districts. That Proclamation referred to a Proclamation of the 9th December 1799, of the Governor in Council of Fort St. George addressed to the Palayagars of Tinnevely and to a rebellion excited and maintained in arms by Palayagars of Panchalam Kurishi and of Virupakshi and by the Sherogars of Sivaganga.

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(1) (1861) 9 M.I.A., 66, 88.

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The following paragraphs of the Proclamation of the 1st December 1801, show clearly what the Government of Fort St. George intended :

"Wherefore the Right Honourable Edward Lord Clive, Governor in Council, aforesaid, with the view of preventing the recurrence of the fatal evils which have attended the possession of arms by the Palayagars and Sherogars of the southern provinces and with the view also of enforcing the conditions of the Proclamation published by Major Bannerman on the 2nd October 1799, formally announces to the Palayagars, Sherogars and inhabitants of the southern provinces the positive determination of His Lordship in Council to suppress the use and exercise of all weapons of offence with the exception of such as shall be authorized by the British Government.

"The military service heretofore rendered by the Palayagars and Sherogars having been suppressed and the Company having in consequence charged itself with the protection and defence of the Palayagar countries, the possession of fire arms and weapons of offence is manifestly become unnecessary to the safety of the people. The Right Honourable the Governor in Council therefore orders and directs all persons possessed of arms in the provinces of Dindigul, Tinnevely, Ramnadpuram, Sivaganga and Madura to deliver the said arms consisting of muskets, matchlocks, pikes (to ?) Lieutenant-Colonel Agnew, the officer now commanding the forces in those provinces.

"It is unnecessary to assure the people of the southern provinces that the Right Honourable the Governor in Council in the determination of carrying this resolution into effect can be governed by no other motives than those connected with the sacred duty of providing for the permanent tranquillity of those countries. His Lordship disclaims every wish of subjecting the chiefs and hereditary landlords to any humiliation, but the discontinuance of the general use of arms according to the prevailing habits of those countries being indispensably necessary to the preservation of peace and to the restoration of prosperity, the Governor in Council hopes that the chieftains will with cheerfulness sacrifice a custom now become useless to the attainment of those important objects.

"With a view therefore of tempering the execution of their general resolution with as great a degree of attention as may be practicable to the hereditary customs and to the personal feelings of the chieftains, the Right Honourable Lord Clive, Governor in Council aforesaid, hereby authorizes each Palayagar or Zamindar

to retain a certain number of peons carrying pikes for the purpose of maintaining the pomp and state heretofore attached to the persons of the said Palayagars. But the said number of authorized pikemen shall be fixed and shall continue to be limited for the better execution of this intention, the said number of pikemen shall be determined by the Governor in Council of Fort St. George upon the representation of the several Palayagars transmitted through the regular channel of the Company's Collector, after proclamation of the number so fixed, the names of the said pikemen shall be registered in the public catcherry of the Collector, and the pikes shall in like manner be publicly stamped by the Collector with a mark bearing the sanction of the British Government.

"In the confident expectation of reclaiming the people of the southern provinces from the habit of predatory warfare and in the hope of inducing them to resume the arts of peace and agriculture, the Right Honourable Edward Lord Clive, Governor in Council of Fort St. George aforesaid, announces to the Palayagars and to all the inhabitants of their Palayams that it is the intention of the British Government to establish a permanent assessment of Revenue on the lands of the Palayams upon the principles of Zamindari tenures, which assessment being once fixed shall be liable to no change in any time to come, that the Palayagars becoming by these means Zamindars of their hereditary estates will be exempted from all military service and that the possession of their ancestors will be secured to them under the operation of limited and defined laws to be printed and published as well for the purpose of restraining its own officers to the regulations and ordinances of the Government as of securing to the people their property, their lives and the religious usages of their respective castes."

It appears to their Lordships that by that Proclamation, military service tenures in the districts to which the Proclamation applied were abolished, whether the Palayagars obtained a permanent assessment sanad or not.

Following upon the Proclamation of the 1st December 1801, came Regulation XXV of 1802, under which a permanent settlement so far, if at all, as it has any bearing on this case was made with the Bank, and an Istimrari sanad was granted to the Bank on the 29th September 1905. The Palayam estate had not been previously settled. The Palayagars generally, including the Palayagar of Kannivadi, refused to accept Istimrari sanads, and when the Palayagar of Kannivadi for

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the time being was willing to accept a sanad the Government refused in 1883 to grant him one. There can be little doubt that that refusal to grant him a sanad was out of consideration for the family, as it was generally believed that it was more difficult for a creditor to bring to sale unsettled Palayams than Palayam estates which were held under an Istimrari Settlement sanad. It appears to their Lordships that Regulation XXV of 1802 does not affect the question as to whether in 1895 the Palayam of Kannivadi was alienable or not. The Board decided in the *Marungapuri* case [*The Collector of Trichinopoly v. Lekkamani*(1)] that the affirmative words of the second section of Regulation XXV of 1802,

"That, in consequence of the assessment the *proprietary right* of the soil shall become vested in zamindars, etc." did not either give to or take away from the former owners of lands not permanently settled any rights which they then had. It (a settlement under that Regulation) merely vested in all zamindars an hereditary right at a fixed revenue upon the conclusion of the permanent settlement with them. In that case the Board approved of the opinion expressed by the High Court, Madras :

"That the existence of a proprietary estate in polliams or other lands not permanently assessed, and the tenure by which it has been held, are, in our opinion, matters judicially determinable on legal evidence, just as the right to any other property."

In the same case the Board held that

"The only difference between a polliam or zamindari which is permanently settled and one that is not, is that, in the former, the Government is precluded for ever from raising the revenue ; and, in the latter, the Government may or may not have that power."

In the present case the learned Judges of the High Court held that the tenure of military service under which the Palayam of Kannivadi had been held had been abolished and determined by the Proclamation of the 1st December 1801, and with that decision their Lordships have agreed.

It remains to be considered whether the Palayam of Kannivadi was held under a tenure of the Palayagar rendering police service to the State. The best and most reliable evidence that the

Palayam was held on police service tenure would be a sanad showing that it was so held. Only two sanads which were granted to any Palayagar of Kannivadi have been brought to the attention of this Board. They are sanads which were granted respectively on the 13th July 1797, for the fasli year 1207, and the 13th July 1800, for the fasli year 1210, to Appaya Naicker, the then Palayagar. There is nothing in either of those sanads from which their Lordships can infer that the Palayam of Kannivadi was held on a tenure of rendering police duties to the State. The conditions in those sanads by which the Palayagar was bound to protect the inhabitants by preventing as far as might be in the power of the Palayagar, robberies, depredations, etc., in their properties, to deliver up persons guilty of murder, and not to give shelter to deserters, and to apprehend and deliver them to the Collector, are similar to the duties which all landholders and zamindars in British India have to perform. Even if it were possible to infer from those sanads that the Palayam of Kannivadi was then held on a tenure of rendering police duties to the State, the police duties of zamindars in that part of the country were abolished in 1816 by the Government of Madras.

Their Lordships hold that in 1895 the Palayam of Kannivadi was not inalienable, and that the then Palayagar had power to alienate it to suit his own purposes, and they will humbly advise His Majesty that this Appeal should be dismissed with costs.

Solicitor for appellant: *H. S. L. Polak.*

Solicitors for respondents: *Woulner & Sons.*

A.M.T.

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APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice
Coutts Trotter and Mr. Justice Ramesam.

MUTHU GOUNDAN (FOURTH DEFENDANT), APPELLANT,

v.

1920,
December
13 and
1921,
January 7.

PERUMAL IYEN AND FIVE OTHERS (PLAINTIFFS AND DEFENDANTS
1 TO 3), RESPONDENTS.*

*Inam—Presumption of Law—Whether grant is of both melvaram and
kudivaram.*

Although their Lordships of the Privy Council do not expressly lay down, in *Suryanarayana v. Patanna*, (1918) I.L.R., 41 Mad., 1012 (P.C.) and *Venkata Sastrulu v. Seetharamudu*, (1920) I.L.R., 48 Mad., 166 (P.C.), that there is a presumption in law that in inam grants both the melvaram and kudivaram are included, such an initial presumption is deducible from the grounds on which these judgments are based.

SECOND APPEAL preferred against the decree of D. G. WALLER, District Judge of Coimbatore, in Appeal Suit No. 92 of 1919, preferred against the decree of P. PARTHASARATHI AYYANGAR, Acting District Munsif of Udumalpet, in Original Suit No. 917 of 1917.

Plaintiffs in this suit sued for a declaration of their title to, and for possession of, certain lands dedicated to the temple of Venkateswara Perumal in the village of Nayarin. Plaintiffs alleged that the suit land was one of the manyams gifted to the temple for purposes of conducting the worship, that plaintiffs had mirasi rights to do pooja in the temple, that they alone had been doing that service, and that defendants were unlawfully in possession. Defendants 1 to 3 did not contest the suit. Fourth defendant contended that he had bought part of the land from third defendant by a registered deed, that defendants 1 to 3 and their ancestors had been themselves enjoying the land, paying taram kadayam due on it to the plaintiffs and their ancestors. The District Munsif held that "the grant to the temple was not of the soil but only of the revenue" and

dismissed the suit. The District Judge reversed that decree for the reasons stated in the Order of Reference. Fourth defendant thereupon preferred a Second Appeal which came on for hearing before AYLING and ODGERS, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

AYLING, J.—The first point for decision in this case is whether the grant to the temple was only of the melvaram: and appellant attacks the finding of the District Judge on the ground that he has initially misdirected himself by supposing that the Privy Council had laid down a presumption that the grant was of the soil itself.

He says in paragraph 2 of his judgment:

"The lower Court is of opinion that the presumption, in such cases, is that the grant was only of the right to receive the royal share of the produce. The latest ruling of the Privy Council on the point is that the presumption is that the grant was of the soil itself. The presumption is, I think, in this instance confirmed by Exhibit D, a statement compiled in 1861, which shows that the then method of enjoyment was by leasing the land to a cultivator for rent and utilizing the proceeds for the temple. The inam title-deed itself (Exhibit B) in no way controverts this statement or rebuts the presumption."

Again in the last paragraph he says:

"The burden of proving that the grant was merely of the melvaram is on fourth defendant and he has, in my opinion, failed to discharge it."

It seems to me clear that the District Judge has, in fact, approached the question with this supposed presumption in his mind—a presumption which in his view it was for the defendant to rebut. The evidence regarding the nature of the grant is in this, as in most cases of the same class, so meagre that the existence or non-existence of an initial presumption one way or the other assumes a special importance: and if the District Judge is wrong on this point, I think we should call for a fresh finding.

It is therefore necessary to determine whether any recent ruling of the Privy Council lays down such a presumption as the District Judge supposes. The only judgments which, so far as

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is suggested, he can have had in mind are *Suryanarayana v. Patanna*(1) and *Venkata Sastrulu v. Seetharamudu*(2). The first of these cases dealt with a minor inam not differing materially, so far as I can see, from the inam with which we have to deal. Their Lordships said that there was no presumption of law, as had been supposed, that in the case of an inamdar it should be presumed, in the absence of the inam grant under which he held, that the grant was of the royal share of the revenue only. They added that the grant of a village by or on behalf of the Crown under British rule is in law to be presumed to be subject to such rights of occupancy, if any, as the cultivators at the time of the grant may have had. The latter is not a presumption with which we are now concerned. Beyond this they, as far as I can see, say nothing about any presumption: and they dispose of the case before them on a discussion of the evidence and the inferences to be drawn therefrom.

The second case dealt with the grant of a whole village; their Lordships after referring to their previous judgment reiterate that no presumption of law exists in favour of a grant of the melvaram only. They proceed to say:

"Each case must therefore be considered on its own merits," and dispose of the case before them on a discussion of the evidence.

After considering these judgments to the best of my ability, I am unable to elicit from them any presumption of law that the grant was of the soil itself. The net effect seems to be to destroy the supposed presumption the other way, and to leave no presumption, one way or the other, each case having to be disposed of on its merits.

This is the view which was taken of the Privy Council judgments by ABDUR RAHIM and MOORE, JJ., in *Sri Sri Mahant Radhakrishnadoss v. Chitri Podhanam*(3).

We have, however, been referred to two recent judgments of this Court, as instances in which a different interpretation has been placed upon them. The first of these is *Nandigam*

(1) (1918) I.L.R., 41 Mad., 1012 (P.C.).

(2) (1920) I.L.R., 43 Mad., 166 (P.C.).

(3) Appeals Nos. 160 of 1919 and 69 of 1918 (unreported).

Subbarayulu v. Kannam Saheb(1) to which my learned brother was a party and which he has discussed in the judgment which he is about to deliver. Regarding this I need say nothing.

The other case is *Sri Gadadhardoss Bavaji v. Suryanarayana Patnaik*(2) in which the learned Chief Justice certainly seems to take the contrary view, and speaks of the

"presumption recently laid down by the Privy Council that the grant to the inamdars was a grant of the proprietary right in the suit land including the kudivaram as well as the melvaram interest."

After the close of the argument, our attention was also directed to another unreported case to which I was a party at one stage, *Narasavalhanulu v. Kamakshiah*(3). In calling for a fresh finding as to whether the grant was of the melvaram only, KRISHNAN, J., and myself stated that the burden of proof had been "shifted" by the Privy Council ruling in *Suryanarayana v. Patanna*(4). This was interpreted by the Lower Appellate Court in that case (and I must admit not unnaturally) as meaning that the Privy Council ruling laid down a presumption that the grant was of the soil itself.

Whether this was our meaning or whether the phrase "shifted" was somewhat unfortunately used when all we meant was that the presumption previously supposed to exist had been destroyed my memory will not allow me to say, and I was not a member of the Bench which considered the finding. The former is, no doubt, the more natural interpretation to put on the language we used, though, if it is correct, I can only say that we assigned no reasons, and on the argument now addressed to us, and on a full consideration of the two Privy Council judgments, I have come to a different conclusion.

In view, however, of the difference of opinion as to the meaning of their Lordships' judgments, and of the importance of settling a point which must frequently arise, I think a reference to a Full Bench is the only course to adopt. I would therefore refer the following question:

(1) (1919) M.W.N., 836.

(2) (1920) 88 M.L.J., 342.

(3) C.R.P. Nos. 610 to 616 of 1917 (unreported).

(4) (1918) I.L.R., 41 Mad., 1012 (P.C.).

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Do the rulings of the Privy Council in *Suryanarayanna v. Patanna*(1) and *Venkata Sastrulu v. Seetharamudu*(2) lay down a presumption that the grant is of both the melvaram and kudivaram or is there any presumption of law at all, as to the extent of the grant, deducible from them?

ODGERS, J.—In this case the point of law is whether the learned District Judge is right in saying in his judgment that in the case of a grant of an inam the latest ruling of the Privy Council on the point is that the grant was of the soil itself. He also says the burden of proving that the grant was merely of the melvaram is on the fourth defendant.

The leading rulings on the point are *Suryanarayanna v. Patanna*(1), and *Venkata Sastrulu v. Seetharamudu*(2), both of the Privy Council. The former directly combats and overrules the presumption of law which was previously applied in Madras and Bombay, that the grant was of the melvaram only. Their Lordships point out that the fact that the rulers in India usually collected their land revenues by taking a share of the produce could not be a foundation for the assumption that the ownership of the soil was not in the rulers and consequently that all they had to grant was the right to the revenue. Their Lordships add that the grant of a village by or on behalf of the Crown under British rule is in law to be presumed subject to any occupancy rights existing at the date of the grant.

In my opinion it is quite clear that their Lordships do not say that a grant of an inam is to be taken to include that of both varams and in the second of the rulings referred to above they directly combat again the supposed presumption that a grant was confined to the melvaram and say "each case must therefore be considered on its own facts." They also hold that the history of the estate in question is wholly inconsistent with the exercise of any permanent occupancy rights.

In *Nandigam Subbarayulu v. Kannam Saheb*(3) (a judgment to which I was a party with my brother SESHAGIRI AYYAR, J.) we were inclined to hesitate to apply the principles of

Suryanarayanna v. Patanna(1), to the grant before us, one by a Nuzvid zamindar, but we thought that the Privy Council by referring to the preamble of Regulation XXXI of 1802 had construed a grant of a similar character as conferring a right to the land itself. We distinctly stated that the Privy Council had held that there was no presumption that the land revenue alone was granted and that it is for defendants to show that at the date of the grant they or their ancestors had the right of occupancy in the land. We examined the evidence on either side and came to the conclusion that the lands were not proved to be in the occupation of the tenants at the time of the grant to plaintiff's ancestors and that it was therefore not an estate within clause (3) (ii) (d) of the Estates Land Act. It was neither my intention nor that of my learned brother (whom I have consulted on the point) that our judgment should in any sense lay down that the grant must be presumed to be that of both varams, and there is in my opinion nothing to justify the opinion of ABDUR RAHIM and MOORE, JJ., in *Sri Sri Mahant Radhakrishnados v. Chitri Podhanum*(2), where they say that

"the learned Judges referring to the preamble of Regulation XXXI of 1802 seem to suggest in one portion of their judgment that the grant which they had to deal with should be presumed to be of the entire rights in the land, that is, of the melvaram and the kudivaram."

In my opinion the learned Judges there were possibly misled by the remark in our judgment where we said:

"Therefore the grant by one of the Nuzvid zamindars would convey the right in the property as well as right in the soil which by Regulation XXXI of 1802 may be regarded as having been surrendered to the grantee by the Government."

This was only the application of the finding in *Suryanarayanna v. Patanna*(1), in the case of the old Reddi kings to a more limited owner—a Nuzvid zamindar; which application we thought justified by section 2 of the Regulation. There is no enunciation of a presumption of law in the passage referred to above, nor was any intended. It should be added that ABDUR

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(1) (1918) I.L.R., 41 Mad., 1012 (P.C.).
(2) (1920) I.L.R., 43 Mad., 166 (P.C.). (3) (1919) M.W.N., 886.

(1) (1918) I.L.R., 41 Mad., 1012 (P.C.).
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RAHIM and MOORE, JJ., held that there was no presumption of the grant of both varams.

A different view has, however, been taken of the Privy Council rulings. In *Sri Gadadhardoss Bavaji v. Suryanarayana Patnaik*(1), before WALLIS, C.J., and SADASIVA AYYAR, J., the former said :

"There is however in this case nothing to rebut the presumption recently laid down by the Privy Council that the grant to the inamdars was a grant of the proprietary right in the suit land including the kudivaram as well as the melvaram interest."

No reasons are given. SADASIVA AYYAR, J., said :

"I agree that after the recent decisions of the Privy Council we must hold that the post settlement grant made to the inamdar (the plaintiff's ancestor) was a grant of both varams."

This is of course in direct conflict with the interpretation of *Suryanarayana v. Patanna*(2) and *Venkata Sastrulu v. Seetharamudu*(3), in *Nandigam Subbarayulu v. Kannam Saheb*(4) (as explained above) and in *Sri Sri Mahant Radhakrishnadoss v. Chitri Podhanum*(5), as well as in conflict with what I am bound to say is in my view the clear interpretation of the Privy Council judgments themselves. There is moreover *Narasavadhanulu v. Kamakshiah*(6), to which our attention has been called since the hearing. My learned brother was a party to that decision. I do not propose to add anything to what he has just said in his judgment as to that decision. As I consider it important to have the matter set at rest once for all—the point is constantly occurring for decision—I agree that the matter should be referred to a Full Bench and concur in the question proposed.

ON THIS REFERENCE—

T. M. Krishnaswami Ayyar for appellant.—My contention is that the Court ought to start with no presumptions. Where the original grant is available all that Courts would have to do is to interpret it. The grant in this case is not forthcoming nor

(1) (1920) 38 M.L.J., 342. (2) (1918) I.L.R., 41 Mad., 1012 (P.C.).

(3) (1920) I.L.R., 43 Mad., 166 (P.C.).

(4) (1919) M.W.N., 836.

(5) Appeals Nos. 160 of 1919 and 69 of 1918 (unreported).

(6) C.R.P. Nos. 610 to 616 of 1917 (unreported).

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is the date of the grant known, but when the inam extract was made the then holder stated the income to be Rs. 45. The assessment by Mr. Hurdiss is the same. I submit therefore that the revenue alone was granted as inam. Reference was made to *Suryanarayana v. Patanna*(1), *Sri Sri Mahant Radhakrishnadoss v. Chitri Podhanum*(2), *Nandigam Subbarayulu v. Kannam Saheb*(3), *Marapu Tharalu v. Telukula Neelakanta Behara*(4).

K. V. Krishnaswami Ayyar for respondents.—In the absence of the original grant the Court must start with some presumption and the presumption ought to be that it was of both varams. Reference was made to *Venkata Sastrulu v. Seetharamudu*(5).

WALLIS, C.J.—The judgments in *Nandigam Subbarayulu v. Kannam Saheb*(3) and in *Sri Gadadhardoss Bavaji v. Suryanarayana Patnaik*(6) (to which I was a party) and in *Narasavadhanulu v. Kamakshiah*(7), proceeded upon the view which I think was not then seriously contested, that the effect of the decisions of the Privy Council in *Suryanarayana v. Patanna*(1) and in *Venkata Sastrulu v. Seetharamudu*(5), was to raise a presumption that a grant to an inamdar was a grant of the proprietary interest in the land including both varams. This view was seriously challenged for the first time in *Sri Sri Mahant Radhakrishnadoss v. Chitri Podhanum*(2), before ABDUR RAHIM and MOORE, JJ., who held that the effect of the Privy Council decisions was that in the case of a grant to an inamdar there was no presumption one way or the other as to whether there was a grant of the proprietary interest in the land. This reference raises the question which of these two views is correct. Now the first thing to be observed is that in the two cases mentioned in the Order of Reference all that the Privy Council was called upon to decide was whether the lands in question were proved to be an "estate" within the meaning of clause (d) of sub-section (2) of section 3 of the Madras Estates Land Act, as

(1) (1918) I.L.R., 41 Mad., 1012 (P.C.).

(2) Appeals Nos. 160 of 1919 and 69 of 1918 (unreported).

(3) (1919) M.W.N., 836.

(4) (1907) I.L.R., 30 Mad., 502.

(5) (1920) I.L.R., 43 Mad., 166 (P.C.).

(6) (1920) 38 M.L.J., 342.

(7) C.R.P. Nos. 610 to 616 of 1917 (unreported).

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"A village of which the land revenue alone has been granted to a person not owning the kudivaram thereof."

Clearly the party claiming that any land is an estate within the meaning of this definition has the onus thrown on him of showing that the land revenue thereof alone has been granted to a person not owning the kudivaram. If there be a presumption that an inam grant is a grant of the revenue only, he would of course be entitled to take advantage of it. The question whether there was such a presumption was an open one when the Act was passed. The earliest cases in which the question of occupancy right came before the High Court were cases of villages granted in inam to temples in Tanjore, and in all these cases it was held that the temple was the owner of the land and that there was a presumption against the existence of any occupancy right on the part of the tenants: *Alagaiya Tiruchittambala v. Saminada Pillai*(1), *Subupalayi Ammal v. Appakutti Aiyangar*(2), *Chockalinga Pillai v. Vythealinga Pundara Sunnady*(3), *Krishnasami v. Varadaraja*(4), *Thiagaraja v. Ganasambanadhu*(5), *Chidambara Pillai v. Thiruvengudathiengar*(6), *Chockalingam Pillai v. Mayandi Chettiar*(7), *Mayandi Chettiar v. Chockalinga Pillay*(8). Then came the leading cases of *Appa Rau v. Subbanna*(9), *Venkatanarasimha Naidu v. Dandamudi Kotayya*(10), *Cheekati Zamindar v. Ranasoora Dhora*(11), establishing a presumption of occupancy right in zamindaris and other larger estates. There was some hesitation about extending the same presumption to inams; but after the passing of the Madras Estates Land Act, 1908, there were a series of decisions holding that there was a presumption that inam grants were grants of land revenue only which was sufficient to make the inam an estate within the meaning of the definition and so confer or confirm occupancy rights in the tenants. When the Privy Council in *Suryanarayanna v. Patanna*(12) overruled these decisions and decided that there was no such presumption, the immediate result, as regards the

(1) (1863) 1 M.H.C.R. 264.

(3) (1870) 6 M.H.C.R., 164.

(5) (1884) I.L.R., 7 Mad., 374.

(7) (1896) I.L.R., 19 Mad., 485.

(9) (1890) I.L.R., 13 Mad., 60.

(2) (1866) 3 M.H.C.R. 106.

(4) (1882) I.L.R., 5 Mad., 345 (F.B.).

(6) (1897) 7 M.L.J., 1.

(8) (1904) I.L.R., 27 Mad., 291 (P.C.).

(10) (1897) I.L.R., 20 Mad., 299.

(11) (1900) I.L.R., 28 Mad., 318.

(12) (1918) I.L.R., 41 Mad., 1012 (P.C.).

question which they were considering, was, that the definition of "estate" had to be applied without the aid of such a presumption; and that, therefore, any person asserting that the land was an estate had to prove that the grant was of the land revenue only to a person not owning the kudivaram, and that, if he could not establish this affirmatively, he must fail. These decisions cannot in my opinion be construed as ruling that in these cases there is no presumption one way or the other.

There was no occasion for the Privy Council in *Suryanarayanna v. Patanna*(1) to rule expressly that there was a presumption that the grant is both of the melvaram and the kudivaram, as the initial presumption was settled by the definition in the statute. That definition, however, only applies when the inam granted is a village or a separated part of a village in which the grant is of the land revenue only. Here the case is outside the Act as the grant was of an unseparated portion of a village about 80 acres in extent; and it therefore becomes necessary to consider whether the proposition that such grant was of the kudivaram as well as of the melvaram is properly deducible from the decision in *Suryanarayanna v. Patanna*(1). In the course of the judgment their Lordships observed that the question was

"was it a grant of the revenue only of the villages, or was it a grant of the proprietary right in the village, that is the soil of the village,"

which appears to suggest that it was one or the other. They then proceeded to reject the historical theory that in ancient times the ownership of the soil of land in India was not in the sovereign or ruler, and that the right of the ruler was confined to a right to receive as revenue a share in the produce of the soil from the cultivator; and they went on to reject the presumption founded on that theory that in the case of an inamdar it should be presumed, in the absence of the inam grant under which the inam was held, that the grant was of the royal share of the revenue only. Now, if there is no sufficient justification for a presumption limiting the grant to the royal share of the revenue only on the ground that that was all the sovereign had to grant, it seems to me to follow that the grant was presumably a grant of that which the sovereign had, viz., the proprietary

(1) (1918) I.L.R., 41 Mad., 1012 (P.C.).

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right in the soil, subject, of course, to the occupancy rights of any of the cultivators holding under him at the date of the grant, as stated by their Lordships towards the close of their judgment.

That is a sufficient answer to the reference, but I would go further and say that in my opinion, there is no presumption, at any rate in the case of these minor inams of less than a village in extent, that there were occupancy rights on the land at the time of the grant; and that, I think, is why the legislature left them outside the operation of the Act. In these circumstances I think that the position of these inamdars is that of pattadars holding under Government on favourable terms, and that the proprietary interest presumably transferred to them by their grants is sufficient, as in the case of ordinary pattadars according to the line of cases ending with the recent decision of the Privy Council in *Seturatnam Aiyer v. Venkatachela Goundan*(1), to some of which I have already referred, to throw the burden of proving the existence of permanent tenancy or occupancy rights in the first instance on the tenants who set up such rights. In this respect it seems to me that their Lordships dealt with all these cases in the same way. In *Suryanarayanna v. Patanna*(2), their Lordships observed in a passage to which I have already referred:

"But the grant of a village by or on behalf of the Crown under British rule is in law to be presumed to be subject to such rights of occupancy, if any, as the cultivators at the time of the grant may have had."

This seems to me to proceed upon the footing that where the question is one of occupancy right it is for the cultivators to establish such rights which would not be the case unless the grant was presumably a grant of the proprietary interest in the soil. In the next case, *Venkata Sastrulu v. Seetharamudu*(3), Lord CAVE, after alluding to the overruled presumption as to the grant being of the melvaram only, stated that

"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."

(1) (1920) I.L.R., 43 Mad., 567 (P.C.). (2) (1918) I.L.R., 41 Mad., 1012 (P.C.).
(3) (1920) I.L.R., 43 Mad., 166 (P.C.).

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This does not, in my opinion, negative the presumption that the grant was of the proprietary right, but only indicates that the question is to be decided on the evidence as a whole. The tests indicated, the terms of the grant and the whole circumstances of the case, are substantially the same as those mentioned by Sir LAWRENCE JENKINS in *Seturatnam Aiyer v. Venkatachela Goundan*(1), where, as regards the question of occupancy right the presumption was expressly found to be in favour of the ordinary pattadar and against the existence of occupancy rights in the tenants holding under him. In that case, it was held that the tenants had proved that their predecessors possessed occupancy rights at the inception of their relations with the plaintiff's predecessors, and I think that similarly it is for the tenants of inamdars to establish the existence of occupancy right in the same manner. My answer to the reference is that the two judgments referred to do not expressly lay down a presumption that the grant is of both the melvaram and kudi-varam, as such a ruling was not necessary for the purposes of those cases, but that such an initial presumption is deducible from the grounds on which the judgments are based.

COUTTS TROTTER, J. — My lord and my brother RAMESAM, J., whose judgments I have had the advantage of perusing, have reviewed the case law on this subject so exhaustively that I think no useful purpose would be served by my going over the same ground, especially as the subject is one with which I am necessarily unfamiliar. There is no doubt that the Privy Council has in terms negatived the rule that this Court had laid down, that the presumption was that an inam grant was a grant of the melvaram only. There is, to my mind, no doubt also that their Lordships have not said in terms that there is a contrary presumption the other way. But I cannot conceive that they meant Courts to try suits of this character, when there is from the nature of things hardly ever any available evidence as to the nature of the original grant, without some working rule, call it presumption or rule as to incidence of proof or what you will. In the absence of such a rule, the result would in most cases be

(1) (1920) I.L.R., 43 Mad., 567 (P.C.).

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a deadlock: whoever came to the Court first and found himself in the position of plaintiff would necessarily fail by that mere accident.

I therefore agree with my lord, that it is a necessary inference from the reasoning of their Lordships of the Privy Council that, in the absence of any evidence one way or the other, it must be taken that such a grant as this was of both varams, and I concur in the answer to this reference which he has formulated.

RAMESAM, J.

RAMESAM, J.—The question referred to the Full Bench may be stated to be “Is there any presumption of law, as to the extent of the grant, deducible from the rulings of the Privy Council in *Suryanarayanna v. Patanna*(1) and *Venkata Sastrulu v. Seetharamudu*(2).”

In the above mentioned cases, their Lordships of the Privy Council had to consider section 3 (2) (d) of the Estates Land Act, for the purpose of deciding the question of jurisdiction, viz., whether the suits were rightly laid before the Civil Courts. The inams in those cases were enfranchised whole inam villages and the question whether the grant was of the melvaram alone had to be considered. For some time the Madras High Court had, in a series of cases [all decided after *Marapu Tharalu v. Telukula Neelakanta Behara*(3), not counting the obiter dictum in *Narasimhulu v. Narasimhulu*(4)] held that the Courts should start with a presumption that the grant was of the melvaram alone and the onus was on the inamdar to prove that he had both the varams, and, therefore, had the right to eject. Their Lordships of the Privy Council held that no such presumption exists. They point out that such a presumption was based on the assumption

“that the right of the ruler was confined to a right to receive as revenue a share in the produce of the soil from the cultivator,” and then say:

“that is an assumption which no Court is entitled to make: indeed that fact would support the contrary assumption that the soil was vested in the rulers . . .” (page 1019).

(1) (1918) I.L.R., 41 Mad., 1012 (P.C.).
(2) (1920) I.L.R., 43 Mad., 166 (P.C.). (3) (1907) I.L.R., 30 Mad., 502
(4) (1906) 16 M.L.J., 888.

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If the assumption on which any presumption is to be based should be, not that the rulers were owners of a share in the revenue but that the soil was vested in the rulers, it follows that the presumption as to the extent of the grant should correspondingly change, i.e., it is not merely the melvaram but the whole right in the soil, for the ordinary rule in construing grants is that the grantor grants all that he has and which can therefore be granted. That this is what their Lordships meant is clear from the sentence at page 1020:

“It is not proved, nor is there any evidence to suggest, that at the date of the grant there were any tenants in the village holding lands with any rights of occupancy by custom or otherwise.”

Who is to prove? Obviously, the tenants who were the defendants in that case. This sentence, in my opinion, throws the burden of proof on the tenants and indicates one mode in which it can be discharged. Again at page 1021, their Lordships say:

“But a grant of a village by or on behalf of the Crown under the British rule is in law to be presumed to be subject to such rights of occupancy, if any, as the cultivators at the time of the grant may have had,”

i.e., may be proved to have had. Who is to prove the right which by subjecting the ownership subtracts from or diminishes it? The person who relies on it or the tenant?

It is true that the sentences I have quoted from pages 1020 and 1021 of *Suryanarayanna v. Patanna*(1), have not been repeated in *Venkata Sastrulu v. Seetharamudu*(2). Apart from the fact that there is nothing to show that the decision in *Venkata Sastrulu v. Seetharamudu*(2) was intended to affect or modify the observations in *Suryanarayanna v. Patanna*(1), a slight consideration will show that this conclusion follows from the simple statement that there is no presumption that the inamdar is grantee of the melvaram alone. Now, when a grant of an inam is admitted, it may be conceded that the grantee is the owner of something. What is that something? The appellant's vakil concedes (in my opinion, rightly) that it must be either (1) melvaram alone or (2) melvaram and kudivaram. The

(1) (1918) I.L.R., 41 Mad., 1012 (P.C.).
(2) (1920) I.L.R., 43 Mad., 166 (P.C.).

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first alternative expresses the minimum extent of the grant, i.e., represents the extreme position against the inamdar, and his grant can never be less than that. If, at all, it may be more. The Madras High Court held that they would start with only this minimum. The Privy Council upset this rule. What follows? The only other alternative is that the inamdar has both varams. There is no middle course. A grant of melvaram plus something more but not "melvaram and kudivaram" is meaningless and cannot be conceived. The statement in *Venkata Sastrulu v. Seetharamudu*(1), "each case must depend on its facts," merely states what has to be done in every case whether there are presumptions or not, and cannot be taken to contravene the express statements in *Suryanarayanna v. Patanna*(2).

It has been held in this Court that it makes no difference whether the grant is by the rulers or zamindars.

I now pass on to the question whether the conclusions I have come to should be confined to whole villages or should be extended to minor enfranchised inams. One would think, from the nature of the case, that it is an *a fortiori* inference for minor enfranchised inams. It may be said that, when a whole village is granted (1) it could not have been intended that the grantee should cultivate the whole village himself, and (2) it is very unlikely that a whole village would be a village of waste lands. Some lands at least would have been cultivated and it could not have been intended to affect the rights of such cultivators, whatever they were. Both these considerations disappear when we come to grants of small extents. When we remember that these inams were granted to favourites or poor dependants, one would think that the subject-matter of the grant was intended to cover all that can be extracted from the soil. It seems to me that the smaller the area granted, the stronger the presumption in favour of the inamdar.

When we consider the history of the case law leading to Legislation (Madras Estates Land Act), the same conclusion follows. From the time of the case of *Chockalinga Pillai v. Vythealinga Pandara Sunnady*(3) onwards, the general impression

(1) (1920) I.L.R., 48 Mad., 166 (P.C.). (2) (1918) I.L.R., 41 Mad., 1012 (P.C.).
(3) (1870) 6 M.H.C.R., 164.

was that, neither in zamindaris nor in inams, the tenants had any occupancy right. The contrary view began to gain ground (so far as zamindars are concerned) in *Appa Rau v. Subbanna*(1) and *Vencata Mahalakshamma v. Ramajogi*(2), which however laid down no principle. A presumption in the nature of a rule of law was first laid down in *Venkatanarasimha Naidu v. Dandamudi Kotayya*(3) and was extended in *Cheekati Zamindar v. Ranasooru Dhora*(4). It is unnecessary now to consider how far this rule was right. The rule served its purpose from *Venkatanarasimha Naidu v. Dandamudi Kotayya*(3) up to the legislation in Madras Estates Land Act and what was given by the rule of law is now given by legislation to tenants in Estates. My opinion is, that if the Madras Estates Land Act had not been passed, *Venkatanarasimha Naidu v. Dandamudi Kotayya*(3) and *Cheekati Zamindar v. Ranasooru Dhora*(4) would have been shaken by the recent Privy Council decisions.

So far as inams are concerned, for some time, there was some hesitation in applying *Venkatanarasimha Naidu v. Dandamudi Kotayya*(3) to them. As to them, it was expressly laid down that the onus is on the tenant to prove occupancy right. [See *Thiagaraja v. Giyana Sambandha Pandara Sannadhi*(5) and *Achayya v. Hanumantrayudu*(6), *Venkatacharlu v. Kandappa*(7), the phrase "the right to eject" in which was explained in *Gandrapu Sinayya v. Koppineni Venkataratnam*(8) and *Marapu Tharalu v. Telukuta Neelakanta Behara*(9) and *Kadambala Dhonna Chowdari v. Rayala Adinarayana*(10) (unreported—decided in January 1903)]. So late as in 1902 it was said [vide *Subbaraya Sastri v. Kristnaiya*(11) decided in 1902 but reported later] that there was no presumption either way, a statement which I do not quite understand. The tide turned definitely in *Bhadrappa v. Bapayya*(12), until it was firmly established in *Suryanarayanna v. Patanna*(13), afterwards reversed by the Privy Council. The presumption was used by the Madras High Court

(1) (1890) I.L.R., 13 Mad., 60. (2) (1898) I.L.R., 16 Mad., 271.
(3) (1897) I.L.R., 20 Mad., 299. (4) (1900) I.L.R., 23 Mad., 818.
(5) (1888) I.L.R., 11 Mad., 77. (6) (1891) I.L.R., 14 Mad., 269.
(7) (1892) I.L.R., 15 Mad., 95.
(8) (1910) 7 M.L.T., 350; s.c., 6 I.C., 701.
(9) (1907) I.L.R., 30 Mad., 502.
(10) S.A. No. 1021 of 1905 (unreported).
(11) (1910) 20 M.L.J., 526. (12) (1911) 21 M.L.J., 803.
(13) (1915) I.L.R., 38 Mad., 608.

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to shift the onus from the tenants (which was the prior existing state of things) on to the landlord, and the decision of the Privy Council restored the state of things as it existed in *Achayya v. Hanumantrayudu*(1) and *Rangasami Reddi v. Gnana Sammantha Pandara Sannadhi*(2) (for ryotwari land).

It is significant that the legislature, when it interfered in 1908 after the most careful and anxious consideration, confined the legislation to estates which included only certain inam villages. The definition in section 3 (2) (d) itself is strong evidence that the legislature thought either that there was not or that there ought not to be occupancy right in minor inams and some inam villages—it being on the tenant to prove to which inam villages the Act applies.

The presumption in favour of the inamdars' right to both varams may be weak or strong according to circumstances. It may be even easily rebutted. But, when there is no evidence, it exists effectively. One word, I will add. The reference by the Privy Council to the entry in Oakes' Register, which they say is conclusive, shows that if there is an entry in a register that the land or agra-haram or village or field is granted, it means both varams are granted. The entry in column 1 of Exhibit D of this case (I do not say anything of other entries or other facts) is like the entry in Oakes' Register, and in my opinion the District Judge was perfectly right in the way in which he used Exhibit D to strengthen the presumption.

It is true that my remarks equally apply to minor subsequent inams, but, as the question, whether the Estates Land Act applies to them, is under consideration by a Bench of three Judges in a Letters Patent Appeal, I do not say more about them.

In the result, I concur in the answer to the reference proposed by my Lord the Chief Justice.

M.H.H.

(1) (1891) I.L.R., 14 Mad., 269.

(2) (1899) I.L.R., 22 Mad., 261.

APPELLATE CIVIL—FULL BENCH.

*Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield
and Mr. Justice Kumaraswami Sastri.*

BALUSWAMI AIYAR (DEFENDANT), APPELLANT,

v.

LAKSHMANA AIYAR AND THREE OTHERS (PLAINTIFFS AND
DEFENDANTS), RESPONDENTS. *

1921,
February
22.

Specific Relief Act (I of 1877), ss. 15 and 17—Sale by managing member—Sale of family property not for necessity—Suit for specific performance—Specific performance of entire contract whether can be granted—Option of purchaser for specific performance as regards share of vendor on date of contract on payment of full consideration—Such share to be specified in decree.

The managing member of a joint Hindu family, who, for purposes not binding upon the other co-parceners and without their concurrence, agrees to convey a specific item of joint family property, cannot "perform" his contract in its entirety and the case falls within the provisions of section 15 of the Specific Relief Act. The purchaser in such a case cannot enforce specific performance of the entire contract. But Courts will grant specific performance by a conveyance of the share which the vendor had in the property at the date of the contract, if the purchaser elects to pay the entire consideration, and the share should be specified in the decree.

Kosuri Ramaraju v. Ivalury Ramalingam, (1908) I.L.R., 26 Mad., 74 and *Srinivasa Reddi v. Sivarama Reddi*, (1902) I.L.R., 32 Mad., 320, dissented from; *Poraka Subbarami Reddy v. Vadlamudi Seshachalam Chetty*, (1910) I.L.R., 38 Mad., 359 and *Nagiah v. Venkatarama Sastrulu*, (1914) I.L.R., 37 Mad., 387, approved.

ON APPEAL from the judgment and decree of Mr. Justice COUTTS TROTTER, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court of Madras in Original Suit No. 182 of 1917.

The facts are fully set out in the Order of Reference.

The Appeal first came on for hearing before WALLIS, C.J., and KRISHNAN, J., who made the following

* Original Suit Appeal No. 21 of 1913.

ORDER OF REFERENCE TO A FULL BENCH.

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WALLIS, C.J.—The facts have been fully set out in the Judgment of COUTTS TROTTER, J., and again by my learned brother. After hearing the case very fully argued I am unable to differ from the finding of the learned Judge that the second defendant's consent to the contract of sale entered into by his father has not been proved. T. V. Subbayyan, the second witness examined for the plaintiff on commission, merely speaks to the second defendant's presence at a meeting at Madura when the sale was discussed, but admittedly no agreement was come to with the first defendant on that occasion. He does corroborate the first plaintiff's statement that at that meeting the second defendant consented to the sale for not less than Rs. 30,000. It is said for the plaintiffs that when the agreement was concluded in Madras a telegram mentioning the fact was sent to second defendant, but the telegram has not been produced as it might have been. All that plaintiff's witness No. 3 says is that such a telegram was written out and given to the first defendant to send. It is not shown that it was ever sent. I agree with the learned trial Judge that the consent of the second defendant has not been proved.

The next question is whether the first defendant as managing member of a joint trading family consisting of himself and the second defendant had power to sell without the second defendant's consent the suit house. The case now made for the plaintiffs is that the joint family of the first and second defendants advanced money to one Kuppasami in the course of the money-lending business carried on by them and that the suit house was acquired by them as the readiest means of realizing their debt, and that in these circumstances it was within the power of the managing member of the joint family as an incident of the joint family business to reconvert the property so acquired into money for the purposes of the joint family business. COUTTS TROTTER, J., regards this as tantamount to saying that the old rules of Hindu Law as to the alienation of family property have no application to trading families. I am not prepared to go so far. It may be that the purchase and resale of immoveable property may be an incident of a joint family business, and as such an incident within the competence of the managing member

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of the family without the consent of the other co-parceners, and my learned brother has called my attention to a recent decision of the Allahabad High Court, *Pahalwan Singh v. Jiwan Das*(1), which appears to support this view. No attempt was made by the plaintiffs to support the suit contract on this ground either in the plaint or in the issues, and in these circumstances I am not prepared to differ from the conclusion of the learned trial Judge, that it is not shown that the facts of the present case bring it within the proposition. As I have already said, this question was not raised in the pleadings or issues. If it had been, we might have had much fuller evidence as to the nature of the business carried on by the defendants' family and the circumstances which led the first defendant to enter into the suit contract. In the present state of the pleadings and evidence I am not prepared to hold that the facts necessary to raise this question have been established. In other respects also, I agree with the conclusions of my learned brother.

KRISHNAN, J.—This is an appeal by the first defendant against the judgment of COUTTS TROTTER, J., in a suit brought by the plaintiffs to enforce specific performance of a contract to sell a house and ground in Madras made by him with them, and in the alternative for damages. His son, the second defendant, was not a party to the contract and did not sign it, but he was added as a party defendant as the plaintiffs claimed that the contract was nevertheless binding on him on two grounds, namely, that he assented to it and authorized his father to sell the whole property, including his own share, and that the father himself had authority under the Hindu law to sell the whole property, as the sale must be taken to have been for the purposes of the family trade carried on by him for the benefit of the family. These pleas were denied by the defendants, and the learned trial Judge has held that they have not been established and has dismissed the suit against the son. The first defendant also raised some pleas against the validity of the agreement in so far as he was concerned, but they were rejected by the trial Judge and have not been raised again before us, and it is not therefore necessary to

(1) (1919) I.L.R., 42 All., 109 (P.C.).

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state them in detail. The contention of the plaintiffs that the property was the self-acquisition of the father was also rejected by the trial Judge and it is also not now raised before us. The learned Judge gave a decree against the first defendant directing him to convey the whole property, including the son's half share in it, to the plaintiffs on their paying the balance of the purchase money due. In Appeal it is contended before us that on the finding of the learned Judge the contract was not binding on the second defendant, that no decree for specific performance should have been passed at all, even as against the first defendant, that the plaintiffs' remedy, if any, was only a claim for damages, and that in any event the decree for specific performance should have been confined to the first defendant's half share in the property under section 15 of the Specific Relief Act.

The plaintiffs, whilst maintaining that the decree of the learned Judge was right in law on the findings, have further tried to support that decree by attacking the finding against the binding character of the agreement on the son. They are clearly entitled to do so under Order XLI, rule 2, clause (1), of the Code of Civil Procedure, and we must consider the correctness of that finding even though the plaintiffs have not appealed themselves. The son had not been made a party to the appeal in which the finding in his favour has been attacked and if in his absence from the record we were to differ from the trial Judge, it would lead to the anomaly of there being conflicting findings on the same point in the same case as between plaintiffs and first defendant on the one hand and between them and the second defendant on the other hand. We, therefore, acceded to the application of the plaintiffs that the second defendant should be added as a party-respondent to enable him to be heard in support of that finding and to bind him by our own findings. He was accordingly made a party-respondent and has been heard by us in appeal.

It was contended that we had no power to add him as a party to the appeal, as he was not interested in the result of the appeal and that Order XLI, rule 20, did not apply to this case. The words of that rule are, however, wide enough to cover the present case; but, even if they were not, our powers to add parties in appeal are not exhausted by that rule, as Order I, rule 10, also applies to appeals by force of section 107, of the Code of Civil

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Procedure. In the present case, it is manifestly desirable to have the second defendant before us to enable us properly and effectually to settle the question whether the plaint agreement is binding on him or not, a question which we have to decide in any case for the disposal of the first defendant's Appeal. We must now consider that question.

As already stated, the agreement to sell is sought to be made binding on the son on two grounds. Taking the first ground alleged, namely, that he had assented to the first defendant's selling the whole property and had authorized him to sell it, I am not prepared to differ from the view taken by the learned trial Judge that there is not sufficient reliable and relevant evidence on record to support a positive finding in plaintiffs' favour on the point. Both the defendants deny any such assent or authorization, and the most that the plaintiffs have been able to prove is that the second defendant knew of the negotiations for sale and that he remained silent without objecting to the sale of his share. I am not able to hold that mere silence in such circumstance can be held to amount to assent in law, as there was no legal duty on his part to interpose. On the other hand, the attempt on the plaintiffs' part to obtain his consent after the contract was concluded, and which failed, would seem to show that there was no real antecedent consent by him and that the plaintiffs understood this. It is not necessary to deal with this point at length as I agree with the judgment of the trial Judge on it; and the plea based on second defendant's assent or authorization by him must thus be rejected.

The next question is whether the agreement can be held to be binding on the son on the second ground alleged, namely, that it was entered into by the father as the manager of the family trade of money-lending and for the purpose of carrying on that trade for the benefit of the family. The argument is set out in detail in the judgment under Appeal. It raises an important question as to how far the ordinary rule of Hindu Law, that a managing member of a joint Hindu family cannot deal with joint family property by himself except for a family purpose and for the necessity or benefit of the family, should be modified or extended in the case of trading families. CHANDAVARKAR, J., has discussed this question at some length in *Raghunathji*

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Tarachand v. The Bank of Bombay(1), and has held that in the case of trading families "a trading purpose or purpose incidental to it must be treated as a family purpose" within the rule above stated. A similar view has also been taken in Allahabad very recently in *Pahalwan Singh v. Jiwan Das*(2). Though I am inclined to follow this view, it is not necessary to discuss and decide the question in this case, as I consider plaintiffs have failed to allege and prove the facts necessary to raise it.

Assuming in the plaintiffs' favour that they have shown that the first defendant did carry on a family trade of money-lending, they have further to show that the plaint agreement was connected with that trade. No doubt they now allege that the defendants purchased the property to liquidate a debt due to their money-lending business, which otherwise could not have been recovered and that the subsequent arrangement to sell was for the purpose of getting the cash back for the business. This suggestion looks plausible, but as pointed out by the learned trial Judge there is no reliable evidence enabling us to come to a positive conclusion on the point in plaintiffs' favour. It was not contended that there was any pressure for cash in the money-lending business at the time of this agreement; the learned Advocate-General for the plaintiffs merely suggested that it would be important for a money-lending business to have its assets in liquid form. This may be so, but from mere general considerations of the kind we cannot draw the inference that the present sale was for any trade purpose. Defendants deny that it had anything to do with any money-lending business and point out that if the idea was to reconvert immoveable property into cash for money-lending purposes the first defendant would not have waited as long as he did to do it, the agreement to sell having been entered into a considerable time after the purchase. Except that for the purchase some money due to the business by one of their debtors, the original owner of the property, was taken as part of the purchase money there is nothing to show that the property was treated or kept as part of the assets of the business, or was used for its purposes. There is thus nothing to connect the agreement to sell with any purpose connected with

(1) (1910) I.L.R., 34 Bom., 72.

(2) (1919) I.L.R., 42 All., 109 (P.C.).

the trade. Defendants deny that there was any such connection, and, in the absence of reliable evidence on the point on plaintiffs' side, we must hold that it is not proved that the plaint agreement was entered into for any trading purpose; on this finding the question of Hindu Law argued does not arise. Both the grounds alleged for making the contract binding on the second defendant thus fail and we must accept the view of the learned Judge that it is not binding on that defendant.

We have thus before us a case of a managing member of a joint Hindu family entering into an agreement to sell an item of family property, which is not proved to be binding on the other member. Can a decree for specific performance be given against him in such a case; and if so what should be the form of the decree? Different opinions have been expressed on this question by different benches of this Court: see *Kosuri Ramaraju v. Ivalury Ramalingam*(1), *Srinivasa Reddi v. Sivarama Reddi*(2), *Poraka Subbarami Reddy v. Vadlamudi Seshachalam Chetty*(3), *Nagiah v. Venkatarama Sastrulu*(4), and *Subba v. Venkatrami*(5). In view of this difference of opinion in the above cases, and of the general importance of the question, it seems desirable to have it settled by a Full Bench. I would therefore refer the following question to a Full Bench:

Where the managing member of a joint Hindu family enters into a contract to sell an item of family property, and that contract is not proved to be binding on the other members, can specific performance of it be decreed against him, and if so, on what terms?

ON THIS REFERENCE.

A. Krishnaswami Ayyar and *M. Bhaskara Ayyar* for appellant.—My contention is, that with regard to a family house, a member of a joint Hindu family cannot sell his share and he cannot give a good title. If the Court holds that defendant can perform a certain part of the contract, then the illustrations to section 15, Specific Relief Act, come into effect. If the Court holds the contract cannot be performed by defendant, then

(1) (1903) I.L.R., 26 Mad., 74.

(2) (1909) I.L.R., 32 Mad., 320.

(3) (1910) I.L.R., 33 Mad., 359.

(4) (1914) I.L.R., 37 Mad., 387.

(5) (1915) I.L.R., 38 Mad., 1187.

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plaintiffs will be entitled only to damages. A member of a joint family is not in a position to sell a specific share in an item of joint family property. Equities may arise at time of partition. I first contend that there can be no specific performance and secondly if specific performance is to be decreed, then I contend that it can be only against the share of the father, i.e., half share on plaintiff paying the full consideration. Reference made to *Subba v. Venkatrami*(1), section 27, Specific Relief Act, illustration (a). In England there is a conflict of opinion. Reference made to *Thomas v. Dering*(2), Fry's Specific Performance of Contract, page 1259, *Naylor v. Goodall*(3), *Lumley v. Ravenscroft*(4), *Price v. Griffith*(5), *Horrocks v. Digby*(6), and *Hooper v. Smart*(7). But we are governed by section 15 of the Specific Relief Act. *Nagiah v. Venkatarama Sastrulu*(8) is decisive on the point that a decree cannot be passed for the entire property. It certainly left open the question as to whether plaintiff can claim specific performance of the share of the vendor. I contend that even if plaintiff is willing to pay the full price for half the share in the house, he cannot claim specific performance: *Castle v. Wilkinson*(9), *Heater v. Pearce*(10) and *Rutherford v. Acton-Adams*(11). *Durham v. Legard*(12) is in terms of section 15 of the Act.

The interest which a member of a joint family has in any particular item is a right *in personam*. It is only an equity: *Manjayya v. Shanmuga*(13), *Subba v. Venkatrami*(1), *Dhadha Sahib v. Mahomed Sultan Sahib*(14), *Sabapathy Pillay v. Thandavaroya Odayar*(15), *Aiyagari Venkataramayya v. Aiyagari Ramayya*(16) and *Subbiah v. Venkatasubbiah*(17). If at all a decree is to be granted, it is to be on condition of

- (1) (1915) I.L.R., 38 Mad., 1187.
 (2) (1837) 1 Keene, 729; s.c., 48 E.R., 488.
 (3) (1877) 47 L.J. Ch., 53. (4) (1895) 1 Q.B., 683.
 (5) (1851) 1 De G.M. & G., 80; s.c., 42 E.R., 482.
 (6) (1878) 9 Ch.D., 180. (7) (1874) L.R., 18 Eq., 683.
 (8) (1914) I.L.R., 37 Mad., 387. (9) (1870) 5 Ch. App., 534.
 (10) (1900) 1 Ch., 341. (11) (1915) A.C., 868 at 870.
 (12) (1865) 34 Beav., 611; s.c., 55 E.R., 771.
 (13) (1915) I.L.R., 33 Mad., 684. (14) (1920) 39 M.L.J., 706.
 (15) (1920) I.L.R., 48 Mad., 309.
 (16) (1903) I.L.R., 25 Mad., 690 (F.B.) at 717.
 (17) (1919) 10 L.W., 449.

plaintiff paying the full consideration for half the share: see *Gurusami v. Ganapathia*(1), which though not under the Act deals with an agreement to sell by a Hindu father, *Kosuri Ramaraju v. Ivalury Ramalingam*(2), *Srinivasa Reddi v. Sivarama Reddi*(3), *Poraka Subbarami Reddy v. Vadlamudi Seshachalam Chetty*(4), *Najiah v. Venkatarama Sastrulu*(5) and *Govinda Naicken v. Apathsahaya Iyer*(6). *Subba v. Venkatrami*(7) lays down that there can be no specific performance because he cannot perform. This is the only authority which considers "can perform." In all the other cases it is assumed that defendant can perform. A member of a joint family cannot predicate any particular item of property or sell any specific item or a part of any specific item. He can sell his undivided share in the joint family property or a part of it, and certain equities arise. But he cannot sell his interest in a particular item. If he did, equities helped on by various limitations would arise. The section does not contemplate something nebulous. The general effect of the decisions in the other Courts is that there cannot be specific performance: *Baikuntha Barik v. Sahib Dass*(8), *Shama v. Kumud*(9), *Mahmud Ali v. Yawar Beg*(10), *Bhagwan Bhan v. Krishnaji Janoji*(11). If a decree is to be given in favour of plaintiff, it must not state "the right title and interest" is to be handed over. The form of the decree here will be "half the house, the share of the first defendant, for the full amount of consideration": *Suraj Bansi Koer v. Sheo Persad Singh*(12), *Deendyal Lal v. Jugdeep Narain Singh*(13) and *Hardi Narain Sahu v. Ruder Perakash Misser*(14).

T. M. Krishnaswami Ayyar for respondent.—Sections 14 to 17 relate to cases where the entire contract cannot be performed. Assuming for the sake of argument that a member of a joint family can assign his share in a specific item, before section 15

- (1) (1882) I.L.R., 5 Mad., 337 (F.B.).
 (2) (1903) I.L.R., 26 Mad., 74. (3) (1909) I.L.R., 32 Mad., 320.
 (4) (1910) I.L.R., 33 Mad., 359. (5) (1914) I.L.R., 37 Mad., 387.
 (6) (1914) I.L.R., 37 Mad., 403. (7) (1915) I.L.R., 38 Mad., 1187.
 (8) (1905) 2 C.L.J., 321. (9) (1918) 27 C.L.J., 611.
 (10) (1915) 13 A.L.J., 739. (11) (1920) I.L.R., 44 Bom., 907.
 (12) (1880) I.L.R., 5 Cal., 148 (P.C.) at 174.
 (13) (1878) I.L.R., 3 Cal., 198 (P.C.) at 209.
 (14) (1884) I.L.R., 10 Cal., 626 (P.C.) at 637.

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can apply, it must be shown that he cannot perform the contract. A vendor is bound to perform the contract. He agreed to confer on me an absolute title. If he cannot what is the next best thing he can do? If in a suit for partition this property is allotted to him he can transfer the property to me. Vendor cannot be heard to say he will not execute such a document. Section 15 is not intended as a defence to the vendor. It applies when the vendor has no title.

[WALLIS, C.J.—Does not section 15 apply?]

No. It is too late to question the fact that a member of a joint family can alienate a specific property. I contend that a Hindu can convey his share in the joint family property, or his share in a specific property. Inability to perform would depend on other circumstances. Section 18 applies to imperfect title, section 15 to non-existent title. What is there to prevent the vendor executing a document to me saying "I convey the right title and interest in the property" and when that is materialised it may end in my getting the property. No further act is necessary for the vendor. I will realize by a suit: *Pandu Vithoji v. Goma Ramji*(1).

[OLDFIELD, J.—What do you mean by "perform"?]

Give a sale deed for all he can convey.

[OLDFIELD, J.—That is not the sense in which it is used in section 14 and first part of section 15.]

WALLIS, C.J. WALLIS, C.J.—I agree with the answer proposed by KUMARASWAMI SASTRI, J., which is in accordance with the view taken in *Nagiah v. Venkatarama Sastrulu*(2), to which I was a party and also, in my opinion, with the earlier decision of WHITE, C.J., and KRISHNASWAMI AYYAR, J., in *Poraka Subharami Reddy v. Vadlamudi Seshachalam Chetty*(3), when those learned Judges observed at page 360:

"The plaintiff asks for a decree against the shares of the first and fourth defendants at least. This we think he cannot have."

All they meant, as appears from the rest of the judgment, was that he could not have a decree directing these defendants,

who were parties to the agreement, to convey their own interest at a reduced price. This might have been granted in England, but in cases governed by section 15 of the Specific Relief Act a plaintiff can only have part performance if he is willing to pay the full contract price and to waive all claims for compensation. As the plaintiff in that case expressed his willingness to comply with these conditions, the learned Judges at the close of their judgment gave him decree as regards the shares of the first and fourth defendants. This amounts to a clear ruling that a case such as the present is governed by section 15 of the Specific Relief Act. This was the conclusion at which I arrived in *Nagiah v. Venkatarama Sastrulu*(1), and after careful re-consideration I think it was right.

OLDFIELD, J.—I agree.

OLDFIELD, J.

KUMARASWAMI SASTRI, J.—The question referred to us for decision is:

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"Where the managing member of a joint Hindu family enters into a contract to sell an item of family property, and that contract is not proved to be binding on the other members, can specific performance of it be decreed against him, and if so, on what terms?"

The answer to the question depends on the provisions of sections 15 and 17 of the Specific Relief Act, and the extent and nature of the powers of alienation possessed by a member of a joint and undivided family.

Section 15 of the Specific-Relief Act provides that

"Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the Court may, at the suit of the party, direct the party in default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance, and all right to compensation either for the deficiency, or for the loss or damage sustained by him through the default of the defendant."

It is argued for the appellant that an undivided co-parcener professing to sell the whole of an item of joint family property

(1) (1919) L.R., 43 Bom., 473.

(2) (1914) I.L.R., 37 Mad., 387. (3) (1910) I.L.R., 33 Mad., 359.

(1) (1914) L.L.B., 37 Mad., 387.

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for purposes not binding on the other co-parceners cannot perform the whole of his contract, as he has only a share in the property, that he cannot give a good title even to his share, as his right to it would be contingent on his getting it in a suit for partition, and that in any event all that he can get is a decree for the share belonging to his vendor on payment of the full consideration under the latter part of the section. For the respondent it is argued that, as Courts in working out the equities between the purchaser and the other co-parceners in a suit for partition would allot to the vendor the property conveyed by him, it cannot be said for certain that the vendor is unable to perform his contract and that consequently the purchaser is entitled to a decree directing the vendor to convey the property, leaving it to the purchaser to realize it as best he can.

There is a conflict of authority on the point. In *Guruswami v. Ganapathia* (1), it was found that the agreement by the father to sell was not for necessity and was not binding on his minor son. Sir CHARLES TURNER who delivered the judgment of the Full Bench observed that imperfection of title in the seller is not sufficient by itself to justify the Court in refusing to award specific performance of a contract of sale. If the title be such as the seller can legally convey, the purchaser has the right to claim the completion of the bargain, although the title he may thereby acquire may not be indefeasible if a claim be brought by a third party. But the Court may not grant specific performance of the contract, if the contract be made by a trustee in excess of his power or involves a breach of trust. The Full Bench called for a finding as to necessity and held that there was no justifying necessity. A decree was passed directing a sale by the father of his half share on receipt of one-half of the purchase money, on the ground that while the Judge was unable to enforce the sale in its entirety they considered that to the extent of the father's interest the respondent was entitled to insist on it, if he thinks fit to do so. The contract was entered into before the Specific Relief Act came into force and the decision therefore does not deal with section 15. It is, however, authority for the view that a co-parcener can perform part of the contract to the extent of his share. In *Kosuri Ramaraju v. Ivalury Ramalingam* (2), the contract

(1) (1882) I.L.R., 5 Mad., 337 (F.B.). (2) (1903) I.L.R., 26 Mad., 74.

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to sell was by one of three members of a joint family. It was held by the Subordinate Judge that the contract was not binding on the other members of the family and the suit was dismissed against all the defendants, as he considered it impossible to apportion the consideration for the sale and the property agreed to be conveyed. In Second Appeal BASHYAM AYYANGAR and MOORE, JJ., held that the plaint disclosed no cause of action against the brothers who were not parties to the contract but that the plaintiff was entitled to a decree for specific performance against the person who agreed to sell the property, without any determination of the question whether the sale by him would or would not bind the interests of the other defendants in the property. No authorities are cited nor is section 15 of the Specific Relief Act considered. In *Srinivasa Reddi v. Sivarama Reddi* (1), the suit was for specific performance of a contract by an undivided father to sell joint property. It was found that the son was not bound by the contract, and a decree was passed directing the father to sell his half share on receipt of one half of the consideration. In Second Appeal SANKARAN NAYAR and PINNEY, JJ., were of opinion that section 15 would only be applicable if the person who agreed to sell

"had no interest in any portion of the property agreed to be conveyed as in illustration (a) or is unable to convey such portion as in illustration (b) to the section."

The learned Judges followed *Kosuri Ramaraju v. Ivalury Ramalingam* (2) and decreed the specific performance of the contract to sell the whole of the plaint property against the first defendant (who entered into the contract) without determining whether such contract would bind his son. Justice SANKARAN NAYAR however took the opposite view in *Subba v. Venkatrami* (3), which I refer to presently. In *Poraka Subbarami Reddy v. Vadlamudi Seshachalam Chetty* (4), the contract was by an adult member of a joint family, acting for himself and as guardian of the minor co-parceners, to sell an item of joint property. It was found that the contract was not binding on the minors and the lower Court dismissed the suit for specific performance against all the defendants, including the person who entered into the

(1) (1909) I.L.R., 32 Mad., 320. (2) (1903) I.L.R., 26 Mad., 74.
(3) (1915) I.L.R., 38 Mad., 1187. (4) (1910) I.L.R., 33 Mad., 359.

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contract. It was held in Second Appeal by Sir ARNOLD WHITE, C.J., and KRISHNASWAMI AYYAR, J., that sections 14 to 16 of the Specific Relief Act do not enable such a contract to be separated as regards the person who entered into the contract and the person on whom it was not binding, that section 17 of the Act precluded the passing of a decree against the share of the person contracting or a decree for the whole against such person, but that the purchaser if he was willing to pay the whole of the purchase money was entitled to a decree directing the contracting party to convey his interest in the property. A distinction is sought to be drawn between cases where a finding as to the binding nature of the contract on the other parties to the suit is or is not necessary, and no opinion is expressed as to whether the interpretation put on section 15 in *Srinivasa Reddi v. Sivarama Reddi*(1) by SANKARAN NAYAR and PINHEY, JJ., was correct. In *Govinda Naicken v. Apathsahaya Iyer*(2), the plaintiff sued to enforce the specific performance of an agreement by one of two divided brothers, alleging that the defendant agreed to have the sale-deed executed by himself and his divided brother on his own account and as guardian of the minor son. The District Munsif dismissed the suit on the ground that sections 15 to 17 precluded him from granting a decree for specific performance of the contract to sell the entire house, and the plaintiff did not offer to purchase the defendant's half on paying the full purchase money. The District Judge thought that there was nothing to prevent the plaintiff from getting a decree, the plaintiff being allowed to take a sale-deed for what it was worth, but dismissed the suit on the ground of delay. In Second Appeal it was held by SUNDARA AYYAR and SPENCER, JJ., that the Court cannot direct execution of a deed which on its execution would be useless owing to the vendor having no title over part of the property.

In *Nagiah v. Venkatarama Sastrulu*(3), the contract was entered into by a father, who was the managing member of the family consisting of himself and his adult and minor sons. It was found that the contract was not binding on the sons and the suit was dismissed. It was held by WALLIS and AYLING, JJ., that

(1) (1909) I.L.R., 32 Mad., 320. (2) (1914) I.L.R., 37 Mad., 403.
(3) (1914) I.L.R., 37 Mad., 387.

section 15 of the Specific Relief Act applied to cases where a member of an undivided family agrees to sell part of the joint property in which he has only a share and that the circumstance that an undivided father has an interest in every portion of the undivided property conveyed does not take the case out of the operation of the section. After referring to *Kosuri Ramaraju v. Ivalury Ramalingam*(1), *Srinivasa Reddi v. Sivarama Reddi*(2), and *Govinda Naicken v. Apathsahaya Iyer*(3), the learned Judges observed :

"To us, however, it appears that the consideration that an undivided father has an interest in every part of the undivided property in no way takes the case out of the operation of the section which runs thus: 'Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole . . . he is not entitled to obtain a decree for specific performance.' We think the words of the section apply where a member of an undivided family agrees to sell part of the joint property in which he has only a share; and the present case is a particularly plain one, because according to the plaintiff's own evidence the first defendant agreed to get the other members of the family to execute the sale deed. Further, the contract has been decided in the present suit not to be binding on the other members of the family, and to decree specific performance against the first defendant only would be merely encouraging useless litigation. We may add that *Barrett v. Ring* (4) is no authority on the present point as the facts were entirely different. The plaintiff does not claim the benefit of the latter part of section 15 of the Specific Relief Act and we dismiss the Second Appeal with costs."

In *Subba v. Venkatrami*(5) the contract was entered into by an undivided father and it was found that it was not binding on the son. It was held by SANKARAN NAYAR and SPENCER, JJ., that the plaintiff was not entitled to a decree for specific performance either against the father or the son. Referring to *Nagiah v. Venkatarama Sastrulu*(6) SANKARAN NAYAR, J., observed :

"A person is entitled to specific performance of a contract by a member of the Hindu family to sell his share of the family property. But there is no question of part performance in that case. If the

(1) (1903) I.L.R., 26 Mad., 74. (2) (1909) I.L.R., 32 Mad., 320.
(3) (1914) I.L.R., 37 Mad., 403.
(4) (1854) 2 Sm. & Giff., 43; s.c., 65 E.R., 204.
(5) (1915) I.L.R., 38 Mad., 1187. (6) (1914) I.L.R., 37 Mad., 387.

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learned Judges intended to go further and lay down that if a junior member of a Hindu family agrees to sell any specific property belonging to his family a decree may be passed against him to sell his share of that specific property, I am unable to agree with that view. Because the junior member is unable to perform the whole of his part of the contract by conveying the entire property agreed to be sold and for the same reason that he is not entitled to claim any specific property till partition, conveyance of a portion is not a part of the contract 'as he can perform' in the terms of section 15 of the Specific Relief Act. On the view that a co-parcener cannot alienate any specific property no specific performance can be decreed."

Where a person sues for specific performance of an agreement to convey and simply impleads the party bound to carry out the agreement there is no necessity to determine the question of the vendor's title, and the fact that the title which the purchaser may acquire might be defeasible by a third party is no ground for refusing specific performance if the purchaser is willing to take such title as the vendor has. But where a party seeking specific performance seeks to bind the interests of persons not parties to the contract, alleging grounds which under Hindu Law would bind their interests and enable the vendor to give a good title as against them and makes them parties, it is difficult to see how the question as to the right of the contracting party to convey any interest except his own can be avoided and a decree passed, the effect of which will merely be to create a multiplicity of suits. As pointed out in *Govinda Naicken v. Apa'hsahaya Iyer*(1) the execution of a sale-deed by a person in respect of property which he has no right to alienate

"would be an act improper in itself as it is calculated to throw a cloud over the title of the other parties entitled to shares in the property and would give them a cause of action for a suit."

With all respect it seems to me that *Kosuri Ramaraju v. Ivalury Ramalingam*(2) and *Srinivasa Reddi v. Sivarama Reddi*(3), which decide that under such circumstances a decree should be passed against the contracting party even if the transaction has been found not to be binding on his co-parceners, would afford no protection to any of the parties, and as pointed out in *Nagiah v. Venkaturama Sastrulu*(4), would be merely

(1) (1914) I.L.R., 37 Mad., 403.

(3) (1909) I.L.R., 32 Mad., 320.

(2) (1903) I.L.R., 26 Mad., 74.

(4) (1914) I.L.R., 37 Mad., 387.

encouraging useless litigation. I may add that SANKARAN NAYAR, J., who was a party to *Srinivasa Reddi v. Sivarama Reddi*(1) refused to pass such a decree when the same question came up before him for decision in *Subba v. Venkatrami*(2). I do not think the Court ought to pass a decree directing a sale of the property ordered to be conveyed when it finds that the person agreeing to convey was only a co-parcener with others and the agreement would not bind their interests. Where the person contracting is the father or managing member of the family he stands in a fiduciary relationship to the other members [*Annamalai Chetty v. Murugesu Chetty*(3), *Sahu Ram Chandra v. Bhup Singh*(4)] and his contract to sell the entire item of joint family property for purposes not binding on them is a breach of duty, and I do not think the Court ought to compel execution of a sale-deed in such cases of the entire item of property leaving it to the other members to incur the expense and go through the trouble of filing a suit to protect their interests. [See *Gurusami v. Ganapathia*(5) and *Baikuntha Barik v. Shib Dass*(6).] There is, however, no objection to the share of the vendor being ordered to be conveyed in cases where he can dispose of his share, as he will then only be exercising his right without detriment to anybody else.

I am also of opinion that section 15 of the Specific Relief Act applies to such cases. With all deference I am unable to follow the reasoning of SANKARAN NAYAR, J., in *Srinivasa Reddi v. Sivarama Reddi*(1), to the effect that section 15 would have application only when the person agreeing to sell has no interest in any portion of the property agreed to be sold. No such restriction appears in the section and the language applies to all cases where a party cannot perform the whole of what he contracts to do, whether such inability is due to his not having a good title to the property agreed to be conveyed or has a good title over only a part of the property. The section only reproduces the English Law with the difference that where the party elects to take what he can get he can only do so by giving

(1) (1909) I.L.R., 32 Mad., 320.

(2) (1915) I.L.R., 33 Mad., 1187.

(3) (1903) I.L.R., 26 Mad., 541 (P.C.) at 553.

(4) (1917) I.L.R., 89 All., 437 (P.C.).

(5) (1882) I.L.R., 5 Mad., 337 (F.B.).

(6) (1905) 2 C.L.J., 321.

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up claims to compensation; and I can find no such distinction in any of the cases though joint tenants are entitled *per tout et per mie* in the joint property. I agree with *Nagiah v. Venkatarama Sastrulu*(1) that section 15 is applicable to cases where a father or a member of a joint family agrees to sell an item of joint property under circumstances that would not bind the other members.

There are no texts which deal with the question of a member of an undivided family alienating property for his own private and individual purposes and there can be little doubt that such an alienation is inconsistent with the strict theory of a joint and undivided family governed by the Mitakshara. As pointed out by Mayne:

"if any member were allowed from time to time to sell his share in the joint family property without severing himself from the family by partition he would be getting the advantages of a partition without submitting to its inconveniences. It would be like the case of partner who claimed the rights to withdraw his capital from the concern at pleasure without withdrawing himself."

It is necessary to bear this aspect in mind when considering whether the same principles and equities should be applied where the matter rests on a contract as where the conveyance has been perfected.

The recognition of the rights of a purchaser for value has been, as pointed out by their Lordships of the Privy Council in *Suraj Bansi Koer v. Sheo Persad Singh*(2),

"of gradual growth founded on the equity which the purchaser for value has to be allowed to stand in his vendor's shoes and work out his rights by means of a partition."

So far as this Presidency is concerned it has been settled by a series of decisions, commencing from *Viraswami Gramini v. Ayyaswami Gramini*(3), that a co-parcener can alienate for value not only his share in the entire joint family properties but also his share in a specific item. It was held in *Venkatarama v. Meera Lubai*(4) that a purchaser from a member of an undivided Hindu family cannot sue for a partition of the item sold to him and obtain an allotment by metes and bounds of his

(1) (1914) I.L.R., 37 Mad., 387.

(3) (1868) 1 M.H.C.R., 471.

(2) (1880) I.L.R., 5 Cal., 148 (P.C.).

(4) (1890) I.L.R., 13 Mad., 275.

vendor's share in that portion of the property. This decision was followed in *Polani Konan v. Masakonon*(1). His remedy is therefore a suit for general partition. When, however, the other co-parceners have alienated their shares also the purchaser from one of the co-parceners can sue and get his share by partition of the item in which only other purchasers are interested: *Iburamsa Rowthan v. Theruvenkatasami Naick*(2). So far as the other co-parceners are concerned it is open to them to accept the transfer as valid and seeking a partition with the purchaser of the only property in which such purchaser is interested: *Subramanya Chettyar v. Padmanabha Chettyar*(3), *Iburamsa Rowthan v. Theruvenkatasami Naick*(2).

As regards the share to which the alienee would be entitled, the view taken by the Full Bench in *Rangasami v. Krishnayyan*(4) was that the share should be computed with reference to the share of the joint family at the date of the suit for partition filed by him and not the state of things that existed at the date of the alienation; but a subsequent Full Bench of this Court in *Chinnu Pillai v. Kalimuthu Chetti*(5) has taken the contrary view. It may therefore be taken as settled that there is no fluctuation in the share to which the alienee is entitled and that his share will be the share of the vendor at the date of the alienation, subject of course to the equities in favour of the other members of the family against the transferor.

The preponderance of authority is in favour of the view that the purchaser of the undivided share of a member of a joint family does not become a tenant in common with the other members. In *Subba Row v. Annathanarayana Aiyar*(6), SUNDARA AYYAR and BENSON, JJ., were inclined to the view that when a co-parcener alienates his share in joint property, the alienee holds the share as tenant in common with the other co-parceners who, as between themselves, are joint tenants with respect to their own shares, and KRISHNASWAMI AYYAR, J., was inclined to this view in *Chinnu Pillai v. Kalimuthu Chetti*(5). A contrary view was taken in *Maharaja of Bobbili v. Venkata-*

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(1) (1897) I.L.R., 20 Mad., 243.

(3) (1896) I.L.R., 19 Mad., 287.

(5) (1913) I.L.R., 35 Mad., 47 (F.B.).

(2) (1911) I.L.R., 34 Mad., 269 (F.B.).

(4) (1891) I.L.R., 14 Mad., 408 (F.B.).

(6) (1912) 23 M.L.J., 64.

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ramanjulu Naidu(1) and *Manjayya v. Shanmuga*(2), which were referred to with approval by the Full Bench of this Court in *Kota Balabhadra Patro v. Khetra Doss*(3), where it was held that an alienee from a member of a joint Hindu family was not entitled to possession of the alienor's share as a tenant in common and that his only remedy was to obtain by partition the share to which the alienor was entitled.

As regards the nature of the equity which is recognized in favour of a purchaser for value of a co-parcener's share it is purely a personal right and is subject to any superior equities which the co-parcener may have against the alienor. In *Dadha Sahib v. Mahomed Sultan Sahib*(4), it was held that a purchaser from the purchaser of the share in the joint family properties cannot enforce the equities which his vendor could have enforced, and in *Sabapathi Pillay v. Thandavaroya Odayar*(5) it was held that a purchaser in Court sale cannot claim a right of substitution but was only entitled to the properties which were comprised in the sale certificate and which fell to the share of the co-parcener whose interests were sold in Court auction. As between the original parties the purchaser has been held to be entitled to the share which the vendor may get in a suit for partition even though the property may not be the property sold but another property which the vendor got for his share.

I am unable to accept the contention that a co-parcener who agrees to sell an item of joint family property, and not merely his share in it, is able to perform the contract merely because on the execution of a sale-deed the vendee will be in a position to file a suit for general partition and would, other things being equal, have the chance of getting the property sold allotted to the share of his vendor. The mere execution of a sale-deed is no performance when the vendor has no exclusive title and cannot put the purchaser in possession owing to the superior claims of his co-parceners. When a person agrees to sell property professing to have an absolute power of disposal over it and it is found that it is joint-family property in which he as a co-parcener has only got a share and that the agreement is not

(1) (1916) I.L.R., 39 Mad., 265.

(2) (1915) I.L.R., 38 Mad., 684.

(3) (1916) 31 M.L.J., 275.

(4) (1920) 39 M.L.J., 706.

(5) 1920) L.L.R., 43 Mad., 309.

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binding on the other co-parceners, I do not think he can perform the contract in its entirety. His chance of getting the property may be defeated by the other co-parceners suing for a partition of the particular item alienated and in a suit for partition they may have superior claims or there may not be other properties which can be given to the co-parcener in lieu of their shares in the property alienated. The view that the alienee from a co-parcener becomes a tenant-in-common with the other co-parceners has not been accepted in the decisions I have referred to, and it is now settled that the alienee of a share has only an equity to work out his rights by partition. Having regard to the fact that the alienation of a share by a co-parcener without the consent of the others is opposed to the spirit of the joint family system, and that it places the other members in a disadvantageous position as the alienor still remains a member of the joint family while conveying his share as also to the fact that it gives the right to an alienee of a small item of family property to disrupt the family by filing a suit for general partition, I do not think Courts ought to put a person whose claim rests on a purely executory contract in the position of a person who by reason of an executed conveyance and the payment of consideration has acquired rights which on equitable grounds Courts consider it desirable to work out in a suit for partition. Then the matter rests merely on a contract which under section 55 of the Transfer of Property Act gives a person no interest in the immovable property. The hardship to the other members of the family is an element to be taken into consideration in the exercise of the discretion. Moreover, the Court ought not to hold the vendor capable of performing, where all that can be predicated is that if the other co-parceners do not file a suit for partition of the item alienated or there exist other properties which can be allotted to him on a general partition, so that without defeating any equities between the alienor and the other members the Court can allot the alienated properties to the vendee.

The preponderance of authority is against the view contended for by the respondent. In *Nidamarthi Mukhanti v. Thammana Ramayya*(1), and *Srinivasa Reddi v. Sivarama*

(1) (1908) I.L.R., 26 Mad., 76.

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Reddi(1), the effect of section 15 of the Specific Relief Act is not considered and the Court thought that his right to convey need not be gone into. In cases where relief was given in respect of contracts prior to the Specific Relief Act the direction was to convey the share of the vendor on an abatement of the price if the purchaser so desired, and in subsequent cases his right to convey was left either for determination in another suit or, when it was held to be wanting, his suit was either dismissed or if he so chose the share of the vendor was decreed on payment of the full consideration.

It is conceded that a co-parcener who agrees to sell joint property cannot enforce specific performance against the purchaser where the agreement is not binding on the other co-parceners, as he has not the title to convey the entire property. The chance of his getting the properties allotted on partition is not in such cases equivalent to his ability to perform the contract. It is difficult to see how in the converse case it can be held that the person agreeing can perform the contract in its entirety.

I am of opinion that a co-parcener who agrees to convey an item of joint family property for purposes personal to himself and not binding on the other co-parceners cannot perform his contract in its entirety, and that the case falls within the first portion of section 15 of the Specific Relief Act.

The next question is whether specific performance can be decreed if the plaintiff is willing to take a conveyance of the share of the co-parcener on his paying the full consideration. I am of opinion that there is nothing to prevent the Court from doing this. The decision of the Full Bench in *Chinnu Pillai v. Kalimuthu Chetti*(2) has finally settled that the share of the alienee from the co-parcener is fixed with reference to what it was at the date of the alienation and is not fluctuating with reference to subsequent events. The co-parcener has a share in each item of the joint family property and there is no difficulty in determining the share of a co-parcener on a given date. Joint tenants are seized *per mie et per tout* and as between themselves have separate rights. On the date of the agreement

to convey the person contracting to sell would have a share determined by the number of the co-parceners, and, the authorities in this Presidency having given the co-parcener a right to alienate his share in a specific item of property, there is no reason why he should not be directed to sell his share especially as that share is not subject to subsequent fluctuation. If the purchaser is willing to pay the full consideration, waive all claim to compensation or damage, and take only the share which his vendor is entitled to, nobody can possibly be prejudiced; while on the other hand it may be distinctly to the advantage of the vendor and co-parcener. Moreover, there is nothing to prevent the person in whose favour the agreement is entered into from filing a suit for damages, obtaining a decree and attaching and bringing to sale the share of the person who contracted to sell; thereby effecting indirectly what could be done directly if the Court grants him the share.

The English decisions on the subject of specific performance where a party is only entitled to a share are not uniform and the latter part of section 15 of the Specific Relief Act is a clear departure from the English rule as to abatement or compensation when specific performance of part of a contract is decreed.

In *Lumley v. Ravenscroft*(1), Lord LINDLEY stated the general rule to be that, in the absence of misrepresentation or misconduct, when a person is jointly interested in an estate with another person and purports to deal with the entirety specific performance will not be granted against him as to his share and that the only remedy was by way of damages. But in *Heater v. Pearce*(2), specific performance was granted of a contract relating to an undivided moiety of mineral property. In *Burrow v. Scammell*(3), a defendant who was entitled only to a moiety of the premises agreed to be sold was directed to perform specifically so much as she was able to perform with a proportionate abatement in the consideration. In *Hooper v. Smart*(4), it was held that where the vendors were entitled only to a moiety of the property agreed to be sold specific performance should be decreed of the moiety with the abatement of one-half of the purchase money.

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(1) [1895] 1 Q.B., 688.
(3) (1881) 19 Ch.D., 175.

(2) [1900] 1 Ch., 341.
(4) (1874) L.R., 18 Eq., 692.

(1) (1909) I.L.R., 32 Mad., 320. (2) (1913) I.L.R., 35 Mad., 47 (F.B.).

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So far as the decisions in India go, specific performance has been decreed of the share to which the vendor was entitled if the purchaser would take it. In *Gurusami v. Ganapathia*(1), a decree was passed directing conveyance of the half share to which the party contracting was entitled. The fact that section 15 would be a bar to the abatement in the price ordered does not affect the granting of the relief as to the share if the purchaser is willing to take it without claiming any abatement in the price. In *Poraka Subbarami Reddy v. Vadlamudi Seshachalam Chetty*(2), it was held that the plaintiff was entitled to a decree for specific performance directing the conveyance of the vendors' share if he paid consideration. In *Shama v. Kumud*(3), where a member of a family governed by the Mitakshara purported to sell the whole property and the agreement was found not to be binding on the other members, specific performance of the contract in respect of the one-fourth share of the defendant was ordered without any abatement in the price. In *Deendyal Lal v. Jugdeep Narain Singh*(4), their Lordships of the Privy Council, while directing possession of property sold in execution of a decree to be given back to the co-parceners, added a declaration that the appellant as purchaser in execution sale acquired the share and, interest of the judgment-debtor in that property and was entitled to take proceedings to have that share ascertained. They only refrained from specifying the share as the wife of the judgment-debtor and mother of plaintiff might have been entitled to a share. In *Suraj Bansi Koer v. Sheo Persad Singh*(5), the decree setting aside the execution sale in its entirety was set aside and a declaration granted:

"that by virtue of the execution sale to them the respondents acquire only the third undivided share . . . which belonged to Adit Sahai with such power of ascertaining the extent of such third part of a share by means of partition as Adit Sahai possessed in his lifetime."

I am of opinion that in all cases where the plaintiff elects to take the share on payment of the full consideration agreed

(1) (1882) I.L.R., 5 Mad., 337 (F.B.). (2) (1910) I.L.R., 33 Mad., 359.

(3) (1918) 27 O.L.J., 611.

(4) (1878) I.L.R., 3 Cal., 198 at 209 (P.C.).

(5) (1880) I.L.R., 5 Cal., 143 at 175 (P.C.).

upon the share of the vendor on the date of the contract should be specified.

My answer to the question is that section 15 of the Specific Relief Act applies to cases covered by the Order of Reference and that specific performance cannot be granted of the contract so as to direct execution of a conveyance of the entire property, but that it is open to the purchaser to get specific performance so far as the share of the vendor is concerned on payment of the consideration agreed upon without any abatement.

M.H.H.

APPELLATE CIVIL.

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

VASUDEVA UDPA AND TWO OTHERS (PLAINTIFFS),
APPELLANTS,

v.

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(DEFENDANTS), RESPONDENTS.*

1920,
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Landlord and tenant—Forfeiture of lease for non-payment of rent—Relief against forfeiture only on payment of all arrears of rent though barred by limitation—Transfer of Property Act, sec. 114.

Under section 114 of the Transfer of Property Act a tenant can be relieved against forfeiture of lease incurred by non-payment of rent only on payment of all arrears of rent, including such as may be barred by limitation, together with such interest as might be legally due thereon.

Semle. The arrears of rent so payable will probably be limited to twelve years.

SECOND APPEAL against the decree of K. GOPALAN NAYAR, Subordinate Judge of South Kanara, in Appeal Suit No. 11 of 1918 (Appeal Suit No. 353 of 1917 on the file of the District Court), preferred against the decree of JAGANNATHA RAO S. TAGAT, District Munsif of Mangalore, in Original Suit No. 10 of 1916.

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This was a suit for possession of certain lands on the ground that the defendants who were lessees incurred, according to the terms of the lease, a forfeiture by non-payment of rent for five years before suit, and also for payment of the five years' rent together with interest thereon. The defendants contended, *inter alia*, that not more than the last three years' rent was payable, that the rest even if due was barred by limitation, that they were not liable for interest, that they were entitled to deduct from the rent the value of their grain distrained by Government for arrears of revenue, and that the forfeiture should be relieved against as they were willing to pay into Court the last three years' arrears. Accepting the above pleas of the defendants both the lower Courts dismissed the suit as the defendants in the course of the suit paid into the Court of First Instance the last three years' arrears of rent. The plaintiffs preferred this Second Appeal.

B. Sitarama Rao for the appellant.

K. Y. Adiga for the respondent.

The Court delivered the following JUDGMENT:—

The only question argued before us is whether the appellant, who is the landlord, should not have been allowed the full arrears of rent as a condition for relieving the defendants against forfeiture which they had incurred according to the terms of the lease by non-payment of the rent. The Subordinate Judge has allowed only three years' rent and disallowed the rest on the ground that it could not be recovered owing to the law of limitation. Section 114 of the Transfer of Property Act says that relief against forfeiture can be given

"if at the hearing of the suit the lessee pays or tenders to the lessor the rent in arrear together with interest thereon, etc."

There is nothing to show that what the legislature meant was only such rent as could be recovered if the landlord was suing for rent, that is, such rent as was not barred. The English rule seems to be that the tenant will be relieved against forfeiture only on his paying full arrears of rent. (See Halsbury's Laws of England, Volume 19, page 100, footnote, and Lightwood on Time Limit of Actions, page 177.) The principle is that under the Limitation Act only the remedy is barred and not that the right of the landlord to rent beyond the period

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specified in the Act is extinguished. Besides, the proviso for forfeiture is really a security for rent. Therefore as the landlord has enforced payment of arrears within twelve years, the tenant should not be given any relief until the full arrears are paid, the full arrears being probably limited to twelve years. In this case, the arrears cover a period of only five years. The Subordinate Judge must be asked to submit a finding as to whether any arrears beyond three years before the suit were due, how much arrears of rent beyond three years prior to the suit has been paid, and how much was due on account of assessment to the defendant. Costs will abide the result. Time one month.

[In compliance with this order the Subordinate Judge of South Kanara submitted findings that the plaintiffs were entitled to Rs. 263-0-1, being the arrears due from the year 1911 and interest thereon at 12 per cent per annum from the dates the rents were due in each year up to the date of plaint, i.e., 16th January 1916.]

The Second Appeal coming on for final hearing, the Court delivered the following JUDGMENT:—

As regards six muras of rice distrained for the arrears of revenue, the tenant, respondent in this appeal, is entitled to deduct the value of it from the rent payable to the appellant. Section 11 of the Revenue Recovery Act makes it clear that the revenue was payable by the pattadar, the appellant; and according to section 11 of the Revenue Recovery Act the tenant is entitled to deduct the value of the rice seized in distraint.

As regards interest on the value of the rent due to the appellant, there can be no doubt that the appellant was entitled to interest. The defendant denied the right of the landlord to the rent. The mere fact that he had written a post-card saying that he was ready to pay would not deprive the appellant of interest on the arrears of rent.

The decree of the Lower Appellate Court will be modified by disallowing the value of six muras of rice.

N.B.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Coutts Trotter.

VENKATARAMA AYYAR (PLAINTIFF), APPELLANT,

v.

CHANDRASEGARA AYYAR AND ANOTHER (DEFENDANTS
Nos. 1 AND 4), RESPONDENTS.*

*Unenfranchised personal inam of lands—Attachment in execution
of decree, validity of.*

Unenfranchised inam lands granted not for future public or private services but as a matter of favour for the maintenance of the donee and his heirs are liable to attachment and sale in execution of a decree against the holder of the inam. *Vissappa v. Ramajogi*, (1865) 2 M.H.C.R., 341, and *Bhanappa Garu v. Kamanna*, S.A. No. 1397 of 1918 (unreported), followed.

SECOND APPEAL against the decree of C. RANGANAYAKULU NAYUDU Garu, Subordinate Judge of the Temporary Sub-Court, Tanjore, in Appeal Suit No. 57 of 1919, preferred against the decree of K. S. GOPALARATNAM AYYAR, District Munsif of Tiruvadi, in Original Suit No. 446 of 1917.

The facts are set out in the judgment of SADASIVA AYYAR, J.

C. V. Anantakrishna Ayyar for appellant.

C. A. Seshagiri Sastri and S. Ganapatti Sundaram for respondent.

SADASIVA
Ayyar, J.

SADASIVA AYYAR, J.—The plaintiff is the appellant. This Second Appeal relates only to plaint items 1, 2, 6, 7 and 8. He brought the suit for a declaration, among other reliefs, that the attachment and sale of these items of the plaint lands in execution of the money decree against his father, the fourth defendant, are invalid as the lands are unenfranchised inam lands, and as their attachment and sale are prohibited by law. Both lower Courts decided against the plaintiff's contention.

The only question argued before us is whether unenfranchised inam lands which had been granted, not for the performance of future services either public or private, but as a pure matter of favour for the maintenance of the donee and his heirs, are incapable of alienation and whether such alienation is prohibited by

law or whether such alienation cannot be allowed as being against public policy. In *Sundaramurti Mudali v. Vallinayakki Ammal*(1), it was held that each holder of a shrotriyam inam which had been granted for only three lives (namely, one Thanappa Mudali, his son, if any, and the son's son, if any), could not be alienated by will by the adopted son of the first grantee (Thanappa Mudali) who died without issue. The grant there seems not to have been of the land itself but only of the land revenue. SCOTLAND, C.J. (with whom FRERE, J., concurred), citing the authorities on the subject, which were then few, and after considering the Regulations IV of 1831, XXXI of 1836 and XXIII of 1838, held that shrotriyams are in the nature of estates tail in strict settlement and that alienation to a stranger by will was therefore invalid. There are, however, these two material distinctions between the facts of that case and the facts of the present case: (1) the grant in that case was strictly confined to three generations, whereas in the present case it was a hereditary grant to continue from generation to generation; (2) the grant there was of land revenue to which Madras Regulation IV of 1831 directly applied, whereas the present was a grant of the land itself. The case is therefore not governed by the three regulations mentioned in that case or by the Pensions Act of 1871 which superseded those regulations. (I do not lay stress on the fact that the grant there was called shrotriyam grant, whereas the grant in the present case is called Bhattavriti grant, as there is no distinction in principle between the two kinds of grants.) In *Vissappa v. Ramajogi*(2) HOLLOWAY and INNES, JJ., criticise *Sundaramurti Mudali v. Vallinayakki Ammal*(1) and point out the distinction between public service inams governed by Regulation IV of 1831 which are made statutorily inalienable by section 2 of that Regulation and mere personal inams, some classes of which inams alone fell under Regulation IV of 1831. It was decided in *Vissappa v. Ramajogi*(2) that the Inam Commissioner's certificate and declaration that the inam was inalienable was of no value and that unless there is a statutory prohibition, contracts of alienation would be valid. There, the inam seems to have consisted of the lands themselves and not the

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(1) (1863) 1 M.H.C.R., 405.

(2) (1865) 2 M.H.C.R., 341.

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land revenue, and the learned Judges distinguish *Sundaramurti Mudali v. Vallinayakki Ammal*(1) on that ground also. In *Gunnaiyan v. Kamakchi Ayyar*(2) the following observations of BHASHYAM AYYANGAR, J., occur at page 345 :

"According to the theory of the common law of the land applicable to hereditary grants of public revenue as inam in favour of individuals and to the interpretation of such Crown grants, succession, in such cases, is or at any rate, is supposed to be limited to the undivided brothers and to the direct lineal heirs, including a daughter's son of the last incumbent as also his widow, and failing them, to the direct lineal heirs of the original grantee. And under that law, it is or it is supposed to be, competent for Government to resume personal inams, when the reversion falls in, or in the language of the Revenue Department, when the inam lapses either by expiration of the lives for which the inam was granted or by reason of the extinction of direct lineal heirs of the body of the original grantee or of a forfeiture incurred by alienation to a stranger."

In that particular case, the land in question was service inam land which had been enfranchised. The observations above quoted do not themselves support the contention that the lands granted as personal inam are not attachable or alienable as the observations deal with grants of land revenue and not of lands themselves as inam. In *Subraya Mudali v. Velayudu Chetty*(3) it was held that except those classes of pensions which fall under section 11 of the Pensions Act, other classes of pensions are attachable and saleable. In *Varadayya v. Nammalwar*(4), MUNRO and ABDUR RAHIM, JJ., held similarly that it is only those pensions and grants which fall under section 11 that are inalienable. *Jogirdar Rama Rao v. Kottippi Thimma Reddi*(5) merely followed *Varadayya v. Nammalwar*(4), and *Subraya Mudali v. Velayudu Chetty*(3). In *Bhanappa Garu v. Kamanna*(6), BAKEWELL, J., and myself referring to unenfranchised personal inam lands observed as follows :

"We have not been referred to any authority (except a Standing Order of the Revenue Board which states that on such alienation, full assessment can be imposed), for the proposition that an alienation by such an inamdar is declared or made legally void and we are not

prepared to assent to such a proposition in the absence of definite authority to that effect."

Mr. Anantakrishna Ayyar, for the appellant, admitted that the Pensions Act and the Regulations of the thirties had no application, and he did not deny that the decision in *Bhanappa Garu v. Kamanna*(1) was a direct authority against him. I think that *Vissappa v. Ramajogi*(2) is also a direct authority against him. He, however, argued that the question was not fully argued or considered in *Bhanappa Garu v. Kamanna*(1), that he did not depend upon the Regulations, that he relied upon the nature of the original grant itself which must be deemed to have forbidden any alienation of the land granted, and that his argument that the original grant should be deemed to have prohibited alienation is corroborated by the observation of BHASHYAM AYYANGAR, J., in *Gunnaiyan v. Kamakchi Ayyar*(3) and also by the Standing Order of the Board of Revenue, Volume II, page 295. I have already referred to *Gunnaiyan v. Kamakchi Ayyar*(3). Standing Order 52, paragraph 1, clause (5), sub-clause (iii), says :

"Alienation of the inam is prohibited."

But it proceeds to say in clause (7) that an alienee by gift, purchase or otherwise, though his title may be legally defective and the inam may be liable to resumption in consequence will be allowed the benefits of rule 5, namely, to have the inam enfranchised or converted into a freehold on payment of an annual quit-rent without the option of refusal. Thus the prohibition of alienation mentioned in the Standing Order was merely intended to indicate that the Government had the right of resumption in consequence of the prohibited alienation, though it would not exercise that right if the alienee agreed to enfranchisement and to pay the ordinary rent or to pay a quit-rent without the option of refusal. This so-called prohibition is therefore not based on any grounds of public policy except the protection of the rights of the Government, and so long as such protection is carried out there is no reason to consider the prohibition as an absolute prohibition even if it has the force of law (which is very doubtful). I think therefore that the view of the lower Courts is correct that

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(1) (1863) 1 M.H.C.R., 465.

(3) (1907) I.L.R., 30 Mad., 153.

(5) (1920) 11 L.W., 398.

(2) (1903) I.L.R., 26 Mad., 339.

(4) (1910) 20 M.L.J., 88.

(6) S.A. No. 1397 of 1918 (unreported).

(1) S.A. No. 1397 of 1918 (unreported).

(2) (1865) 2 M.H.C.R., 341.

(3) (1903) I.L.R., 26 Mad., 339.

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alienation being incidental to ownership of property and no restriction of this general power of ownership in the case of inam lands having been clearly indicated by statute or by any rules having the force of statute except so far as it is necessary to preserve the rights of the Government, it is not necessary to construe the Standing Order as more than indicating the nature of the tenure of the land, namely, that it is subject to resumption by Government on alienation and not to indicate that alienation is absolutely prohibited as unlawful.

In the result, I would dismiss the Second Appeal with costs.

COUTTS
TROTTER, J.

COUTTS TROTTER, J.—I am of the same opinion for the same reasons.

N.R.

APPELLATE CIVIL.

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

1921,
January 17.

PARASURAMA UDAYAN AND ANOTHER (FIRST AND SECOND DEFENDANTS), APPELLANTS,

v.

VEDAJI BASKAR THIRUMAL ROW SAHIB, BY HIS NEXT FRIEND RAO SAHIB J. I. CHRISTMAS PILLAI AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 3, 4 AND 5), RESPONDENTS.*

Trustee of a temple—Delegation of powers of the trustee—Power to appoint and dismiss hereditary temple servants—Delegation of such power to an agent, whether valid—Dismissal of archaka by agent, whether valid.

A trustee of a temple cannot appoint an agent to do acts which involve the exercise of judicial discretion by himself. He cannot therefore delegate to an agent his power of appointing and dismissing hereditary temple servants, who cannot be dismissed without sufficient cause being established. *Krishnamachari v. Ranganachari*, (1893) 1 L.R., 16 Mad., 73, referred to.

SECOND APPEALS against the decree of T. M. FRENCH, the Temporary Subordinate Judge of Vellore, in Appeal Suit No. 214 of 1918, preferred against the decree of A. P. P. SALDANHA, the District Munsif of Vellore, in Original Suit No. 116 of 1917 (Original Suit No. 1245 of 1915 on the file of the Court of the District Munsif of Arni).

This Second Appeal, and another connected with it, arose out of suits instituted by the Jagirdar of Arni, through his next friend,

* Second Appeals Nos. 1081 and 1785 of 1919.

the Manager of his Estate, to recover the suit lands as the trustee of the suit temple from the defendants, of whom the fourth and fifth defendants were the hereditary archakas of the temple, and defendants Nos. 1 to 3, persons in possession of the lands under a permanent lease granted by the elder brother of the fourth defendant. The plaintiff had executed a power-of-attorney in favour of an agent for the management of his Estate, expressly investing him thereunder with the power to appoint and dismiss temple servants. The agent, so authorized, purported to dismiss the fourth and fifth defendants (who were hereditary archakas) for misconduct and for unlawfully alienating by way of permanent lease the suit lands which belonged to the temple and were held by them as remuneration for performance of services as archakas of the temple. The material terms of the power-of-attorney (Exhibit D) were as follows :—

"9. He (Commissioner or Agent) is further authorized to appoint, dismiss, suspend or fine all Devastanam servants in my Jaghir and hold inquiries with regard to Devastanam and Service Inam in my Jaghir and to take necessary steps for the proper management of the said Devastanams."

The defendants pleaded inter alia, that the dismissal of the archakas by the agent was invalid and that the plaintiff could not sue to eject them. The District Munsif, who tried the suit, held that the dismissal of the archakas by the agent was invalid, and that the plaintiff could not maintain the suit. On appeal by the plaintiff, the Subordinate Judge held that the dismissal was valid and was for good cause, and decreed the suit in plaintiff's favour. Against this decree, the first and second defendants preferred this Second Appeal, and the fifth defendant preferred the connected Second Appeal No. 1785 of 1919.

S. T. Srinivasagopalachari, A. Krishnaswami Ayyar and B. C. Seshachala Ayyar for appellant.
C. Madhavan Nayar for first respondent.

SADASIVA AYYAR, J.—These are two connected Second Appeals from a single judgment pronounced by the Subordinate Judge, Vellore, in the lower Appellate Court. In one of these Second Appeals, the appellant is the fifth defendant, and in the other the appellants are the defendants Nos. 1 and 2. The facts

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ATTAR, J.

of the case shortly stated are these. The plaintiff is the hereditary trustee of a temple called the Kasi Viswanathaswami temple situated in a village included in his Arni Jaghir. The fourth defendant is the hereditary archaka (temple priest) in the said temple and along with the hereditary office has inherited the right of enjoyment of the emoluments of certain manyam lands attached to the archaka service. In the year 1894, the elder brother of the fourth defendant, who was the father of the fifth defendant and who was then the hereditary archaka, granted a permanent lease of the plaint lands in favour of the father of defendants Nos. 1 to 3. The plaintiff executed a power-of-attorney, Exhibit D, in January 1915 in favour of one K. V. Lakshmana Rao, appointing him as (what the document describes as) the executant's Commissioner and Agent to do several acts, functions and duties and to exercise several powers. One of such duties and powers which are granted under this deed, Exhibit D, is described in paragraph 9 as follows:

"He" (i.e., the said Commissioner) "is authorized to appoint, dismiss, suspend or fine Devastanam servants of my Jaghir and hold inquiries with regard to Devastanam and Service Inams of my Jaghir and take necessary steps for the proper management of the said Devastanams."

Purporting to act under this clause, Mr. Lakshmana Rao inquired into the conduct of the defendants Nos. 4 and 5 (the fifth defendant was a minor at that time) and dismissed them from their office of archakas on the 30th July 1915. This suit is brought (basing that dismissal as the cause of action) for the recovery of the lands from all the defendants, and also for a declaration that the lands belong to the suit temple. Defendants Nos. 1 to 3 (whose father obtained the permanent cowle) went so far as to deny that the lands were temple lands and raised several other defences which it is unnecessary to set out in detail. Defendants Nos. 4 and 5 pleaded that it was only the melwaram of the lands that belonged to the suit temple and was granted as service manyam and that their dismissal by Mr. Lakshmana Rao was invalid, they being hereditary archakas who were not guilty of any such misconduct as could justify their dismissal. They seem also to have raised at the time of the framing of issues the contention that the proceedings of Mr. Lakshmana Rao dismissing them were not legally valid

because the delegation of the right of inquiry into the misconduct of hereditary archakas by the plaintiff to Mr. Lakshmana Rao was legally not justifiable. (Several other pleas were also raised which, again, it is unnecessary to set out.)

The first issue raised in the case was whether the plaintiff can sue on behalf of the plaint mentioned temple. The District Munsif subdivided this issue into three, viz., whether there was sufficient ground for the dismissal (that is, of the defendants Nos. 4 and 5), (2) whether the defendants Nos. 4 and 5 could be legally dismissed and (3) whether the Commissioner was competent to dismiss in the place of the Jaghirdar. I think the question No. (3) should be answered in favour of the contention of the defendants Nos. 4 and 5, because a trustee cannot appoint an agent to do acts in which judicial discretion was intended to be exercised by himself (the trustee). The power of appointing an agent exists in a trustee only as regards matters in which expert knowledge is required or in which it is usual, according to the course of business, (e.g., temple agents in respect of particular acts), or where it is a matter of necessity (using the word "necessity" in a business sense) to do so, and in similar exceptional circumstances. The power of appointment and dismissal of hereditary temple servants, who cannot be dismissed without sufficient cause (such as grave misconduct) being established, is not one of the powers of a trustee which is capable of being delegated to an agent. This principle of law is recognized in *Krishnamachari v. Rangachari*(1) and I do not think it necessary to quote in support of the above principle the observations in other cases (English and Indian) in which this matter has been considered. Defendants Nos. 4 and 5 were thus not validly dismissed and it follows that the plaintiff's claim to recover possession of the plaint lands must be negatived. Having regard, however, to the facts that defendants Nos. 1 to 3 even denied that the lands belonged to the temple and that defendants Nos. 4 and 5 alleged that only the melwaram belonged to the temple and also to the contention put forward by all the defendants that the permanent lease in favour of defendants Nos. 1 to 3 is binding on the temple, I would grant in favour of the temple the following declaratory reliefs:

(1) (1893) I.L.R., 16 Mad., 73.

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(1) that it be declared that the plaint lands belong to the temple and are held by defendants Nos. 4 and 5 as archakas of the temple, and

(2) that the permanent lease granted in favour of the father of the defendants Nos. 1 to 3 is not binding on the temple.

The parties will bear their respective costs throughout.

NAPIER, J.

NAPIER, J.—I agree.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Ramesam.

SABAPATHY PATHAN (PLAINTIFF) APPELLANT,

v.

PERUMAL PADAYACHI AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XXVI, r. 9, and O. XVIII, r. 18—Commission for local investigation—Personal inspection by Judge—Old Code (Act XIV of 1882), sec. 392—Alteration in language, effect of.

Under Order XXVI, rule 9, read with Order XVIII, rule 18, of the Civil Procedure Code, a Judge has power to make a local investigation in person in any case in which he sees fit to do so or he can issue a commission for local investigation if he thinks fit, irrespective of the question whether it is convenient for himself to conduct the investigation in person.

The Privy Council in *Kessowji Issur v. G.I.P. Railway Company*, (1907) I.L.R., 31 Bom., 381 (P.C.), does not lay down that Judges should under no circumstances hold an inspection of the site in dispute but only objects to opinions being formed upon an inspection made under conditions quite different from those which were material to the question at issue at the trial.

SECOND APPEAL against the decree of A. NARAYANA PANTULU Garu, Subordinate Judge of Māyavaram, in Appeal Suit No. 16 of 1919, preferred against the decree of GURURAJA RAO, District Munsif of Māyavaram, in Original Suit No. 221 of 1916.

This Second Appeal arises out of a suit for a declaration that the suit site belonged to the plaintiff, and for an injunction restraining the defendants from entering upon the site or opening a window in his wall so as to affect the plaintiff's right to privacy.

* Second Appeal No. 1111 of 1920.

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The District Munsif found the title to and possession of the site in favour of the plaintiff and passed a decree for a declaration and an injunction against the defendants. The District Munsif had appointed a commissioner to make a local investigation and to report on the results of his investigation. The defendants preferred an Appeal and the lower Appellate Court admitted in evidence certain paimash registers tendered by the defendants only before that Court; and the Subordinate Judge who heard the Appeal made a personal inspection of the place and came to the conclusion that the defendants were the owners of the disputed site and, reversing the decree, dismissed the suit. The Subordinate Judge observed, as to his local inspection as follows.

"I inspected the site in dispute and I have no doubt that the site belongs to the shops (of the defendants) and not to the plaintiff. There was no necessity for me to examine anybody present at the time of inspection by me and to note the points observed there, because all the points required were already noted by the Commissioner in his report."

The plaintiff preferred this Second Appeal.

S. Muttayya Mudaliyar for appellant.

K. Bashyam Ayyangar for respondents.

The Court delivered the following JUDGMENT:—

We are not satisfied that the learned Subordinate Judge acted irregularly either in admitting additional evidence in appeal or in inspecting the site. The Judge gave substantial reasons for admitting additional evidence in the shape of public records.

Rai Kishori Ghose v. Kumudini Kanta Ghose(1), *Avant Lal Sahu v. Gokul Sahu*(2) and *Dawarka Prasad v. Makhu Lal*(3) have been quoted in support of the argument that it is illegal for a Court in person to hold a local inquiry.

The two latter are judgments of single Judges and in all these cases the decisions are based on the omission from Order XXVI, rule 9, of the Code of Civil Procedure, of the words that occurred in section 392 of the Old Code, which provided for the issue of a commission for a local investigation only in cases where it could not be conveniently conducted by the Judge in

(1) (1912) 14 I.C., 377.

(2) (1916) 35 I.C., 344.

(3) (1914) 52 I.C., 241.

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person. Two of the learned Judges relied also on the English practice in such matters. In India we must be guided by our own Civil Procedure Code on matters of procedure which are specifically provided for.

There is also a case of this Court, *Syed Ahamad Sahib v. The Magnesite Syndicate, Ltd.* (1), which proceeds on the assumption that the change of language in Order XXVI, rule 9, signified a prohibition of inspections being conducted by Judges in person.

We do not think that it has that significance.

The effect of the alteration in the language seems only to be that the issue of commissions is not restricted to cases where the Judge is unable conveniently to make the investigation himself. As the rule now stands, a Judge may issue a commission in any case where he deems it fit to do so, irrespective of his own convenience.

In none of the above decisions has any account been taken of the newly enacted provision in Order XVIII, rule 18, which declares:

"The Court may at any stage of a suit inspect any property or thing concerning which any question may arise."

This rule suggests that the legislature desired to encourage rather than to prohibit the elucidation of the truth by means of personal inspections made by Judges.

The Privy Council decision, *Kessonji Issur v. G.I.P. Railway Company* (2) has very often been quoted as meaning that Judges should under no circumstances hold an inspection of the site in dispute, but if the decision is carefully studied it appears that the objection to the procedure adopted in that case was mainly to opinions being formed upon an inspection made under conditions quite different from those which were material to the question at issue at the trial.

In the present case no such objection can be advanced. The use made by the learned Judge of what he observed at his inspection was to verify and confirm what the commissioner had already noted in his report. By so doing it cannot be urged that either side was prejudiced.

The Second Appeal fails and is dismissed with costs.

K.R.

(1) (1915) 28 M.L.J., 598.

(2) (1907) I.L.R., 31 Bom., 381 (P.O.).



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CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 102—*Second Appeal*—Suit of a nature cognisable by a Small Cause Court, meaning of.—Suit by a landholder for rent under the Madras Estates Land Act (I of 1908), ss. 77 and 189.—*Second Appeal in such suits whether competent*—Provincial Small Causes Courts Act (IX of 1897), sec. 15.] A suit by a landholder for rent under the Madras Estates Land Act is cognisable only by a Revenue, and not by a Civil, Court; and such a suit is therefore not of a nature cognizable by a Court of Small Causes within the terms of section 102, Civil Procedure

Code, and consequently a Second Appeal in such a suit is not barred by that section. *Soundaram Ayyar v. Sennia Naicken*, (1900) I.L.R., 23 Mad., 547 (F.B.), applied.

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CIVIL PROCEDURE CODE (ACT V OF 1908), O. IX, R. 13—*Ex parte decree against one of the defendants*—Appeal by another defendant against the decree of Original Court—*Ex parte defendant, a party respondent in the appeal*—Application to set aside *ex parte* decree made to the appellate Court pending appeal, whether competent.] Where a decree was passed *ex parte* against one of the defendants, and an appeal against the decree preferred by another defendant was pending in the Appellate Court, an application by the former defendant to set aside the *ex parte* decree passed against him can be made only in the Original Court which passed the decree and not in the Appellate Court. *Sankara Bhatta v. Subraya Bhatta*, (1907) I.L.R., 30 Mad., 535, distinguished; *Chenna Reddi v. Peddaobi Reddi*, (1909) I.L.R., 32 Mad., 416 (F.B.), applied.

Palaniappa Chetty v. Subramania Chetty ... (1921) I.L.R., 44 Mad., 731

HINDU LAW—*Adoption*—*Sudras*—*Partition*—*Respective shares of adopted and after-born aurasa son*—*Dattaka Chandrika*—*Joint family property*—*Accountability of managing member*.] In the case of Sudras in the Madras Presidency an adopted son on partition of the family property shares equally with a son or sons of the adoptive father born after the adoption. So held on the grounds that the rule stated in the *Dattaka Chandrika* (section 5, paragraphs 29, 32) as to the share of an adopted son among Sudras had been accepted and acted on for more than a century in that Presidency, until disturbed by the decision of the Madras High Court in *Gopalam v. Venkataraghavulu*, (1917) I.L.R., 40 Mad., 632, and the rule, although not supported by the *Smritis*, or by the *Mitakshara*, is not inconsistent with them.

Semle, that the same rule applies among Sudras in Bengal. Judgment of the High Court reversed and the above-mentioned decision disapproved. In the absence of proof of direct misappropriation or fraudulent and improper conversion, the manager of a joint family estate, is liable to account only for what he has received, not for what he ought or might have received if the family moneys had been profitably dealt with.

Arunthi Perrasu v. Subbarayadu ... (1921) I.L.R., 44 Mad. (F.C.), 656

—*Inheritance*—*Sudra ascetic*—*Right of shishya (disciple) to inherit*—*Texts of Hindu Law, whether obsolete*—*Yajnavalkya*—*Mitakshara*.—*Escheat to Government*—*Religious instruction to Sudras*—*Disciple, meaning of*—*Spiritual relationship, proof of*.] The disciple of a Sudra ascetic who dies without leaving any blood relations, is an heir of the latter under the Hindu Law and succeeds to his estate so as to prevent its escheat to the Government. The texts relating to succession by preceptors, disciples and fellow-students, enunciated, in *Yajnavalkya Smriti*, Chapter II, verse 187, and in the *Mitakshara*, section VII, are not obsolete. In determining who is a preceptor, a pupil or a fellow-student under the above texts, we have only to consider the imparting of purely religious instruction. Religious instruction and training are not confined to Brahmans; *Giyana Sambandha*

Pandara Sannadhi v. Kandasami Tambiran, (1887) I.L.R., 10 Mad., 375.
Dharmapuram Pandara Sannadhi v. Virapandiyam Pillai, (1899) I.L.R., 22 Mad., 302, distinguished. Strict proof is required to be given by the claimant regarding his alleged spiritual relationship to the deceased.

Nambasivam Pillai v. Secretary of State for India ... (1921) I.L.R., 44 Mad., 704

INAM—*Karnam service lands—Enfranchisement—Inam title-deed—Confirmation in last holder—Nature of title.*] The karnam of a village in Madras occupies his office not by hereditary or family right but as a personal appointee, although the appointment is primarily made of a suitable person who is a member of a particular family. When karnam service lands have been enfranchised, a quit-rent being imposed in lieu of the service, and an inam title-deed is granted confirming the lands to the holder of the office, his representatives and assigns, the lands are his separate property, and are not subject to any claim to partition by other members of the family. *Venkata v. Rama*, (1885) I.L.R., 8 Mad., 249 (F.B.), approved; *Gummaiyar v. Kamakchi Ayyar*, (1913) I.L.R., 26 Mad., 339 and *Pingala Lakshmi-pathi v. Bommireddipalli Chalamayya*, (1907) I.L.R., 30 Mad., 434 (F.B.), disapproved.

Venkata Jagannadha v. Veerabhadrayya ... (1921) I.L.R., 44 Mad. (P.C.), 643

INCOME-TAX ACT (VII OF 1918), ss. 51 (1) AND 52—*Sec. 106 (2) of the Government of India Act, 5 and 6 George V, Chapter 61—Sec. 45 (h) of the Specific Relief Act (I of 1877)—English decisions on English Income-tax Act, guides to interpret Indian Income-tax Act.*] Where a person who was assessed to income-tax while to the Board of Revenue and the Board dismissing the appeal refused to refer the matter to the High Court under section 51 of the Income-tax Act, though requested to do so, *Held* that section 106 (2) of the Government of India Act, and section 52 of the Income-tax Act prohibited the High Court from entertaining any application under section 45 in the nature of a mandamus for the purpose of compelling the Revenue Board to refer the matter to the High Court under section 51 of the Income-tax Act; *Spooner v. Juddow*, (1850) 4 M.I.A., 353, followed. Issuing an order under section 45 of the Specific Relief Act in the nature of a mandamus is an exercise of "original jurisdiction" within section 106 (2) of the Government of India Act. An application under section 45 of the Specific Relief Act against the Board is a "proceeding" within section 52 of the Income-tax Act. *In re Onward Building Society*, [1891] 2 Q.B., 463, applied. "Anything done" in section 52 includes "anything omitted to be done." *Jokiffe v. Wallasey Local Board*, (1878) L.R., 9 C.P., 62, followed. English decisions are not decisions of "Foreign Courts" and as the Income-tax Act of India generally follows the lines of the English Income-tax Act, the decisions of English Courts on the latter Act are the best guides to the interpretation of the Indian Act. The meaning of "unnecessary" in section 51 of the Income-tax Act, considered.

Offst Commissioner of Income-Tax v. North Anantapur Gold Mines, Limited ... (1921) I.L.R., 44 Mad., 71

LIMITATION ACT (IX OF 1908), ART. 181—*Appeal against preliminary decree for sale in a mortgage suit—Application for final decree under O. XXXIV, r. 5, Civil Procedure Code—Article applicable and starting point of limitation.*] An application for a final decree for sale under Order XXXIV, r. 5, Civil Procedure Code, is governed by article 181 of the Limitation Act and the starting point, in cases where there has been an appeal from the preliminary decree, is the date of the appellate decree whether the latter confirmed or varied the preliminary decree; *Bhup Indar Bahadur Singh v. Bijai Bahadur Singh*, (1901) I.L.R., 23 All., 152 (P.C.), applied. *Juscurn Boid v. Pirthichand Lal Choudhury*, (1919) I.L.R., 46 Cal., 670 (P.C.), explained. *Viswanatha Sastri v. Sitalakshmi Ammal*, (1921) 13 L.W., 37, distinguished.

Venkayya v. Sathiraju ... (1921) I.L.R., 44 Mad., 714

MADRAS ESTATES LAND ACT (I OF 1908), SEC. 3, CL. (5)—*Minor inamdar—Lands granted by zamindar after settlement in permanently settled estate—Whether inamdar a "landholder"—Whether tenants under him have occupancy rights.*] Where a zamindar made post-settlement inam grant of a portion of a village with both the warams on a permanent kattubadi, *Held* (KUMARASWAMI SANTRI, J., dissenting) such minor inamdar is a "landholder" within the meaning of section 3, clause (5) of the Estates Land Act and the tenants have permanent rights of occupancy.

Gadadhara Das Bavaji v. Suryanarayana Patnaik ... (1921) I.L.R., 44 Mad., 677

PROVINCIAL SMALL CAUSES COURTS ACT (IX OF 1897), SEC. 15:—*See CIVIL PROCEDURE CODE (ACT V OF 1908)*, SEC. 102 ... 697
SPECIFIC RELIEF ACT (I OF 1877):—*See INCOME-TAX ACT (VII OF 1918)*, SEC. 51 ... 718

PRIVY COUNCIL.*

MUSTI VENKATA JAGANNADHA (DEFENDANT),

1921,
April 21.

v.

MUSTI VEERABHADRAYYA, SINCE DECEASED
(PLAINTIFF).[On Appeal from the High Court of Judicature
at Madras.]*Inam — Karnam service ands—Enfranchisement—Inam title-deed—Confirmation
in last holder—Nature of title.*

The karnam of a village in Madras occupies his office not by hereditary or family right but as a personal appointee, although the appointment is primarily made of a suitable person who is a member of a particular family. When karnam service lands have been enfranchised, a quit-rent being imposed in lieu of the service, and an inam title-deed is granted confirming the lands to the holder of the office his representatives and assigns, the lands are his separate property, and are not subject to any claim to partition by other members of the family.

Venkata v. Rama, (1885) I.L.R., 8 Mad., 249 (F.B.), approved; *Gunnaiyan v. Kamakshi Ayyar*, (1903) I.L.R., 26 Mad., 339 and *Pingala Lakshmipathi v. Bommireddipalli Chalamayya*, (1907) I.L.R., 30 Mad., 434 (F.B.), disapproved.

APPEAL (No. 114 of 1919) from a judgment and decree of the High Court (February 19, 1918) reversing a decree of the Temporary Subordinate Judge of Cocanada.

The respondent, since deceased, sued the appellant to recover possession of a one-half share of lands by partition between them. The lands in question had formed the emoluments attached to the office of karnam of the village of Pandalapaka. In 1902 one Subbarayudu was karnam. He had two sons, by different wives, Venkataramayya (the father of the appellant), and the deceased respondent, Veerabhadrayya. On February 23, 1902, Subbarayudu was removed from the office on the ground of incapacity due to old age, and Venkataramayya was appointed.

*Present:—Lord BUCKMASTER, Lord DUNEDIN, Lord SHAW, and Sir JOHN EDGE.

VENKATA
JAGANNADHA
v.
VEERABHAD-
RAYYA.

Subbarayudu and Veerabhadrayya refusing to give up certain of the karnam lands to Venkataramayya, the latter obtained possession under a decree of the Revenue Court, dated November 7, 1902. It appeared from a report by the Deputy Collector that under an arrangement Subbarayudu had allowed the widow of his brother, the plaintiff, and the defendant to enjoy specified parts of the land.

In 1906 the lands were enfranchised from the service, and an inam title-deed in accordance with the Standing Order of the Board of Revenue (No. 52 of 1897) was granted, confirming the lands to the appellant, his representatives and assigns. The terms of the title-deed are set out in the judgment of the Judicial Committee.

Before the enfranchisement took place there had admittedly been a partition between Venkataramayya and Veerabhadrayya. The latter by his plaint alleged that when the partition took place the service lands were left undivided, and that by reason of the enfranchisement he should now receive a one-half share.

The only issue material to this report was:

"Whether the enfranchisement in the name of the defendant's father enured for the benefit of the family or to himself exclusively."

The Temporary Subordinate Judge dismissed the suit. He was of opinion that upon enfranchisement the property devolved upon the enfranchisee and his joint family, but that the parties being divided it enured exclusively for the benefit of the enfranchisee.

The plaintiff appealed to the High Court, which reversed the decision of the Trial Judge. The learned Judges (AYLING and SESHAGIRI AYYAR, JJ.) said:

"Mr. Narayanamurti, for the respondent, did not argue the main question regarding the effect of enfranchisement, having regard to our decision in Appeal No. 79 of 1917. We may, however, point out to the Subordinate Judge that the decision in *Ramayya v. Jagannadha*(1), which he quotes as supporting him in the view of the law he has enunciated, does not in the least help him. On the other hand, that decision is inconsistent with his conclusions."

(1) (1916) I.L.R., 39 Mad., 930.

VENKATA
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v.
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RAYYA.

A decree was made declaring the plaintiff entitled to a one-half share in the properties, and remanding the suit to the Subordinate Judge to divide the properties and pass a final decree, which he has since done.

Dunne, K. C. and Narasimham for the appellant.—The lands in suit attached to the office of karnam were resumable by Government, and upon enfranchisement enured to the exclusive benefit of the appellant under the inam title-deed: *Srinivasa v. Lakshamma*(1), *Bada v. Hussu Bhai*(2), *Venkata v. Rama*(3), *Venkatarayadu v. Venkataramayya*(4), *Dharani-pragada Durgamma v. Kadambari Virrazu*(5) and *Subbaraya Mudali v. Kamu Chetti*(6). The decision of the High Court in *Narayanna v. Chengalamma*(7) related to an unsettled palayam, the lands being held on an essentially different tenure from karnam service lands. The decision was erroneously applied to karnam service lands in *Gunnaiyan v. Kamakchi Ayyar*(8), which has since been approved by a Full Bench in *Pingala Lakshmipathi v. Bommireddipalli Chalamayya*(9) and followed in *Ramayya v. Jagannadha*(10) and other cases. It is submitted that the last-named Full Bench decision is in conflict with that of 1884, and opposed to the current of authority in Madras prior to 1902. The inam title-deed was in the form provided by the Standing Order (No. 52 of 1897) in the case of enfranchisement of a service inam as opposed to a personal inam. But even if the Full Bench decision of 1907 was right, the respondent had no interest in the lands, since there was a partition between him and his brother, the appellant, before the enfranchisement took place. It cannot be said that the karnam lands were left for subsequent division, for they were in their nature impartible; there was a complete partition. That being the case, the Madras decisions since 1902 already referred to are not applicable. Whatever permissive interest was allowed by Subbarayudu in the karnam lands to the deceased respondent cannot avail against the appellant, who held the lands as karnam

(1) (1884) I.L.R., 7 Mad., 206.
(3) (1895) I.L.R., 8 Mad., 249 (F.B.).
(5) (1898) I.L.R., 21 Mad., 47.
(7) (1887) I.L.R., 10 Mad., 1.
(9) (1907) I.L.R., 30 Mad., 434 (F.B.).

(2) (1884) I.L.R., 7 Mad., 236.
(4) (1892) I.L.R., 15 Mad., 284.
(6) (1900) I.L.R., 23 Mad., 47.
(8) (1908) I.L.R., 26 Mad., 339.
(10) (1916) I.L.R., 39 Mad., 930.

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from 1902. Further, the appellant has been in adverse possession since the decree of 1902, and the suit is barred by limitation and *res-judicata*. [Reference was also made to Madras Act II of 1894, section 9, section 16, sub-section (2), sections 17, 20 and 28; and Madras Act III of 1895, sections 3, 7, 13 and 21.]

De Gruyther, K.C. and *Dube*, for the deceased respondent's representatives.—The lands were held before enfranchisement for the benefit of the family, subject to the performance of the service. The office was hereditary by custom; see Fifth Report, Volume I, pages 11 to 15 (reprint) and Madras Regulation XXIX of 1802, and Madras Regulation VI of 1831. Under Madras Act II of 1894 the office is taken by virtue of succession and not by virtue of appointment. The enfranchisement did not affect the family rights in the land, but was merely a substitution of a quit-rent for the services. That view accords with the Madras Acts dealing with the enfranchisement of service lands. The decision of the Madras High Court in *Gunnaiyan v. Kamakchi Ayyar*(1), is directly in point. That in *Venkata v. Rama*(2) does not affect this case. There, a stranger had been appointed and it was found that there was no member of the family having an interest. Immediately the lands in suit were enfranchised the respondent became entitled to his share on partition. The question is whether the family was still joint and whether the lands were still joint property.

The JUDGMENT of their Lordships was delivered by

LORD SHAW.

Lord SHAW.—This is an appeal from a decree, dated the 19th February 1918, of the High Court of Judicature at Madras which reversed a decree, dated the 14th March 1917, of the Temporary Subordinate Judge of Cōcanada. This last-mentioned decree remanded the suit so that partition might be decreed in favour of the plaintiff-respondent.

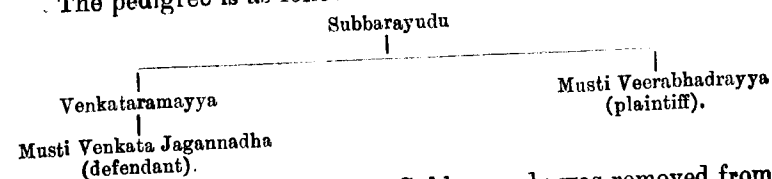
The suit was for the recovery of the possession of a one-half share of lands specified in the schedule attached to the plaint. It was admitted that the suit properties had formed the emoluments attached to the office of karnam, or village accountant, in the village of Pandalapaka.

(1) (1903) I.L.R., 26 Mad., 389.

(2) (1884) I.L.R., 8 Mad., 249 (F.B.).

These lands were enfranchised, as after-mentioned, in the year 1906, by an inam title-deed granted to Venkataramayya, the appellant's father.

The pedigree is as follows:—



The appellant's grandfather Subbarayudu was removed from his office of karnam for incapacity due to old age, and his eldest son, Venkataramayya, was appointed karnam on 23rd February 1902. Shortly thereafter the former karnam died.

It is a fact in the case, which is admitted, that prior to the enfranchisement and inam grant of 1906 all the family properties which were capable of division were divided into two equal shares between Venkataramayya and Veerabhadrayya. No partition took place of the service inam lands which are in suit in the present case.

The appellant maintains that the respondent had no right to such lands; that they were not joint family property, and were for that reason not included within the scope of the division made; and that the enfranchisement of the karnam lands in 1906 and the procedure with regard thereto are consistent with the view that the lands were impartible and were confirmed as separate property to the then holder of the office of karnam; while upon the other hand the respondent maintains that a division of this particular property, although it is undoubtedly karnam land, must now be decreed and that the enfranchisement of 1906 could not destroy the nature of the property as joint family property and the interest of the respondent therein.

The Subordinate Judge took the former view and the High Court took the latter. The question in the appeal is which of these views is correct.

The point in issue is compendiously put in the respondent's case in these terms:

"Whether the enfranchisement in the name of the defendant's father enured for the benefit of the family or to himself exclusively?"

It is admitted that the lands in suit formed the emoluments of the karnam or village accountant. A large body of authority

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on the subject of the nature of the title to lands so held was cited to the Board. There can be no question of assailing (whatever be the nature of the title to the property itself) the validity of the enfranchisement under the Inam Rules. The suit proceeds upon that footing and asks for a division of the property on the assumption that it has been duly enfranchised under the Inam Rules of 1859.

It is, however, highly expedient to note the exact terms of the enfranchisement itself. It is dated the 21st March 1906, and is signed by Mr. J. A. Atkinson, Inam Commissioner. It is thus expressed :

" No. 1520.

" Title-deed granted to Musti Venkataramayya.

" By order of the Governor in Council of Madras acting on behalf of the Secretary of State for India in Council, I acknowledge your title to an inam consisting of the right to a portion of the Government revenue on land measuring (forty-five) 45—83 acres of dry (be the same a little more or less) originally granted for service, and situated in the village of Pandalapaka in the Estate of Pithapur, in the taluk of Ramachandrapur, in the district of Gōdāvari.

" 2. This inam, being held for karnam service, now otherwise provided for, shall now be deemed freed of such service, but shall henceforth be subject to the payment of an annual quit-rent of Rs. (296-8-0) two hundred and ninety-six and annas eight exclusive of Rs. (24) twenty-four already payable as jodi to the proprietor, which quit-rent is hereby imposed upon the inam in commutation both of the said service and of the reversionary interest possessed by Government in the inam. The inam is now confirmed to you, your representatives and assigns, to hold or dispose of as you or they think proper, subject only to the payment of the above-mentioned quit-rent and jodi (which quit-rent will be liable to revision at the periodical re-settlements of the district), and to the provisions of the next clause.

" 3. The right of Government to all minerals, if any, in the land referred to in Clause 1 above is hereby expressly reserved to Government, and the revenue referred to in such clause represents only the right of Government to a share in the surface products of such land.

" Dated 21st March 1906.

" MADRAS.

J. A. ATKINSON,
Inam Commissioner."

There can be no question as to the absolute nature of this grant in favour of the appellant's father. The inam is confirmed " to you, your representatives and assigns, to hold or dispose of as you or they think proper " subject only to the payment of quit-rent, etc., and to the reservation of minerals.

It is worthy of note, first, that this enfranchisement happens also to be in entire accord with the Standing Order of the Board of Revenue of Madras as to Inams, No. 52 of 1897, and, second, that that Standing Order makes the distinction between grants which are personal or subsistence grants, and those which are service inams. It is to the latter category that the enfranchisement in the present case properly belongs. By the Standing Order alluded to it is provided by section 29, that

" XXIX. Inams thus enfranchised, either by the payment of an annual quit-rent, or of a single fixed sum equal to twenty years' purchase of the quit-rent, will, like every other description of property, be subject to the jurisdiction of the ordinary Courts of Justice in all questions of disputed right, succession, etc., and they may be mortgaged, sold and transferred in any manner, at the will and discretion of the inamdār, subject to the payment of quit-rent, if such is not redeemed."

The Board has carefully considered the long series of authorities quoted in argument, and it is of opinion as follows :

(1) The lands comprising the emoluments of a karnam were attached to the office held by him as such ;

(2) When the karnam for the time being was removed from office, he lost all right and title to the lands ;

(3) Although in point of fact there might be even a long continuance of the office in a particular family, the right of the Government and the decision of the Revenue authorities to remove a karnam from office and to appoint another, were not open to question in Courts of Law ; and

(4) If this right of selection were exercised in favour of a stranger, there being, for example, within the range of the family (which had been accustomed to have one of its members holding the office of village accountant) no person who in the opinion of the Revenue officer was suitable for the position, then the appointment went to the stranger selected and the lands with it as emoluments without any claim thereon as a family right by relatives of former holders of the office.

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These propositions seem to their Lordships to have been part of the law of Madras long prior to the Acts of 1894 and 1895, which are now to be referred to; but it is to be observed with regard both to Madras Act II of 1894, section 10, and Madras Act III of 1895, section 10, that eligibility, whether for nomination to the office of Karnam by the proprietor of the village under the former Act or by the Collector under the latter, is a matter personal to the nominee, clearly taking into account such things not only as sex and age, but also the physical and mental capacity to discharge the office, and even the educational qualifications of the person selected.

It is accordingly clear that since that time in Madras the Karnam of the village occupies his office not by hereditary or family right, but as personal appointee, though in certain cases that appointment is primarily exercised in favour of a suitable person who is a member of a particular family. It would accordingly appear, apart from the authorities, that lands held as appurtenant to the office so enjoyed should continue to go with that office and should accordingly be impartible.

It may be, however, that the course of authority leads to a different result from that to which principle and administrative convenience would seem to point. Their Lordships will therefore examine the authorities, which, as will be seen hereafter, are conflicting.

In *Srinivasa v. Lakshamma*(1), it was held that where a hereditary village officer who had been dismissed sued to recover land which had formerly been the emoluments of the office and which had been enfranchised and granted to another person holding the office at the time of the enfranchisement, such a suit could not lie. Their Lordships quote the judgment of TURNER, C.J., as containing a compact statement of law upon the point:

"The lands were attached to the office of karnam as its emolument; when the appellant was removed from the office, he lost his right to the land.

"The circumstance that money may have been expended on the improvements of the land, in the expectation that the office with its emolument would be continued to the family, would not give the

(1) (1884) I.L.R., 7 Mad, 206.

appellant any title to recover the land in the events that have occurred. When he was removed for misconduct, the office and emoluments were conferred on a stranger, and with the decision of the revenue authority on that question we can not interfere. While the office was held by a stranger, the Government resolved to sever the lands from the office and to offer them to the then office-holder for enfranchisement; the holder accepted the offer and became the owner."

The decision, it will be observed, non-suited the former holder of the office from recovering the land. But the same result followed in the subsequent case of *Bada v. Hussu Bhai*(1) in which a member of the family of an office-holder who had never held the office sued to recover a share of the lands, and the same learned Judge put the point thus:

"The land was appurtenant to the office, and the Government determined to sever it from the office and to allow the office-holder or office-holders for the time being to enfranchise it. The appellant, who was never the holder of the office, could not have a claim on its emoluments."

That this was the law of Madras was stated by the Full Court in the year 1884, in *Venkata v. Rama*(2). The judgment of HUTCHINS, J., in referring to the Full Court thus states the point:

"To ensure the office being held by a qualified person, the Executive was compelled to reserve to itself the determination of all claims."

Following the line of his dissent, however, he added:

"But subject to this one condition the absolute right of hereditary succession has been repeatedly recognized."

He dissented, as has been said, on this point from the judgment of the Full Bench. But in the opinion of their Lordships the judgment then pronounced (and it is observed that TURNER, C.J., and MUTTUSWAMI AYYAR, J., were members of the Court), was clear and sound. The Madras Regulations of 1802, 1806 and 1831 are most carefully considered, and the general result is stated in the following sentences of the judgment of TURNER, C.J.:

"When the emoluments consisted of land, the land did not become the family property of the person appointed to the office,

(1) (1884) I.L.R., 7 Mad., 236.

(2) (1885) I.L.R., 8 Mad., 249 (F.B.).

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whether in virtue of an hereditary claim to the office or otherwise. It was an appanage of the office inalienable by the office-holder and designed to be the emolument of the officer into whose hands soever the office might pass. If the revenue authorities thought fit to disregard the claim of a person who asserted an hereditary right to the office and conferred it on a stranger, the person appointed to the office at once became entitled to the lands which constituted its emolument."

Even on the footing that the respondent in the present case had established that the office was one in which he as a member of the family had a species of expectation or hereditary right, the decision would equally apply to the present case. The judgment of MUTTUSWAMI AYYAR, J., upon this point was clear:

"According to the law, therefore, as it stood prior to the enfranchisement of the inam, a right to the land could only be legally acquired through the right to the possession of the office, and neither the respondent's father nor the respondent had then any vested interest in the office to sustain an action in the nature of an ejectment."

The same reasoning would have applied to any attempt to partition the lands.

In the opinion of the Board the law of Madras was thus soundly stated and that judgment should not have been disturbed.

It was followed in the case of *Venkatarayadu v. Venkata-ramayya*(1), and as the judgment of Sir ARTHUR COLLINS seems strictly to apply to the present litigation these sentences from it are quoted and are adopted:

"We think that the decision of the Subordinate Judge is opposed to the principles laid down in the Full Bench decision in *Venkata v. Rama*(2). The land which formed the emolument of the office of karnam did not become the family property of the person appointed to the office, although he may have had an hereditary claim to the office. The land was designed to be the emolument of the person into whose hand the office of the karnam might pass and was inalienable by him. The effect of enfranchisement was to free the lands from their inalienable character and to empower the Government to deal with them as they pleased."

(1) (1892) I.L.R., 15 Mad., 284.

(2) (1885) I.L.R., 8 Mad., 249 (F.B.).

The same result was reached in *Dharanipragada Durgamma v. Kadambari Virrazu*(1), in which the principle of the Full Bench case was again followed.

In *Subbaraya Mudali v. Kamu Chetti*(2),

"lands which had been held by a deceased as maniyam service inam were enfranchised after his death and sold by his widow. On a claim being preferred by the reversioners for a declaration that the sale was inoperative as against them after the expiration of the widow's life estate it was held that the right of the widow under the grant was not limited to that of a widow's estate."

The case was expressly decided as following the Full Bench decision. Subsequently, with one exception about to be noted, the law of Madras up to the year 1899 followed the consistent line which has just been stated.

The difficulty, however, which appeared in the later decisions sprang from the case of *Narayana v. Chengalamma*(3). It must, however, be observed that that was not a karnam case; it was the case of a palayam, and in their Lordships' opinion the error which has appeared has been in the treatment of these two separate cases as governed by analogical principles. Running through the decisions of the Madras Courts the same difficulty more than once appears: it arises from the same cause, namely, that the law of the palayam is treated as the same as the law of the karnam. This is carried to the point that in 1902 in the case of *Gunnaiyan v. Kamakchi Ayyar*(4), the Full Court reversed the law that had been laid down by a Madras Full Bench in 1884 in the case of *Venkata v. Rama*(5). This procedure has been, of course, full of perplexity and that perplexity must now, if possible, be brought to an end.

The judgment of this Board dealing so fully with the case of a palayam tenure, and delivered by Sir JOHN EDGE, in the case of *Appayasami Naicker v. Midnapore Zamindary Company, Ltd*(6), on the 16th March 1921, makes it unnecessary to enter again at length on that topic. The palayagars were originally

"petty chieftains occupying usually tracts of hills or forest country subject to pay tribute and service to the paramount State, but seldom paying either, and more or less independent."

(1) (1898) I.L.R., 21 Mad., 47.

(2) (1900) I.L.R., 28 Mad., 47.

(3) (1887) I.L.R., 10 Mad., 1.

(4) (1908) I.L.R., 26 Mad., 389.

(5) (1885) I.L.R., 8 Mad., 249 (F.B.).

(6) (1921) I.L.R., 44 Mad., 575 (P.O.).

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The State policy with regard to palayagars was definitely announced by the proclamation of Lord Clive in 1801. To all intents and purposes the palayagars were relieved of military duties; they had to give up possession of firearms and weapons of offence and become zamindars; a certain number of pikemen whose names were to be registered were allowed to these chieftains in deference to their personal feelings and "for the purpose of maintaining the pomp and state heretofore attached to the persons of the said palayagars." The meaning of the proclamation is that their estates were subjected to assessment "upon the principles of zamindar tenures." Palayagars so treated were dealt with as zamindars with hereditary estates, their ancestors' possessions being secured to them.

It is accordingly not to be wondered at that when a case of this nature was brought before the Courts, as in *Narayana v. Chengalamma*(1) already referred to, it should have been held that the inam title-deed which had been granted to the palayagar in that case did not confer any new title and that the enfranchisement had no "larger operation than as a release granted by the Crown in respect of its reversionary interest and of the obligation of rendering service." The decision forms no authority for the same principle being extended to the case of a Karnam. It was so interpreted, however, in *Gunnaiyan v. Kamakchi Ayyar*(2), and BHASHYAM AYYANGAR, J., applied the law laid down as to palayams as "law bearing upon the enfranchisement of Inams whether they be personal inams or service inams." "The only difference," said the learned Judge, "between that case and the present one is that in the former the office itself was abolished as unnecessary, whereas in the present case the office was retained, a fixed salary being attached thereto in lieu of the inam. This, of course, can make no distinction in principle."

Their Lordships differ from this view. When a palayam was abolished, in so far as the duty of rendering military service was concerned, the estate was continued with all its hereditary incidents to the Palayagar in the same manner as if possessed

(1) (1887) I.L.R., 10 Mad., 1.

(2) (1908) I.L.R., 26 Mad., 339.

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by a zamindar. It is different with regard to the case of a karnam. A hereditary right in a karnam or his family can only, at the utmost, be said to constitute a certain *spes* among persons within the area of selection of those eligible for the office. But it is not, as has already been observed, even so limited. The power of selection rests with the administrative officials, who alone are judges of the eligibility of the karnam for the time being, and it is the settled law of Madras that the emoluments in the shape of lands follow the office, *ex necessitate*. Otherwise, the holder of the lands might be some person other than the holder of the office as already pointed out. The analogy fails.

It was, however, decided in the opposite sense by a Full Bench in *Pingala Lakshmipathi v. Bommireddipalli Chalamayya*(1). In a brief opinion, it is said that "it is difficult to gather any definite principle common to the majority" in *Venkata v. Rama*(2). The case of *Gunnaiyan v. Kamakchi Ayyar*(3) was approved. Their Lordships are of opinion that the Full Bench was in error: that the case of a karnam stands on its own footing and that the principles applicable thereto were properly decided in *Venkata v. Rama*(2), by the Full Court. The reasons for their Lordships' views have already been sufficiently stated.

To quote and to adopt the judgment of the 25th August, 1902, of Mr. GALLETT, Acting Sub-Collector, in this case:

"This is a suit for the recovery of the Karnam service inam lands of Pandalapaka. Plaintiff is admittedly Karnam. The land is admitted to be Karnam's inam. Judgment for plaintiff with costs."

A warrant of execution, dated the 24th October 1902, authorizing the removal of "any person bound by the decree who may refuse to vacate the same," was also right. It is unnecessary, however, to enter upon questions either of limitation or of *res-judicata*, which were referred to in the argument, because the case has been disposed of on the merits.

When accordingly, on the 21st March 1903, the title-deed already quoted was granted by way of an inam to the appellant's

(1) (1907) I.L.R., 30 Mad., 494 (F.B.).

(2) (1886) I.L.R., 9 Mad., 249 (F.B.).

(3) (1908) I.L.R., 26 Mad., 339.

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father and was in express words confirmed "to him, his representatives and assigns, to hold or dispose of as he or they think proper," the Board is of opinion that that enfranchisement must be given full effect to, and that it is not subject to be eviscerated or altered by the claim for partition or division put forward in the present suit.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the decree of the Temporary Subordinate Judge of Cocanada, dated the 14th March 1917, be affirmed and that the appellant be found entitled to costs in the Courts below from the said date, and of the costs of this appeal.

Solicitor for appellant: *Douglas Grant*.

Solicitors for respondent: *Barrow Rogers and Nevill*.

A.M.T.

PRIVY COUNCIL.*

1921,
May 5.

ARUMILLI PERRAZU AND OTHERS (DEFENDANTS),

v.

ARUMILLI SUBBARAYADU AND OTHERS (PLAINTIFFS)
(AND CONNECTED APPEAL).

[On Appeal from the High Court of Judicature at
Madras.]

Hindu Law—Adoption—Sudras—Partition—Respective shares of adopted and after-born aurasa son—Dattaka Chandrika—Joint family property—Accountability of managing member.

In the case of Sudras in the Madras Presidency an adopted son on partition of the family property shares equally with a son or sons of the adoptive father born after the adoption.

So held on the grounds that the rule stated in the *Dattaka Chandrika* (section 5, paragraphs 29, 32) as to the share of an adopted son among Sudras had been accepted and acted on for more than a century in that Presidency, until disturbed by the decision of the Madras High Court in *Gopalam v. Venkataraghavulu*, (1917) I.L.R., 40 Mad., 632, and the rule, although not supported by the Smritis, or by the *Mitakshara*, is not inconsistent with them.

Seemle that the same rule applies among Sudras in Bengal.

Judgment of the High Court reversed and the above-mentioned decision disapproved.

* Present:—Lord BUCKMASTER, Lord DUNEDIN, Lord SHAW and Sir JOHN EDGE.

In the absence of proof of direct misappropriation or fraudulent and improper conversion, the manager of a joint family estate is liable to account only for what he has received, not for what he ought or might have received if the family moneys had been profitably dealt with.

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CONSOLIDATED APPEALS Nos. 18 and 19 of 1919 from a judgment and decree of the High Court, varying a decree (December 13, 1913) of the Temporary Subordinate Judge of Rajahmundry.

The two consolidated Appeals arose out of a suit for partition brought by Subbarayadu and his two sons (respondents in both Appeals), against, among other defendants, the four sons of Subbarayadu's deceased brother, Venkiah. The parties were members of a joint Hindu family resident in the Madras Presidency, Subbarayadu being the manager, and were Sudras governed by the *Mitakshara*. It was found at the trial, and conceded upon Appeal, that Subbarayadu had adopted Ramanna, the fourth son of Venkiah, before the plaintiffs, the aurasa sons, were born. The defendant, Ramanna, by his written statement claimed that as adopted son he was entitled to share equally with Subbarayadu's after-born aurasa sons. Ramanna's brothers, and other defendants, by their written statements raised various questions with regard to the joint family property, alleging acts of misfeasance by Subbarayadu in relation to it, and claimed a general account.

The Subordinate Judge made a decree for partition, and dealt with the various disputed items with regard to the joint family property, but refused a general account. He allowed Ramanna's claim as adopted son to share equally with Subbarayadu and his two legitimate sons, holding him entitled to an eighth of the whole joint property.

There were separate Appeals to the High Court. One (No. 104 of 1914) was by the plaintiffs, and another (No. 187 of 1914) was by defendants other than Ramanna and his sons.

The learned Judges (AYLING and SRINIVASA AYYANGAR, JJ.) heard the Appeals together. Dealing first with Appeal No. 104 of 1914, they reversed the decision of the trial Judge with regard to the share to which Ramanna was entitled, and held that he was entitled to one-thirteenth of one-half of the property, namely, one-fourth of the share of each of the plaintiffs. The judgment of the High Court on this point is set out towards the

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end of the judgment of the Judicial Committee, as also that of the trial Judge. The learned Judges then proceeded to consider the various questions relating to the items of property raised by that Appeal and by Appeal No. 187 of 1914; they varied the decree of the Subordinate Judge in the manner appearing from the judgment of the Judicial Committee.

Of the present consolidated Appeals, No. 18 of 1919 was from the decree of the High Court in Appeal No. 187 of 1914, and No. 19 of 1919 was from the decree of the High Court in Appeal No. 104 of 1914. The arguments relating to the share of the adopted sons alone are reported.

Dunne, K.C., Parikh and Narasimham, for the appellants in both Appeals.—Among Sudras an adopted son shares in the family property equally with the after-born aurasa sons. In the case of the twice-born castes an adopted son assumes an inferior position as to offerings when a natural-born son is born, and consequently receives a reduced share; that reason does not apply in the case of Sudras. The rule rests on the Dattaka Chandrika, section 5, paragraph 29, which excludes Sudras from the operation of paragraphs 17 and 19 of that section, and paragraph 32 makes it clear that among Sudras the rule is as stated. That view is recognized expressly in *Strange's Hindu Law* (1830 Edition, Volume I, page 99) and in *W. Macnaghten's Hindu Law* (1829, Volume I, page 70). The high, and in Southern India paramount, authority of the Dattaka Chandrika, with regard to adoption has been affirmed by the Board: *Run-gama v. Atchama*(1), *Collector of Madura v. Moottoo Ramalinga Sathupathy*(2), *Sri Balusu Gurulingaswami v. Sree Balusu Ramalakshamma*(3), *Bhagwan Singh v. Bhagwan Singh*(4), *Nagindas Bhugwandas v. Bachoo Hurkissondas*(5). The Smritis do not establish any rule to the contrary. The view contended for was accepted by the Madras High Court in *Raja v. Subbaraya*(6). The decision of that Court in *Gopalam v. Venkataraghavalu*(7) is in conflict with that case. It was there held that the question was one of inheritance and was therefore governed by the

(1) (1846) 4 M.I.A., 1, 97.

(3) (1898) L.R., 26 I.A., 113, 132.

(5) (1915) L.R., 43 I.A., 56.

(2) (1868) 12 M.I.A., 397, 437.

(4) (1896) L.R., 26 I.A., 153, 161.

(6) (1884) I.L.R., 7 Mad., 253.

(7) (1917) I.L.R., 40 Mad., 632.

Mitakshara. There is, however, nothing to the contrary in the *Mitakshara*; further, the question is really one regarding the status of an adopted son and consequently within the particular authority of the Dattaka Chandrika. Of the decisions relied on by the High Court in the case last mentioned, in *Ayyavu Muppanar v. Niladatchi Ammal*(1) the Dattaka Chandrika was not referred to, and it appears that only one-fourth was claimed, the contest being as to the validity of the adoption; the Bombay case, *Bachoo v. Nagindas*(2), was reversed by the Board in *Nagindas Bhugwandas v. Bachoo Hurkissondas*(3). The High Court at Calcutta has given effect to the Dattaka Chandrika in this respect: *Baramanund Mahanti v. Choudhry Krishna Charan Patnaik*(4), *Asita Mohon Ghosh Mouluk v. Nirode Mohon Ghosh Mouluk*(5).

De Gruyther, K.C., and Eldis for the respondents.—The Dattaka Chandrika and similar commentaries have not the same kind of authority as the *Mitakshara* and *Dayabhaga*. The opinions expressed in them are not to be accepted if they do not accord with the Smritis: *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma*(6). With increasing knowledge (see page 129 of that report) the somewhat exaggerated view of the authority of the Dattaka Chandrika and Dattaka Mimamsa previously held had ceased to be entertained by the Board (see also *Ganga Saha v. Lekhraj Singh*(7). In *Puttu Lal v. Parbati Kunwar*(8), the Board refused to give effect to an opinion expressed in the Dattaka Mimamsa. The present question is one of inheritance and the *Mitakshara* (Chapter I, section 11, paragraphs 1 and 24) clearly lays down that when a legitimate son is born an adopted son takes a fourth, that statement being based upon the *Vasishta Smriti*; no exception is made as to Sudras, although in section 12 the special position of Sudras is dealt with. The view in the Dattaka Chandrika is expressed merely to explain the text of *Gautama*, cited in section 5, paragraph 32. That text is not referred to in the *Mitakshara*, and was probably treated as being obsolete (see

(1) (1862) 1 M. H.C.R., 45.

(3) (1915) L.R., 43 I.A., 56.

(5) (1916) 20 C. W.N., 901.

(7) (1887) I.L.R., 9 All., 253, 322, 323.

(2) (1914) 16 Bom., L.R., 263.

(4) (1911) 14 C. L.J., 133.

(6) (1898) L.R., 26 I.A., 113, 131.

(8) (1915) L.R., 42 I.A., 155.

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Shyama Charan Sircar's *Vyavastha-Chandrika*, Volume II, pages 167, 169); the *Dattaka Mimansa* (section 5, paragraph 43) attempts to give a different explanation of the text. No Smriti or commentator gives any support to the opinion expressed in the *Dattaka Chandrika*. There is nothing in *Gautama* (see *Muller's Sacred Books*, Volume II) to support the explanation in the *Dattaka Chandrika*. The statement in *Raja v. Subbaraya*(1) was *obiter*: the decision was that the plaintiff took a half share by representation of his deceased adoptive father. In *Ayyavu Muppanar v. Niladatchi Ammal*(2) the reference to the ceremonies of the adoption shows that the parties were Sudras. There is no judicial decision in Madras supporting the appellant, Ramanna.

Dunne, K.C., in reply.—The *Dattaka Chandrika* is a special treatise, on adoption and there is nothing in the *Mitakshara* to the contrary on this question. Moreover, although the Board has said that the *Dattaka Chandrika* is to be received with caution if it conflicts with the *Smritis*, there is no authority that it is to give way to the *Mitakshara*. [Reference was also made to the judgment of *BANNERJI, J.*, in *Bhagwan Singh v. Bhagwan Singh*(3).]

The JUDGMENT of their Lordships was delivered by

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SIR JOHN EDGE.—These appeals raise a question of great and far-reaching importance with regard to the rights of succession in the Presidency of Madras, but this is associated with a series of relatively unimportant matters relating to questions of accounts that have arisen in these circumstances.

The first plaintiff in the suit, who is the first respondent to each Appeal, was the manager for many years of a joint family estate which appears greatly to have prospered under his care. Distrust, however, arose, and was apparently well justified, as to his dealing with certain portions of the estate, and elaborate inquiries were set on foot outside the Courts for the purpose of ascertaining what the true position was. This first respondent—uneasy, it is asserted, as to the prospect of proceedings being

brought against him as the result of these inquiries—instituted proceedings himself, to which the appellants were parties, alleging that they also had been in custody of part of the joint family estate, and asking for accounts and consequential relief, to which demand, among other answers, a claim was put forward that the plaintiff should render an account of the joint family properties and his management from 1898 onwards. The questions associated with these claims have been before the Subordinate Judge and before the High Court. Both these Courts refused the claim for the general account and decided the various questions in issue that were raised on the accounts. Apart from the dispute as to the rights of succession, the claim for the general account and the following items only are the subject of these consolidated Appeals: First, the appellants say that the plaintiff should pay interest at 9 per cent on the moneys misapplied in accordance with the direction of the Subordinate Judge, this direction being overruled by the High Court, who reduced it to 6 per cent; secondly, they assert that the High Court was wrong in deciding that certain items of Schedule B and Schedule C of the Supplemental Schedule B were the joint property of the family; and finally, they assert that the High Court was wrong in excluding from the items on which interest was payable a sum of Rs. 7,000, which was the subject of a promissory note held by the plaintiff.

With regard to the claim for a general account, this has been refused by both Courts. The High Court based their decision upon the ground that all the items in respect of which the plaintiff was alleged to have been guilty of misconduct had been investigated and set out in the schedules which were before the consideration of the learned Judge, who had dealt with them item by item as appeared in his judgment. They continue in these words:

“What more could be done, even if we direct a general account it is difficult to see.”

Their Lordships are entirely in agreement with this view. The learned Subordinate Judge himself stated that it appeared that all possible items of collection by the first plaintiff had been proved as far as possible by the indefatigable energy of the defendants Nos. 1 and 3. He also added that he thought delay

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(1) (1884) I.L.R., 7 Mad., 253.

(2) (1862) 1 M. H.C.R., 46.

(3) (1895) I.L.R., 17 All., 294 (F.R.).

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was a good reason for refusing the claim. Their Lordships think that the High Court rightly interpreted the judgment of the Subordinate Judge, and that in substance, if not in actual words, both Courts have decided that in effect the account asked for has already been taken and that it would be a needless prolongation of litigation and waste of cost if a further account were ordered. This conclusion is the one at which their Lordships have themselves arrived, and they therefore think that upon this point the Appeal must fail.

With regard to the interest, the matter can be briefly dealt with. The High Court have considered that 6 per cent simple interest is sufficient. It would require very special and unusual circumstances to induce this Board to vary such a decision, which rests upon discretion, even though in this matter the view of the High Court differed from that of the Subordinate Judge as to the way in which that discretion should be exercised. But they may add that if the matter were one upon which an independent judgment was required, they think that the judgment of the High Court was correct.

As to the items claimed by some of the defendants as separate property this depends upon evidence and the Courts have differed as to its effect. Their Lordships think that the judgment of the High Court is correct as to its interpretation. The first defendant asserts that the property was bought with moneys belonging to his wife, and he accounts for these moneys by stating:

"My mother-in-law gave property to my wife just before her death. My wife told me of her gift of property to her. I was not present at the time."

And this is supported by the evidence of the defendant's brother-in-law, whose evidence is in these terms:

"My sister sold away her husband's properties to which she succeeded. No; she obtained 4 acres from her husband's family for maintenance. She also purchased 10 acres. Subsequently she sold away all the 14 acres of land."

The wife was not examined to support the claim. It appears that the learned Subordinate Judge based his judgment upon the view that there was nothing improbable in the defendant's wife having inherited the amount necessary for the purchase of the property. That would be a potent reason if there were

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substantial evidence to show that such inheritance had in fact been acquired. In their Lordships' opinion such evidence is not forthcoming, and they think upon this point also the judgment of the High Court is correct, though it is liable to be misunderstood from the form of the judgment, which suggests as a reason that the first defendant's story was contradicted by one of his own witnesses whose evidence was inadmissible. This would apparently leave the first defendant's story unchallenged, but in truth his account was never sufficiently substantiated, and for this reason that claim fails.

With regard to the last matter of the Rs. 7,000, it is extremely difficult to extract the reasons why the High Court dealt with this sum differently from other amounts which appear in the same account, though in fact it was added as an additional item. There is, however, nothing to show their Lordships that it was so dealt with by the first plaintiff as to render him liable to account for anything more than the actual interest that he received upon it; but to this extent he is accountable.

Their Lordships desire once more to repeat the warning they have often given against attempting to apply without qualification in India the rules applicable to strict accounts between trustees and *cestuis que trusts* that exist in this country, because in truth there are a number of fiduciary relationships in India to which these rules cannot in their entirety apply. This does not mean that breach of established duty should be less severely dealt with in India than in this country, but that there are fiduciary relationships which do not involve all the duties which are imposed upon trustees here. The office of manager of a joint family estate affords an illustration of this difference. In the absence of proof of direct misappropriation, or fraudulent and improper conversion of the moneys to the personal use of the manager, he is liable to account for what he received and not for what he ought to or might have received if the moneys had been profitably dealt with. Their Lordships cannot find in this case anything to render the first respondent liable beyond the extent to which they have referred. On this point also, except to the extent above mentioned, the appellants fail.

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The next question which it is necessary to consider is that which is raised by the second of these two consolidated Appeals in which the defendants Arumilli Ramanna and his three sons, Arumilli Ragavudu, Arumilli Venkataratnan and Arumilli Subbarayadu, are the appellants, and the plaintiffs are the respondents. The parties are Sudras and belong to a family of Sudras, of the Presidency of Madras, which in general is governed by the law of the Mitakshara. Arumilli Ramanna was, as has been concurrently found by the Courts below, adopted by the plaintiff, Subbarayadu, as his son when that plaintiff was childless. Ramanna was by birth a son of Venkiah, who was a brother of that plaintiff. After Ramanna had been adopted that plaintiff's sons, Ramamurthi and Periah, who are respectively the second and third plaintiffs, were born, and the question to be considered in the second of these two Appeals is whether in the Sudra caste in the Presidency of Madras an adopted son on partition of the family property shares equally with a son of his adoptive father born subsequently to his adoption. The question is an important one, and is by no means an easy one for this Board to decide. The question depends on a text of the Dattaka Chandrika and on the authority to be allowed in the Presidency of Madras to that text.

So far as ancient texts and recognized Sanskrit commentaries on Hindu law are concerned, the earliest authority for the proposition, that amongst Sudras an adopted son on a partition of the property of the joint family shares equally with a legitimate son of the adoptive father born subsequently to the adoption, is that of the Dattaka Chandrika. In Section 5 of the Dattaka Chandrika ("Hindu Law Books," edited by Whitley Stokes, 1865) which deals with "the succession by inheritance of adopted sons lineally and collaterally," the commentator, after referring to rights of members of a Hindu joint family generally to share in a partition of the family property, says:

"29. The mode, however, of partition between the son of the wife, the son given and the rest and the legitimate son, which has been propounded in what preceded does not apply to the Sudra tribe."

After some further observations, the commentator further says:

"32. Accordingly, the text subjoined must be construed as referring merely to Sudras. 'A son given being thus adopted, if by any chance, a legitimate son should be born let them be equal partakers of the father's estate.' So also in the following text, the equal participation, of all lawfully begotten Sudras having been first propounded, the succession to equal shares of the other sons likewise is subsequently declared by the sentence, ('if there be an hundred sons') occurring therein. 'For a Sudra is ordained a wife of his own class and no other. Those begotten on her shall have equal shares; if there be an hundred sons [the same mode of partition shall obtain].' If the sentence in question be referred to the real legitimate son only, the position contained in it being obtained from what preceded, its repetition would be unmeaning."

For those statements as to the right amongst Sudras, of the adopted son to share equally on partition with the subsequently born legitimate son of the adoptive father, the author of the Dattaka Chandrika did not state who his authority was. He quoted a text from Vriddha Gautama to the effect that an adopted son and an after-born son share equally, which is not accepted by the Courts in India or by the followers of the Mitakshara or by the followers of the Dayabhaga as a correct statement of the law applicable to all Hindus, and drew his inference that it was applicable to Sudras from texts which do not propound any such proposition, and, so far as their Lordships understand them, do not suggest the conclusion expressed on this subject by that commentator.

The Dattaka Chandrika has been treated by the Board as a high authority. As early as 1846 Lord KINGSDOWN, then Mr. PEMBERTON LEIGH, in delivering the judgment of the Board in *Rungama v. Atchama*(1) in reference to the Dattaka Chandrika and the Dattaka Mimansa, said:

"They are written on the particular subject of adoption; they enjoy, as we understand, the highest reputation throughout India."

In *Collector of Madura v. Mootoo Ramalinga Sethupathy*(2) which was an appeal from the High Court at Madras,

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(1) (1846) 4 M.I.A., 1, 97.

(2) (1868) 12 M.I.A., 397, 437.

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Sir JAMES COLVILLE, in delivering the judgment of the Board, referring to the Dattaka Mimansa and the Dattaka Chandrika, said:

"Again, of the *Dattaka Mimansa* of Nanda Pandita, and the *Dattaka Chandrika* of Davanda Bhatta, two Treatises on the particular subject of adoption, Sir William Macnaghten says that they are respected all over India; but that when they differ the doctrine of the latter is adhered to in Bengal and by the Southern Jurists, while the former is held to be the infallible guide in the Province of Mithila and Benares."

It has since then been ascertained that Davanda Bhatta was not the author of the Dattaka Chandrika. Sir JAMES COLVILLE, in the passage above quoted, was referring to the authority of the work itself.

In *Sri Balusu Gurulingaswami v. Sri Balusu Ramamalakshamma*(1), which was an appeal from the High Court at Madras, Lord HOBHOUSE in delivering the judgment of a Board consisting of himself, Lord MACNAGHTEN and Sir RICHARD COUCH, said:

"The date of the Dattaka Chandrika is not certain; but it is at all events very much later than the Smritis, and it stands only on the footing of a work by a learned man. Messrs. West and Bühler in their valuable work on Hindu Law, 3rd ed., p. 11, speak thus: 'The Dattaka Mimansa and the Dattaka Chandrika, the latter less than the former, are supplementary authorities on the law of adoption. Their opinions, however, are not considered of so great importance but that they may be set aside on general grounds in case they are opposed to the doctrines of the Vyavahara Mayukha or the Dharmasindhu and Nirnayasinidhu.' This is spoken with special reference to Bombay and Western India. But both works have had a high place in the estimation of Hindu lawyers in all parts of India, and having had the advantage of being translated into English at a comparatively early period, have increased their authority during the British rule. Their Lordships cannot concur with KNOX, J., in saying that their authority is open to examination, explanation, criticism, adoption, or rejection like any scientific treatises on European jurisprudence. Such treatment would not allow for the effect which long acceptance of written opinions has upon social customs, and it would probably disturb recognized law and settled arrangements. But, so far as saying that caution is required in accepting their glosses

(1) (1898) L.R., 26 I.A., 118, 121.

where they deviate from or add to the Smritis, their Lordships are prepared to concur with the learned Judge."

In *Bhagwan Singh v. Bhagwan Singh*(1), which was an appeal from the High Court at Allahabad, Lord HOBHOUSE in delivering the judgment of a Board consisting of himself, Lord MACNAGHTEN, Lord MORRIS and Sir RICHARD COUCH, in referring to the Dattaka Mimansa and the Dattaka Chandrika said:

"If there were anything to show that in the Benares School of Law these works had been excluded or rejected, that would have to be considered. But their authority has been affirmed as part of the general Hindu law, founded on the Smritis as the source from whence all schools of Hindu Law derive their precepts. In Doctor Jolly's Tagore Lecture of 1883, that learned writer says: 'The Dattaka Mimansa and Dattaka Chandrika have furnished almost exclusively the scanty basis on which the modern law of adoption has been based.' Both works have been received in courts of law, including this Board, as high authority. Lord KINGSOWNS' words in *Rungama v. Atchama*(2) have already been quoted and those of Sir JAMES COLVILLE in the case reported in *Collector of Madura v. Moctoo Ramalinga Sethupathy*(3). As has been said, Sir JAMES COLVILLE quotes with assent the opinion of Sir WILLIAM MACNAGHTEN, that both works are respected all over India, that when they differ the Chandrika is adhered to in Bengal and by the Southern Jurists while the Mimansa is held to be an infallible guide in the Provinces of Mithila and Benares. To call it infallible is too strong an expression, and the estimates of Sutherland, and of West and Bühler, seem nearer the true mark; but it is clear that both works must be accepted as bearing high authority for so long a time that they have become embedded in the general law."

There can be no doubt that the Dattaka Chandrika has been for long and still is accepted in the Presidency of Madras as a treatise on adoption of the highest authority. It is not primarily a work dealing with rights of inheritance or with rights of coparcenary in property acquired by birth or adoption, but it does necessarily deal with such subjects as the occasion requires. It is not known who was the author of the Dattaka Chandrika,

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(1) (1898) L.R., 26 I.A., 153, 161. (2) (1846) 4 M.I.A., 197.
(3) (1868) 12 M.I.A., 397, 437.

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and the doubt as to its authorship makes it impossible to fix with any certainty the date when it was written, but it is believed to be an earlier work than the *Dattaka Mimansa*, which was written by Nanda Pandita, who is known to have lived about 300 years ago. When the *Dattaka Chandrika* was first accepted in Southern India as an authority on the law of adoption, it would probably be impossible now to ascertain. It, however, appears to their Lordships that it does not necessarily follow from the fact that the *Dattaka Chandrika* has been long accepted in Southern India as a high authority on the law of adoption that comments and propositions, apparently then novel, contained in it, if not based upon ancient texts which can with some certainty be identified, have been accepted by the Hindus of Southern India as part of the Hindu law. It thus becomes necessary to ascertain, if possible, whether the rule propounded for the first time, it is believed, in paragraphs 29 and 32 of section 5 of the *Dattaka Chandrika*, which have been quoted above, ever was accepted and acted upon by the Hindus of the Presidency of Madras as Hindu law.

Mr. W. Macnaghten in his "*Principles and Precedents of Hindu Law*," which was published at Calcutta in 1829 and is a recognized authority on Hindu law, said at page 70 of Volume I :

"Where a legitimate son is born subsequently to the adoption, he and the son adopted inherit together, but the adopted son takes one-third, according to the law of Bengal, and one-fourth, according to the doctrine of other Schools."

In a note to that passage, Macnaghten stated :

"It is laid down in the *Dattaka Chandrika* that in the case of *Sudras*, if a legitimate son be subsequently born he is entitled to an equal share only with the adopted son and this rule prevails accordingly in the Southern Provinces."

It has been suggested, in reference to his note which has been quoted, that Mr. William Macnaghten, when he wrote his book, had no special knowledge of the law affecting *Sudras* in the Presidency of Madras, but even if that suggestion is well founded, it cannot be suggested that Sir Thomas Strange, when he wrote his well-known book on Hindu law, which was first published in 1825, did not know what was the then accepted law in the Presidency of Madras as to the rights of

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an adopted son amongst *Sudras*. Sir Thomas Strange had been Chief Justice of Nova Scotia; he commenced his judicial experience in India in 1798, when he was appointed Recorder of Madras, and became a celebrated Indian jurist. He was Chief Justice of the Supreme Court at Madras from 1800 until 1817. At page 99 of Volume I of his "*Hindu Law*," in reference to the right of inheriting on the death of a Hindu father, Sir THOMAS STRANGE stated:

"Among *Sudras* in the same event (the death of the father), the after-born son and the adopted son share equally the paternal estate."

That statement was doubtless based on the text of the *Dattaka Chandrika* which has been quoted. Sir Thomas Strange knew that according to Hindu law as applicable to the twice-born classes, the share to which an adopted son would be entitled on partition would be less than the share of the legitimate son born to the adoptive father subsequently to the adoption, and he would not have stated that amongst *Sudras* those sons would take equal shares if from his judicial experience in Madras he had any doubt that the rule propounded in the *Dattaka Chandrika* had not been accepted and acted upon in the Presidency of Madras.

The earliest reported case in the Presidency of Madras, so far as their Lordships are aware, in which this question as to the right amongst *Sudras* of the adopted son to share equally in the property of a joint family with the subsequently born legitimate son of the adoptive father was mentioned, came on appeal before the High Court at Madras in 1883. In that case [*Raja v. Subbaraya*(1)], the plaintiff sued for partition and to recover from the defendant one-half of certain moveable and immoveable properties on the ground that he was an adopted son of the deceased undivided brother of the deceased father of the defendant. The parties were *Sudras*, and the defendant contended that the plaintiff was entitled to one-fifth only of the estate, and that he, the defendant, was entitled to four-fifths under the Hindu law. In that case TURNER, C.J., and MUTTUSWAMI AYYAR, J., on appeal, delivered the following Judgment:

(1) (1884) I.L.R., 7 Mad., 253.

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"There is no valid ground for the contention that if the adoption be proved the plaintiff should take but a fifth share. By representation the adopted son takes the share which his adoptive father would be entitled to take on partition. With all deference to the authority of the High Court of Calcutta in *Raghunund Doss v. Sadhu Churn Doss*(1), we doubt whether the passage in Dattaka Chandrika section 5, paragraph 25, even with the addition suggested, has been correctly interpreted. If there be such a special rule, as is suggested, it is not applicable at all events to Sudras, among whom the adopted son is declared entitled to take an equal share with a legitimate son who is born subsequently to the adoption. We agree with the Judge that the plaintiff would take his father's share, a moiety, if he were really adopted."

It has been objected, and correctly, that the dictum in that case, that amongst Sudras an adopted son is entitled to take an equal share on partition with a legitimate son born subsequently to the adoption, was not necessary to the decision of the appeal then before the Madras Court, and that the opinion on that subject expressed by TURNER, C.J., and MUTTUSWAMI AYYAR, J., must be regarded as *obiter*. Nevertheless, it was the opinion of the then Chief Justice of Madras, who was an able and careful lawyer, and of Mr. Justice MUTTUSWAMI AYYAR, who was a member of a Brahman family of the Madras Presidency, and who earned for himself the well-deserved reputation of being one of the most accomplished and reliable lawyers in India in cases involving a knowledge of Hindu law. That opinion of those learned Judges, although strictly it was an *obiter dictum*, was deserving of respect, and was probably expressed in answer to some argument of counsel in the case. If the rule propounded in the Dattaka Chandrika, that amongst Sudras the adopted son and the subsequently born legitimate son shared equally, had been seriously questioned in the Presidency of Madras, it is impossible to believe that Mr. Justice MUTTUSWAMI AYYAR should in 1883 not have been aware that the rule had not been accepted and acted upon in that Presidency as correct.

The next reported case relating to Sudras in the Madras Presidency, of which their Lordships are aware, in which the rule in question here of the Dattaka Chandrika was considered,

(1) (1879) I.L.R., 4 Cal., 425.

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is that of *Gopalam v. Venkataragharulu*(1), which came on appeal before the High Court at Madras in 1915. In that case the parties were Sudras, and the plaintiff, who was the respondent to the appeal, had been adopted in 1898 by one Venkana, a Sudra, who died in 1902 leaving him surviving the plaintiff, the first defendant, who was the legitimate son of Venkana, born to him subsequently to the adoption of the plaintiff, and his widow, who was the natural mother of the first defendant, and was the second defendant. During the minority of the plaintiff and the first defendant, the widow managed the estate. The plaintiff attained majority in 1907, and brought the suit in 1910 for partition and delivery to him of half of the family estate, alleged mismanagement of the estate by the widow and misappropriation by her of portions of the estate for the benefit of the first defendant, and claimed an account. The first defendant, through his mother as his guardian, pleaded, amongst other things which are not material to the question to be considered here, that the plaintiff, as an adopted son, was entitled only to a fifth share of the estate, and that he, the first defendant, was entitled to the remaining four-fifths. The suit was tried by A. SAMBAMURTI AYYAR, a Hindu, the then Subordinate Judge of Rajahmundry, who decreed to the plaintiff a half share in all the family properties, and, finding that there had been malversation of the estate by the second defendant for the benefit of the first defendant, made a decree for restitution.

It is to be observed that the learned Hindu Subordinate Judge, who tried that suit in or after 1911, must have believed that in the Presidency of Madras the rule of the Dattaka Chandrika, that amongst Sudras an adopted son was entitled to share equally on a partition with the subsequently born legitimate son of the adoptive father, was the rule to be applied in the Presidency of Madras in cases in which the parties were Sudras. The appeal from that decree of the Subordinate Judge of Rajahmundry came before WALLIS, C.J., and SESHAGIRI AYYAR, J. SESHAGIRI AYYAR, J., wrote the judgment, with which WALLIS, C.J., concurred. The learned Judges of the High Court held that they were not bound by the opinion on the question

(1) (1917) I.L.R., 40 Mad., 682.

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of the right amongst Sudras of an adopted son to share equally with the subsequently born son of the adoptive father in the property of the joint family which had been expressed by TURNER, C.J., and MUTTUSWAMI AYYAR in *Raja v. Subbaraya*(1), on the ground that the opinion was *obiter* and on the ground that the attention of those learned Judges had not been drawn to the case of *Ayyavu Muppanar v. Niladatchi Ammal*(2), and, having considered some ancient texts and the Mitakshara, came to the conclusion that the rule propounded on this subject in the Dattaka Chandrika was not binding upon them and that the dictum based on the authority of the Dattaka Chandrika should not be followed.

As the reference in the Judgment of SESHAGIRI AYYAR, J., in *Gopalam v. Venkataraghavulu*(3) to the decision in *Ayyavu Muppanar v. Niladatchi Ammal*(2) suggests that if that decision had been brought in 1888, to the attention of TURNER, C.J., and MUTTUSWAMI AYYAR, J., in *Raja v. Subbaraya*(1), they would not have expressed the opinion that amongst Sudras the adopted son is entitled to take an equal share with a legitimate son who is born subsequently to the adoption, it is necessary to consider that case. The case of *Ayyavu Muppanar v. Niladatchi Ammal*(2) came on appeal to the High Court at Madras in 1862.

The parties to the suit were Hindus, but it does not appear whether the parties were Sudras; all that is stated is that

"the parties were of a class not strictly bound by the requirements of the Hindu law."

Probably they were Sudras. The plaintiff had brought his suit for one-fourth of the estate of Ayyavu Muppanar, deceased; the defendant, a minor appearing through his mother as guardian, was a son of Ayyavu Muppanar, born after the adoption. The main questions considered were whether the adoption had in fact been made, whether if made it was a valid adoption, whether a son, adopted or begotten, could claim maintenance until put in possession of his share of the ancestral estate, and whether as against an adopted son suing for his share of the ancestral estate the law of limitation does not begin to run until the allotment of such share has been demanded and

(1) (1884) I.L.R., 7 Mad., 253.

(2) (1862) 1 M.H.C.R., 45.

(3) (1917) I.L.R., 40 Mad., 632.

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refused. The question as to whether the adopted son was entitled to more than one-fourth share does not appear to have been raised or considered. STRANGE and FREER, JJ., considered Chapter I, section 11, paragraph 24, of the Mitakshara and decided that the estate should be divided into five portions of which the begotten son should have four and the adopted son one. The Dattaka Chandrika was not, so far as appears, alluded to. Even if it be assumed that the parties were Sudras, their Lordships are unable to regard that case as an authority on the question which was before the High Court in *Gopalam v. Venkataraghavulu*(1) and which has to be considered in this Appeal.

In the present case, the subject of this Appeal, the suit was brought in the District Court of Gōdāvari on the 26th November 1909; it was transferred to the Court of the Subordinate Judge of Rajahmundry. The Subordinate Judge who tried the suit was A. SAMBAMURTI AYYAR, and he delivered his judgment in it on the 13th December 1918. There were six issues framed, but the material question so far as the second of these appeals is concerned relates to the share to which the adopted son, and through him his sons, were entitled on partition of the family property. The plaintiffs were Arumilli Subbarayadu and his two minor natural-born sons. The defendants 1, 2 and 3 were the sons of Venkiah, who had been the only brother of the plaintiff, Arumilli Subbarayadu; fifth defendant was a son of first defendant; sixth defendant was a son of second defendant; fourth defendant was the adopted son of the plaintiff Arumilli Subbarayadu, but was described in the plaint as a son of Venkiah, and defendants 7, 8 and 9 were the minor sons of fourth defendant. The other defendants are immaterial so far as the second of these two consolidated Appeals is concerned. In the plaint the adoption by the plaintiff Arumilli Subbarayadu of Arumilli Ramanna, fourth defendant, was ignored, and it was alleged in the plaint that the "plaintiffs are entitled to a half-share in the entire family property and the defendants 1 to 9 are entitled to a half-share." In the written statement of the defendants 1, 2, 3, 5 and 6 it was alleged that the plaintiff

(1) (1917) I.L.R., 40 Mad., 632.

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Arumilli Subbarayadu had adopted the fourth defendant, A. Ramanna, as his son in 1896. In the written statement of the defendants 4, 7, 8 and 9, who are the appellants in the second of these consolidated Appeals, it was alleged that the plaintiff Arumilli Subbarayadu had adopted the fourth defendant, Arumilli Ramanna, in 1896 and that as an adopted son he was entitled to an equal share along with the plaintiffs.

The fact and the validity of the adoption were disputed, but the Subordinate Judge, on the clearest evidence, found that the adoption was proved and was valid, and having so found that issue he, in the thirtieth paragraph of his judgment, recorded his finding as to the share in the family property which the fourth defendant as an adopted son in the Sudra family was entitled to, thus :

" 30. As regards the share to which the fourth defendant should be entitled according to law, there is practically no dispute. The parties belong to the Sudra caste and the law is clear that amongst the Sudras the adopted son shares equally with the subsequent born Aurasa sons (see I.L.R., 7 Mad., 253 and I.L.R., 18 Mad., 422 and 435.) Thus, the first plaintiff's branch consisting of plaintiffs 1 to 3 and the fourth defendant will have to divide amongst themselves a half-share of the family property, and the fourth defendant's share therein will, therefore, be one-eighth of the whole property. This is my finding on issue I (a.)"

It may be mentioned that their Lordships have been unable to ascertain what was the case which the Subordinate Judge referred to as reported in "I.L.R., 18 Mad., 422 and 435." That judgment of the Subordinate Judge was delivered on the 13th December 1913, and it is to be noticed that up to that date the plaintiffs do not appear to have contended that amongst Sudras an adopted son was not entitled to share on partition of the family property equally with the legitimate sons of the adoptive father born subsequently to the adoption. They apparently raised that point for the first time in their memorandum of appeal to the High Court on the 24th March 1914. The judgment of the High Court appears to have been delivered on the 13th October 1916. Their Lordships do not know when the appeal to the High Court in *Gopalam v. Venkataraghavulu*(1) was presented, but the appeal to the High

(1) (1917) I.L.R., 40 Mad., 632.

Court in that case was heard in August and September, 1915. That was an appeal from a decree of the same Subordinate Judge.

The learned Judges, AYLING and SRINIVASA AYYANGAR, JJ., who heard the appeal to the High Court in this present suit, briefly dealt with the rights of an adopted son amongst Sudras as follows :—

"As to the share of the adopted son, it has been decided now that the fact of the adopted son being a Sudra does not give him an equal share with the natural born sons [*Gopalam v. Venkataraghavulu*(1)]. The dictum in *Raja v. Subbaraya*(2) which has been followed by the lower Court has been disapproved in that case.

... The fourth defendant's share will therefore be altered to one-thirteenth of one half of the family property."

From the decree of these learned Judges this Appeal has been brought.

The inference which their Lordships draw from the materials before them is that the rule of the Dattaka Chandrika that on a partition of the joint family property of a Sudra family an adopted son is entitled to share equally with the legitimate son born to the adoptive father subsequently to the adoption had been accepted and acted upon for at least more than a century in the Presidency of Madras as the law applicable in such cases to Sudras until the law on that subject was disturbed in 1915 by the decision of the High Court at Madras in *Gopalam v. Venkataraghavulu*(1). It also appears to their Lordships that that rule of the Dattaka Chandrika, although not supported by any ancient text of the Smritis or by the Mitakshara, is not inconsistent so far as Sudras are concerned with the Smritis or the Mitakshara.

What has been said in the preceding paragraph is sufficient to dispose of the second of these consolidated Appeals from the High Court at Madras, but as the Dattaka Chandrika is considered in Bengal as a high authority it will be satisfactory to consider what view has been expressed by the High Court at Calcutta about the rule of the Dattaka Chandrika as to the right of an adopted son in a Sudra family to share equally on a partition of the joint family property with a

(1) (1917) I.L.R., 40 Mad., 632. (2) (1884) I.L.R., 7 Mad., 253.

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legitimate son of the adoptive father born subsequently to the adoption. The latest case of which their Lordships are aware in which the subject was discussed in the High Court at Calcutta was that of *Asita Mohon Ghosh Moulik v. Nirode Mohon Ghosh Moulik*(1) which came on appeal before CHOUDHURI and NEWBOULD, JJ., from a decree of the 30th March 1912, of BABU KUNJA BEHARY GUPTA, Additional Subordinate Judge of Birbhum, who, having found that the parties were Sudras, held that the adopted son was entitled to share equally with the after-born natural son. The learned Judges of the High Court say :

"Clear authority for the proposition (the right of a Sudra adopted son to share equally with the after-born legitimate son) is to be found in the *Dattaka Chandrika*. See V, sections 29 to 32. The *Dattaka Chandrika* is a work of undoubted authority in Bengal. . . . In *Baramanund Mahanti v. Chowdhry Krishna Charan Patnaik*(2) a Bench of this Court accepted the law as laid down in the *Dattaka Chandrika* on this point . . . There are no other decided cases exactly on the point (in the High Court at Calcutta). We feel bound to attach great weight to the fact that those decisions have remained unchallenged for over thirty years."

The learned Judges then considered some texts of Manu, Yajnavalkya and the Mitakshara, and some other commentaries and concluded as follows :

"Having regard to the above we cannot say that the *Dattaka Chandrika* has in any way deviated from the *Smritis*."

The judgment is a long one as it also dealt with several other matters which do not affect the question here.

The result is that interest actually received on the sum of Rs. 7,000 must be allowed, and to this extent the decree must be varied, but subject thereto the first Appeal must be dismissed. The slight alteration does not deprive the respondents, who appeared, of their right to the costs.

The second Appeal (No. 19 of 1919) must be allowed. The decree of the High Court must be set aside with costs so far as it varied the declaration in the decree of the Court of the Subordinate Judge as to the shares to which the parties are entitled, which last mentioned decree must to that extent be affirmed and restored.

(1) (1916) 20 C.W.N., 901.

(2) (1911) 14 C.L.J., 183.

The appellants in the first Appeal will pay the costs of the first three respondents, who alone appeared, and the respondents in the second Appeal will pay the appellants' costs of that Appeal. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellants: *Edward Dalgado*.

Solicitor for respondents 1, 2, 3: *Douglas Grant*.

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APPELLATE CIVIL.

*Before Mr. Justice Ayling, Mr. Justice Coutts Trotter and
Mr. Justice Kumaraswami Sastri.*

SRI GADADHARA DAS BAVAJI, MAHANT OF BALAJI MUTT
(THIRD DEFENDANT), APPELLANT,

1921.
February 10.

v.

SURYANARAYANA PATNAIK AND TWO OTHERS (PLAINTIFFS
AND DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

*Madras Estates Land Act (I of 1908), sec. 3, cl. (5)—Minor inamdar—Lands grant-
ed by samindar after settlement in permanently settled estate—Whether
inamdar a "landholder"—Whether tenants under him have occupancy rights.*

Where a samindar made a post-settlement inam grant of a portion of a village with both the warams on a permanent kattubadi, Held (KUMARASWAMI SASTRI, J., dissenting) such minor inamdar is a "landholder" within the meaning of section 3, clause (5) of the Estates Land Act and the tenants have permanent rights of occupancy.

APPEAL under Clause 15 of the Letters Patent against the judgment of His Lordship the Chief Justice in Second Appeal No. 859 of 1918, preferred against the decree of T. KRISHNASWAMY NAYUDU, Subordinate Judge of the Temporary Subordinate Court of Ganjam at Berhampur, in Appeal Suit No. 20 of 1918, preferred against the decree of M. V. HAYAGREVA RAO, Additional District Munsif of Berhampur, in Original Suit No. 284 of 1916.

The suit lands were situated in the village of Thandipuram in the permanently settled zamindari of Surangi and were held of the zamindar by the inamdar at a kattubadi or quit-rent of Rs. 15 payable to the zamindar. Plaintiff sued for a declaration

* Letters Patent Appeal No. 2 of 1920.

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that defendants 1 and 2, who were tenants under him, had no rights of occupancy and to set aside an attachment of the lands by the third defendant who claimed that they had such rights. The lower Appellate Court decreed the suit in favour of plaintiff. Third defendant filed a Second Appeal which was heard by WALLIS, C.J., and SADASIYA AYYAR, J. The former held that such a minor inamdar did not come within the definition of 'landholder' and that the tenants had no occupancy rights. The latter held that he was 'a landholder' and that the tenants had rights of occupancy. The following are the judgments of their Lordships:

WALLIS, C.J.—We accept the finding that the cadjan deed, Exhibit A, is not proved. There is, however, in this case nothing to rebut the presumption recently laid down by the Privy Council that the grant to the inamdar was a grant of the proprietary right in the suit land including the kudivaram as well as the melvaram interest. There is, also, no sufficient reason to interfere with the finding on the second additional issue, assuming it to be material, that the inam in question was created after the permanent settlement of the estate.

The suit lands are situated in the village of Thandipuram in the permanently settled zamindari of Surangi and are held of the zamindar by the inamdar at a kattubadi or quit-rent of Rs. 15 payable to the zamindar. If the whole village had been granted, it would itself have constituted an estate within the meaning of the Madras Estates Land Act as coming within the words 'one or more villages' of a permanently settled estate in section 3 (2) (e) and the Act would have been applicable to ryots holding under the inamdar. It has, however, been contended before us that, although the lands, which are only part of a village, are not made an estate in themselves by virtue of this clause, the Act is rendered applicable because the inamdar is 'a landholder' within the meaning of clause (5). Before coming to the wording of this definition, it is desirable to examine the general scheme of the Act, in the light of which the definition in clause (5) of section 3 must be interpreted, with a view to seeing if it was really the intention of the legislature to apply the provisions of the Act as between the

inamdar and his tenants where the land is situated in a permanently settled estate and consists of only a part of a village and the inamdar is the owner of the kudivaram as well as the melvaram. Now, the Act is called the Madras Estates Land Act and its general scope is limited by the definition of 'estate' in section 3 (2). That definition is reproduced, with one important modification, from Madras Acts XI of 1894 and IV of 1897 where it had been found convenient to answer the purposes of these Acts; but, whereas clause (d) in that Act ran:

"Any village of which the grant was made or had been confirmed by the British Government;"

this appears in the present Act 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 recognised by the British Government, or any separated part of such village."

Therefore as regards inams outside the large estates coming under clauses (a), (b) and (c), it is clear that the legislature did not wish the Act to apply between the inamdar and his tenant where the inamdars owned the kudivaram as well as the melvaram, or where the land was only part of a village, unless it had been separated from the rest of the village. This being the policy of the Act as regards inams outside large estates as defined in clauses (a), (b) and (c), the next question is whether it was the intention of the legislature that the Act should apply to such inams when the lands were situated within these large estates. Looking at the matter as between the inamdar and his tenants, there seems no strong reason for making the Act inapplicable where the quit-rent is payable directly to the Government, and applicable where it is payable to the zamindar or poligar, as in clauses (a), (b) and (c). It is *prima facie* unlikely that the legislature should have intended to apply a different rule in these two cases and, if it did, it would have so provided expressly. In one class of cases it has so expressly provided, because clause (e) constitutes any portion of one of the larger estates dealt with in clauses (a), (b) and (c) an estate of itself within an estate for the purposes of the Act, where it consists of one or more villages and is held on a permanent under-tenure, whether the tenure holder or inamdar owns the kudivaram or not.

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The legislature having thus expressly made the Act apply as between the inamdar and his tenants in the case of certain inams in these large estates by virtue of the definition in clause (e), the next question is whether it intended to nullify that definition and render it altogether nugatory by adopting a few lines lower down a definition of 'landholder' wide enough in terms to include holders of inams and other under-tenures in the larger estates, where the inam in question did not consist of one or more villages, but, as here, of a lesser extent. The onus of showing that the definition of 'landholder' had this extraordinary result is strongly on those who affirm it.

To come now to the definition itself: 'landholder' is defined in the first part of clause (5) as meaning "a person who owns an estate or part thereof." Stopping here, an inamdar who holds under a zamindar subject to the payment of quit-rent to him is not the owner of the inam land in the ordinary legal meaning of the word 'owner,' as held in *Maharaja of Vizianagaram v. The Collector of Vizagapatam*(1), where the authorities are cited. So long as a full owner in making a grant reserves an interest to himself, as by way of rent, he and his successors continue to be the owners, no matter how insignificant may be the interest he reserves for himself. There is no reason for attributing a different meaning to the term 'owning an estate' in the present definition. No doubt where an inam is an estate within an estate by virtue of the definition in clauses (c), (d), of section 3 (2), as the object of the inclusion is to apply the Act between the inamdar and his tenants, the inamdar must be held to be the landholder for the purposes of the Act, but that is, not because he comes within the definition as owning an estate, but because it would be repugnant to the subject or context to apply the strict definition of 'landholder' to such a case.

The main contention, however, was that, in a case such as the present, the inamdar comes within the definition of 'landholder', not because he is a person "owning an estate or part thereof" but because the clause proceeds to include in the term landholder "every person entitled to collect the rents of the whole or portion of the estate by virtue of any transfer from the owner or his predecessor-in-title or of any order of a competent Court

or of any provision of law." What are to be collected here are "the rents of the whole or any portion of the estate" and rent is defined in clause (11) as meaning

"whatever is lawfully payable in money or in kind or in both to a landholder for the use or occupation of land in his estate for the purpose of agriculture."

It is a payment to a landholder for the use or occupation of land in his estate, and cannot therefore include a payment by tenants to an inamdar for use and occupation of land in an estate which is not the inamdar's estate but is the estate of the superior landholder. Not only, then, is the construction contended for opposed to the scheme of the Act, and the apparent intention of the legislature as I have already endeavoured to show, but it cannot be arrived at without disregarding the definition of 'rent' which itself has been framed to fit into the general scheme of the Act. There is, in my opinion, no sufficient reason for refusing to apply the definition of 'rent' in clause (11) to the word 'rents' in clause (5), and full effect can be given to that definition by reading the latter part of it as intended to include, as it says, persons entitled to collect the rents due to the owner of the estate, such as farmers or assignees of such rents by way of mortgage, etc. Whatever construction be put upon it, it affords, in my opinion, no justification for bringing inams such as that with which we are dealing within the operation of the Act contrary to the intention of the legislature, as sufficiently indicated in the definition of 'estate,' 'rent' and 'ryot,' which are correlative and must be read together.

The contention now put forward is no doubt supported by *Appalanarasimhulu v. Sanyasi*(1), which has been followed in several cases. In that and the subsequent decisions many of the considerations I have set out were not dealt with and were apparently overlooked. I am unable with great respect to follow them, as I am satisfied that it was not the intention of the legislature to apply the Act to this class of cases, and it appears to me to be of great importance that an Act of this kind should not be extended by strained construction to cases not contemplated by the legislature. If cases, such as this, are to

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(1) (1915) I.L.R., 38 Mad., 1123 (F.B.).

(1) (1915) I.L.R., 38 Mad., 33.

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be brought under the Act, it should be by an amendment of the existing Act. For these reasons I agree with the Subordinate Judge and would dismiss this Second Appeal with costs.

SADASIVA AYYAR, J.—I regret that I have the misfortune to differ from my Lord the Chief Justice in this case. I agree that, after the recent decision of the Privy Council, we must hold that the post-settlement grant made to the inamdar (the plaintiff's ancestor) was a grant of both varams. It is also clear that the inam not being a whole village or part of a permanently settled estate separately registered, the lands themselves do not form an estate within the definition of section 3, clause (2) (b) (d) or (e) of the Estates Land Act.

The decision in this case therefore depends solely upon the answer to the question whether an inamdar to whom lands were granted by the zamindar after the settlement, and out of the lands included in the permanently settled estate, is a 'landholder' within the definition of clause (5) of section 3. If an inamdar can be said to own part of an estate, he clearly comes under the definition of landholder. If, again, he can be called a person "entitled to collect the rents of any portion of an estate by virtue of" the inam grant (which is clearly a transfer), then also, he comes under the definition of landholder and section 6 applies in favour of the ryots holding lands under him. Now the inamdar of a whole village is admittedly a landholder, because the whole village itself is an estate and he owns it as an inamdar even though he might be paying some kattubadi or jodi to the higher owner, the zamindar. Thus the words "persons owning part of an estate" in clause (5) of section 3 admittedly include several classes at least of inamdars also, notwithstanding that their ownership is accompanied by the recognition of a higher owner, the zamindar, through their payment of jodi or kattubadi to the zamindar. Hence, it seems to me that a minor inamdar also, though he may not own a whole village in an estate as part of an estate, does own in the very same sense his inam lands which are undoubtedly part of the permanently settled estate and hence he comes under the definition of landholder even within the first portion of that definition. If, again, 'rents' in the second portion of the definition mean 'rents and profits,'

he is included in the second portion of the definition also, where he usually lets the lands to tenants and obtains rents from his tenants. Some inamdars no doubt would still escape falling under the definition of 'landholder,' that is, those inamdars to whom inams had been granted before the permanent settlement without reservation of kattubadi or jodi. I, therefore, think that the construction placed by the uniform decisions of this Court on the definition of 'landholder' does not render altogether nugatory the definition of an 'estate' in clause 2 (e) of section 3 as it does exclude some inamdars from the provisions of the Act, that is, many presettlement inamdars. As regards post settlement inams, their grants were grants of land out of an estate and such grants cannot prevent those lands from continuing to be 'part thereof,' that is, part of the estate, whether that part forms a whole village (in which case the inamdar admittedly does own it) or only defined lands not forming a whole village.

Again the Madras Estates Land Act came into force in July 1908. It naturally took about three years for the question, whether a Darmila minor inamdar is or is not a 'landholder', to arise before the High Court for direct decision after contest in the lower Courts. The earliest direct decision on this point I have come across is *Badam Suryanarayana v. Yalla Ballayya* (1), dated 9th November 1911, where ABDUR RAHIM, J., held that a minor Darmila inamdar is a 'landholder.' For more than eight years now, that view has held ground. SUNDARA AYYAR, J., and myself followed it in *Appalanarasimhulu v. Sanyasi* (2), and I find that a majority of the Judges of this Court have followed the same opinion. I am therefore unwilling to depart from this catena of decisions, especially as it is very difficult to get at the real and final intention of the legislature from the words of an Act whose language was added to and modified during its long progress through the Legislative Council in various ways, according as the party favourable to the landholder or the party favourable to the tenants got the upper hand in debates from time to time. I would therefore allow the Appeal and dismiss the suit as the tenants have obtained full

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(1) C.R.P., 895 of 1910 (unreported). (2) (1915) 1 L.R., 83 Mad., 38.

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occupancy rights under section 6, on the date of this suit. As regards costs, I would give costs in this Second Appeal to the appellant (third defendant), but as section 6 was not relied on in the Court of the District Munsif, I would order the parties to bear their respective costs in the lower Courts.

In the result the Second Appeal was dismissed. The third defendant then filed this Letters Patent Appeal.

C. S. Venkata Achariyar for appellant.—The question is whether a minor inam granted by a zamindar out of his estate after the passing of the Estates Land Act comes under the operation of the Act. Preamble of the Act refers to the holding of all land in an estate. The suit land comes under clause (a) of section 3. Reference was made to *Appalanarasimhulu v. Sanyasi*(1), *Maharaja of Vizianagaram v. The Collector of Vizagapatam*(2), *Chipurapalli Appayya v. Ramachendra Raju*(3), *Tungalla Mallanna v. Gothumukkala Ramaraju*(4), *Duddampudi Venkatrayudu v. Bikkina Subbarayudu*(5), *Tripurana Venkata Soorya Prasada Row v. Tripurana Jhaga Row*(6).

A. C. Sampath Ayyangar for respondent.—What your Lordships have to see is what was my position in law when I let the tenant into possession. Was I a ryot paying a favourable quit-rent or was I a landholder? If the former, the case falls under section 19 of the Act. If I was a tenant, I could not also be the landholder. Reference was made to *Gajapati Maharaju Garu v. Sondi Prahalada Binoyi Ratno*(7), *Marina Veeraswamy v. Boyinapalli Venkatrayudu*(8), *Alagiri Naicker v. Thiruvenkittappa Naicker*(9).

AYLING J. AYLING, J.—The suit out of which this appeal arises was brought by a minor inamdar to declare that defendants 1 and 2, tenants under him, have no occupancy right in the inam lands and to set aside an attachment of the said lands effected by third defendant on the ground that they possessed such a right.

(1) (1915) I.L.R., 38 Mad., 33.

(2) (1915) I.L.R., 38 Mad., 1128 (F.B.). (3) (1914) 27 M.L.J., 490.

(4) (1914) M.W.N., 845.

(5) (1918) M.W.N., 643

(6) S.A. 1169 of 1907 (unreported).

(7) (1914) M.W.N., 179 180.

(8) (1920) 39 M.L.J., 225 (F.B.).

(9) S.A. 986 of 1917 (unreported).

The sole question is whether the suit lands form part of an 'estate,' and whether plaintiff and defendants 1 and 2 occupy the position of 'landholder' and 'ryot' within the meaning of the Madras Estates Land Act. If they do, section 6 of the Act will operate to confer occupancy right on the defendants.

The suit lands were originally ryoti lands situated within the permanently-settled zamindari of Surangi, which is an estate within the meaning of the Act: they were granted by the zamindar after permanent settlement on a quit-rent payable to himself of Rs. 15 per annum. The grant is found as a fact to include both varams.

The learned Chief Justice has held that in consequence of the inam grant, the Act is not applicable to such lands, the inamdar not being a 'landholder' within the meaning of the Act. SADASIVA AYYAR, J., on the other hand, considers the inamdar to be a landholder, and holds that in spite of the grant the lands still form part of an estate and that section 6 operates to give defendants occupancy right.

I have considered with great care and respect the reasoning of the learned Chief Justice, especially as regards the intention of the framers of the Act; but both on the ground of authority and of the provisions of the Act as they stand, I am constrained to take the opposite view.

The suit lands admittedly, but for the grant in inam, would fall within clause (a) of section 3 (2) of the Act. As regards the definition of 'landholder' it may be conceded at once that so long as the zamindar reserves to himself a quit-rent the inamdar cannot be regarded as the owner of the lands in the ordinary legal meaning of the term. But the definition of 'landholder' includes

"every person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner,"

and I think the grant in inam must be regarded as such a transfer. A certain difficulty may arise, where, as in the present case, the grant was of both varams: this I shall consider later. But where the grant is only of the melvaram, I do not see how a Court can refuse to treat it as a transfer by the owner of the right to collect the rent of the portion of the

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estate to which it relates: and whatever may have been the intention of the Legislature we have to deal with the Act as it left their hands. This is the view taken in a series of cases before this Court, starting with *Appalanarasimhulu v. Sanyasi*(1). The difficulty referred to by the learned Chief Justice as regards the definition of rent is dealt with by SUNDARA AYYAR, J., in that case: and I entirely agree with his view. The rent which the inamdar is entitled to collect by virtue of his inam grant is identical with the rent which was lawfully payable to the zamindar before the grant, and with all respect to the view of my Lord the Chief Justice, I think the significance sought to be placed on the words 'in his estate' in the definition of 'rent' is misplaced. Among later cases in which the same view is taken I may quote *Chipurapalli Appayya v. Ramachendra Raju*(2), *Venkanna v. Sri Raja Rama Row*(3), *Duddampudi Venkatrayudu v. Bikkina Subbarayudu*(4) and a recent unreported case, *Tripurana Venkata Soorya Prasada Row v. Tripurana Jhaga Row*(5). We were referred to two cases, *Gajapati Maharaju Garu v. Sondi Prahalada Binoyi Ratno*(6), and *Idubilli Siyyaddi v. Sri Rajah Viswaswara Nissanka*(7), in which a service inamdar is said to have been treated as the tenant of the zamindari, but in neither of these cases did the question before us arise for consideration. The suits turned on the nature of the zamindar's power of resumption.

The learned vakil for respondent, however, seeks to fall back on the possible ground of distinction that in this case the grant is found to be of both varams: and he argues that the zamindar should consequently be held, by virtue of the inam grant to have admitted the inamdar as a ryot of his own. This argument has occasioned me some doubt, but I have come to the conclusion that it really makes no difference. This was the view taken in *Tripurana Venkata Soorya Prasada Row v. Tripurana Jhaga Row*(5), above quoted: and *Lakshminarasimham Pantulu v. Sree Sree Ramachandra Mardaraja Deo*(8), and

(1) (1915) I.L.R., 38 Mad., 33.

(2) (1915) I.L.R., 38 Mad., 1155.

(3) S.A. 1169 of 1907 (unreported).

(7) (1915) 18 M.L.T., 142.

(2) (1914) 27 M.L.J., 490.

(4) (1918) M.W.N., 643.

(6) (1914) M.W.N., 179.

(8) (1914) I.L.R., 37 Mad., 319.

Tallapragada Subba Row v. Gopisetti Narayanaswami Naidu Garu(1), further tend to support it.

We must assume that at the time of the inam grant, the lands were either lying waste or were cultivated by a mere tenant at will—in any case there was no one in possession whose occupation could not be terminated at the pleasure of the zamindar or his grantee. What was the effect of the grant? It seems to me it was to place the inamdar in the same position as his grantor, subject only to the liability to pay quit-rent which prevented him from being viewed as an owner of an 'estate.' He could deal with the land exactly as the zamindar could before the transfer—either cultivate it himself, or admit somebody else as a tenant under him. If, as in the present case, he adopted the latter course, he placed the tenant in exactly the same position as the zamindar would have done, if the admission had been by him. If he cultivated the land himself this would not alter its character as ryoti land or affect the consequence of any subsequent admission as a tenant. In fact, when we say that the grant was of both varams, we merely mean that the rights of the grantee in respect of the land were not limited by the necessity of respecting the rights of any person possessed of the kudivaram at the time of the grant.

I think this view is supported by the amendment to the Act in respect of the definition of rent effected by Act IV of 1909. As section 8 (11) originally stood, rent for the purposes of a number of sections of the Act dealing chiefly with recovery included "(c) quit-rent, jodi, poruppu and the like payable by an inamdar as such to the landholder." By the amending Act this clause was omitted. No explanation is afforded by the preamble; but it seems to me that the legislature could only have intended deliberately to take away the power specifically conferred on a landholder by the Act, as it was originally enacted, to treat his inamdar as if he were a ryot in respect of the realization of quit-rent.

I may add that the view I am inclined to take does not seem to me to involve any practical inconvenience, or to run counter to the general policy of the Act. One of the main objects of

(1) (1910) 31 M.L.J., 339.

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the latter was to confer definitely occupancy rights on all tenants of ryoti land, whose claim to the same was previously only presumptive. It is difficult to see why such persons should be less entitled to such a benefit because the right to collect rent from them had been transferred by the zamindar to an inamdar.

One more argument calls for brief consideration. The learned vakil for respondent drew attention to the words 'in the estate of such landholder' in section 6 (1) and argued that they exclude the case of a ryot admitted by an inamdar, who was not the *owner* of the estate although a landholder within the definition of section 3. I think this difficulty is only imaginary. The section is not happily framed whatever be its meaning: but I feel no doubt that the words referred to 'in the estate of such landholder' simply mean in the estate of which he is treated for the purpose of this Act as the landholder.

Since writing the above, my attention has been drawn to the possible contingency of a grant of the class we are dealing with being made to a person who is already at the time of the grant in possession of the kudivaram right. The anomaly of such a case is more apparent than real. It would be pedantry to speak of the grant as a transfer to the ryot of the right to collect rent from himself: it is simply a concession to him of a portion of the rent which he was previously liable to pay. He was a ryot with occupancy rights before the grant, and his position is not affected by the grant: vide Explanation to section 6 of the Act.

I would allow the Letters Patent Appeal and dismiss the suit with costs of third defendant throughout.

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COUTTS TROTTER, J.—I regret very much that, owing to the divergences of judicial opinion, first between the Chief Justice and SADASIVA AYYAR, J., and now between my brother AYLING, and my brother KUMARASWAMI SASTRI, both of whose judgments I have had the opportunity of perusing, it falls to my lot to give what is in effect the deciding opinion in this case. I regret it, because I have had very little experience of the Act and have had very few of its provisions to consider judicially. I do not propose to follow my learned brothers in their exhaustive examination of the material sections and the relevant decisions

on the Act, partly because it is no use covering the same ground again, and partly because this reference was made with the express purpose of challenging the admitted current of decisions in this Court. On the other hand, I do not think it safe, even where one is prepared to cut oneself adrift from the existing authorities and reconsider the question *ab initio*, to be guided by speculations as to the supposed general objects of an Act of this nature. Of course there are statutes whose general objects are so plain that one can use them as a guide to reject constructions of ambiguous sections which are possible interpretations of the language of particular sections but obviously opposed to the plain general purpose of the Act. But that general purpose, if it is to be used as a guide, must be apparent from the language of the Act itself and it must only be utilized in the elucidation of language which is really ambiguous, in the sense that, without straining it, it can be held reasonably capable of bearing either of the suggested constructions. Speaking for myself, I am unable to gather from the language of this Act any general intention with regard to the position of minor inamdars; and, consequently, I cannot think that the words of section 8 (5) can in any legitimate sense be called ambiguous. In my opinion the definition of the word 'landholder' in that sub-section inevitably brings a minor inamdar within its scope. I cannot see how it can possibly be said that a minor inamdar is not a person entitled to collect the rents of a portion of the estate by virtue of a transfer from the owner. I quite agree that this undoubtedly has the effect of enlarging the definition of 'estate' in section 3 (2) but I know of no principle of construction which would justify me in using section 3 (2) as in any way overriding or controlling what I am driven to regard as the plain meaning and necessary construction of section 3 (5). Two considerations have, at one time or another, been adduced on the language of section 3 (5) which were suggested to avoid the construction of which I am in favour. One was based upon the use of the word 'rents' and seems at one time to have found favour with the learned Chief Justice. That was given up before us and admitted to be unarguable. The other argument was that the words in section 6 'in the estate of such landholder' must be considered for the purpose of that section as

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qualifying the definition of 'landholder' by the previous definition of 'estate.' I do not regard that either as a reasonable or even possible construction. It seems to me that the words 'such landholder' can only be construed as meaning 'landholder' as defined in this Act. On this short ground I base my agreement with the conclusion of my brother AYLING, and I prefer to rest there and abstain from going into the wider grounds covered in the arguments and in many judgments which were cited before us. While I agree generally with the reasoning of AYLING, J., I would be taken as not expressing any opinion as to whether the result does or does not tend to defeat the general purpose of the Act or whether it is desirable or undesirable. To express opinions on these points would require a much greater knowledge not only of the Act but of the conditions of land tenure in this Presidency generally and under the Act, than I, as a Judge whose work has been almost exclusively on the Original Side of this Court, could possibly pretend to possess. I think that the words of the section can only have one plain meaning; and I am constrained to give effect to it whether the result is to be welcomed or regretted. If it is to be regretted, it can be put right by the legislature. In the result, I agree that the Letters Patent Appeal should be allowed and the suit be dismissed with costs of third defendant throughout.

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KUMARASWAMI SASTRI, J.—The question raised in this appeal is whether the provisions of section 6, clause (1), of the Estates Land Act apply to a *post* settlement inam of a portion of a village, when the grant by the zamindar to the inamdar comprises both the melvaram and kudivaram, on a permanent kattubadi so as to confer on the inamdar's tenants rights of permanent occupancy. The lands comprised in the suit are situate in the village of Thandipuram, in the permanently settled zamindari of Surangi, and were granted by a former zamindar to a predecessor in title of the plaintiff on a fixed kattubadi of Rs. 15 a year. It was found by the Lower Court that the cadjan document which is alleged to contain the terms of the inam grant was not proved to be genuine and that the grant in inam was subsequent to the permanent settlement. These findings

were accepted by the Chief Justice and SADASIYA AYYAR, J. The learned Judges agreed in holding that the grant must be presumed to be a grant of the proprietary right in the suit land including the kudivaram as well as the melvaram interest, but differed as to whether the Estates Land Act was applicable as between the inamdar and his tenants when the land was situated in a permanently settled estate and consisted of only part of a village and the inamdar was the owner of the kudivaram as well as the melvaram. The Chief Justice was of opinion that the provisions of the Act did not apply to minor inams on the ground (a) that such inams did not fall within the definition of 'estate' in clause (2) of section 3, (b) that an inamdar was not the owner of the estate, (c) that rent is defined in clause (11) as whatever is lawfully payable to a landholder for the use or occupation of land in *his estate*, and as the estate does not belong to the inamdar the sum payable by the tenant to the inamdar cannot be rent within the definition, (d) that the definition of 'landholder' in clause (5) cannot apply to inamdars as they are not owners of the estate and as what they collect from tenants is not rent within the definition in clause (11), the inamdar cannot be said to collect rent by virtue of the transfer within the meaning of clause (e), (e) that the legislature having carefully excluded minor inams from the definition of 'estates' in clause (2) of section 3, it cannot be reasonably held that they rendered the definition in clause (2) nugatory by defining 'landholder' in such a way as to include inamdars. SADASIYA AYYAR, J., while agreeing that a minor inam cannot fall within the definition of 'estate' in clause (2), was of opinion that the definition of a 'landholder' was sufficiently wide to include minor inamdars as they owned the part of the village granted to them and collected rents by virtue of the transfer in inam to them. The learned Judge was not prepared to dissent from the series of decisions that took the view that minor darmila inamdars were 'landholders.'

I am of opinion that a minor inamdar is not a 'landholder' where the grant to him is of *both the varams*.

It is clear that the inam such as the one in suit does not fall within the definition of an 'estate' as defined in clause (2) of section 3 of the Estates Land Act, as it does not come within any

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of the clauses (a) to (e). As pointed out in *Narayanaswami Nayadu v. Subrahmanyam*(1),

"The definition in clause (d) of sub-clause (2) was obviously intended to exclude from the definition of 'estate' what are known as minor inams, namely, particular extents of land in a particular village as contrasted with the grant of the whole village by its boundaries."

In order to bring a minor inamdar within the definition of landholder he must either (1) own an estate or part thereof, (2) be a person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessor-in-title or under any order of a competent Court or of any provision of Law.

I do not think an inamdar, like the one in suit, can be said to be the owner of an estate or part thereof. In *Maharajah of Vizianagaram v. The Collector of Vizagapatam*(2) it was held that grantees holding under perpetual grants, subject to the payment to the zamindar of a small rent under the names of jodi, kattubadi or poruppu, are not owners or proprietors of the land granted to them. Though the decision was in connexion with the provisions of the Madras Land Revenue Assessment Act (I of 1876) the reasoning proceeds on general grounds and the *ratio decidendi* is equally applicable to cases under the Estates Land Act.

The cases under consideration fall under two heads (1) where the grantee is already the owner of the kudivaram and (2) where the land granted was in the absolute disposal of the zamindar owing to there having been no occupancy ryot on the land at the date of the grant. Where the grantee of the melvaram was himself the occupancy ryot it is difficult to see how the grant of the melvaram interest to him can divest him of that character so as to convert his sub-tenants into permanent occupancy ryots. It is clear that tenants let into possession by occupancy ryots are not governed by the provisions of the Estates Land Act as a sub-tenant of an occupancy ryot is not a ryot within the meaning of the Act, which defines a ryot as 'a person who holds for agriculture ryoti land in an estate on condition of paying to the landholder the rent which is legally due on it.' The whole policy

(1) (1916) I.L.R., 39 Mad., 688. (2) (1915) I.L.R., 38 Mad., 1128 (F.B.).

of the Act was to give statutory recognition to the presumption as to the rights of permanent occupancy of ryots in zamindaris laid down in the *Cheekati Case*(1) and to prevent devices whereby the right may be defeated. Section 6, which confers occupancy rights on ryoti land not being old waste, expressly provides that a person having a right of occupancy in land does not lose it by subsequently being interested in the land as a landholder or by subsequently holding the land on ijara or farm.

I think it would be unreasonable to hold that the mere fact that an occupancy ryot gets an interest in the melvaram would give his sub-tenants (who till then had no rights of occupancy and who could be evicted) rights of permanent occupancy and put the grantee of the melvaram in a decidedly worse position. In all such cases, when there is no merger under any of the provisions of the Act, the right of the inamdar as an occupancy ryot remains in him, and the effect of his acquiring an interest in the melvaram is not to extinguish his rights as an occupancy ryot and convert him into a landholder so as to bring his sub-tenant within the provisions of section 6, clause (1). *Muthu Reddi v. Muthu Venkatapathi Reddi*(2) and *The Zamindar of Sanivarappet v. The Zamindar of South Vellur*(3) are authorities for the view that the Explanation to section 6 prevents any results that would arise from a merger of the melvaram and kudivaram rights in the same person.

In the second class of cases when the grant is of both varams owing to the land having been in the absolute disposal of the zamindar, such grants, where they are minor inams (or grants of particular extents of land in particular villages as contrasted with grants of the whole village or villages), are in the great majority of cases grants in consideration of services past or future and the object of the grantor is to allow the grantee to enjoy the lands on favourable terms and not to create minor landholders. The legislature has therefore been careful in so framing the definition of the word 'estate' as to exclude such minor inamdars and I agree with my Lord in thinking that it could not have been the intention of the legislature which carefully excluded minor inamdars when framing the definition of 'estates'

(1) (1903) I.L.R., 28 Mad., 1818.

(2) (1916) 31 M.L.J., 354.

(3) (1916) I.L.R., 39 Mad., 944.

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to let them in bodily by virtue of the definition of 'landholder' a few lines lower down. It is no doubt true that if the plain language of the section leaves one no other alternative the result cannot be helped, but in construing the definition of 'landholder' regard must be had to the definition of 'estate' and any conflict must, if possible, be avoided. If the primary object in granting minor inams is to confer on the grantee the right to occupy the land permanently at a favourable rate (whether such a rate is called rent or kattubadi) I think the two interests must be kept distinct in dealing with the relations between the minor inamdar and his tenants. This distinction is clearly brought out in *Gajapati Maharaja Garu v. Sondi Prahalada Binoji Ratno*(1) and *Idubilly Siyyaddi v. Sri Rajah Viswaswaru Nissanka*(2), where it was held that the resumption of minor inams did not entitle the zamindar to eject the inamdar from the lands granted. AYLING, J., observed in the former case:

"The favourable rate of rent paid by the defendants may be regarded as the recompense for their services: the tenant's profits are the recompense for his labour as a cultivator, and there is no reason why these defendants should be placed in a worse position in the way of permanence of tenure than any other tenant."

In *Alagiri Naicker v. Thiruvengkitappa Naicker*(3) certain lands were granted by the Zamindar of Ettaiyapuram to one Peddammal and she granted it as inam to certain josiys from whom first and second defendants claimed by right of purchase. The plaintiffs who claimed absolute right to the lands were found by the District Judge to have been in possession for several years as tenants paying rent. It was also found that the original grant was of the land and not of the melvaram only. It was contended in Second Appeal that the plaintiffs were permanent tenants by virtue of section 6. This claim was disallowed. SPENCER, J., observed:

"Again it is contended that the plaintiffs by being in possession in 1908, when the Madras Estates Land Act came into force, must have acquired the status of occupancy ryots under section 6 of that Act. But they have not shown that the land in dispute was ryot land not being old waste and that they were paying rent upon it to

(1) (1914) M.W.N., 179.

(2) (1915) 18 M.L.T., 142.

(3) S. A. No. 986 of 1917 (unreported).

the landholder. To assume the latter proposition would involve the finding (1) that Peddammal to whom the zamindar admittedly made a grant more than 50 years ago was herself a person owning an 'estate' or part thereof within the meaning of section 3, clauses (2) and (5) of Act I of 1908 and (2) that the zamindar did not grant her kudivaram right."

I may, in this connexion, refer to the Explanation to section 8 of the Estates Land Act (dealing with merger) which provides that

"Notwithstanding anything contained in the 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."

It will thus be seen that the legislature in the Explanation to section 6 dealing with cases of the acquisition of the interest in the melvaram by a permanent occupancy ryot and the Explanation to section 8 dealing with the acquisition of an interest in the kudivaram by the inamdar prevented the acquirer in either case from losing his right in the kudivaram by the grant of permanent tenancy to the sub-tenants of the acquirer. It was never the intention of the legislature that persons who already acquired rights of permanent occupancy or who acquired it by virtue of the inam grant should lose the benefit simply because they get an interest in the melvaram as well.

Where the grant is of both the varams, or when the kudivaram holder acquires rights in the melvaram, it would, I think, be straining the language of the section to hold that the grantee collects rents from himself by virtue of the grant of the melvaram. I think the definition of 'landholder' in section 3, clause (5), can only be invoked if at all when the transfer of the melvaram is to a person who does not own the kudivaram which is in somebody else. In grants of both the varams in cases of minor inams the object of the grant is to enable the grantee to enjoy the kudivaram rights on favourable terms. If the amount the grantee has to pay can be regarded as a favourable rate of rent, or if the effect of the grant cannot be treated as a transfer of the right to collect rent owing to there being no person already paying it whose liability is transferred, it is clear from the decision of the Full Bench in *Marina Veeraswamy v. Boyina-*

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palli Venkatrayudu(1) that the tenants of the grantee would not be governed by section 6, clause (1), and acquire a permanent right of occupancy. Remission of rent wholly or in part cannot be said to be the transfer of the right to collect rent, and the fact that instead of stipulating for rent the grantor requires payment of kattubadi would equally not be the transfer of the right, if at the date of the grant there was no ryot in possession paying rent and it was the grantee who was the person to enjoy the kudivaram either by cultivating the land himself or letting it out to others. If after having got the kudivaram right from the zamindar the inamdar lets the land to tenants he collects rents not by virtue of the grant of the melvaram right but by virtue of the contract between himself and his sub-tenants just as he would have done if he had been only an occupancy ryot and had sub-let the land.

When a minor inam consists of the grant of both the varams I think it is against the whole policy of the Act to treat him as a 'landholder' and deprive him of the right of enjoying the land to the best advantage either by cultivating it himself or letting it out to others. I am of opinion that where he lets the land to others the section applicable is section 10, which provides that the relations between a ryot and his tenants or between a landholder and a tenant of his private land and the rights of any other owners of land are not, except as otherwise specially provided in the Act, to be regulated by its provisions.

When a minor inamdar has both the varams either by virtue of a grant of the melvaram while he was the owner of the kudivaram or by virtue of the grant of both the varams to him, owing to the land having been at the absolute disposal of the zamindar at the time of the grant, I agree with my Lord in thinking that he is not a 'landholder' within the meaning of the Act and that the provisions of the Act do not apply so as to give his tenants occupancy rights under section 6, clause (1) of the Act.

The decision of the Chief Justice being in my opinion right, I would dismiss the Letters Patent Appeal with costs.

M.H.R.

(1) (1920) 39 M.L.J., 225 (F.B.).

APPELLATE CIVIL.

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

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DEO BAHADUR, ZAMINDAR OF TARLA (PLAINTIFF).

APPELLANT,

v.

KANDA BARIKIVADU (DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), sec. 102—Second Appeal—Suit of a nature cognizable by a Small Cause Court, meaning of—Suit by a landholder for rent under the Madras Estates Land Act (I of 1908), ss. 77 and 169—Second Appeal in such suits, whether competent—Provincial Small Cause Courts Act (IX of 1887), sec. 15.

A suit by a landholder for rent under the Madras Estates Land Act is cognizable only by a Revenue, and not by a Civil, Court; and such a suit is therefore not of a nature cognizable by a Court of Small Causes within the terms of section 102, Civil Procedure Code, and consequently a Second Appeal in such a suit is not barred by that section.

Soundaram Ayyar v. Sennia Naicken (1900) I.L.R., 28 Mad., 547 (F.B.), applied.

SECOND APPEAL against the decree of A. J. CURGENVEN, the District Judge of Ganjam at Berhampur, in Appeal Suit No. 383 of 1918, preferred against the decree of N. RANGANADHA ACHARYA, the Suits Deputy Collector of Chicacole, in Suit No. 320 of 1916.

The material facts are set out in the judgment of SADASIVA AYYAR, J.

S. Varadachariyar and *K. Satyanarayanamurti* for appellant.

B. Jagannadha Doss for respondent.

SADASIVA AYYAR, J.—A preliminary objection has been raised in this case, namely, that no Second Appeal lies having regard to section 102 of the Code of Civil Procedure. To understand this objection I shall state the material facts. The plaintiff, who is the appellant before us, is the proprietor of Tarla estate and a landholder under the Madras Estates Land Act. The defendant is the holder of about two acres of wet land called

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"Kheta Jiaryati Kotwal land" in some places in some of the muchilkas, Exhibits A and B series, but it is treated as jirayati or ordinary ryoti land in fixing and charging assessment thereon. That it has been treated as ordinary jirayati land from about 1906 by both the zamindar and by the defendant's father who was then a tenant cannot be denied. The proprietor seems to have made a reference to the land as "Kheta Kotwal," that is, as once having been held on service tenure with some object which it is not necessary to find out definitely for the purpose of this case. As I said, the fact that the land had been converted into ryoti land with the consent and knowledge of both the landlord and tenant cannot, in my opinion, be disputed on the evidence. The present suit was brought by the plaintiff for the recovery of arrears of rent for four faslis preceding the institution of the suit. The defence was that the land continued to be service inam and that no rent was payable. The preliminary objection is to the effect that as this suit for rent is, in the words of section 102, Civil Procedure Code, 'a suit of the nature cognizable by Courts of Small Causes' and as the amount or value of the subject matter is less than Rs. 500, no Second Appeal lies, though the suit was instituted in the Revenue Court and though by section 189 (Madras Estates Land Act) suits for rent brought by landholders under the Act against their tenants are expressly excluded from the jurisdiction of Civil Courts (which expression includes Small Cause Courts and Civil Courts exercising small cause jurisdiction). To find out whether a suit for rent between a landlord and a ryot falling under the Madras Estates Land Act is or is not of a nature cognizable by Small Cause Courts we have to consider the provisions of the Provincial Small Causes Courts Act (IX of 1887). Section 15 of that Act is as follows:

"(1) A Court of Small Causes shall not take cognizance of the suits specified in the second schedule as suits excepted from the cognizance of a Court of Small Causes.

"(2) Subject to the exceptions specified in that schedule and to the provisions of any enactment for the time being in force all suits of a civil nature of which the value does not exceed Rs. 500 shall be cognizable by a Court of Small Causes.

"(3) Subject as aforesaid the Local Government may by order in writing direct that all suits of civil nature of which the value

does not exceed Rs. 1,000 shall be cognizable by a Court of Small Causes mentioned in the order."

Clause (2) of section 15 is the important clause in that section, and, in my opinion, it shows that where any of the exceptions specified in the schedule to the Act or any provision of any other enactment for the time being in force excludes the subject-matter of a suit from the cognizance of a Court of Small Causes, then a suit relating to that subject-matter is not one of a nature cognizable by the Small Cause Court within the meaning of section 102 of the Civil Procedure Code. Now, if we turn to schedule 2 of the Small Cause Courts Act, clauses 8 and 44 of that schedule clearly exclude a suit of which the subject-matter is rent due to a landlord under the Estates Land Act by his tenant from the category of "suits of the nature cognizable by the Small Cause Courts." The observations of the learned Chief Justice and of the majority of the other Judges of the Full Bench in *Soundaram Ayyar v. Sennia Naicken* (1), in my opinion, support the above interpretation of section 102, Civil Procedure Code. I might add that this preliminary objection, which might have been similarly taken in the very numerous cases which have come before this Court on Second Appeal under the Estates Land Act passed 12 years ago, seems either not to have been so taken at all or not seriously pressed even if taken in any of those numerous cases. I would therefore overrule the preliminary objection.

Coming to the merits, the learned District Judge has reversed the Deputy Collector's decision on very unsatisfactory grounds. The only plausible reason for arriving at the conclusion that the land continued to be service inam, notwithstanding that both parties have treated it as having been resumed by the landholder and granted back as jirayati land, is that although the service may have ceased no formal steps had been taken for its conversion into jirayati land. I think that if both the grantor and grantee agreed that the service should cease from a certain date and that the land should thereby cease to be held for the performance of such service no "formal" steps (whatever that may mean) are necessary to convert it into ordinary jirayati land.

(1) (1900) I.L.R., 28 Mad., 547.

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Under the Estates Land Act the presumption is that all land is jirayati land and once the land ceases to be service inam land, it resumes its character of ordinary jirayati land without any "formal" ceremonies being gone through.

Reliance was placed upon *Musa Miya Sahab v. Sayad Gulam Hussein Muhamad*(1) in support of the argument that a suit for rent is a suit of a nature cognizable by the Small Cause Court. It must be remembered however that that decision is a decision of 1882, when Act XI of 1865 was the Small Cause Court Act in force. As pointed out by Sir ARNOLD WHITE, C.J., in his opinion in the Full Bench case, *Soundaram Ayyar v. Sinnia Naicken*(2), the schedule of the later Act of 1887 is the converse of that of Act XI of 1865. Under the Act of 1865 the Court of Small Causes is given jurisdiction over certain specified claims, whereas under the Act of 1887 the Court has jurisdiction over every suit falling within certain descriptions and within a certain pecuniary limit, unless that suit is expressly excluded from the cognizance of the Small Cause Court by the schedule or by any other enactment. Hence, there might be one answer to the question, whether a particular suit is cognizable by a Small Cause Court, when that question is considered with reference to the provisions of Act XI of 1865. The very same question, whether that suit is cognizable by the Court of Small Causes, might permit of quite a different answer when it is considered with reference to the provisions of Act IX of 1887. Under section 6 of Act XI of 1865 all claims for money due on a bond or other contract or for rent, or for personal property, are cognizable by Courts of Small Causes except claims which may be brought before a Revenue officer and so on. Thus, the subject-matter of suits for rent had been treated as a class as falling within the category of the subject-matter of suits cognizable by a Court of Small Causes and hence so long as that Act of 1865 was in force the expression "suits of the nature cognizable by a Small Cause Court" would include suits for rent; but as I said, the scheme of the Act of 1887 is quite different and the schedule 2 to that Act clearly excludes the subject-matter of a suit for rent due by a tenant to a landlord

(1) (1882) I.L.R., 7 Bom., 100.

(2) (1900) I.L.R., 28 Mad., 554 (F.B.).

under the Estates Land Act from the subject-matter of suits which are of a nature cognizable by Small Cause Courts.

I would, therefore, allow the Appeal and restore the decree of first Court with costs of the plaintiff here and in the lower Appellate Court.

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NAPIER, J.—I agree and only wish to add a few words on the preliminary point taken as we are informed that there is no reported case in which this point has been decided. That this objection has at all events rarely been taken is obvious from the fact that this Court has for the last ten years been occupied in giving decisions on the construction and meaning of the word "rent" in cases which if this objection prevailed could not have come to this Court. It is therefore necessary that there should be a definite ruling on the point so that the question may be set at rest. In my opinion, the ruling of the Full Bench in *Soundaram Ayyar v. Sinnia Naicken*(1) disposes of the matter. There, the Court had to consider the meaning of section 586 of the Old Code (Act XIV of 1882) corresponding to section 102 of the present Code. The Chief Justice stated as follows on the meaning of these words:

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"The object of this section as it seems to me is to take away the right of Second Appeal or Special Appeal where the value of the subject-matter of the original suit does not exceed Rs. 500 in the case of all suits which as regards their subject-matter would be within the jurisdiction of Courts of Small Causes but which are outside that jurisdiction by reason of the amount claimed being beyond the pecuniary limit of the Small Cause jurisdiction."

In another part of his judgment the learned Chief Justice said:

"It seems to me that section 586 of the Code applies to cases which as regards subject-matter would be within, but by reason of the amount claimed are without, the jurisdiction of a Court of Small Causes."

The words "any suit of the nature cognizable" as used in section 586 of the Code may be paraphrased thus: any suit relating to a subject-matter over which a Court of Small Causes would have jurisdiction if the claim were within the pecuniary limits of its jurisdiction.

(1) (1900) I.L.R., 28 Mad., 547, 554.

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SHEPHARD, J., said :

"If it is found that a suit for rent could legally be tried by a Small Cause Court, that suit is a Small Cause and, therefore, a Second Appeal is precluded."

SUBRAHMANYA AYYAR, J., said :

"It is therefore as urged by Sir V. Bhashyam Ayyangar, on behalf of the appellants almost certain that the words 'any suit of a nature cognizable in Courts of Small Causes' in section 586 were intended to comprise suits which are cognizable by any Court of Small Causes by virtue of the provisions of the Small Cause Courts Act itself, but not suits which may become cognizable by Small Cause Courts under special circumstances only."

BENSON and DAVIES, JJ., agreed with the learned Chief Justice. Taking the language of the learned Chief Justice the important words are :

"Suits which as regards their subject-matter would be within the jurisdiction of Courts of Small Causes," and we have to ascertain whether a suit such as this would be within the jurisdiction of the Courts of Small Causes in any circumstance whatever. The Provincial Small Cause Courts Act of 1887 contains this provision :

"Section 15 (2). Subject to the exceptions specified in the second schedule and to the provisions of any enactment for the time being in force, all suits of a civil nature of which the value does not exceed five hundred rupees shall be cognizable by a Court of Small Causes."

Sub-section 3 says :

"Subject as aforesaid, the Local Government may by order in writing direct that all suits of a civil nature of which the value does not exceed one thousand rupees shall be cognizable by a Court of Small Causes."

We have therefore to see, with regard to the first of these two sub-sections, whether there is any exception specified in the schedule and any provision of any enactment for the time being in force which prevents these suits which are otherwise of a civil nature from being cognizable by Courts of Small Causes ; and with regard to the second sub-section, whether it would be possible for the Local Government by order in writing to direct that suits such as these, the value of which does not exceed Rs. 1,000, should be cognizable by Courts of Small Causes.

I will first deal with the exceptions based on the schedule of the Act. The schedule provides under article 8 that a suit

for the recovery of rent, other than house-rent, unless the Judge of the Court of Small Causes has been expressly invested by the local authority to exercise jurisdiction, is excepted. Therefore, unless there has been a special investment such a suit would not be cognizable. But with regard to sub-section 3 there is this provision, that the Local Government may by order in writing direct, and we have therefore to find if the Local Government did so direct and whether there is any other provision in the second schedule which would prevent such a direction having effect. This provision is to be found in article 44 :

"a suit the cognizance whereof by a Court of Small Causes is barred by any enactment for the time being in force."

So that, even with regard to the exceptions specified in the schedule, there is this article 44 which is a complete bar to the jurisdiction either accruing by virtue of section 15 (2) or being made applicable by virtue of section 15 (3).

Then we have to turn to the language of the Madras Estates Land Act. The suit is one under section 77, of the Madras Estates Land Act, to recover arrears of rent and the language is :

"At any time after an arrear of rent has become due, the landholder may institute a suit before the Collector for the recovery of the arrear."

Then section 189 provides that

"A Collector or other Revenue officer specially authorized under this Act shall hear and determine as a Revenue Court all suits and applications of the nature specified in Parts A and B of the schedule and no Civil Court in the exercise of its original jurisdiction shall take cognizance of any dispute or matter in respect of which such suits or applications might be brought or made"

and the Schedule, Part A, serial No. 8, which has reference to section 77, says :—

"By landholder to recover arrears of rent."

Therefore, both under the specific language of the Madras Estates Land Act which is definite on the point as excluding the jurisdiction of all Civil Courts, and on the true construction of section 15 of the Provincial Small Cause Courts Act, it is clear that a Small Cause Court can have no jurisdiction over a

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suit for rent under the Madras Estates Land Act, and therefore it is not within the meaning of section 102, Civil Procedure Code, a suit "of the nature cognizable by a Court of Small Causes." It follows therefore that this suit is excepted from the language of the Chief Justice in the case above referred to, namely, in the case of all suits which as regards the subject-matter would be within the jurisdiction of Courts of Small Causes, and the contention for the respondent is negatived by that ruling.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Odgers.

1921,
February 15.

SAMBASIVAM PILLAI AND ANOTHER (DEFENDANTS NOS. 1 AND 3),
APPELLANTS,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
REPRESENTED BY THE COLLECTOR, SOUTH ARCOT,
AND ANOTHER (PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

Hindu Law—Inheritance—Sudra ascetic—Right of sishya (disciple) to inherit—Texts of Hindu Law, whether obsolete—Yajnavalkya—Mitakshara—Escheat to Government—Religious instruction to Sudras—Disciple, meaning of—Spiritual relationship, proof of.

The disciple of a Sudra ascetic who dies without leaving any blood relations, is an heir of the latter under the Hindu Law and succeeds to his estate so as to prevent its escheat to the Government.

The texts relating to succession by preceptors, disciples and fellow-students enunciated, in Yajnavalkya Smriti, Chapter II, verse 187, and in the Mitakshara, section VII, are not obsolete.

In determining who is a preceptor, a pupil or a fellow-student under the above texts, the Court will only consider the imparting of purely religious instruction.

Religious instruction and training are not confined to Brahmans; *Giyana Sambanda Pandara Sannadhi v. Kandasami Tambiran* (1887) I.L.R., 10 Mad., 375.

Dharmapuram Pandara Sannadhi v. Virapandiyam Pillai (1893) I.L.R., 22 Mad., 302, distinguished.

Strict proof is required to be given by the claimant regarding his alleged spiritual relationship to the deceased.

* Second Appeal No. 257 of 1920.

SECOND APPEAL against the decree of R. ANNASWAMI AYYAR, the Temporary Subordinate Judge of Cuddalore, in Appeal Suit No. 30 of 1918, preferred against the decree of A. V. RATNA-VELU PILLAI, the District Munsif of Chidambaram, in Original Suit No. 140 of 1915.

One Shanmuga Yogeeswaraswami was a Sudra ascetic who was leading the life of a Paradesi and a physician. He purchased the suit property (a house) in his own name, and died on the 28th April 1908. No relations came forward to claim his properties as heirs though notices were issued by the Government. The Secretary of State for India in Council instituted the present suit in 1915, to recover possession of the properties from the fourth defendant who claimed to be a "Sishya" (disciple) of the deceased Swami and as such entitled to inherit his properties under the Hindu Law. Defendants 1 to 3 were alienees from the fourth defendant. The defendants 1 and 3, who contested the suit, contended that the deceased Swami was head of a private religious Mutt, called Palani-andavar Matam, and that the fourth defendant had been appointed by him as his successor to the mutt and the properties which were alleged to be attached to that mutt. They also contended that the fourth defendant was the heir of the Swami, as he was the chief Sishya of the deceased. The Lower Court held that the fourth defendant was not an heir under the Hindu Law, and relying on *Dharmapuram Pandara Sannadhi v. Virapandiyam Pillai* (1), decreed the suit in favour of the plaintiff. The contesting defendants 1 and 3 preferred this Second Appeal.

T. Ranga Achariyar and C. Padmanabha Ayyangar, for appellants.

J. C. Adam for The Government Pleader, for respondents.

AYLING, J.—This Second Appeal arises out of a suit by Government to obtain possession as an escheat of the property of one Shanmuga Yogeeswaraswami. The facts found are that the latter was a Sudra ascetic, not entitled to enter the order of yati or sanyasi, that the suit property was his secular property,

(1) (1899) I.L.R., 22 Mad., 302.

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not endowed in favour of any institution, that he died leaving no relations, and that fourth defendant was his chief "sisya" or disciple. The sole question for our decision is whether the claims of the fourth defendant to inherit as "sisya" are sufficient to stop the escheat to Government. Both the Lower Courts decided in favour of Government. Defendants 1 and 3, who have acquired the rights of the fourth defendant by purchase, appeal.

Both the Lower Courts have decided the question as if it were concluded by the ruling in *Dharmapuram Pandara Sannadhi v. Virapandiyam Pillai*(1), but as a matter of fact that has no application to the present case. Appellants here rely on the passages in Yajnavalkya, Chapter II, verse 137, and Mitakshara, Ch. II, section 7, which recognize in ordinary cases of succession the claims of a pupil or fellow-student to succeed in default of kindred. The text in Yajnavalkya runs thus :

"The lawfully wedded wife and the daughters also, both parents, brothers likewise, and their sons, gentiles, cognates, a pupil and a fellow-student, on failure of the first among them, the next in order is the heir to the estate of one who departed for heaven, leaving no male issue. This rule extends to all classes."

The learned Judges in *Dharmapuram Pandara Sannadhi v. Virapandiyam Pillai*(1), on the other hand, were considering the applicability of a totally different section of the Mitakshara, section 8, which is based on Yajnavalkya, Chapter II, verse 138, and lays down a special rule of succession to a hermit or ascetic whereby the claims of kindred are dismissed in favour of those of "a preceptor virtuous pupil and spiritual brother or associate in holiness." This is an exception to the ordinary rule; and it was held in the above quoted judgment that it did not govern the case of a Sudra ascetic. The dispute there was between the spiritual and natural heirs.

What has to be determined here is whether the rule in Yajnavalkya, Chapter II, verse 137, which is stated to apply to all classes should be given effect to as against the escheat claim of Government: or whether, as urged by the learned Government Pleader, the rule is obsolete and should be disregarded. I need

hardly say that where the meaning and applicability of ancient texts is concerned, I come to a conclusion with great diffidence; but in the present instance there seems to be no doubt as to the meaning of the texts themselves while as to their applicability I am not unfortified by authority and the conclusion to which I feel forced is not so unreasonable, even to western ideas, as it might seem at first sight.

I have already quoted the text of Yajnavalkya which is not only perfectly specific but purports to be of universal application. Chapter II, section 7 of the Mitakshara is equally clear (quoting Apastamba) :

"If there be no male issue the nearest sapindas inherit: or in default of kindred the preceptor, or failing him the disciple. If there be no pupil, the fellow-student is the successor."

And the last paragraph of the section limits the king's right of escheat as regards property of Kshatriyas or other inferior castes (i.e., non-Brahmans) to cases of "failure of all heirs down to the fellow-student."

The same section makes it clear (paragraph 2) that in dealing with the case of preceptors, pupils and fellow-students, we have only to consider purely religious instruction—a consideration which would largely limit the application and prevent the undesirable extension of the rule—vide also Manu IX, 18, which in dealing with the same point speaks of "the spiritual teacher of the pupil." Having regard to the importance of religious teaching in Hindu ideas, and to the fact that this kind of heirship, only operates on failure of natural heirs and to defeat the claims of the State, this seems to me to present the rule in a much less unreasonable and fantastic light, than one might be at first inclined to view it in.

In this connexion it may be useful to refer to a passage from a judgment of the Judicial Committee of the Privy Council in *Ramchandra Martand Waikar v. Vinayek Venkatesh Kothekar*(1). Their Lordships were there dealing with an attempt to secure recognition as heirs of sapinda relations beyond the fifth degree. They say (page 421):

"It was urged that it is hardly likely Vijnaneswara would give a right of inheritance to a spiritual preceptor or guru before

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(1) (1889) I.L.R., 23 Mad., 302.

(1) (1915) I.L.R., 42 Cal., 894 (F.O.).

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kinsmen however remotely connected. This argument appears to ignore the peculiar and intimate relationship which their Lordships understand exists in the Hindu system between the pupil and the guru who has to initiate him into the mysteries of the vedic laws and rites, and under whose roof he has to pass many years of his life. It is easy to suppose that in such circumstances the mystical relationship between a spiritual preceptor and a pupil should be regarded as creating a far closer tie than remote relationship of blood."

The spirit of these remarks seems to me to militate strongly against any tendency to brush aside appellants' claim as based on an obsolete and unreasonable rule.

In another case, *Gridhari Lall Roy v. The Bengal Government*(1), their Lordships also comment (at page 463) on the extreme jealousy with which the Hindu Law regarded the right of the king to take on a failure of heirs. They quote the provisions of the Mitakshara to which I have referred; and they do so without any suggestion that the rules should not be given effect to.

No doubt the claim is a novel one so far as the Courts are concerned. Mr. Mayne in his book on Hindu Law, in paragraph 489, says:

"I know of no instance in which a claim has ever been set up by a preceptor or pupil to the property of a man dying without heirs"

and no case has been quoted to us. But it by no means follows that the rule has not been observed in practice: and I hesitate to treat a clear direction of the texts as obsolete and negligible, when it involves no inequity or conflict, so far as I know, with even modern Hindu ideas, and when it has been referred to by the highest tribunal in the terms I have quoted.

The learned Government Pleader has drawn our attention to a recent case of this Court in which the ancient Hindu rule disqualifying a person born blind from inheriting was held to be obsolete. I do not find anything in the reasoning of the learned Judges which bears on the question before us. The learned vakil for appellants also referred to a case of the Privy

(1) (1898) 12 M.L.A., 443.

Council [*Gunjeswar Kunwar v. Durga Prasad Singh*(1)], as throwing doubt on the correctness of the decision in that case.

On the best consideration I can give to the matter, I am inclined to think that the old rule appearing in the texts should not be treated as obsolete. Its applicability will naturally be closely scrutinized by the Courts and strict proof required of the spiritual relationship alleged. But where, as in the present case, that is clearly established, I can see no reason for refusing to give effect to it.

I would allow the Appeal and dismiss the suit with costs throughout.

ODGERS, J.—This Appeal concerns the property of a certain Sudra ascetic, Shanmuga Yogeaswaraswami by name, who died without heirs or relations in the ordinary sense of those words. The property of the deceased is claimed by the appellant, who was a "disciple" of the deceased, and by the Government as escheat. The lower Courts have held that the Government is entitled, hence this Second Appeal. *Dharmapuram Pandara Sannadhi v. Virapandiyam Pillai*(2), is relied on by both the lower Courts. This lays down that a Sudra is unable to enter the order of "yathi" or sanyasi and that the ordinary law of inheritance regulates the devolution of his property. There, the property was decreed to the secular heir, the brother of the deceased as against the members of the mutt into which the deceased had been admitted. There is no such contest in this case. I am not called upon to decide between a devolution to an ordinary heir, e.g., a brother or a son and one to a religious institution. The question is whether a disciple of a Sudra ascetic can be interposed between the deceased and the Government, who admittedly take by escheat only in the last resort. It is admitted that there is no decision that the disciple of a Sudra ascetic is an heir and the case is therefore largely one of first impression. *Giyana Sambandha Pandara Sannadhi v. Kandasami Tambiran*(3), is authority for holding that religious training is not confined to Brahmans and the first authority relied

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(1) (1918) I.L.E., 45 Cal., 17 (P.O.). (2) (1899) I.L.E., 22 Mad., 308.
(3) (1887) I.L.E., 10 Mad., 375.

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on by the appellant for establishing his right is the first paragraph of Yajnavalkya, Chapter II, verse 137—139, quoted at page 171 of J. C. Ghose's book on Hindu Law. It runs as follows:

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"The lawfully wedded wife and the daughters also, both parents, brothers likewise, and their sons, gentiles, cognates, a pupil, and a fellow-student, on failure of the first among them, the next in order is the heir to the estate of one who departed for heaven, leaving no male issue. This rule extends to all classes." (Note especially the last sentence)—

"The heirs to the property of a hermit, of an ascetic, and of a student in theology are in order (that is in the inverse order) the preceptor, a virtuous pupil, and a spiritual brother and one belonging to the same hermitage."

The second paragraph admittedly cannot apply as a Sudra cannot be an ascetic: *Dharmapuram Pandara Sannadhi v. Virapandiyam Pillai*(1); cf. also Colebrooke's Digest of Hindu Law, Volume 2, page 522, for the former of these texts and page 577 for the second. Similar quotations are given from Yajnavalkya in Setlur's Hindu Law Books on Inheritance, the Mitakshara, page 36, where it is stated that the rule of Yajnavalkya must be understood as extending to all castes; at page 48, it is stated:

"if there be no bandhus of the deceased, the preceptor, or on failure of him, the pupil, inherits under the texts of Apastamba (ii, 6, 14, 2-3) of also Sacred Books of the East, Volume II, page 133."

In the Laws of Manu, Chapter IX, section 187 (Sacred Books of the East, Volume 25, page 866) it is stated:

"Always to that (relative within three degrees) who is nearest to the (deceased) sapinda the estate shall belong, afterwards a sakulya shall be (the heir, then) the spiritual teacher or the pupil."

Sir Thomas Strange in his book on Hindu Law, Chapter VI, page 148, puts it thus:

"In default of natural kin, the series of heirs, in all the classes, that of the Brahman excepted, terminates with the preceptor of the deceased, his pupil, his priest hired to perform sacrifices, or his fellow-student, each in his order—and, finally, failing all these, the lawful heirs of the kshatrya, vaisya and sudra, are learned and virtuous Brahmans—a description, however special, yet too comprehensive to be consistent with the right of escheat, for want of heirs,

(1) (1899) I.L.R., 22 Mad., 302.

in the king; and, therefore, it has been narrowed in construction to such as reside in the same town or village."

It was laid down by the Privy Council in *The Collector of Masulipatam v. Cavalry Vencata Narrainapah*(1) that the Mitakshara is the highest authority on inheritance for this province. Their Lordships say, at page 525:

"But when it is made out clearly that by the law applicable to the last owner, there is a total failure of heirs, then the claim to the land ceases (we apprehend) to be subject to any such personal law."

They proceed, at page 526:

"In the present case, if the Hindu Law had expressly provided that, upon the death of a Brahman, without heirs, ordinarily so-called, his property should pass to some definite person or class of persons; if, for instance, it admitted, in the case of a Brahmanical succession, collaterals more remote than it would admit in the case of succession to a sudra, there would be ground for excluding the title of the Crown, because there would, by Hindu Law, be some person in the nature of an heir capable of succeeding; but here the *Sudder Dewanny Adawlut* rests its decision on what it terms 'the primary declaration of Manu that the property of a Brahman shall never be taken by the king'."

It is therefore established in my opinion, that there is, on the authority of the texts quoted above, a rule of Hindu Law that the property of a person such as the deceased should pass to a definite person or class of persons by the personal law of the deceased. *Gridhari Lall Roy v. The Bengal Government*(2) is also authority for saying that the Mitakshara recognizes the interposition of three classes of heirs, viz., preceptor, pupil, fellow-student, between the relatives of the deceased and the King.

In *Ramchandra Martand Waikar v. Vinayek Venkatesh Kothekar*(3), a case before the Privy Council, their Lordships say, at page 406:

"It is to be remarked, as has been observed in previous cases before this Board, that the Hindu Law contains its own principles of exposition, and that questions arising under it cannot be

(1) (1860) 8 M.I.A., 500.

(2) (1868) 12 M.I.A. 448, 463.

(3) (1915) I.L.R., 42, Cal., 384 (P.C.).

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determined on abstract reasoning or analogies borrowed from other systems of law but must depend for their decision on the rules and doctrines enunciated by its own law-givers and recognized expounders ; ”

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again, after noticing the argument that it is hardly likely that Vijnaneswara would give a right of inheritance to a spiritual preceptor or guru before kinsmen, however remotely connected, their Lordships remark :

“ This argument appears to ignore the peculiar and intimate relationship which their Lordships understand exists in the Hindu system between the pupil and the guru who has to initiate him into the mysteries of the vedic laws and the rites and under whose roof he has to pass many years of his life. It is easy to suppose that in such circumstances the mystical relationship between a spiritual preceptor and a pupil should be regarded as creating a far closer tie than remote relationship of blood (page 421). ”

The answer to this argument is that the rule of law and the texts on which it is based are obsolete and that in the absence of proof of a special custom it is impossible or impracticable to apply it. The texts are also said to be too indefinite and vague. Reliance is placed on the text of Brihaspathi, XXV (see Ghose, page 175) :

“ Should a kshatriya, vaisya or sudra die without leaving male issue, or wife, or brother, their property shall be taken (as escheat) by the King, for he is the lord of all.”

The objection to this view is that Brihaspathi has admittedly nothing like the same authority as the Mitakshara, which, as pointed out above, has been laid down by the highest judicial tribunal as being the authority for the Hindu Law of Inheritance in this part of India. There is also the objection that Brihaspathi does not enumerate all heirs, bandhus, etc. I do not think it is impossible to apply the text—at least to a disciple. I admit greater difficulty in the case of a “ fellow-student ” in modern days. It is not disputed that the appellant was a sishya or student of the deceased and this was so found by the learned Subordinate Judge. With regard to the question of the rule of inheritance being obsolete, reference was made to *Surayya v. Subbamma*(1). In that case it was held that the

(1) (1920) I.L.R., 48 Mad., 4.

rule which prevents a person “ born blind ” from claiming a share in his ancestral property was obsolete having regard to present day circumstances and modern methods to enable the blind to, at any rate partially, overcome their defect.

However, in *Gunjeswar Kunwar v. Durga Prasad Singh*(1), it was held that blindness, to exclude from inheritance, must be congenital, adopting the statement of law in *Rajkumar Sarva-dhikari's Hindu Law of Inheritance*, page 956. Apparently the attention of the learned Judges of this Court was not called to this authority when they decided *Surayya v. Subbamma*(2). In any case, the Privy Council has upheld the rule of Hindu Law as far as congenital blindness is concerned. Further, the Full Bench case of *Rajani v. Nitai*(3), is authority for saying that a rule (in that case also a rule of inheritance) cannot be said to be obsolete merely because there is no occasion for its application. The application of a rule like that under discussion must of necessity be extremely rare, but I have already stated that in my opinion its application when necessity arises is neither impossible nor impracticable. It seems to me that where we have, as I think we have here, a clear rule of inheritance deducible from the ancient Hindu authorities which is generally recognized and supported by the highest judicial authority in recent times [cf. *Ramchandra Martand Waikar v. Vinayak Venkatesh Kothekar*(4)], it cannot be said that the rule is obsolete because there happens to be no judicial decision exactly in point. For all these reasons I would allow the Appeal and dismiss the suit throughout with costs.

K. R.

(1) (1918) I.L.R., 45 Calo., 17 (P.C.). (2) (1920) I.L.R., 48 Mad., 4.
(3) (1920) 32 C.L.J., 383 (F.B.). (4) (1915) I.L.R., 42 Calo., 384 (P.C.).

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APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and
Mr. Justice Oldfield.

1-21,
February 22.

JAYANTI VENKAYYA AND ANOTHER (DEFENDANTS NOS. 1 AND 2),
APPELLANTS,

v.

DAMISETTI SATHIRAJU AND SIX OTHERS (PLAINTIFFS AND
SIXTH AND FIFTH DEFENDANTS), RESPONDENTS.*

Limitation Act (IX of 1908), Article 181—Appeal against preliminary decree for sale in a mortgage suit—Application for final decree under Order XXXIV, rule 5, Civil Procedure Code—Article applicable and starting point of limitation.

An application for a final decree for sale under Order XXXIV, rule 5, Civil Procedure Code, is governed by article 181 of the Limitation Act and the starting point, in cases where there has been an appeal from the preliminary decree is the date of the appellate decree whether the latter confirmed or varied the preliminary decree; *Bhup Indar Bahadur Singh v. Bijai Bahadur Singh*, (1901) I.L.R., 23 All., 152 (P.O.), applied. *Juscurn Boid v. Pirthichand Lal Choudhury*, (1919) I.L.R., 46 Cal., 670 (P.O.), explained. *Viswanatha Sastri v. Sitalakshmi Ammal*, (1921) 13 L.W., 87, distinguished.

APPEAL against the final decree of N. BALARAMADAS PANTULU Garu, Subordinate Judge of Cocanada, in Original Suit No. 17 of 1914.

In this case the plaintiffs obtained on 29th September 1915 a preliminary decree for sale in a suit for sale on a mortgage. An Appeal from that decree filed in the High Court was dismissed on 12th September 1917. An application for a final decree was filed on 12th February 1919. The lower Court granted the application, overruling the objection of the judgment-debtors that the application was out of time on the ground that it was filed more than three years after the date fixed for payment by the preliminary decree. The judgment-debtors (mortgagors) preferred this Appeal to the High Court.

P. Somasundaram for appellants.

B. Satyanarayana and K. Ramamurti for respondents.

* Appeal No. 88 of 1920.

The Court delivered the following JUDGMENT:

This is an Appeal from the judgment of the Subordinate Judge's Court of Cocanada in a mortgage suit and a question of some importance has been argued before us by Mr. Somasundaram as to whether the starting point for an application for a decree absolute under Order XXXIV, rule 5, Civil Procedure Code, which is governed by article 181 of the Limitation Act, is the date of the original decree or the date of the appellate decree which affirmed the original decree.

It had long been regarded as well-settled in this Court that the starting point under article 181 was the date of the appellate decree, and there is a decision of the Privy Council in *Bhup Indar Bahadur Singh v. Bijai Bahadur Singh*(1) which strongly supports that view. In that case, the District Judge passed a decree giving the plaintiff possession with future mesne profits. That decree was set aside by the High Court and was restored after a great many years by the Privy Council. The question then arose in execution as to the date from which mesne profits should be calculated under the provisions of section 211 of the Old Code (Act XIV of 1882), and their Lordships observed, at page 158,

"The Court is now executing not the District Judge's decree of 1887, but the Queen's Order of 1895 which, by affirming the District Judge's decree, has adopted its terms and has carried on their effect down to a later date."

Those observations of the Privy Council are entirely in accordance with what has till recently been the established view in this Court. If the date of the final decree was the proper date to have regard to for the purposes of section 211, Civil Procedure Code, it follows that it is equally the proper date to have regard to with reference to an application for a decree absolute under Order XXXIV, rule 5.

We have, however, been asked to hold that this authority should be disregarded on the authority of a more recent decision of the Privy Council in *Juscurn Boid v. Pirthichand Lal Choudhury*(2) and certain observations of SESHAGIRI AYYAR, J., one of the learned Judges who decided *Viswanatha Sastri v.*

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(1) (1901) I.L.R., 23 All., 152 (P.O.). (2) (1919) I.L.R., 46 Cal., 670 (P.O.).

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Sitalakshmi Ammal(1), which go to support this contention. The observations were *obiter* because both the learned Judges concurred in holding that the case was governed by article 182, the general article relating to execution. We have carefully examined *Juscurn Boid v. Pirthichand Lal Choudhury*(2), and have come to the conclusion that it is not inconsistent with the previous decision to which we have referred. In the recent case, an auction-purchaser sued to recover from certain decree-holders his purchase money in consequence of the sale being set aside. Assuming that article 97 was the article applicable, the Privy Council held that consideration failed when the sale itself was set aside in the first Court, that time then began to run under article 97 and that consideration did not fail afresh when the order setting aside the sale was affirmed by the Appellate Court. Here, as in the well-known case of *Bassu Kuar v. Dhum Singh*(3) the question their Lordships had to decide was when the consideration in fact failed. Once that was established the application of article 97 was clear. With reference to this question they observed, in accordance with the express provisions of the Code, that an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal, but those observations must in my opinion be considered as inapplicable to questions arising under articles 181 and 182. By article 182 the appellate decree is expressly made a fresh starting point for purposes of execution, and an appellant is not required to proceed with the execution of a decree, against which he has appealed, while the appeal is pending on pain of becoming barred if he does not. It would be strange if a different rule were applicable under article 181 as regards applications for a decree absolute where the preliminary decree is under appeal, an application so much resembling an application for execution that, under the repealed chapter of the Transfer of Property Act, it was held by this Court to be one. That was a question which their Lordships were not considering.

(1) (1921) 18 L.W., 37.

(2) (1919) I.L.R., 46 Cal., 670 (P.C.).

(3) (1889) I.L.R., 11 All., 47 (P.C.).

The view that for the purpose of such an application the appellate decree supersedes the original decree appears to be in accordance with the earlier decision in *Bhup Indar Bahadur Singh v. Bijai Bahadur Singh*(1) where their Lordships held that the decree that they were executing was the decree of the Appellate Court. Applying that to the present case the preliminary decree which is being executed must be held to be the preliminary decree passed by the Appellate Court. It would obviously be so if the decree of the Appellate Court had varied the preliminary decree passed by the lower Court and there are no good reasons for applying different rules as regards questions arising under article 181, when the Appellate Court affirms the decree of the lower Court and when it varies it. Consequently, an application for a decree absolute has to be made under article 181 within three years from the passing of the preliminary decree by the Appellate Court, and therefore the present application was in time and the objection fails.

The other objection which was taken is an objection to the preliminary decree which has already been confirmed by this Court and cannot be now questioned.

Objection has then been taken that the legal representative of the fourth defendant, who was one of the representatives of the original mortgagee, was not brought on record in time. We think that in the circumstances, if that is so, the delay should be excused.

The Appeal accordingly fails and is dismissed with costs.

N.B.

(1) (1901) I.L.R., 23 All., 152 (P.C.).

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APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and
Mr. Justice Oldfield.

1921,
March 2.

THE CHIEF COMMISSIONER OF INCOME-TAX (BOARD
OF REVENUE), MADRAS (RESPONDENT), APPELLANT,

v.

THE NORTH ANANTAPUR GOLD MINES, LIMITED
(APPELLANTS), RESPONDENTS.*

Indian Income-tax Act (VII of 1918)—Sec. 51 (1) and sec. 52—Sec. 106 (2) of the Government of India Act, 5 and 6 George V, Chapter 61—Sec. 45 (h) of the Specific Relief Act (I of 1877)—English decisions on English Income-tax Act guides to interpret Indian Income-tax Act.

Where a person who was assessed to income-tax appealed to the Board of Revenue and the Board while dismissing the appeal refused to refer the matter to the High Court under section 51 of the Income-tax Act, though requested to do so,

Held that section 106 (2) of the Government of India Act, and section 52 of the Income-tax Act prohibited the High Court from entertaining any application under section 45 in the nature of a mandamus for the purpose of compelling the Revenue Board to refer the matter to the High Court under section 51 of the Income-tax Act; *Spooner v. Juddow* (1850) 4 M.I.A., 353, followed.

Issuing an order under section 45 of the Specific Relief Act in the nature of a mandamus is an exercise of "original jurisdiction" within section 106 (2) of the Government of India Act.

An application under section 45 of the Specific Relief Act against the Board is a "proceeding" within section 52 of the Income-tax Act. *Re Onward Building Society* [1891] 2 Q.B., 463, applied.

"Anything done" in section 52 includes "anything omitted to be done": *Jolliffe v. Wallasey Local Board* (1873) L.R., 9 Q.P., 62, followed.

English decisions are not decisions of "foreign Courts" and as the Income-tax Act of India generally follows the lines of the English Income-tax Act, the decisions of English Courts on the latter Act are the best guides to the interpretation of the Indian Act.

The meaning of "unnecessary" in section 51 of the Income-tax Act considered.

APPEAL from the judgment of Mr. Justice KUMARASWAMI SASTRI passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in *In the matter of the North Anantapur Gold Mines, Ltd.*

* Original Side Appeal No. 1 of 1921.

The North Anantapur Gold Mines, Limited, which has its registered office in London, and whose profits are derived solely from the sale in Great Britain of gold mined in the Anantapur district, was assessed to income-tax by the Collector of Anantapur on an income of Rs. 2,13,134. The Company appealed to the Board of Revenue against the imposition of the assessment, principally on two grounds, namely, (1) that the Company was not a "person" within the meaning of section 33 of the Income-tax Act, and (2) that as the sale of gold took place entirely in Great Britain it had no "business connexion in British India" within the meaning of the Income-tax Act. After hearing arguments on both these points the Board of Revenue dismissed the appeal. Though requested by the assessee to refer the matter to the High Court under section 51 of the Income-tax Act, they declined to do so.

After this dismissal the Company filed an application on the Original Side of the High Court under section 45 of the Specific Relief Act for the issue of a writ of mandamus against the Revenue Board with a view to compel the Board to refer the question of the Company's liability to the High Court, under section 51 of the Income-tax Act. The matter was heard by Mr. Justice KUMARASWAMI SASTRI. On behalf of the Board the Government Pleader argued before His Lordship that the High Court had no jurisdiction to issue a mandamus in a matter concerning the collection of revenue and relied on section 106 of the Government of India Act in support of his position. His Lordship overruled this contention, and held on the strength of section 45 of the Specific Relief Act that the powers of the High Court to issue a mandamus in a proper case was not taken away, and he accordingly issued a writ of mandamus calling on the Revenue Board to state a case to the High Court under section 51 of the Income-tax Act, being of opinion that the case raised difficult questions of law.

Against this decision, the Revenue Board preferred this Appeal.

C. P. Ramaswami Ayyar, Advocate-General, with O. Madhavan Nayar, Government Pleader, for the appellant.—The High Court had no jurisdiction to issue a mandamus. The jurisdiction to decide on appeal whether an assessee was

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properly assessed is vested by the Income-tax Act entirely in the Board of Revenue. Section 51 of that Act gives the Board various powers after hearing the appeal; it might simply dismiss the appeal without referring any question to the High Court, or it might, if it thought fit, refer any difficult or doubtful question of law arising in the appeal for the decision of the High Court. Such reference it could make either of its own accord or at the request of the assessee, if it considered such request not frivolous or vexatious. In this particular case the Board had considered all the points of law placed before it and had delivered a considered judgment dismissing the appeal. It had exercised its discretion vested in it under section 51. The Board being a special tribunal constituted for a special purpose by the Statute, its acts done in the exercise of its discretion could not be questioned in any Court of law either by a mandamus or in any other manner even if the decision were erroneous. He relied on the following cases: *The Queen v. Overseers of Walsall*(1), *Reg v. Allo Paroo*(2), *Sharpe v. Wakefield*(3), *Rex v. Port of London Authority*. *Ex parte Kynoch, Ltd.*(4), *Julius v. Lord Bishop of Oxford*(5), and *Prosad Chunder De v. Corporation of Calcutta*(6). The words "if it thinks fit" are interpreted in *Reg v. Allo Paroo*(2). When a discretion is vested in an authority it is not compelled to adopt one course any more than another: *Reg v. Coltham*(7) and *Rex v. The Justices of Kingston*. *Ex parte Davey*(8). "Discretion" is interpreted in *Sharpe v. Wakefield*(3). Only if there is a conscious refusal to exercise its discretion or if in the exercise of its discretion extraneous matters are taken into consideration a mandamus can issue, and a mere erroneous decision cannot be upset by a mandamus: *Rex v. Marshland Smeeth and Fen District Commissioners*(9), *The King v. The Justices of Monmouthshire*(10), *The King v. The Justices of Monmouthshire*(11), and *Clifton v. Furley*(12). Further, section 106 (2) of Government of India Act, 1915, prohibits

- (1) (1878) 3 Q.B.D., 457. (2) (1847) 5 Moo. P.O.C., 293, 300.
(3) [1891] A.C., 173. (4) [1919] 1 K.B., 176.
(5) (1880) 5 App. Cas., 214. (6) (1913) 1 L.R., 40 Cal., 836.
(7) [1898] 1 Q.B., 802, 808. (8) (1902) 86 L.T., 589.
(9) [1900] 1 K.B., 155, 164, 165.
(10) (1828) 8 B. & C., 137; s.c., 108 E.R., 994.
(11) (1835) 4 B. & C., 844; s.c., 107 E.R., 1272.
(12) (1862) 7 H. & N., 738; s.c., 168 E.R., 685.

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interference by the High Court in any matter concerning revenue. The origin of the King's Bench's jurisdiction in revenue matters is shown in *Anonymous*(1). Section 8 of 21 George III, Chapter 70, shows the origin of section 51. So far as India is concerned, subsequent statutory provisions on the same subject are section 11 of 37 George III, Chapter 142; section 3 of 39 and 40 George III, Chapter 79; section 9 of 24 and 25, Vic., C. 14. *Venkata Runga Pillay v. E.I. Co.*(2) quoted by the learned Judge does not touch this question: see *In the matter of Audhur Chundra Shaw*(3). *Spooner v. Juddow*(4) holds that even, where the East India Company's regulations have been violated by making a distraint of a wrong person's goods, Courts have no jurisdiction to remedy the injury; see also *Collector of Sea Customs v. P. Chithambaram*(5). I rely also on section 52 of the Income-tax Act and it relates also to the mufassal.

R. N. Aingar for respondent.—Unless the application to refer is unnecessary or frivolous the point must be referred if it is necessary for the decision of the case: see section 51 (3). Even if there is a discretion vested, a mandamus can be issued if the limits of the discretion have been exceeded; *Rex v. Board of Education*(6) holds that if jurisdiction is declined on a wrong construction of the Act, then a mandamus will lie; see also *Leslie Williams v. Haines Thomas Giddy*(7) and *The Queen v. Vestry of St. Pancras*(8). The words "frivolous or unnecessary" are copied from the English Income-tax Act II of 1915 (5 and 6 George V, Chapter 89), sections 41 and 42 where the words are "frivolous or vexatious or one already decided." *Smidth & Co. v. Greenwood*(9), *Sharpe v. Wakefield*(10). Section 106 of the Government of India Act has been repealed by section 51 of the Income-tax Act. Moreover, this matter does not come before the High Court in its "Original jurisdiction" within the meaning of section 106, as this comes under section 45 of the Specific Relief Act. This matter may be said to come before

- (1) (1793) 1 Aust., 205; s.c., 145 E.R., 846.
(2) (1803) 1 Strange, 153; s.c., 5 Indian Decisions, 80.
(3) (1873) 11 B.L.R., 260. (4) (1850) 4 M.I.A., 353.
(5) (1876) 1 Mad., 80, 108, 115, 117. (F.B.). (6) [1910] 2 K.B., 165, 179.
(7) (1911) 21 M.L.J., 641 (P.O.); s.c. [1911] A.C., 381.
(8) (1890) 24 Q.B.D., 371, 375. (9) [1920] 3 K.B., 275.
(10) [1891] A.C., 173.

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the High Court also in its revisional jurisdiction: *Chappan v. Moidin Kutti*(1) which follows *Nilmoni Singh Deo v. Taranath Mukerjee*(2). Section 50 of the Specific Relief Act abolished the old writ of mandamus, for which section 45 is a substitute. The old writ of mandamus was issued by the Supreme Court but this is by the High Court. This does not concern "revenue" directly, or immediately within the meaning of section 106: *Venkata Runga Pillay v. E. I. Co.*(3), *Hari Ranji v. The Secretary of State for India*(4).

The right is conferred by section 51 and the remedy is by section 45, Specific Relief Act; compare words "may" and "shall" in section 51. Section 131 (3) of Government of India Act empowers a repeal or modification of section 106.

A. Krishnaswami Ayyar (amicus curiae) for a similar assessee—Any point that arises on the facts of a particular case must be referred to the High Court because it is relevant and therefore "necessary" for the decision of the case. The Board is not a Court of construction, for then the provision for reference to the High Court will be unnecessary: *Board of Education v. Rice*(5), *Rex v. Board of Education*(6), *Melbourne Tramway and Omnibus Co. v. Fitzroy Corporation*(7) and *The Queen v. Boteler*(8). "Necessary" in section 51 does not mean "necessary" in the Board's opinion but "necessary for the disposal of the case": *R. v. Cotham*(9), *Rex v. Stepney Corporation*(10), *The Queen v. Vestry of St. Pancras*(11), *Julius v. Lord Bishop of Oxford*(12) does not touch the point.

"Unnecessary" in clause (2) means "does not arise in the case"; see *Reg v. Mayor and Corporation of Newcastle-on-Tyne*(13), as to limited discretions.

"Frivolous" means abusive of the process of Court: *Young v. Holloway*(14), *Dyson v. Attorney-General*(15) and *Attorney-General v. North Metropolitan Tramways Company*(16). The jurisdiction of High Court which is invoked under section 106 is

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| (1) (1899) I.L.R., 22 Mad., 68 (F.B.). | (2) (1883) I.L.R., 9 Cal., 395 (P.O.). |
| (3) (1850) 1 Strange, 153. | (4) (1882) I.L.R., 4 Mad., 344, 354. |
| (5) [1911] A.C., 179. | (6) [1910] 2 K.B., 165, 179. |
| (7) [1901] A.C., 153, 161. | (8) (1864) 4 B. & S., 959; n.c., 122 E.R., 718. |
| (9) [1898] 1 Q.B., 802. | (10) [1902] 1 K.B., 317. |
| (11) (1890) 24 Q.B.D., 371. | (12) (1880) 5 App. Cas., 214, 222. |
| (13) (1889) 60 L.T. (N.S.), 963, 965. | (14) [1895] P., 87, 90. |
| (15) [1911] 1 K.B., 410, 420. | (16) [1892] 3 Ch., 70. |

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not "original" but appellate or supplemental; see *Maharaja Birendrakishor Manikya Bahadur v. Secretary of State for India* (1). See section 106 (2) and articles 11 and 12 of Letters Patent as to the various jurisdictions of the High Court. This is like a reference under the Stamp Act, section 57; otherwise section 57 would have to be held as repealed by section 106. Section 106 (2) is an exception to section 106 (1) which refers to sections 11 and 12 of the Letters Patent.

C. P. Ramaswami Ayyar in reply—Section 106 is not repealed either expressly or by necessary implication. Section 106 (1) last portion preserves to the High Court all the jurisdiction of the Supreme Court, which was purely "original" and never appellate; last portion of section 106 is not considered in *Maharaja Birendra Kishor Manickya Bahadur v. Secretary of State*(1). "Satisfied" in section 51 means "satisfied" according to the Board and not according to the Court: see *Duke v. Rameswar Malia*(2), *Stockton and Darlington Railway Company v. Brown*(3), *Harward v. Guardians of the poor of the Hackney Union and Frost Relieving Officer*(4), *Wilkinson v. Hull, etc., Railway and Dock Company*(5), and *Jones v. Robson*(6). "Necessary" in section 51 means necessary in the opinion of the Board: for that relates to the previous words therein, viz., "when a question has arisen." "Frivolous" means "petty," "trivial," "paltry," "trumpery" or "futile." "Necessary" means "indispensable."

WALLIS, C.J.—This is an Appeal from an order passed by WALLIS, C.J. KUMARASWAMI SASTRI, J., under section 45 of the Specific Relief Act directing the Chief Commissioner of Income-tax to make a reference to the High Court under section 51 of the Indian Income-tax Act, 1918, and raises questions of importance as to the jurisdiction of the High Court to make such an order. The case has been very fully argued before us by the learned Advocate-General for the appellant, by Mr. Aingar for the respondent, and we also heard Mr. A. Krishnaswami Ayyar for other persons who have applications of a similar nature pending.

The powers conferred on a High Court by section 45 of the Specific Relief Act are in lieu of the power to issue the writ of

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| (1) (1920) 25 C.W.N., 80, 84, 85. | (2) (1899) I.L.R., 26 Cal., 811, 813. |
| (3) (1890) 2 H.L. Cas., 243. | (4) (1898) 14 T.L.R., 306. |
| (5) (1892) 20 Ch.D., 323, 331. | (6) [1901] 1 K.B., 673. |

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mandamus inherited from the Supreme Court which is taken away by section 50, and clause (h) of the proviso makes it clear that the section does not authorize the making of

"any order which is otherwise expressly excluded by any law for the time being in force."

The Advocate-General contended that the order under appeal is excluded by section 106 of the Government of India Act, 1915, and also relied on the provisions of section 52 of the Indian Income-tax Act which apparently were not brought to the notice of the learned Judge. The Government of India Act is a consolidating statute which in section 106 has re-enacted the prohibition which was expressly imposed upon the Supreme Court of Bengal in 1780, after the well-known conflict with Warren Hastings, and was applied by reference to the Supreme Courts of Madras and Bombay when they were erected in the early part of the last century. The prohibition as contained in section 8 of the East India Company Act, 1780, was in the following terms:

"The said Supreme Court shall not have or exercise any jurisdiction in any matter concerning the revenue or concerning any act or acts ordered or done in the collection thereof according to the usage and practice of the country or the regulations of the Governor-General in Council,"

and a very wide construction was put upon the section by the Privy Council in *Spooner v. Juddow* (1). This prohibition never applied to the Company's Courts and when the Supreme Court and the Sudder Courts were superseded by the High Courts under the Act of 1861 and the Letters Patent issued pursuant thereto, a question arose in *Collector of Sea Customs v. P. Chithambaram* (2) as to whether the prohibition still attached to the High Court in the exercise of the original jurisdiction conferred upon it. MORGAN, O.J., thought it did. INNES and KERNAN, JJ., thought it did not, though for different reasons. The framers of the Government of India Act, 1915, were obviously of the same opinion as MORGAN, C.J., as they treated the prohibition as still in force and re-enacted it in section 106 of the Government of India Act as follows:

"The High Courts have not and may not exercise any original jurisdiction in any matter concerning the revenue or concerning any

Act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force."

The only difference is that whereas the Act of 1780 said that the Supreme Court should not have or exercise any jurisdiction, the new Act says the High Court has not and may not exercise any original jurisdiction in any matter concerning the revenue.

Now, the issuing of the writ of mandamus to secure the performance of a public duty where no adequate remedy existed by action or otherwise was, it seems to me, clearly an exercise of original jurisdiction. It was a proceeding originating in the Court issuing it, and might be directed in a proper case to any class of public officer, executive or judicial. It must also be regarded as having been within the original jurisdiction of the Supreme Court because that Court had no appellate jurisdiction. Similarly, I think that the substituted jurisdiction to issue orders under section 45 of the Specific Relief Act is original jurisdiction. It may in terms be directed to any person holding a public office, and to any corporation, as well as to any inferior Court of Judicature. The nature of the jurisdiction exercised is the same in each case, and must, in my opinion, be considered an exercise of original jurisdiction. If this be so, I am unable with great respect to agree with the learned Judge that in making the order prayed for, we should not be exercising original jurisdiction "in a matter concerning the revenue." The case appears to me to come within the plain meaning of the section and this was not very seriously disputed. The learned Judge has referred to some observations of Sir Thomas Strange in *Venkata Runga Pillai v. E.I. Co.* (1), but his attention does not appear to have been called to the very wide interpretation put upon the section by the Privy Council in *Spooner v. Juddow* (2).

As already observed, the effect of the proviso to section 45 was to leave old statutory restrictions in full force. This, however, was not one of the statutory provisions which the Indian Legislature was prohibited from altering under the Indian Councils Act, 1861, and section 131 (3) of the Government of India Act, 1915, and the fifth schedule thereto, expressly recognizes the power of the Indian Legislature to repeal or alter

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(1) (1850) 4 M.I.A., 358.

(2) (1876) I.L.R., 1 Mad., 89 (F.B.).

(1) (1808) 1 Strange, 158.

(2) (1850) 4 M.I.A., 358.

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the provisions of section 106. Now, these provisions have been to some extent altered by section 51 of the Indian Income-tax Act, 1918, which obviously confers jurisdiction on the High Court to proceed on a reference from a revenue authority under the provisions of the section. That section not only enables the Revenue authority to make a reference to the High Court but requires it to do so "unless it is satisfied that the application is frivolous or that the reference is unnecessary."

The question then is whether we have any jurisdiction to issue any order to the Chief Revenue Authority under section 45 of the Specific Relief Act with a view to enforcing the due discharge of the duty imposed upon it by the section, and in dealing with this question we have to consider, not only section 106 of the Government of India Act but also the provision of section 52 of the Income-tax Act itself, which provides that no prosecution, suit or other proceeding shall lie against any Government officer for anything in good faith done or intended to be done under this Act. That an application for an order under section 45 of the Specific Relief Act against the Chief Revenue officer is a proceeding against him within the meaning of the section appears to be settled by the high authority of *BOWEN and KAY, L.JJ.*, in *In Re Onward Building Society*(1), where an application against a liquidator of a company directing him to register shares was held to be within the prohibition in section 87 of the Companies' Act against proceeding with any "suit, action or other proceeding against the company." Lord Justice BOWEN said:

"The question whether a proceeding under section 35 is a proceeding against the company appears to me to admit of but one answer, viz., that it is. That section gives a summary mode of enforcing rights which might have been prosecuted by a suit in chancery or possibly by an action for a mandamus at common law. It would be impossible to say that if the circuitious proceeding would have been a proceeding against the company, that the compendious one is not so also."

KAY, L.J., also uses language showing that he regarded an application for a mandamus as a proceeding against the company. Consequently, independently of section 106 of the

Government of India Act, section 52 of the Income-tax Act prohibits among other things any application against the Chief Revenue Authority under section 45 of the Specific Relief Act in respect of "anything done by him in good faith." That the words "anything done" in an Act of this kind include also anything omitted to be done is also well settled: See *Jolliffe v. Wallasey Local Board*(1) and *The Queen v. Williams*(2) and the provision in section 3 (2) of the General Clauses Act, 1897, that "words which refer to acts done extend also to illegal omissions."

There is no suggestion of any want of good faith on the part of the Chief Revenue Commissioner in the present case, and therefore the present proceeding is, in my opinion, prohibited by the express terms of section 52 of the Act itself. The effect of section 52 is to extend to subordinate Courts and to the High Court in the exercise of its appellate jurisdiction the prohibition imposed upon the High Court in the exercise of its original jurisdiction by section 106 of the Government of India Act as regards acts done by the revenue authority in good faith. Further, as at present advised, I am not satisfied that there are any sufficient grounds for holding that the effect of section 51 is to partially repeal section 106 even to the limited extent of allowing the High Court to exercise original jurisdiction when there are allegations of bad faith. It is, however, unnecessary to decide this question.

Much argument has been addressed to us as to the nature of the duty imposed on the Chief Revenue Authority and as to the meaning of the words "frivolous" and "unnecessary." In particular it has been argued that unless he is satisfied that the application is frivolous he is bound to make the reference unless the point in his opinion either does not arise or has already been decided. The ordinary legal meaning of the word "necessary" as appears from Stroud's Judicial Dictionary is "reasonably required for the disposal of the case," and I am not satisfied that it was intended to use the word in the section in any more restricted sense. In England, the assessee can ordinarily claim to have a case stated as of right, but 5 and 6 Geo. V, Ch. 89, section 42, dealing with the excess profits tax, provides that the

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(1) [1891] 2 Q.B. 468.

(1) (1896) I.L.R., 9 O.P.

(2) (1884) 9 App. Cas., 418, 438.

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Commissioners "unless they are of opinion that the application is frivolous or vexatious or relates to a matter already decided by the Board of Referees" shall refer the case to a Board. I think it is very likely that this part of section 51 was modelled on that section, and that the legislature substituted the word "necessary" with the intention of giving the Revenue Authority a wider discretion.

As regards this particular case, I will only say that while the Commissioner has rightly based his decision on the language of the Indian section, which differs materially from the corresponding section of the English Act, he has fallen into error in supposing that in *Imambandi v. Mutsaddi*(1) the Privy Council deprecated the practice of referring to English decisions which are the basis of so much of our law in India. The decisions in question were American decisions and were correctly described as foreign, an adjective which is inapplicable and would certainly not have been applied by the Privy Council to the decisions of the English Courts. As regards income-tax, the Indian Act generally follows the lines of the English Act, and where the provisions are similar English decisions are the best guide to their meaning. The Revenue authority no doubt may not always find it easy to apply them, and that is one reason why the Act empowers and requires it to make a reference to the High Court in appropriate cases. The Appeal must be allowed and the application dismissed with costs throughout.

OLDFIELD, J.—I agree with the judgment just delivered and as regards the application of section 106, Government of India Act, 1915, have nothing to add.

The alternative ground, on which the judgment under Appeal has been supported, is that under section 51 (1), Act VII of 1918, the making of the reference asked for is in the words of the proviso to section 45, Specific Relief Act, "clearly incumbent" on the Chief Revenue Authority, against whom an order under the latter section is claimed; and it is thus necessary to consider the wording of the former closely, since it is on it and not on any general rule as to the duties imposed by other statutes in different or wider terms on public officers or public or associated bodies that our conclusion must rest; so far moreover as the

(1) (1918) L.R., 45 I.A., 78.

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numerous well-known cases which have been laid before us, require adherence to the principles of natural justice and an honest exercise of the discretion conferred, whatever the nature of the duty to be performed or the procedure to be employed, they are not in point, because their requirements were clearly fulfilled in the present case, the Commissioner of Income-tax, the authority concerned, having, as his order shows, heard counsel and having dealt adequately with the English decisions relied on.

It accordingly is not material that after distinguishing those decisions, he, further, in order to fortify his position, relied on the reference to foreign decisions in the judgment of the Judicial Committee in *Imambandi v. Mutsaddi*(1), as justifying a general refusal to follow those of the English Courts. In doing so he was perhaps influenced by the interpretation placed on that reference in one of the judgments in *Seeni Nadan v. Muthusamy Pillai*(2). But in view of the context and of the practice of the Judicial Committee I agree that the word "foreign" cannot have been used by it in the sense proposed and that the decisions of English Courts must, subject to all necessary exceptions, continue to afford guidance in India. In particular, where, as in the present case, a new statute expressed in exacter language, and it would appear administered in a stricter manner, than the former law is in question, the assistance afforded by English authorities on the construction of what are due allowances made for different wording and local conditions in many respects similar statutes, cannot safely be rejected; and further, as in cases in which a reference to this Court is found necessary that assistance will presumably be accepted here, the same foundation must be adopted for our decisions and those of the revenue authorities, if a consistent system of income-tax administration is to be reached.

To return to the section, decisions directly relevant to its construction have not been cited; and their absence is natural because the right conferred by it on the assessee corresponds with nothing in the previous Indian Income-tax Act and there is, so far as we have been shown, no provision in any other statute in the same or equivalent terms by which any similar duty is imposed. We have therefore in the absence of anything

(1) (1918) L.R., 45 I.A., 78.

(2) (1919) I.L.R., 42 Mad., 821 (F.B.).

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to modify, anything to alter, anything to qualify the language to construe it in its ordinary and natural sense—vide *Vestry of St. John Hampstead v. Cotton*(1); and the construction proposed before us by the assessee seems to be inconsistent with our doing so. The material part of section 51 (1) runs:

"The Chief Revenue authority shall refer any question on the application of the assessee unless it is satisfied that the application is frivolous or that a reference is unnecessary";

and it is with the latter alternative that we are directly concerned. For the assessee before us contends that "unnecessary" means only "unrelated to any issue arising necessarily in the course of assessment" and that the Court is to determine whether the issue in question is of that nature. There are two fundamental objections to this which I think are valid; firstly, that it refuses effect to the requirement that the Revenue authority shall be satisfied, substituting as the test of the necessity for the reference that this Court shall be so; and secondly, that it restricts the meaning of "unnecessary" inconsistently with the ordinary use of the word. On the first of these, there is no reason for assuming that, frivolous applications excepted, this Court has been given unrestricted jurisdiction, where previously it had none; on the second, it is the reference not the determination of the question referred which is described as unnecessary, and there is no reason for excluding from the class of questions under contemplation those which the Revenue authority in fact does determine unaided. Shortly, the assessee's argument would be justified if the section simply made a reference obligatory, unless it were unnecessary; and it could, if that had been the intention, have easily been worded in that way with a provision for an absolute right to appeal or to have a case stated. On the other hand if we leave to the Revenue authority which is entrusted with the assessment the duty of deciding whether and to what extent it requires assistance in making it, we give full effect to each part of the language employed. Accepting the latter alternative, I concur in allowing the Appeal and in the order proposed.

Solicitors *Messrs. Grant and Greatorex* for appellant:

Solicitors *Messrs. Brightwell and Moresby* for respondent:

N.B.

APPELLATE—CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and
Mr. Justice Oldfield.

PALANIAPPA CHETTY (SECOND RESPONDENT IN APPEAL SUIT
No. 98 OF 1919 IN THE HIGH COURT), PETITIONER,

1921,
March, 10.

v.

SUBRAMANIA CHETTY AND TWO OTHERS (APPELLANT RESPONDENTS Nos. 1 AND 3 IN APPEAL SUIT No. 98 OF 1918), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. IX, r. 13—Ex parte decree against one of the defendants—Appeal by another defendant against the decree of Original Court—Ex parte defendant, a party respondent in the appeal—Application to set aside ex parte decree made to the Appellate Court pending appeal, whether competent.

Where a decree was passed *ex parte* against one of the defendants, and an appeal against the decree preferred by another defendant was pending in the Appellate Court, an application by the former defendant to set aside the *ex parte* decree passed against him can be made only to the Original Court which passed the decree and not to the Appellate Court. *Sankara Bhatta v. Subra Bhatta*, (1907) I.L.R., 30 Mad., 535, distinguished; *Chenna Reddi v. Peddaobi Reddi*, (1909) I.L.R., 32 Mad., 416 (F.B.), applied.

PETITION praying the High Court to set aside the *ex parte* decree passed against the petitioner by the Court of the Temporary Subordinate Judge of Sivaganga, in Original Suit No. 95 of 1918, pending disposal of appeal No. 98 of 1919, preferred therefrom to the High Court.

A decree was passed by the Original Court *ex parte* against the petitioner who was the first defendant in the case, and after contest against the other defendant. The latter appealed to the High Court against the decree and impleaded the former defendant as one of the respondents to the Appeal. During the pendency of the Appeal in the High Court, the former, the *ex parte* defendant, filed in the High Court an application to set aside the *ex parte* decree. The respondents objected that the petition could not be made in the Appellate Court.

K. Ramachandran Ayyar and *K. S. Lakshmana Ayyar* for petitioner.

G. V. Anantakrishna Ayyar and *C. S. Vankata Achariyar* for respondents.

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The Court delivered the following JUDGMENT:

This is a petition by the second respondent in this Appeal under Order IX, rule 13, Civil Procedure Code, to set aside an *ex parte* decree obtained against him in the lower Court in the suit now under Appeal, and in support of this application reliance was placed on *Sankara Bhatta v. Subraya Bhatta*(1). That was a case in which the application was made after the appeal had been disposed of and the case is, therefore, distinguishable. That case, however, proceeds upon the ground that the filing of the Appeal divested the lower Court of the power to entertain that application. There was some warrant for that view in earlier decisions at the time when that judgment was given, but the matter has been abundantly considered since, and we think it must now be taken as settled, at any rate in all the other High Courts, that the mere filing of an Appeal does not take away the jurisdiction of the lower Court to entertain such an application as this. We may also observe that *Ramanathan Chetty v. Narayanan Chetty*(2), as to the proper Court to which a review application should be made and which was relied on in *Sankara Bhatta v. Subraya Bhatta*(1) was subsequently overruled by a Full Bench of this Court to which WALLIS, C.J. was a party [*Chenna Reddi v. Peddaobi Reddi*(3)]. This question has been elaborately considered in a number of recent cases [*Mathura Prasad v. Ram Charn Lal*(4), *Gajraj Mati Tiwarin v. Swami Nath Rai*(5) and *Kumud Nath Roy Chowdhury v. Jotindra Nath Chowdhury*(6)] and we are clearly of opinion, on the authority of these decisions and also of the Full Bench decision of this Court [*Chenna Reddi v. Peddaobi Reddi*(3)] that this application should have been made to the lower Court and not to this Court. Order IX, rule 13, expressly provides that the party may apply to the Court by which the decree was passed, and the petitioners were clearly wrong in presenting their petition to this Court pending the appeal, and ought to have gone to the lower Court. In the result, the petition will be returned to the petitioner to enable him to take such further action on it as he may be advised. The petitioner will pay counter-petitioner's costs.

K R.



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(3) (1909) I.L.R., 32 Mad., 416 (F.B.). (4) (1916) I.L.R., 37 All., 208.

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within section 36 of the Code of Civil Procedure, and the petition signed by the pleader but not signed by the party, is a duly presented petition even if neither the agent nor the pleader is a "recognized agent" within section 37. [*Judgment of the High Court reversed.*]

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CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 11—ss. 40 to 43, *Evidence Act* (I of 1872)—Sec. 43, *Specific Relief Act* (I of 1877)—*Judgment not inter partes, whether res judicata.*] A judgment operates as a bar only as between the parties thereto or their privies; hence a judgment in a suit by A against B a rival claimant for an office negating A's title as against B is no bar to a suit by A against a third party for the emoluments of the said office. It is only a piece of evidence on the question of title. *Gokul Mandar v. Padmanund Singh* (1902) I.L.R., 29 Cal., 707 (P.C.) and *Peari Mohan Shaha v. Durlavi Dasaya* (1913) 18 O.W.N., 954, followed. *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar* (1910) I.L.R., 38 Mad., 493 and *Ramamurti Dhora v. The Secretary of State for India in Council* (1918) I.L.R., 36 Mad., 141, overruled.

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Chief Commissioner of Income-tax v. Ramanathan Chettiar

(1921) I.L.R., 44 Mad. (S.B.), 768

HINDU LAW—Partition—Custom—*Patnibhaga—Morpu.*] A custom was found to exist among the Nattukottai Chettis inhabiting seven villages in the Madurai district of the Madras Presidency whereby when a Chetti during the life of his wife married another wife he appropriated out of his

property a portion, called *moopu*, for the first wife's maintenance, that portion descending to her son if she had one, and the rest of the property was notionally divided, one moiety going to the son or sons by the first wife, and the other moiety to the son or sons by the second wife. In a suit for partition brought by the only son of a first wife against his father and the sons by the second wife the Judicial Committee applied the custom, without, however, determining what the father's share would be in the circumstances, as the question did not arise before their Lordships. The authorities as to the custom of *patnibhaga*, or the division according to wives, considered. [*Judgment of the High Court reversed.*]

Palaniappa Chettiar v. Alagana Chetti ... (1921) I.L.R., 44 Mad. (P.C.), 740

HINDU LAW—Succession—*Bandhus—Maternal uncle—Father's sister's grandson—Preference among atma-bandhus.*] Under the Mitakshara law a maternal uncle succeeds in preference to a son of the paternal aunt's son. So held on the grounds that both claimants being *atma-bandhus*, the maternal uncle and the deceased were sapindas to each other, whereas the other claimant offered no pinda to the ancestors of the deceased, and the maternal uncle was the nearer in degree; a contention that the claimant who was *ex parte paterna* should be preferred to the claimant who was *ex parte materna* being rejected. Four propositions as to *bandhus* enunciated by the Madras High Court in *Muthusami v. Muttukumarasami* (1893) I.L.R., 16 Mad., 23, 80, approved, as furnishing a safe guide in the absence of any express authority varying the rule. *Sundarammal v. Rangasami Mudaliar* (1895) I.L.R., 18 Mad., 193, and *Balugami Pandithar v. Narayana Rau* (1897) I.L.R., 20 Mad., 342, so far as they held that among *bandhus* of the same class those *ex parte paterna* are to be preferred to those *ex parte materna*, disapproved. [*Judgment of the High Court reversed.*]

Vedachela Mudaliar v. Subramania Mudaliar ... (1921) I.L.R., 44 Mad. (P.C.), 758

— Suit by son for partition against father and father's alliance—*Alienation held not binding on son—Form of decree to be given to the son.*] If in a suit for partition by a son against his father and an alienee from the father, the Court holds the alienation not to be binding on the son, the son is entitled to get a decree for his share in the family properties without any condition being imposed on him to refund the consideration paid by the alienee to the father. *Sahu Ram Ghundar v. Bhup. Singh* (1917) I.L.R., 39 All., 87 (P.C.); I.L.R., 44 I.A., 126, applied. The dictum of MITTAL, J., in *Keer Hasmat Rai v. Sunder Das* (1885) I.L.R., 11 Cal., 830, not followed. Held further by SRINAGINI AYYAR, J., a son is bound to pay only such debt of his father as *exist* while they are joint; and a son getting a decree for partition becomes divided from his father as from the date of suit for partition. Any liability of the father to refund the consideration to the alienee arising as the result of the decree for partition is a liability for unliquidated damages and not a debt and even if it becomes a judgment-debt it is not a debt existing on the date of suit for partition.

Srinivasa Aiyangar v. Kuppuswami Aiyangar ... (1921) I.L.R., 44 Mad., 801

INDIAN INCOME-TAX ACT (VII of 1918), ss. 3, 33 (1)—*Non-resident foreigner having business connexion in British India—Assessability to income-tax in British India.* A person who is not a resident in British India, but to whom income arises or accrues through business connexions in British India is assessable to income-tax under sections 3 and 33 (1) of the Indian Income-tax Act (VII of 1918) whether he is a British subject or a foreigner. The provision in the latter section that such income shall be taxable in the name of the agent of any such person does not mean that it is not chargeable unless assessed in the name of an agent.

Chief Commissioner of Income-tax v. Bhanjee Ramjee & Co. ... (1921) I.L.R., 44 Mad. (S.B.), 773

INSOLVENCY ACT (PROVINCIAL) (III of 1907), ss. 4, 5 AND 47—*Civil Procedure Code (Act V of 1908), O. I, r. 3—Single petition by creditor to adjudicate debtors as insolvents—Debtors, members, of a joint Hindu family—Joint debt—Joint acts of insolvency—Single petition against joint debtors, whether maintainable—Multifariousness in suits—Test of.* The members of a joint Hindu family can be adjudicated insolvents on a single petition by a creditor if they are liable on a joint debt and have been guilty of a joint act or acts of insolvency. The test is whether, if the application were treated as a suit, the suit would be bad for multifariousness, that is, for misjoinder of different causes of action against different defendants; if no such objection can be successfully advanced, a single application for adjudication is maintainable. *Sarada Prasad Ukil v. Ram Sukh Chandra* (1905) 2 C.L.J., 318, dissented from.

Mamayya v. K. R. Rice Mill Co. ... (1921) I.L.R., 44 Mad., 810

LIMITATION ACT (INDIAN) (IX of 1908), ss. 4 AND 14—*Suit for dower—Period of limitation expiring during Christmas holidays—Suit filed in a Subordinate Judge's Court, on its Small Cause side on the re-opening day—Plaint, returned for want of jurisdiction on the Small Cause side—Plaint presented as an Original Suit in the same Court on its regular side—Limitation, bar of.* Where the period limited for the institution of a suit for dower expired on a day when the Court was closed for the Christmas holidays, and the suit was instituted on the re-opening day as a Small Cause suit in the Court of a Subordinate Judge on its Small Cause side and on the plaint being returned after some days for want of jurisdiction it was filed on the next day in the same Court as an original suit and the defendant pleaded that the suit was barred by limitation. *Held*, that the time during which the suit was pending on the Small Cause side of the Court and which the plaintiff was allowed to deduct under section 14 of the Limitation Act could not be tacked on to the period during which the Court was closed, under section 4 of the Act, so as to save the bar of limitation.

Ummathu v. Pathumma ... (1921) I.L.R., 44 Mad., 617

ARTS. 81 AND 62—Railways Act (Indian)

(IX of 1890), sec. 56—*Suit by consignor of goods for surplus sale-proceeds—Suit against the Company—Sale of goods under section 56 of the Railways Act—Suit for compensation, distinct from suit for surplus sale-proceeds—Money had, and received—Applicability of article 81 or 62, Limitation Act.* A suit

by the consignor of goods by a Railway Company for the recovery of the surplus sale-proceeds realized by the Company by sale of the goods under section 56 of the Indian Railways Act, is governed by article 62 and not article 81 of the Limitation Act. *M. & S.M.Ry. Co., Ltd. v. Haridoss Banmalidoss* (1918) I.L.R., 41 Mad., 871, referred to.

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RAILWAYS ACT (INDIAN) (IX of 1890), s. 56:—*See* LIMITATION ACT (IX of 1908), ARTS. 81 AND 62 ... 823

REGISTRATION (INDIAN) ACT (III of 1877), sec. 17—*Registration—Adoption—Authority to adopt—Whether document a will.* A Hindu about three weeks before his death executed a document which was headed by a statement that it was a will in favour of the executant's wife; by it the executant, after stating that he had long been seriously ill and had no issue, said, "I have consented to your adopting a son at your pleasure and conducting the management of the estate in the best manner. None of my heirs shall have cause to raise disputes touching this matter. This will has been executed by my consent." The document was not registered. After the executant's death his widow adopted a son to him. *Held*, that the document was merely an authority to adopt and not a will, and was therefore required to be registered by the last provision in section 17 of the Indian Registration Act, 1877. [Judgment of the High Court affirmed.]

Bheema Deo v. Behari Deo ... (1921) I.L.R., 44 Mad. (P.C.), 723

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PRIVY COUNCIL.*

JAGANNATHA BHEEMA DEO (PLAINTIFF),

1921,
May, 10.

v.

KUNJA BEHARI DEO (DEFENDANT).

[On Appeal from the High Court of Judicature
at Madras.]*Indian Registration Act (III of 1877), sec. 17—Registration—Adoption—
Authority to adopt—Whether document a will.*

A Hindu about three weeks before his death executed a document which was headed by a statement that it was a will in favour of the executant's wife; by it the executant, after stating that he had long been seriously ill and had no issue said, "I have consented to your adopting a son at your pleasure and conducting the management of the estate in the best manner. None of my heirs shall have cause to raise disputes touching this matter. This will has been executed by my consent." The document was not registered. After the executant's death his widow adopted a son to him.

Held, that the document was merely an authority to adopt and not a will, and was therefore required to be registered by the last provision in section 17 of the Indian Registration Act, 1877.

[*Judgment of the High Court affirmed.*]

APPEAL (No. 55 of 1920) from a judgment and decree of the High Court in Appeal No. 135 of 1917 (September 12, 1918) affirming a decree of the District Judge of Ganjān.

The suit was brought in 1916 by the appellant claiming to be the adopted son of Brojo Kishoro Deo who died on September 3, 1906, to obtain possession of the estate. The deceased was a Hindu governed by the Mitakshara, and on August 14, 1906, had executed a document headed by a statement that it was a will in favour of the executant's wife, and proceeding in the terms set out in the judgment of the Judicial Committee. In 1915 the widow adopted the appellant to her deceased husband. The power to adopt, according to the case made in the plaint, was given orally, also by the document above mentioned. The defendant by his written statement denied that any authority to adopt was given, and contended that the document was not a will but a mere power to adopt, and as such

* *Present*:—Viscount HALDANE, Lord ATKINSON and Sir JOHN EDGE.

SHEEMA DEO required registration under section 17 of the Indian Registration Act, 1877; he pleaded further that the estate had vested in him before the adoption was made and was not divested by the adoption.

The District Judge dismissed the suit; he found that no oral authority had been given and that the document was not a will, and was consequently inoperative for want of registration.

The High Court (WALLIS, C.J. and SESHAGIRI AYYAR, J.) affirmed that decision. The learned Judges were of opinion that the document contained no disposition of property, the powers of management being given merely as incidental to the power to adopt; upon the question of the divesting of the estate they held in favour of the plaintiff.

Kennworthy Brown (De Gruyther, K.C., with him) for the appellant.—The document was a will for the purpose of section 17 of the Registration Act, and consequently did not require registration. Not only does it clearly purport to be a will, and a will in favour of the executant's wife, but it provides that she is to have the management of the estate and the heirs are not to raise objection. The right of management given could be exercised by the widow before she chose to adopt, and cannot be regarded as merely incidental to the power to adopt. Even if the instrument was ineffective by reason of the Madras Impartible Estates Act (Madras Act II of 1904) it was none the less a will within the meaning of section 17. It was within the definition of a "will" in section 3 of Act V of 1881, a "legal declaration of the intention of the testator with respect to his property." The decision of the Board in *Mussumat Bhoom Moyee Debia v. Ram Kishore Acharj Choudhry*(1) is distinguishable, as the document in question was in terms simply an authority to adopt. So also in *Somasundara Mudaly v. Duraisami Mudaliar*(2), the document contained no power to manage the estate, nor any other disposition of it. *Seshamma v. Chennappa*(3), referred to in the High Court, is not applicable.

Hon. Sir William Finlay, K.C., and Parikh for the respondent.—The document is merely an authority to adopt, with power

(1) (1905) 10 M.J.A., 379, 380. (2) (1904) I.L.R., 27 Mad., 80.
(3) (1907) I.L.R., 30 Mad., 467.

ancillary to that authority; it is not a will and accordingly, **SHEEMA DEO** having regard to sections 17 and 49, conferred no power to **SHEEMA DEO** adopt in the absence of registration. (They were stopped.)

The JUDGMENT of their Lordships was delivered by

Viscount HALDANE.—This case is an important one, and but for a preliminary point on which it turns, might have been a long one. There is, however, a preliminary question which goes to the root of the Appeal. Sri Sri Brojo Kishore Deo executed a document in favour of his wife on the 14th August 1906. He called it a will; in the body of the document; but its only operative contents are to be found in the words which follow:

"I have been laid up with severe bodily illness for about the last seven months. Consequently having had serious misgivings, and not having until now been blessed with an heir-apparent for want of divine favour, I have consented to your adopting a son at your pleasure and conducting the management of the estate in the best manner. None of my heirs shall have cause to raise disputes touching this matter. This will has been executed with my consent."

It will be observed that what is said by the writer of the document is that having had serious misgivings, and not having been until now blessed with an heir-apparent, he has consented to his wife adopting a son at her pleasure, and conducting the management of the estate in the best manner. That standing by itself appears to their Lordships to be no more than a present authority to the wife to make an adoption, and there is nothing else of substance in the document. It may be that the writer was in a position under the law applicable to give her such power, but whether he was or was not, he purports to give her nothing else; for the references to property that occur in it are no more than consequences of the guardianship of the wife, and the character of being a will is not established independently of these. Their Lordships therefore agree with the learned Judges in the Court of Appeal in thinking that the document is not a will, but only a power to adopt, and as such ought to have been registered as being an authority to adopt a son, not conferred by a will within the meaning of section 17 of the Registration Act of 1877.

VISCOUNT
HALDANE.

BHERMA DEO
v.
BEHARI DEO.
—
Viscount
HALDANE.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellant: *Douglas Grant.*

Solicitors for respondent: *Chapman-Walker & Shephard.*

PRIVY COUNCIL.*

1921,
May 26.

THIRUVENKATASAMI IYENGAR AND ANOTHER
(DECREE-HOLDERS),

v.

PAVADAI PILLAI (EXECUTION DEBTORS).

[On Appeal from the High Court of Judicature
at Madras.]

Code of Civil Procedure (Act XIV of 1882), ss. 36, 37—"Pleader duly appointed"—Appointment of authorised agent—Signature to execution petition.

Where a party to a suit authorizes an agent by special power-of-attorney to appoint a pleader to sign execution petitions, a pleader so empowered by the agent, is a "pleader duly appointed to act on his" (the party's) "behalf," within section 36 of the Code of Civil Procedure, and the petition signed by the pleader but not signed by the party, is a duly presented petition even if neither the agent nor the pleader is a "recognized agent" within section 37.

[Judgment of the High Court reversed.]

APPEAL from a judgment and decree of the High Court (November 25, 1910) affirming a decree of the Subordinate Judge of Kumbakonam.

The appellants, the panchayatdars or trustees of a temple, held a decree for mesne profits against the respondents, or their predecessors, for mesne profits. In 1905, the then trustees petitioned for execution of the decree. The petition was signed on their behalf by one Raghava Naicker and their duly authorized agent and by the first-grade pleader whom he had retained acting under a special power-of-attorney from the trustees, authorizing him to "execute vakalat to vakils, to sign execution petitions." The defendants contended that the petition was

not duly presented, since neither it nor its pleader's retainer was signed by the trustees. On December 31, 1906, the Subordinate Judge rejected the objection. Subsequently, in the same proceedings, the judgment-debtors renewed their objection, and on this occasion the Subordinate Judge (on September 30, 1907), allowed it, and dismissed the petition.

On Appeal to the High Court the decision of the Subordinate Judge was affirmed. The learned Judges (SESHAGIRI AYYAR and NAPIER, JJ.) dealing with sections 33, 36 and 37 of the Code of Civil Procedure said:

"The decree-holders could not legally authorize the person who signed the vakalat to present the application for execution himself, and that being so he could not authorize any one else to do it."

Kenworthy Brown for the appellants.—The Subordinate Judge held in 1906 that the petition was duly presented, and rejected the present objection; he had no power subsequently to review or set aside his decision. But in any case the petition was signed by a "pleader duly appointed to act" who under section 36 had power to sign on behalf of the decree-holders. He did not purport to sign as a "recognized agent" under section 37, and it is not material that neither he nor Raghava Naicker were so. This was not a case of delegation of authority; Raghava Naicker was specially authorized to appoint a pleader on behalf of the trustees and did so. [Reference was made to *Badri Prasad v. Bhagwati Dhar*(1).

The respondents did not appear.

The JUDGMENT of their Lordships was delivered by

Lord ATKINSON.—This is an Appeal against the judgment and decree of the High Court of Judicature at Madras, dated the 25th November 1910, which affirmed the decree of the Subordinate Judge of Kumbakonam, dated the 30th September 1907, and made on an Execution Petition No. 279 of 1905.

The appellants are the panchayatdars or trustees of a temple, and as such hold a decree for mesne profits against the respondents or their predecessors-in-title. Their petition praying for the execution of this decree was dismissed by the Subordinate

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Lord
ATKINSON.

(1) (1894) I.L.R., 16 All., 240 (F.B.).

* Present:—Viscount HALDANE, Lord ATKINSON and Sir JOHN EDGE.

THIRUVAN-
KATASAMI
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v.
PAVADAI
PILLAI.
—
Lord
ATKINSON.

Judge, and his judgment was upheld by the High Court. From this latter decision, the decree-holders have brought this Appeal.

There were nine plaintiffs originally in the suit. All but three of them have died or resigned or been removed from the trusteeship.

The appellants, to use the words of section 37 of the Code of Civil Procedure, 1882, are resident within the local limits of jurisdiction of the Court within which limits the application by petition was to be made, and the sale applied for carried out. The case of the appellants does not come within any one of the sub-sections of section 37. The Execution Petition No. 279 of 1905 was not signed by any of the appellants. It was signed by a pleader appointed in writing to make the application embodied in the petition, and that writing was filed in the Court.

Both the High Court of Madras and the Subordinate Judge of Kumbakōnam held that this petition was not validly presented because, to use the words of the judgment of the High Court,

"the person who executed the vakalat to the pleader to act on his behalf was not a recognized agent of the decree-holder as defined under section 37 of the Civil Procedure Code, 1882, and could not have presented the application for execution himself. Under section 36 of the Civil Procedure Code, the pleader appointed can only do what might be done by the party on whose behalf he is appointed."

The only question for their Lordships' decision is whether the construction put upon sections 36 and 37 of the Code of Civil Procedure in this passage is their true construction. Their Lordships do not think it is their true construction for this reason: that it confounds the intending litigant, the pleader's client, with the intermediary by whom, as the agent of that litigant, the pleader is appointed to act on the litigant's behalf. The pleader is not appointed, on behalf of the intermediary or agent, to act on the agent's behalf, but by the agent on behalf of his principal, the litigant, to act on the litigant's behalf. The litigant is at once the principal of the agent and the client of the pleader. The lines of section 36 of the Code of Civil Procedure immediately preceding the proviso run thus:

"be made or done by the party in person or by his recognized agent or by a pleader duly appointed to act on his behalf."

The possessive pronoun *his* all through this sentence refers to the "*party*," i.e., the *litigant*, not the intermediary or agent.

This construction gives a reasonable and natural meaning to the provisions of section 36. The application is to be made or done by the party in person, or by the recognized agent of the party in person, or by the duly appointed pleader of the party in person, while the other construction would leave entirely uncovered the case where the party himself in person without the intervention of any agent duly appoints his own pleader to act on his own behalf.

In the present case, the appellants on the 8th September 1902, executed, not a general power-of-attorney, but a special power-of-attorney in favour of one Raghava Naicker, authorizing him on their behalf to, amongst other things,

"execute vakalat to vakils, to sign execution petitions, and put in affidavits and to conduct all necessary proceedings" in this suit. On the same day this same Raghava Naicker, the appellants' agent, authorized the pleader to appear in the Tanjore Court to present the execution petition verified by him; the agent, to examine witnesses, argue, etc. No doubt the words run: "to appear on my behalf in the Tanjore Court," and he describes himself as general agent of the appellants under a general power-of-attorney, but that was a misrecital. The power-of-attorney was not a general power-of-attorney, but a special one, and the words, "on my behalf," are misleading. The execution petition was to be presented on behalf of the appellants, they were the only persons who had the right to put the decree into execution and have the property of the debtors attached and sold.

Their Lordships are therefore of opinion that the judgment appealed from as well as that of the Subordinate Judge, which it affirmed, were erroneous and should be reversed, and a declaration made that the appellants' decree should be put into execution. They will humbly advise His Majesty accordingly.

The respondents will pay the costs of the Appeal.

Solicitors for appellants: T. L. Wilson & Co.

A.M.T.

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PRIVY COUNCIL.*

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v.

ALAGAN CHETTI AND OTHERS (DEFENDANTS).

[On Appeal from the High Court of Judicature
at Madras.]*Hindu Law—Partition—Custom—Patnibhaga—Moopu.*

A custom was found to exist among the Nattukkottai Chetties inhabiting seven villages in the Madura district of the Madras Presidency whereby when a Chetti during the life of his wife married another wife he appropriated out of his property a portion, called moopu, for the first wife's maintenance, that portion descending to her son if she had one, and the rest of the property was notionally divided, one moiety going to the son or sons by the first wife, and the other moiety to the son or sons by the second wife. In a suit for partition brought by the only son of a first wife against his father and the sons by the second wife the Judicial Committee applied the custom, without, however, determining what the father's share would be in the circumstances, as the question did not arise before their Lordships.

The authorities as to the custom of patnibhaga, or division according to wives, considered.

[Judgment of the High Court reversed.]

APPEAL (No. 32 of 1919) from a judgment and decree of the High Court (January 12, 1915) varying a decree of the Subordinate Judge of Madura (December 23, 1911).

The parties to the litigation were members of a Hindu joint family belonging to the caste of Athangudi Chettis and were resident at a village called Vallalapatti in the Madura district. The suit was brought by the appellant against the respondents, his father and half brothers by a second wife, for partition.

By paragraphs 6 and 13 of his plaint, the appellant alleged a custom of his caste resident at Vallalapatti and certain other villages in the terms set out in the judgment of the Judicial Committee. By paragraph 7, he relied on an agreement, which "following the custom," was executed by his father in 1885 before marrying his second wife, stipulating to

* Present:—Lord SHAW, Lord PHILLIMORE, Sir JOHN EDEE and Mr. AMEEB ALI.

give for the jeshtabhagam of his male children by his first wife certain properties and Rs. 500, and to divide and give a moiety of the remaining family properties. He prayed to recover the properties named as jeshtabhagam, also Rs. 500 for moopu, and to have it declared that he was entitled to a moiety of the remainder of the property; he also prayed, if the Court should be of opinion that the father was entitled to maintenance, for a direction for payment of a one-fifth share or otherwise.

The respondents by their written statements denied the appellant's right to a larger share than that allowed on partition by the ordinary Hindu Law.

Both Courts in India held that the agreement, which was not registered, was not enforceable; also, that the appellant was entitled to recover moopu. The present Appeal was confined to the validity and effect of the custom with regard to which oral and documentary evidence was adduced at the trial.

The Subordinate Judge held that a custom of the caste was proved whereby upon a second marriage the family property became divisible equally between the male issue of the two wives; he, however, was of opinion that the father could not be excluded from a share. He declared that the plaintiff was entitled to a one-third share.

The half-brothers (the present respondents 2—4) appealed to the High Court, and the plaintiff (the present appellant) filed cross-objections under Order XLI, rule 22, maintaining his right under the custom to a moiety of the property. The Appeal was allowed, it being held that the plaintiff was entitled to a one-sixth share only; in other respects the decree of the trial Judge was affirmed. The learned Judges (SANKARAN NAYAR and SPENCER, JJ.), came to the conclusion

"that division according to the number of wives having sons has not been established as a custom, and cannot be enforced in this case."

Macquisten, K.C., and Ingram for the appellant.—The evidence establishes that there is a caste custom in the villages referred to whereby on a second marriage the property was divisible according to wives. In the various instances proved the property has descended according to that custom, and there are no instances to the contrary. A custom of this nature

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is not unknown to Hindu Law, and is prevalent in Southern India: *Temmakal v. Subbammal*(1), *Sumrun Singh v. Khedun Singh*(2), *Strange's Hindu Law*, (1880 Edn.), Vol. 1, p. 205, Vol. 2, p. 357, *Mayne's Hindu Law*, 8th Edn., para. 473, n. Both Courts upheld the custom so far as related to the moopu, and the custom with regard to the shares on division rested on the same evidence. In any case, the appellant was entitled to a one-fifth, not only a one-sixth share. An additional sharer could not be introduced after suit; the institution of the suit operated as a severance of the joint status: *Suraj Narain v. Iqbal Narain* (3), *Girja Bai v. Sadashiv Dhundiraj*(4), *Kawal Narain v. Budh Singh*(5).

De Gruyther, K.C., and *Dube* for the respondents.—The custom which the trial Judge gave effect to, and which is now contended for, differs from that pleaded. In any case, the evidence does not establish a custom affecting the division of property. A custom varying the ordinary law applicable must be proved by clear and unambiguous evidence: *Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar*(6), *Abdul Hussein Khan v. Sona Dero*(7), and the custom relied on here differs so widely from the ordinary Hindu Law that particularly clear proof is requisite. Only four instances were attempted to be proved, and of those two only were supported by documents. It was not shown that property was actually divided in pursuance of the agreements relied on, and the agreements themselves indicate that there was no binding custom: *Rama Nand v. Surgiani*(8). The code of rules drawn up by the Nagarathars indicates at most that some such division of the property was regarded as a matter of social propriety. There is no reported case in which a custom of patnibhaga has been proved. In *Moottoovengadachellasamy Manigar v. Toombayasamy Maniagar*(9), decided by

(1) (1864) 2 M.H.C.R., 47. (2) (1814) 2 S.D.A. Beng., 116, 117.

(3) (1913) I.L.R., 35 All., 80 (P.C.); L.R., 40 I.A., 40.

(4) (1916) I.L.R., 43 Cal., 1031 (P.C.); L.R., 43 I.A., 151.

(5) (1917) I.L.R., 39 All., 496 (P.C.); L.R., 44 I.A., 159.

(6) (1872) 14 M.I.A., 570, 585.

(7) (1918) I.L.R., 45 Cal., 450 (P.C), 461; L.R., 45 I.A., 10, 15.

(8) (1894) I.L.R., 16 All., 221.

(9) (1849) 1 S.D.A. Mad., 27, 30.

the Sadr Dewani Adalat of Madras in 1849 and coming from Tinnevely, which adjoins Madura, it was held not to be deserving of recognition in that part of India. So far as the agreements show a provision for maintenance by a managing member of the joint family for his wife they show nothing conflicting with Hindu Law. A "Moopu" in the case of a Hindu marrying a second wife is in accordance with a very ancient part of Hindu Law: see *Bannerjee's Hindu Law of Marriage and Stridhan*, p. 136, *Strange's Hindu Law*, Vol. 1, p. 52, *Mitakshara* 2-11-2. It is for that reason, and the small sum involved, that the allowance of the moopu is not contested.

Macquisten, K.C., in reply, referred to the Indian Evidence Act (I of 1872), section 13, and *Kokla v. Piari Lal*(1), and pointed out that in *Moottoovengadachellasamy Manigar v. Toombayasamy Maniagar*(2) no evidence of a caste or family custom was adduced.

The JUDGMENT of their Lordships was delivered by

Lord PHILLIMORE.—The plaintiff in this case, the present appellant, instituted a suit for partition of family property against his father and three half-brothers. During the pendency of this suit, a fourth half-brother was born, and all these are defendants and respondents. The right of the plaintiff to have partition was not seriously questioned: the dispute concerns the extent of his share. The Subordinate Judge decreed to him a third share, but the High Court only gave him one-sixth, on the theory that the father would have one share, the plaintiff one, and each of his four step-brothers, one. There is a possible third view that the plaintiff should have one-fifth, his youngest born step-brother not being counted for a share, as having been born since the unequivocal statement by the plaintiff of his desire to have partition. But in the circumstances, their Lordships do not find it necessary to pronounce upon this contention.

It is not disputed that, according to the ordinary Hindu Law of the Mitakshara, upon the death of the father and a subsequent partition, the five children of the two marriages would each take an equal share, and that if there were a partition during

(1) (1918) I.L.R., 35 All., 502.

(2) (1849) 1 S.D.A. Mad., 28, 30.

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the father's lifetime, he would count as one with the five, so that the shares would be in sixes.

The appellant has contended before their Lordships that by the usage and custom of the sub-caste to which he belongs, the children of each wife take as a unit and sub-divide their share among themselves, so that he as the only son of the first marriage would, if his father were dead, be entitled to half, and each of the four half-brothers to an eighth. Applying this principle to partition during the father's lifetime, he now claims to divide the property into three shares, and take one for himself, leaving one-third for his four half-brothers, and one-third for his father. In addition, before the property was divided he claimed the sum of Rs. 600 as a first charge in his favour on the whole property as representing the moopu provided according to the caste custom for a first wife when her husband married a second time, and descending from her to her son or sons.

He did not in his plaint state the custom as to application on partition in the precise form in which he insisted upon it in his evidence, and in which it was found in his favour by the Subordinate Judge, and it has been contended by the respondents that this variation is fatal to his case.

The paragraphs of his plaint which relate to the partition are the following :

"6. It is the longstanding custom obtaining among the people of the said caste, that any one of the said caste desiring to marry a second wife during the lifetime of the first wife gets the assent of the first wife for it and sets apart certain properties suitable to his position for the *jeshtabhagam* of the male children by his first wife born or to be born, and divides the properties, giving one share to all the male children together by the first wife on one side and a share equal thereto to all the male children together by the second wife on the other, irrespective of one wife begetting a greater, and the other a less, number of male children."

"13. According to the custom of the caste, first defendant should live with his children by his second wife. Plaintiffs have no objection to make proper arrangements for him out of the common properties till his death if he were to claim separate maintenance, Plaintiffs believe that Rs. 20 per mensem will be a sufficient allowance for him."

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He also relied in paragraph 7 upon an agreement executed by his father on the occasion of his second marriage, which he asserted was made in pursuance of the custom by which the father stipulated that he would give for the *jeshtabhagam*, which seems practically the same thing as the *moopu*, the Rs. 600 or their equivalent, and further stipulated to divide the remaining family property between the families of his two wives, giving each a moiety.

When it came to giving evidence it appeared that there were few known instances of partition during the father's lifetime, and that there was a lack of authority for the contention that the father was in such a case reduced to maintenance, as contended by the plaintiff in paragraph 13 of his plaint. The evidence offered mainly related to division after the father's death and to the caste custom applying in this event.

It appears to their Lordships that the case in the Court of first instance was conducted upon this footing, and that what the Court was asked to decide was whether the caste custom as to division after the father's death was or was not a proved and binding custom ; and that the mode of partition during the lifetime of the father was treated as consequential upon the custom, so that the plaintiff would not be precluded by the language of his plaint from proving the custom which would operate upon the death of the father by reason of his having carried his claim too far and endeavoured to reduce the father's interest upon a partition in his lifetime to one of maintenance only. The Subordinate Judge who had control of the matter and could have allowed an amendment in the pleading, if it were necessary, and if no injustice was thereby done, stated among others the following issues :

"(1) Whether the custom set up by the plaintiff is true and valid ; (8) To what share is the plaintiff entitled ?"

He found the first issue in the affirmative, and as to the eighth issue he said :

"8th issue.—The division is *as per* number of wives having sons. This will naturally be after the husband's death. In some cases to which plaintiff's exhibits relate, the husband has made a division retaining nothing for himself. It is open to him not to claim a share, but where the son enforces a partition, it can never be said that the father is not entitled to a share. The number of shares will be

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taken to be the number of wives having sons *plus* the father, if he is alive. So that, in this case, the property will have to be divided into three equal shares, of which the first plaintiff will be entitled to one-third, first defendant one-third, and defendants 2 to 4 and 24th, one-third. First plaintiff is therefore entitled to one-third share.

No doubt in their memorandum of appeal to the High Court the defendants took the objection that "the custom set up in paragraphs 6 and 13 of the plaint could not be split up piecemeal, and that the whole must stand or fall together." But there is no trace in the judgment of the High Court of this view having been taken by the learned Judges in that Court.

Their Lordships therefore think that it was open for the appellant to contend at their Bar, as he did, that the effect of the custom would entitle him on a partition effected during his father's lifetime to one-third.

This being so, it is necessary to look somewhat closely into the custom and to the evidence given in support of it, evidence which was accepted by the Subordinate Judge, but considered insufficient by the High Court.

That the two modes of division between sons are both known in Hindu Law is unquestionable. There are appropriate words for them. When the division is by number of sons, it is called *putrabhaga*, when the division is according to wives it is known as *patnibhaga*. That *putrabhaga* is now the recognized rule of Hindu Law is not to be questioned; but there are traces of the other view. In the appendix to Strange's Hindu Law, Vol. II, p. 351, the answer of the Pundit to whom the case concerning the Zilla of Chittoor was referred, states that there is much dispute in books as to which is the true view of division; and the Pundit in that case proceeded to decide in favour of the rule of division by wives as being the law in the superior castes and the custom in the Vaisya and Sudra castes. The parties in the particular case were, as it happened, Sudras. This decision, as a statement of the general Hindu Law, was incorrect, as is pointed out by Mr. Colebrooke and Mr. Ellis in their notes on the case; but both these writers agree that there might be such a custom, and that it would support the Pundit's opinion.

Strange himself, in the first volume of his book, the first edition of which was in 1825 and the second in 1880, speaks of

the two modes—*patnibhaga*, or division by wives, and *putrabhaga*, or division by sons. He speaks of the first as an "unnatural division," and says it

"is therefore allowed only among Sudras, nor among them but where there is a custom for it, which must, of course, be strictly proved, though it is said to prevail in the southern territories of India as much as did formerly the custom of gavelkind in Kent, thus to a certain extent but still in the Sudra class only superseding the law of the Sastras; and to this opinion the frequency with which references of the kind appear to have been made in the Courts of the company in the Peninsula seems to give countenance." (Vol. I, 1830 Edn., pp. 205, 206).

There being this divergence of thought, it is not wonderful, that in a land where there are so many customs, appropriate to certain areas of territory, families, or castes, though the prevailing law is that of *putrabhaga* there should be in certain cases a customary law of *patnibhaga*. As was observed by their Lordships in the case of *The Collector of Madura v. Moottoo Ramalinga Sathupathy*(1):

"Under the Hindu system of law clear proof of usage will outweigh the written text of the law."

Mayne in his Hindu Law (Edn. 7), para. 473, states the general law as the right to shares which pass by survivorship as follows:

"Each class will take *per stirpes* as regards every other class, but the members of the class take *per capita* as regards each other. This rule applies equally whether the sons are all by the same wife or by different wives."

But in a note he adds:

"In some families, however, a custom called *patnibhaga* prevails of dividing according to mothers, so that if A had two sons by his wife B and three sons by C, the property would be divided into moieties, one going to the sons by B, and the other to the sons by C: *Sumrun Singh v. Khedun Singh*(2). This practice prevails locally in Oudh, as evidenced by numerous *Wajib-ularz*, which I have seen in cases under appeal to the Privy Council."

The case before the Sudder Dewanny Adawlut to which Mayne refers carries him but a little way. It was decided in

(1) (1868) 12 M.I.A., 397, 486. (2) (1814) 3 S.D.A. Beng., 116, 117.

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1814, and held that two instances of the alleged peculiar usage of the family in which distribution had been regulated by the number of wives were not enough to prove the custom and that the general Hindu Law must prevail. However, it shows the existence of the idea.

Their Lordships have not been referred to any other authority for the existence of the custom in Northern India, but as regards Southern India, it seems fairly prevalent. Mr. Ellis, on page 357 of Vol. II of *Strange*, is quoted as speaking strongly of the prevalence of the custom in many parts of Southern India; and at page 167, a paper of his, written in 1812 is set out, in which he gives certain deviations by the Dravidian people from the ordinary Hindu Law, the third of which is as follows:

"The division of estates, in case of one person having several families by different women, among the families in equal shares without reference to the number of persons in each."

He explains all these deviations as showing that though the Brahmans were

"successful in extirpating the aboriginal religion of the South . . . they succeeded but partially in introducing the laws of the Smritis, and were obliged to permit many inveterate practices to continue . . ."

It is possible that the matriarchal theories of the earlier inhabitants of Southern India may have led to the prevalence of this custom and caused the difficulty in the way of its being extirpated by the Brahmans. If this theory were sound it would naturally lead us to expect that the extirpation of the custom would be less effective in the lower castes.

In the case of *Temmaikal v. Subbammal*(1), decided in 1864, it was held to be within the power of a guardian to refer to the panchayat the question which of the two principles of division should apply. Incidentally it may be mentioned, that the panchayat held that the division should be by mothers.

Their Lordships therefore have to approach the evidence in this case with a knowledge that such a custom does exist, and was not an improbable one in the particular case, the parties coming from Southern India and belonging to the sub-caste of Chettis. The Chettis are generally deemed to be Sudras. The

(1) (1864) 2 M.H.C.B., 47.

judgment in the High Court in this case describes the parties as Vaisyas, but apparently without any foundation for this in the evidence. The explanation for this may be, as was suggested at the Bar, that the Chettis now forming a prosperous class of the community are gradually claiming to be considered as Vaisyas; but whether they are Vaisyas or Sudras does not make much difference for the purpose of considering the probability of the custom.

The evidence offered for the plaintiff was to the effect that in seven villages, inhabited by this particular class of Chettis, there were several peculiar customs, two of them relating to the case where a man marries a second wife in the life of the first. One custom is that the first wife is entitled to have some property set aside for her maintenance which would descend to her son if she had one, and is then called *moopu*. The other, that the property is upon the second marriage, notionally divided, one moiety going to the sons of the first wife, and the other to the sons of the second. The custom further appears to have put some restriction on the liberty of a second marriage, and these marriages seem infrequent where the first wife has already a living son. It appears to be usual to execute an agreement or settlement, with the consent of the relatives and Nagarathars or villagers, represented by the heads of houses, providing for the *moopu*, and at the same time stating that the property will be or is divided in moieties between the two families. In this particular case, such an agreement or deed of settlement was produced and proved, and the plaintiff did alternatively base his case upon this agreement. It was said, however, and for the present purpose it may be taken, that the document being unregistered, could not be enforced as a conveyance.

This document, however, Exhibit C, is only one of a series of documents lettered to M, where provisions of a like character were made. The earliest is Exhibit M, and goes back to 1864. In that case the first wife had a son, but she was considered to be incapable of carrying on household affairs. The document proceeds to show that her relations had been consulted and that with their consent and with the consent of the wife the husband was building a separate house for her and her son, arranging to mess with each wife in turn, to allow the first wife and her son to take certain lands and goods as *stridhanam*, and that the

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rest of the man's property was to be divided one moiety to the first wife and the other moiety to the second.

The last document is Exhibit B, in 1900. Here the first wife had no children, and it is provided that there should be certain lands for her moopu, that should she have a male child, the land shall be appropriated for moopu, which apparently means that her son would succeed to it, and that the issues of the two marriages should take the properties remaining after excluding the moopu lands, in equal shares.

Various comments were made upon these documents by counsel for the respondents. It was suggested that several of them were mere agreements, and that it did not follow that they had ever been carried out: that where there was no son by the first marriage, the father, if at the moment separate from his family, was dominus of his property, and could arrange to placate his first wife by providing for her possible issue; it did not however appear that the father was separate from the other members of his family and in some cases he certainly was not. Then it was suggested that the very existence of these agreements proved that there was no legal custom, that it was a mere social usage and matter of propriety among the inhabitants of the seven villages that a partition of this kind should be made, and therefore it was occasionally made by people who wished to stand well with their neighbours. But on the other hand, the witnesses who speak to these documents, also give oral evidence to the effect that it was and had always been the custom in their villages that property should be divided in this way.

Two special settlements showing a different arrangement were produced by the defendants, but the cases were special, being cases where a senior wife adopted the child of a junior wife, and provision might have to be made for preventing the adopted son from getting a double portion. One settlement was put in where there was only a conditional moopu and no provision as to the sons. In this case there was no son by the first wife, and it was suggested that perhaps she had passed the age of probable child bearing. But with these exceptions there were no documents pointing to a different custom.

As to the oral evidence the case in favour of the custom largely outweighed the evidence against it. Except the

defendant, the father, no witnesses spoke without qualification to the negative. The father had executed this particular deed, and tried to get out of it by saying that it was not meant to be acted upon, but as a blind to induce his wife to consent to the second marriage. One of the defendant's witnesses said:-

"I do not know of any instance of partition according to the number of sons in all my seventy-five years' experience. I do not even remember to have heard of division by the number of sons."

As regards the argument that the existence of the several agreements shows that without them the law would have been otherwise, their Lordships on consideration are not inclined to attach much importance to it. It would be necessary to fix the moopu, and this being so, it would be convenient at the same time that the settlor should state his recognition of the custom. At any rate, the inference from the existence of settlements, that settlements are required, is not enough to outweigh the very positive evidence of the custom.

In the High Court it was said that there was no evidence that among the Chettis where settlements were not made division of property among male children *per stirpes* was observed; but the learned Judges must have omitted to notice some of the positive evidence given on both sides. Weight was also attached by them to a document drawn up in 1893 called an agreement between the Nagarathars of the seven villages, stating various matters of conduct and of business on which they desired to come to an agreement among themselves, such as that they would refer all their disputes to the Nagarathars and not have recourse to the magistrates or even to the village panchayat. One provision is thus expressed:

"Should any wish to take a second wife during the lifetime of his first wife, he shall do so after informing the Nagarathars of his village and after making sufficient provision for maintenance of his first wife. Any violation of this rule shall be communicated by the Nagarathars of that locality to the Nagarathars of all seven villages who shall all assemble at Navinapatti, and the party shall abide by their decision."

This no doubt does not state the custom now sought to be proved; but the document is not a record of laws, but a provision *de futuro* as to social conduct; and one of the witnesses

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says that the rules as to moopu and division were so well known that it was not necessary to express them.

The High Court have treated the case as if it were an attempt to set up a local custom, and say it would be unreasonable to impose it upon all persons dwelling in the area. But their Lordships conceive that the custom is one of the particular class of Chettis, who happen, it is true, to dwell in and probably are at the moment the only dwellers in the area of the seven villages.

It was pointed out for the appellant that when the High Court came to consider the second matter, said to be proved by custom, namely the giving of moopu, they thought that it was proved by the evidence oral and documentary. For the respondents, it was said that an arrangement similar to moopu was known to ordinary Hindu Law. This may or may not be so; but the High Court considered moopu as established by custom, and the evidence for the one matter is substantially as strong as for the other.

There is a curious possible effect of the custom upon general Hindu Law, which may have some day to be considered. Upon a partition during the father's lifetime, the general Hindu rule is that he gets a share equal to that of one son, which if the partition were by sons would be one-sixth. The effect, in the view taken by the Subordinate Judge, of a division patnibhaga is that the father counts for one share, and the children of each wife for one share, and so he gets one-third. Their Lordships, however, have not to determine this point. If the division is patnibhaga, the plaintiff as the only son of the first wife is certainly entitled to one-third. Their Lordships think that he proved the custom of patnibhaga, and that he was entitled first to the moopu (which the respondents do not now question), and secondly to a third share of the residue.

Their Lordships will therefore humbly advise His Majesty that the decree of the High Court be reversed, and the decree of the Subordinate Judge restored and that the appellant have the costs in the High Court and in the Privy Council.

Solicitor for appellant: *D. Graham Pole.*

Solicitor for respondents: *H. S. L. Polak.*

PRIVY COUNCIL.*

VEDACHELA MUDALIAR (DEFENDANT NO. 10),

v.

SUBBRAMANIA MUDALIAR (PLAINTIFF, SINCE DECEASED) AND
OTHERS [AND CONNECTED APPEAL].

1921,
July 7.

[On Appeal from the High Court of Judicature
at Madras.]

*Hindu Law—Succession—Bandhus—Maternal uncle—Father's sister's grandson
—Preference among atma-bandhus.*

Under the Mitakshara law a maternal uncle succeeds in preference to a son of the paternal aunt's son.

So held on the grounds that both claimants being *atma-bandhus*, the maternal uncle and the deceased were sapindas to each other, whereas the other claimant offered no pinda to the ancestors of the deceased, and the maternal uncle was the nearer in degree; a contention that the claimant who was *ex parte paterna* should be preferred to the claimant who was *ex parte materna* being rejected.

Four propositions as to bandhus enunciated by the Madras High Court in *Muttusami v. Muttukumarasami*, (1893) I.L.R., 16 Mad., 23, 30, approved, as furnishing a safe guide in the absence of any express authority varying the rule.

Sundrammal v. Rangasami Mudaliar, (1895) I.L.R., 18 Mad., 193, and *Balusami Pandithar v. Narayana Rau*, (1897) I.L.R., 20 Mad., 342, so far as they held that among bandhus of the same class those *ex parte paterna* are to be preferred to those *ex parte materna*, disapproved.

[Judgment of the High Court reversed.]

CONSOLIDATED APPEALS (No. 103 of 1916) from a judgment and decree of the High Court (January 22, 1913) reversing a decree of the Subordinate Judge of Tinnevely.

The suit related to the property of one Sankaramurthi Mudaliar, a Hindu governed by the Mitakshara. There were cross-appeals to the High Court, the two Appeals to the Privy Council being consolidated. The appellant (defendant No. 10) was the maternal uncle of the deceased; the first respondent (plaintiff, since deceased) was the son of a son of a paternal aunt. The relationship of the parties appears from the pedigree included in the judgment of the Judicial Committee. The sole

* Present:—Lord SHAW, Lord PHILLIMORE and Mr. AMER ALI.

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question for determination upon the Appeal was whether the appellant or the first respondent had the better right to succeed to the property.

The Subordinate Judge, after considering the authorities, held that the maternal uncle was entitled to succeed. He was of opinion that there was no foundation in the smritis for the view that among *atma-bandhus* those *ex parte paterna* succeeded in preference to those *ex parte materna*.

On an Appeal to the High Court the decision was reversed : See (1921) I.L.R., 41 Mad., 114.

MILLER, J., said :

"Both competitors then being in the class of *atma-bandhus*, the matter is in my opinion concluded by authority in this Court. In *Sundrammal v. Rangasami Mudaliar*(1) and *Balusami Pandithar v. Narayana Rru*(2) it was held that *bhandhus ex parte materna* are to be postponed to those *ex parte paterna*. The contest in the former case between the plaintiff and the third defendant closely resembles the position in the case before us and there (vide page 199) preference was given to the more distant paternal kinsman, over the nearer relative on the maternal side. In *Balusami Pandithar v. Narayana Rru*(2) the preference of *bandhus ex parte paterna* is said to be a fundamental principle of the law and the learned Judges support their statement of the law by a reference to *Sundrammal v. Rangasami Mudaliar*(1), and to a text of the *Saraswati Vilasa* from which they draw an inference opposed to the maternal *bandhus*. It is urged as detracting from the authority of this case, that the decision was also based on other grounds but that of course does not entitle us to treat this particular ground as unnecessary for the disposal of the matter. It is also suggested that the rule is not based on the authority of the smritis or any of the accepted commentaries, but even if that is so, it is not a sufficient reason why we should refuse to follow the course of decisions in this Court. As a matter of fact the result at which I arrive in the present case is in accord with the views of several learned writers on this very difficult branch of Hindu Law. The Subordinate Judge was in error in treating this decision as of no authority on the question in dispute."

SADASIWA AYYAR, J., also was of opinion that, according to the text of the *Mitakshara* and the authorities, the Appeal should be

(1) (1896) I.L.R., 18 Mad., 193. (2) (1897) I.L.R., 20 Mad., 342.

allowed. With regard to the rule laid down in the *Mitakshara*, he, however, made the observations set out in the judgment of the Judicial Committee, being of opinion that that text was not in accordance with the *sastras*.

Dube and *Hasra* for the appellant.—Both the appellant and the respondent were *atma-bandhus* according to the classes into which *bandhus* are divided in *Mitakshara*, Chapter II, section 6. The inheritance belongs to the appellant, as the nearest sapinda. He was nearer in blood and to be preferred having regard to the benefit which he conferred on the deceased by his offerings. The respondent would make no offerings to the ancestors of the deceased. The position of a maternal uncle as a very near sapinda, and as an *atma-bandhu*, is well established: *Gridhari Lall Roy v. The Bengal Government*(1), *Amrita Kumari Debi v. Lakshminarayan Chuckerbutty*(2), *Muttusami v. Muttukumarasami*(3) and *Mohandas v. Krishna bai*(4). Sapinda relationship depends upon community of blood, thus inheritance depends primarily upon degree: *Ramchandra Marland Waike v. Vinayak Venkatesh Kothekar*(5). The Board has however recognized that in finding the preferential heir the test to be applied is the capacity to offer oblations: *Buddha Singh v. Lallu Singh*(6). In the judgment of the High Court at Madras in *Muttusami v. Muttukumarasami*(3), which was affirmed by the Board the High Court laid down four propositions of which the fourth was that among *bandhus* of the same class "the spiritual benefit which they confer upon the propositus is, as stated in *Viramitrodaya*, a ground of preference." It was not necessary for the Board in appeal to consider that proposition, but no criticism of it was made. Whichever test is adopted here, the appellant succeeds. The High Court decided in favour of the respondent upon the ground that among *atma-bandhus* those *ex parte paterna* succeed before those *ex parte materna*. That view is not supported by principle, nor by any adequate authority.

The High Court in the present case relied on a statement in the judgment of that Court in *Balusami Pandithar v. Narayana*

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(1) (1848) 12 M.I.A., 448. (2) (1869) 2 B. L.R., 23 (F.R.).
(3) (1903) I.L.R., 18 Mad., 23, 30. (4) (1881) I.L.R., 5 Bom., 597.
(5) (1915) I.L.R., 42 Cal., 834 (P.O.); L.R., 41 I.A., 290.
(6) (1915) I.L.R., 37 All., 604 (P.O.); L.R., 42 I.A., 203.

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Rau(1), that it was a fundamental principle that among *bandhus* of the same class those who are *ex parte paterna* take before those who are *ex parte materna*. The passage in the *Saraswati Vilasa* which was given as an authority clearly means merely that the *pitru-bandhus* take before the *matru-bandhus*. In *Sundrammal v. Rangasami Mudaliar*(2), which also was relied on, no authority was cited for the view expressed; further, in that case the claimants in question were equal in propinquity. Because *pitru-bandhus* are preferred as a class to *matru-bandhus*, it cannot be inferred that *bandhus* in the same class take precedence according to whether they are *ex parte paterna* or *ex parte materna*. [Reference was also made to *Umashankar Prasad Parasari Mussumat v. Nageswari Koer*(3).]

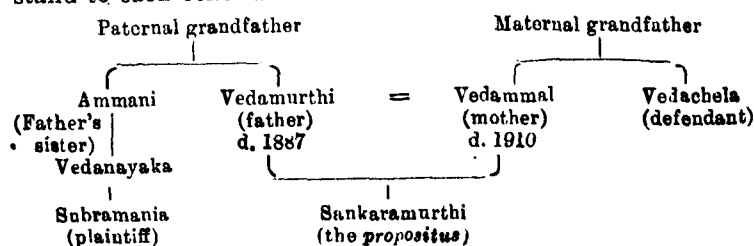
The respondents did not appear.

The JUDGMENT of their Lordships was delivered by

AMEER ALI.

Mr. AMEER ALI.—The two actions which have given rise to the present consolidated Appeal relate to the inheritance of one Sankaramurthi Mudaliar, a Hindu inhabitant of the Tinnevely district in the Madras Presidency, subject to the law of the Mitakshara as recognized in the Dravida country. The question for determination is of considerable importance and their Lordships cannot help regretting that, owing to the non-appearance of the respondents, it has been heard *ex parte*. Sankaramurthi died in 1900 without leaving any male issue or a widow. Consequently, on his death his mother, Vedammal, who was alive at the time, succeeded to his estate. She held the property until her own demise in 1910. Thereupon the two claimants, Subramania (since deceased) and Vedachela, came forward alleging title as *bandhus* to Sankaramurthi's inheritance, each claiming by virtue of his relationship to be preferentially entitled.

The following table will show the position in which they stand to each other and to Sankaramurthi:—



(1) (1897) I.L.R., 20 Mad., 342.

(2) (1895) I.L.R., 18 Mad., 198.

(3) (1918) 3 Patna L.J., 668 (F.B.).

Subramania brought his action on the 27th January 1911, in the Court of the Subordinate Judge of Tinnevely in which Vedachela was impleaded as the tenth defendant. The other defendants appear to be mainly assignees from Vedammal. Vedachela brought his suit shortly after, Subramania being the principal defendant.

The two suits were numbered respectively 6 and 15 of 1911, and were tried together before the Subordinate Judge. The primary question for him to determine was which of the two claimants, viz., the son of the paternal aunt's son or the maternal uncle, was entitled to the inheritance in preference to the other. The Subordinate Judge after examining the authorities came to the conclusion that the maternal uncle, Vedachela, had the superior title. He accordingly dismissed Subramania's suit and decreed Vedachela's claim. From his decrees there were two appeals to the High Court of Madras. The learned appeal Judges differed from the Subordinate Judge as to the respective rights of the parties, and accordingly reversed his decision in both the suits, the result being that Subramania's claim was allowed and Vedachela's was rejected. The present consolidated Appeal before the Board is from the judgment and decrees of the High Court.

The point for determination turns on the construction of the rule laid down in the Mitakshara as to the succession of *bandhus*, for which the English word "cognates" has been used as a synonym in English translations and treatises on Hindu law and in a long series of judgments. The history of the law relating to *bandhus* and the principles governing their right to inherit have been explained at considerable length in *Ramchandra Martand Waikar v. Vinayek Venkatesh Kothekar*(1). It is sufficient to observe here that under the Mitakshara the right of inheritance depends on sapinda relationship, in other words, "community of blood." Sapinda relations are divided into two groups, viz., samana-gotra sapindas (blood relations of the same gotra or stock) and bhinna-gotra sapindas (consanguineous relations belonging to another gotra), in other words blood relations connected through females who have passed into other families or gotras. The bhinna-gotra sapindas on whom the law confers the right of inheritance are the inheriting *bandhus*.

(1) (1915) I.L.R., 42 Cal., 884 (P.O.); L.R., 41 I.A., 291.

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The rule in the Mitakshara as to the succession of these *bandhus* is rendered into English by Mr. Colebrooke in the following words *:

"(1) On failure of agnates, the cognates are heirs. Cognates are of three kinds; related to the person himself, to his father, or to his mother as is declared by the following text: 'The sons of his own father's sister, the sons of his own mother's sister, and the sons of his maternal uncle, must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal uncles, must be reckoned his mother's cognate kindred.'

"(2) Here, by reason of near affinity, the cognate kindred of the deceased himself, are his successors in the first instance; on failure of them, his father's cognate kindred; or, if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended."

Mr. Colebrooke's rendering of the first part of paragraph 1 is a paraphrase of the original terms, *atma-bandhu*, (*pitri*) *pitru-bandhu* and (*matri*) *matru-ba-dhu*. Then what follows has been judicially construed to be merely illustrative of what the three classes severally mean. It will be noticed that in the enumeration of *bandhus* in this illustration, several important *bandhus*, such as the maternal uncle and sister's son, are omitted. The maternal uncle's position as an inheriting *bandhu* was established so early as the 16th century by Mitra Misra, whose well-known commentary on the Mitakshara named the Viramitrodaya is regarded as a high authority wherever the law of that school is in force. Mitra Misra gives first an exposition of the rule enunciated in the Mitakshara:

"On failure of the samanodakas the 'cognates' or '*bandhus*' are heirs. The cognates are of three descriptions: the cognates of a man himself, the cognates of the father, and the cognates of the mother. To this effect is the following passage of the Smriti: 'One's father's sister's sons, one's mother's sister's sons and one's maternal uncle's sons are known to be one's own cognates; the father's father's sister's sons, the father's mother's sister's sons and the father's maternal uncle's son are known to be the father's cognates;

the mother's father's sister's sons, the mother's mother's sister's sons and the mother's maternal uncle's sons are known to be the mother's cognates.'

"Amongst these also the order is, that, by reason of greater propinquity, first one's own cognates, after them the father's cognates, and after them the mother's cognates."

He then goes on to add:

"The term *bandhus* in the text of Vignaneswara and Yagnavalkya must comprehend also the maternal uncles and the rest, otherwise the maternal uncles and the rest would be omitted, and their sons would be entitled to inherit, and not they themselves, though nearer in the degree of affinity; a doctrine highly objectionable."

The Judicial Committee in *Gridhari Lall Roy v. The Bengal Government*(1), recognized the authority of the Viramitrodaya and acting upon its exposition, held that the maternal uncle, although not mentioned specifically in the illustration, was an inheriting *bandhu*. In that case, the contest was between the father's maternal uncle and the Crown claiming the property by escheat. The Board held that as the maternal uncle was a *bandhu* of the deceased, the father's maternal uncle was a *bandhu* of the father. The maternal uncle's place, however, among the *bandhus* of his own class was not defined, and he has had many battles to fight in consequence.

The Subordinate Judge in the present case has held that both the claimants are no doubt *atma-bandhus*, but that the maternal uncle, both on the ground of nearness of blood as well as superior efficacy of oblations, was the preferable heir. One part of his judgment deserves notice. Referring to *Gridhari Lall Roy's* case(1) he says as follows:

"Their Lordships relied on the passages quoted from the Viramitrodaya in that case as well as on the passage in the Mitakshara dealing with the property of a trader dying abroad. The reference here is to Vignaneswara's commentary on Sloka 264, Chapter 11 of Yagnavalkya. It occurs in the prakaranam (section) called Sambooya Samuthauam (concerns between partners). The sloka says that the property of a trader dying abroad goes to his (1) dayadis; (2) bhandavas; (3) gnatis; (4) returning partners, and on failure of these in order, to the king. Vignaneswara explains dayadis as 'sons and the rest,' bhandavas as 'on the mother's side the maternal

* Mitakshara, Chapter II, section 6, paragraph 1.

(1) (1868) 12 M. I.A., 448.

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uncle and the rest,' and the gnatis as 'gotraja sapindas as distinguished from the descendants.' It is clear from this that among the *bandhus* related through the mother, the mathula or maternal uncle takes the first place."

The learned Judges of the High Court on appeal proceeded on a different line. Mr. Justice MILLER felt himself constrained to follow certain previous decisions of his own Court in holding that the maternal uncle's claim must be overruled. His learned colleague, SADASIVA AYYAR, J., considered the passage in the Mitakshara laying down the order of succession among *bandhus* as 'spurious' and 'non-shastraic.' His view should be given in his own words:

"As I pointed out in the course of the arguments, the text is illogical, incomplete and inconsistent. However, it has to be accepted though, in my opinion, it is not a Shastraic text, for, I am bound by the authority of the Privy Council not to rely upon the more ancient and authoritative Shastras where the law has been settled by the Courts according to the custom and practice of the Hindu community resident in a certain Province, even though the custom is based upon less authoritative treatises. (The mother's sister's son is unconditionally stated to come under the term 'bhinna-gotra sapinda,' though very frequently he is of the same gotra as the propositus, that is when the mother and her sister have married husbands of the same gotra.) Though the *bandhus* are classified as *atma-bandhus*, *pitru-bandhus* and *matru-bandhus*, all three come in as heirs because they are *bandhus* of the propositus himself though the first class alone is technically called *atma-bandhus* (or own *bandhus*). With the greatest deference the fourth proposition laid down by Sir T. MUTTUSWAMI AYYAR, J., viz., that between *bandhus* of the same class the spiritual benefit they confer on the propositus is a ground of preference, does not commend itself to me, though guarded *obiter dicta* to the same effect are found in other learned judgments also both earlier and later in date than *Muttusami v. Muttukumarasami*(1). Some of the *pitru-bandhus* and *matru-bandhus* mentioned in the text itself confer no spiritual benefit whatever on the propositus, and I fully agree with those judicial observations which hold that according to the Mitakshara (and ignoring the Benares branch of that school) the question of spiritual benefit or of death pollution, or of the right of performance of

obsequial ceremonies, should not be introduced when considering the question of heirship. I go further and say that the introduction of such questions would lead only to inextricable confusion."

And the learned Judge went on to add:

"The enumeration in the Vridha Satatapa's text being clearly not exhaustive, several *bandhus* have been brought in by the decisions of the Courts even in precedence of the three *atma-bandhus* specially mentioned in the text (the said three being the father's sister's son, the mother's sister's son, and the mother's brother's son). When we once bring in others, *atma-bandhus* before *pitru-bandhus* it seems logical to hold that all *atma-bandhus* (lower in status to the three specially mentioned) should also be exhausted before even the first *pitru-bandhu* could come in. The only convenient and logical principle seems to me to so bring in all the *atma-bandhus*, though removed to the extreme limit of five degrees from the propositus, before bringing in a *pitru-bandhu*, though the latter may be removed by a less number of degrees from the propositus and (by the same analogy) to bring in all the *pitru-bandhus* even up to the fifth degree, before a *matru-bandhu*, though the latter is removed by less than five degrees."

It is hardly possible for their Lordships to pronounce an opinion on the authenticity of the passage condemned in such strong terms by a Hindu Judge. They can only observe that it appears to have been accepted by a series of commentators and by eminent Hindu Judges in the British Indian Courts. Any doubt at this stage as to its character or authority will, in their Lordship's opinion, lead only to perplexity and confusion. As regards the incompleteness of the rule, it is obvious that if the enumeration of *bandhus* was only intended by way of illustration the difficulty disappears, and the omission of such important *bandhus* as the mother's brother and the sister's son becomes easily intelligible, as both must have held in the social and religious system of the Hindus, a position which did not require a jurist's pronouncement to elucidate.

Respecting the learned Judge's view in the latter part of the passage quoted above, their Lordships do not consider they are called upon to express an opinion by the facts of the present case. Both the contestors are found to be *atma-bandhus*, and the sole question is who among the two is preferentially entitled to Sankaramurthi's inheritance. Recent writers on Hindu law

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have divided each class of *bandhus* into two sub-classes respectively designated as cognates *ex parte paterna*, and cognates *ex parte materna*. This subdivision is evidently based on an inference from the order in which the several *bandhus* are mentioned in the illustrative enumeration. For instance, among the *atma-bandhus* enumerated, the name of the father's sister's son is first given; then comes the mother's sister's son; and after him, the son of the mother's brother. Similarly, among the specifically named (*pitri*) *pitru-bandhus* first comes the son of the father's paternal aunt, and among (*matri*) *matru-bandhus* the son of the mother's paternal aunt. From this it has been inferred that the expounder of the rule in question intended that each class should be divided into two sub-classes according to the side of relationship, and that in every case preference should be given to the father's side. Their Lordships, again, in the view they take of the rights of the parties in the present case, do not think it necessary to express an opinion how far this proposition is in conformity with the express rule that in each class propinquity should be the governing factor. Assuming, however, the inference to be well-founded, the question arises, what is the place of the mother's brother among the *atma bandhus*? He is not specifically named; his sons are. He is unquestionably the nearest sapinda; and according to the ancient rule relating to sapinda descent, "to the nearest sapinda, the inheritance next belongs," he would undoubtedly be entitled to Sankaramurthi's estates, unless he is cut out, as the learned Judges of the Madras High Court have cut him out in favour of the paternal aunt's grandson, by the inferential application of a rule of preference in each class to a person not named at all in the text, but who certainly stands nearest to the deceased by sapinda relationship.

The earlier decisions of the Madras High Court throw no light on the question at issue. In *Narasimma v. Mangammal* (1), where the contest was between the mother's brother and the father's sister, preference was given to the maternal uncle. Again in *Chinnammal v. Venkatachala* (2), where the contest was between the maternal grandfather of the deceased on one side

and his paternal aunt on the other, the mother's father was preferred to the father's sister. In *Muttusami v. Muttukumara-sami* (1), the contest was between a maternal uncle of the half-blood and the father's paternal aunt's son. Mr. Justice MUTTUSWAMI AYYAR and Mr. Justice PARKER held in favour of the maternal uncle, and their view was affirmed by the Judicial Committee (*Muthusami Mudaliyar v. Simambedu Muthukumaraswami Mudaliyar* (2)).

It was in this case that the learned Judges laid down four broad principles for determining preferability among contending *bandhus*. (To one of these propositions Mr. Justice SADASIVA AYYAR, in the present case, has taken exception.) They say as follows:

"The conclusions we have come to are (1) that those who are bhinna-gotra sapindas or related through females born in or belonging to the family of the propositus are *bandhus*; (2) that as stated in the text of Vridha Satatapa or Baudhayana they are of three classes, viz., *atma-bandhus*, *pitru-bandhus* and *matru-bandhus*, and succeed in the order in which they are named; (3) that the examples given therein are intended to show the mode in which nearness of affinity is to be ascertained; and (4) that as between *bandhus* of the same class, the spiritual benefit they confer upon the propositus is, as stated in Viramitrodaya, a ground of preference."

In *Sundrammal v. Rangasami Mudaliyar* (3) there was a triangular contest. The third defendant was the deceased's mother's sister's son, the fourth and fifth defendants were the daughters of his two sisters, whilst the plaintiffs and two other defendants were the sons of the daughters of the deceased's paternal uncle. The learned Judges overruled the claim of the sisters' daughters, and of the mother's sister's son. In rejecting the latter's claim the learned Judges used the following terms:

"As between plaintiffs and the third defendant the latter is a *bandhu ex parte materna*, whilst the former are *bandhus ex parte paterna*. The decision in *Muttusami v. Muttukumarasami* (1) is not in point. There, the competition was between a maternal uncle and the father's paternal aunt's son, both of whom were bhinna-gotra sapindas and *bandhus*."

(1) (1893) I.L.R., 10 Mad., 23, 30.

(2) (1896) I.L.R., 19 Mad., 403 (P.C.); I.L.R., 23 I.A., 83.

(3) (1895) I.L.R., 18 Mad., 193.

(1) (1890) I.L.R., 13 Mad., 10. (2) (1892) I.L.R., 15 Mad., 421

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In *Balusami v. Narayana*(1), on which the decision of the High Court mainly rests, the contest was between the deceased's maternal uncle's son on one side, and the son of his sister's son on the other. The learned Judges of the High Court held that the latter was nearer in degree to the propositus than the maternal uncle's son. Among other reasons for this conclusion they state at the end of the judgment :

"another fundamental principle of the law in favour of the third defendant's preferable right is that among *bandhus* of a class, those who are *ex parte paterna* take before *bandhus ex parte materna*."

It is to be noticed that in *Balusami Pandithar v. Narayana Rau*(1), the learned Judges do not exclude from consideration in determining the question of preferability the fact of superior religious efficacy. They also recognize the high authority of the Viramitrodaya in the Mitakshara school.

The passage in the Mitakshara (Chapter II, section 6, paragraphs 1 and 2), which lays down the rules relating to the succession of *bandhus*, has already been quoted in a previous part of this judgment. It is expressly declared that among the classes, each takes precedence according to the order mentioned, viz., the deceased's *atma-bandhus* come first, the (*pitri*) *pitru-bandhus* (the father's *bandhus*) come next, and the (*matri*) *matru-bandhus* come last. The ground on which the rule is based is stated in express terms to be "nearness" of blood. "Here," the text says,

"by reason of nearness the *atma-bandhus* are his successors in the first instance," and so on.

In Southern India the Smriti Chandrika of Devananda Bhatta holds a parallel position to the Mayukha in the Bombay Presidency. Devananda Bhatta flourished before Mitra Misra, the author of the Viramitrodaya, for the latter frequently quotes Devananda. Although the Smriti Chandrika in the Southern Presidency is regarded as the most authoritative commentary on Vignaneswara's work, the Viramitrodaya holds, as in Western India, a high position. It supplements many gaps and omissions in the earlier commentaries, and illustrates and elucidates with logical preciseness the meaning of doubtful prescriptions.

(1) (1897) I.L.R., 20 Mad., 342.

The Smriti Chandrika (Chapter XI, section 5, paragraphs 13 to 15) states the rule as to the succession of *bandhus* in the following terms :

"13. Brihaspati bearing in mind all the above principles declares: 'Where there are many relatives (*jnatayah*), or remote kindred (*sakulyah*) or cognate kindred (*bandhavah*), whoever is nearest of kin, shall take the wealth of him, who dies without male issue.'"

"14. *Jnatayah sapindas*, or kinsmen connected by funeral oblations of food (*sakulyah*) *samanodakas* or distant kinsmen connected by libations of water (*bandhavah*) cognate kindred. A description of these is given, as follows, in a different Smriti, according to their order of relationship."

"The sons of his own father's sister, and the sons of his own mother's sister, and the sons of his maternal uncle must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt and the sons of his mother's maternal uncle, must be reckoned his mother's cognate kindred."

"15. Of the kinsmen, distant kinsmen, and cognate kindred, in default of one that stands nearest in the order expressly given, he that may be somehow viewed to stand on a par with him may be selected; it being generally declared by Gautama:—'Let those take the inheritance who give the funeral cake (*pinda*) who are the descendants from the same gotra, or who are sprung from the same Rishi.'"

The Sarasvati Vilasa, according to the editor of the *Vivada Chintamani*, is another work of authority in Southern India. It frequently refers to the Smriti Chandrika, and, consequently, its author must have flourished later than Devananda Bhatta. In the Sarasvati Vilasa, the principle relating to the succession of *bandhus* is thus given :

"Paragraph 595. The *bandhus* are mentioned in another Smriti in the order of their propinquity. The sons of one's father's sister, the sons of one's mother's sister, and the sons of one's mother's brother should be known as one's *atma-bandhus*. The son of one's father's father's sister, the sons of one's father's mother's sister, and the sons of one's father's mother's brother should be known as one's *pitru-bandhus*. The sons of one's mother's father's sister, the sons

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of one's mother's mother's sister, and the sons of one's mother's mother's brother should be known as *matru-bandhus*."

" Paragraph 596. These have a claim upon the wealth in default of the gotrajas."

" Paragraph 597. Even there, one's *atma-bandhus* take the wealth first by reason of their propinquity. In default of them, the *pitru-bandhus* take the wealth, and in default of them, the *matru-bandhus*. This order should be known."*

And then comes the passage on which the Judges in *Balusami Pandithar v. Narayana Rau*(1) relied in their division of *atma-bandhus* in two sub-classes, viz., *ex parte paterna* and *ex parte materna*. That passage runs thus :

" Paragraph 598. Nor could it be urged here that the mother being nearer than the father, the *matru-bandhus* take the wealth before the *pitru-bandhus*. From the text, 'of these the mother is more important than the father'; (2) the mother's precedence alone is stated and not that of the mother's *bandhus*. Therefore, we think it sound that the *matru-bandhus* should take the wealth only after the *pitru-bandhus*."

A very small consideration would show that that passage has nothing to do with the members of the same class *inter se*. It only explains why *pitru-bandhus* are to be preferred to *matru-bandhus*, the mother's position being special to herself under an express rule.

The passage in the Viramitrodaya bearing on the subject has already been referred to, but attention may once more be directed to the words of Mitra Misra in which he declares the position of the maternal uncle as an heir :

" otherwise the exclusion of the maternal uncle and the like would be the result. And it would be extremely improper that their sons are heirs, but they themselves though nearer are excluded."

Among modern writers both Golap Chandar Shastri (page 296) and Raj Coomar Sarbadhikary (page 726) affirm that nearness of blood is the governing principle in the succession of *bandhus*. The Shastri lays down the rule in the following words :

" (1) The nearness in degree on whichever side is to be preferred to one more remote ; (2) of those equal in degree, one related

* Setlar's Collection of Hindu Law Books on Inheritance, page 183.
(1) (1897) I.L.R., 20 Mad., 242.

on the father's side is to be preferred to one related on the mother's side ; (3) when the side is the same, the circumstance of one being related through a male and another through a female makes no difference."

And Professor Raj Coomar Sarbadhikary states that in a case of a contest between two members of the same class and of the same degree or equally remote, the question of efficacy of oblations "determines the preferable right." The tables of succession in Professor Sarbadhikary's lectures and in Mr. Mayne's and Mr. Bhattacharji's erudite works are very valuable in judging of the *bandhus* belonging to each class. But their Lordships are not satisfied that the place they have suggested for the maternal uncle in their respective tables of succession is correct.

Their Lordships think that, in the absence of any express authority varying the rule, the propositions enunciated in *Muttusami v. Muttukumarasami*(1) which, on appeal, was affirmed by the Judicial Committee, furnish a safe guide.

In the present case before their Lordships, the appellant and the deceased were sapindas to each other ; and the appellant is undoubtedly nearer in degree to the deceased than Subramania. He also offers oblations to his father and grandfather to whom the deceased was also bound to offer *pinda*. The deceased thus shares the merit, resulting from the appellant's oblations to the manes of his ancestors, whereas the father's sister's son's son offers no *pinda* to the deceased's ancestors. On all these grounds their Lordships think the view taken by the Subordinate Judge was well founded. They will therefore humbly advise His Majesty to reverse the judgment and decrees of the High Court and restore those of the first Court with costs.

Solicitor for appellant : *Douglas Grant*.

A.M.T.

(1) (1893) I.L.R., 16 Mad., 23, 30.

APPELLATE CIVIL—SPECIAL BENCH.

*Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling
and Mr. Justice Krishnan.*

1921,
April 19.

THE CHIEF COMMISSIONER OF INCOME-TAX, MADRAS,
REFERRING OFFICER,

v.

M. A. R. N. RAMANATHAN CHETTIAR
AND ANOTHER, ASSESSEES.*

*Excess Profits Duty Act (X of 1919)—Whether duty should be assessed within
the revenue year.*

Under the Excess Profits Duty Act (X of 1919) it is not necessary that
the duty should be assessed within the year for which the duty is payable.

CASE stated under section 51 of the Indian Income-tax Act
read with section 15 of the Excess Profits Duty Act (X of
1919) by the Deputy Commissioner and Secretary to the Chief
Commissioner of Income-tax, Madras.

All the material facts are set out in the Letter of Reference
which is as follows :

"I am directed by the Board of Revenue to submit, under section
51 of the Indian Income-tax Act read with section 15 of the Excess
Profits Duty Act, for the decision of the High Court, the question
of the legality of assessments to Excess Profits Duty made after
31st March 1920, which has arisen in the following case.

"2. M. A. R. N. Ramanathan Chettiar, Tanjore, was on 29th
March 1920 assessed to income-tax by the Collector of Tanjore on
Rs. 74,366, income derived from rice mill and rice trade during the
year 1918-19. As the income was above Rs. 30,000, a notice was
issued by the Collector on the same date (29th March 1920) to
the assessee to furnish within two months the particulars required
under section 11 of the Excess Profits Duty Act. The assessee
replied to this notice on 30th May 1920, and the Collector assessed
him to the Excess Profits Duty on 20th September 1920. The
assessee contends that the assessment is illegal because it was made
after 31st March 1920, and requests that the question may be referred
to the High Court for decision.

* Referred Case No. 2 of 1921.

"The question has been already raised before the Board and it
was decided that such assessments are legal: but in view of the
observation of the High Court in the judgment, dated 11th Novem-
ber 1920, in the *mandamus* application of the North Anantapur Gold
Mines, Limited, the Board considers that the question should now be
referred to the High Court.

"3. The assessee relies on section 19 of the Excess Profits Duty
Act and section 3 of the Super-tax Act (VIII of 1917). He argues
that because section 19 of the Excess Profits Duty Act directs that
where the profits of a business are chargeable to Excess Profits
Duty and to super-tax, only duty or tax, whichever is higher, shall be
charged, and because section 3 of the Super-tax Act (VIII of 1917)
directs that super-tax shall be charged, recovered and paid in each
year, the Excess Profits Duty also must be assessed in the year so as
to make it possible for the authorities to determine which sum is
larger and to levy it accordingly. In the Board's opinion the argu-
ment is very far-fetched. There is nothing in the Excess Profits
Duty Act itself to justify the inference that assessment under it
must be made before 1st April 1920, and the only rule which in any
way restricts the Collector's power in the matter is rule 24 (3), which
lays down that no proceedings for the recovery of any sum payable
under the Act or the rules shall be commenced after 31st March
1921, that is, assessment proceedings should be begun in sufficient
time to permit of steps being taken by this date for the recovery of
the duty. If the assessee's contention were correct, it might have
been expected that section (2) of the Act would have read:—"It shall
come into force on 1st April 1919 and shall remain in force until
31st March 1920.

"4. A reference to the provisions of the Revenue Acts in the
matter, for example, the Madras Irrigation Cess Act (VII of 1865)
and the Revenue Recovery Act (II of 1864), appears to lead to the
same conclusion. Section 1 of the Irrigation Cess Act specifically
restricts the time for the levy of water cess to one year succeeding
that in which the irrigation takes place. In the Revenue Recovery
Act there is no provision limiting the period within which land
revenue should be collected. These appear to show that when it is
intended to restrict the powers of the executive in the matter of the
collection of Government dues, such restrictions are clearly stated in
the legislation itself.

"5. The question now under reference was raised before the
Board in connexion with certain other Excess Profits Duty appeals
when two other arguments were adduced against the assessments;

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'(a) That the Act was temporary for one year and therefore the assessments should be made before 1st April 1920, and

'(b) That section 15 of the Excess Profits Duty Act, which makes certain sections of the Income-tax Act applicable to the Excess Profits Duty Act, omits section 25 under which the income escaping assessment in the year is assessable in the succeeding year.'

"(a) It is true that the Act was intended to be temporary, but temporary in the sense that it related only to the profits of one single year. See paragraph 2 of the Statement of Objects and Reasons, dated 13th December 1918, which runs thus:

"2. Although no guarantee can be given by the Government of India on the point, the change which has recently come over the military situation makes it possible that the sum raised by the duty will not be required for more than one year, and the duty is, therefore, imposed by the bill only on the profits of a single year (clauses 2 and 4). The proposed duty will absorb 50 per cent of the excess of the profits made in an accounting period of twelve months over a certain standard called in the bill the "Standard profits" (clause 4).

"In the Board's opinion there is nothing to suggest that the intention of the legislature was to limit the period within which the duty should be actually levied to one year as contended.

"(b) The argument here appears to be based on a misapprehension of the scope of the Income-tax Act. Under section 14 (2) of that Act, the tax shall be levied in respect of each year in that year, and section 25 provides for cases that escape in the year. The section of the Excess Profits Duty Act corresponding to section 14 (2) of the Income-tax Act is section 4 which makes no mention of the year in which the tax is to be levied and hence there was no necessity to make section 25 of the Income-tax Act applicable to the Excess Profits Act. The difference in the wording of these two sections seems further to support the Board's view.

"I am to add that the Board will be glad to furnish any further particulars that may be required by the High Court."

E. L. Thornton, A. Krishnaswami Ayyar, M. Patanjali Sastri and T. S. Krishnaswami Ayyangar for the assesses. The Income-tax Act, the Super-tax Act and the Excess Profits Duty Act must all be read together. "The two former Acts enjoin the levy of tax only within the year of the tax. The same rule applies to excess profits duty. If a person is liable to pay super-tax and excess profits duty, only that which

is higher can be levied; see section 19 of the Excess Profits Duty Act. In this case the party was not assessed to super-tax within the year; hence he cannot be charged with super-tax. Indefinite postponement of levy of tax is not contemplated.

The Advocate-General (C. P. Ramaswami Ayyar) with the *Government-Pleader (C. Madhavan Nayar)* for the Referring Officer.—The duty need not be levied within the year. The calculation of Excess Profits duty is a complicated matter. The Collector has to calculate the standard profits, the capital at the end of the accounting year and the income, in accordance with section 5 of the Excess Profits Duty Act. All these take a long time. The duty itself is imposed only in respect of the profits of one year, viz., 1918-19. The limitation of one year prescribed in the other Acts does not find a place in the Excess Profits Duty Act. The new provision in section 25 of the Income-tax Act that income of any year which has escaped taxation can be assessed in the following year is not repeated in the Excess Profits Duty Act for the reason abovementioned. The only limitation of time is that contained in section 30 (5) of the Income-tax Act which has been made applicable to the Excess Profits Duty Act.

OPINION.

The question referred to us is whether the Excess Profits Duty Act, 1919, requires the duty to be assessed within the year from the 1st April 1919 to 31st March 1920 for which the duty is imposed. A comparison of the Act with the earlier Income-tax Acts makes it quite clear that this was not the intention of the legislature. It is expressly provided in section 4 of the Indian Income-tax Act, 1886, section 8 of the Super-tax Act, 1917, and section 14 of the Income-tax Act, 1918, that the tax under each of these Acts shall be paid or collected in the year for which it is imposed and this necessarily implies that the assessment must also be within the year. Consequently under the Acts of 1886 and 1917, income which escaped assessment within the year went free, but in section 25 of the Act of 1918 it was for the first time provided that in cases governed by that Act it might be assessed in the following year, and the Super-tax Act, 1917, has recently been amended to the same effect. On the other hand, the Excess Profits Duty Act, 1919, which we have to construe, contains no provision that the tax

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is to be paid within the year but simply provides in section 4 that it is to be "charged, levied and paid," and the legislature whilst making sections 21 to 24, 26 and 27 as well as other sections of the Indian Income-tax Act, 1918, applicable in proceedings under this Act has omitted section 25 which, as already mentioned, provides for the assessment in the following year of income which has escaped assessment in any year. The omissions of any provision that the tax should be paid within the year and of any provision for the assessment of income which had escaped assessment in the year itself are conclusive indications that it was the intention of the legislature to depart from the scheme of the earlier Acts and not to require assessment and payment within the year. The reason, as pointed out by the learned Advocate-General, no doubt, was that the assessment of the standard profits under section 9 for the purposes of calculating the Excess Profits Duty was a complicated matter and in many cases could not be completed within the year. Consequently the legislature considered it a sufficient limitation to incorporate by reference, the provisions in section 80 (5) of the Indian Income-tax Act, 1918, that no proceedings for recovery of the tax should be taken after the expiration of one year from the last day of the year in which any demand is made under the Act.

It has, however, been argued that as the income with which we are dealing is not chargeable with super-tax under the Act of 1917 because it was not assessed to super-tax within the year, it must also be held exempt from excess profits duty under section 19 of the present Act. That section merely provides, for the protection of the tax-payer, that the profits of any business shall not be chargeable both with super-tax and excess profits duty, but with whichever is the higher, and has no application to a case in which profits are chargeable only with excess profits duty and not with super-tax. It does not relieve profits from the liability to excess profits duty imposed by section 4 unless such profits are chargeable with super-tax and the super-tax exceeds the excess profits duty. The answer must be that it is not necessary that the Excess Profits Duty should be assessed within the year. The assessee will pay cost to Crown Rs. 250.

N.R.

APPELLATE CIVIL—SPECIAL BENCH.

*Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling
and Mr. Justice Krishnan.*

THE CHIEF COMMISSIONER OF INCOME-TAX, MADRAS
(REFERRING OFFICER),

1921,
April 19.

v.

BHANJEE RAMJEE & Co. (ASSESSEE).*

*Indian Income-tax Act (VII of 1918), ss. 3, 33 (1)—Non-resident foreigner
having business connexion in British India—Assessability to income-tax in
British India.*

A person who is not a resident in British India, but to whom income arises or accrues through business connexions in British India is assessable to income-tax under sections 3 and 33 (1) of the Indian Income-tax Act (VII of 1918) whether he is a British subject or a foreigner.

The provision in the latter section that such income shall be taxable in the name of the agent of any such person does not mean that it is not chargeable unless assessed in the name of an agent.

CASE stated under section 51 of Act VII of 1918, by the Deputy Commissioner and Secretary to the Chief Commissioner of Income-tax, Madras, in his letter, dated the 11th February 1921, in pursuance of the order contained in the judgment of the High Court in the exercise of its Ordinary Original Civil Jurisdiction, and dated the 28th September 1920.

The Collector of Income-tax, Calicut, assessed the assessee on an income of Rs. 76,660. Against this the latter appealed to the Board of Revenue. The latter in dismissing the appeal stated:

"The appellants make the usual application that 'in case the opinion of the Board on the question of the legal liability of the petitioners' Company be against the petitioners' Company' the question should be referred to the High Court under section 51 of the Act. In the opinion of the Board it is unnecessary to make this reference and the question whether the decision of the Board is against or in favour of the Company is quite irrelevant in coming to a decision on the question whether a reference is necessary or not."

* Referred Case No. 4 of 1921.

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Thereupon, the assessee applied under section 45, Specific Relief Act of 1877, to the High Court in its Ordinary Original Jurisdiction for an order requiring the Chief Revenue authority in Madras to refer to the High Court, under section 51 of the Income-tax Act, the questions raised in the appeal. On this notice of motion KUMARASWAMI, J., ordered that the Chief Revenue authority should draw up a statement of the case and should "refer to the High Court the question whether the Collector of South Malabar had jurisdiction to assess the petitioner." The Board of Revenue then referred the matter to the High Court. The material portions of the Letter of Reference are as follows :

"2. Messrs. Bhanjee Ramjee & Co. have their head office at Mattancheri in the Native State of Cochin. The firm carries on trade with European firms in British Cochin. The contracts for the supply of goods are entered into and signed at the offices of firms in British Cochin and the goods are delivered at the jetties of the purchasers: the sale-proceeds are paid to the firm's agent or other duly authorized servant in cash in British India or by cheques which are cashed in Banks in British India.

"3. The Collector of Malabar is the proper officer who is to assess income arising or accruing in British Cochin (vide Logan's Manual, Volume III, pages 345-46).

"4. Section 1 (2) does not exclude from taxation the subjects of a Native State. Section 33 (1) specifically makes persons residing out of British India taxable and section 33 (2) makes specifically taxable a person who is neither a resident in British India nor a British subject.

"5. Under section 2 (5) since the assessee himself resides out of British India the Collector for the purpose of assessing his income must be taken to be the Collector of that area in which the business, from which the taxable income accrues, is done.

"6. Under section 33 (1) all profits or gains accruing or arising from any business connexion in British India are taxable, although the merchant is out of British India. For convenience the income-tax is to be charged in the name of the agent of such firm. Whether the firm has an agent or not in British India is a question of fact. The petitioner did not move the question before the Board of Revenue. He is not therefore entitled to move it before the High Court. Even supposing that he should have no agent this cannot render his income free of tax. As a matter of fact the assessee himself accepted service of the P.D. notice and appeared in answer to the E. notice

and it is not open to him now to plead that an irregularity, if any, in procedure invalidates the assessment. Nor is he prejudiced by the procedure adopted if it be held on the facts that he has a business connexion in British India. The petitioner's contention that he is a resident of a foreign state and does not carry on business by himself, or by agent who is within the jurisdiction of the Collector of Malabar, is therefore contradicted by the evidence.

"7. As stated above, the petitioner is dealing with European firms in British Cochin and his gain accrue within British India, and this constitutes in the opinion of the Board a business connexion from which profits or gains accrue within British India.

"It is not open to the petitioner to contest the facts on record in this reference although the question whether these facts do or do not constitute a 'business connexion' as intended by section 33 (1) may be a question of law for the decision of the High Court."

ON THIS REFERENCE

S. Srinivasa Ayyangar for the assessee.—My client does not reside in British India and therefore is not liable to pay income-tax. The petition to the Board states that I have no business in British India. I do not say his income does not accrue in British India. I say he is not liable to assessment and the Collector of Malabar has no jurisdiction. His principal place of business is Bombay. Reference made to sections 33, 34, 17 (2), 18, 20, *Rea v. General Income-tax Commissioners for Aldington*, *Ex parte A. M. Singer* (1) and *Rea v. General Income-tax Commissioners for Southampton*, *Ex parte W. Singer* (2).

Government Pleader (C. Madhavan Nayar) for the Referring Officer.—The assessee used to send an agent into British Cochin to enter into contracts, the cheques given were cashed in Banks situated in British India, and the money was kept by him in such Banks. This establishes that he has connexions in British India as required by section 33. It is admitted it is taxable income. Section 33 lays down the machinery. We have succeeded in getting at him even though we had the option of charging the agent. Reference was made to *Tischler & Co. v. Apthorpe* (3), and *Wells & Co. v. Colquhoun* (4).

(1) (1916) 114 L.T., 1170.

(2) (1916) 114 L.T., 1164; *supra*, (1916) 2 K.B., 249.

(3) (1895) 52 L.T., 814 at 816, 817. (4) (1898) 20 Q.B.D., 753 at 760.

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OPINION.

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The question which the Board was directed to refer is whether in the circumstances, the Collector of Malabar had jurisdiction to assess the petitioner. Now the income which is taxable under the Act is, as provided in section 3,

"All income from whatsoever source it is derived if it accrues or arises or is received in British India or is under the provisions of this Act, deemed to accrue or arise or to be received in British India,"

And under section 33 (1), in the case of any person residing out of British India,

"All profits or gains accruing or arising to such person whether directly or indirectly through or from any business connexion in British India shall be deemed to be income accruing or arising in British India."

and is consequently taxable under the express provisions of section 3. It makes no difference with regard to this section whether the non-resident entitled to the income is a British subject or a foreigner; in either case he is chargeable with the tax in British India. It has, however, been argued that because section 33 (1) not only provides that such profits and gains shall be deemed to be income accruing or arising within British India but goes on to provide that they

"shall be chargeable to income-tax in the name of the agent of any such person, and such agent shall be deemed to be the assessee in respect of such income-tax,"

the profits and gains in question are not chargeable unless they are assessed to income-tax in the name of an agent of the non-resident. This construction is not supported by the proviso immediately following:

"Provided that any arrears of tax may be recovered also in accordance with the provisions of this Act from any assets of the non-resident person, which are or may at any time come within British India,"

which supports the construction that the profits or gains are chargeable if they can be got at in British India whether they are assessed in the name of an agent of the non-resident or not. This was expressly decided on the corresponding section of the English Act by MATHEW and A. L. SMITH, JJ., in *Tischler v. Aphorpe*(1), which was approved by the Court of

(1) (1885) 52 L.T., 814.

Appeal in *Werle & Co. v. Colquhoun*(1), and it was held that a non-resident who had been himself assessed whilst in England had been properly assessed. All that the latter part of the section does is to provide machinery by which the tax can be levied where the non-resident cannot himself be got at.

In the present case, the petitioner resides and has his principal place of business in the Cochin State in Mattancherri, which adjoins British Cochin and practically forms one town with it, and the petitioner not only does a large part of his business in British Cochin as stated in the reference, but also accepted notices and submitted the necessary returns to the Collector of Malabar, of which British Cochin forms a part for income-tax purposes. The reference states that

"Contracts for the supply of goods are entered into and signed at the offices of firms in British Cochin and the goods are delivered at the jetties of the purchasers: the sale-proceeds are paid to the firm's agent or other duly authorized servant in cash in British India or by cheques which are cashed in Banks in British India."

In these circumstances, it seems clear that these are profits and gains arising to the petitioner through or from his business connexions in British India in respect of which he is assessable under the Act. The petitioner never set up the case that his principal place of business in British India was situate in Bombay and that therefore even as regards his gains and profits in British Cochin he ought to have been assessed by the Collector of Bombay by virtue of the definition of Collector in section 2 (5). His case was that the business in Bombay was carried on by another firm in which he was merely a partner and that there were no assessable profits or gains arising to him in British Cochin. If there were, he did not dispute the right of the Collector of Malabar to assess him in respect of them. On the contrary he submitted the necessary returns to the Collector of Malabar and did not raise this point either before the Collector or on his appeal to the Board of Revenue nor is it dealt with either in the order directing the reference or in the reference itself. In these circumstances it is not open to him to raise this question now, and it is unnecessary for us to consider it. The petitioner must pay the costs of the reference, Rs. 250.

M.H.H.

(1) (1888) 20 Q.B.D., 753.

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APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Spencer
and Mr. Justice Kumaraswami Sastri.

1921,
April 11.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
(DEFENDANT), APPELLANT,

v.

SYED AHMAD BADSHA BAHADUR (PLAINTIFF), RESPONDENT.*

Sec. 11, Civil Procedure Code (V of 1908), ss. 40 to 48 Evidence Act (I of 1872)—
s. 43, Specific Relief Act (I of 1877)—Judgment not inter parties, whether
res judicata.

A judgment operates as a bar only as between the parties thereto or their
privies; hence a judgment in a suit by A against B a rival claimant for an
office negating A's title as against B is no bar to a suit by A against a third
party for the emoluments of the said office. It is only a piece of evidence on
the question of title.

Gokul Mandar v. Pudmanund Singh, (1902) I.L.R., 29 Cal., 707 (P.C.) and
Peari Mohan Shaha v. Durlavi Dassya, (1913) 18 C.W.N., 954, followed.
Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar, (1910) I.L.R., 38 Mad., 483 and
Ramamurti Dhora v. The Secretary of State for India in Council, (1913) I.L.R.
36 Mad., 141, overruled.

SECOND APPEAL from the decree of P. N. SATAGOPA NAYUDU,
Subordinate Judge, in Appeal No. 186 of 1917, on the file of the
Subordinate Judge's Court of North Arcot, preferred against the
decree of A. RAMANATHA AYYAR, District Munsif, in Original Suit
No. 217 of 1916, on the file of the District Munsif's Court, Ranipet.

This was a suit to recover Rs. 394 from the Government,
alleged to have been spent by the plaintiff in 1915 for the per-
formance of a festival in connexion with the Asari Sheriff (relic
of the Prophet Muhammad) said to be in the possession of the
plaintiff. The plaintiff claimed a right to possess the Asari
Sheriff, to conduct an annual festival in connexion therewith as
being the successor in office to his father, and to recover from the
Government the emoluments attached thereto by the Govern-
ment. He alleged that his elder brother was a lunatic, that by
the usage of the institution the next person capable of holding

* Second Appeal No. 15 of 1920.

the office succeeded to that office, that he accordingly succeeded
to the office and performed the festival at a cost of Rs. 394 and
that the appointment by his father of his elder brother's son to
the office and its recognition by the Government were invalid.
The defendant pleaded that the plaintiff was not the lawful
successor to the office, that the plaintiff's nephew who was ap-
pointed by his father and who was recognized by the Government
was the lawful office-holder and that the plaintiff's claim to the
office was barred by *res judicata* as his title thereto was negated
in a former suit brought by him against the elder brother and his
son. The District Munsif dismissed the suit holding that it was
barred by *res judicata*. On appeal by the plaintiff, the Subordi-
nate Judge allowed the suit holding that as the parties were
different in both the suits, the suit was not barred by *res*
judicata. The defendant preferred a Second Appeal which was
heard by NAPIER and KRISHNAN, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

NAPIER, J.—The question which arises in this Appeal is one
of estoppel by a previous judgment. The suit was by one Syed
Ahmad against the Secretary of State to recover a sum of Rs. 394
alleged to be due to the plaintiff as a person entitled to possess
the Asari Sheriff and perform the services connected therewith
and to receive from Government the emoluments granted by
Government to the person so entitled. The defendant pleaded
that the plaintiff was not entitled to the office, his claim having
been negated by the judgment of the High Court in Second
Appeal No. 726 of 1913 and also that the suit was barred by
the rule of *res judicata*.

The issue framed was

"whether the plaintiff's right to the office in question is con-
cluded by reason of the decree in Second Appeal No. 726 of 1913,
on the file of the High Court."

The suit in that case was by the present plaintiff against two
other persons alleging that the plaintiff was entitled to perform the
Asari Sheriff service and to recover annually the emoluments of
Rs. 394 from Government without any objection by the defendants.
The second defendant was recognized by Government as the person
entitled to the emoluments. The Court of the Subordinate Judge
of North Arcot on appeal from the District Munsif in that suit held
against the plaintiff's right. It pointed out that the plaintiff did

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not claim the office by appointment either by Government or by the last holder of the office but only according to the Muhammadan law of succession to private property, and held that that law did not apply and that therefore the plaintiff had no title. In the Second Appeal to the High Court the judgment states as follows:

"It being clear that the plaintiff has no title to the office, the declaration of title to which was the principal relief claimed in the suit, his suit brought for that relief and other subsidiary reliefs was rightly dismissed by the Lower Appellate Court."

Dealing with the second issue in this case the District Munsif held that it was no longer open to him now to sue to recover the emoluments appertaining to the office, he being concluded by reason of the prior judgment. The Lower Appellate Court however held that the decision in the former suit did not operate as *res judicata*.

It must first be pointed out that no suggestion is made in this suit that the plaintiff's suit was barred under section 11, Code of Civil Procedure. This contention could not have been raised as the defendants in the prior suit were different. But the Lower Appellate Court is in error in supposing that this disposes of the question. It is contended that the judgment in the prior suit disposed of his claim and that the plaintiff cannot raise this question in another form. This proposition is established in *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar*(1), entirely apart from any question of section 11. The Bench there accepted the proposition that the relation established between the parties by a judgment is conclusive against third persons in the absence of fraud upon them. The prior suit having been between a person put forward by Government and the plaintiff, the decision as to title between them is binding on the defendant in this suit and must therefore be binding on the plaintiff on the well-known principle that estoppels must be mutual assuming always that *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar*(1) is rightly decided.

The same proposition was laid down in *Ramamurti Dhora v. The Secretary of State for India in Council*(2). There, the Bench adopted the view expressed in an unreported case, Second Appeal No. 574 of 1909, and restated the same

(1) (1910) I.L.R., 33 Mad., 483.

(2) (1913) I.L.R., 36 Mad., 141.

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proposition as was there laid down. On page 144, the learned Judges say:

"The question does not depend on the application of the doctrine of *res judicata* between the parties as expounded in section 13, Code of Civil Procedure (Old Code). That section does not cover all cases of estoppel by judgment."

On page 143 they say—

"The question relating to the ownership of the land was one entirely between the plaintiffs and the Barikis; and the Barikis having obtained judgment against the plaintiffs, third parties having no interest in the land at the time of the litigation cannot dispute a settlement of the dispute between them as to title, and it appears to us to be equally true that neither of the parties to the litigation can be permitted to aver as against third persons in the like position that the land belongs to himself and not to his opponent in the litigation."

The judgment, again, if correct, is conclusive of the plaintiff's claim.

It is suggested that these cases were wrongly decided, and reliance is placed on the judgment of the learned Chief Justice and SESHAGIRI AYYAR, J., in S. A. No. 1747 of 1919. The Court there says that the grounds on which *Ramamurti Dhora v. The Secretary of State for India in Council*(1), was decided were questioned in a judgment of the Calcutta High Court in *Peari Mohan Shaha v. Durlavi Dassya*(2), and the Court agreed with the view therein taken. The Court also refers to the judgment of the Privy Council in *Gokul Mandar v. Pudmanund Singh*(3), as laying down that the provisions of section 11, Civil Procedure Code, are exhaustive. With the greatest deference to the learned Chief Justice and SESHAGIRI AYYAR, J., I think that the language of the Board has been misconstrued. I do not think the Board ever intended to lay down that there was no such thing as an estoppel by judgment outside the Civil Procedure Code. I have elsewhere (in Second Appeal No. 1888 of 1919) expressed my opinion that under the Civil Procedure Code the question is not strictly one of estoppel and that therein lies the distinction between *res judicata* in India and before the Courts in England. Under the Code the Court is prohibited from trying any issue

(1) (1913) I.L.R., 36 Mad., 141.

(2) (1913) 18 C.W.N., 954.

(3) (1902) I.L.R., 29 Calc., 707 (P.O.).

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in which the matter directly and substantially in issue has been heard and finally decided by a previous Court. The section operates to bar the jurisdiction of the Court to try and goes farther than the principle under which a party is estopped from offering evidence on an issue. Dealing with this question of want of jurisdiction to try a case, the Board pointed out that the first Court must have jurisdiction to try the suit in which the issue is subsequently raised and that the words of the section could not be extended beyond their provision. I cannot read the words of the Board as meaning to lay down that consent decrees, decrees by default and other judgments in which the question at issue has not been heard and decided, cannot be pleaded as estoppels. In *In re South American and Mexican Company, Ex parte Bank of England*(1), Lord HERSCHELL delivering the judgment of the Court of Appeal stated with regard to a judgment by consent that it

"is intended to put a stop to litigation between the parties just as much as a judgment which results from the decision of the Court after the matter has been fought out to the end."

Therefore, I cannot think that the Board intended to lay down that there can be no estoppel by judgment outside the Civil Procedure Code.

In *Peari Mohan Shaha v. Durlavi Dassga*(2), JENKINS, C.J., and MOOKERJEE, J., seem to have thought that they were bound by the decision of the Privy Council in *Gokul Mandar v. Pulmanund Singh*(3) on the subject of *res judicata* to hold that no estoppel by judgment could be pleaded. But they held that the previous judgment was cogent evidence against an assignor of one of the parties to the previous suit. In this case the person whom it is sought to bind is not an assignee who would of course be bound by section 11 or an assignor, but the actual party himself. I cannot therefore agree that what was decided in that case is any authority against the weight of the decisions in *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar*(4) and *Ramamurti Dhora v. The Secretary of State for India in Council*(5).

(1) [1895] 1 Ch., 37.

(3) (1902) I.L.R., 29 Cal., 707 (P.C.)

(2) (1913) 18 C.W.N., 954.

(4) (1910) I.L.R., 33 Mad., 483.

(5) (1913) I.L.R., 36 Mad., 141.

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Reliance was placed by the respondent on *Arumuga Mudaliyar v. Krishnasami Naicken*(1). In that case the correctness of the doctrine laid down in *Suppa Bhattar v. Suppu Sokkaya Bhattar*(2) was considered. But that seems to me to have no bearing on the question raised here. It seems to me that the only answer to the reported decisions in *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar*(3), and *Ramamurti Dhora v. The Secretary of State for India in Council*(4) is the suggested effect of the dictum of the Privy Council referred to by the learned Chief Justice. I venture to think that it in no way lays down anything at variance with the effect of estoppel by judgment outside *res judicata*. But as it has been doubted and as the question is in my opinion one of great importance, I would refer the matter to a Full Bench, the question referred being

"whether in the circumstances of this case it is open to the plaintiff to reassert a title which was definitely negated in a previous suit against a contesting claimant."

KRISHNAN, J.—The first question argued before us is the one raised in third issue whether the plaintiff's right to the office of Asari Sheriff and its emoluments is concluded against him by reason of the decision in the prior litigation between him and his nephew Syed Kadir Badsha Sahib which ended in Second Appeal No. 726 of 1913. In that Second Appeal it was decided that plaintiff had no title to the office. The Government contend in this suit that Badsha Sahib is the proper office-holder entitled to the Yeomiah allowance attached to the office and not the plaintiff, and that the question of title to the office is *res judicata* between him and the plaintiff and that they are entitled to rely on the plea in this suit and the plaintiff cannot reopen the question.

For this contention of the Government reliance is placed by the learned Government Pleader on *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar*(3), *Boyinapalli Venugopala Rao v. Nekkallapudi Venkatarajudu*(5), *Ramamurti Dhora v. The Secretary of State for India in Council*(4), and *Suppa Bhattar v. Suppu Sokkaya Bhattar*(2), which are in his favour. But on the other

(1) (1917) 42 I.C., 498.

(3) (1910) I.L.R., 33 Mad., 483.

(2) (1915) 29 M.L.J., 558.

(4) (1913) I.L.R., 36 Mad., 141.

(5) (1911) 10 M.L.T., 450.

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side our attention has been drawn to *Peari Mohan Shaha v. Durlavi Dassya*(1), and the unreported judgment of the learned Chief Justice and SESHAGIRI AYYAR, J., in Second Appeal No. 1747 of 1919, both of which dissent from the view expressed on the point in the cases cited by the Government Pleader. In this state of conflict of authorities, I agree to the reference of the question to a Full Bench.

In doing so, I would point out that the plea raised here is in my opinion not really that the issue as to plaintiff's title is directly *res judicata* between him and the Government, but that it is *res judicata* between him and the person whose title the Government is setting up, and that the Government is entitled to rely on that plea in establishing that title and defeating the plaintiff's claim. In other words, we have here a plea of *jus tertii* and when such a plea is raised the question of title or the *jus* set up has to be decided as if it arose between the party against whom it is set up and the *tertius* or third party. In such a case, it seems to me that the person setting up the *jus tertii* is entitled to rely on all pleas that would have been available to the third party to prove his title whether it be one of estoppel by *res judicata* or otherwise. Similarly, he will also be bound by all pleas available against that third party. Even admissions made by that party could be relied on against him.

The question therefore in cases like the present is not in the first instance a question of *res judicata* between the parties to the subsequent suit but a question of what pleas a party is entitled to set up when he pleads *jus tertii*. On raising the plea of *res judicata* between the *tertius* and the opposite party he must show that the plea is well founded between them under section 11, Code of Civil Procedure, before he can succeed. I do not think it is necessary to pray in aid any principle of *res judicata* outside the scope of section 11, Code of Civil Procedure, in this case. To do so would be against the opinion expressed by the Privy Council in *Gokul Mandar v. Pudmanund Singh*(2), and is not justifiable. So far as the plea involves the question of *res judicata* between plaintiff and Badsha that question must be decided under section 11 itself. If the *res judicata* pleaded

(1) (1913) 18 C.W.N., 951.

(2) (1908) I.L.R., 39 Cal., 707.

is established under section 11 the next question will be whether the defendant can rely on it against the plaintiff; and that is not a question governed by section 11 at all but by considerations of what pleas are available to a person setting up a *jus tertii* under the general law. It seems to me that confusion arises in not keeping the two parts of the question distinct and separate. If the Government were not setting up a *jus tertii* but were only pleading that the finding in the former suit was *res judicata* directly between them and the plaintiff against the plaintiff's title without admitting and setting up Badsha's title it would be difficult to support their contention as they were not parties to the previous litigation nor can they be said to claim under any of those parties. The finding clearly does not bind them of its own force and they cannot take advantage of it *simpliciter*. It is only so far as they set up the third party's title that the plea of *res judicata* is available for or against them.

As the matter will be fully argued before the Full Bench, I have only briefly indicated my view; it will reconcile the earlier rulings of this Court with the dictum of the Privy Council.

ON THIS REFERENCE--

The Government Pleader (*C. Madhavan Nayar*) for appellant.—I concede that the former judgment is not *res judicata*; but it acts as estoppel against the plaintiff who was a party to the previous suit.

[COURT.—What do you say to sections 41 to 43, Evidence Act?]

This is an exceptional case of estoppel. See *Duchess of Kingston's Case*(1). American text writers have dealt with this matter in the same manner. If all the persons interested are parties to the previous suit, the judgment acts as estoppel. Reliance was placed on *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar*(2), *Ramamurthi Dhora v. The Secretary of State for India in Council*(3), *Suppa Bhattar v. Suppu Sokkaya Bhattar*(4),

(1) (1776) 2 Sm.L.C., 732.

(2) (1910) I.L.R., 33 Mad., 488.

(3) (1913) I.L.R., 36 Mad., 141.

(4) (1915) 29 M.L.J., 558.

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Boyinapalli Venugopala Rao v. Nekkalapudi Venkatragudu(1), Bigelow on Estoppel, 6th Edn., pages 44, 45 and 150. As against these there is only *Peari Mohan Shaha v. Durlavi Dassya*(2) wherein all the people interested in disputing the title were not parties to the previous suit. Section 11, Civil Procedure Code, is not exhaustive, e.g., it does not deal with judgments *in rem*. Reference was made to *Jagannaikulu v. Manager of Nandigam Estate*(3), Black on Judgments, Volume II, sections 603 to 609, *Arumugha Mudaliar v. Krishnasami Naicken*(4), *Khaji Sayyid Yusuf Sahib v. Ediga Narasimhappa*(5), *Rahim Unnissa Begam v. Srinivasa Aiyangar*(6). Second Appeal No. 1747 of 1919 (unreported) is distinguishable. *Gokul Mandar v. Pudmanund Singh*(7) contains only a dictum.

S. Varada Achariyar for the respondent.—The previous judgment acts neither as *res judicata* nor as estoppel. Reference was made to sections 40 to 43, Evidence Act, and section 43, Specific Relief Act and to illustrations therein; *Spencer v. Williams*(8), *Lady Wenman v. Mackenzie*(9), *Anderson v. Collinson*(10), *The Natal Land and Colonization Company v. Good*(11), *Petrie v. Nuttall*(12), *Govind Baba Gurjar v. Jijibai Saheb*(13) and *Ramnād Zamindar v. Dorasami*(14), Everest and Strobe on Estoppel (1907), 2nd Edn., pages 63 and 64, *Hukm Chand's Res Judicata*, paragraph 110, page 237. The passages quoted in *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar*(15) and *Ramamurti Dhora v. The Secretary of State for India in Council*(16) from Black on Judgments, paragraphs 605 and 607, and Bigelow on Estoppel, page 50 (6th edition), deal only with the relationship of creditor and debtor and have been misapplied. They only embody the rule recognized in section 53, Transfer of Property Act, which is enacted to prevent fraud, a rule recognized in *The*

(1) (1911) 10 M.L.T., 450.

(2) (1918) 18 C.W.N., 954.

(3) (1916) I.L.R., 39 Mad., 269, 273.

(4) (1917) 42 I.C., 498.

(5) (1918) M.W.N., 175.

(6) (1920) 38 M.L.J., 266, 270.

(7) (1902) I.L.R., 29 Cal., 707 (P.C.), 715.

(8) (1871) L.R., 2 P. & D., 230.

(9) (1855) 5 E. & B., 447, 457.

(10) [1901] 2 K.B., 107.

(11) (1868) L.R., 2 P.C., 121, 133.

(12) (1856) 11 Exch., 569, 574.

(13) (1912) I.L.R., 36 Bom., 189.

(14) (1884) I.L.R., 7 Mad., 341, 343, 344.

(15) (1910) I.L.R., 33 Mad., 483.

(16) (1907) I.L.R., 30 Mad., 141.

Duchess of Kingston's Case(1). Even a judgment obtained by a creditor against a surety is evidence only as to the amount paid and not as to the liability to pay, in a subsequent suit by surety against principal. Coke on Littleton quoted in *Ramamurti Dhora v. The Secretary of State for India in Council*(2) does not support the conclusion therein stated. The rule of *jus tertii* only enables defendants to plead right of their parties, but it cannot get over *res judicata*. No relationship between the parties was established in the previous suit, only my suit was dismissed.

The Government Pleader replied.

WALLIS, C. J.—The question is whether the plaintiff is estopped from bringing this suit against Government to recover the emoluments attached to the office of Mutawalli of the suit wakf, an office which he now alleges to be descendible by usage to the nearest qualified male heir of the last holder of the office, by reason of the dismissal of the previous suit instituted by him against his elder brother, the then first defendant, and that brother's son, the then second defendant, for a declaration that their father's will nominating such second defendant and the plaintiff's own son to succeed him in the office was invalid, and that the plaintiff by reason of his elder brother's insanity was entitled to succeed to the office and its emoluments and for an injunction restraining them from interfering with him. The suit was dismissed in Second Appeal by the High Court, which held that the plaintiff had clearly no title to the office and that the appeal had been rightly dismissed by the Lower Appellate Court. The Lower Appellate Court held that in the absence of any special provision or usage the office devolved on the nominee of the last Mutawalli, and declined to allow the plaintiff to set up a case of usage which had been abandoned in the Lower Court and which was not proved. In the present case the plaintiff has pleaded that he is entitled to succeed by the usage of the institution, and the defendant, whilst admitting that the plaintiff's father was "an hereditary holder of the yeomiah allowance," has denied the plaintiff's right and also relied on the decree in the previous suit as barring the present suit.

(1) (1776) 2 S.n. L.C., 732.

(2) (1913) I.L.R., 35 Ma d., 141.

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As regards the general question our decision should in my opinion be based on the provisions of the Civil Procedure Code and the Evidence Act and on the English Law on which they are founded. The Privy Council in *Imambandi v. Mutsaddi*(1), has deprecated the practice of referring to foreign decisions and observed that the judgments of foreign Courts based often on considerations and conditions totally differing from those applicable or prevailing in India are only likely to confuse the administration of justice, and the warning is specially applicable with regard to subjects which are dealt with in Indian Code based on English precedents.

In England, as observed in Roscoe's *Nisi Prius*, page 190:

"the judgment of a Court of concurrent jurisdiction directly upon a point is, as a plea, a bar, and, as evidence, conclusive upon the same matter between the same parties," and he goes on to explain that it is conclusive (as an estoppel) where there is an opportunity of pleading it; but that, where there is no such opportunity, it is conclusive as evidence. In India section 40 of the Evidence Act makes a previous judgment relevant on the question whether it by law prevents the Court from taking cognizance of a suit or holding a trial. The law which prevents the Court from taking cognizance of a suit or holding a trial is to be found in section 11 of the Code of Civil Procedure, which only prohibits the trial of a suit or issue which has been directly and substantially in issue in a former suit between the same parties or

"between parties under whom they or any of them claim, litigating under the same title."

Now the effect of this section read with section 9 in my opinion is to preclude the Court from refusing to try a suit or issue which was not between the same parties but between one of such parties and a third person, because, as observed by the Privy Council in *Gokul Mandar v. Pudmanund Singh*(2),

"The essence of a Code is to be exhaustive on matters in respect of which it declares the law, and it is not the province of a Judge to disregard or to go outside the letter of the enactment according to its true construction."

(1) (1918) I.L.R., 45 Cal., 878 904, (P.C.).

(2) (1902) I.L.R., 29 Cal., 707 715, (P.C.).

It is true that as held by the Privy Council in *Ram Kirpal v. Rup Kuari*(1) and in the very recent case of *Hook v. Administrator-General of Bengal*(2) this section is not to be read as entitling a party to reagitate a matter decided at an earlier stage of the same suit; and it is also true that it does not prevent consent decrees from operating as an estoppel; but it does in my opinion prevent the Court from refusing to try suits or issues by reason of previous judgments not between the same parties, a sort of estoppel unknown to English law especially as the Evidence Act closely following the English law contains express provisions as to the general effect of previous judgments in evidence. Section 41 makes certain judgments of a Court in the exercise of a Probate, Matrimonial, Admiralty or Insolvency jurisdiction not only relevant but conclusive evidence of certain matters. Having dealt with such judgments, which are usually known as judgments *in rem*, the Act goes on to deal with other judgments generally known as judgments *in personam*, and provides in section 42 that they are

"relevant if they relate to matters of a public nature relevant to the inquiry,"

but are not conclusive proof of what they state, and in section 43 that all other judgments are irrelevant unless the existence of such judgment is a fact in issue or relevant under some other provision of this Act, and under those other provisions the judgment may be relevant but cannot be conclusive in law though it may in fact. Thus in *Brew v. Haren*(3) and *Brew v. Haren*(4) where the question was whether the plaintiff was the owner of the foreshore, the facts that he had successfully prevented people from taking seaweed from the shore and that he had instituted a suit for trespass in which there was a reference to arbitration and an award in his favour were held evidence of ownership. Similarly, if in a suit where the previous judgment is not *res judicata* under section 11, Civil Procedure Code, a question should arise whether certain property belonged to A or B a judgment by which A had recovered possession from B by a decree which had become final might be just as conclusive evidence as a conveyance from B to A irrespective of the question whether the

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(1) (1884) I.L.R., 8 All., 289 (P.C.).
(3) (1874) Ir.R., 9 C.L., 29.

(2) (1921) 48 I.A., 187.
(4) (1877) Ir.R., 11 C.L., 198.

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previous judgment was right or wrong. A previous judgment between altogether different parties might even be conclusive in the same way, as in *R. v. Hebden*(1), the report of which in Selwyn's *Nisi Prius*, volume 2, page 1136, is referred to both by Taylor and Roscoe. That was a *quo warranto* to try the defendant's right to be a bailiff of Scarborough. He relied on his election under two former bailiffs. The prosecution denied that they were bailiffs, and on this issue, tendered a judgment of ouster against the two bailiffs in question. On a motion for a new trial, it was held that the evidence was rightly admitted, the Court observing:

"The defendant has made the title of Batly and Armstrong (the previous bailiffs) part of his right, and if he gives evidence of the right of their election, can that better be disproved than by a judgment of ouster wherein such election is declared to be void."

Reference may also be made to the provisions of the Specific Relief Act which expressly provides in section 48, that declaratory decrees made under section 42 shall not be binding except on the parties to the suit and those claiming under them.

As regards the present case, all that was decided in the previous suit was that the present plaintiff had not pleaded or proved in that suit that there was any special usage as to the descent of the office in question which would render the ordinary Muhammadan Law inapplicable. The previous judgment not being between the same parties does not in my opinion estop them from setting up such a special usage in the present suit against the present defendant who was no party to the suit. In *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar*(2) the learned Judges relying on a passage in Mr. Bigelow's Treatise on the Law of Estoppel adopt the rule that judgments *in personam* establishing the relations between parties are an exception to the general rule that judgment *in personam* bind only parties and their privies.

The judgment in *Ramamurti Dhora v. The Secretary of State for India in Council*(3) after referring to some dicta of Lord

(1) (1788) Andr., 388.

(2) (1910) I.L.R., 33 Mad., 488.

(3) (1913) I.L.R., 36 Mad., 141.

COKE which it is now admitted apply to judgments *in rem*, quotes the following extract from Bigelow:

"If all who have a right to appear and be heard in a cause have been duly made parties, the judgment establishes a perfect and complete right against all, as much as would a conveyance of a joint estate by all the parties interested. Judgment in an action strictly *in personam*, indeed, bind third persons in that way; all that is necessary is that all those who have the exclusive right to litigate the cause are proper parties to it and that the question should be determined without collusion. Judgment that A is debtor of B is an example. . . . Indeed, the difference between judgments *in rem* and judgments *in personam* in any law, as regards their effect, appears at bottom to be only a difference of degree."

However attractive this doctrine may appear to be, it is in my opinion opposed to the provisions of the Indian Evidence Act, which was not referred to either in this or the earlier decision, and in my opinion precludes the reception of the American rule in India. That rule is in my opinion in conflict with the provisions of our statute Law. This is in effect the view taken by JENKINS, C.J., and MOOKERJEE, J., in *Peari Mohan Shaha v. Durlavi Dassaya*(1).

I would therefore answer the question in the affirmative and overrule *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar*(2) and *Ramamurti Dhora v. The Secretary of State for India in Council*(3).

SPENCER, J.—At the very commencement of the arguments I drew attention to sections 40, 41, 42 and 43 of the Indian Evidence Act which appeared to me to be exhaustive of the question of the relevancy of judgments other than those which operate as a bar to the trial of a suit or issue between the same parties or their privies, under the law of *res judicata* contained in section 11 of the Civil Procedure Code. These sections of the Evidence Act have not been referred to in the Order of Reference or in the judgments of the two Courts below in dealing with the effect of the judgment in the prior suit (O.S. No. 274 of 1911).

As regards *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar*(2) and *Ramamurti Dhora v. The Secretary of State for*

(1) (1913) 18 C.W.N., 254.

(2) (1910) I.L.R., 33 Mad., 488.

(3) (1913) I.L.R., 36 Mad., 141.

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India in Council(1) I agree with my Lord in thinking that they went too far in extending the principle of estoppel by judgment beyond the limits of our Codes of Procedure and Evidence, and that they should be overruled as being in contravention of the principles laid down by the Privy Council in *Gokul Mandar v. Pudmanund Singh*(2) for the interpretation of codified law and as being examples of the tendency since deprecated by their Lordships in *Imambandi v. Mutsaddi*(3) of referring to foreign decisions.

With the exception of the above two decisions of this Court and *Boynapalli Venugopala Rau v. Nekkalapudi Venkatarayudu*(4), which followed the earlier of them, and *Suppa Bhattar v. Suppu Sakkaya Bhattar*(5) and *Rahim Unnissa Begam v. Srinivasa Aiyangar*(6), which were cases of privity of estate, our attention has not been called to any authoritative ruling of a High Court in this country which would support the return of any other answer but an affirmative one to the question referred to us.

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KUMARASWAMI SASTRI, J.—The question raised by the reference is whether it is open to a party to reassert as against a third person a title which has been definitely negatived in a previous suit against a contesting claimant. The judgment which is pleaded in bar is a judgment in a previous suit filed by the present plaintiff against two other persons for a declaration that he was entitled to the Asari Sheriff and to recover from the Government the emoluments of the office. It was held in that suit that the plaintiff did not prove title to the office and the suit was dismissed. The present suit is filed by the plaintiff against the Government to recover a sum of Rs. 894 alleged to be due to him as the person entitled to the Asari Sheriff and to perform the services connected therewith. The Government was paying the sums to the successful party in the previous litigation and sets up the judgment negativing the plaintiff's right as a bar to the suit.

(1) (1913) I.L.R., 36 Mad., 141.

(2) (1902) I.L.R., 29 Cal., 707 (P.C.).

(3) (1918) I.L.R., 45 Cal., 878 (P.C.). (4) (1911) 10 M.L.T., 450.

(5) (1916) 29 M.L.J., 558.

(6) (1920) 33 M.L.J., 266.

The question is how far and under what circumstances can a judgment *in personam* be given the force of a judgment *in rem* or be pleaded as a bar under section 11, Civil Procedure Code, in cases where it is pleaded as a defence to an action by third parties who do not claim under or were not represented by the parties to the original action.

So far as the statute law in this country is concerned, the case is governed by section 11 of the Civil Procedure Code, which deals with *res judicata*, sections 40 to 44 of the Evidence Act, which deal with the relevancy of judgments of competent Courts, and section 43 of the Specific Relief Act, which deals with declaratory decrees.

Under section 11 of the Civil Procedure Code one of the conditions precedent to its application is that the former suit should be "between the same parties or between parties under whom they or any of them claim" and the section is a bar to the trial of a suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in the previous suit. The section codifies the law in British India as regards the plea of *res judicata* and, though the principle has been applied to proceedings other than suits (e.g., execution proceedings), the essentials required by the section as to identity of the questions involved and parties have not been lost sight of. Section 43 of the Specific Relief Act enacts that a declaratory decree passed under the Act is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees. Sections 40 to 44 of the Evidence Act deal with the relevancy of judgments of Courts of Justice. Section 40 enacts that the existence of any judgment, order or decree, which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial. Section 41 deals with final judgments, orders or decrees of competent Courts in the exercise of Probate, Matrimonial, Admiralty or Insolvency jurisdiction, or what is known as judgments *in rem*, and it states that such judgments, orders or decrees are conclusive proof of the matters specified in the section; and,

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by virtue of section 4 of the Evidence Act, evidence cannot be allowed to disprove the facts established by such judgments. Section 42 refers to judgments relating to matters of a public nature relevant to the enquiry and the section states that such judgments, though evidence, are not conclusive proof of that which they state, thus allowing evidence to be given to disprove the facts found in judgments. Section 43 says that judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provision of the Act (e.g., section 13). Section 44 enables a party to show that any judgment, order or decree which is relevant under sections 40, 41 or 42, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

In dealing with this question, I think the distinction between the effect of a judgment as preventing the Court from trying the same matter in issue in subsequent proceedings and as simply affording evidence of the truth or falsity of the claim under consideration should be borne in mind. In the former case, section 11 declares that the Court shall not try the suit or issue and the plea is one in bar to the maintainability of the action. In cases where there is no bar under section 11, the Court has to try the issue and if the judgment is filed for the purpose of proving the plaintiff's claim or for the purpose of proving the defence to the action, it is relevant only as a piece of evidence, the probative value of which is regulated by the provisions of the Evidence Act. If it is a judgment *in rem*, the Court under section 41 of the Evidence Act will treat it as conclusive proof of the matters stated in that section and under section 4 it will prevent evidence from being given for the purpose of disproving the facts established by the judgment *in rem*. One has only to file the judgment and the Court has no option but to decide the matter covered by it in accordance with the declaration in that judgment, even though the other party may be in a position to prove facts to the contrary. So far as judgments *in rem* are concerned, I think the matter is codified by section 41 of the Evidence Act which states what judgments would be judgments *in rem* so as to make them conclusive proof

of the declarations granted by them. It seems to me that it is not open to us, in the face of the sections of the Civil Procedure Code, the Evidence Act and the Specific Relief Act, to hold that judgments not falling within those sections would still be a bar to an action or afford conclusive proof. This, in effect would be to create new kinds of *res judicata* and to destroy the distinction between judgments *in rem* and judgments *in personam* which has been laid down in sections 41 and 42 of the Evidence Act.

In *Ramamurti Dhora v. The Secretary of State for India in Council*(1), it was held that the provisions of section 13 of the Code of 1882 were not exhaustive, and a judgment was held to be binding on a person who was no party to it on the ground that third parties having no interest in the property at the time of the litigation cannot, in the absence of any fraud or collusion, question the validity of a judgment passed in a suit between the only parties interested in the property at the date of the previous suit. Reference was made to Bigelow on Estoppel, 5th Edn., page 44, where the learned author observes :

"If all who have a right to appear and be heard in a cause have been duly made parties, the judgment establishes a perfect and complete right against all, as much as would a conveyance of a joint estate by all the parties interested. Judgment in an action strictly *in personam*, indeed, binds third persons in that way ; all that is necessary is that all those who have the exclusive right to litigate the cause are proper parties to it, and that the question should be determined without collusion. . . . Indeed, the difference between judgments *in rem* and judgments *in personam* in our law, as regards their effect, appears at bottom to be only a difference of degree."

When a judgment is *in personam* I can find no authority either in English decisions or recognised works by English jurists for holding that it can prevent persons, not parties or privies, from agitating the question except in cases of joint liability and covenants for indemnity. In *The Natal Land and Colonization Company v. Good*(2), it was sought to use a judgment between the mortgagor and the person from whom he purchased the property which found that the sale was vitiated

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(1) (1913) I.L.R., 36 Mad., 141.

(2) (1868) L.R., 2 P.O., 121.

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by fraud against the mortgagee who was no party to the suit. Their Lordships of the Privy Council observed :

"Now, the first observation which occurs is that this judgment was not admissible in evidence. It is the only proof of the fraud, but if it were ample and sufficient proof of the fraud, it is *res inter alios acta*, and in no Court of Law or Equity in this country would it have been admitted at all, except as between the parties to it, the respondents and Crowley, or if a foundation for it had been laid by evidence of some fraud having been committed by which the plaintiffs could be affected."

In *Anderson v. Collinson*(1), it was held that a judgment in affiliation proceedings taken by the daughter of the plaintiff, holding that it was not proved that the defendant was the father, was not final and conclusive in an action for seduction filed by the mother so as to estop the defendant from denying that he was the father of the child, as the parties to the two proceedings were different. In *Spencer v. Williams*(2), Lord PENZANCE observed :

"It is proper, therefore, where the question is raised between the same parties, or those claiming under them, that they should be estopped; but the decisions give no authority for a proposition of a wider character—that a party who was not a party in the original litigation shall be bound by the result."

The rule was held to apply though the interest of the parties was identical and the same question was involved, namely, whether a person was next of kin and entitled to distribution of the assets of the deceased. In *Lady Weirman v. Mackenzie*(3), the plaintiff sued for injury to her reversionary right alleging that she was entitled to a fishery in an arm of the sea and was in possession through her tenant, Fairman, and that the defendant who held the neighbouring property under one Gipps infringed her right. Fairman, her tenant, had filed an action to recover damages for a similar injury against Gipps and the suit was referred to arbitration, and an award made in favour of Fairman. It was held that the proceedings were not evidence as plaintiff

(1) [1901] 2 K.B., 107.

(2) (1871) L.R., 2 P. & D., 280

(3) (1855) 5 E. & B., 447.

"did not claim by, through or under Fairman and, so far as she was concerned, the action of *Fairman v. Gipp* was *res inter alios acta*,"

and as the proceedings and award could not have been admitted as evidence against her, they are not admissible for her. In *Petrie v. Nuttall*(1), it was held that the conviction of a person for barring a highway would not bar a suit by the same person against another for stopping up the road on the ground that the crown and subject were the parties to the indictment and therefore it was not between the two parties to the action and that the judgment in the indictment may be given as evidence upon the trial of the issue as to whether the *locus in quo* is a public highway; though it cannot be pleaded as an estoppel.

Estoppel must be mutual and it is difficult to see how a party not bound by a judgment can set it up in bar against a party to it.

Turning to the question as to whether a judgment *in personam* can acquire the force of a judgment *in rem* under any given set of facts, the only authority which I can find for such a view is the passage from Bigelow already referred to and the decision in *Cander v. Lord*(2), referred to in *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar*(3) as authority for the view taken in that case.

With all respect it seems to me that we cannot travel outside the provisions of section 11 of the Code of Civil Procedure and apply the rule of *res judicata* to cases falling outside the limitation imposed by the section. In *Gokul Mandar v. Pudmanund Singh*(4), their Lordships of the Privy Council observe :

"They will further observe that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law and it is not the province of a judge to disregard or go outside the letter of the enactment according to its true construction."

In *Peari Mohan Shaha v. Durlavi Dassya*(5), the question arose in a suit between an auction purchaser, who bought the right of one Durlavi Dassya, and her daughter Patteswari, whose

(1) (1856) 11 Exch., 569.

(2) (1849) 2 N.Y. (2 Contt.), 269; s.c., 51 Am. D., 294.

(3) (1910) I.L.R., 38 Mad., 483. (4) (1902) I.L.R., 29 Cal., 707.

(5) (1913) 18 C.W.N., 954 (P.C.).

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suit under section 283 of the Code (relating to suits by an unsuccessful claimant) was dismissed. The suit was filed by the purchaser against the unsuccessful claimant for a declaration of her title and the decree in the previous suit was sought to be availed of as concluding the matter in issue. JENKINS, C.J., and MOOKERJEE, J., were of opinion that the provisions as to *res judicata* contained in section 11 of the Code were exhaustive and that judgments in suits between third parties however cogent they might be as evidence where the same matter is in question in a suit by or against a stranger did not operate as a bar to the suit under section 11 of the Code. JENKINS, C.J., observed:

"It appears to me that, in these circumstances and having regard to the facts with which we have to deal in this case, the result of that litigation is at least as cogent against the defendant as would have been an instrument of transfer executed by Patteswari, the ostensible owner, in favour of her sons. I wish to make it clear that in the view I take, I cannot regard the decree in the previous litigation as amounting to *res judicata* which would bar all possibility of evidence on the part of the defendant. It would, I conceive, have been open to the defendant to show that, notwithstanding that decree, there were circumstances either vitiating the result of that litigation or affecting its result so as to prevent its operation in favour of Patteswari's sons."

The learned Judges were not prepared to follow the dictum in *Ramamurti Dhora v. The Secretary of State for India in Council*(1), that the provisions of the Civil Procedure Code were not exhaustive and judgment not inter parties can make the question *res judicata*. This decision was referred to and followed by the Chief Justice and SESHAGIRI AYYAR, J., in Second Appeal No. 1747 of 1919. The learned Judges were of opinion that the provisions of the Code as to *res judicata* were exhaustive and that a judgment not between the same parties or their privies was only evidence of title. They were not prepared to follow *Ramamurti Dhora v. The Secretary of State for India in Council*(1) and *Suppa Bhattar v. Suppu Sokkaya Bhattar*(2), on the ground that the attention of the learned Judges was not drawn to the decision of the Privy Council in *Gokul Mandar v.*

(1) (1913) I.L.R., 36 Mad., 141.

(2) (1915) 29 M.L.J., 558.

Pudmanund Singh(1). In the *Ramnad Zamindar v. Dorasami*(2), which related to a monthly allowance, it was held that a litigation as regards the right to receive the allowance would not estop the zamindar from putting the party claiming it against him to the proof of his title on the ground that he was not a party to the previous litigation. So far, therefore, as the Civil Procedure Code is concerned, I do not think that the trial of a suit or issue can be barred because of an adjudication in a prior suit or proceeding to which the plaintiff was not a party or privy.

Turning to the Evidence Act, I have already pointed out that sections 41 and 42 draw a distinction between judgments *in rem* and judgments *in personam*, and it seems to me to be clear from the sections that a judgment which does not fall within section 41 can only be evidence but cannot be used for the purpose of preventing the other side from proving facts which he sets up.

It is not open to us to import considerations as to convenience in dealing with matters which have been codified and dealt with by the Evidence Act, however attractive the theory may be and however much one would like to have the principle embodied by the legislature in the Codes. It is no doubt true that there are decisions of this Court which adopt the view of Bigelow as to judgments *in personam* creating an estoppel as against strangers [see *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar*(3); *Ramamurti Dhora v. The Secretary of State for India in Council*(4); *Suppa Bhattar v. Suppu Sokkaya Bhattar*(5); and *Boyinapalli Venugopala Rao v. Nekkalapudi Venkatrayudu*(6). In the last of these cases it was held that a decision between the plaintiff and another person that the latter is a co-proprietor with him is conclusive on third parties where the contention raised by them depends on the relationship between the plaintiff and such person and the learned Judges followed *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar*(3); but they, however, observed that the rule that makes the decision conclusive on third parties was not the rule of *res judicata* and they based their

(1) (1902) I.L.R., 29 Cal., 707 (P.C.).
(3) (1910) I.L.R., 33 Mad., 488.
(5) (1915) 29 M.L.J., 558.

(2) (1884) I.L.R., 7 Mad., 341.
(4) (1913) I.L.R., 36 Mad., 141.
(6) (1911) 10 M.L.T., 450.

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decision on the ground that it would be intolerable to hold that, when the relationship between the two parties have been determined by litigation between them, other persons can contend that one of them has not the right against the other which he has been held to have.]

With all respect it seems to me that these decisions do not take into consideration the effect of the provisions of the Evidence Act and the limitations imposed by a consideration of those sections. To hold that a judgment which does not fall under section 41 is conclusive proof would be to act in direct contravention of the provisions of section 42, which declares that judgments orders or decrees, other than those mentioned in section 41, are relevant but not conclusive proof.

It seems to me that where a judgment *in personam* is pleaded, its legal effect and probative force will depend upon the facts of each case. As pointed out by Sir LAWRENCE JENKINS in the case I have referred to, the judgment of a competent Court, whereby a declaration is made as regards property in dispute, would have the force of a conveyance by the other parties to the suit in favour of the successful litigant. Where, therefore, all the parties interested in the immovable property or in the right in contest have been parties to the previous litigation it may be that the judgment obtained in the previous litigation would render it impossible for persons to get rid of the effect of the judgment. But this is not because the judgment constitutes *res judicata* or judgment *in rem*. The difficulty would be analagous to the difficulty of a person who wants to impeach the title which is conferred on his opponent by all the persons who could have a legal interest in the property with the additional fact that when a judgment is relevant it is not open to a party to show that as between the parties the conclusion arrived at by the Judge is wrong and is not warranted by the evidence. *Suppa Bhattar v. Suppa Sokkaya Bhattar*(1) may be supported on the ground that all the parties interested were parties to the previous litigation in favour of one of them. Cases where *jus tertii* is set up are really no exceptions to the rule. In all cases of *jus tertii* the person who sets up the rights of a third party

(1) (1915) 39 M.L.J., 558.

is bound to prove that the third party has or had the rights alleged and it is always open to the other party to displace the title of the person so set up by showing that he was a party to the litigation which has negatived that title. Whatever would estop or bar the persons whose title is set up must also bar the person pleading *jus tertii* whether the estoppel is by record, deed or *in pais*. This is the principle on which *R. v. Hebden*(1) referred to by my lord was decided. The defendant relied on his right to the office of bailiff owing to his having been elected by two former bailiffs. A judgment was produced in which the right of the persons whom he set up was negatived and it was held that having made the title of the previous bailiffs part of his right, there could be no better evidence in disproof than the judgment where their rights were negatived.

I would hold that the decision in the previous suit is not conclusive but is only evidence and that it is open to the plaintiff to establish his title as against the Government and I would answer the question raised by the reference in the affirmative.

N.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice
Seshagiri Ayyar.

T. K. SRINIVASA AIYANGAR (PLAINTIFF), APPELLANT,

v.

KUPPUSWAMI AIYENGAR *alias* VEERASAMY
AIYENGAR AND TWENTY-SEVEN OTHERS (DEFENDANTS, NOS. 1 TO 9,
11 TO 15, 17 TO 23, 26, 27 AND 29 TO 33) (RESPONDENTS), AND
LEGAL REPRESENTATIVES OF TWELFTH RESPONDENT.*

1920,
September
10.

Hindu Law—Suit by son for partition against father and father's alienee—Alienation held, not binding on son—Form of decree to be given to the son.

If in a suit for partition by a son against his father and an alienee from the father, the Court holds the alienation not to be binding on the son, the son is entitled to get a decree for his share in the family properties without any condition being imposed on him to refund the consideration paid by the alienee to the father. *Sahu Ram Chandra v. Bhup Singh*, (1917) I.L.B., 39 All., 437 (P.C.); L.R., 44 I.A., 126, applied. The dictum of MITTER, J., in *Ker Hasmat Bai v. Sunder Das*, (1885) I.L.B., 11 Cal., 396, not followed.

* Appeal No. 61 of 1917.

(1) (1738) Andrews, 888.

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Held further by SESHAGIRI AYYAR, J.: A son is bound to pay only such debts of his father as exist while they are joint; and a son getting a decree for partition becomes divided from his father as from the date of suit for partition. Any liability of the father to refund the consideration to the alienee arising as the result of the decree for partition is a liability for unliquidated damages and not a debt and even if it becomes a judgment-debt it is not a debt existing on the date of suit for partition.

APPEAL against the decree of V. BHASHYAM AYYANGAR, Subordinate Judge of Kumbakonam, in Original Suit No. 125 of 1913.

This was a suit for partition of certain properties filed by a son against his father and the father's alienees. The son alleged that the alienations were not binding on him while the alienees pleaded otherwise. The Subordinate Judge, who found some of the alienations to be not binding on the son, set aside those alienations and gave the plaintiff a share in the properties so alienated but made it conditional on his refunding to the alienees the considerations paid by them to the father. The plaintiff appealed and the alienees preferred a Memorandum of Objections.

T. Narasimha Ayyangar and V. Narasimha Ayyangar for appellants.

K. Bhashyam Ayyangar, S. Natesa Sastri, A. Narasimha Ayyar, K. S. Narayana Ayyangar, K. R. Narayanaswami Ayyar and V. N. Venkatavarada Ayyangar for respondents.

WALLIS, C. J. WALLIS, C.J.—We have been asked in this case to depart from the usual form of decree in suits for partition between sons and their father in which alienees are joined for the purposes of setting aside the father's alienations of the joint family property, one of the commonest classes of suits in this Presidency, by making the setting aside of the alienations conditional on the refund by the sons of the moneys paid to the father in consideration of the alienations on the ground that the father becomes liable to make such a refund on the setting aside of the alienations and that his sons at the same time incur a pious obligation to discharge the liability. The setting aside of such alienations has often been made conditional on the refund to the alienees of such part of the consideration as was shown to have been advanced by them for necessary purposes, including in that term the discharge of the father's debts

antecedent to the alienations in discharge of which the son's shares could have been brought to sale by reason of their pious obligation to discharge their father's debts, and a similar equity would no doubt be recognized if it were shown that the purchase money had been carried to the joint family assets, as observed in *Modhoo Dyal Singh v. Golbur Singh*(1); but it has never been the practice of this Court to make the setting aside conditional on the refund by the sons of the consideration for the alienations paid by the alienees to the father. Further, it was held by Sir BARNES PEACOCK and a Full Bench of the Calcutta High Court in the case already cited that no such condition could be imposed except in circumstances such as I have mentioned. I am unable, with great respect, to agree with the view of MITTER, J., in *Koer Hasmat Rai v. Sunder Das*(2), that this judgment of Sir BARNES PEACOCK and the Full Bench was virtually overruled by Sir BARNES PEACOCK himself delivering the judgment of the Judicial Committee in *Girdharee Lall v. Kantoo Lall*(3), where this question is nowhere dealt with. On the contrary, it seems to me that the Calcutta Full Bench decision is much more in accordance, than *Koer Hasmat Rai v. Sunder Das*(2), and the cases which have followed it, with the principles underlying the most recent decision of the Privy Council in *Sahu Ram Chundra v. Bhup Singh*(4). It is there pointed out that the alienation of joint family property by a father where there is neither necessity nor antecedent debt amounts to a plain breach of trust, and that the Mitakshara Law does not warrant or legalize any such transaction. It follows in my opinion that the Courts are bound to afford the sons adequate relief in the nature of a *restitutio in integrum* unfettered by any conditions based on the alleged pious obligation of the sons to pay their father's debts. I am moreover not satisfied that any such pious obligation exists in this case. Any liability which the father may incur to the alienees on such unconditional setting aside of the alienation arises from his own immoral act in making the alienation in the first instance, in breach of the duty which he owed to his sons as

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(1) (1868) 9 W. R., 511.
(3) (1874) L.R., 1 I.A., 321.

(2) (1885) I.L.R., 11 Cal., 396.
(4) (1917) I.L.R., 89 All., 437 (P.C.)
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manager of the joint family property, and I do not think the sons can properly be held to be under any pious obligation to relieve him from the consequences of his unsuccessful attempt to defraud them. I do not think the decided cases oblige us to go so far. To recognize such an obligation would in my opinion be very largely destructive of the sound and wholesome principles enforced by the Privy Council in the case referred to and opposed to the settled practice of the Court in suits of this nature. Otherwise, I agree with the order proposed by my learned brother.

SESHAGIRI
AIYAR, J.

SESHAGIRI AIYAR, J.— . . . We have now dealt with the various alienations. The Subordinate Judge has held that, even though the alienations are not binding on the plaintiff and the second defendant, they should pay to the alienees their share of the money which the first defendant, the father, received for the conveyances he executed.

The practice on the Original Side of the High Court and in mufassal is opposed to this conclusion. In suits for partition, the usual decree is to direct the co-parcener to pay his share of the debt which is found to be binding on the family. The decided cases support this practice. It was contended that as the consideration paid for the alienations was not spent for illegal or immoral purposes, it should be regarded as a personal debt of the father which the son is bound to discharge as a pious obligation recognized by Hindu Law. Mr. Narasimha Ayyangar contended that, as on the date of the suit, there was no debt due from the father, no question of pious obligation arises. There can be no doubt that a partition decree speaks from the date of the plaint: and it is well-established that the moment that a plaint in a contested suit is filed there is a severance of the joint family. On the date of the plaint, there were alienations of the family property, but they were made for consideration received and not for any antecedent debt. Under section 54 of the Transfer of Property Act, in effecting a sale otherwise than for a pre-existing debt, the vendor is either paid or promised a consideration. Such a consideration is not a debt owed by the vendor. Therefore, when the suit was filed there was no debt of the father. On the alienation being set aside, an obligation to make good the loss sustained by the

vendee to the extent the consideration fails would arise. This obligation could be enforced against the father by filing a suit for damages. Till a decree is obtained, there is no debt of the father. The only authority which supports the contrary view is *Koer Hasmat Rai v. Sunder Das*(1).

Before dealing with this case, I shall make a few observations on the theory of the pious obligation of the sons. I had originally intended to rest my decision on the decided cases, but after a discussion with the learned Chief Justice on the point and having regard to the case law on the subject, I think it desirable that I should state my view on this branch of the Hindu Law. As is well-known the liability to a personal debt of the father is founded on a text which has been translated by Mayne thus :

"The sons are not compellable to pay sums due by their father for spirituous liquors, for losses at play, for promises made without any consideration or under the influence of lust or wrath; or sums for which he was a surety or a fine or a toll or the balance of either,"
nor generally any debt for a cause repugnant to good morals.

Every recognized smriti writer has embodied this injunction. The principle underlying the text is that the son should relieve the father from the pangs of hell by paying off his undischarged debts. A high ideal of moral responsibility and of filial duty is responsible for introducing this principle. In the ancient patriarchal days, when the father was the law-giver of the family, its protector and practically its Divinity, the sons were enjoined from motives of piety to pay the debt which the father had contracted. It is a pity that this moral precept was ever seriously enforced in a Court of Law. Many a text has been consigned to the limbo of oblivion on the ground that it is ill-suited to the times or was intended only as a directory admonition and not as a mandatory rule. This text should have shared the same fate. In my opinion the father can hardly be expected to be rescued from hell when the son is compelled, very much against his will and with imprecations in his mouth, by a decree of Court to make the payment. One of

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(1) (1885) I.L.R., 11 Cal., 396.

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the commonest forms of defence in a creditor's action against the sons is to attribute to the father illegality, immorality and all other vices known to law. In such a state of society, the enforcement of the theory of pious obligation seems incongruous. Unfortunately, however, on this text has been founded a large number of decisions which have practically ignored the root principle underlying it. The decisions have laid down that a son is bound to pay the debt of a father which has been brought into existence by the committing of a breach of trust. For example, in *Venugopala Naidu v. Ramanadhan Chetty*(1), it was held that the son was liable for the father having unauthorizedly spent temple money. In *Ramkrishna Trimbak v. Narayan*(2), the son was held liable to pay a debt contracted by the father in carrying on a trade prohibited by Government. In *Hanumat Mabton v. Sonadhari Singh*(3), a mortgage by the father created for meeting charges of a criminal offence was held binding on the son. In *Hanmant Kashinath v. Ganesh Annaji*(4), the son was held liable for a civil breach of trust committed by the father. No doubt it has been held that if there has been a criminal breach of trust the son will not be liable, but the distinction between a civil and criminal breach of trust is very thin and it would not be easy in all cases to say whether the breach of trust is of such a character as would not subject the father to a prosecution. I have cited these cases for the purpose of showing to what extent the theory of pious obligation has been pushed. In *Sahu Ram Chundra v. Bhup Singh*(5), Lord SHAW, in delivering the judgment of the Judicial Committee, said that a father alienating property not for any of the purposes warranted by law would be committing a breach of trust. Now, if a son is liable for a debt arising from a civil breach of trust against third parties, can it be said that he should not be liable for a technical breach of trust committed against himself? I wish that this statement of the law by the Judicial Committee should be enforced strictly. In that case, all these decisions which have put a strained construction upon the theory of pious

(1) (1914) I.L.R., 37 Mad., 458.

(3) (1919) 4 Patna L.J., 858.

(5) (1917) I.L.R., 39 All., 487

(2) (1916) I.L.R., 40 Bom., 126.

(4) (1919) I.L.R., 43 Bom., 612.

(P.O.); I.L.R., 44 I.A., 126.

obligation by compelling sons to pay the debts which have in no way benefitted them may have to be reviewed. In my opinion the decisions commencing with *Nunna Setti v. Chidaraboyina*(1), wherein Sir V. BHASHYAM AYYANGAR, J., speaks of a decree debt giving rise to a fresh cause of action against the sons, and ending with the decision to which I was a party, where it was held that a decree obtained against a father when the father and the sons were undivided for damages for failure of consideration should all be reconsidered. Fortunately, this case can be disposed of without directly impugning the authorities I have quoted.

Now I shall proceed to consider the Judgment of Mr. Justice MITTER in *Koer Hasmat Rai v. Sunder Das*(2). The learned Judge says :

"Now, if the sale be set aside in this case, it is clear that the purchaser would be entitled to recover the purchase-money from Raja Dunpat Rai, the father of the plaintiffs. It would be, therefore, their father's debt, and unless they show that it was contracted for immoral purposes mentioned in the *Hindu shastras*, the whole of the joint family property, including the disputed mouzahs in their hands, would be liable for it."

With all respect this dictum ignores the principle that a decree in a partition suit relates back to the date of the filing of the plaint. What we have to see is whether on the date of the plaint there was a personal debt of the father which could be enforced in the suit against the sons under the *Hindu Shastras*. On that date, while the sons claimed that the sale should be set aside, the father and the alienees contended that the alienation was binding on the plaintiff. The possibility of an event happening which might throw on the father an obligation for unliquidated damage is not within the principle relating to the pious obligation of the sons. The principle itself is alien to other systems of jurisprudence and therefore its operation should be limited to the letter of the law.

In *Peda Venkanna v. Sreenivasa Deekshatulu*(3), it was held by the learned Chief Justice and KUMARASWAMI SASTRI J., that the decision of the Judicial Committee in *Sahu Ram Chundra*

(1) (1908) I.L.R., 26 Mad., 214.

(2) (1885) I.L.R., 11 Cal., 396.

(3) (1918) I.L.R., 41 Mad., 186.

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v. *Bhup Singh*(1), should not be regarded as upsetting the long course of decisions in this Presidency that the pious obligation arises even during the life-time of the father. In Calcutta the same view has been taken. But no decision has laid down, excepting *Koer Hasmat Rai v. Sunder Das*(2), that a possible unliquidated claim for damages should be considered as a debt payable during the life-time of the father. In *Kilaru Kotayya v. Polavarapu Durgayya*(3), Mr. Justice ABDUR RAHIM says:

"The consideration of Rs. 800 was paid for the sale of the property and no question of debt could arise until, at least, the sale is set aside."

I entirely agree with this observation. In *Subbaya Mudaliar v. Thulasi Mudaliar*(4), Mr. Justice SADASIYA AYYAR took the same view. *Madan Gopal v. Sati Prasad*(5) is also to the same effect.

I have already, in a general way, referred to some of the Madras decisions quoted by Mr. BHASHYAM AYYANGAR. I shall now deal with a few of them specifically. The observation of Mr. Justice BHASHYAM AYYANGAR in *Periasami Mudaliar v. Seetharam Chettiar*(6), that such an obligation becomes a debt of record for which a new cause of action will arise has been accepted in more recent decisions. In *Raman Pandithan v. Satha Cudumban*(7), to which I was a party, we held that where, on the setting aside of a sale, a decree was obtained against the father for failure of consideration, that decree may be executed against the sons' share in the family property. In *Muthu Krishna Naidu v. Muthu Krishnappa Naidu*(8), the same view was taken. In all these cases, there was no severance of the joint family status; and it was held that, when after setting aside the sale, the family continues to be joint and a personal obligation is converted into a decree debt, the principle of pious obligation could be invoked in favour of the alienee, but where, as in the present case, the joint family is disrupted by the filing of the suit and a decree for partition is given, the principle has no application. In *Sivaganga Zamindar v.*

- (1) (1917) I.L.R., 39 A.M., 437; L.R., 44 I.A., 126.
 (2) (1885) I.L.R., 11 Calc., 396. (3) (1918) 35 M.L.J., 451.
 (4) (1914) M.W.N., 18. (5) (1917) I.L.R., 39 All., 485.
 (6) (1904) I.L.R., 27 Mad., 248 (F.B.).
 (7) (1916) 31 M.L.J., 502. (8) (1917) M.W.N., 273.

Lakshmana(1), to which Mr. Justice MUTTUSWAMI AYYAR was a party, in *Krishnasami Konan v. Ramasami Ayyar*(2) decided by SUBRAHMANYA AYYAR and DAVIES, J.J., and in *Kilaru Kotayya v. Polavarapu Durgayya*(3), it was held that after division no question of pious obligation arises.

I respectfully follow these decisions and hold that the decree of the Subordinate Judge directing the plaintiff and the second defendant to pay their share of the money received by the father for the conveyance should be set aside to that extent. We may point out that, wherever possible, in passing the final decree the father's share should comprise such of the properties as have been already alienated by him.

The Subordinate Judge is also wrong in his conclusion on the third issue. A money decree was obtained against the plaintiff before this suit and that decree was satisfied by the first defendant, the father, from out of the joint family funds. The Subordinate Judge has directed the plaintiff to pay to the defendants 1 and 2 a third share each in the said decree debt. This is wrong. The debt having been paid from family funds, the plaintiff is not bound to pay his father or his brother any portion of it. The decree to that extent also must be varied. Before finally disposing of the Appeal, we must direct the Subordinate Judge to return a finding regarding the amount of mesne profits from the date of plaint due to the share of the plaintiff and the second defendant regarding items covered by Exhibits XIIa, XIII, XV, XVa, XVIIIa, XXI, XXVIII and XXXa. Either party will be allowed to file fresh evidence and 2 months will be allowed for the return of findings and 10 days for filing objections. Plaintiff is entitled to his cost against the alienee.

N.R.

- (1) (1886) I.L.R., 9 Mad., 188. (2) (1899) I.L.R., 22 Mad., 519.
 (3) (1918) 35 M.L.J., 451.

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APPELLATE CIVIL.

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

1921,
January 26.

BOLISETTI MAMAYYA, FIFTH RESPONDENT, APPELLANT,

v.

KOLLA KOTTAYYA, KOMMURRI RAMAYYA RICE
MILL COMPANY, PETITIONERS, RESPONDENTS.*

Provincial Insolvency Act (III of 1907), ss. 4, 5 and 47—Civil Procedure Code (Act V of 1908), O. I, r. 3—Single petition by creditor to adjudicate debtors as insolvents—Debtors, members of a joint Hindu family—Joint debt—Joint acts of insolvency—Single petition against joint debtors, whether maintainable—Multifariousness in suits—Test of.

The members of a joint Hindu family can be adjudicated insolvents on a single petition by a creditor, if they are liable on a joint debt and have been guilty of a joint act or acts of insolvency.

The test is whether, if the application were treated as a suit, the suit would be bad for multifariousness, that is, for misjoinder of different causes of action against different defendants; if no such objection can be successfully advanced, a single application for adjudication is maintainable.

Sarada Prasad Ukil v. Ram Sukh Chandra, (1905) 2 C.L.J., 818, dissented from.

APPEAL against the order of F. A. COLERIDGE, the District Judge of Guntūr, in I.P. No. 59 of 1918.

The material facts are set out in the judgment.

P. Narayanamurti for appellant.

B. Somayya, A. Satyanarayana and K. Kamanna for respondents.

SADASIVA
AYYAR, J.

SADASIVA AYYAR, J.—These two appeals have arisen out of an order of the District Judge, Guntūr, adjudicating a father and two of his sons styled respondents Nos. 1, 2 and 3 as insolvents. The petitioner in insolvency was a creditor of the father and may also be treated as the creditor of his three sons (respondents Nos. 2, 3 and 4) for the purpose of these appeals. He applied for adjudicating the father and his major sons the

* Appeal against Order No. 96 of 1920.

second and the third respondents as insolvents and did not pray that the minor fourth respondent should also be made an insolvent. He alleged in his petition vaguely "that the respondents" transferred their immoveable properties under six documents, Exhibits A to F, September and November 1918 to their relations and friends either nominally without consideration or with a view to fraudulently prefer the alienees who were their relations and friends and that therefore the "respondents" have committed acts of insolvency within the meaning of clauses (b) and (c) of section 4 of the Provincial Insolvency Act (III of 1907.) As he prayed only for respondents 1 to 3 to be adjudicated insolvents I shall take it that the above allegations against "respondents" refer to respondents 1 to 3 alone and that respondents 1 to 3 alone are alleged to have transferred their immoveable properties and thus committed acts of insolvency. The learned District Judge adjudicated the first three respondents to be insolvents accordingly. Appeal No. 96 is preferred by the fifth respondent who is one of the three alienees mentioned in the application. Respondents No. 3 and 4 are the two appellants in the other Appeal No. 138. It is admitted by the learned vakil for respondents 3 and 4 (in the lower Court) who are the appellants in 138, that the inclusion of the fourth respondent as one of the appellants in that appeal was a mistake as he was not adjudicated an insolvent by the District Court and (as I have said before) even the applying creditor did not pray for the fourth respondent also being adjudicated an insolvent.

Section 5 of the Provincial Insolvency Act provides that an "Insolvency petition may be presented either by a creditor or by the debtor." Next section 6 makes a distinction between the circumstances which entitles a debtor to present an application and the circumstances which entitle a creditor to make an application. Clause (3) of section 6 details the conditions which enable the debtor to present the Insolvency petition, and clause (4) the condition similarly entitling the creditor. Further, between the contents of the petitions respectively presented by a debtor or a creditor a distinction is made in section 11, clauses (1) and (2). After the presentation of the petition the Court is directed to fix a date for hearing the petition and on the date fixed for the hearing of the petition or on an adjourned date the

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Court is directed to require "proof" (that is, I take it from the person presenting the petition whether debtor or creditor) that three requisites have been complied with, requisite (a) being that the creditor or the debtor, as the case may be, is entitled to present the petition, and requisite (c) being that the debtor has committed the act of insolvency alleged against him. I take it that the requisite (c) refers only to the petition by a creditor and not to the petition by the debtor, for so far as the debtor is concerned, it has been held that the presentation of the petition itself by a debtor is an act of insolvency on his part and hence there is no meaning in requiring proof of requisite (c) in the case of an application made by the debtor himself.

The two reasons given by the District Judge for adjudicating three of the debtors as insolvents are (1) that the first respondent himself filed an independent petition to be declared an insolvent and (2) that he admitted he had alienated properties under six documents within three months before the date of the petition. I take it that the reference to the period of three months before the date of the petition was made having in mind the provision of section 6, clause (4) (c), which says that the act of insolvency on which the petition is grounded must have occurred within three months before the presentation of the petition.

Now an act of insolvency is defined in section 4. Two of the acts which fall under that definition are (1) a transfer of the property of the debtor with intent to defeat or delay his creditors (clause b) and (2) a transfer which would be void as a fraudulent preference if he were adjudged an insolvent (clause c). Section 37 (1) of the Act provides that a transfer by a person unable to pay his debts in favour of a creditor with a view of giving that creditor a preference over other creditors shall, if the petition on which he is adjudged an insolvent is presented within three months after the date of the transfer, be deemed fraudulent and void (that is, that such a transfer would be a fraudulent preference and an act of insolvency, reading section 37 with section 4). The District Judge therefore must have intended that or some of these six alienations were fraudulent preferences that at least one of them was intended as a fraudulent preference. He does not however expressly say so. He has not also clear-

indicated whether he considers all the six alienations to be fraudulent preferences or only a less number, and if so which of them.

As I stated in the beginning, the allegation in the petition seems to be that all the respondents Nos. 1 to 3 committed joint acts of insolvency. It is, however, clear on a perusal of Exhibits A to F that it is only the first respondent that executed these transfers, and assuming that all, or some of them are fraudulent preferences, or at least one of them is such, there is no proof found among the records to establish that respondents Nos. 2 and 3 were guilty of any act or acts of insolvency. The second respondent has not appealed but as the fifth respondent has appealed against the entire order of the District Judge, I would modify the Lower Court's order by dismissing the application of the petitioning creditor so far as the second and third respondents in the lower Court are concerned.

Then, we have the case of the first respondent in the lower Court to consider. He, again, has not appealed but the fifth respondent who is an alienee of some of his properties has attacked the first respondent's adjudications on several grounds and he is entitled to contest the matter. His contentions may be stated mostly in his own words thus:

"(1) The learned District Judge should have given opportunity to the fifth respondent to adduce evidence in support of the alienations in his favour."

"(2) There is no finding that the first respondent committed an act of insolvency."

(I take it that he means that there is no proof that there was a fraudulent preference in favour of the fifth respondent or either of the other two alienees.)

"(3) The lower Court failed to see that a joint application against a number of persons who are members of a joint Hindu family to declare them insolvents is not maintainable and a declaration cannot be asked for in one petition against several joint debtors."

I shall take the last point first. On general principles of the law governing procedure, I do not see why a single application should not be filed against the members of a joint Hindu family by a petitioning creditor if those members have been guilty of a joint act or joint acts of fraudulent preference. Section 47 of the Provincial Insolvency Act directs the Court to follow the

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same procedure in insolvency matters as is followed in civil suits. Now, a suit can be maintained by a plaintiff against several defendants where the facts constituting the cause of action are one and the same against all the defendants (see rules in Order 1 of the Civil Procedure Code). Mr. Narayanamurti, however, relied on two Calcutta decisions, *Sarada Prasad Ukil v. Ram Sukh Chandra*(1) and *Kali v. Hari*(2), in support of his contention.

Kali v. Hari(2) merely follows what the learned Judges who decided that case considered to be the principle of *Sarada Prasad Ukil v. Ram Sukh Chandra*(1) though they admit that the latter case was decided under Chapter XX of the Code of Civil Procedure and not under the Provincial Insolvency Act. Turning to *Sarada Prasad Ukil v. Ram Sukh Chandra*(1), Mr. Justice MUKERJEE, who delivered the judgment of the Bench in that case, merely points out several inconveniences which would arise in many cases from entertaining a single application directed against several persons to adjudicate them insolvents and the inconveniences of holding a single trial on such a petition. But I think the learned Judge (with all respect) ignores that there would be grave inconveniences also in many cases in holding separate trials where the debt due to the petitioning creditor is a joint debt of all the persons sought to be adjudicated insolvents and where the latter have been guilty of a joint act or joint acts of insolvency. The fact that section 8 of the Insolvency Act provides for consolidation on the ground of convenience even in cases where distinct petitions are obligatory shows that the argument on the ground of inconvenience should not be given too much weight. As I stated, the test is whether if the application was treated as a suit, that suit would be bad for multifariousness, that is, for misjoinder of different causes of action against different defendants. If no such objection can be successfully advanced a single application is, in my opinion, maintainable in that case. Of course, we should confine ourselves to the allegations in the petition to find out whether the objection of multifariousness is sustainable. In the present case, on the allegations in the creditor's petition as it stands, the objection of multifariousness cannot be sustained. That ground of appeal is therefore rejected.

(1) (1906) 2 C.L.J., 318.

(2) (1920) 81 C.L.J., 204.

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Now, as regards the two other contentions the learned District Judge, as pointed out already, might have distinctly stated whether he considers all of these alienations as fraudulent preferences or whether he considers only one or a few of them as such, and if so, which of them. No doubt it lies upon the petitioning creditor to prove that there was at least one alienation which was made with the object, on the part of the insolvent, to give a fraudulent preference. As pointed out by my learned brother in *The Official Assignee, Madras v. T. B. Mehta & Sons*(1), it is not sufficient to prove that the transfer had the effect of giving preference to a creditor; it must be proved further that there was the view or intention to give that creditor a preference. Such a proof was sought to be given by the petitioning-creditor in this case by examining the first respondent as his witness. That first respondent admits that all the three alienees were his relations and that they have been preferred to other creditors. Without deciding that all the six alienations were meant as fraudulent preferences I am satisfied that there is sufficient material for a finding that at least one of these was a fraudulent preference made with a view to prefer the alienee under it, and so I see no reason to interfere with the order of the District Judge adjudicating the first respondent as an insolvent.

As regards the contention that the appellant was not given sufficient opportunity to prove that the first respondent was not guilty of any fraudulent preference, I do not think that he has established that he was so denied such an opportunity by the lower Court.

As regards the provision of the English Act quoted in the Calcutta cases, already referred to, I wish to add a few observations. That provision corresponds to Order 30, rule 1 of the Code of Civil Procedure, which says:

"any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were at the time of the

(1) (1919) 1 L.R., 42 Mad., 510.

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acorning of the cause of action partners in such firm, to be furnished and verified in such manner as the Court may direct."

It was never considered that the existence of this provision, enabling a person to sue a firm in the firm's name, had any effect upon the right of the plaintiff who has a joint cause of action against several persons not constituting a trading firm to bring a single suit against them. That being so, I cannot see how that provision has any relevancy in the consideration of the question whether a single petition is permissible by a creditor against two or more joint debtors guilty of a joint act of insolvency.

In the result the order so far as it adjudicates the first respondent an insolvent is confirmed but it is set aside as regards the adjudication of respondents 2 and 3.

NAPIER, J.

NAPIER, J.—I agree. I only wish to add a few words on one point out of deference to the learned Judges of the High Court of Calcutta who decided *Kali v. Hari* (1). The point taken by the appellant is that a joint application will not lie against more than one person, even on an allegation of joint liability and joint acts of insolvency. The contention certainly receives support from the judgment above referred to; but for the reasons given by my learned brother I am unable to agree with it. The learned Judges say:

"There is no doubt provision in the English Bankruptcy Act that any two or more persons being partners or any person carrying on business under a partnership name may take proceedings or be proceeded against under this act in the name of the firm," and I gather that the learned Judges are of opinion that if it was not for that provision, it would not be possible to take any proceedings against two persons who are held to be jointly liable as partners. With the greatest deference I do not think that the section says anything of the sort. What the section says is that any two or more persons being partners may be proceeded against in the name of the firm, that is to say, the section presumes that a suit or proceedings may be taken against them in the name of the firm itself as is done in a suit against members of a partnership. There is no definite provision saying that proceedings might be taken against such persons

(1) (1920) 31 O.L.J., 206.

jointly and I have no doubt that it was never considered necessary to make any such specific provision. The judgment in that case, as my learned brother pointed out, was founded on a previous judgment under the Code of Civil Procedure and I see no reason why it should be necessary to import into this Act anything arising out of the Code of Civil Procedure, even if such a contention could be justified on the true construction of the Code.

As for inconvenience, it seems to me that that question is practically resolved by the provision which says that where a creditor has actually applied in separate petitions against persons jointly liable the Court has power to consolidate the proceedings for the convenience of all parties. I quite agree that there must be a cause of action which is joint to all the persons who are sought to be adjudicated and that it would not be sufficient to allege that persons were joint debtors but had committed separate acts of insolvency, but where the debt and the acts of insolvency are joint, I have no doubt that a petition will lie against persons alleged to be jointly liable to the creditor.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Ramesam.

UMMATHU (PLAINTIFF), APPELLANT,

v.

PATHUMMA AND OTHERS (DEFENDANTS NOS. 1 TO 4), RESPONDENTS.*

Limitation Act (Indian) (IX of 1908), ss. 4 and 14—Suit for dower—Period of Limitation expiring during Christmas holidays—Suit filed in a Subordinate Judge's Court, on its Small Cause side on the re-opening day—Plaint, returned for want of jurisdiction on the Small Cause side—Plaint presented as an Original Suit in the same Court on its regular side—Limitation, bar of.

Where the period limited for the institution of a suit for dower expired on a day when the Court was closed for the Christmas holidays, and the suit was instituted on the re-opening day as a Small Cause suit in the Court of a Subordinate Judge on its Small Cause side and on the plaint being returned after some days for want of jurisdiction it was filed on the next day in the

* Second Appeal No. 1105 of 1920.

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same Court as an original suit and the defendant pleaded that the suit was barred by limitation.

Held, that the time during which the suit was pending on the Small Cause side of the Court and which the plaintiff was allowed to deduct under section 14 of the Limitation Act could not be tacked on to the period during which the Court was closed, under section 4 of the Act, so as to save the bar of limitation.

SECOND APPEAL against the decree of V. PANDRANG RAO, the District Judge of South Malabar, in Appeal Suit No. 503 of 1919, preferred against the decree of G. L. D'CRUZ, the Subordinate Judge of Cochin, in Original Suit No. 11 of 1918.

The material facts are set out in the Judgment.

P. G. Krishna Ayyar for appellant.

T. S. Viswanatha Ayyar and P. R. Narayana Ayyar for respondents.

SPENCER, J.

SPENCER, J.—The plaintiff had three years from the death of her husband to institute this suit for dower. As he died on 30th December 1914, the last day for presenting the plaint was 30th December 1917.

She actually presented it on 3rd January 1918 in the Small Cause Court of Cochin, that being the day when that Court re-opened after the Christmas holidays. The plaint was returned for want of jurisdiction on 6th February, as suits by a Muhammadan for dower are excepted from the cognizance of a Court of Small Causes by section 15 (1) and article 36 of the second schedule of the Provincial Small Causes Courts Act. The plaintiff re-presented the plaint on the following day in the Court of the Subordinate Judge of Cochin.

The question is whether the suit was in time. It would have been in time if it had been instituted on 3rd January as the Subordinate Court of Cochin was closed on 30th December when the period of limitation prescribed by the first schedule of the Limitation Act for such suits expired and it re-opened on 3rd January. The explanation to section 3 shows that a suit can be said to be instituted when the plaint is presented to the proper officer. This also is the view taken in *Haridas Roy v. Sarat Chandra Dey*(1) by a Bench of the Calcutta High Court.

(1) (1913) 18 I.C., 121.

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SPENCER, J.

The proper officer in this case was the Subordinate Judge of Cochin sitting on the original side, or the chief ministerial officer of his Court authorized under rule 14 of the Civil Rules of Practice to receive plaints. The plaint was not so presented till 7th February when more than three years had elapsed from the cause of action arising. The plaintiff wishes to have the benefit of section 4 of the Act and she would be entitled to it if she had presented her plaint on 3rd January to the proper officer, seeing that both Courts were closed till 2nd January. But a presentation to the wrong officer is not an institution of a suit at all. It has been clearly established by *Mira Mohidin Rowther v. Nallaperumal Pillai*(1), *Seshagiri Row v. Vajra Velayudam Pillai*(2) and *Ramalingam Ayyar v. Subbier*(3) that for the purposes of section 4 account cannot be taken of the closing and re-opening of any other Court than that in which the suit was rightly instituted.

Such being the effect of section 4, it may next be considered whether section 14 will avail the plaintiff so as to bring her suit within the limitation period. Under section 14 it might, under certain circumstances, be possible to exclude the time between 3rd January and 6th February as being a time when the plaintiff was prosecuting with due diligence another civil proceeding against the same party for the same relief, but even if this were done, it could not operate to revive a claim which became time expired by the plaintiff's failure on 3rd January to institute a suit in a Court of competent jurisdiction. The period allowed by section 14 cannot be tacked on to the period during which the proper Court was closed [see *Ramalingam Aiyar v. Subbier*(3)] as the regular suit cannot be treated as a continuation of the Small Cause suit in which the plaint was returned [see *Seshagiri Row v. Vajra Velayudam Pillai*(2).]

It has been held that the period requisite for obtaining a copy of judgment for the purpose of appealing can be tacked on to the period during which the Court that passed the decree appealed against was closed if it was too late to apply for a copy on the date when the judgment was pronounced [see

(1) (1913) I.L.R., 36 Mad., 131.

(2) (1913) I.L.R., 36 Mad., 432.

(3) (1913) 8 L.W., 256.

UMMATHU v. PATHUMMA. SPENCER, J. *Saminatha Ayyar v. Venkatasubba Ayyar*(1)] thus showing that sections 12 and 4 may be combined, this being because section 4 applies to applications (for copies) as well as to suits. But it is necessary that the appellant should have a subsisting right to appeal when he applied for the copy [see *Tukaram Gopal v. Pandurang Sadaram*(2), *Venkata Row v. Venkatachella Chetty*(3) and *Siyadat-un-nissa v. Muhammad Mahmud*(4)], and that he should apply on the re-opening day [see *Subramanyam v. Narasimham*(5)].

But it has never been held that the period which may be excluded under section 14 can be tacked on to the period when the Court having jurisdiction was closed under section 4. The reason is that the Courts are different, and a plaintiff who fails to institute his suit in the Court having jurisdiction before the limitation period expires, or on the re-opening date if the period expires during the vacation of that Court, has no longer a valid and subsisting cause of action.

It makes no difference that the same Judge presides over both Courts or even that the same ministerial officer is deputed to receive plaints on the Original as well as the Small Cause side, for section 33 of the Provincial Small Cause Courts Act declares that they shall be deemed to be different Courts for the purposes of that Act and the Code of Civil Procedure. Sections 15 to 26 of the Code of Civil Procedure which deal with the institution of suits are thus affected with the consequence that a suit instituted on the Small Cause side cannot, for the purpose of section 4 of the Limitation Act, be regarded as a suit instituted in "the Court" having jurisdiction to hear original suits.

The Second Appeal is dismissed with costs.

RAMESAM, J. RAMESAM, J.—I agree in holding that the Second Appeal should be dismissed with costs. The facts are stated in my learned brother's judgment and need not be repeated. In deciding that the suit was time barred, the Courts below relied on *Mira Mohidin Rowther v. Nallaperumal Pillai*(6) and *Seshagiri*

(1) (1904) I.L.R., 27 Mad., 21.
(3) (1905) I.L.R., 28 Mad., 452.
(5) (1920) I.L.R., 43 Mad., 640.

(2) (1901) I.L.R., 25 Bom., 584.
(4) (1897) I.L.R., 19 All., 342.
(6) (1913) I.L.R., 36 Mad., 131.

Row v. Vajra Velayudam Pillai(1). In the first of these cases, the proper Court was not closed on the day on which the plaint was first presented. The facts in the second case are not quite similar to the first. As ascertained from the printed papers, it appears that the proper Court was closed on the day of the first presentation but had re-opened some days before the re-presentation. It may be said that these cases are distinguishable on the ground that, in both of them, the proper Court had been opened for some days before the re-presentation which is not the case with the appeal before us. But this does not conclude the matter.

I may first clear the ground by observing that the days from 3rd January to 6th February ought to be obviously excluded from computation under section 14 of the Limitation Act. The only question for consideration is whether the days from 31st December to 2nd January can be excluded in favour of the appellant. It is conceded on all hands that the language of section 4 enables them to be so excluded, if the plaint is re-presented on the re-opening day where the period of limitation expires on a holiday, or, in other words if the holidays follow any other period that can be excluded from computation under another section, such as section 12 or section 15. But can the appellant get the benefit of section 4, if the holiday precedes such period? This being the real question it is necessary to consider only the cases involving the joint application of section 4 with some other section of the Act relating to computation. First, we have a group of cases relating to the joint applications of sections 4 and 12. The appellant relies on *Siyadat-un-nissa v. Muhammad Mahmud*(2), *Tukaram Gopal v. Pandurang Sadaram*(3), *Pandarinath v. Shankar*(4) and *Saminatha Ayyar v. Venkatasubba Ayyar*(5) and the respondent relies on *Venkata Row v. Venkatachella Chetty*(6), *Tanjore Palace Estate v. Andi Ramiahchetty*(7), *Subramanyam v. Narasimham*(8), and *Masilamani v. Arumuga Mudali*(9). *Saminatha Ayyar v. Venkatasubba Ayyar*(5) cannot help the appellant. In that case the judgment was

(1) (1913) I.L.R., 36 Mad., 482.
(3) (1901) I.L.R., 25 Bom., 584.
(5) (1904) I.L.R., 27 Mad., 21.
(7) (1911) 11 L.O., 389.
(2) (1897) I.L.R., 19 All., 342.
(4) (1901) I.L.R., 25 Bom., 586.
(6) (1905) I.L.R., 28 Mad., 452.
(8) (1920) I.L.R., 43 Mad., 640.
(9) (1920) 12 L.W., 460.

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delivered on the last day before the holidays, at a time when it was impossible to make an application for copies. The Court being closed for the vacation, the application was made on the re-opening day and their Lordships held that it being impossible for the appellant to make an application earlier, the whole time that elapsed between the date of judgment and the date of application must be regarded as time taken for obtaining copies within the meaning of section 12. They did not invoke the aid of section 4 (then section 5 of the Act of 1877) in arriving at their conclusion. If there was a similar disability in applying for copies (which does not appear from the facts) in *Tukaram Gopal v. Pandurang Sadaram*(1) and *Pandarínath v. Shankar*(2), I agree with these decisions also. The actual *ratio decidendi* of the judgments, however, depends on the use of section 5 of the Limitation Act of 1877. It was held that an application for copies may be made so long as the right of appeal was subsisting, a proposition with which I agree, and that not only the period following the application for copies but all the prior holidays can be excluded. I do not see any warrant for the latter proposition in the Limitation Act, unless section 4 can be construed liberally as a section generally enabling exclusion of holidays from computation. If such construction is permissible, the qualification that the right of appeal should be subsisting on the date of application is unnecessary. That such a construction cannot be made is clear from *Venkata Row v. Venkatachella Chetty*(3), *Tanjore Palace Estate v. Andi Ramiah-chetty*(4), *Subramanyam v. Narasimham*(5), *Masilamani v. Arumuga Mudali*(6), from *Mira Mohidin Rowther v. Nallaperumal Pillai*(7), and *Seshagiri Row v. Vijra Velayudam Pillai*(8), from *Shevadas Daulatram v. Narayan*(9) and from other cases to be cited below. That being so I doubt the correctness of *Siyadat-un-nissa v. Muhammad Mahmud*(10), *Tukaram Gopal v. Pandurang Sadaram*(1) and *Pandarínath v. Shankar*(2). In passing, I may observe that these cases relate to appeals

- (1) (1901) I.L.R., 25 Bom., 584.
(3) (1905) I.L.R., 38 Mad., 452.
(5) (1920) I.L.R., 43 Mad., 640.
(7) (1918) I.L.R., 46 Mad., 181.
(9) (1912) I.L.R., 36 Bom., 268.

- (2) (1901) I.L.R., 25 Bom., 586.
(4) (1911) 11 I.C., 389.
(6) (1920) 12 L.W., 460.
(8) (1918) I.L.R., 36 Mad., 482.
(10) (1897) I.L.R., 19 All., 342.

and in the circumstances of these cases, the delay might have been excused under section 5A of the Act of 1877 (section 5 of the present Act) a course not available for suits. I may also observe that no question relating to section 12 can arise in the case of suits. Passing on to the joint application of section 4 with other sections of the Act, I find that it was held in *Bai Hemkore v. Masamalli*(1) by JENKINS, C.J., and ASTON, J., that section 4 cannot be tacked on prior to the period of extension given by section 19. Again, *Makund Ram v. Ramraj*(2) and *Ramalingam Aiyar v. Subbier*(3) are on all fours with the present case and are authorities against the appellant. *Abhaya Churn Chuckerbutty v. Gour Mohun Dutt*(4) also supports the respondents' contention. I agree with them and hold that the suit is barred by limitation.

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K.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Ramesam.

1921,
March 15.

TARACHAND (PLAINTIFF), PETITIONER,

v.

THE MADRAS AND SOUTHERN MAHRATTA RAILWAY
COMPANY, LIMITED (DEFENDANTS), RESPONDENTS.*

Limitation Act (IX of 1908), arts. 81 and 82—*Railways Act* (Indian) (IX of 1890), sec. 56—*Suit by consignor of goods for surplus sale-proceeds—Suit against the Company—Sale of goods under section 56 of the Railways Act—Suit for compensation, distinct from suit for surplus sale-proceeds—Money had and received—Applicability of art. 81 or 82, Limitation Act.*

A suit by the consignor of goods by a Railway Company for the recovery of the surplus sale proceeds realized by the Company by sale of the goods under section 56 of the Indian Railways Act, is governed by article 62 and not article 81 of the Limitation Act.

M. & S.M. Ry. Co., Ltd. v. Haridoss Benmalidoss (1918) I.L.R., 41 Mad., 871, referred to.

- (1) (1902) I.L.R., 26 Bom., 782.
(2) (1916) 14 A.L.J., 810.
(3) (1918) 8 L.W., 256.
(4) (1875) 24 W.R., 26, 28.

* Referred Case No. 18 of 1920.

TARACHAND
M. & S. M.
EX. CO.,
LTD.

CASE stated under section 69 of the Presidency Small Cause Courts Act by the Presidency Small Cause Court in Suit No. 3721 of 1920 (F.B. No. 118 of 1920).

This reference was made to the High Court by the Presidency Small Cause Court, Madras, under section 69 of the Presidency Small Cause Courts Act, owing to a difference of opinion between the Judges of that Court on a question of limitation. The suit, in which the reference was made, was instituted by the owner and consignor of certain goods entrusted for carriage to the defendant, a Railway Company, for recovery of surplus sale-proceeds realized by the Company on the sale of such goods and not "rendered to the consignor" under section 56 of the Indian Railways Act. The consignment to the Company was made on 8th June 1918, the sale of the goods by the company was on 12th February 1919, and the suit was instituted on 26th March 1920. The majority of the Full Bench of the Small Cause Court held that article 62 and not article 30 or 31 of the Limitation Act governed the case. The other material facts and contentions appear from the following Letter of Reference of the Small Cause Court:

This is a case stated for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act as we have differed in opinion on the question of limitation raised during the hearing of the Full Bench application.

2. The facts are as follows:—

The plaintiff consigned on the 8th of June 1918 two cases of camphor to a certain consignee at Bangalore. The said boxes were not delivered to the consignee. The railway receipt was not produced, having been lost in course of post, and the defendant Company was unable to trace the goods to their owner as plaintiff stated that he consigned from Salt Cotaurs instead of Central Station. The duplicate of the railway receipt has been produced and proves that the goods in question were in fact consigned by plaintiff as alleged by him. The defendant Company held possession of the said two boxes till 12th February 1919 when they sold them under their powers contained in section 56 of the Railways Act, IX of 1890, and realized a sum of Rs. 550 or thereabouts.

3. The plaintiff brought this suit, on the 26th of March 1920, i.e., about 21 months after the boxes would ordinarily have been delivered in Bangalore and more than 13 months after the sale above referred to, for an account of the sale-proceeds of the two

boxes of camphor and for payment of a sum of Rs. 623, or as may be found due. There is no doubt about the facts but it is pleaded on behalf of the Railway Company that the suit is barred as falling within article 30 or 31 of the Limitation Act, IX of 1908. The plaintiff contended that the suit fell within article 62 of the same Act and his contention was upheld in the opinion of two of us, the third Judge holding the contrary view. The reasons are set out in the enclosures which are called judgments and which contain our differing opinions. These, however, have not yet been pronounced pending the result of this Reference.

4. As will appear the majority of us held that this was in fact a suit for money had and received to the use of the plaintiff and that as a suit of the present character is not in terms comprised within the wording of either article 30 or 31, there was no reason for holding that a Railway Company was exempt from the ordinary provisions of the law and that it could not be said that the articles in question are exhaustive of all actions that can be brought against carriers in respect of goods carried. The third Judge on the other hand holds that this is a suit against a carrier for compensation for non-delivery and is therefore governed by article 31 of the Limitation Act. It may be observed that there seems to be no direct authority in any of the reports, though the ruling in *Venkatasubba Rao v. The Asiatic Steam Navigation Co., Calcutta*(1) shows that in suits for the return of specific goods three years are the period of limitation and that therefore articles 30 and 31 are not the only articles of the Limitation Act applicable to sections against Railway Company.

5. The question therefore we beg to refer for the opinion of the High Court is:

"Whether a suit by the owner of goods entrusted to a railway for carriage, for recovery of the sale-proceeds of such goods when sold under section 56 of the Railways Act, is governed by article 31 or by article 62 of the Limitation Act.

P. Venkataramana Rao for appellant.

R. N. Ayyangar for respondent.

The Court delivered the following JUDGMENT:—

The plaintiff in this reference is the consignor of goods for carriage by the Madras Railway Company to a consignee at Bangalore. The goods were not delivered and there seems

(1) (1916) I.L.R., 39 Mad., 1 (F.B.).

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to have been a certain amount of correspondence and inquiry after them by plaintiff. But it came to nothing apparently, because it is common ground that the goods had not on them his correct address and that he stated the station, at which he booked them incorrectly. It has further been found that, in the end, the goods which were in the Railway Company's possession were sold in the exercise of their right under section 56 of the Indian Railways Act. The plaintiff is now suing to recover the surplus proceeds of that sale, which, in the words of the section, the Railway Company is bound to render to the person entitled.

We are asked to decide what is the article of schedule 1 of the Limitation Act applicable to this suit. The plaintiff contends, and two learned Judges of the Small Cause Court have held, that the article is No. 62 :

"For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use."

On the other hand, as one learned Judge has held, the Railway Company contends for the application either of article 30 or article 31, the two articles dealing with suits against a carrier. Article 30 may at once be dismissed from consideration, because there is no question in the present case of loss or injury to goods. We, therefore, have to decide between articles 31 and 62.

It is not disputed that article 62 would apply in terms to the sale-proceeds. The argument of Mr. R. N. Ayyangar on behalf of the Company is, however, that plaintiff, having a right of suit for compensation for non-delivery of the goods, must be supposed to be now suing to enforce that right and that article 31 is applicable. Mr. Ayyangar has relied strongly on the fact that section 56 of the Indian Railways Act is contained in Chapter VI thereof, dealing with the "Working of Railway," whereas the responsibility of Railway Companies is dealt with in Chapter VII, and he has referred to the statement of His Lordship the Chief Justice in *M. & S. M. Ry. Co., Ltd. v. Haridoss Bannalidoss*(1), that Chapter VII must be taken and was intended to cover the whole liability of the Railway Company, including among other things the responsibility of the Railway

Company for misdelivery by whatever reason caused. It is sufficient to observe that section 56 (2) and the procedure authorized therein were not in question in that case and there is no reason for assuming that it was present to the mind of his Lordship or that, if it had been brought to his notice, he would have used the same expressions.

As we read section 56, it authorizes the Railway Company to adopt a certain procedure and to hold a sale, and gives a direction as to the disposal of the proceeds thereof. We cannot hold that that direction is merely moral or administrative. There is no reason why it should not confer a right to the surplus proceeds on the person referred to in the section as entitled to them. That person would be in the present case the plaintiff. There is further no reason why that right should not be enforced by a suit. Such a suit could not be brought until after the sale, that is, in the words of the third column of the schedule until after the date when the money was received for the plaintiff's use. The argument for the application of article 31 can be supported only on the assumption that what the plaintiff is suing for is not merely the surplus sale-proceeds, but compensation for the non-delivery of goods; and that is not how the plaintiff has described his claim. The distinction is material. For compensation for the non-delivery of the goods might very well be, and in fact very frequently would be, much more than the surplus sale-proceeds. The two classes of suits are entirely distinct and, because the suit to which article 31 would apply might have been available for the plaintiff, that is no reason why we should refuse to regard his suit as one for the money referred to in section 56 (2), to which article 62 would apply.

We hold that the suit is in time and answer the reference accordingly. The costs of this Reference will be provided for in the decree.

Solicitors for respondent: *Messrs. Brightwell and Moresby.*
K.R.

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APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and
Mr. Justice Napier.

1921,
March 29.

S. T. M. R. MURUGAPPA CHETTIAR (DIED) AND ANOTHER
(PLAINTIFFS AND LEGAL REPRESENTATIVE OF THE DECEASED PLAINTIFF),
APPELLANTS,

v.

PONNUSAMI PILLAI (DEFENDANT), RESPONDENT.*

Order XLI, rule 22 (4), Civil Procedure Code (V of 1908)—Death of an appellant who had sued for damages for malicious prosecution—Abatement of appeal by—Jurisdiction to hear Memorandum of Objections.

Where a person sued for damages for malicious prosecution and obtained a decree but preferred an appeal claiming more damages than he had been awarded, and died pending the Appeal, the Appeal abates. *Rustomji Dorabji v. Nurse* (1921) I.L.R., 44 Mad., 357 (F.B.) and *Josiam Tiruvengadachariar v. Sawmi Iyengar* (1911) I.L.R., 34 Mad., 76, followed.

After such abatement any Memorandum of Objections filed by the respondent cannot be heard. *Alagappa Chettiar v. Chockalingam Chettiar* (1918) I.L.R., 41 Mad., 907 (F.B.), followed.

APPEAL against the decree of MUHAMMAD FAZL-UD-DIN, Subordinate Judge of the Subordinate Judge's Court of Trichinopoly, in Original Suit No. 57 of 1917.

This was a suit for recovery of Rs. 5,100, as damages for malicious prosecution. The defendant pleaded that there was just and probable cause for the prosecution and denied malice and stated that the damages claimed were excessive. The Subordinate Judge found the issues for the plaintiff and awarded Rs. 500 as damages. The plaintiff preferred an appeal claiming more damages and the defendant preferred a Memorandum of Objections objecting to the award of any damages. Pending the Appeal the appellant died.

S. Varada Achariyar with *T. V. Ramanatha Ayyar* for respondent.—The appellant having died the appeal abates: *Rustomji Dorabji v. Nurse*(1) and *Josiam Tiruvengadachariar v. Sawmi Iyengar*(2). There being a decree against the respondent

* Appeal No. 316 of 1919.

(1) (1921) I.L.R., 44 Mad., 357 (F.B.).

(2) (1911) I.L.R., 34 Mad., 76.

his memorandum can be heard in spite of the abatement of the Appeal: *Phillips v. Hourfray*(1). In *Alagappa Chettiar v. Chockalingam Chettiar*(2) there was no valid presentation of the Appeal. After 1908 a Memorandum of Objections stands on the same footing as an Appeal. The two contingencies mentioned are not exhaustive.

K. V. Krishnaswami Ayyar with *B. Kesava Ayyangar* for appellants.—When an appeal abates the Memorandum of Objections also cannot be heard: *Alagappa Chettiar v. Chockalingam Chettiar*(2). Order XLI, rule 22 (4), mentions only two contingencies in which it could be heard even when the Appeal is not heard; and this is not one of them: compare section 561, old Civil Procedure Code.

The Court delivered the following JUDGMENT:—

Following the Full Bench decision in *Rustomji Dorabji v. Nurse*(3) we hold the appeal abates; and it is dismissed with costs.

In this case the plaintiff preferred an appeal from a decree in his favour in a suit for malicious prosecution on the ground that the damages awarded were insufficient, and the defendant who had not appealed from the decree, filed a Memorandum of Objections contesting the decree. The plaintiff having died subsequently his appeal abated, as we have just held on the authority of the Full Bench decision in *Rustomji Dorabji v. Nurse*(3) and *Josiam Tiruvengadachariar v. Sawmi Iyengar*(4).

The question then argued before us is whether the respondent in the appeal is none the less entitled to have his Memorandum of Objections heard and determined. Order XLI, rule 22 (4), Civil Procedure Code, gives him such a right when after the filing of his Memorandum of Objections the appeal has been withdrawn or dismissed for default but not when it has abated. If the legislature had intended that he should have such a right in cases of abatement also, it would have said so. Rule 22 (1) entitles a respondent, though he may not have appealed from any part of the decree, not only to support the decree on any of the grounds decided against him in the Court below, but,

(1) (1883) 24 Ch.D., 439.

(2) (1918) I.L.R., 41 Mad., 907 (F.B.).

(3) (1919) I.L.R., 41 Mad., 904.

(4) (1911) I.L.R., 34 Mad., 76.

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also, to take any cross-objection to the decree which he could have taken by way of appeal. The intention of the rule is not to give a respondent who has allowed his own right of appeal to become barred a fresh substantive right of appeal, but only to allow him to take cross-objections on the appeal filed by the other side, and, if that appeal goes, the right to take cross-objections goes with it. As however it would be a hardship to allow an appellant to prevent the Memorandum of Objections from being heard by withdrawing the appeal or allowing it to be dismissed for default, the legislature has thought fit to provide that in such cases the memorandum of objections may "nevertheless" be heard and determined. The use of the word "nevertheless" is significant, especially when read with the word "cross-objection" which has been substituted for "objection" which occurred in section 561 of the old Code. This language shows that the legislature did not intend to alter the law by which the entertainment of objections was made contingent and dependent upon the hearing of the appeal. Whatever may be the reasons for the omission in rule 22 (1) of the words "upon the hearing" which occurred in section 561, the rule is sufficiently plain as it stands as held by the Full Bench in *Alagappa Chettiar v. Chockalingam Chettiar*(1), in which it was ruled that where an Appeal is dismissed as barred by limitation the Memorandum of Objections cannot be heard.

The Memorandum of Objections is dismissed with costs.

N.R.

(1) (1918) I.L.R., 41 Mad., 904 (F.B.).

BOOKS AND PUBLICATIONS OF THE LEGISLATIVE DEPARTMENT OF THE GOVERNMENT OF INDIA FOR SALE.

*List of Books and Publications for Sale which are
less than two years old.*

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, Digests of Indian Law Cases and Index to Enactments have been considerably reduced.

The British Enactments in force in Native States were issued by the Foreign and Political Department.

[The amounts within parentheses where noted are for packing and postage.]

I.—THE INDIAN STATUTE-BOOK.

A.—LOCAL CODES IN THE PRESS.

The United Provinces Code.
The Bombay Code.

B.—STATUTES.

The Government of India Act, 1919 (9 and 10 Geo. 5, ch. 101). As. 8.
(Anna 1.)
The Government of India Act (Being the Act of 1915-16, as amended by the Act of 1919.) Rs. 1 as. 4. (As. 2 p. 6.)

C.—RULES AND ORDERS.

Addenda et Corrigena to the List of General Rules and Orders. List No. I of 1919. As. 2 p. 9. (Anna 1.)
Addenda et Corrigena to the List of General Rules and Orders. List No. II of 1919. As. 3 p. 3. (Anna 1.)
Addenda et Corrigena to the List of General Rules and Orders. List No. I of 1920. Anna 1 p. 6. (Anna 1.)
Addenda et Corrigena to the List of General Rules and Orders. List No. II of 1920.

II.—ACTS, REGULATIONS AND ORDINANCES.

Acts (Unrepealed) of the Governor-General of India in Council and the Indian Legislature from 1919 up to date.
Regulations made under the Statute 5 and 6 Geo. 5 Ch. 61, from 1919 up to date.

Ordinances of the Governor-General of India from 1919 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 XXX of 1852 (Naturalization of Aliens), as modified up to 1st October 1919. As. 2 p. 9. (Anna 1.)
Act XIII of 1859 (Workman's Breach of Contract), as modified up to 1st November 1920. As. 2 p. 3. (Anna 1.)
Act V of 1898 (Code of Criminal Procedure), as modified up to 1st May 1920. Rs. 3 as. 10. (As. 4.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS OF THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

- Act III of 1919 (Motor Spirit Duties Amendment). In Urdu. Pies 3. (Anna 1.)
Act III of 1919 (Motor Spirit Duties Amendment). In Nagri. Pies 3. (Anna 1.)
Act IV of 1919 (Indian Income-tax Amendment). In Urdu. Pies 3. (Anna 1.)
Act IV of 1919 (Indian Income-tax Amendment). In Nagri. Pies 3. (Anna 1.)
Act V of 1919 (Termination of the Present War, Definition). In Urdu. Pies 3. (Anna 1.)
Act V of 1919 (Termination of the Present War, Definition). In Nagri. Pies 3. (Anna 1.)
Act VIII of 1919 (Negotiable Instruments Amendment). In Urdu. Pies 3. (Anna 1.)
Act VIII of 1919 (Negotiable Instruments Amendment). In Nagri. Pies 3. (Anna 1.)
Act IX of 1919 (Punjab Courts Supplementing). In Urdu. Pies 3. (Anna 1.)
Act IX of 1919 (Punjab Courts Supplementing). In Nagri. Pies 3. (Anna 1.)
Act X of 1919 (Excess Profits Duty). In Urdu. Pies 9. (Anna 1.)
Act X of 1919 (Excess Profits Duty). In Nagri. Pies 9. (Anna 1.)
Act XI of 1919 (Anarchical and Revolutionary Crimes). In Urdu. Anna 1. (Anna 1.)
Act XI of 1919 (Anarchical and Revolutionary Crimes). In Nagri. Anna 1. (Anna 1.)
Act XII of 1919 (Poisons). In Urdu. Pies 3. (Anna 1.)
Act XII of 1919 (Poisons). In Nagri. Pies 3. (Anna 1.)
Act XIV of 1919 (Provident Funds Amendment). In Urdu. Pies 3. (Anna 1.)
Act XIV of 1919 (Provident Funds Amendment). In Nagri. Pies 3. (Anna 1.)
Act XVI of 1919 (Indian Naturalization Amendment). In Urdu. Pies 3. (Anna 1.)
Act XVI of 1919 (Indian Naturalization Amendment). In Nagri. Pies 3. (Anna 1.)
Act XIX of 1919 (Indian Tariff Amendment). In Urdu. Pies 3. (Anna 1.)
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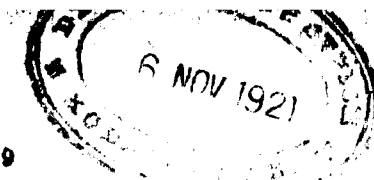
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- Act VI of 1886 (Births, Deaths and Marriages Registration), as modified up to 1st May 1911. As. 6. (Anna 1.)
- Act XI of 1886 (Indian Tramways), as modified up to 1st December 1903. As. 9. (As. 2.)
- Act VII of 1887 (Suits Valuation), as modified 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.)

III.—REPRINTS OF ACTS AND REGULATIONS, ETC.—*cont.*

- Act XIV of 1887 (Indian Marine), as modified up to 15th February 1899. As. 2. (Anna 1.)
- 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. 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 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 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.)
- Act VIII of 1911 (Indian Army), as modified up to 1st August 1918. As. 14. (As. 2.)
- 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' Suite), as modified up to 1st November 1904. In Urdu. Pies 3. (Anna 1.)
- Act XII of 1855 (Legal Representatives' Suite), 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 modified up to 1st November 1920. In Urdu. Pies 3. (Anna 1.)
- Act XIII of 1859 (Workman's Breach of Contract), as modified up to 1st November 1920. 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 June 1910. In Urdu. Re. 1 as. 5. (As. 5.)
- Act XLV of 1860 (Indian Penal Code), as modified up to 1st June 1910. 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.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- 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.)
- 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 Urdu. 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 Paraoes), as modified up to 1st August 1908. In Urdu. Pies 6. (Anna 1.)
- Act XXII of 1867 (Sarais and Paraoes), 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. 9. (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.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- Act I of 1872 (Indian Evidence), as modified up to 1st May 1908. In Urdu. As. 8. (Anna 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.)
- 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 1st December 1917. In Urdu. As. 3 p. 3. (Anna 1.)
- Act VIII of 1873 (Northern India Canal and Drainage), as modified up to 1st December 1917. In Nagri. As. 3 p. 3. (Anna 1.)
- Act X of 1873 (Indian Oaths), as modified up to 1st February 1908. In Urdu. Anna 1. (Anna 1.)
- Act X of 1873 (Indian Oaths), as modified up to 1st February 1908. 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), as modified up to 1st September 1909. 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 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 1908. In Urdu. As. 4. (Anna 1 p. 6.)
- Act VII of 1878 (Indian Forests), as modified up to 1st December 1908. 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 1903. In Urdu. As. 2. (Anna 1.)
- Act XVII of 1878 (Northern India Ferries), as modified up to 1st June 1903. In Nagri. As. 2. (Anna 1.)
- Act XVIII of 1879 (Legal Practitioners), as modified up to 1st July 1911. In Urdu. As. 2 p. 6. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- Act XVIII of 1879 (Legal Practitioners), as modified up to 1st July 1911. 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), as modified up to 1st September 1909. In Urdu. Anna 1 p. 3. (Anna 1.)
- Act XIII of 1880 (Vaccination), as modified up to 1st September 1909. 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), as modified up to 1st May 1911. In Urdu. Anna 1 p. 3. (Anna 1.)
- Act X of 1886 [Indian Criminal Law (Amendment)]. In Urdu. Pies 2. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- Act XI of 1886 (Indian Tramways), as modified up to 1st December 1903. In Urdu. As. 3 p. 3. (Anna 1.)
- Act XI of 1886 (Indian Tramways), as modified up to 1st December 1903. In Nagri. As. 3 p. 3. (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.)
- Act VII of 1887 (Suits' Valuation), as modified up to 1st November 1904. In Urdu. Pies 9. (Anna 1.)
- Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December 1900. In Urdu. As. 2 p. 3. (Anna 1.)
- Act IX of 1887 (Provincial Small Cause Courts), as modified up to 1st December 1900. In Nagri. As. 2 p. 6. (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. 6. (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), with footnotes. In Urdu. Pies 3. (Anna 1.)
- Act II of 1889 (Measures of Length), with footnotes. 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.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- Act VII of 1889 (Succession Certificate), as modified up to 1st June 1910. In Urdu. Anna 1 p. 9. (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.)
- 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 1909. 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), with footnotes. 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), with footnotes. In Urdu. As. 2 p. 3. (Anna 1 p. 6.)
- Act I of 1894 (Land Acquisition), with footnotes. 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), as amended by Act XIII of 1898. In Urdu. As. 2 p. 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—*cont.*

- Act IX of 1894 (Prisons), as amended by Act XIII of 1898. 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.)
- 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), as modified up to 1st February 1910. In Urdu. Anna 1. (Anna 1.)
- Act X of 1897 (General Clauses), as modified up to 1st February 1910. 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 May 1920. In Urdu. Re. 1 as. 4. (As. 8.)
- Act V of 1898 (Code of Criminal Procedure), as modified up to 1st May 1920. In Nagri. Re. 1 as. 6. (As. 8.)
- Act VI of 1898 (Indian Post Office). In Nagri. As. 3 p. 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—*con.*

- Act VI of 1898 (Indian Post Office). In Urdu. 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.)
- 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 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 XII of 1900 (Banker's Books Evidence). In Urdu. Pies 3. (Anna 1.)
- Act XII of 1900 (Banker's Books Evidence). In Nagri. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

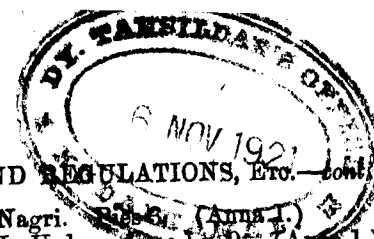
- Act II of 1901 [Indian Tolls (Army)]. In Urdu. Pies 6. (Anna 1.)
 Act II of 1901 [Indian Tolls (Army)]. In Nagri. Pies 9. (Anna 1.)
 Act V of 1901 [Indian Forest (Amendment)]. In Urdu. Pies 3. (Anna 1.)
 Act V of 1901 [Indian Forest (Amendment)]. In Nagri. Pies 3. (Anna 1.)
 Act VI of 1901 (Assam Labour 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.)
 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.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—*cont.*

- 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.)
 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 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.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- 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.)
- 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.)



IV.—TRANSLATIONS OF ACTS AND REGULATIONS, Etc.—cont.

- 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 VIII of 1911 (Indian Army), as modified up to 1st August 1918. In Urdu. As. 4 p. 6. (Anna 1.)
- Act VIII of 1911 (Indian Army), as modified up to 1st August 1918. In Nagri. As. 4 p. 6. (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.)
- 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 VII of 1912 (Wild Birds and Animals Protection). In Urdu. Pies 3. (Anna 1.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—*cont.*

- 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.)
 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.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—*cont.*

- 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.)
 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 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 Amendment). 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.)

IV.—TRANSLATIONS OF ACTS AND REGULATIONS, ETC.—*cont.*

- Act II of 1917 (Motor Spirit Duties). 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 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.)
 Act X of 1917 (Indian Army 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.)
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ESTATES LAND ACT (MADRAS ACT I OF 1903), sec. 6—Permanent right of occupancy—Subletting—"Ijaradars and farmers of rent"—Middlemen.]
 The appellants were lessees of certain lands under a lease made before the Madras Estates Land Act, 1908, came into operation. The lease by its terms contemplated the cultivation of the land by ryots, and did not prohibit subletting; it provided for the termination of the tenancy in 1910. The appellants sublet the lands to tenants who occupied and cultivated them. Held, that the appellants had not a permanent right of occupancy under section 6, sub-section (1) of the Act, being merely middlemen. If the "Ijaradars and farmers of rent" referred to in section 6, sub-section (6), are ryots at all they are non-occupying ryots, and cannot be converted into ryots with a permanent right of occupancy.
 [Judgment of the High Court affirmed.]

Budhappa v. Appa Rao (1921) I.L.R., 44 Mad. (P.C.), 843

LEASE LANDS, RIGHT OF GOVERNMENT TO RESUME:—See MADRAS REGULATION XXV OF 1902, ss. 3 and 4 854

LEGAL PRACTITIONER—Witness—Whether can appear for accused person.] The rule as to the exclusion of witnesses from Court until they have been examined does not extend to counsel for accused who is cited as a prosecution witness. There may be circumstances which may make it desirable for counsel not to appear in a case in which he is a witness, but they would not render his appearance illegal.

In re Babu Reddi ... (1921) I.L.R., 44 Mad., 916

LIMITATION—Adverse possession—Plaintiff proving title—Both parties having uncertain possession—Indian Limitation Act (IX of 1908), Schedule I, article 144.] Adverse possession in order to bar by limitation a suit for the possession of land must be adequate in continuity, in publicity, and extent, so as to show that it is possession adverse to the competitor. When a person establishes his title to land and proves that he has been exercising during the currency of his title various acts of possession, then the quality of those acts, even though they might have failed to constitute adverse possession against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is required from any person challenging by possession the rightful title. *Radhamoni Devi v. The Collector of Khulna*, (1900) I.L.R., 27 Calo., 948 (P.O.); I.R., 27 I.A., 140; and *Secretary of State for India v. Chellikani Rama Rao*, (1916) I.L.R., 39 Mad., 617 (P.O.); I.R., 43 I.A., 192, applied.

[Judgment of the High Court reversed.]

Kuthali Moothavar v. Kunharan Kutty ... (1912) I.L.R., 44 Mad. (P.O.), 888

LIMITATION ACT (IX OF 1908), SCH. I, ARTS. 134, 144—See RELIGIOUS ENDOWMENT ... ART. 144—See LIMITATION ... 831

LIMITATION ACT (IX OF 1908), ARTS. 11, 13 AND 120—Attachment before judgment—Decree and order for sale—Claim to attached property, filed after order for sale—Order allowing claim—Suit filed after more than one year to contest the order on claim—Limitation.] Property was attached before judgment and after a decree in the suit, and an order for sale in execution were passed, a claim to the property was preferred and allowed by the Court. On a suit to contest the order on the claim being filed more than a year after such order, *Held*, that the property must be deemed to have been attached in execution of a decree by virtue of Order XXXVIII, rule 11, Civil Procedure Code, and that article 11 and not article 13 or 120 was applicable and that the suit was barred by limitation.

Arunachalam Chetty v. Periasami Servai ... (1921) I.L.R., 44 Mad. (F.B.), 902

MADRAS REGULATION XXV OF 1802, ss. 3 and 4—Zamindar—Permanent Settlement—Sanad—Construction of Sanad—Right of Government to resume inam lands.] A sanad issued by the Government on August 24, 1802 to a zamindar in the Presidency of Madras (Arcot) stated that in consideration of the relief which the zamindar's finances would derive from the relinquishment of his military services, and of the Government charging itself with the duty of protecting his territories, "the British Government has fixed your annual contribution, including equivalent for military service and the established peshkash for every year, at the sum of Rs. 1,11,058, which said amount shall never be liable to change under

any circumstances." Clause (5) reserved to the Government the revenue derived from salt and saltpetre, and certain other subjects, without making any mention of lakhiraj or inam lands. It appeared from other documents that the assessment had been fixed on the whole zamindari, irrespective of the assets derived from each particular unit of property within it. Madras Regulation XXV of 1802, which was passed on July 18, 1802, provided by section 3 that in all cases of disputed assessment reference was to be had to the sanads and kabuliya executed; and by section 4 that the Government having reserved to itself certain articles of revenue including "lakhiraj lands (or lands exempt from the payment of Government revenue), and of all other lands paying only favourable quit-rents, the permanent assessment of the land-tax shall be made exclusively of the said articles now recited." At the time of issue of the sanad there were in the zamindari certain religious and charitable inams and lakhiraj lands granted by the zamindar or his predecessors. *Held*, that having regard to the terms of the sanad, and the circumstances in which it was issued, the Government was not entitled to resume them or assess them to the public revenue.

[Judgment of the High Court affirmed.]

Secretary of State for India v. Raja of Venkatagiri ... (1921) I.L.R., 44 Mad. (P.O.), 864

MALABAR LAW—Conversion of a member of Marumakkattayam tarwad to Muhammadanism—Right of convert to partition of tarwad property—Removal of Caste Disabilities Act (XXI of 1850), effect of.] A member of a Marumakkattayam tarwad does not, by reason of his conversion to Muhammadanism, acquire right to a partition of the tarwad property: Observation of Wilson, J., in *Matungini Gupta v. Ram Rutton Roy*, (1892) I.L.R., 19 Calo., 289 (F.B.) at 291, followed. *Kunhichekkan v. Lydia Arucanden*, (1912) M.W.N., 286, and *Abraham v. Abraham*, (1893) 9 M.I.A., 195, explained.

Pathamma v. Raman Nambiar ... (1921) I.L.R., 44 Mad. (F.B.), 891

MARUMAKKATTAYAM TARWAD:—See MALABAR LAW ... 891

PENAL CODE (INDIAN) (ACT XLV OF 1860), SEC. 341—Restraint upon a drunken and disorderly person—Common Law of England—Applicability to India.] A private citizen has the right to arrest under the Common Law any person as to whom there is reasonable apprehension that he will commit a breach of the peace. *Timothy v. Simpson*, (1835) 4 L.J. (Ex.), 81, and *Queen v. Light*, (1857) 27 L.J. (M.C.), 1, referred to.

In re Ramaswami Ayyar ... (1921) I.L.R., 44 Mad., 918

RELIGIOUS ENDOWMENT—Mutt—Relation of heads and managers of religious institutions to their property—Alienation by head of mutt—"Trustee" Indian Limitation Act (IX of 1908), sch. I, arts. 134 and 144.] The endowments of a Hindu mutt are not "conveyed in trust," nor is the head of the mutt a "trustee" with regard to them, save as to any specific property proved to be vested in the head for specific and definite object. Consequently, article 134 of Schedule I of the Indian Limitation Act, 1908, which contains the expressions above quoted, does not apply where the head of a mutt has granted a permanent lease over a part of the mutt property not

proved to be subject to a specific trust. The same rule applies to the endowments of Muhammadan religious institutions, and to alienations made by the <i>sajjadanashin</i> or <i>mutwali</i> . <i>Ram Parkash Das v. Anand Das</i> , (1916) I.L.R., 43 Cal., 707 (P.C.); L.R. 43 I.A., 73, explained. <i>Behari Lal v. Muhammad Muttaki</i> , (1898) I.L.R., 20 All., 482 (F.B.), <i>Dattagiri v. Dattatraya</i> , (1903) I.L.R., 27 Bom., 363; <i>Nilmony Singh v. Jagabandhu Roy</i> , (1896) I.L.R., 28 Cal., 536, disapproved. Except for unavoidable necessity, the head of a mutt cannot create any interest in the mutt property to endure beyond his life. A lessee, however, has not adverse possession under article 144 of the schedule abovenamed during the life of the head who granted the lease. If the lessee's possession is consented to by the succeeding head, that consent can be referable only to a new tenancy created by him, and there is no adverse possession until his death. [Judgment of the High Court reversed.]	Page
<i>Vidya Varuthi v. Balusami Ayyar</i> ... (1921) I.L.R., 44 Mad. (P.C.),	831
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PRIVY COUNCIL.*

VIDYA VARUTHI THIRTHA (PLAINTIFF),

v.

BALUSAMI AYYAR AND OTHERS (DEFENDANTS).

[On Appeal from the High Court of Judicature
at Madras.]1921,
July 5.

Religious endowment—Mutt—Relation of heads and managers of religious institutions to their property—Alienation by head of mutt—"Trustee" Indian Limitation Act (IX of 1908), sch. I, arts. 134 and 144.

The endowments of a Hindu mutt are not "conveyed in trust," nor is the head of the mutt a "trustee" with regard to them, save as to any specific property proved to be vested in the head for a specific and definite object.

Consequently, article 134 of Schedule I of the Indian Limitation Act, 1908, which contains the expressions above quoted, does not apply where the head of a mutt has granted a permanent lease over a part of the mutt property not proved to be subject to a specific trust.

The same rule applies to the endowments of Muhammadan religious institutions, and to alienations made by the *sajjada-nashin* or *mutwali*.

Ram Parkash Das, v. Anand Das (1914) I.L.R., 43 Cal., 707 (P.C.); L.R., 43 I.A., 73, explained.

Behari Lal v. Muhammad Muttaki, (1898) I.L.R., 20 All., 482 (F.B.), *Dattagiri v. Dattatraya*, (1903) I.L.R., 27 Bom., 363, *Nilmony Singh v. Jagabandhu Roy*, (1896) I.L.R., 28 Cal., 536, disapproved.

Except for unavoidable necessity, the head of a mutt cannot create any interest in the mutt property to endure beyond his life. A lessee, however, has not adverse possession under article 144 of the schedule abovenamed during the life of the head who granted the lease. If the lessee's possession is consented to by the succeeding head, that consent can be referable only to a new tenancy created by him, and there is no adverse possession until his death.

[Judgment of the High Court reversed.]

APPEAL (No. 48 of 1919) from a judgment and decree of the High Court (October 19, 1916) reversing a decree of the Temporary Subordinate Judge of Rāmnaḍ.

The suit was instituted in 1913 by the present respondents for a declaration of title and for possession of land in Madura, forming part of the endowments of a mutt situated in Mysore State. The defendants were, the present appellant, the head of

* Present:—Lord BUCKMASTER, Lord DUNEDIN, Lord SHAW and Mr. AMERZ ALL.

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the mutt (referred to as the Pandarasannadhi or Matathipathi), certain lessees from him, who were in possession, and others. The plaintiffs claimed under a permanent lease granted to them in 1891 by a former head of the mutt. They also claimed that they had acquired good title under the Indian Limitation Act, 1908; they relied on articles 134 and 144 of Schedule I and section 28.*

The facts are stated at the beginning of the judgment of the Judicial Committee.

Both Courts in India held that the lease of 1891 was not made for necessity, and that the land in suit was part of the general endowment of the mutt, not being subject to any specific trust. The Subordinate Judge dismissed the suit. He held that the head of the mutt was not a "trustee" of its endowed property, and that consequently article 134 of Schedule I did not apply; he was also of opinion that there had not been adverse possession so as to bring article 144 into operation. The High Court allowed the appeal. A decree was made declaring that the first plaintiff was a permanent lessee of the land in suit and for possession and mesne profits. The judgment was delivered by BURN, J., SADASIVA AYYAR, J., agreeing. The learned Judge was of opinion that expressions in the judgment of the Board in *Ram Parkash Das v Anand Das*(1) constrained the Court to hold that the head of the mutt was a trustee of the endowed properties and that consequently article 134 applied. The appeal to the High Court is reported at I.L.R., 40 Mad., 745.

Clauson, K.C., and *Kenworthy Brown*, for the appellant.—Both Courts in India found that the permanent lease was not made for necessity, also that the property in suit was part of the general endowment of the mutt and not subject to any specific trust. Article 134 does not apply, because the property was not "conveyed in trust," and the transferor was not a "trustee." If the article applies to an alienation by the head of a mutt such an

* Indian Limitation Act, 1908, Schedule I, article 134, provides that for a suit "to recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration," the period of limitation shall be 12 years from "the date of the transfer." By section 28 "at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."

(1) (1914) I.L.R., 43 Cal., 707 (P.O.); L.R., 43 I.A., 73, 76, 90.

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alienation would always become effectual if the alienor lived for twelve years after the transfer. Although the head of a mutt may hold specific property subject to a specific trust, he is not a "trustee" of the general endowment of the institution: *Kailasam Pillai v Nataraja Thambiran*(1). The case in which that decision of the Full Bench was given came on appeal to the Privy Council: *Nataraja Thambiran v. Kailasam Pillai*(2); the Board affirmed the decree of the High Court which in one of its branches was based entirely upon the Full Bench decision. In the present case the learned Judges thought that certain expressions in the judgment of the Board in *Ram Parkash Das v. Anand Das*(3) bound them to hold that the head of a mutt was a "trustee" of its property. There was, however, no question in that appeal as to the position of the head of a mutt towards its property, and the expressions referred to mean merely that the head was in a fiduciary position as to the property. No title was acquired under article 144. A permanent lease granted by the head of a mutt is valid during his life; the lessee has not adverse possession during that period: *Muthusamier v. Sree Sreemethanithi Swamier*(4). Consent to the lessee's succeeding head creates a new tenancy also valid for his life.

De Gruyther, K.C., and *Dube*, for the respondents.—Article 134 applies to this case; the head of the mutt was a "trustee" within the meaning of that article. The land was part of an inam granted for religious and charitable purposes and was so recognized by the Inam Register. The word "trust" is not used in article 134 in a technical sense but includes all cases in which property is affected by an obligation as to the purposes to which it is to be applied. In the Religious Endowments Act (XX of 1863) section 14, the word "trustee" is used. Every High Court except that at Madras has treated article 134, either of the 1877 or 1908 Act as applying to an alienation by the head of a religious institution: *Dattagiri v. Dattatraya*(5), *Nilmony Singh v. Jagabandhu Roy*(6), *Behari Lal v. Muhammad Muttaki*(7), *Rameswar Malia v. Sri Sri Jiu Thakur*(8). In

(1) (1910) I.L.R., 33 Mad., 265 (F.B.).

(2). (1921) I.L.R., 44 Mad., 283 (P.O.); L.R., 48 I.A., 1.

(3) (1916) I.L.R., 43 Cal., 707 (P.O.); L.R., 43 I.A., 73.

(4) (1915) I.L.R., 38 Mad., 856. (5) (1903) I.L.R., 27 Bom., 363.

(6) (1896) I.L.R., 23 Cal., 536. (7) (1898) I.L.R., 20 All., 482 (F.B.).

(8) (1916) I.L.R., 43 Cal., 34.

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Kailasam Pillai's case,(1) the present question did not arise. In two Appeals the Board held that article 134 of the Act of 1877 did not apply because the mutt property in suit had not been "purchased for valuable consideration" within the terms of the article: *Abhiram Goswami v. Shyama Charan Nandi*(2), and *Ishwar Shyam Chand Jiu v. Ram Kanai Ghose*(3); but in neither of these cases do the judgments suggest that article 134 did not apply for the reason now urged. If "trustee" is used in article 134 in a technical sense, and if the Full Bench decision of 1909 is correct, it is submitted that having regard to the Inam Register and the confirmation of the title under rule 3 (1) of the Inam rules (Standing Order of the Board of Revenue, 1859) the property was held subject to a specific trust. Alternatively there was a title under article 144. It is well settled in India that there can be adverse possession in the case of a permanent lease: *Mitra's Law of Limitation*, pages 160 and 161.

Clauson, K.C., in reply.—Article 144 was not relied on in the High Court, the case of the plaintiffs being that the present appellant had recognized them as tenants and was estopped.

The JUDGMENT of their Lordships was delivered by

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MR. AMEER ALI.—The suit that has given rise to this Appeal relates to certain lands lying in the town of Madura in the Madras Presidency which admittedly belong to an old mutt (Math) situated within the Mysore State. The origin, development, and *raison d'être* of these mutts have been discussed in a number of cases decided in the Madras High Court, to some of which their Lordships propose to refer in the course of this judgment. In their general characteristics they are almost identical with similar institutions in Northern India and in the Bombay Presidency. The heads of these foundations bear different designations in respect of the rights and incidents attached to the office; the difference arises from the customs and usages of each institution. The superior of this particular mutt has been called in these proceedings Matathipathe and sometimes Pandarasannadhi, which their Lordships understand

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connote the same idea of headship. At the time this action was brought the twenty-sixth defendant held the office of Matathipathe. He has since died and the present appellant is the head of the institution. In 1891 one Srinivasa was the Matathipathe and he on the 17th March of that year granted to the second plaintiff, a near relative, a permanent lease of the lands in suit, on a small quit-rent of Rs. 24 a year. Shortly after the grant of the lease Srinivasa died, and was succeeded by one Samudra, who held the office until 1906. On his death the now deceased defendant No. 26 became the head. In 1902 the second plaintiff sub-leased the lands to the first and second defendants for a period of ten years.

Since 1905 the mutt has been under the management of the Mysore State under a power-of-attorney, executed at first by the Matathipathe Samudra and afterwards by his successor, in favour of the Diwan and his successors in office. About the same time the second plaintiff conjointly with his son (the third plaintiff) assigned their right and interest in the lands in suit to the first plaintiff. It is in evidence and, so far as appears from the judgments of the two Courts in India, does not appear to be contradicted, that it was only in 1908 that the representative of the Diwan, acting under the power granted by the Matathipathe, became aware of the transaction of 1891 under which the plaintiffs claim title. The sub-lease created in 1902 by the second plaintiff in favour of the first and second defendants was to have expired in 1912. But before its expiry they obtained a lease for 17 years from the representative of the Diwan. They are now in possession of the lands in suit under this lease. The plaintiffs are and were at the time they brought their suit in the Court of the Subordinate Judge of Madura on the 5th March 1913, admittedly out of possession. The present action is for a declaration of title and for ejectment and possession, principally directed against the Matathipathe as the head of the mutt and the first and second defendants lessees holding possession under him. The other defendants have been joined as parties apparently in consequence of certain rights they possess or exercise under those defendants.

The plaintiffs base their title on two grounds: Firstly, that the permanent lease under which they claim was created under circumstances that would bind not only the grantor but all his

(1) (1910) I.L.R., 38 Mad., 265 (F.B.).

(2) (1909) I.L.R., 38 Cal., 1003 (P.C.); L.R., 36 I.A., 148.

(3) (1911) L.R., 38 Cal., 526 (P.C.); L.R., 38 I. A., 76.

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successors; and secondly, that even if the lease was not valid they had acquired a title under the Indian Limitation Act by adverse possession for over twelve years from the date of the grant.

Their case throughout has been that Srinivasa was a "trustee" and that all his successors are "trustees," that the lands were granted on a "specific" trust, and that consequently under article 134 of the second schedule of the Indian Limitation Act (IX of 1908) they have acquired a good title against the mutt. The Matathipathe controverted both allegations. He denied that the alienation by Srinivasa was of such a character as would bind the mutt; he further denied that he and his predecessors were "trustees" of the mutt or that the second plaintiff or his assignee had acquired any right to the mutt lands by adverse possession. On these contentions, two points arose for determination which are embodied in the first two issues. The trial judge after giving the substance of the second plaintiff's evidence and of the other witnesses, formulates the position which the pleader took up:

"He contends," says the learned Judge, "that the plaint property is trust property set apart for the worship of the titular deity of the mutt, that the head of the mutt is a trustee merely, and that the permanent lease to second plaintiff is an alienation of mutt property, and that twenty-sixth defendant at this distance of time could possibly have no right to such property. The alienation being *ab initio* void, the twenty-sixth defendant had no right to plaint property as he succeeded only in 1906 and first plaintiff had perfected his title by adverse possession for over twelve years."

The Subordinate Judge negatived this contention; he held upon the admissions of the second plaintiff that the property in suit was "ordinary mutt property," and was not set apart on any specific trust; that the head of the mutt was not a "bare trustee," as it was admitted that the income was at his absolute disposal and that "none had a right to question him about it." He found also that the second plaintiff took the lease with full knowledge of the character of the endowment and had learnt on inquiry that "he could not safely purchase it."

With regard to the question of estoppel arising from the alleged acceptance of rent by the twenty-sixth defendant as the plaintiffs contended, the Subordinate Judge held:

"In fact the first plaintiff never paid money as rent and the twenty-sixth defendant or his agent never accepted payment with knowledge that the payment was as rent for plaint property. In these circumstances, I find that these defendants are not estopped from denying plaintiff's title. I find this issue against plaintiffs."

He accordingly dismissed the suit save and except in respect of a money claim against the first and second defendants.

The plaintiffs appealed to the High Court of Madras, which reversed the trial Judge's order and decreed the claim. The learned Judges do not negative the finding of the first Court that the second plaintiff took the lease with notice. But they considered that the matter in dispute fell within article 134 referred to above. They summed up their conclusion in the following words:

"that the lessor intended to grant, and the lessee intended to acquire, an interest greater than the transferor was competent to alienate, and all the requirements of article 134 have been complied with."

The findings of the learned Judges on the issue relating to limitation and the acquisition of right by adverse possession require notice. They deal first with the question of justifiable necessity, which they decide against the plaintiffs. They say: "there is no doubt that the head of a mutt cannot in the absence of necessity bind his successors in office by a permanent lease at a fixed rent for all time."

And then add:

"There is no allegation, much less proof, of any such necessity. The first contention must be rejected."

They then proceed to discuss the nature of the endowment in question and the position of its head. Their finding on this point is important; they say as follows:

"In connexion with the second point a question arises as to the nature of the endowment and the position of the head of the mutt in relation to it. The exact terms of the original grant are not in evidence. It was conceded in argument that the grant was made by one of the Nayakan dynasty of Madura. The case for the appellants is that the endowment was for a specific purpose, i.e., for the worship of Gopalakrishnaswami, who is described by defendants' first witness as the "titular deity of the mutt." The evidence does not support this contention and it has been found against in the Lower Court. A statement made by a local agent of the mutt during the Inam

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Commission inquiries is relied upon for the appellants. It was apparently unsupported by any documentary evidence. The description of the inam as given at the close of the inquiry is that it was granted 'for the support of Vyasaray Matam' (Exhibit L). Compare also description in Exhibit F. The evidence for the defendants is that the income from this property is not appropriated to any particular purpose but forms part of the general funds of the mutt. I think the grant must be held to have been made for the general purposes of the mutt."

They thus concur with the first Court that there was no "specific trust," which was the foundation of the plaintiff's case. But, after examining some of the judgments of their own Court, they apparently felt constrained to hold that the decision of this Board in *Ram Parkash Das v. Anand Das*(1) had crystallized the law on the subject, and definitely declared the Mahant to be a "trustee." It is to be observed that in that case the decision related to the office of Mahant, but in the course of their judgment their Lordships conceived it desirable to indicate *inter alia* what, upon the evidence of the usages and customs applicable to the institution with which they were dealing and similar institutions, were the duties and obligations attached to the office of superior; and they used the term "trustee" in a general sense as in previous decisions of the Board, by way of a compendious expression to convey a general conception of those obligations. They did not attempt to define the term or to hold that the word in its specific sense is applicable to the laws and usages of the country. As pointed out by their predecessors in *Greedharee Doss v. Nundokissore Doss, Mohunt*(2),

"The only law as to these Mahants and their functions and duties is to be found in custom and practice, which is to be proved by testimony."

Generally speaking, however, the duties and obligations resting on the superior, indicated in *Ram Parkash Das v. Anand Das*(1), do not seem to vary. In this particular institution, the position of the Matathipathe in relation to the mutt was clearly established by testimony and concurrently found by both Courts. But the learned Judges misapprehended their Lordships' judgment and proceeded to hold that as Srinivasa, who granted

(1) (1916) I.L.R., 48 Cal., 707 (P.C.); L.R., 43 I.A., 78.
(2) (1867) 11 I.A., 405, 428.

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the permanent lease, was a "trustee," his act fell under article 134. To this article their Lordships will presently refer. Before doing so, however, they consider it necessary to observe that there are two systems of law in force in India, both self-contained and both wholly independent of each other, and wholly independent of foreign and outside legal conceptions. In each, there are well-recognized rules relating to their religious and charitable institutions. From the year 1774 the Legislature, British and Indian, has affirmed time after time the absolute enjoyment of their laws and customs, so far as they are not in conflict with the statutory laws, by Hindus and Muhammadans. It would, in their Lordships' opinion, be a serious inroad into their rights if the rules of the Hindu and Muhammadan laws were to be construed with the light of legal conceptions borrowed from abroad, unless perhaps where they are absolutely, so to speak, *in pari materia*. The vice of this method of construction by analogy is well illustrated in the case of *Vidyapurna Tirtha Swami v. Vidyavidhi Tirtha Swami*(1), where a Mahant's position was attempted to be explained by comparing it with that of a bishop and of a beneficed clergyman in England under the ecclesiastical law. It was criticised, and rightly, in their Lordships' opinion, in the subsequent case, which arose also in the Madras High Court, of *Kailasam Pillai v. Nataraja Thambiran*(2). To this judgment their Lordships will have to refer further later on.

It is also to be remembered that a "trust," in the sense in which the expression is used in English law, is unknown in the Hindu system, pure and simple. (J. G. Ghose, "Hindu Law," page 276.) Hindu piety found expression in gifts to idols and images consecrated and installed in temples, to religious institutions of every kind, and for all purposes considered meritorious in the Hindu social and religious system: to *Brahmans*, *Goswamis*, *sanyasis*, etc. When the gift was to a holy person, it carried with it in terms or by usage and custom certain obligations. Under the Hindu law the image of a deity of the Hindu pantheon is, as has been aptly called, a "juristic entity," vested with the capacity of receiving gifts and holding property. Religious institutions, known under different names, are regarded as possessing the same "juristic" capacity, and gifts are made to them

(1) (1904) I.L.R., 27 Mad., 435.

(2) (1910) I.L.R., 33 Mad., 265 (F.B.).

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eo nomine. In many cases in Southern India, especially where the diffusion of Aryan Brahmanism was essential for bringing the Dravidian peoples under the religious rule of the Hindu system, colleges and monasteries under the names of mutt were founded under spiritual teachers of recognized sanctity. These men had and have ample discretion in the application of the funds of the institution, but always subject to certain obligations and duties, equally governed by custom and usage. When the gift is directly to an idol or a temple, the seisin to complete the gift is necessarily effected by human agency. Called by whatever name, he is only the manager and custodian of the idol or the institution. In almost every case he is given the right to a part of the usufruct, the mode of enjoyment and the amount of the usufruct depending again on usage and custom. In no case was the property conveyed to or vested in him, nor is he a "trustee" in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee, in the general sense, for maladministration.

The conception of a trust apart from a gift was introduced in India with the establishment of Moslem rule. And it is for this reason that in many documents of later times in parts of the country where Muhammadan influence has been predominant, such as Upper India and the Carnatic, the expression *wakf* is used to express dedication.

But the Muhammadan law relating to trusts differs fundamentally from the English law. It owes its origin to a rule laid down by the Prophet of Islam; and means, "the tying up of the property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings."

When once it is declared that a particular property is *wakf*, or any such expression is used as implies *wakf*, or the tenor of the document shows, as in *Jewun Doss Sahoo v. Shah Kubeerood-deen*(1), that a dedication to pious or charitable purposes is meant, the right of the *wakf* is extinguished and the ownership is transferred to the Almighty. The donor may name any meritorious object as the recipient of the benefit. The manager of the *wakf* is the *mutwalli*, the governor, superintendent, or curator. In *Jewun Doss Sahoo's* case(1), the Judicial Committee

(1) (1840) 2 M.I.A., 890.

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call him "procurator." It related to a *Kānkāh*, a Muhammadan institution analogous in many respects to a mutt where Hindu religious instruction is dispensed. The head of these *Khānkhās*, which exist in large numbers in India, is called a *sajjada-nashin*. He is the teacher of religious doctrines and rules of life, and the manager of the institution and the administrator of its charities, and has in most cases a larger interest in the usufruct than an ordinary *mutwalli*. But neither the *sajjada-nashin* nor the *mutwalli* has any right in the property belonging to the *wakf*; the property is not vested in him, and he is not a "trustee" in the technical sense.

It was in view of this fundamental difference, between the judicial conceptions on which the English law relating to trusts is based and those which form the foundations of the Hindu and the Muhammadan systems, that the Indian Legislature in enacting the Indian Trusts Act (II of 1882) deliberately exempted from its scope the rules of law applicable to *wakf* and Hindu religious endowments. Section 1 of that Act, after declaring when it was to come into force and the areas over which it should extend "in the first instance," lays down, "but nothing herein contained affects the rules of Muhammadan law as to *wakf*, or the mutual relations of the members of an undivided family as determined by any customary or personal law, or applies to public or private religious or charitable endowments"

Section 3 of the Act gives a definition of the word "trust" in terms familiar to English lawyers. It says:

"A 'trust' is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner; the person who reposes or declares the confidence is called the 'author of the trust'; the person who accepts the confidence is called the 'trustee'; the person for whose benefit the confidence is accepted is called the 'beneficiary'; the subject-matter of the trusts is called 'trust-property' or 'trust-money'; the 'beneficial interest' or 'interest' of the beneficiary is his right against the trustee as owner of the trust-property; and the instrument, if any, by which the trust is declared is called the 'instrument of trust'."

In this connexion it may be observed that in *Muhammad Rustam Ali Khan v. Mushtaq Husain*(1) the dedication was of

(1) (1920) I.L.R., 42 All., 603 (P.C.); L.R., 47 I.A., 224.

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specific property created by an instrument called a "trustee-namah." Lord BUCKMASTER, delivering the judgment of the Board, dealt thus with the objection as to the validity of the document.

"It is argued" said the noble Lord, "that 'the trustee-namah' must have dealt with an interest in immovable property for otherwise the trustees could have no right to maintain the suit; and such an argument at first sight makes a strong appeal to those who are accustomed to administer the English law with regard to trustees. It needs, however, but a slight examination to show that the argument depends for its validity upon the assumption that the trustees of the wakf-namah in the present case stand in the same relation to the trust that trustees to whom property had been validly assigned would stand over here. Such is not the case. The wakf-namah itself does not purport to assign property to trustees."

In 1810 in the Bengal Presidency, and in 1817 in the Madras Presidency, the British Government had assumed control of all the public endowments and benefactions, Hindu and Muhammadan, and placed them under the charge of the respective Boards of Revenue. In 1863, under certain influences to which it is unnecessary to refer, the Government considered it expedient to divest itself of the charge and control of these institutions, and to place them under the management of their own respective creeds. With this object, Act XX of 1863 was enacted; a system of committees was devised to which were transferred the powers vested in Government for the appointment of "managers, trustees and superintendents"; rules were enacted to ensure proper management and to empower the superior Court in the district to take cognizance of allegations of misfeasance against the managing authority. Their Lordships are not giving a summary of the Act, but indicating only its general features. The Act contains no definition of the word "trustee"; it uses indifferently and indiscriminately the terms "manager, trustee or superintendent," clearly showing that the expressions were used to connote one and the same idea of management. After the enactment of 1863, the Committees, to whom the endowments were transferred, were vested, generally speaking, with the same powers as the Government had possessed before in respect of the appointment of "managers, trustees or superintendents."

Article 134 of Schedule I to the Indian Limitation Act (IX of 1908) is in these terms:

"To recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for valuable consideration," and the period prescribed for the institution of the suit is twelve years "from the date of transfer." In the old Act (XV of 1877) the words were "purchased from the trustee or mortgagee." The alteration was made with the object of including permanent leases in transactions of the character contemplated in the article.

Article 134 is, as pointed out in *Abiram Goswami's* case(1), controlled by section 10 of the Limitation Act, which runs thus:

"Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, or the proceeds thereof or for an account of such property or proceeds, shall be barred by any length of time."

The language of section 10 gives the clue to the meaning and applicability of article 134. It clearly shows that the article refers to cases of specific trust, and relates to property "conveyed in trust." Neither under the Hindu law nor in the Muhammadan system is any property "conveyed" to a *shebait* or a *mutwalli*, in the case of a dedication. Nor is any property vested in him; whatever property he holds for the idol or the institution he holds as manager with certain beneficial interests regulated by custom and usage. Under the Muhammadan law, the moment a *wakf* is created all rights of property pass out of the *wakf*, and vest in God Almighty. The curator, whether called, *mutwalli* or *sajjada-nashin*, or by any other name, is merely a manager. He is certainly not a "trustee" as understood in the English system.

In *Sammantha Pandara v. Sellapa Chetti*(2) the position of the superior in relation to the properties of the mutt was laid down

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(1) (1909) I.L.R., 36 Cal., 1003 (P.C.); L.R., 36 I.A., 148.
(2) (1879) I.L.R., 2 Mad., 175.

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in terms which have an important bearing on the present case. The learned Judges say there:

"The property is in fact attached to the office and passes by inheritance to no one who does not fill the office. It is in a certain sense trust property; it is devoted to the maintenance of the establishment, but the superior has large dominion over it, and is not accountable for its management nor for the expenditure of the income, provided he does not apply it to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution. Acting for the whole institution he may contract debts for purposes connected with his mattam, and debts, so contracted might be recovered from the mattam property and would devolve as a liability on his successor to the extent of the assets received by him."

The origin and nature of these mutts were again considered at great length in a case which arose in the same Court in 1886. In this case, *Giyana Sambandha Pandara Sannadhi v. Kandasami Tambiran*(1), the learned Judges pronounced that the head of the institution held the *matam* under his charge, and its endowment in trust for the maintenance of the mutt, for his own support, for that of his disciples, and for the performance of religious and other charities in connexion therewith according to usage. An almost identical question came up for consideration in 1904 in *Vidyapurna Tirtha Swami v. Vidyaniidhi Tirtha Swami*(2) already referred to. In this case the learned Judges, after an elaborate examination of English institutions which they conceived to be analogous to Hindu mutts, came to the conclusion that whilst a *dharmakarta* of a temple, who has specific duties to perform, might be regarded as a trustee the superior of a mutt is not a trustee but a "life-tenant."

The same question in another form came up again for consideration in 1909 before a Divisional Bench of the Madras High Court in *Kailasam Pillai v. Nataraja Thambiran* (3). The learned Judges before whom the point arose considered that the view taken in *Vidyapurna Tirtha Swami v. Vidyaniidhi Tirtha Swami*(3) was in conflict with that propounded in the two earlier cases *Sammantha Pandara v. Sellappa Chetti*(4) and *Giyana Sambandha Pandara Sannadhi v. Kandasami Tambiran*(5) and

(1) (1887) I.L.R., 10 Mad., 375.

(2) (1904) I.L.R., 27 Mad., 435.

(3) (1910) I.L.R., 33 Mad., 265 (F.B.).

(4) (1879) I.L.R., 2 Mad., 175.

(5) (1887) I.L.R., 10 Mad., 375.

referred the question to a Full Bench. The reference was in these terms:

"Does the head of a mutt hold the properties constituting its endowment as a life-tenant or as a trustee?"

The Officiating Chief Justice expressed his opinion in the following terms:

"I think, then, that it cannot be predicated of the head of a mutt, as such, that he holds the properties constituting its endowments as a life-tenant or as a trustee. The incidents attaching to the properties depend in each case upon the conditions on which they were given, or which may be inferred from the long-continued and well-established usage and custom of the institution in respect thereto."

Mr. Justice WALLIS substantially agreed in this view.

Mr. Justice SANKARAN NAYAR pointed out that in the case of these mutts,

"Any surplus that remains in the hands of the Pandara Sannadhi, he is expected to utilize for the spiritual advancement of himself, his disciples or of the people. But his discretion in this matter is unfettered. He is not accountable to anyone and he is not bound to utilize the surplus. He may leave it to accumulate."

And he further added:

"It is also true, in my opinion, that he is under a legal obligation to maintain the mutt, to support the disciples and to perform certain ceremonies which are indispensable. That will be only a charge on the income in his hands and does not show that the surplus is not at his disposal."

In the result, he was of opinion:

"that in the absence of any evidence to the contrary, the Pandara Sannadhi (the superior) as such, is not a trustee. He is not also a life-tenant for the reasons already stated."

All three Judges agreed in thinking that if any specific property was specifically entrusted to the head for specific purposes he might be regarded a "trustee" with regard to that property; but that in the absence of any such evidence the superior was not a trustee in respect of any part of the endowment.

The point came up for discussion again in a concrete form in 1913 in *Muthusamier v. Sree Sreemethanithi Swamier*(1),

(1) (1915) I.L.R., 38 Mad., 356.

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where the exact point for decision was the question of limitation. The facts which gave rise to the litigation were almost identical with the present case before their Lordships, with this difference, that the suit there was brought by the head of the mutt to recover possession of the leased properties.

Mr. Justice MILLER states thus the question for determination :

"The principal question, a question which arises in both the Appeals, is whether the suit is barred by limitation. It is conceded for the appellants that the lease is in excess of the powers of the matathipathe, and their contention is that the suit is barred because limitation must run from the date of the alienation in 1872, the lease being void, or at the latest from the death of Sukguana Nidhi Swamiar in 1890."

The learned Judges held in substance that there was no specific trust, that the properties were given or endowed generally for the performance of the worship of the deities in the mutt and other attendant duties, and for the support of the superior and his disciples; that a lease granted by him was valid for his life, and if adopted by his successor would enure during his term of office; but neither the original alienation nor the subsequent adoption would create a bar by adverse possession.

These cases deal exclusively with the position of the superior of a mutt in relation to its endowment. But there are some others respecting the powers of the managers of religious institutions generally. In *Muhammed v. Ganapati*(1), a lease was granted by the *dharmakarta* of a temple; and the suit to recover the leased lands was brought by his successor in office. The defence was limitation, running from the date of the alienation. Mr. Justice SHEPPARD (MUTTUSWAMI AYYAR, J., concurring) held as follows:

"In the present case, though the plaintiff may in point of time have succeeded the *dharmakarta* who made the alienation, he does not derive his title from that *dharmakarta* and is, therefore, not bound by his acts. Subject to the law of limitation, the successive holders of an office, enjoying for life the property attached to it, are at liberty to question the dispositions made by their predecessors [*Papaya v. Ramana*(2), *Jamal Saheb v. Murgaya Swami*(3), *Modho*

(1) (1890) I.L.R., 18 Mad., 277. (2) (1884) I.L.R., 7 Mad., 85.
(3) (1886) I.L.R., 10 Bom., 34.

Koory v. Tekait Ram Chunder Singh(1)], and it is equally clear that time runs against the successor who challenges his predecessor's disposition, not from the date of the disposition, but from the date of the predecessor's death, when only the successor became entitled to possession. Accordingly, Raman Pujari having died so recently as 1885, the plaintiff's suit cannot be barred by limitation."

That was followed in *Sathianama Bharati v. Saravanabagi Ammal*(2). In this case the superior is called the "manager."

In *Chockalingam Pillai v. Mayandi Chettiar*(3) it was conceded that "the manager for the time being had no power to make a permanent alienation of temple property in the absence of proved necessity for the alienation." But from the long lapse of time between the alienation and the challenge of its validity, coupled with other circumstances, the learned Judges came to the conclusion that necessity may reasonably be presumed.

From the above review of the general law relating to Hindu and Muhammadan pious institutions, it would *prima facie* follow that an alienation by a manager or superior, by whatever name called, cannot be treated as the act of a "trustee" to whom property has been "conveyed in trust" and who by virtue thereof has the capacity vested in him which is possessed by a "trustee" in the English law. Of course, a Hindu or a Muhammadan may "convey in trust" a specific property to a particular individual for a specific and definite purpose, and place himself expressly under the English law when the person to whom the legal ownership is transferred would become a trustee in the specific sense of the term.

But the respondents rely on three decisions of the Indian Courts in support of their contention that persons holding properties generally for Hindu and Muhammadan religious purposes are to be treated as "trustees." The first is a decision of the Bombay High Court in *Dattagiri v. Dattatraya* (4). The facts of that case were peculiar. The mutt there was an old one and the dedication was recognized and confirmed by the Mahratta Government. The village was granted to a holy ascetic for the maintenance of a charity attached to the mutt; the governance went by succession to the disciples of the *guru* (the spiritual

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(1) (1883) I.L.R., 9 Cal., 11.
(3) (1896) I.L.R., 19 Mad., 485.

(2) (1895) I.L.R., 18 Mad., 286.
(4) (1903) I.L.R., 27 Bom., 363.

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preceptor or head). In 1871 the village was divided between two disciples, Shivgiri and Shankargiri, in equal moieties, and each held his half separately from the other. In the same year one of them, Shankargiri, sold the lands in dispute to the defendant. In 1897 Shankargiri obtained a sanad from Government under Act II of 1863 declaring him to be the absolute owner of his share. He died in August, 1897, after appointing the plaintiff as his successor, who in 1898 brought an action to recover possession of the alienated lands on the ground that Shankargiri had no power to alienate them as they were dedicated property. The defence was, firstly, that the sanad had altered the character of the property, and secondly, that the suit was barred. The lower appellate Court found that the lands in suit were private alienable property and that consequently the action was barred. The first finding was strongly challenged by the plaintiff's counsel on Second Appeal. He contended that as it was dedicated property its holders from time to time "could not allow the Government to treat it as private property." The learned Judges of the High Court refrained from deciding that point; and confined their attention solely to the question of limitation. They proceeded to deal with the case, as they expressly say,

"On the hypothesis that the lands in suit were held by Shivgiri and Shankargiri as heads of the mutt and as trustees therefor." On that hypothesis the conclusion at which they arrived was inevitable. The position of the head of the mutt in relation to its property under the Hindu Law, custom and practice, was not considered; he was simply assumed to be a trustee. The pith of the judgment consists in the following words:

"We have then here a suit to recover possession of immoveable property conveyed in trust and afterwards purchased from the trustee for a valuable consideration."

"Conveyed in trust" is hardly the right expression to apply to gifts of lands or other property for the general purposes of a Hindu religious or pious institution. The learned Judges relied on the two decisions of the Allahabad and Calcutta High Courts to which their Lordships will presently refer. The case, however, was practically decided on the exposition of the law in *St. Mary Magdalen, Oxford v. The Attorney-General*(1). With respect to it they say as follows:

(1) (1857) 6 H.L.Cas., 189.

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"In further support of this conclusion we would also refer to the already cited case of *St. Mary Magdalen, Oxford v. The Attorney-General*(1) for though it is a decision on the English statute, still it contains many points of resemblance to the present, and furnishes us with the clearest exposition of the law applicable to cases of this class. We propose to refer to that case in some detail, as it probably is not within the reach of most mufassal Courts in this Presidency."

They set out the provisions of sections 2, 24 and 25, of Will. IV, cap. 27, and then add

"the section (s. 25), it will be seen, corresponds more or less with our articles 134 and 144 and section 10 of the Limitation Act."

Speaking with respect, it seems to their Lordships that the distinction between a specific trust and a trust for general pious or religious purposes under the Hindu and Muhammadan law was overlooked, and the case was decided on analogies drawn from English law inapplicable in the main to Hindu and Muhammadan institutions. That case can hardly be treated as authority in the decision of the present controversy.

Narayan v. Shri Ramchandra(2) only followed the view expressed in *Dattagiri v. Dattatraya*(3). But the facts, when examined, show a marked difference in the legal position of the parties in the two cases. The *mulgeni* lease under which the defendant claimed title was granted in 1845, and the suit to set it aside was brought somewhere in 1899. Repeated attempts were made by successive managers of the temple to obtain enhancement of rent, but the suits were invariably withdrawn. There was thus clear acquiescence on the part of successive managers in the validity of the transaction. The case fell within the principle of *Chockalingam Pillai's case*(4) and might well have been decided without disturbance of Hindu Law or usage.

The second decision relied upon in support of the respondent's contention is *Behari Lal v. Muhammad Muttaki*(5), which related to a Muhammadan "shrine." The origin and history of these "shrines" or *durgahs*, as they are called, is described compendiously in the judgment in *Piran v. Abdool Karim*(6):

(1) (1857) 6 H.L. Cas., 189.

(2) (1908) I.L.R., 27 Bom., 373.

(3) (1903) I.L.R., 27 Bom., 563.

(4) (1898) I.L.R., 19 Mad. 455.

(5) (1898) I.L.R., 20 All., 482 (F.B.).

(6) (1892) I.L.R., 19 Calc., 208, 220, 222.

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"The *sajjadanashin* has certain spiritual functions to perform. He is not only a *mutwali*, but also a spiritual preceptor. He is the curator of the durgah where his ancestor is buried, and in him is supposed to continue the spiritual line (*silsilla*). As is well known, these durgahs are the tombs of celebrated dervishes, who in their lifetime were regarded as saints. Some of these men had established *khankâhs* where they lived and their disciples congregated. Many of them never rose to the importance of a *khankâh*, and when they died their mausolea became shrines or durgahs. These dervishes professed esoteric doctrines and distinct systems of initiation. . . . The preceptor is called the *pir*, the disciple the *murid*. On the death of the *pir* his successor assumes the privilege of initiating the disciples into the mysteries of dervishism or sufism. This privilege of initiation, of making *murids*, of imparting to them spiritual knowledge, is one of the functions which the *sajjadanashin* performs or is supposed to perform. The endowment is maintained by grants of land to the shrines by pious Moslems. The head of the institution, like that of a *khankâh*, is called a *sajjadanashin*. The governance (*towliat*) of the endowment is in his hands; he is a *mutwali*, with the duty of imparting spiritual instruction to those who seek it. The property of the 'shrine' is *wakf* 'tied up in the ownership of God.'"

The appointment of the *sajjadanashin* is regulated by usage and practice. This is referred to in the same judgment:

"Upon the death of the last incumbent, generally on the day of what is called the *sium* or *teja* ceremony (performed on the third day after his decease), the *fakirs* and *murids* of the durgah, assisted by the heads of neighbouring durgahs, instal a competent person on the *guddi*; generally the person chosen is the son of the deceased or somebody nominated by him, for his nomination is supposed to carry the guarantee that the nominee knows the precepts which he is to communicate to the disciples. In some instances the nomination takes the shape of a formal installation by the electoral body, so to speak, during the lifetime of the incumbent."

The duties in connexion with the "shrine," apart from giving spiritual instruction, consist in the due observance of the annual ceremonies at the tomb of the Saint, the distribution of charity at fasts and festivals, the celebration of the birthday of the Prophet, and the performance of other rites and ceremonials prescribed either by the religious law or by usage and practice. Ordinarily speaking, the *sajjadanashin* has a larger right in the

surplus income than a *mutwali*, for so long as he does not spend it in wicked living or in objects wholly alien to his office, he, like the *mohant* of a Hindu *mutt*, has full power of disposition over it.

In *Behari Lal v. Muhammad Muttaki*(1), the plaintiff as *sajjadanashin* sued to set aside certain mortgages executed by his predecessor in office, and dated his cause of action from the time he was appointed as *sajjadanashin*. The learned Judges, on a misconception of the rules of the Muhammadan law and of the judgment of their Lordships in *Jewun Doss Sahoo v. Shah Kubeer-ood-deen*(2), held that the *sajjadanashin* was a "trustee." One Judge held that the suit was barred either under article 134 or article 144; the two others held that article 134 was applicable as the mortgages were created by a "trustee."

Their Lordships have to differ from this conclusion. In their opinion this case was not, in view of the considerations set forth above, correctly decided.

As regards the third case, *Nilmony Singh v. Jagabandhu Roy*(3), the suit was brought by the plaintiff as the *shebait* of a Hindu idol to set aside a *dur-mokurrai* pottah, executed in respect of certain of the *debottar* lands by two ladies who acted as *shebait*s during his minority. He alleged that he became entitled to sue for possession of the alienated lands on his appointment to the office of *shebait* by a decree of the Court. The material defence was that the claim was barred. It should be observed that the *dur-mokurrai* was created in 1857 and the suit was brought after 1888. In the judgment of the High Court the words "*shebait*" and "trustee" are used as synonymous and convertible terms; the expression is always "*shebait* or trustee." Probably the fact that the *shebait* has duties and obligations in connexion with the dedication, influenced the employment of the word "trustee" in a general sense. Mr. Mayne uses the expression in the same general sense to connote the same idea. That the learned Judge did not regard the *shebait* as a trustee in the specific sense may be inferred from his indecisive conclusion as to the application of article 134 to the plaintiff's claim.

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(1) (1898) I.L.R., 20 All., 482 (F.B.). (2) (1840) 2 M.I.A., 390.
(3) (1896) I.L.R., 23 Cal., 536.

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It is quite clear, however, that the legal position of a *shebait* is quite different from that of a trustee to whom specific property is "conveyed" on a specific trust. In *Prosunno Kumari Debye v. Golab Chand Baboo*(1), where the question for determination was whether a particular transaction challenged as invalid had been entered into for such necessity as would make it binding on the dedication, Sir MONTAGUE E. SMITH, in delivering the judgment of the Board, scrupulously avoided the use of the confusing word "trustee." Dealing with the powers of the *shebait*, he said as follows:

"But notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is in their Lordships' opinion competent for the *shebait* of property dedicated to the worship of an idol, in his capacity as *shebait* and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them. The authority of the *shebait* of an idol's estate would appear to be in this respect analogous to that of the manager for an infant heir as defined in a judgment of this Committee delivered by KNIGHT BRUCE, L.J. It is only in an ideal sense that property can be said to belong to an idol, the possession and management of it must, in the nature of things, be entrusted to some person as *shebait* or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property at least to as great a degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted and its worship discontinued for want of the necessary funds to preserve and maintain them."

The identical question relating to the powers and position of a *shebait* was again before the Board in *Abhiram Goswami's case*(2) already referred to. With regard to the powers of the *shebait*, their Lordships say as follows:

"The second question is whether, this being so, the Mohant had power to grant a Mokarari Pottah of the Monzah. It is well settled law that the power of the Mahant to alienate debottar property is,

(1) (1875) L.R., 2 I.A., 145; 14 B.L.R., 450, 458.
(2) (1909) I.L.R., 36 Cal., 1008 (P.O.); L.R., 36 I.A., 148.

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like the power of the manager for an infant heir, limited to cases of unavoidable necessity: *Prosunno Kumari Debye v. Golab Chand Baboo*(1). In the case of *Konwut Doorganath Roy v. Ram Ohunder Sen* (2) a Mokarari Pottah of debottar lands was supported on the ground that it was granted in consideration of money said to be required for the repair and completion of a temple, for which no other funds could be obtained. But the general rule is that laid down in the case of *Maharamee Shibessouree Debia v. Motlooranath Acharjo*(3), that apart from such necessity 'to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty' in the Mahant. There is no allegation that there were any special circumstances of necessity in this case to justify the grant of the Pottah of 1860, which on the most favourable construction enured only for the lifetime of the grantor, Prananda, who died in 1891, or of the Pottah of 1896, which, at best, could only be deemed operative during the lifetime of Raghubananda, who died in 1900."

The question came up again for consideration by the Board in *Palaniappa Chetty v. Sreemath Devasi kamony Pandara Sannadhi*(4). The suit was instituted by the head of a mutt to recover possession of certain land which formed part of the endowment of a Hindu temple attached to the mutt, and had been granted by his predecessor to the defendant by a perpetual rent-free lease in consideration of a small sum of money paid at the time. The contention in that case was that the alienation was for the benefit of the institution; that contention was overruled, and the decision proceeded on the basis that the *shebait* was only a manager. Lord ATKINSON, delivering the judgment of the Board, further added:

"Three authorities have been cited which establish that it is a breach of duty on the part of a *shebait*, unless constrained thereto by unavoidable necessity, to grant a lease in perpetuity of debottar lands at a fixed rent, however adequate that rent may be at the time of granting, by reason of the fact that by this means the debottar estate is deprived of the chance it would have, if the rent were variable, of deriving benefit from the enhancement in value in the future of the lands leased."

(1) (1875) L.R., 2 I.A., 145; 14 B.L.R., 450. (2) (1876) L.R., 4 I.A., 52.

(3) (1869) 18 M.I.A., 270, 275.

(4) (1917) I.L.R., 40 Mad., 709 (P.O.); L.R., 44 I.A., 147, 155, 156.

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In that case the leased lands were situated in the street of a village; here they are in the town of Madura.

Reverting then to the judgment in *Nilmony Singh's case*(1) their Lordships think that the expression "trustees" was loosely and, speaking with respect, wrongly applied to the *shebait* in order to bring the case under article 134. It is to be observed that in none of the three cases was there any examination of the laws and usages governing the respective institutions, or of the Madras decisions, in which the subject had been elaborately considered.

In the present case the character of the endowment in relation to the superior is proved beyond contradiction. It has been found concurrently by both the Courts in India that the endowment was held by the defendant No. 26 for the general purposes of the institution. Considerable stress was laid on behalf of the respondents on the entry in the inam register that the dedication was for a specific purpose, viz., the worship of the idol. The Inam proceedings did not create any dedication. They were instituted simply with the object of investigating titles to hold lands revenue-free as belonging to valid endowments. The gifts were made, long before the Inam proceedings, by the Hindu kings or chiefs who then held the country. The purposes of the dedication must therefore be gathered from established usage and practice, and that has been found by the Courts in India. Again, "valuable consideration" forms the essence of both section 10 of the Limitation Act and of article 134 of the second Schedule. Even if this were a specific trust, which it is not, it would be ridiculous to hold that the rent reserved in the grant to the second plaintiff was "valuable consideration."

In the Courts below the plaintiffs rested their claim mainly, if not entirely, on article 134. Before the Board an alternative argument has been advanced. It is contended that the second plaintiff acquired the title he is seeking to establish by twelve years' adverse possession under article 144. That article declares that for a suit "for possession of immoveable property or any interest therein not hereby (i.e., by the schedule) otherwise

specially provided for" the period of limitation is twelve years from the date when the possession of the defendant became adverse to the plaintiff. In view of the argument it is necessary to discover when, according to the plaintiff, his adverse possession began. He was let into possession by Mahant No. 1 under a lease which purported to be a permanent lease, but which under the law could enure only for the grantor's lifetime. According to the well settled law of India (apart from the question of necessity, which does not here arise) a Mahant is incompetent to create any interest in respect of the mutt property to enure beyond his life. With regard to Mahant No. 2, he was vested with a power similarly limited. He permitted the plaintiff to continue in possession and received the rent during his life. Such receipt was with the knowledge which must be imputed to him that the tenancy created by his predecessor ended with his predecessor's life, and can, therefore, only be properly referable to a new tenancy created by himself. It was within his power to continue such tenancy during his life, and in these circumstances the proper inference is that it was so continued, and consequently the possession never became adverse until his death.

There is one other point which deserves notice. The administration of the second Mahant lasted until 1906. In 1905, however, the mutt went under the management of the Diwan of the Mysore State, under a power of attorney granted by the Mahant and his successor, who may conveniently be designated as Mahant No. 3. Certain persons, to whom the second plaintiff had sub-leased the lands for ten years, thereupon obtained from the Diwan during the currency of their term a lease for seventeen years. It is a direct lease from the Diwan as holder of a power of attorney from Mahant No. 3. The lessees thereunder have been in possession for some years prior to this suit, and the object of the present action is not to keep the plaintiff in possession, but to eject these possessors, who hold under a title proceeding from the Diwan and Mahant No. 3, and to upset the act of administration of Mahant No. 3, on the ground of rights acquired adversely to the mutt by lapse of time during the incumbency of Mahant No. 2.

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For the foregoing reasons their Lordships are of opinion that neither article 134 nor article 144 applies to this case: that the plaintiffs have acquired no title under either of those articles; that the judgment and decree of the High Court of Madras must therefore be reversed, and the order of the Subordinate Judge dismissing the suit restored with costs here and of the appellate Court.

Their Lordships will humbly advise His Majesty accordingly. -

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitor for respondents: *H. S. L. Polak.*

A.M.T.

PRIVY COUNCIL.*

1921,
July 11.

SURISETTI BUTCHAYYA AND ANOTHER

v.

RAJA PARTHASARATHY APPA RAO AND ANOTHER
(AND CONNECTED APPEAL).

[On Appeal from the High Court of Judicature
at Madras.]

*Estates Land Act (Madras Act I of 1908), sec. 6—Permanent right of occupancy
—Subletting—"Ijaradars and farmers of rent"—Middlemen.*

The appellants were lessees of certain lanka lands under a lease made before the Madras Estates Land Act, 1908, came into operation. The lease by its terms contemplated the cultivation of the land by ryots, and did not prohibit subletting; it provided for the termination of the tenancy in 1910. The appellants sublet the lands to tenants who occupied and cultivated them.

Held that the appellants had not a permanent right of occupancy under section 6, sub-section (1) of the Act, being merely middlemen.

If the "ijaradars and farmers of rent" referred to in section 6, sub-section (6), are ryots at all they are non-occupying ryots, and cannot be converted into ryots with a permanent right of occupancy.

[Judgment of the High Court affirmed.]

CONSOLIDATED APPEAL (No. 58 of 1919) from a judgment and two decrees (April 14, 1916) of the High Court, affirming two

* Present:—Lord ATKINSON, Lord PHILLIMORE and Sir JOHN EDER

decrees of the District Judge of Kistna at Masulipatam (April 25, 1913) affirming decrees of the Deputy Collector, Ellore, made in summary suits. BUTCHAYYA v. APPA RAO.

The appellants sued for the issue of pattas for certain lanka lands under section 55 of the Madras Estates Land Act, 1908. They held the lands under leases, the provisions of which appear from the judgment of the Judicial Committee, made shortly before July 1, 1908, when the Act above named came into operation. The leases by their terms ended in 1910. The defendants by their written statements pleaded, inter alia, that the plaintiffs were not ryots and were not ryots in possession within the meaning of section 6, sub-section (1) of the Act; that they were mere ijaradars or farmers of rent within sub-section (6); and that the lanka lands were specifically let as "ijara" lands to prevent the acquisition of any right of occupancy.

The District Judge, affirming the Deputy Collector, dismissed the suits. He was of opinion that the plaintiffs held the lands on July 1, 1908, as "ijaradars" (whom he distinguished from "farmers of rent"), and were not holding as occupancy ryoti tenants, and that therefore they had acquired no occupancy rights.

The High Court affirmed the decrees. NAPIER, J., who delivered the judgment stated that it was admitted that the plaintiffs did not cultivate the lands themselves, but sub-leased them to cultivating tenants. The learned Judge thought that it was unnecessary to decide whether the plaintiffs were ijaradars. He preferred to decide the case on the construction of section 6, sub-section (1), read with the interpretation section (section 3) and other sections, together with a consideration of the broad policy of the Act. The learned Judge came to the conclusion that a lessee of the character of the plaintiffs was not a ryot within the meaning of the Act.

Narasimham for the appellants.—The appellants were entitled to pattas under section 55 of the Act. The effect of the interpretation clause (section 3) is that everyone holding ryoti land is a ryot for the purposes of the Act. The appellants come under section 6, sub-section (1) and not under section 6, sub-section (6). The definition of ryot imposes the condition that the land is held "for the purpose of cultivation"; it does not provide that the tenant must cultivate the land himself. Section

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187 applies to leases made before and after the Act, so that a tenant cannot contract himself out of the provisions of the Act. It was not suggested that anybody other than the appellants had an occupancy right. The judgment of the High Court proceeded upon a mistaken view that the lease was an ijara lease. [Reference was made to *Ramasami v. Baskarasami*(1).]

Sir George Lowndes, K.C., and *Parikh* for the respondents, who were called on only to refer to recent decisions of the Board dealing with "ryots," referred to *Debendra Nath Das v. Bibudhendra Mansingh Bhramarbar*(2), *Jagaveera Rama Ettapa v. Arumugam*(3) and *Yerlagadda Mallikarjuna Prasad Nayudu v. Somaya*(4).

De Gruyther, K.C., and *Kenworthy Brown* for the respondents in the connected appeal.

The JUDGMENT of their Lordships was delivered by

LORD
ATKINSON.

Lord ATKINSON.—This is a consolidated Appeal against two decrees, both dated the 14th April 1916, of the High Court of Judicature at Madras, affirming two decrees, both dated the 30th March 1914, of the Court of the District Judge of Kistna at Masulipatam, which affirmed two decrees, both dated the 25th April 1913, of the Court of the Suits Deputy Collector, Kistna district, Ellore, made in Summary Suits Nos. 376 and 377 of 1912.

Though the parties in each of these suits, as well as the property affected, are different, the questions raised for decision in both Appeals are practically identical, so that the decision made in one disposes of the other.

In the first suit the first defendant who had been appointed Receiver by the Court in a suit dealing with the estate of the Zamindar upon which the lanka lands, the subject of the suit, are situated, by a lease bearing date the 31st March 1908, demised to the two plaintiffs, the appellants in this Appeal, and to the deceased husband of the second of the two defendants, the respondents in the Appeal, a considerable tract of lanka land,

(1) (1879) I.L.R., 2 Mad., 67 (P.O.).
(2) (1918) I.L.R., 45 Cal., 805 (P.O.); L.R., 45 I.A., 67.
(3) (1918) L.R., 45 I.A., 195.
(4) (1919) I.L.R., 42 Mad., 400 (P.O.); L.R., 46 I.A., 44.

over 100 acres in extent, for a term of three years from the 31st March 1908, reserving thereout a cist or rent of Rs. 2,420 per annum.

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Some of the provisions of this lease demand consideration. It contains a recital that, in an auction held by the lessors, on whose behalf, of course, the Receiver acted, the lease had been made. The practice prevailing on this estate in reference to such lands as were demised ~~was~~ proved to be this: that when a lease was about to expire, or had but recently expired, an auction was held. Those who desired to become lessees of the land previously demised, bid at this auction, and the new lease was granted to the highest bidder, whether he was the old lessee or another. There was thus no custom of continuity of occupation. The outgoing lessee had no privilege or advantage. It is further recited that as the lessees had executed a muchilka in favour of the lessors agreeing to cultivate the said lanka lands under the conditions set forth in the lease, the lessors had "written and given their patta." One of these conditions was that as regards planting seeds, turfs, grass, etc., and enlarging the extent of land, the lessees were to regard all the orders the lessors had issued or might issue. Another condition was that the lessees were to continue to cultivate only 110 acres and 85 cents. A third, that if the Government should, during the lease, take any of the demised lands for conservance works or any other purpose, the lessees would get a remission for that land of only the average cist that might accrue with reference to the ijara cist. That in the event of the Government taking lands with crops upon them the lessees might receive compensation from the Government for loss of profits, but would not be given any compensation out of the estate funds for such crops. A fourth condition, that if within the term silts should be formed and loss be caused by erosion, the lessees must bear the loss and pay the whole cist, etc., every year, and that they were not to apply for remission on any ground whatever. Again, the lessees were to bind themselves to all the steps the lessors might take against them under the Madras Rent Recovery Act, VIII of 1865, in regard to the collection of arrears. These are distress, sale or eviction. Another condition was that the lessees were not to transfer their ijara rights to others without the lessors' consent,

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and again, another, that neither the lessees nor the ryot who cultivates it, nor the merchant who purchases it, nor anybody else, shall take the tobacco and other produce raised on the ijara lanka to other places than the ijara lanka.

It is clear from this provision that the parties contemplated the cultivation of the land and the raising of crops upon it by ryots. No clause prohibiting subletting is to be found in the lease.

It is further stipulated that at the conclusion of the term the lanka lands leased are to be dealt with according to the pleasure of the estate authorities without obtaining any release from the lessees, and that at the conclusion of the term, though it ends by the 30th June, fasli 1319, the lessees are to give up the lanka land without leaving on it any produce whatever belonging to them by the end of May of that fasli for the convenient transaction of business. Provisions so elaborate as these are scarcely such as one would expect to find in the contract of tenancy of an ordinary ryot.

The appellants contend that by the provisions of certain clauses of the Madras Estates Land Act of 1908 this contract of tenancy is entirely superseded; that they are relieved from the obligations imposed on them by many of the covenants of their lease; that their tenure is changed, their occupancy continued, and their rent made subject to revision. If that be so, as they contend it is, then the burden rests upon them of clearly establishing that those clauses apply to their case. The obligation of proving the negative proposition, that these clauses do not apply to their case, does not rest upon the lessors.

On the 30th December 1909, a notice was, on behalf of the lessors, served upon the lessees informing them that as the term of three years ijara of the lanka lands which they held from the lessors would expire by this fasli 1319, and as they were bound to quit the lands at the end of May 1910, according to the contract of their registered muchilka, they were required to remove by that date their things, etc., that were on the said lanka lands and to vacate the same.

To this notice the lessees, on the 18th April 1910, sent a reply, to the effect that they were cultivating the lands as ryots when the Madras Estates Land Act, 1908, came into force; that

they thereby acquired under section 6 of that statute permanent occupancy rights in the said lanka lands and would not vacate them; and, further, that they possessed the right to obtain patta of the said lands; and that if patta should not be granted to them they would take legal proceedings. Accordingly, the appellants, in pursuance of this intimation of their intention, instituted on the 14th March 1911, against the respondents, the suit out of which this Appeal has arisen, praying the Court to determine what was a fair and equitable rent for the holding so leased to them, and, further, to make a decree directing the respondents to grant to them a patta in the form prescribed of their said lands on proper terms and to pay their costs.

In the judgment of NAPIER, J., who delivered the judgment of the High Court of Madras, the following passage is to be found:

"It is admitted that the lessees did not cultivate the lands themselves, but sub-leased them to cultivating tenants."

From the judgment of the Deputy Collector it clearly appears that it was proved before him by the witnesses examined on behalf both of the appellants and the respondents that the appellants had sublet, at all events, a considerable portion of the demised lands to sub-tenants who cultivated them personally, paying rent therefor. In the judgment of the Judge of the District Court is to be found the following passage:

"Much stress has been laid upon the fact that there were no tenants on the lands when leased to the plaintiffs. I do not see that this alters the case in the least, if the lands were leased to them under ijara tenure as I have held they were. It is in evidence that the plaintiffs did not cultivate the lands at all themselves, but let them out to cultivating tenants. Even if they had cultivated some of the lands themselves, I do not think it would have altered the position, as the ijara tenure was clearly understood between the parties when it was entered upon."

The above-mentioned extract from the judgment of NAPIER, J., cannot, in their Lordships' view, be treated as merely a restatement in wider language of the conclusion at which the District Judge had arrived. It may well be that before the High Court the advocate who appeared for the present appellants, feeling it hopeless, owing to the evidence that had been given and to the judicial opinions which had been pronounced,

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to contest the point further, made the admission set forth by NAPIER, J. The passage from Mr. Justice NAPIER's judgment should, in their Lordships' view, be taken in its ordinary meaning, from which it follows that the appellants dealt with the lands demised as middlemen, subletting them to tenants who held their holdings subject to a rent payable to their immediate landlords, occupied them, and cultivated them. The lessees claim to have a rent fixed for all the land demised to them by their leases, and to have a patta granted to them of all these lands. Their Lordships have not to determine, if Mr. Justice NAPIER's statement be accepted according to its ordinary meaning, whether, if the appellants had only sublet to occupying and cultivating sub-tenants a substantial portion of their lands, they would be altogether disentitled to the relief they seek, or would only be entitled to that relief in relation to the portion of the demised lands which they had not sublet, especially as this question was not raised or argued before their Lordships on the hearing of this Appeal. A decision on either of them is not called for in this Appeal, and their Lordships must not be taken to have formed, much less to have expressed, any opinion upon them.

It appears to their Lordships to be plain, from the provision of the first seven chapters of this Statute of 1908, if not indeed from the whole of it, that the object of the Act was to improve the condition and confer new rights and privileges, especially upon the occupying cultivators of ryoti land such as these lands admittedly were. It would be quite opposed to its policy to confer on middlemen who sublet to occupying and cultivating tenants, rights and privileges at all resembling those conferred on occupying cultivators, and, indeed, would result in depriving the latter class of the benefits intended to be conferred upon them. It could hardly be suggested that it was the object of the Statute to bring about such a result as this, that the middleman could compel his landlord to grant him a patta at a rent to be fixed by a Court, and the middleman's occupying and cultivating sub-tenants should in their turn be able to compel their immediate landlord, the middleman, to grant to them pattas of their holdings at rents to be similarly fixed, and this, though the middleman was an absentee who never even visited his estate.

By section 50 of the Act, sub-section (1), the class of persons is described to whom the provisions of Chapter 4 are to apply. By sub-section (2) of that section, it is provided that a person of that class shall be entitled to have granted to him a patta for any current revenue. Turning back to sub-section (1), to find the description of the class to whom the right is given, it is to be composed of ryots with a permanent right of occupancy, and also ryots holding old waste lands under a landlord otherwise than under a lease in writing.

It is obvious, the lessees in this case are not members of this latter section of the class. It is equally clear that they are not members of the first section of the class. They are not ryots with a permanent right of occupancy. It is to be observed the word is "occupancy," not "possession." An owner may, in one sense, be in possession of his estate by the receipt of rent from the tenants of that estate, but not occupancy.

Section 51 prescribed what the patta is to contain, and by sub-section (2) of that section it is enacted that any stipulation in restraint of cultivation or of harvesting by a ryot, or the giving up possession of his land by an occupying ryot at any specified time, is to be void and of no effect, a provision which in itself seems to suggest that the ryot, to be entitled to have a patta granted to him, has to be a cultivator of his holding.

Section 6, sub-section (1), defines the persons who are to be entitled to acquire the permanent right of occupancy in holdings. This definition qualifies the first section of the class mentioned in section 50 which is entitled to apply for a patta. They are those who were ryots, at the passing of the Act, and then in possession, or thereafter admitted by a landowner to possession of ryoti land not being waste land situate on the landlord's estate. It is this permanent right of occupancy which entitles the ryot to apply for the patta. Section 46 prescribes the mode by which a non-occupying ryot may acquire a permanent right of occupancy of his land, but cases falling within section 6, sub-sections (4) and (5), are expressly excluded.

In the view of their Lordships the words "ijaradar and farmer of rent" occurring in this sub-section are not synonymous. They denote two classes of persons. They are not defined in the definition clause. If ijaradars and farmers of

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rent are ryots at all they are, as appears from section 46, non-occupying ryots, and cannot be converted into ryots with a permanent right of occupancy.

For these several reasons their Lordships are of opinion that the appellants do not belong to the class of persons entitled to the kind of relief they seek to obtain, that the judgments appealed from were right and should be affirmed, and this appeal be dismissed; and they will humbly advise His Majesty accordingly. The appellants must in both appeals pay the respondents' separate costs.

Solicitor for appellants: *H. S. L. Polak.*

Solicitors for respondents: *E. Dalgado; Douglas Grant.*

A.M.T.

PRIVY COUNCIL.*

1921,
July 15.

SECRETARY OF STATE FOR INDIA IN COUNCIL
(DEFENDANT),

v.

RAJA OF VENKATAGIRI (PLAINTIFF)

AND CONNECTED APPEALS

[On Appeal from the High Court of Judicature
at Madras.]

Madras Regulation XXV of 1802, ss. 3 and 4—Zamindar—Permanent Settlement—Sanad—Construction of Sanad—Right of Government to resume inam lands.

A sanad issued by the Government on August 24, 1802 to a zamindar in the Presidency of Madras (Arcot) stated that in consideration of the relief which the zamindar's finances would derive from the relinquishment of his military services, and of the Government charging itself with the duty of protecting his territories, "the British Government has fixed your annual contribution, including equivalent for military service and the established peshkush for every year, at the sum of star pagodas 1,11,058, which said amount shall never be liable to changes under any circumstances." Clause (5) reserved to the Government the revenue derived from salt and saltpetre, and certain other subjects, without making any mention of lakhiraj or inam lands.

* Present:—Viscount CAVE, Lord SHAW and Mr. AMER ALI.

It appeared from other documents that the assessment had been fixed on the whole zamindari, irrespective of the assets derived from each particular unit of property within it.

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Madras Regulation XXV of 1802, which was passed on July 12, 1802, provided by section 3 that in all cases of disputed assessment reference was to be had to the sanads and kabuliyats executed; and by section 4 that the Government having reserved to itself certain articles of revenue including "lakhiraj lands (or lands exempt from the payment of Government revenue), and of all other lands paying only favourable quit-rents, the permanent assessment of the land-tax shall be made exclusively of the said articles now recited."

At the time of the issue of the sanad there were in the zamindari certain religious and charitable inams and lakhiraj lands granted by the zamindar or his predecessors. Held, that having regard to the terms of the sanad, and the circumstances in which it was issued, the Government was not entitled to resume them or assess them to public revenue.

[Judgment of the High Court affirmed.]

CONSOLIDATED APPEAL (No. 10 of 1920) from a judgment and four decrees of the High Court (March 29, 1916) affirming four decrees of the District Court of Nellore.

The plaintiff (now respondent) in each of the first four cases was the Raja of Venkatagiri, who held the zamindari of Venkatagiri under a permanent settlement sanad. Within the ambit of his estate there were at the date of the sanad various parcels of land which had previously been alienated by inam grants. The first suit related to them generally, and he therein asked for and obtained an injunction restraining Government

"from holding any investigation into the nature of and title to inams and lakhiraj lands in the said zamindari and from dealing with the same under the inam rules . . . or resuming them or assessing them to public revenue."

The second, third and fourth suits related to certain specific instances of such inams of the classes known as devadayam, dharmadayam and brahmadayam or religious inams. The inam lands in question in the second and third suits had been taken by the zamindar into his own occupation—the grants being (as the plaintiff stated in his plaint) resumed—and that in question in the fourth suit had been bought up by him; and all were in the possession of the plaintiff. In each case the Inam Commissioner had completed his inquiry, in the course of which he found that the inams should not be confirmed as such under the rules, and consequently ordered that they should be "resumed by Government," i.e., assessed to public revenue.

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In each case the Raja obtained a declaration that such order was invalid.

The material passages of the sanad of August 24, 1802, and the circumstances in which it was issued appear from the judgment of the Judicial Committee. The terms are stated shortly in the head-note to this report.

The plaintiff by his plaints submitted that by virtue of the sanad the Government had no right to investigate the conditions of the inams in question nor any right to resume them or assess the lands to public revenue. He further pleaded that the question in issue had been decided in favour of his predecessor in a suit brought by the Collector in 1816 before the Provincial Court of Nellore. He prayed for declarations of his rights accordingly, and for an injunction.

The defendant by his written statement did not admit that at the time of the issue of the sanad the reversionary right in the inams belonged to the Rajas, or that they had power to resume. By paragraph 8 he pleaded:

"The defendant submits that under Regulation XXV of 1802, the revenue derivable from lakhiraj lands and all other lands paying only favourable quit-rents was reserved to the Government and the permanent assessment directed to be made exclusive of that head of revenue, and that it was not competent to the zamindar to resume or assess any lands devoted to religious or charitable purposes under the denomination of devadayam, dharmadayam or brahmadayam."

He also denied that the question was *res judicata* as alleged.

The terms of sections 4, 12 and 13 of Madras Regulation XXV of 1802, upon which the defendant relied appear from the judgment of the Judicial Committee.

The District Judge made declarations as prayed by the plaintiff, and granted an injunction in the terms stated above. His judgment was based upon a view which was not adopted by the High Court upon Appeal. He was of opinion that owing to an arrangement by which the sanad was to take effect from July 12, namely, before the Regulation was passed, the Regulation did not apply. He, however, expressed the view that if the sanad took effect from the date of its issue, the lakhiraj lands were bound to be excluded from the settlement having regard to the Regulation.

An Appeal to the High Court (Appeal No. 62 of 1913) in the first suit was heard by Sir JOHN WALLIS, C.J., and PHILLIPS, J., and was dismissed on March 26, 1916. The judgment was subsequently treated as governing the other suits.

The learned Chief Justice in the course of his judgment said.

"The inam lands in question in this suit form part of the zamindari, and not having been excluded, as were the police lands, appear to me as a matter of construction to have passed under the grant. I think that, subject to the rights of the inamdars, the zamindar is entitled to hold under the terms of the sanad subject to the payment of the permanent peshkush, and that the Government has no right to levy any fresh assessment. This brings us to the most important question in the case, whether, supposing the terms of the sanad to be clear, Government is at liberty to disregard them on the ground that they are in contravention of the provisions of Regulation XXV of 1802, sections 4, 12 and 13. In view of the recognition for nearly a century of the rights which are now challenged, I think this objection should be very clearly made out. It is said in the first place that section 4 restricts Government from alienating any of the reserved articles of revenue therein mentioned. The section, however, merely recites that Government had reserved these articles of revenue, and provides that the permanent assessment of the land-tax should be made exclusively of them. I do not think that it was intended by this section in any way to restrict the full power of alienating all classes of land revenue which Government had under the Treaty of Cession with the Nawab and the provisions of the Act of 1793, by which the government and administration of the Presidency were vested in the Governor in Council. The section appears to me to have been enacted *alio intuitu*, and like some other parts of the Regulation to be largely declaratory and explanatory of the position which the zamindars were to occupy under the sanads that were to be granted to them. Full effect may, I think, be given to section 4 by holding that it was not intended to affect the power of Government to alienate the reserved articles if so minded, but only to secure that the zamindar should not be assessed on what was not granted to him. It may no doubt be said that this follows from the reservation, but it must be remembered that the main object of passing the Regulation in this form and issuing the sanad was to make things plain to the zamindar and to guard against any sort of misunderstanding however unreasonable. In this view, the effect of section 4 was to obviate misunderstandings and to enable the zamindar to object to the reserved articles being taken account of

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in fixing his peshkush. Similarly, I think that the provisions of sections 12 and 13 prohibiting the zamindar from resuming, or fixing a new assessment on certain classes of inams without the consent of Government, and providing for the imposition of a fresh assessment on the zamindar where such assent was granted, must be construed as confined to cases in which, pursuant to the policy enunciated in section 4, these inams had been reserved and not taken into account at the settlement of the land tax."

On the question of *res judicata* the learned Chief Justice was of opinion that the judgment of the Provincial Court was a decision that the revenue of lakhiraj villages was not reserved to Government under the sanad, and that Government had no right to resume them.

PHILLIPS, J., delivered judgment to the same effect.

Dunne, K.C., and Kenworthy Brown for the appellant.—Under the permanent settlement the zamindar had no right or title to the inam lands in question; and he had no right, whether under the sanad or apart from it, to resume the inam lands. The provisions of sections 4, 12 and 13 of Madras Regulation XXV of 1802 were not excluded by the terms of the sanad, and could not be excluded. It was not shown that the peshkush under the sanad was assessed upon the inam lands; the contrary was established. Because lakhiraj lands were not expressly reserved and other matters, reserved by section 4, are specifically reserved, it cannot be inferred that lakhiraj lands were not reserved. A common right is not parted with by implication. There are provisions in the Regulation (e.g., as to the power of sale and furnishing accounts) which clearly are included in the sanad, although not mentioned. The Government having, by Regulations XXV and XXXI of 1802 and by subsequent legislation consistently kept inams under its own control, it is very unlikely that it was intended by the sanad to hand them over to the zamindar with power to resume them himself. The Government did not at an earlier date put into force their powers with regard to the resumption of inams, because it was misled by the decision of the Provincial Court. That decision related to a service tenure and has no bearing upon the religious and charitable inams now in question. Further, there is no *res judicata* because the question was purely one of law, not fact:

Mangalathammal v. Narayanaswami Aiyar(1), *Natesa Chetti v. Vengu Nachiar*(2). [On the earlier part of the argument reference was made to *The Collector of Trichinopoly v. Lekka-mani*(3) and to *Vedanta v. Kanniyappa*(4).]

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Upjohn, K.C., and *Dube* for the respondent.—The arrangement concluded by the Government with the zamindar, culminating in the issue of the sanad, was not a settlement of the peshkush and did not fall within the Regulation at all. The peshkush had been settled in 1792. The object and effect of the arrangement made in 1802 was merely to commute the military service with revenue. It also took away the zamindar's right to make collections in the specific matters mentioned in clause (5) of the sanad. That arrangement was a matter wholly outside the Regulation. The present matter is *res judicata* by reason of the judgment of the Provincial Court. Further, there were admissions by the Government in 1823, 1829 and 1860 that the judgment was correct. The zamindar, acting on those representations, bought part of the lakhiraj lands. There is, therefore, an estoppel *in pais*. The present contention of the Government cannot be supported upon any fair construction of sections 3, 4, 12 and 13 of Madras Regulation XXV of 1802. [Reference was made to Aitcheson's Treaties, volume 5, pages 238, 244, 245.]

The JUDGMENT of their Lordships was delivered by

MR. AMER ALI.—The facts of this litigation take their origin in the early establishment of British rule in the Madras Presidency. The Raja of Venkatagiri holds a zamindari of considerable extent in the modern district of Nellore. His ancestors were admittedly in possession of the estate since the Muhammadan times, subject first to the Emperors of Delhi, and afterwards, on the disruption of the Mogul Empire, to his representatives in the Carnatic, usually styled the Nawabs of Arcot. Besides the payment of a fixed revenue or peshkush, they were bound to maintain an armed force for the assistance of Government in times of disorder or rebellion.

(1) (1907) I.L.R., 30 Mad., 461.

(2) (1910) I.L.R., 33 Mad., 102.

(3) (1874) L.R. 1, I.A., 282, 305, 306.

(4) (1886) I.L.R., 9 Mad., 14 (F.R.).

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In the year 1792 a treaty was entered into between the East India Company on the one side, and the Nawab of Arcot on the other, under which the administration of the country was assigned to the British. The arrangement, however, was found not to be satisfactory. It had left the Nawab a considerable amount of authority, which soon gave rise to causes of friction between him and the East India Company. Consequently, in 1801, a fresh treaty was executed under which the entire administration passed into British hands. In both the treaties the position of the Raja of Venkatagiri was maintained; and the revenue he became bound to pay to the East India Company continued to be the same as he had all along paid to the Muhammadan rulers.

In pursuance of the policy laid down by the Board of Directors, Lord Clive, who was at the time the Governor of Madras, proceeded to persuade the Raja of Venkatagiri and other Poligars who occupied a similar position, and whose zamindaris lay chiefly in Western Arcot, to abandon the system of maintaining an armed force for the assistance of Government. It was pointed out to them by the Governor in Council that the duty of maintaining an army for the service of Government imposed a heavy and costly responsibility; the East India Company would henceforward take over all charge for the preservation of law and order and thus relieve the zamindars of an irksome burden. They were at the same time assured that their fixed peshkush would remain invariable. The zamindars were thus induced to consent willingly to this arrangement, and in lieu of maintaining an army, which cost them a considerable amount of money, they undertook to pay an additional revenue on their estates, which was added to their peshkush.

Pursuant to this arrangement a sanad was issued, on the 24th August 1802, to the zamindar of Venkatagiri and other zamindars occupying a like position, embodying the terms which had been agreed upon. This document is called a "*sunnud-i-milkeut istimrar*," or deed of permanent property. The word *istimrar* denotes its character of perpetuity and permanency of revenue. The aggregate peshkush was, in the case of Venkatagiri, put down as 1,11,058 star pagodas. The clause in the sanad which relates to this particular arrangement is in these terms:

"In consideration of the relief which your finances will derive from the relinquishment of your military service and from the discontinuance of the expense to which you have on that account been liable, in consideration also of charging itself with the entire protection of the territories dependent on its power, the British Government has fixed your annual contribution, including equivalent for the military service and the established peshkush for every year, at the sum of star pagodas 1,11,058, which said amount shall never be liable to changes under any circumstances, and is hereby accordingly declared to be permanent annual demand of Government on your zamindari."

The only reservations in respect of the absolute abandonment on the part of Government of all claim to enhance the consolidated peshkush is contained in clause (5), which runs thus:

"The permanent peshkush fixed by this sanad in your zamindari is exclusive of the revenue derived from the manufacture and sale of salt and saltpetre, exclusive of the sayer or duties of every description, the entire administration of which the Government reserves to itself, exclusive of the tax on the sale of spirituous liquors and the intoxicating drugs, exclusive of all lands and rums heretofore appropriated to the support of the police establishment. The Government reserves to itself the entire exercise of its discretion in continuing or discontinuing temporarily or permanently the articles of all sorts included according to the custom and practice of the country under the several heads above stated."

It is clear, however, that at this time two policies were on foot: one with regard to the powerful zamindars who maintained large armies, with whom a settlement was essential on a separate basis; the other a measure of general assessment in accordance with the instructions issued to the Board of Revenue on the 24th September 1799. In the carrying out of this latter policy the Government passed Regulation XXV of 1802, which came into force on the 13th July 1802. The preamble of this Regulation is important. It declared:

"Whereas it is known to the zamindars, mirasidars, ryots, and cultivators of land in the territories subject to the Government of Fort St. George, that from the earliest until the present period of time the public assessment of the land revenue has never been fixed; but that, according to the practice of Asiatic Governments, the assessment of the land revenue has fluctuated without any fixed

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principles for the determination of the amount; and without any security to the zamindars, or other persons, for the continuance of a moderate land tax; that on the contrary, frequent inquiries have been instituted by the ruling power, whether Hindu or Muhammadan, for the purpose of augmenting the assessment of the land revenue; that it has been customary to regulate such augmentations by the inquiries and opinions of the local officers appointed by the ruling power for the time being; and that in the attainment of an increased revenue on such foundations it has been usual for the Government to deprive the zamindars, and to appoint persons on its own behalf to the management of the zamindaris; thereby reserving to the ruling power the implied right, and the actual exercise of the proprietary possession of all lands whatever; And whereas it is obvious to the said zamindars, mirasidars, ryots, and cultivators of land that such a mode of administration must be injurious to the permanent prosperity of the country, by obstructing the progress of agriculture, population and wealth; and destructive of the comfort of individual persons, by diminishing the security of personal freedom, and of private property: Wherefore the British Government, impressed with a deep sense of the injuries arising to the State, and to its subjects, from the operation of such principles, has resolved to remove from its administration so fruitful a source of uncertainty and disquietude; to grant to zamindars, and other landholders, their heirs and successors, a permanent property in their land in all time to come; and to fix for ever a moderate assessment of public revenue on such lands, the amount of which shall never be liable to be increased under any circumstances."

And in section 2 it proceeded to enact that

"In conformity to these principles, an assessment shall be fixed on all lands liable to pay revenue to the Government; and in consequence of such assessment, the proprietary right of the soil shall become vested in the zamindars, or other proprietors of land, and in their heirs and lawful successors for ever."

Section 3 will be referred to later.

Section 4, which forms an important element in the consideration of the present case, is in the following terms:

"The Government having reserved to itself the entire exercise of its discretion in continuing or abolishing, temporarily or permanently, the articles of revenue included according to the custom and practice of the country under the several heads of salt and salt-petre; of the sayer, or duties by sea or land; of the abkari, or tax

on the sale of spirituous liquors, and intoxicating drugs; of the excise on articles of consumption; of all taxes personal and professional, as well as those derived from markets, fairs or bazaars; of lakhiraj lands (or lands exempt from the payment of public revenue); and of all other lands paying only favourable quit-rents: the permanent assessment of the land tax shall be made exclusively of the said articles now recited."

The drafting of this section can by no means be commended for preciseness or lucidity, but it is clear that the reservations in respect of the power of Government are wider than in the sanads referred to above.

It appears that the Venkatagiri estate, when it came under British administration, included a large number of inam lands, which had been expropriated by the zamindars from time to time for charitable or pious purposes, either free of rent or on favourable rent. Some lands had also been granted to people for services to the estate. In respect of the latter the zamindar had an absolute right of resumption. As regards the others, which came within the category of pious grants, his power appears to have been limited; he could resume them only on specific and apparently valid reason.

In 1816 the Government attempted to enforce its rights against the zamindar in respect of some of these alienated lands. The dispute was as to whether the zamindar was entitled to take possession of them without any liability for the payment of additional revenue, or whether the Government was entitled to the benefit of the resumption and possessed the right to assess revenue on those lands. The dispute was decided in favour of the zamindar, viz., that the Government had no such right as it claimed. Matters remained quiescent from the year 1822, when the action was decided in the Provincial Court, until 1897, when the Government again put forward the same claim as they had done in 1816 and attempted, by their revenue officers, to investigate into the title of the grantees who held the lands under the zamindar and to ascertain whether the grants were valid or not, and if they were not, to assess revenue on them. The Raja of Venkatagiri resisted the Government's claim, and after a good deal of correspondence brought in the Court of the District Judge of Nellore the four suits which form the principal foundation of the present consolidated Appeal. The fifth suit, which

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has been made a part of the proceedings, was brought against the Government on similar grounds by another person in the Court of the Subordinate Judge of North Arcot in respect of lands lying in another estate.

In paragraph 10 of the plaint the Raja states the nature of the grants and his rights with reference to the alienated lands, and in paragraph 11 he specifies his grounds of objection to the fresh assessment which the Government proposed to make on him. His ground of action is thus stated in the plaint:

"That the Inam Deputy Collector of Nellore, acting under the orders of Government, gave a notice to the plaintiff that he would proceed to investigate the condition of devadayam and dharmadayam inams in the Venkatagiri zamindari which had been granted prior to the permanent settlement, and that in order to enable him to do so, the plaintiff should furnish him with a list of such inams containing the particulars specified in a statement annexed to the said notice, and that, in spite of the plaintiff's repeated objections to the right of Government to resume such inams in the zamindari of Venkatagiri or deal with the same under the inam rules, the said Deputy Collector is proceeding with the investigation. . . ."

He pleaded *res judicata* on the basis of the proceedings in 1816, and alleged further that the Government by their own conduct were estopped from claiming the right of assessment. On these grounds, he prayed for a declaration that the Secretary of State had no right to resume or assess to public revenue inams or lakhiraj lands situate within the zamindari of Venkatagiri nor any reversionary right therein, nor any such right in the inams or lakhiraj lands which had already come in the plaintiff's possession. He also asked for a permanent injunction restraining the Secretary of State and his officers from holding any investigation into the nature of and title to inams or lakhiraj lands within his estate, and from dealing with the same under the inam rules sanctioned by Government on the 9th August 1859, or resuming them or assessing them to public revenue.

The Government joined issue with him on the question of the right of Government to resume and assess these expropriated lands; their principal contention being that under section 4 of Regulation XXV of 1802 the Government had expressly reserved its power and that the provisions in the sanad do not prejudice it or take it away.

The other objections in the written statement do not appear to their Lordships material for the purposes of the present judgment.

The District Judge states, in their Lordships' opinion, correctly and concisely the question for determination:

"The main question really to be decided in this suit is, whether the reversion in respect of inams or lakhiraj lands situated within the zamindari of Venkatagiri belongs to the Government or to the zamindar, and whether the Government is entitled to resume those inams or whether such right of resumption belongs to the zamindar."

In a careful review of the facts, he held in substance that the Venkatagiri zamindari did not fall within the purview of the Regulation, and that consequently the contention of the Government was not maintainable; and he accordingly in the four suits before him made a declaration in favour of the plaintiff's right and granted an injunction as asked for. On appeal to the High Court his decrees have been maintained, although the reasons which the learned Judges of the High Court have assigned for coming to the same conclusion as the first Court do not proceed on the same lines as those followed by the District Judge. In substance, however, there is absolute concurrence between the two Courts.

The Government appears to have failed also in the Court of the Subordinate Judge of North Arcot, and their Appeal to the High Court was dismissed.

As their Lordships substantially agree with the conclusions arrived at by the Courts in India, they do not think it necessary to traverse at any great length the grounds upon which the High Court and the District Judge have rested their judgments. It has been argued before the Board that the sanad of the plaintiff could not possibly override the express provisions of the Regulation, and that the executive Government had no power to convey to the grantees—viz., the zamindar—larger rights than the Statute provided. It was urged that the rights of the Crown cannot be taken away by implication, and it was stated that, having regard to the terms of the section already referred to, the Government had absolute power at any time to direct an investigation into the title of the lakhiraj lands to which the plaintiff laid a claim as part and parcel of his estate not liable to assessment by

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Government. In view of this contention, which has been strenuously pressed by learned Counsel for the Government, it becomes necessary to examine a little more closely the circumstances which led to the conferment of the sanad on the zamindar of Venkatagiri and the other zamindars who were in the same position with him, and to consider how far the grant is affected by the provisions of Regulation XXV of 1802.

As already observed, the British authorities appear to have taken in hand as early as the 24th September 1799, the regularisation of the land revenue in the Carnatic and to have issued instructions to the Board of Revenue as to the line of action to be taken for the purpose of instituting a general inquiry into the conditions under which land was held within those territories. Regulation XXV of 1802 was an outcome of the inquiries made under those instructions to the Board of Revenue; but it appears that whilst these inquiries were proceeding with regard to a general settlement of revenue, simultaneously an inquiry was in progress respecting the amount the Venkatagiri estate should in addition to the "established peshkush" pay in lieu of its release from the liability to keep up an army for the service of Government.

Mr. Stratton, the peshkush Collector of North Arcot, had been deputed to make a thorough inquiry as to the resources of the different Poligars, and the report, which he submitted to the Government on the 14th July 1801, contained all the requisite information, and upon that information the commutation which was granted to the zamindar of Venkatagiri in respect of his military force appears to have been fixed. He sets out in his report the different kinds of inams, some of which the zamindar was at liberty to resume at his own discretion, others which he could not resume without sufficient reason, such as neglect of duty, etc. All these lands appear to have been taken into consideration in arriving at the estimate of the commuted amount.

The sanad to the zamindar of Venkatagiri was issued, as already stated, on the 24th August 1802, by the Governor in Council, Lord Olive, on behalf of the East India Company. The material terms of the sanad have already been referred to.

On the same date Lord Olive addressed a letter to the zamindar in terms which leave little doubt as to the meaning to

be attached to the grant. He states first the object with which the sanad was granted, and goes on to say that—

"Under the circumstances, the amount which your brave self has to pay annually in future is fixed as follows:—In consideration of military service—eighty-nine thousand three hundred and eighty-five star pagodas—The fixed peshkash (tribute)—twenty-one thousand six hundred and seventy-three pagodas. Total—one lakh eleven thousand and fifty-eight star pagodas,"

and what follows is important. The document goes on to say:

"As the above-mentioned amount is the maximum portion of your exalted self's zamindari which should annually be sent to the Government on account of the expenses for general protection, therefore, sanad (deed) of perpetual ownership, to the effect that the sum of one lakh eleven thousand and fifty-eight star pagodas should be paid to the Government annually by the zamindari of your brave self, by way of permanent jama (assessed revenue) is sent to you under the seal and signature of the Members of Government,"

and again:

"Accordingly, having this matter in view, all the incomes from the lands of amaram and kattubadi retained in possession of foot soldiers were not included in the account of the item of the consideration for their services."

On the 25th August 1802, a letter was addressed by the Secretary to the Government to the Collector of western peshkush, which included the three zamindaris principally concerned, viz., Venkatagiri, Kalahasti and Bomrauzepalem, making it clear that the revenues that were assessed upon these three zamindaris were deliberately fixed in the case of Venkatagiri at Rs. 1,11,058, to be paid annually by the zamindar.

Paragraph 10 of that document is important, and it is in these terms:

"To remove from the minds of the zamindars all doubt of the permanency of the present arrangement the Governor in Council has caused sanad-i-milkiat istimrar to be prepared under the seal and signature of His Lordship in Council for the purpose of being delivered to the zamindars; kabuliyats corresponding with these sanads are also transmitted, and the special commission desire that you will require the zamindars to sign and return them to you duly executed; to these kabuliyats you will annex a kistbandi fixing the kists according to the seasons of produce."

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In accordance with these instructions from the Government given to the Collector of western peshkush, kabuliyats were taken from the zamindars in identical terms, but before executing his kabuliyat the zamindar of Venkatagiri took particular care to have the extent of his zamindari inserted in specific terms in the sanad that was granted. That appears from Mr. Stratton's letter of the 17th September 1802. In paragraph 6 that officer states as follows :

"The Venkatagiri zamindar further made objections to sign his kabuliyat until I had specified therein the several districts composing the Venkatagiri zamindari; considering this scruple of no material import, I was induced to accede to his request and at his suggestion to recommend to you that the districts under him should be particularized at the back of his sanad, for which purpose it is now accordingly returned."

So far as these documents are concerned, they leave no possible doubt that the Government, represented by the Governor in Council, on the one side fixed a definite specific assessment on the whole zamindari of Venkatagiri irrespective of the particular assets derived from each particular unit of property within the estate, and that the zamindar, on his side, accepted that arrangement on that special understanding. The question now is whether that action of the Government was, in view of the provisions of Regulation XXV of 1802, valid or otherwise. As already stated, Counsel for the appellant have strongly argued that, in view of the provisions of section 4 of that regulation excluding the "lakhiraj lands (or lands exempt from the payment of public revenue) and all other lands paying only favourable quit rents" from the permanent assessment of the land tax, it was not competent for the Governor in Council to grant a sanad of the character that is in issue in this case; and much stress is laid upon the instructions that were originally issued in connection with the inquiry into the general resources of the different estates in 1799. It is said that in that document the Government took care to reserve its right on all lands

"at present alienated and paying no public revenue which may have been or may be proved to be held under illegal or invalid titles and the revenue of which is not included in the Committee's account."

In respect of this contention two considerations arise—firstly, whether the lands which are now sought to be assessed were in fact paying no public revenue, and secondly, whether, in view of the provisions of section 3, it is open to the Government to contend that the sanad should not be taken into account in the construction of section 4. Section 3 declares as follows :

"Where the conditions of the permanent assessment of the revenue may have been adjusted, a sanad-i-milkiat istimrar, deed of permanent property, shall be granted on the part of the British Government to all persons being, or constituted to be, zamindars or proprietors of land; and each zamindar or proprietor of land shall execute and deliver to the Collector of the district a correspondent kabuliyat. The said sanad and kabuliyat shall contain the conditions and articles of tenure by which the lands shall be held; in all cases of disputed assessment, reference shall be had to the sanads and kabuliyats; and judgment shall be given by the Courts of Judicature, in conformity to the conditions under which the agreement may have been formed in each particular case."

The above section lays down a definite rule relative to the principles on which the provisions in the Regulation should be construed. Now the sanad in question contains no reference to the lakhiraj lands within the Venkatagiri zamindari. It would follow, therefore, that in the case of this property the provisions of section 4 have no application, and that the assessment fixed upon it by virtue of the arrangements adopted in 1802 was upon a basis quite different from that provided in section 4 of the Regulation. In other words, both the assessment and the sanad are outside the Regulation, under which the Government claims the right to resume the inam lands within the estate of the plaintiff and to assess them separately.

It should also be observed that, although the regulation was passed on the 13th July 1802, and the sanad was granted to the zamindar of Venkatagiri on the 24th August, the recommendation of the Commission of the 12th August 1802, on which the sanad was granted, recommended that the new assessment should be fixed to run from the 12th July of that year. After stating the principle on which they were proceeding in fixing the amount to be paid by the zamindar in commutation of the military service, in paragraph 40, they say as follows :

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"If the grounds on which we have now had the honour to propose that the assessment of public revenue should be fixed on the four western zamindaris, including the customary peshkush and equivalent for military service, be approved by your Lordship-in-Council, the total amount of revenue derived to the State from those valuable provinces will exceed the amount of the old peshkush by the sum of 1,72,296 pagodas, and the aggregate amount of peshkush and the equivalent will, in future, be 2,50,000 pagodas per annum. We conclude the subject by recommending that the permanent assessment of the public revenue on these zamindaris be fixed accordingly at that rate, from the 12th day of July last."

This also clearly shows that the arrangement in respect of "the four western zamindaris" was made independently of the provisions of the Regulation. Another thing has to be observed in connexion with this arrangement, viz., the difference in the terms of this sanad from the sanads granted to the other zamindars under the Regulation itself.

In the view their Lordships take of the general evidence in the case, they do not consider it necessary to express any opinion on the question raised by the plaintiff that the controversy in dispute is *res judicata* in consequence of the decision of the Provincial Court in 1822; but it is desirable to point out that since that decision the Government at various times expressly assented to the position which the zamindar had taken up in respect of the inam lands within his estate. Their Lordships will refer only to three documents: first, Exhibit K—a letter of the 24th April 1823, addressed by the Secretary to the Board of Revenue to the Chief Secretary to the Government, in which it was stated as follows:

"The permanent peshkush of the zamindari of Venkatagiri was fixed upon the same principles as upon Bomrauze and Kalahasti and for the same reasons which induced the Board to state upon a former occasion that they considered the zamindar of Bomrauze not to be entitled to remission on account of certain villages having been taken from him by a decree of Court, inasmuch as by the operation of that decree there was taken from him nothing on which his contribution to Government was fixed; they are now of opinion that the zamindar of Venkatagiri is entitled to benefit by the resumption of any villages formerly alienated from his zamindari without question on the part of Government or being liable to assessment on the increase to his resources thereby acquired."

Again in 1839 the Board of Revenue, in a letter addressed to the Chief Secretary to the Government (Exhibit N), stated as follows:

"The zamindar now rests his claim on the ground that as his permanent cowl was framed without any reference to its assets, and as it contains no reservation in respect to the right of resuming lakhiraj land, as in the case of the northern and other zamindaris; the right to resume inams or lakhiraj lands in the position of Peddapolar belong of right to him and by no means to the Government; and he cites a decree by the Provincial Court of the Northern Division in favour of the zamindar of Venkatagiri in a suit brought by the Collector of Nellore for the recovery of the village under similar circumstances."

And in paragraph 7 they say as follows:

"On the other hand, the decrees of the Zillah Court of Chittoor and of the Provincial Court of the centre division are in favour of the right of Government to resume, in preference to that of the zamindar. But it will be noticed that they contained no allusion to the dissimilarity in the terms of the permanent settlement of Kalahasti and the other western Palaiyams, assuming that the peshkush was fixed as on the northern zamindaris upon the assets, and that Regulation XXXI of 1802 applies to the former as to the latter. By a reference to the *kabuliyat* of the zamindar of Kalahasti and the correspondence which passed at the time a permanent cowl was granted to him, it will be seen at once that the peshkush was not so fixed, and, as already shown, the Regulation above mentioned was not considered to apply to the case of the Venkatagiri zamindar."

On the 3rd September 1860, the Commissioner of the Division issued certain instructions for the guidance of the Deputy Collectors employed in inam investigation of the North Arcot district, and he correctly laid down the position with regard to the zamindar of Venkatagiri and the other zamindars who stood in the same position, in the following terms:

"The private estates will be first noticed. The zamindaris of Kalahasti and Karvetnagar were, like the zamindari of Venkatagiri in the Nellore district, permanently settled in 1803 on the principle of the commutation of the military service tenure attached to them. The peshkush was not fixed upon the assets of the estates, but was a proportion of the cost of the zamindar's military establishment, inclusive of amarams and kattubadis,

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diminished by the amount of revenue derived from salt, sayer and abkari, which were reserved by Government. The inams were not excluded by the settlement, and the Government have therefore no right of reversion in them."

The revenue authorities in that part of the Presidency, in the face of the expressions of opinion to which reference has been made here, have attempted to reverse the arrangement expressly entered into in 1802. In their Lordships' opinion this attempt fails.

Some stress was laid on behalf of the appellant on the provisions of Regulation XXXI of 1802. It is sufficient, however, to point out that that Regulation refers entirely to procedure appointed for the investigation of the title to hold lands exempted from the payment of revenue. Here the lands which are sought to be resumed were not exempted from the payment of public revenue; the revenue which was paid on the estate included the lands in question and the jama was assessed on the whole estate inclusive of the lakhiraj and inam lands.

For the foregoing reasons their Lordships are of opinion that the judgments and decrees of the Courts in India are right and should be affirmed and that these Appeals should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitor for appellant: *Scheitor for India Office.*

Solicitor for respondent: *Douglas Grant.*

K.B.

PRIVY COUNCIL.*

KUTHALI MOOTHAVAR (PLAINTIFF),

PERINGATI KUNHARANKUTTY (DEFENDANT).

[On Appeal from the High Court of Judicature at Madras.]

1921,
July 18.

Limitation—Adverse possession—plaintiff proving title—Both parties having uncertain possession—Indian Limitation Act (IX of 1908), sch. I, art. 144.

Adverse possession in order to bar by limitation a suit for the possession of land must be adequate in continuity, in publicity, and extent, so as to show that it is possession adverse to the competitor. When a person establishes his title to land and proves that he has been exercising during the currency of his title various acts of possession, then the quality of those acts, even though they might have failed to constitute adverse possession against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is required from any person challenging by possession the rightful title.

Radhamoni Devi v. The Collector of Kuluva, (1900) I.L.R., 27 Cal., 943 (P.C.); L.R., 27 I.A., 186; and *Secretary of State for India v. Chellikani Rama Rao*, (1916) I.L.R., 39 Mad., 617 (P.C.); L.R., 43 I.A., 192, applied.

[Judgment of the High Court reversed.]

APPEAL (No. 85 of 1919) from a judgment and decree of the High Court (December 8, 1917) so far as it reversed a decree of the Subordinate Judge of Tellicherry.

The appellant sued to establish his title to certain land in Malabar containing thirty-four hills. His title to a group of ten of the hills was negatived by both Courts in India, and the present Appeal related only to the remaining twenty-four hills. The appellant was the head, or karnavan, of a Nayar tarwad, or family, in Malabar; he and his predecessors were referred to as the Kuthali Nayar. The defendant in the suit was, and the present respondent became on his death, the head or karnavan of a Moplah tarwad in the same district; the distinctive name of that tarwad was Peringati.

* Present:—Viscount CAVE, Lord SHAW and Mr. AMER ALI.

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The nature of the land in question, which had been subject to very little cultivation, and the other facts of the case appear from the judgment of the Judicial Committee.

The Subordinate Judge held that the title of the plaintiff (appellant) to the twenty-four hills was established; he rejected the defendant's claim to have acquired title by adverse possession. He accordingly made a decree in favour of the plaintiff.

The High Court reversed the decision so far as it related to the twenty-four hills. The learned Judges (ABDUR RAHIM and OLDFIELD, JJ.) did not expressly reverse the finding that the plaintiff had at one time a good title; they, however, found that the defendant had made out a better case as to possession and decided in his favour on the issue as to limitation.

De Gruyther, K.C., Kenworthy Brown, and Palat for the appellant.—The appellant's title to the twenty-four hills was established by the previous litigation, the effect of which was misconstrued in the High Court. The appellant does not admit that he is out of possession. The evidence did not show that the respondent had such exclusive and continuous possession over the whole land in dispute as was necessary to establish a title by adverse possession: *Secretary of State for India v. Chelikani Rama Rao*(1), *Radhamoni Debi v. The Collector of Khulna*(2), *Secretary of State for India v. Krishnamoni Gupta*(3), *Lowe v. Telford*(4).

Hon. Sir W. Finlay, K.C., and Narasimham for the respondent.—Neither the previous litigation nor the evidence in the suit established the appellant's title to the disputed land. The evidence showed that the respondent had legally effective possession from 1870 and that after that date the appellant had no effective possession. The High Court rightly held he had a good title under the Indian Limitation Act, 1908. [Reference was also made to Madras Act II of 1864, section 42.]

Kenworthy Brown replied.

(1) (1916) 1 L.R., 89 Mad., 617 (P.C.); L.R., 43 I.A., 192.

(2) (1900) 1 L.R., 27 Cal., 943 (P.C.); L.R., 27 I.A., 138.

(3) (1902) 1 L.R., 29 Cal., 518 (P.C.); L.R., 29 I.A., 104.

(4) (1876) 1 App. Cas., 414, 428.

The JUDGMENT of their Lordships was delivered by

Lord SHAW.—This is an Appeal from a decree dated December 3, 1917, of the High Court of Judicature at Madras, which allowed in part an Appeal from a decree dated March 20, 1916, of the Court of the Temporary Subordinate Judge of Tellicherry. The suit was brought by the present appellant to establish his title to thirty-four hills in the North Malabar district. The decree of the Subordinate Judge was in favour of the respondent with regard to ten of the hills, comprising, roughly stated, the north and north-east portion of the group of thirty-four. No question is raised in this Appeal with regard to those ten hills, it being conceded that the defendant has a title thereto.

The still outstanding issue between the parties, however, is as to the remaining group of hills, twenty-four in number, which may be said in general terms to form the southern half of the entire group which was originally in suit and to be bounded on the south by the Peravanna river. With regard to those twenty-four hills, the decree of the Subordinate Judge was in favour of the plaintiff, while the judgment of the High Court favoured the defendant. The plaintiff has appealed to this Board.

The appellant is the head or karnavan of a Nayar tarwad or family, in Malabar, called on the record the Kuthali Nayar. The defendant in the suit was, and the respondent in the present Appeal became on his death, the head or karnavan of a Moplah tarwad in the same district. Shortly put, the question in the Appeal is: Are the lands which are the subject of the Appeal the property of the Kuthali, the appellant's family, or of the Moplah, the respondent's family?

Although the proceedings are voluminous, their Lordships desire to say at once that the Appeal in their judgment must be settled by applying a well-known doctrine of law to the complex and somewhat contradictory mass of evidence as to the possession of these hills.

Both parties claim them. Both parties claim to have possessed them. And upon a balance of the evidence it has been found by the High Court that the respondent's possession upon the whole outweighs that of the appellant, and that accordingly the respondent is entitled to prevail.

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Upon this subject of possession much importance attaches to the nature of the property itself. It is forest land—apparently very little of it capable of, or at least, up to the present, subject to, cultivation—and growing here and there stretches of timber. It is quite clear that a property of this nature is far removed as a subject of definite possession from lands under continuous and permanent cultivation, compactly situated and capable of being remembered with identification as the lands held and occupied in articulate plots or under leases.

Their Lordships sympathize with the difficulties which confronted the Courts below, as to the possession of the property under Appeal, and they agree with what is apparently the view of both Courts that such possession has to be interpreted according to the fairest view of what the property itself was capable of in the way of possession and what upon a broad view would be considered an adequate assertion of title by sufficient occupation. Along with this observation their Lordships desire further to remark that they are not certain that they would have been prepared to reverse—although no definite opinion is here given—the conclusion reached by the High Court had the case before the Board been one merely of a question of the balance of evidence as among rival possessors. How nebulous the situation is may be gathered from these passages in the judgment of the High Court:

“From 1871, the evidence as to possession consists mainly of certain leases either for cutting trees or of the usufruct generally of the hills, for none of the parties seem to have directly exercised any definite acts of possession. Besides these leases, the evidence relates to what is called ‘Punam’ or fugitive cultivation. Punam cultivation is thus described in the Gazetteer of the Malabar district, Volume 1, paragraph 220: ‘It is a most destructive form of cultivation, with ruinous effects upon forest growth. A patch of forest is cleared and burnt, trees too big to be burnt being girdled and left to die. A crop of hill rice, mixed with which dholl, millet and plaintains are often grown, is raised, and the ground is then left fallow for some years, the cultivators, generally hill men, moving on to another patch to repeat the process.’ As regards punam cultivation, the evidence on either side cannot be said to be very satisfactory, and from the nature of the leases granted for cutting trees acts of

possession of that character would not by themselves be regarded as conclusive evidence in support of the case of either party.”

Their Lordships accept the general description of possession as here given.

But when the judgment proceeds:

“But such is the nature of the evidence of possession adduced in the case, and we have to find by comparison of the evidence on both sides, judged in the light of probabilities, who in fact is shown to have been in possession of the property,” their Lordships cannot apply the rule there laid down. For the Board is of opinion that in the competition of title to this ground the appellant definitely prevails, and that any doctrine of balance where original title was unknown, cannot apply to this case. Upon that subject the High Court expresses itself to the effect that:

“It is not now possible apart from these decrees (of 1864 and 1867) to come to any definite conclusion on the merits of the claim of either party so far as title is concerned.”

It is thus necessary to consider these decrees, for one or other of them has been treated by the parties as the foundation of their respective titles.

In the year 1864 Kutti Pocker, head of the Moplah family, brought a suit for dispossession of one Kunhassan from the lands, on the ground that a lease of the same for three years from the year 1859 had expired. Kunhassan in defence stated, however, that the lands to which the suit referred were to a large extent over-stated, and that in particular the hills the property of which is now under Appeal were possessed by him under a right conferred, not by the Moplah, but by the Kuthali family. In these circumstances the then head of the Kuthalis, one Achutan alias Achammadathil Nayar, was convened by a supplemental suit as defendant. He was at that time the head of the Kuthali family, but, for some reason not sufficiently explained, he did not defend the action nor take any steps to protect the Kuthali family interest.

The suit proceeded for a period of about three years and was about to be brought to a close by decree, February 13, 1867, when another suit (Original Suit No. 11 of 1867) was raised by Nuchiledathil Krishnan alias Kuthali Chathoth Nayar. It is said that this suit was brought only by a reversioner to the

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Kuthali rights, and this is true, but it must be noted, first, what was the reason for that litigation, and second, what was the true scope of the suit.

As to the reason, there can be no doubt. It is thus recited in the judgment of November 4, 1868 :

"Plaint recited that the two groups are the jenm property of the sthanam of Kuthali Nayar to which plaintiff is entitled to succeed on the death of first and third defendants, that first defendant, the present incumbent of the above sthanam, having allowed third defendant to manage the sthanam and the latter by his extravagance dissipated the sthanam property, plaintiff has already filed Suits Nos. 117 and 120 of 1863 to remove them from the management of the sthanam property, that the said defendants have therefore colluded with second defendant and refused to adduce any proof in Suit No. 25 of 1864 in support of the sthanams' right to the thirty-four hills which the second defendant has fraudulently included in the suit as portions of his two hills, that if first and third defendants, who possess only a life-interest in the sthanam property, be allowed to ruin a portion of it by neglecting to defend the suit, a great injury will result to plaintiff's right of reversion and that he therefore prays that a declaration protecting his right may be given under section 15 of the Civil Procedure Code."

If these facts, the substance of which was held to be proved, are accepted, it appears to be plain that the Courts were properly appealed to to prevent a decree being granted against the Kuthali family to its prejudice by reason of neglect amounting to malfeasance upon the part of its head.

Upon the second point, viz., the scope of the suit, there can be no question. Its object was to exclude inter alia the lands which are the subject of this Appeal from falling within the scope of the decree in the suit of 1864, by reason of this, that they belonged to the Kuthalis. This was the true issue in the 1867 case, and the last important point in regard to it is that that suit was fought out, and fought out by the proper contradictors, viz., the Moplah family. The family was represented by the defendants Nos. 4 and 5, viz., Ibrayi and Amanath. Pocker, the head of the Moplahs, had just died, and Ibrayi and Amanath appeared in his stead and defended the 1867 suit, maintaining, in opposition to the plaintiffs therein, that the lands in question were in fact Moplah property.

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In these circumstances it appears to their Lordships not only that the suit of the later year, 1867, was one which definitely dealt with the question of property now under Appeal, but that it would be unreasonable to endeavour to found rights under a decree of 1864 by ignoring the proceedings of 1867. In any view of the case it must be admitted that the later proceedings were at least of an interpretative character; they were directed to the avoidance of mistake as to the ambit or scope of the 1864 litigation, and to ignore them, and to treat the 1867 proceedings either as if they had never been brought or were of no avail is in their Lordships' opinion contrary to sound principle. The description of the suit itself in the judgment of 1867 makes it clear that :

"This suit is brought to procure a decree declaring that two cherikkals (groups) consisting of thirty-four hills are not included within the boundaries of second defendant's two hills called Pakkath Villiyari for which he has brought a suit No. 25 of 1864 against third defendant and others and establishing plaintiff's reversionary right to those thirty-four hills valued at Rs. 1,500."

Putting all the proceedings, therefore, together, the question that remains for the Board on title is to see what is the scope of the judgment in the 1867 proceedings, which were conducted between these rival families and *in foro contentioso*.

Upon that subject the judgment in the Court of the Principal Sudder Amlu of Tellicherry, November 4, 1868, is clear and is final. The learned Judge says that

"Upon a consideration of these circumstances I am of opinion that the Decree No. 25 of 1864 is not binding upon the plaintiff."

"The next question," he adds, "is one of boundaries."

The learned Judge discusses that, and after referring to the report of a Commissioner who held a local investigation, he concludes :

"Upon the above grounds I am of opinion that the middle stream in the Commissioner's plan represents the Alamb river mentioned in the defendant's documents and that the twenty-four hills situated on the southern banks of that river constitute the Pannikottur group. . . . For the foregoing reasons I declare that the plaintiff (i.e., the Kuthali family) is entitled to the reversion of the first twenty-four hills which are proved to be the jenm of Kuthali sthanam and reject his claim to the remaining hills (twenty-five to thirty-four)."

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In the opinion of the Board it is thus definitely settled that the title to the twenty-four hills, the property of which is under Appeal, is in the Kuthali family.

Their Lordships think that the High Court erred in not treating the case from this point of view. It is not a case of doubtful title, but of clear title. Had the High Court been of the opinion that the title of the appellant was clear, it is very probable that they would have reached the result on a review of the evidence and of the law about to be stated, that no contrary right to these properties has been acquired by the Moplah family by reason of possession. The rule stated by this Board in *Radhamoni Debi v. The Collector of Khulna*(1) seems to be very applicable to the present case. It is as follows :

"It is necessary to remember that the onus is on the appellant, and that what she has to make out is possession adverse to the competitor. That persons deriving from her any right they had have done acts of possession during the twelve years in controversy may be conceded, and is indeed evidenced by the dispute which ended in the magistrate's order of 1885. But the possession required must be adequate in continuity, in publicity, and in extent, to show that it is possession adverse to the competitor. The appellant does not present a case of possession for the twelve years in dispute which has all or any of these qualities. The best attested cases of possession do not cover the whole period, and apply to small portions of the ground."

The Board thinks that the learned Temporary Subordinate Judge of Tellicherry approached the case correctly from this point of view, and so approaching it the Board, after full consideration, accepts his analysis of the evidence and is of opinion that possession upon the part of the respondent of these hills has not been adequate "in continuity, in publicity, and in extent" so as to "show that it is possession adverse to the competitor." That competitor is the appellant, and the foundation of his title is the judgment of 1868 which has just been cited.

Their Lordships cannot part with the case without referring to and following the doctrine of *onus probandi* in such cases, as laid down by this Board in *Secretary of State for India v. Chellikani Rama Rao*(2). Standing a title in "A," the alleged

(1) (1900) I.L.R., 27 Cal., 943 (P.C.); L.R., 27 I.A., 196.

(2) (1916) I.L.R., 39 Mad., 617 (P.C.); L.R., 43 I.A., 192.

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adverse possession of "B," must have all the qualities of adequacy, continuity and exclusiveness which should qualify such adverse possession. But the onus of establishing these things is upon the adverse possessor. Accordingly when the holder of title proves, as in their Lordships' view he does with some fulness prove in the present case, that he too has been exercising during the currency of his title various acts of possession, then the quality of these acts, even although they might have failed to constitute adverse possession as against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from any person challenging by possession the title which he holds.

Their Lordships will humbly advise His Majesty that the Appeal be allowed, the decree of the High Court set aside with costs, and the decree of the Subordinate Court restored. The respondent will pay the costs of the Appeal.

Solicitors for appellant: *Chapmans-Walker and Shephard*.

Solicitor for respondent: *Douglas Grant*.

A.M.T.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Spencer and Mr. Justice Kumaraswami Sastri.

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PATHUMMA AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

MUTHOORA PALLIATH PURAKKOT RAMAN NAMBIAR
AND OTHERS (DEFENDANTS NOS. 1 TO 9 AND 11 TO 17), RESPONDENTS.*

Malabar Law—Conversion of a member of Marumakkattayam tarwad to Muhammadanism—Right of convert to partition of tarwad property—Removal of Caste Disabilities Act (XXI of 1850), effect of.

A member of a Marumakkattayam tarwad does not, by reason of his conversion to Muhammadanism, acquire right to a partition of the tarwad property: Observation of WILSON, J., in *Matungini Gupta v. Ram Rutton Roy* (1892) I.L.R., 19 Cal., 289 (F.B.) at 291, followed. *Kunhiekkkan v. Lydia Arucanden* (1912) M.W.N., 286 and *Abraham v. Abraham*, (1868) 9 M.I.A., 195, explained.

* Second Appeal No. 256 of 1920.

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SECOND APPEAL against the decree of V. S. NARAYANA AYYAR, Temporary Subordinate Judge of Tellicherry, in Appeal No. 490 of 1918, preferred against the decree of L. R. ANANTANARAYANA AYYAR, Principal District Munsif of Tellicherry, in Original Suit No. 425 of 1916.

A few members of a Marumakkattayam tarwad who became converts to Muhammadanism filed this suit for partition and delivery to them of their share of the tarwad property. Upholding the plea of the other members of the tarwad, that the plaintiffs had no right to a partition, both the Lower Courts dismissed the suit. Thereupon the plaintiffs preferred a Second Appeal.

The Second Appeal came on for hearing before SADASIVA AYYAR and COUTTS TROTTER, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

The questions of law involved in this case are of great importance. We are aware that a case involving similar questions was considered and decided by a Bench of this Court : *Kunhichekkan v. Lydia Arucanden*(1). The effects of that decision seem to have been considered as so far reaching and almost revolutionary that the lower Courts have, notwithstanding that decision, dismissed the suit of the plaintiffs (Mussalman converts) claiming partition of Marumakkattayam property. Both sides agree that the case is one fit to be decided by a Full Bench so that the matter might be settled authoritatively as far as possible. Under rule 2 of the rules of the High Court, Appellate Side, we refer to a Full Bench the "matter" (that is, this whole case) as its "determination involves a question of law" of much importance.

ON THIS REFERENCE

C. Madharan Nayar for appellants.—After conversion a person is an outcaste and ceases to be a member of the tarwad; conversion creates a disruption of the tarwad. Hence the convert can claim partition: *Abraham v. Abraham*. Act XXI of

(1) (1912) M.W.N., 286.

1850 preserves to him his right to property. Hence he can demand partition. A convert to Muhammadanism cannot live in the tarwad house which is necessary for his claiming maintenance. The karnavan has various ceremonies to perform, social and religious. A Muhammadan karnavan cannot perform them and cannot act as the trustee of a Hindu temple in cases where a tarwad has the management of a temple. Reliance was placed on *Kunhichekkan v. Lydia Arucanden*(1).

B. Pocker followed and referred to *Khunni Lal v. Gobind Krishna Narain*(2). A Hindu co-parcenary is severed by the conversion of one member, so far as that one is concerned: *Kulada Prasad Pandey v. Haripada Chatterjee*(3).

C. V. Anantakrishna Ayyar for respondents.—In *Abraham v. Abraham*(4) this question did not arise. All the members there were Christians. Even the observation on page 237 that conversion severs the joint status of a joint Hindu family cannot apply to Marumakkattayam law as there is no right to partition. Moreover, that case dealt with property acquired subsequent to conversion. *Kunhichekkan v. Lydia Arucanden*(1), related to a case where all were Christians at the time and therefore the Indian Succession Act was applied. Act XXI of 1850 does not enlarge the rights or take away previous restrictions: *Kery Kolitany v. Moneeram Kolita*(5), *Matungini Gupta v. Ram Rutton Roy*(6), *Vitta Tayaramma v. Chatakundu Sivayya*(7).

WALLIS, C.J.—If it were not for the authorities the question would appear to be free from difficulty. There is no doubt that under Hindu Law a member of a Marumakkattayam tarwad on his conversion to Mahammadanism would forfeit all interest in the tarwad property. Act XXI of 1850, however, provides that any law or usage which inflicts on any person forfeiture of rights or property by reason of his renouncing his religion or being deprived of caste shall cease to be enforced as law. The effect of this Statute would appear to be that a

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(1) (1912) M.W.N., 286. (2) (1911) I.L.R., 33 All., 356 (P.C.).
(3) (1913) I.L.R., 40 Cal., 407. (4) (1863) 9 M.I.A., 195.
(5) (1873) 13 B.L.R., 1 (F.B.), 26. (6) (1892) 1 L.R., 14 Cal., 289 (F.B.).
(7) (1918) I.L.R., 41 Mad., 1078 (F.B.), 1091. 2 1, 295.

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convert's interest in the tarwad is unaffected by his conversion. As has been pointed out in *Matungini Gupta v. Ram Rutton Roy*(1) by WILSON, J., the effect is not to enlarge the convert's interest in any property or to get rid of any condition or restriction to which it was originally subject. It would therefore appear to be a sufficient answer to the reference to say that conversion to Christianity cannot give a member of a tarwad a right to a partition of tarwad property which is impartible under the Marumakkattayam Law. It has, however, been held in *Kunhichekkan v. Lydia Arucanden*(2) that the conversion of two sisters to Christianity dissolved the co-parcenary till then existing between them and their brother as a tarwad, and had the effect of converting them into tenants-in-common of the tarwad property without rights of survivorship, and, if this be so, it may be said that a right to partition is an ordinary incident of tenancy-in-common. The proposition that conversion has the effect of depriving the convert of his right of survivorship which may often be a most valuable right, as when the joint family consists of an old father and two brothers, one of whom becomes a convert, appears to be opposed to the express provisions of the Statute that conversion is not to involve any forfeiture of property or rights. It has however, been accepted as good law not only in *Kunhichekkan v. Lydia Arucanden*(2) but also in *Kulada Prasad Pandey v. Haripada Chatterjee*(3) in which three sons, two of whom had been converted to Christianity, sought to question an alienation made by the deceased father to defendants Nos. 1 to 4 as opposed to Hindu Law. It was held that the conversion of plaintiffs Nos. 1 and 2 though it did not deprive them of their interest in the joint family property, had the effect of severing them in status, putting an end to rights of survivorship, and to the father's power to bind their share by alienation of the family property for purposes neither illegal nor immoral. With this last question we are not now concerned. The judgment in both cases proceed on the authority of the Privy Council in *Abraham v. Abraham*(4). Now that was not a case governed by Act XXI of 1850 or the earlier Bengal

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Regulation VII of 1832, as the family had been converted to Christianity long before they were passed, and the property in suit had all been acquired after conversion, and it seems to me, with great respect, that in the observations at page 237, on which reliance is placed as to conversion severing the convert from the family and putting an end to the co-parcenership, Lord KINGSDOWN was merely stating the undoubted effect under Hindu Law of conversion to another religion and was not considering the effect of Act XXI of 1850 on cases governed by it. Indeed, he expressly says so at page 239, and points out that Act XXI had no application to the case :

"Such then being the state of the case so far as the Hindu Law is concerned, we must next consider whether there is any other Law which determines the rights over the property of a Hindu becoming a convert to Christianity. The *Lex Loci* Act clearly does not apply, the parties having ceased to be Hindu in religion."

Act XXI of 1850 had been described in the argument at page 218 as the *Lex Loci* in case of apostacy, and was clearly the Act referred to by Lord KINGSDOWN. In a later case, *Khunni Lal v. Gobind Krishna Narain*(1), the Judicial Committee had to consider a case governed by section 9, Bengal Regulation VII of 1832, the principle of which, they held, was extended to the rest of India by Act XXI of 1850. In that case, there was a joint family consisting of one Ratan Singh and his son Daulat Singh. Ratan Singh became a Muhammadan in 1845, and subsequently Daulat Singh predeceased him. After the deaths of both their widows, a compromise was entered into by which Ratan Singh's daughter's daughter agreed to share the properties left by him with Daulat Singh's daughters. After the deaths of Daulat Singh's daughters, the sons of one of them set up that the compromise was not binding on them and contended that on the conversion of Ratan Singh the whole of the joint family properties became vested in his son Daulat Singh. This contention their Lordships rejected, observing, at page 366, that

"The effect of the legislations of 1832 and 1850 was that on Ratan Singh's abandonment of Hinduism, Daulat Singh did not acquire any enforceable right to his father's share in the joint

(1) (1892) I.L.R., 19 Cal., 289 (F.B.), 291. (2) (1912) M.W.N., 295.
(3) (1913) I.L.R., 40 Cal., 407. (4) (1863) 9 M.J.A., 195.

(1) (1911) I.L.R., 38 All., 356 (P.C.).

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family property which he could either assert himself or transmit to his heirs for enforcement in a British Court of Justice.”

The daughters of Daulat Singh had obtained an 8½ annas share of joint family property in the compromise which was being attacked, and their Lordships had not to consider whether under the Bengal Regulation Daulat's share did not pass by survivorship on his death to his father Ratan Singh in spite of the latter's conversion to Muhammadanism. Mr. Anantakrishna Ayyar, on the other hand, has relied on the observations of their Lordships as to the original imperfection of Daulat Singh's title when the case came before them on an earlier occasion in *Karim-ud-din v. Gobind Krishna Narain*(1) as showing that their Lordships were then of opinion that on Daulat's death his interest passed by survivorship to his father Ratan Singh to the exclusion of his own daughters. These observations may, however, have been made with reference to the case then set up, that the properties in suit were all the self-acquired properties of Ratan Singh. On the whole, I have come to the conclusion that there is nothing in any of the decisions to prevent us from giving effect to what appears to me to be the plain bearing of Act XXI of 1850, and I must therefore hold that the plaintiffs are not entitled to a partition of the tarwad property by reason of their not being Hindus and that the Appeal fails and must be dismissed with costs. The question of the plaintiff's right to succeed to the office of karnavan is not before us, and I express no opinion about it as it may involve other considerations. The Second Appeal fails and is dismissed with costs of defendants Nos. 1 to 7 and 11 to 16.

SPENCER, J.

SPENCER, J.—I agree with my Lord that the plaintiffs are not entitled to a partition of the tarwad property by reason of their becoming converts from Hinduism to Islam. It is clear from the preamble to the Removal of Caste Disabilities Act (Act XXI of 1850) that the effect of that Act was to preserve existing rights but not to confer any new rights such as a right of partition of property which did not exist before in the family to which the convert belonged. Impartibility being one of the incidents

(1) (1909) I.L.R., 31 All., 497 (P.C.), 504.

of a Marumakkattayam family, a right to partition could not be acquired in consequence of a change of religion.

In the District Munsif's and Subordinate Judge's Courts the plaintiffs appear to have based their title to partition on the ruling in *Kunhichekkan v. Lydia Arucanden*(1). It was therein observed that the conversion to Christianity of two daughters, Lydia and Salome, belonging to a Marumakkattayam family in Malabar, “operating on the joint family dissolved the co-parcenary which existed under the Marumakkattayam Law,” and the converts “remained as co-owners and became tenants-in-common of their joint property.”

That case might have been decided upon the short points, that after Chandan died all the family being Christians were governed in matters of succession by the Indian Succession Act, that plaintiff having an interest in the property of her deceased husband Nathaniel had a right under section 91 of the Transfer of Property Act to institute a suit for redemption, and that in a suit for redemption all persons interested should be joined as parties.

In a case of intestacy among converts to Christianity the children's rights of succession to the property of their converted parents are governed by the Indian Succession Act, and the rules of co-parcenary and survivorship of Hindu Law no longer apply; but if the parents were undivided co-parceners at the time of conversion or at the time of the passing of the Succession Act, each parent will retain a vested interest in the co-parcenary till he dies. That was the principle on which *Tellis v. Saldanha*(2) was decided, and the position of the widow and daughter of Augustine Tellis therein was similar to the position of Lydia's children in *Kunhichekkan v. Lydia Arucanden*(1).

But where the parties are not Christians but Muhammadans after conversion, the Indian Succession Act has no application at all, as Muhammadans are exempted under section 331 of that Act from the provisions relating to intestate or testamentary succession to property. The Second Appeal should, in my opinion, be dismissed with costs of defendants Nos. 1 to 7 and 11 to 16.

(1) 1912 M.W.N., 286.

(2) (1887) I.L.R., 10 Mad., 69.

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KUMARASWAMI SASTRI, J.—I agree with the conclusions arrived at by my Lord and SPENCER, J., whose judgments I have had the advantage of perusing.

I am of opinion that apostacy from Hinduism does not entitle a member of a Malabar tarwad to claim partition of the tarwad property and delivery to him of his share. It is clear that a member of a tarwad has no right to claim partition, as tarwad property is indivisible and no one member, nor even all but one, can enforce a division upon any who object. As this was not disputed at the hearing it is not necessary to refer in detail to the authorities which go back to a period as early as 1814. I need only refer to the following observations by TURNER, C.J., and MUTTUSWAMI AYYAR, J., in *Tod v. P.P. Kunhamod Hajee*(1):

"The law governing the property of a tarwad has not reached the same stage of development as the law regulating the joint property of the Hindu family. Not only in the former case is the succession traced to females but the property is indivisible so that the members of the family may be said to have rather rights out of the property than rights to the property. . . . The family and not the individual is what we may term the social unit. . . . The individual right of the members of the tarwad is so feeble that it is not competent to any one of them to insist on a partition. The males take interests in the tarwad property which endure only for their lives and do not pass to their offspring nor are available for the satisfaction of their private debts."

If a member while a Hindu has no right to claim partition against the will of the other members of the tarwad it is difficult to see how he acquires the right by apostacy. Act XXI of 1850 (Caste Disabilities Removal Act), it is argued, gives him the right but the Act only prevents any law or usage from depriving a convert of rights or property, or rights of inheritance, which he had before conversion. I do not think that the Act can give to any party any right higher than that to which he is entitled under the law from which that right is derived. As observed by WILSON, J., in *Matungini Gupta v. Ram Button Roy*(2):

(1) (1881) I.L.R., 3 Mad., 189.

(2) (1892) I.L.R., 19 Cal., 289 (F.B.), 291.

"A change of religion does not cause any forfeiture of property.

But neither could it enlarge it nor get rid of any condition or restriction to which it was originally subject."

It is argued that conversion severs the co-parcenary and that consequently gives rise to a claim for partition and separate enjoyment. Reference has been made to *Abraham v. Abraham*(1) and to *Kulada Prasad Pandey v. Haripada Chatterjee*(2). *Abraham v. Abraham*(1) was a case where the family had been Christian for more than one generation and there was no ancestral property. The observations of their Lordships of the Privy Council relate to cases governed by the ordinary Hindu Law applicable to Mitakshara families where partition is a right which can be exercised at the volition of any adult co-parcener. No question arose as to the effect of Act XXI of 1850. Their Lordships observe:

"Considering the case then with reference to parcenership what is the position of a member of a Hindu family who has become a convert to Christianity. He became, as their Lordships apprehend, at once severed from the family and regarded by them as an outcaste. The tie which bound the family together is, so far as he is concerned, not only loosened but dissolved. The obligations consequent upon and connected with the tie must, as it seems to their Lordships, be dissolved with it. Parcenership may be put an end to by severance effected by partition; it must as their Lordships think equally be put an end to by severance which the Hindu Law recognizes and creates. Their Lordships therefore are of opinion that upon the conversion of a Hindu to Christianity the Hindu Law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound as he has renounced his old religion or if he thinks fit he may abide by the old law notwithstanding he has renounced his old religion."

It seems to me that these observations do not necessarily lead to the result that when by the very nature of the property no right to partition exists before conversion, mere severance of the co-parcenary would give a person that right. Where before conversion partition without common consent cannot be claimed on any ground, severance effected by change of religion cannot give a right to partition. *Kulada Prasad Pandey v. Haripada Chatterjee*(2) was also a case of one of the

(1) (1868) 9 M.I.A., 195, 287.

(2) (1913) I.L.R., 40 Cal., 407.

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members of a Mitakshara family becoming a convert. Partition was a right to which the convert was entitled to before conversion and severance of the co-parcenary created by the conversion gave him no new right. Where under the law governing the parties it is open to any one member to resist a partition it is difficult to see how his rights can be taken away because another member chooses to change his religion. The application of Act XXI of 1850 would in effect enlarge the right of the convert and cut down the right of the remaining members of the tarwad, a result which is unwarranted by the Act.

The only decision on the question as to the effect of conversion of a member of a tarwad is *Kunhishekkam v. Lydia Arucanden*(1), where ABDUR RAHIM and SUNDARA AYYAR, JJ., held that conversion of a member makes him a tenant-in-common. In that case one Acha had a son, Chandan, and two daughters. The daughters became converts to Christianity and assumed the names of Lydia and Salome. The parties were, before conversion, members of a Marumakkattayam tarwad and after conversion Chandan died. Lydia had a son, Nathaniel, who mortgaged the property and on his death his widow sued to redeem the property. The mortgagee resisted the suit on the ground that Nathaniel's widow had no right to redeem. The contention was that the property was the joint property of Acha's children, that the plaintiff, who was no member of the tarwad, had no right to redeem and that the right vested in the surviving children of Salome and Lydia. Having regard to the fact that after Chandan's death some years before the suit all the members of the family were Christians the only law to be applied was the Succession Act. The case was not one of a conflict between converted members of the tarwad and the other members who remained Hindus. The observations as to the conversion of a member making him into a tenant-in-common were *obiter* and, with all respect, I fail to see why the converted member of the tarwad should be enabled to give to the tarwad property the character of partibility which it never possessed. Impartibility being the very nature of the estate, such right as the parties may have should be worked out so as not to affect the fundamental character of the property. There is no complete analogy between a

(1) (1912) M.W.N., 286.

Malabar tarwad and the Mitakshara joint family and if the observations of TURNER, C.J., and MUTTUSWAMI AYYAR, J., in *Tod v. P. P. Kunhamod Hajee*(1) which I have already set out are borne in mind, I do not think conversion makes the convert a tenant-in-common and even if it did, I do not think it further gives him a right to partition on the analogy of a Mitakshara family.

I am of opinion that all that the convert is entitled to is to continue to reside in the house and be maintained as before if the other members are willing or to get separate residence and maintenance allotted to him if the other members refuse.

It is unnecessary to consider what the effect would be if the convert becomes entitled to the karnavanship. The same difficulty would arise if a karnavan becomes a convert and refuses to ask for partition or give up office, or when a hereditary dharma-karthartha becomes a convert. The question will turn on whether the office is a right which falls under Act XXI of 1850 and whether community of religion is an essential requisite to eligibility or continuance so as to entitle the other parties to claim supercession or removal. I would dismiss the Second Appeal with costs of defendants Nos. 1 to 7 and 11 to 16.

N.B.

(1) (1881) I.L.R., 3 Mad., 169.

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APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield,
Mr. Justice Spencer, Mr. Justice Kumaraswami
Sastri and Mr. Justice Ramesam.

1921,
May, 2.

ARUNACHALAM CHETTY AND ANOTHER (PLAINTIFFS),
APPELLANTS IN BOTH,

v.

PERIASAMI SERVAI AND ANOTHER (DEFENDANTS), RESPONDENTS,
IN SECOND APPEAL NO. 369 OF 1920.

MEENAKSHI AND ANOTHER (DEFENDANTS), RESPONDENTS
IN SECOND APPEAL NO. 370 OF 1920.*

Limitation Act (IX of 1908), arts. 11, 18 and 120—Attachment before judgment—Decree and order for sale—Claim to attached property, filed after order for sale—Order allowing claim—Suit filed after more than one year to contest the order on claim—Limitation.

Property was attached before judgment, and after a decree in the suit and an order for sale in execution were passed, a claim to the property was preferred and allowed by the Court. On a suit to contest the order on the claim, being filed more than a year after such order,

Held, that the property must be deemed to have been attached in execution of a decree by virtue of Order XXXVIII, rule 11, Civil Procedure Code, and that article 11 and not article 18 or 120 was applicable and that the suit was barred by limitation.

SECOND APPEAL against the decree of L. R. ANANTANARAYANA AYYAR, Temporary Subordinate Judge of Sivaganga, in Appeals Nos. 36 and 37 of 1919, preferred against the decrees of P. R. GOVINDA RAO, District Munsif of Sivaganga, in Original Suits Nos. 31 and 33 of 1919.

The facts appear in the Order of Reference and in the second paragraph of the opinion of Sir JOHN WALLIS.

The Second Appeal came on for hearing before NAPIER and KRISHNAN, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

NAPIER, J.—The point that arises in this Second Appeal is one of limitation. The suit is one for a declaration that the plaintiffs are entitled to attach the suit properties and to bring

* Second Appeals Nos. 369 and 370 of 1920.

them to sale in execution of a decree. The properties were attached on 9th May 1912 in a suit (Original Suit No. 122 of 1912), prior to judgment. The plaintiffs endeavoured to bring them to sale in execution of the decree passed in that suit, but the defendants put in claim petitions which were allowed. The present suit was filed more than a year after the order in the claim petitions. The lower Appellate Court held that the suit was barred by article 13 of the Limitation Act. Hence this Appeal. It has not been contended before us that article 13 applies, but it is urged by the appellants that article 120 applies, while the respondents rely on article 11. Article 11 is as follows:

“ . . . on an objection made to the attachment of property attached in execution of a decree.”

Clearly, the words if strictly applied do not cover the present case, but it can be argued that the descriptive words are only intended to indicate the class of orders, and that as such orders are made in claims against attachment before judgment by virtue of Order XXXVIII, rule 8, of Civil Procedure Code, the article should be read accordingly. Additional force is given to this argument by the provisions of Order XXXVIII, rule 11, for it is certainly arguable that rule 11 operates to *make* the attachment one in execution of a decree. In Second Appeal No. 194 of 1920 a Bench has decided otherwise, but with respect, I cannot appreciate the reasons of that decision. If the Bench had held that neither under the Code of 1877 nor under the present Code could either article 11 of the old Limitation Act or article 11 of the present Act apply, I could understand that view, but the learned Judges seem to think that where specific sections of the Code are mentioned, as in article 11 of the old Act, the application may be made, but where the words “in execution of a decree” are used it cannot be done. With deference, the Bench overlooks the fact that section 487 of the Code, which applies the procedure of the claim sections, is not included among the sections referred to in article 11, so that the position under the old Act instead of being stronger seems to me to be weaker, for sections 281, 282 and 283 set out in article 11 are all ancillary to section 278 which refers to property attached in execution of a decree. It seems to me easier to give a wide

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meaning to words, than to include sections not enumerated in the article. It is curious that there are no reported cases under the old Act or Code on the point, but I am informed by one of my colleagues who has long experience in claim petitions, that article 11 has always been applied under the old Code to claims in execution in respect of property attached before judgment—doubtless in view of sections 487 and 490. I may point out that the Full Bench in *Prasada Nayudu v. Virayya*(1), have given an extended meaning to the word “investigated” in Order XXXVIII, rule 8, following the policy and intention of the Code rather than the actual words, and it may be possible to do so with reference to article 11 of the Limitation Act for it has been laid down that the Code and the Limitation Act, must be read and construed together. I do not feel prepared to go so far myself in view of the decision above referred to, but I think that the question is one which does require an authoritative ruling as early as possible, now that it has been raised. There is, of course, nothing in principle distinguishing claims in execution proceedings to property attached before judgment from claims to property attached after judgment.

I, therefore, think it advisable to refer to a Full Bench the following question :

Does article 11 of the Limitation Act apply to suits arising out of claim petitions regarding property attached before judgment? If not, does article 18 or article 120 apply?

KRISHNAN, J.—The question we have to consider in these cases is what article of the Limitation Act applies to suits by defeated claimants under Order XXI, rule 68, to contest orders passed on claim petitions with reference to property attached before judgment. It was recently ruled by a Full Bench in *Prasada Nayudu v. Virayya*(1), overruling the contrary view taken in *Ramanamma v. Kamaraju*(2), that rules 58 to 68 applied to cases of attachment before judgment also. Now the question is what is the limitation applicable to such suits, a question which was not directly decided by the Full Bench.

(1) (1918) I.L.R., 41 Mad., 849 (F.B.). (2) (1918) I.L.R., 41 Mad., 28.

The Munsif applied article 11 and that is supported by the respondent before us. The Subordinate Judge applied article 18 but the appellant argues that neither article 11 nor article 18 applies but that only the residuary article 120 applies. In support of his contention the appellant has referred us to a recent ruling of OLDFIELD and SESHAGIRI AYYAR, JJ., in Second Appeal No. 194 of 1920, still unreported, and it certainly supports him. That decision, however, leads to the manifest anomaly of allowing six years to a defeated claimant when the attachment is one before judgment, whereas in all other cases the one year rule under article 11 will apply. No good reason has been shown why such a distinction should have been made by the Legislature; in fact the learned Judges think that it is a case of oversight made per incuriam by Legislature. But before we attribute mistakes to Legislature we must, I think, be fully satisfied that the language of the particular enactment cannot possibly be construed so as to avoid doing so. The learned Chief Justice has pointed out in his judgment in the Full Bench above referred to, that “the general policy of the law is that questions of title raised by claims against attachments *before* or *after* judgment should be promptly disposed of.” In view of this observation and of the anomaly I have pointed out above, I think, with all respect, that the view taken in Second Appeal No. 194 of 1920 should be reconsidered, and I agree with my learned brother's proposal to refer the question to the Full Bench to have an authoritative ruling on it. The learned Judges in Second Appeal No. 194 of 1920 consider that the language of article 11 is altogether inapplicable to cases of property attached before judgment, as it speaks of property “attached in execution of a decree.” Though this may appear to be so at first sight, it seems to me that the effect of Order XXXVIII, rule 8, as explained by the Full Bench is to bring property attached before judgment within the purview of rules 58 to 68 of Order XXI and thus within the expression “property attached in execution of a decree,” which is the very expression used in rule 58. The learned Judges concede that article 11, as it stood under the repealed Act IX of 1877, covered suits referring to property attached before judgment, for that article expressly referred to orders under sections 280 to 282 of

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the old Code and section 487 corresponding to Order XXXVIII, rule 8, made the order on a claim petition in a case of attachment before judgment one under one of those sections. If this view is correct, as I respectfully think it is, it seems to me easy to hold that the words of article 11 (1) referred to all orders under rules 60 to 62 and do not exclude such orders when passed in cases of attachment before judgment. I do not think the change of language was intended to alter the scope of the article in any way, but was really due to the fact that provisions in sections 280 to 282 of the old Code were not enacted in the body of the present Code, but were relegated to the rules which were declared to be subject to alteration by the High Courts in section 122 of the Code. If the rules were referred to by number in the article an alteration in the rules by a High Court may introduce a difficulty. The use of the compendious expression "property attached in execution of a decree" in article 11 instead of referring to the rules 60 to 62 themselves seems to be intended to avoid this difficulty, and not to any intention to alter its scope. I think, therefore, the words "property attached in execution of a decree" includes property attached before judgment as well. I am, therefore, inclined to the opinion that article 11 applies to the present suit and not article 120, but as the question is referred to the Full Bench I need not come to any decision on it.

I may add that I agree with the view expressed in Second Appeal No. 194 of 1920 that article 18 is inapplicable for the reasons stated in it, and that besides the case referred to in it, *Sivarama v. Subramanya*(1), the rulings in *Ayyasami v. Samiya*(2), and in *Narasimma v. Appalacharu*(3), are to the same effect.

I agree to the order proposed by my learned brother.

ON THIS REFERENCE

N. A. Krishna Ayyar (with *T. R. Ramachandra Ayyar*) for appellants.—[WALLIS, C.J.—In this case the claim was made after decree and after an application for execution. As the Civil

(1) (1886) I.L.R., 9 Mad., 57.

(2) (1885) I.L.R., 8 Mad., 82.

(3) (1889) I.L.R., 12 Mad., 294.

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Procedure Code lays down that when there has once been an attachment before judgment there need not be any further attachment in execution, why should not this claim made after decree be considered as one coming within the wording of article 11?] /

Article 11 can apply only if the *attachment* is after decree. Order XXXVIII, Civil Procedure Code, enacts only a rule of procedure and not a rule of limitation and even that makes a distinction between an attachment before judgment and one in execution of a decree. It is only the latter that is dealt with in the Limitation Act.

[WALLIS, C.J.—We must read both the Civil Procedure Code and the Limitation Act together.]

Reference was made to Order XXXVIII, rules 7 and 8. RAMESAM, J., referred to Order XXXVIII, rule 10, Civil Procedure Code.

Reference was made to Appendix F, No. 5, as to the form of attachment before judgment, and to Appendix E, No. 16, as to the form of attachment after judgment. An attachment before judgment is not in every sense equivalent to one after judgment: see *Basiram Malo v. Kattayani Debi*(1). Where the language of a Statute is plain we should not speculate as to the intention of the legislature: *Vestry of St. John, Hampstead v. Cotton*(2), *Salomon v. Salomon & Co.*(3).

A. V. K. Krishna Menon for the respondent.—Where the intention of the legislature is plain the Statute must be applied unless it is impracticable: *Salmon v. Duncombe*(4). Article 11 applies.

WALLIS, C.J.—The scope of the claim proceedings sections has recently been considered by Full Benches of this Court in *Prasada Nayudu v. Virayya*(5), *Venkataratnam v. Ranganayakamma*(6), and *Ramaswami Chettiar v. Mallappa Reddiar*(7). In all these cases it has been pointed out that the

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(1) (1911) I.L.R., 38 Cal., 448, 450. (2) (1887) 12 App. Cas., 1, 6.

(3) [1897] A.C. 22, 38.

(4) [1896] 11 A.C., 627, 634.

(5) (1918) I.L.R., 41 Mad., 849 (F.B.). (6) (1918) I.L.R., 41 Mad., 985 (F.B.).

(7) (1920) I.L.R., 43 Mad., 760 (F.B.).

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object of these sections is to secure the speedy settlement of questions of title raised by attachments, as explained by the Judicial Committee in *Sardhari Lal v. Ambika Pershad*(1), and in the last of these cases attention was drawn to the fact that in claim proceedings the release, under rule 60, of the property attached, or the disallowance under rule 61 of the claim are made to depend not on title but on possession at the date of attachment, the question of title being left to be investigated in the suit which the unsuccessful party is bound to bring within the prescribed period on pain of losing all his rights. It is by this suit or the failure to institute it that the speedy settlement of the questions of title is secured, and all that the order on the claim petition does, beyond raising or confirming the attachment, is to decide which party is to sue on pain of losing his rights. Section 246 of the Code of 1859 expressly provided, as regards attachments before and after decree, that the suit was to be brought within the short period of one year, and this did not cease to be any the less a cardinal and most essential feature of this procedure, when in the supposed interests of uniformity the period of one year was omitted from the Code and transferred to the Limitation Act of 1871. It is not disputed that the period of one year continued to be prescribed by the Limitation Acts of 1871 and 1877, and the suggestion that in the Limitation Act of 1908 the Legislature consciously intended to make an alteration as regards orders on claims as to attachments before decree and to allow the unsuccessful party six years to sue under article 120 instead of one year under article 11 is *prima facie* most unlikely, seeing that the effect of the alteration is to defeat what has always been the essential feature of this procedure, the speedy settlement of titles. It is also clear that the occasion of the change made in 1908 in the terms of article 11 was the repeal of the sections of the old Code referred to in the article as it stood in the Act of 1877, and that no argument in favour of an intended alteration in the substance of the article can be based on the fact that the Legislature did not merely substitute for the repealed sections a reference to the corresponding rules of

(1) (1888) I.L.R., 15 Cal., 521 (P.C.).

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Order XXI of the new Code, as it was a sufficient reason for not adopting that course that under the new Code numbering of the rules as well as the rules themselves are made subject to alteration by each of the High Courts in the exercise of its rule-making power. There is, therefore, no apparent reason to suppose that the Legislature intended to alter the law so as in the case of the claims arising out of attachments before judgment to give the unsuccessful party six years in which to sue; and, as attachment is the first step in execution and the effect of the provisions as regards attachment before judgment is in exceptional cases to allow that step to be taken without waiting for the decree, I was at first disposed to think that even an attachment before judgment might be regarded as an attachment "in execution of a decree" within the meaning of the new article, seeing that it is a step taken purely for purposes of execution and that we should best give effect to the real intention of the Legislature by so holding. On a further consideration of the subject, I think, that such a construction is inadmissible in view of the fact that section 246 of the Code of 1859 referred to property "which may have been attached in execution of a decree" or under any order for attachment passed before judgment, and that section 86, which has been reproduced in the subsequent Codes and now appears as Order XXXVIII, rule 8, provided that claims to property attached before judgment should be investigated in the same manner as claims to property attached in execution of a decree. As it is well settled that the Limitation Act and the Code are to be read together, I have reluctantly come to the conclusion that we should not be justified in laying down generally that property attached before judgment is attached "in execution of a decree" within the meaning of the present article 11.

It then becomes necessary to consider cases in which the claim to property attached before judgment is put in after decree, or even, as in the present case, after sale has been ordered in execution. As already observed, an attachment before judgment in default of security being given is always a step taken with a view to execution; it has the same effect as an attachment after decree which is the first order to be obtained in execution; and like such an attachment endures until a further order

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of the Court (see Schedule 1, Appendix F, No. 7, and Appendix E, No. 8). Order XXI, rule 57, deals with property "under attachment in execution of a decree," but throws no light on the present question, as it merely provides for the dismissal for default of an application for execution and for the attachment ceasing on such dismissal. Order XXXVIII, rule 11, is more in point, and provides in effect that, when an attachment before judgment continues in force after a decree for the plaintiff, it shall not be necessary on an application for execution to apply for a reattachment. This provision does not, in my opinion, enable us to say that property attached before judgment becomes property attached in execution of a decree upon the mere passing of a decree for the plaintiff, either within the meaning of article 11 of the Limitation Act or of Order XXI, rule 57, already mentioned, as execution may never be applied for, but merely enables the decree-holder to apply for execution by sale of the attached property without a fresh attachment. Where, however, as in the present case, there is an order in execution for the sale of the attached property, that order appears to me to proceed upon the footing that the property is to be considered as attached in execution by virtue of rule 11, and I think a claim put in after that order may properly be regarded as a claim to property attached in execution of a decree within the meaning of article 11 and would answer the reference accordingly, merely adding cases not governed by article 11 must be governed by article 120, as it has not been seriously argued that article 13 is applicable.

Even so, the result of the changes introduced in the Limitation Act of 1908 is to leave the law on this subject in a very unsatisfactory state. The whole object of the summary claim procedure is frustrated when a period of six years is allowed under article 120 for questioning an order on a claim petition, and I think that the matter should be set right by the Legislature at the earliest opportunity.

OLDFIELD, J. OLDFIELD, J.—I agree.

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SASTRI, J. KUMARASWAMI SASTRI, J.—I agree.

RAMESAM, J. RAMESAM, J.—I agree.

SPENCER, J.—The whole object and aim of attachments before judgment is to prevent property being put out of the reach of creditors in the interval which must elapse between such attachment and the passing of a decree. As observed by the Privy Council in *Moti Lal v. Karrabuldin*(1), "Attachment only prevents alienation, it does not confer title."

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I conceive that it was with this object in view that section 64 of the Code of Civil Procedure (corresponding to section 276 of the Code of 1882) was enacted, making any private transfer or delivery of the property attached void as against all claims enforceable under the attachment. The section only restricts transfers being made by or in favour of defendants. Attachment ceases automatically upon the connected petition being dismissed. (See Order XXI, rule 57).

When property is attached before judgment, there is no disturbance at this stage of the possession of persons other than the debtor-defendant, for Order XXXVIII, rule 7, declares that attachment is to be made in the manner provided for the attachment of property in execution of a decree, which means that the person in possession of movable property attached other than the judgment-debtor is prohibited under Order XXI, rule 46, from giving it over to the judgment-debtor (who may be termed the debtor-defendant before the decree is passed), and that the debtor-defendant, if the property is immovable, is prohibited under Order XXI, rule 54, from transferring or charging the property, and other persons are prohibited from benefiting by any such transfer or charge.

There is no occasion then for third parties to object to attachments made before judgment as they create no rights and disturb no third party's possession. Order XXXVIII, rule 10, expressly saves the rights, existing prior to the attachment, of persons who are not parties to the suit. They are not prohibited from making transfers between themselves. If, as the result of the trial, the suit is dismissed, the attachment has by the provision in Order XXXVIII, rule 9, to be forthwith withdrawn. If, on the other hand, a decree is passed and an attempt is made to execute it, what was an attachment before judgment becomes in effect an attachment in execution of a decree, because Order XXXVIII,

(1) (1898) I.L.R., 25 Calo., 179 (P.C.), 186.

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rule 11, declares that no re-attachment is necessary. As attachment is the first step in the execution of all decrees against property, just as sale or delivery of property is the last step, the effect of this provision is that execution is made to date back to the first attachment which was before judgment.

Rule 8, which directs that investigation into claims preferred to property attached before judgment shall be made in the same manner as if it was attached after judgment, is another indication that for all purposes an attachment before judgment was intended to be treated as if it was made after judgment.

In Civil Miscellaneous Second Appeal No. 21 of 1920, ABDUR RAHIM and SADASIYA AYYAR, JJ., held that a claim to property attached before judgment was a matter arising in execution of a decree falling under section 47 of the Civil Procedure Code.

In the Appeals before us the claims preferred by the first defendant in each suit were put in after the properties were brought to sale in the execution proceedings. I find no difficulty in classing such a claim under the heading of "a claim preferred to . . . property attached in execution of a decree," which are the words of article 11 of the 1st Schedule, Indian Limitation Act. At the time when the claim was made, there was a decree, the decree was being executed, and the property had been attached in a manner which the law declares to be sufficient.

As the suits, which were subsequently filed to establish rights denied to the plaintiffs by the orders passed on the claim petitions, were not instituted within one year of the date of the orders, they were rightly dismissed. An instance of an objection being raised to attachment or a claim being preferred before the passing of a decree and the commencement of execution proceedings has not occurred in the present case, and, as I have endeavoured to show, is not likely to occur in other cases. No opinion need be expressed on hypothetical cases. The first question referred to the Full Bench may be answered in the affirmative and the alternative question in the negative.

To remove the doubts that have arisen I concede that it is desirable that article 11 should be made clearer by adding the words "before judgment or" between the words "property" and "in execution of a decree."

N.B.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Coutts Trotter.

RAMASWAMI AYYAR (SECOND ACCUSED), PETITIONER.*

1921,
January 27.

Indian Penal Code (Act XLV of 1860), sec. 341—Restraint upon a drunken and disorderly person—Common Law of England—Applicability to India.

A private citizen has the right to arrest under the Common Law any person as to whom there is reasonable apprehension that he would commit a breach of the peace.

Timothy v. Simpson, (1835) 4 L.J. (Ex.), 81, and *Queen v. Light*, (1857) 27 L.J. (M.C.) 1, referred to.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the First-class Subdivisional Magistrate of Māyavaram in Criminal Appeal No. 21 of 1920, presented against the judgment of the Stationary Second-class Magistrate of Pāpanāsam, in Calendar Case No. 205 of 1919.

The facts are set out in the judgment.

K. S. Jayaram Ayyar for petitioner.

The Public Prosecutor for the Crown.

The Court delivered the following ORDER:

The appellant in this case has been convicted and fined for an offence under section 341, Indian Penal Code, wrongful restraint of the person. The facts appear to be these. The appellant was a Village Magistrate and on the day in question his attention was drawn to the misconduct of one Mari Goundan. Mari Goundan is described as having been very drunk. He tore the sacred thread of one of the witnesses and, subsequently, at what stage of the proceeding it is not quite clear, bit the appellant, the Village Magistrate, in the foot. Thereupon, the Village Magistrate with the help of several persons tied his hands and removed him to the police station.

The lower appellate Court took the view that there was nothing in the conduct of Mari Goundan which justified the action

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of the appellant, on the ground that the evidence disclosed that Mari Goundan was drunk and probably disorderly, which is a non-cognizable offence. An argument has been addressed to us to show that under various Regulations of the last century, the appellant as Village Magistrate possessed powers which would enable him to effect an arrest in circumstances of this kind, apart from his position as one of the general public. In our opinion, it is very doubtful whether such Regulations giving such a power were not really repealed by Act XVII of 1862; but in any case we think that the matter is of sufficient importance to base our judgment upon a more general and wider ground and we propose to deal with the matter as if the Village Magistrate had been merely an ordinary member of the general public.

The Common Law of England on the subject seems to have become, if it was not so at the outset, reasonably free from doubt. Hale in his "Pleas of the Crown" seems a little doubtful as to how far the rights of arrest without a warrant except in cases of felony extend, but we have been referred to later passages in Hawkins' "Pleas of the Crown," Russell "On Crimes," and other standard books, which show that the Common Law rights are much wider than Lord HALE was disposed to concede. Without going into ancient authorities we may cite a passage from a judgment of PARKE, B., in *Timothy v. Simpson*(1), which sums up the law. After citing from Lambard, Hawkins, Hale and other text-books of authority he says:

"It is clear therefore that any person present may arrest the affrayer at the moment of the affray and detain him till his passion has cooled and his desire to break the peace has ceased, and then deliver him to a peace officer. And if that be so, what reason can there be why he may not arrest an affrayer after the actual violence is over, but whilst he shows a disposition to renew it by persisting in remaining on the spot where he has committed it. Both cases fall within the same principle, which is, that, for the sake of the preservation of the peace any individual who sees it broken may restrain the liberty of him whom he sees breaking it so long as his conduct shows that the public peace is likely to be endangered by his acts. In truth whilst those are assembled together who have committed acts of violence and the danger of their renewal continues the affray itself may be said to continue."

(1) (1835) 4 L.J. (Ex.), 81.

We have also been referred to a decision of the Court of Crown Cases Reversed in *Queen v. Light*(1), where a very powerful Court consisting of COCKBURN, C.J., ERLE and WILLIAMS, JJ., MARTIN and CHANNELL, BB., held that there was a power not only in a constable but in all Her Majesty's subjects to apprehend a person as to whom there is reasonable ground for supposing that he is about to commit a breach of the peace. The Common Law of England on the subject may be said to be clearly established, and there is authority in this Court in *In re Venkata Reddy*(2) for holding that the Common Law of England may be applied to India except where a Statute either expressly or by implication abrogates it. We think that the power given in this matter is one which is very essential to the orderly government of society and the preservation of the peace. No doubt the magistracy and the judiciary should jealously watch any interference with the liberty of the subject and scrutinize carefully the acts of any person who alleges that in order to preserve the peace he had to interfere with the liberty of his fellow citizen. But if that necessity is once clearly established, we think that it is not only the law, but it is extremely expedient, that the power of interference should be upheld.

In this case we think that there was ample justification, on the facts as found, for the appellant, not as Village Magistrate but as a private citizen, to put a restraint upon this drunken and disorderly person who was not only threatening to commit a breach of the peace but was a danger to the other villagers. We, therefore, hold that the conviction and sentence must be set aside; the fine, if paid, must be refunded.

M.H.H.

(1) (1857) 27 L.J. (M.C.), 1.

(2) (1913) I.L.R., 36 Mad., 216.

In re RAMA-
SWAMI
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APPELLATE CRIMINAL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Krishnan.

1921,
March 30
and April 1.

VEMUREDDI BABU REDDI (FIRST ACCUSED IN THE COURT OF THE SECOND-CLASS MAGISTRATE OF KOVUR), PETITIONER.*

Legal Practitioner—Witness—Whether can appear for accused person.

The rule as to the exclusion of witnesses from Court until they have been examined does not extend to counsel for accused who is cited as a prosecution witness.

There may be circumstances which may make it desirable for counsel not to appear in a case in which he is a witness, but they would not render his appearance illegal.

PETITIONS under sections 435 and 439 of the Criminal Procedure Code and section 107 of the Government of India Act to set aside the order of Mr. RANGASWAMI RAO, Second-class Magistrate, Kovur, in Preliminary Register Case No. 2 of 1921.

Mr. Ward is a practising first grade pleader in Nellore and Vemureddi Babureddi has been his standing client for several years. The latter was impleaded as first accused in Preliminary Register Case No. 2 of 1921 on the file of the Second-class Magistrate of Kovur. He retained Mr. Ward to defend him, and Mr. Ward filed appearance on 19th January 1921 and on that date appeared on his behalf to apply for bail before the Magistrate. He appeared before the Sessions Judge two days later in appeal, as the Magistrate refused bail. He also instructed counsel in the High Court as the bail was refused by the Sessions Judge. At the hearing of the Preliminary Register Case on 21st February 1921 objection was taken to Mr. Ward appearing for Babureddi as his (Mr. Ward's) name appeared among the list of witnesses for the prosecution. The Magistrate ruled that 'Mr. Ward cannot appear as counsel for accused No. 1 as long as he is a prosecution witness.' Against this order Babureddi filed a Criminal Revision Petition and Mr. Ward filed a Civil Miscellaneous Petition.

* Criminal Revision Case No. 224 of 1921.

Dr. Swaminathan, T. R. Ramachandra Ayyar, A. Krishna-swami Ayyar and K. Balasubrahmanya Ayyar for petitioners.
The Public Prosecutor for the Crown.

The Court passed the following ORDER:—

These are applications put in by Mr. F. T. Ward, a first-grade pleader of Nellore, and by his client the first accused in a murder case, under section 107 of the Government of India Act and section 435, Criminal Procedure Code, to set aside an order of the Second-class Magistrate of Kovur debaring Mr. Ward from appearing as counsel for the first accused at the preliminary inquiry on the ground that his name appears in a supplemental list of witnesses put in by the prosecution as forty-second witness for the prosecution. Such an order is wholly unprecedented and is not supported by any of the cases referred to in the order. The Magistrate states that as a prosecution witness Mr. Ward cannot sit in Court on the accused's behalf until he is called in for examination in due order by the prosecution. The rule as to the exclusion of witnesses from Court until they have been examined is not without exceptions. It does not extend to the parties themselves in civil cases, so long as they conduct themselves properly, or to their solicitors whose assistance is necessary for the proper conduct of the case: Roscoe's Nisi Prius, Volume 1, page 159 (18th Edition). The same rule applies in Criminal cases: Roscoe's Criminal Evidence, page 114 (13th Edition), and it has never been suggested that the fact that in England the accused is now a competent witness justifies his exclusion from the Court during the trial. There are even stronger reasons for not applying the rule to the counsel of the parties who has to conduct the case; and this is apparently the first case of its application to him which has come before a superior Court. In our opinion the rule does not apply to counsel either in England or in India; and further it would not be easy to reconcile its application to them with the provisions of section 340, Criminal Procedure Code.

The Bar Council has no doubt laid down, for the guidance of the profession, certain rules as to refusing retainers or withdrawing from the case where they are summoned as

In re BABU
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witnesses: see *Weston v. Peary Mohan Dass*(1). But there is nothing in those rules to suggest that circumstances which may make it desirable for a counsel not to appear render his appearance illegal. On the contrary, the rules in question are for the guidance of counsel in the exercise of their legal right to appear or refuse to appear. It might be otherwise, if by appearing in a case a counsel became incompetent to be a witness. It is, however, now well-settled that there is no such incompetency, as held by WOODROFFE, J., in the case just cited, on the authority of *Cobbet v. Hudson*(2), and *Corea v. Peiris*(3), where a counsel in the case gave evidence and no objection was taken to the propriety of his so doing in the particular circumstances of that case.

Further, it cannot be said at the present stage of the case and on the materials before us that there are circumstances which make it desirable that Mr. Ward should retire from the case. It is not suggested that he knows anything about the alleged murder itself. All that is suggested is that he acted for the first accused in certain civil matters which may have afforded a motive for the crime, and even as to those matters, as pointed out by the Public Prosecutor, it may be open to him to plead privilege. The order of the Magistrate must be set aside.

M.H.H.

(1) (1913) 1 L.R., 10 Cal., 898.

(2) (1852) 1 E. & B., 11; s.c., 118 E.R., 341. (3) [1909] A.C., 543.

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Muthiah Chettiar v. Govindaswami Krishnadoss ... (1921) I.L.R., 44 Mad., 919

value of improvements, held, that the landlord was entitled to an order in execution for ejectment of the tenant from all the lands specified in the decree, even though the value of improvements, effected by the tenant on some of the lands, subsequent to the decree, had not been ascertained under section 6 (8) of the Malabar Compensation for Tenants Improvements Act.

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Elumalai Chetty v. Balakrishna Mudaliar ... (1921) I.L.R., 44 Mad., 965

VAKIL—*Suit on the Original Side of the High Court—Fees, non-payment of—Duty of vakil to take necessary steps in the suit—Written statement not filed in time—Refusal of vakil to file, because his fees was not paid—Refusal of vakil to consent to transfer of case to another vakil—Application for change of vakil—Order of Court—Delay in filing written statement, whether excusable—Rules of Practice, Original Side of the High Court, rule 48.*] A vakil engaged in a suit on the Original Side of the High Court is not entitled to refuse to take a necessary step in the suit, on the ground that his own fees had not been paid, and at the same time refuse his consent to a change of vakalat to another vakil. Delay in filing a written statement within the time fixed by the rules of the High Court caused by such refusal on the part of the vakil on the record was excused.

Muthu Krishna Yachendra v. Nurus ... (1921) I.L.R., 44 Mad., 978

VOID USUFRUCTUARY MORTGAGE—*Possession by mortgagee as such for more than 12 years—Acquisition of title as mortgagee—Suit for redemption—Liability of mortgagee to account for the whole period of possession.*] A person in possession of a property as usufructuary mortgagee under a void mortgage, for more than 12 years, acquires by prescription, the rights of a mortgagee, and is as much accountable to the mortgagor for the rents and profits not only of the last three years preceding the suit for redemption but for the whole period of his possession. *Madhava v. Narayana* (1886) I.L.R., 9 Mad., 244, and *Sundara Gurukkal v. Subramaniya Arachakar* (1912) 18 I.O., 960, followed.

Gopala Dasu v. Rami ... (1921) I.L.R., 44 Mad., 946

APPELLATE CIVIL.

*Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Spencer
and Mr. Justice Kumaraswami Sastri.*

P. M. A. R. M. MUTHIAH CHETTIAR (APPELLANT), APPELLANT,

1921,
April 6.

v.

LODD GOVINDDOSS KRISHNADOSS VARU AND ANOTHER
(RESPONDENTS), RESPONDENTS.*

Execution—Civil Procedure Code (V of 1908), O. XXI, rr. 15, 16 and O. XXII, r. 10

(1)—Transfer of part of decree—Right of transferee to execute or to join in execution—Prohibition of execution by transferee, void under section 28, Contract Act (IX of 1872)—Appeal against orders purporting to be passed under O. XXII, r. 10, Civil Procedure Code.

Section 146, Civil Procedure Code, recognizes the validity of a transfer of a part of a decree and execution thereof by the transferee. Order XXI rule 16 is no bar to the application of the section. Such transferee is like a joint decree-holder and can, under Order XXI, rule 15, protect his rights either by executing the decree himself or by joining or intervening in the execution by his transferor. An agreement by the transferee of part of a decree that the transferor shall conduct execution proceedings and may compromise the same as he thinks fit, only constitutes the transferor the agent of the transferee and the agency is revocable. An agreement between them that the transferee shall not in any way enforce his rights under the transfer e.g. execute or intervene in execution is void under section 28 of the Contract Act.

An order purporting to be passed under Order XXII, rule 10, by a court of first instance is appealable though on the facts the order should not have been passed under the rule.

LETTERS PATENT APPEAL against the judgment, dated 28th January 1920, of the Hon'ble Mr. Justice OLDFIELD (differing from SESHAGIRI AYYAR, J.) in Appeal against Order No. 50 of 1919, preferred to the High Court against the Order of the District Court of North Arcot, dated 23rd December 1918, in Execution Petition No. 37 of 1918 in Original Suit No. 12 of 1901.

The facts are set out in the judgment of KUMARASWAMI SASTRI, J.

A. Krishnaswami Ayyar for appellant.—The deed in question constituted the appellant a transferee of one-eighth part of the

*.Letters Patent Appeal No. 5 of 1920.

MUTHIAH
CHETTIAR
v.
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decree, and not merely a lender or a charge-holder. Under sections 141, 146 and 151 and Order XXI rules 15 and 16, Civil Procedure Code, the appellant is entitled to execute the decree or to join in execution like a joint decree-holder. Order XXII, rule 10, applies also to execution proceedings: see *Midnapore Zamindari Co., Ltd. v. Naresh Narain Roy*(1), *Virupakshappa v. Shidappa and Basappa* (2), *Shaik Davud Rowther v. Paramasami Pillai*(3). A mortgage suit is a "pending suit" till a personal decree is passed: *Bhugwan Das Khetry v. Nilakanta Gangulij*(4). A transferee is a "representative" of the transferor: see *Sitaramswami v. Lakshmi Narasimha*(5). A transfer of a part of a decree is valid and such transferee can execute or join in execution; see *Kishore Chand Bhakat v. Gisborne & Co.*(6), *Muthunarayana Reddi v. Balakrishna Reddi*(7), *Endoori Venkataramaniah v. Venkatachinnulu*(8), *Gyamonee v. Radha Romon*(9).

Under Order XXI, rules 15 and 16, a transferee's right to execute a decree does not depend upon any discretion of the Court. The words "if it thinks fit" which occurred in section 232 of the old Civil Procedure Code are omitted from the present Code: see *Asad Ali Mollah v. Haidar Ali*(10).

The stipulation in the deed of assignment, that the transferor shall execute the decree and may compromise the case if he thinks fit, does not negative the right of the transferee to execute and is consistent with it, as the transferor retained for himself seven-eighths of the decree. Moreover, such a stipulation constituted the transferor the agent of the transferee and such agency is revocable. If the stipulation is construed as absolutely restraining the transferee from enforcing his rights, it is void under section 28 of the Contract Act.

T. Ranga Achariyar with K. Bhashyam Ayyangar, A. Ramachandra Ayyar and V. N. Venkatavarada Achariyar for respondent.—The transfer is not of one-eighth of the decree but is only of one-eighth of any sum that may be realised under the decree. The transferor has under the document absolute discretion to execute

- (1) (1912) I.L.R., 39 Cal., 220 at 226. (2) (1902) I.L.R., 26 Bom., 109 at 118.
(3) (1916) 31 M.L.J., 207. (4) (1904) 9 C.W.N., 171.
(5) (1918) I.L.R., 41 Mad., 510 at 512. (6) (1890) I.L.R., 17 Cal., 341 at 342.
(7) (1896) I.L.R., 19 Mad., 808. (8) (1910) I.L.R., 33 Mad., 80.
(9) (1880) I.L.R., 5 Cal., 592. (10) (1911) I.L.R., 38 Cal., 13 at 21.

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or compromise the decree as he thinks fit. It is only subject to these conditions that the decree has been transferred. Such a transferee cannot execute: *Ram Sahai v. Gaya*(1). This is an agency coupled with interest and cannot be revoked. Section 146, Civil Procedure Code, cannot apply to execution proceedings, as specific provisions for execution have been made under Order XXI, rules 15 and 16. If at all, section 146 merely enables the assignee to file a fresh application of his own. Order XXII, rule 10, cannot apply to execution proceedings and the matter in question is not a "pending suit": see *Manmotha Nath Mitter v. Rakhal Chandra Tawary*(2), *Sitaramaswami v. Lakshmi Narasimha*(3), *Goodall v. The Mussoorie Bank, Limited*(4), *Venkata Chandrappa Nayanivaru v. Venkatarama Reddi*(5). As a personal decree has already been passed in this case the suit is not a pending one. Section 28 of the Contract Act applies only to rights enforceable under the contract and not to rights enforceable under a decree: *Ramghulam v. Janki Rai*(6). Moreover, the deed of assignment does not "absolutely restrain" the transferee from enforcing his rights. Where the restriction is only partial, as in this case, the section cannot apply. As the matter is not one between the decree-holder and the judgment-debtor but is one between the decree-holder and his assignee there is no right of appeal. Allowing execution at the instance of the transferee is a matter of discretion for the Court and the discretion ought not to be lightly interfered with by an appellate Court: see *Balakrishna Udayar v. Vasudeva Ayyar*(7).

A. Krishnaswami Ayyar in reply.—This being an application for execution, section 47, Civil Procedure Code applies and hence there is a right of appeal: see *Veyindramuthu Pillai v. Maya Nadan*(8). Moreover, as the order of the lower Court purports to be passed under Order XXII, rule 10, there is a right of appeal: see *Abdul Rahiman Sahab v. Ganapathi Bhatta*(9), *Latchman Chetty v. Ramanathan Chetty*(10). If a court declines

- (1) (1885) I.L.R., 7 All., 107. (2) (1909) 14 C.W.N., 753.
(3) (1918) I.L.R., 41 Mad., 510. (4) (1888) I.L.R., 10 All., 97, 105.
(5) (1889) I.L.R., 22 Mad., 256. (6) (1885) I.L.R., 7 All., 124, 131.
(7) (1917) I.L.R., 40 Mad., 793 (P.C.), 793.
(8) (1920) I.L.R., 43 Mad., 107 (F.B.).
(9) (1900) I.L.R., 23 Mad., 517. (10) (1905) I.L.R., 28 Mad., 127.

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jurisdiction on a wrong construction of a section the order can be revised: *Sundaram v. Mausa Mavuthar*(1). There is no agency coupled with an interest as the transferor has no interest in the thing transferred. Not only can the transferee himself execute but he can also intervene in the execution initiated by his transferor: *Dwar Buksh Sirkar v. Fatik Jali*(2).

WALLIS, C.J.

WALLIS, C.J.—This is an Appeal under the Letters Patent from a judgment of OLDFIELD, J., SESHAGIRI AYYAR, J., dissenting, dismissing an Appeal from an order of the District Judge of Chittoor refusing the application of the appellant, who claims to be a transferee of a one-eighth share in a mortgage decree, to make him a party to the execution proceedings on the mortgage decree in substitution of, or jointly with, the decree-holder. The question has been raised whether any appeal lay to the High Court from the order in question.

In making that order the District Judge purported to act under Order XXII, rule 10, of the Code of Civil Procedure and, as orders under that rule are appealable, we are bound to entertain the appeal, as held in *Abdul Rahiman Saheb v. Ganapathi Bhatta*(3) and *Latchmaran Chetty v. Ramanathan Chetty*(4).

In dealing with the appeal it will be convenient to consider in the first place whether under the present Code a decree can be transferred in part, and if so, whether the part transferee can be made a party to pending execution proceedings and allowed to execute if the transferor, who has obtained an order for execution, forbears to execute; and secondly, whether there has been a part transfer of the decree in this case, and if so whether the part transferee, the petitioner, is debarred by the terms of the deed of transfer from executing the decree or intervening in the execution.

It was well settled under the old Code that there could be part transfers of a decree [*Kishore Chand Bhakat v. Gisborne & Co.*(5) and *Endoori Venkataramaniah v. Venkatachainulu*(6)] and it was also settled that one of several decree-holders could transfer

his interest: *Muthunarayana Reddi v. Balakrishna Reddi*(1). I do not find any sufficient indication in the new Code that it was intended to alter the law in this respect. On the contrary, the present Code contains a new general section (section 146) enacting that, save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken on 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. This general provision is to take effect unless it is otherwise provided in the Code itself, or by any law for the time being in force, and, even if it should be held that the part transfer of a decree is not provided for in the rules, though it is not prohibited, that would not prevent due effect being given to such part transfers under this section itself, which is wider than the rules, if it can be read as authorizing such a part transfer. The section should, I think, have a beneficial interpretation, and be read as supplementing the rules, and, as a part transferee is a person claiming under a decree holder, I think it sufficiently authorizes applications in execution by such a part transferee. Further, section 232 of the old Code, which was held to authorize such an application, is reproduced in Order XXI, rule 16, and the fact that the case of the interest of any decree-holder being transferred is now expressly provided for in the rule does not, in my opinion, show that part transfers are not covered by the rule, and still less that the rule prohibits an application by a part transferee of the decree so as to make section 146 inapplicable. Reliance has also been placed for the appellant on Order XXII, rule 10 (1), which provides that in other 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. On the other hand it has been contended that this order does not apply to proceedings in execution. Generally, an application for execution is a proceeding in a suit, as held in *Virupakshappa v. Shidappa and Basappa*(2) and *Shaik Davud Rowther v. Paramasami Pillai*(3), and I

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(1) (1921) I.L.R., 44 Mad., 554 (F.B.).

(3) (1909) I.L.R., 23 Mad., 517.

(5) (1849) I.L.R., 17 Cal., 341.

(2) (1899) I.L.R., 26 Cal., 250.

(4) (1905) I.L.R., 28 Mad., 127.

(6) (1910) I.L.R., 33 Mad., 80.

(1) (1896) I.L.R., 19 Mad., 306. (2) (1902) I.L.R., 28 Bom., 109.

(3) (1916) 31 M.L.J., 207.

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think that the present Code has been drafted on this basis. It expressly provides by Order XXII, rule 12, that nothing in rules 3, 4 and 8 of that Order, which provide for abatements, shall apply to execution, and in Order XXIII, rule 4, that nothing in that Order shall apply to execution, while it contains no such provision in Order XXXII, as to minors or persons of unsound mind which must none the less be equally applicable to execution.

A further objection has been taken that an application in execution cannot be an application "during the pendency of a suit", within the meaning of Order XXII, rule 10, but, if for the purposes of the Order applications in execution are applications in suits, they must in my opinion equally for the purposes of the Order be applications during the pendency of suit.

I do not, however, desire to rest my decision on this point, because in my opinion the terms of section 146 are wide enough to enable the Court to recognize part transfers of a decree.

Assuming that a decree may be transferred in part under the present Code, the next question is how is the part transferee to enforce his rights. He is much in the position of a joint decree-holder under Order XXI, rule 15, but does not come within the words of that rule, as the decree has not been passed in favour of more persons than one. Rule 15 provides that where the court allows one of several decree-holders to execute, it shall make such provision as it may deem necessary for protecting the interests of persons who have not joined in the application. It must also, it seems to me, have jurisdiction to allow such other decree-holders to intervene in a pending execution if it is not being properly conducted, and must also have jurisdiction to allow a part transferee of the decree so to intervene, if, as alleged here, the executing decree-holder is not duly prosecuting the execution. It would be a very unsatisfactory state of the law, if a decree-holder who has obtained valuable consideration for a part transfer of the decree were to be at liberty to abandon or delay the execution of the decree and defeat the right of the transferee.

These being the general questions of law arising in the case, the next question is whether the deed is a transfer of part of the decree. It recites that the decree-holder has agreed to assign a one-eighth share of the decree amount together with the

securities therefor and goes on to provide that in consideration of Rs. 2,89,000 he assigns "all that one-eighth share in the above said sum now owing on the said decree." This, in my opinion, is a clear assignment of one-eighth of the decree. There is a further assignment of one-eighth share of the rents and profits of the mortgaged property which were in possession of the assignor decree-holder as mortgagee, but these provisions do not affect the assignment of part of the decree.

Lastly, we have to consider the provisions.

"That the execution proceedings shall be carried on in the name of the said Mr. Lodd Govindoss (the transferor) as heretofore and the said Mr. Lodd Govindoss shall be at liberty to continue the Execution Petition No. 145 of 1905, in the District Court of North Arcot as Mr. Lodd Govindoss may think proper and Mr. Lodd Govindoss shall be at liberty to compromise the matter in the course of the said execution proceedings in any manner as he thinks proper."

I am unable, with great respect, to agree with the conclusion of *Oldfield, J.*, that these provisions show that it was intended not that there should be a part transfer of the decree, but only a transfer of a right to share in any sum that Lodd Govindoss might choose to recover under the decree. On this question I entirely agree with the observations of *Seshagiri Ayyar, J.* Assuming the appellant to be a part transferee of the decree, there remains the more difficult question as to the effect of the stipulation that the transferor is to continue the execution proceedings as he may think proper. *Seshagiri Ayyar, J.*, was of opinion that these stipulations merely established a revocable agency which the appellant was at liberty to revoke. It has also been argued before us, that, even if this be not so, and the stipulation goes further and prevents the appellant from intervening in the execution, it would be invalid as opposed to the provisions of section 28 of the Indian Contract Act, that

"Every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals," is void to that extent. If the stipulations in question have the effect of restricting the appellant absolutely from enforcing his rights in execution as a part transferee of the decree, I am of opinion that they are void under the section and are no bar

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to the entertainment of the present application if a proper case is made out.

Subsequent to the transfer, the transferor decree-holder in my opinion is in the same position as a joint decree-holder who has been allowed to execute under Order XXI, rule 15. As I have already said, I think the other joint decree-holders have a right to ask to be allowed to intervene at any stage of the execution if their interests are not adequately protected, and I think that equally in the present case the appellant, the part transferee, should be allowed to intervene and even be given the conduct of the execution proceedings if a proper case is made out. As the District Judge has not dealt with this aspect of the case I would allow the Appeal, set aside the order and remand the case for disposal according to law in the light of the above observations. Costs to abide.

SPENCER, J.

SPENCER, J.—I agree that the judgment of SESHAGIRI AYYAR, J., who was for allowing the appeal against the District Judge's order refusing leave to the transferee, Muthiah Chettiar, to continue the pending execution proceedings in Execution Petition No. 145 of 1905 should be upheld in this Letters Patent Appeal. OLDFIELD, J., who differed from him, did so for three main reasons, which are (1) that in his opinion the appellant had not obtained a transfer of the decree, (2) that the District Judge's exercise of discretion should not be interfered with, and (3) that the Civil Procedure Code does not provide any procedure for allowing a transferee of a partial interest in a decree to carry on pending execution proceedings commenced by his transferor.

On the first point, he was of opinion that under the terms of the indenture the appellant obtained only the right to recover his share from the fund composed of realizations under the decree or the profits of management as that fund might come into existence.

Now the indenture provides for the assignment to the shareholder of

"One-eighth share or 12½ per cent of the decree amount together with the securities therefor and the outstanding arrears of rents and profits as standing on the date of the agreement that may be realized."

A fund implies collections and its existence might be gathered from the creation of rules for its formation, its management, and the custody of cash belonging to it, but the indenture is singularly silent on such subjects. The arguments advanced by Mr. K. Bhashyam Ayyangar on behalf of the respondent really amount to this, that there was a transfer of the debt without a transfer of the decree. That is an impossible position, for as soon as the decree was passed the debt became merged in it and ceased to exist independently of it. I consider that under the indenture there was a transfer of a fraction of the decree amount and of a further interest in the decree-holder's right to enjoy the rents and profits from villages mortgaged to Lodd Govindoss.

I can see no objection to the assignee of a portion of a decree being allowed to come in and execute it on behalf of himself and his co-decree-holder under Order XXI, rule 16, of the Code of Civil Procedure, provided that the Court imposes under rule 15 such terms for the conduct of the execution proceedings as may be necessary for the protection of the interests of others, such as a direction for payment into Court of sums realized under the decree. *Kishore Chant Bhakat v. Gisborne & Co.*(1), *Muthunarayana Reddi v. Balakrishna Reddi*(2), *Endoori Venkataramanish v. Venkatachinnulu*(3), *Gyamones v. Radha Romon*(4) are decisions which support this view; and *Dwar Buksh Sirkar v. Fulik Jali*(5) shows that no distinction should be made in this connection between the institution of execution proceedings and the continuation of such proceedings already begun by the assignor decree-holder which are still pending.

On the second point, I am of opinion that the transferee decree-holder's right of execution should not have been made to depend upon the discretion of the Court: see *Asad Ali Mollah v. Haidar Ali*(6) where the change of language between section 232 of the Code of 1882 and Order XXI, rule 16, by the omission of the words "if that Court thinks fit," is alluded to. The discretion of the Court should be confined to laying down the conditions upon which execution should be allowed to proceed. There is

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(1) (1890) I.L.R., 17 Cal., 311. (2) (1896) I.L.R., 19 Mad., 306.
(3) (1910) I.L.R., 33 Mad., 80. (4) (1880) I.L.R., 5 Cal., 592.
(5) (1899) I.L.R., 26 Cal., 250 at 253.
(6) (1911) I.L.R., 38 Cal., 13 at 21.

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no room for the exercise of the Court's discretion otherwise. I further think that if the District Judge's grounds for the exercise of his discretion appear to be ill-founded, the Appellate Court should in any case interfere. We have here an assertion on oath by the appellant that the respondent, Lodd Govindoss, is improperly delaying execution, which has not been contradicted or shown to be false. I think that Lodd Govindoss was the agent of the appellant under the agreement for recovering what was due as the appellant's one-eighth share in the decree and the sale-proceeds of the mortgaged properties, and that under sections 28 and 203 of the Contract Act, the appellant was at liberty to revoke the authority he gave in the indenture to his agent for carrying on execution proceedings in his own (agent's) name if he acted prejudicially to his (principal's) interests in respect of his one-eighth share.

On the last point, the general provisions of section 146 of the Code of Civil Procedure and the special provisions of Order XXII, rule 10, as to devolution of interest during the pendency of a suit, appear to be ample authority for permitting the assignee decree-holder to continue the pending execution proceedings. Although Order XXII is headed "Death, Marriage and Insolvency of parties" the use of the word "assignment" in rule 10 implies that transfers of interest *inter vivos* are included.

The observation, though obiter, in *Midnapore Zamindari Co., Ltd. v. Naresb Narain Roy*(1), that the express exclusion by rule 12 of the application of rules 3, 4 and 8 of Order XXII from execution proceedings implies that the remaining rules are applicable even in execution, commends itself to my mind. In the note to rule 12 in Amir Ali's Civil Procedure Code there is an observation to the same effect. The observation in *Sitaramswami v. Lakshmi Narasimha*(2) that rule 10 would not apply to devolution of interests after the termination of the suit was one made with strict reference to an Appeal. The learned Judges held that section 146 would cover even Appeals. I have already dealt with the objection that the assignment to the appellant was not of the decree-holder's entire interest. The result is that the Appeal succeeds and the case must go back to the District Judge

for passing orders under Order XXI, rules 15 (2) and 16. Costs to abide.

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KUMARASWAMI SASTRI, J.—This appeal arises out of a difference of opinion between OLDFIELD and SESHAGIRI AYYAR, JJ., as to the right of the appellant, who claims to be a transferee of part of a decree, to come on record and to continue execution proceedings. The decree is a mortgage decree for Rs. 21,21,000 passed in favour of the respondent's father, who was a mortgagee in possession on the 29th September 1903, in respect of which execution proceedings were filed by the decree-holder on the 13th December 1905, and on the decree-holder's death continued by the respondent, his son. On 1st October 1917 the respondent executed an indenture in favour of the appellant which, appellant contends, transferred to him an eighth share in the amount secured by the decree for a consideration of Rs. 2,89,000, and which respondent states was only an assignment of an eighth share of the sum that might be ultimately realized. The appellant on the strength of the deed applied to the District Court to be brought on record as assignee decree-holder and to execute the decree either in substitution of or jointly with the respondent. It was alleged that the respondent was conducting execution proceedings in a manner prejudicial to the appellant. The application was opposed by the respondent, on the ground that he was not entitled to apply for the relief claimed. The District Judge held that there was a transfer of an eighth share in the decree but that appellant was not entitled to the relief claimed as the deed of transfer stipulated that execution proceedings were to be carried on by the respondent and that as there was a contract he could not join in the execution proceedings. He did not go into the allegations made against respondent but contented himself with stating that the holder of a seven-eighths share would not act in a manner prejudicial to the appellant, who had an eighth share only.

On appeal OLDFIELD, J., was of opinion that the appellant was not in law entitled to the relief he claimed, while SESHAGIRI AYYAR, J., took the contrary view. I agree with the view taken by SESHAGIRI AYYAR, J.

(1) (1912) I.L.R., 39 Cal., 220 at 226. (2) (1918) I.L.R., 41 Mad., 510.

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So far as the indenture, dated 1st October 1917, is concerned, I am of opinion that it is an assignment of an eighth share in the decree. The preamble distinctly states that Lodd Govindoss

"has agreed to assign to the share-holder P. M. A. Muthiah Chettiyar one-eighth share or twelve and a half per cent of the decree amount together with the securities therefor and the outstanding arrears of the rents and profits as standing on this day that may be realized (according to the accounts of the taluk office) for a consideration of Rs. 2,89,000."

The deed proceeds to state that in consideration of the said sum Lodd Govindoss assigned

"all the one-eighth share in the above said sum now owing on the said decree as hereinbefore mentioned and one-eighth share of the arrears of rents and profits now due and may be realized and hereafter to become due and may be realized on the said decree and of all other securities for the said decree amount to which Mr. Lodd Govindoss may be entitled."

The transfer was subject to certain conditions. Execution proceedings were to be carried on in the name of Lodd Govindoss as heretofore and he was at liberty to continue the execution proceedings in Execution Petition No. 145 of 1905 as he may think proper and be at liberty to enter into any compromise he thought fit. If the execution proceedings resulted in a sale, the appellant was entitled to an eighth share of lands purchased by the decree-holder himself or to an eighth share in the sale-proceeds if the lands were purchased by strangers. A private sale of the property comprised in the decree was to be made in consultation with Muthiah Chettiyar, the transferee. I think it is clear from the terms that what was transferred was an eighth share of the decree and not simply a right to share in the amount that might be realized, the transferee having no interest in the decree itself. The preamble is clear and refers to the transfer of an eighth share of the decree. The clause allowing the transferor to continue execution proceedings in his name and giving him power to compromise are explainable by the fact that the transferor retained seven-eighths share in the decree and wanted to secure a predominating right in realization. If all that was transferred was only a share in the fund that might be ultimately

realized nothing would have been easier than to have said so. The whole tenor of the document shows that it was the one-eighth share in the decree that was transferred.

I do not think there is anything in the provisions of the Civil Procedure Code prohibiting the transfer of a part of a decree. In *Kishore Chand Bhakat v. Gisborne & Co.*(1), a decree-holder assigned a twelve-anna share of the costs awarded to him and the transferee applied for the execution of the decree. It was contended on appeal that as the transferee purchased only a portion of the decree he had no right to be substituted in place of the decree-holder and permitted to execute. It was held that there was no prohibition in the Civil Procedure Code against the transferee of a part of the decree executing the decree subject to any equities which the judgment debtors may have against the original decree-holder and subject to the interest of the original decree-holders retained by them being safeguarded.

In *Muthunarayana Reddi v. Balakrishna Reddi*(2), it was held that there was no prohibition against one of several decree-holders assigning his interest in the decree and the assignee applying for execution. In *Endoori Venkataramaniah v. Venkatachaimulu*(3), a decree-holder who obtained a decree for maintenance transferred it in so far as it related to the arrears accrued due. It was held, following *Kishore Chand Bhakat v. Gisborne & Co.*(1) and *Muthunarayana Reddi v. Balakrishna Reddi*(2), that the assignment of part of a decree was valid and the transferee of such part could execute the decree.

If a transferee of a part of the decree can apply to execute a decree he is equally entitled to apply to continue execution proceedings already instituted by his transferor. In *Dwar Buksh Sirkar v. Fatik Jali*(4), it was held that an assignee, pending execution proceedings, can continue the execution proceedings, as there was nothing in the Code to prevent the Court from recognizing the transferee as the person to go on with the execution in cases where there was an assignment pending execution proceedings. In fact to hold otherwise

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(1) (1890) I.L.R., 17 Cal., 341. (2) (1896) I.L.R., 19 Mad., 306.
(3) (1910) I.L.R., 33 Mad., 80. (4) (1899) I.L.R., 25 Cal., 250.

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would lead to great hardship and necessitate proceedings being commenced *de novo*. A fresh application may also be barred.

I see nothing in the present Code of Civil Procedure preventing a transferee of part of a decree from applying to the Court to bring him on record in the execution proceedings and allowing him to execute the decree either along with or in substitution for the decree-holder. Section 146 of the Code is very general, and provides that where proceedings may be taken or applications made by or against any person then the proceedings may be taken or the application may be made by or against any person claiming under him. Order XXI, rule 15, provides for applications for execution by one or more joint decree-holders in a case where a decree has been passed jointly in favour of one or more persons. Rule 16 provides for the interest of any decree-holder in the decree being transferred and empowers the Court to execute the decree on the application of the transferee in the same manner and subject to the same conditions as if the application was made by such decree-holder.

If assignment of part of a decree is valid, I do not see why the assignee should not apply to be allowed to execute the decree jointly with the decree-holder interested in the remainder on the analogy of a joint decree-holder applying for execution under rule 15. The words of section 146, which are very general, do not prohibit this and so long as there is nothing in Order XXI, rules 15 and 16, cutting down the right, section 151 will empower the Court to grant relief by applying principles analogous to rules 15 and 16 and give him relief, even assuming that the rules would not in terms apply. Where rights are conferred by the sections of the Code and no provision is made for a particular set of facts I think Courts ought to apply the provisions of the rules which are nearest in point, with such modifications as may be necessary, and not refuse relief on the ground that the legislature has not made provision for a particular case, though within the generality of a section of the Code. The object of section 151 is to give such power to Courts and to prevent a failure of justice. In cases of transfer of part of a decree pending execution, I think the proper course is to allow the transferee to be brought on record in execution proceedings and to treat further proceedings as if it was a joint petition by the

transferor and transferee. Even if rule 10, Order XXII, does not apply to execution proceedings owing to the rule referring to pending suits I do not see why the same principle should not be applied. During the pendency of the suit a transferee of the whole or any part of the interest of the plaintiff or one of the plaintiffs is entitled to be brought on record and there is no reason why a transferee pending execution proceedings should not be given similar relief, especially as the transferee can only work out his rights by execution and a denial of the right, simply because an execution, petition by his transferor was pending, would lead to grave hardship in case the transferor is negligent or hostile. The present Code gives the Court no discretion to allow a joint decree-holder to come on record and execute the decree. It will of course be open to the Court to give the conduct of the proceedings to such of the petitioners as it might think fit after taking proper steps to secure the interests of the others.

The legal right of the petitioner to join in an execution proceeding being in my opinion clear, the question is whether the terms of the deed of transfer in his favour preclude him from exercising the right. The clause in the deed relied on runs as follows :

"That the execution proceedings shall be carried on in the name of the said Mr. Lodd Govindoss as heretofore and that the said Mr. Lodd Govindoss Krishnadoss shall be at liberty to continue the Execution Petition No. 145 of 1905, in the District Court of North Arcot, as Mr. Lodd Govindoss Krishnadoss may think proper and Mr. Lodd Krishnadoss Govindoss shall also be at liberty to compromise the matter in the course of the said execution proceedings in any manner as he thinks proper."

I am of opinion that this clause does not amount to a negative covenant whereby the transferee precludes himself absolutely from having anything to do with execution proceedings under all contingencies. It merely amounts to an appointment of Lodd Govindoss as the transferee's agent to realize the amount under the decree. It is not an agency coupled with an interest as Lodd Govindoss had no lien, charge or other interest in the eighth share transferred to Muthiah Chettiar. His interest is only in the seven-eighths share not transferred. An arrangement between co-owners, whereby one person is

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empowered to do certain acts for the benefit of all of them would not make the agency one coupled with an interest so as to make it irrevocable if his conduct is prejudicial to the other co-owners. The agreement that Mr. Govindoss was to continue the execution proceedings in his own name would no doubt be an important factor in determining who should be given the conduct of the execution proceedings, but I do not think it is an absolute bar to the transferee applying to be added as a party to the execution application, in case he shows that he would be otherwise prejudiced. Even if the agency is one coupled with an interest there is nothing to prevent the principal from acting where the agent refuses to act, or acts in a manner which is prejudicial to the interests of the principal, especially when such a course is not required to safeguard the agent's interests owing to a conflict between the interests of the principal and agent. An agent coupled with an interest is as much bound to act bona fide and in the interests of his principal as any other agent. The clause giving Lodd Govindoss the absolute discretion to compromise would be unaffected by any orders bringing the petitioner on record in execution proceedings as there is nothing to prevent Lodd Govindoss from entering into a compromise. So long as there is no fraud or collusion the Court will record the compromise and would disregard any objection of the transferee who under the deed of transfer in his favour has deprived himself of the right to object to a bona fide compromise of the claims under the decree.

If the clause as to Lodd Govindoss continuing execution proceedings in his name amounts in law to an absolute prohibition of the transferee from executing, I think the clause would be invalid as falling under section 28 of the Contract Act, which renders void every agreement by which a party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals unless it can be brought under the exceptions to the section. The only way to realize by legal proceedings the fruits of a decree which has been transferred is by execution, and where there has been an absolute transfer any direction that he shall not execute the decree under any circumstances would be a restriction repugnant to the interest created and so inoperative.

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It was contended by the appellant during the course of the argument that Order XXII, rule 10, applied to execution proceedings, and reference was made to the fact that rule 12 provides that nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order thus making the other rules applicable. Reliance was placed on *Midnapore Zamindari Co. Ltd. v. Naresh Narain Roy*(1) where CASPERZ and SHARFUDDIN, JJ., observed :

"The present Code (Order XXII, rule 12) seems to imply by the principle of exclusion that all the rules of that Order except rules 3, 4 and 8 are applicable to proceedings in execution of a decree or order, and we are inclined to think that rule 10 is so made applicable."

These observations were obiter, as the learned judges began by stating that as the case was one not in execution of a decree it was unnecessary to decide the point. Reliance has been placed by the respondent on the decisions passed under the corresponding section in the Act of 1882, to *Manmotha Nath Mitter v. Rakhai Chandra Tewary*(2), and to *Sitaramswami v. Lakshmi Narasimha*(3) where it was held by SESHAGIRI AYYAR and NAPIER, JJ., following *Subbu Pillai v. Rungasami*(4), that Order XXII, rule 10, does not apply to applications after the termination of the suit. I am of opinion that Order XXII, rule 10, which expressly refers to the assignment, creation or devolution, of any interest during the pendency of a suit in terms excludes applications after a final decree has been passed. The words "pendency of a suit" mean the interval between the filing of a plaint and the passing of a final decree. It is no doubt true that applications for the execution of a decree are proceedings in the suit itself : *Virupakshappa v. Shidappa and Basappa*(5) ; but in order to bring the case within Order XXII, rule 10, the application should be in a pending suit. I do not think that the fact that only rules 3, 4 and 8 are referred to in rule 12 would make rule 10 applicable, if the wording of the rule necessarily renders it inapplicable to execution proceedings. As a decree for any deficiency that may arise has been passed in the present

(1) (1912) I.L.R., 39 Calc., 220.

(2) (1909) 14 C.W.N., 752.

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

(4) (1917) M.W.N., 306.

(5) (1902) I.L.R., 26 Bom., 109.

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case, which was decided before the present Civil Procedure Code was passed, it is unnecessary to consider if in mortgage suits the suit can under Order XXXIV of the present Civil Procedure Code be considered as pending till the last of the decrees contemplated by it has been passed.

It has been argued that if rule 10 does not apply there will be no appeal from the order of the District Judge to the High Court. As the District Judge purported to act under Order XXII, rule 10, and rejected his application, an appeal will lie even if the Court thinks the rule inapplicable. In *Abdul Rahiman Saheb v. Ganapathi Bhatta*(1) it was held by Sir ARNOLD WHITE, C.J., and SUBRAHMANYA AYYAR, J., that the fact that the District Judge had no power to pass an order under a particular section does not bar this Court from treating his order as having been passed thereunder for the purposes of entertaining an appeal against the order, and reference was made to the decision of the Privy Council in *Hurriah Chunder Chowdhry v. Kalisunderi Debi*(2). A similar view was taken in *Latchmanan Chetty v. Ramanathan Chetty*(3). The application is in substance one by a representative of the decree-holder to execute the decree and the relief claimed is against the judgment-debtor. The application is one to execute a decree. I do not think it matters from whom the objection proceeds. As the case falls under section 47 of the Code the order is by virtue of the definition of "decree" in section 2 appealable as a decree.

The appellant has made several allegations to the effect that the respondent has been acting in a manner prejudicial to his interests. These allegations have not been gone into by the District Judge, who disposed of the case on the ground that the appellant was precluded by the terms of the deed of assignment from making the application. The remark of the Judge that it is improbable that the respondent will act in a manner prejudicial to the recovery of the amount due under the decree as he has a predominating interest is hardly a finding on the facts alleged on a consideration of the evidence before him. As respondent is in possession and enjoying the rents and profits of the

(1) (1900) I.L.R., 28 Mad., 517.

(2) (1888) I.L.R., 9 Cal., 482 (P.C.).

(3) (1905) I.L.R., 28 Mad., 127.

mortgaged property, it may well be in his interests to delay execution as long as possible while he puts off the appellant's claims.

I would reverse the order of the District Judge and direct that the application of the petitioner be disposed of according to law in the light of the observations in the judgment. Costs to abide and follow the result.

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APPELLATE CIVIL.

*Before Sir John Wallis, Kt., Chief Justice, and
Mr. Justice Sadasiva Ayyar.*

DAVOOD MOHIDEEN RAVUTHAR (SECOND DEFENDANT),
APPELLANT,

v.

JAYARAMA AIYAR AND ANOTHER (PLAINTIFF AND FIRST DEFENDANT),
RESPONDENTS.*

1920,
October 1.

Landlord and Tenant—Lessee sub-leasing his right to another for a term without obtaining possession—Trespass by stranger—Right of lessee to sue stranger for possession, mesne profits and damages.

A lessee of certain lands who had not obtained possession from his lessor but sub-leased his right to others for a term with a stipulation that they should obtain possession, has no right to sue during the continuance of the term trespassers in possession either for mesne profits or for damages.

Per WALLIS, C.J. (SADASIVA AYYAR, J., contra). The lessee is also not entitled to sue the trespassers for possession.

APPEAL against the decree of K. S. VENKATACHALA AYYAR, Acting Subordinate Judge of Tanjore, in Original Suit No. 2 of 1919.

The facts are set out in the judgment of WALLIS, C.J.

R. Kuppuswami Ayyar for appellant.

A. Krishnaswami Ayyar for respondents.

WALLIS, C.J.—The plaintiff in this case on 6th December 1917 took the suit lands and other lands on lease from the first defendant under a rental agreement (Exhibit A) for four years from 15th December 1917 at an annual rent of Rs. 400

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and on the same day Venkatachalla and Ponnusami Muthiriyar took the same lands from the plaintiff for the same term and at the same rent, under Exhibit V, which is styled a deed of sub-lease and contains a stipulation that they would themselves take possession of the lands and enjoy them. The plaintiff did not obtain possession of the suit lands and brought this suit to recover possession and mesne profits of them from his lessor the first defendant and defendants 2 to 4 who were alleged to be in wrongful possession of them. The Subordinate Judge found that defendants 2 to 4 were in possession of the suit lands as trespassers, and passed a decree for possession against all the defendants, and for Rs. 350 for past mesne profits and Rs. 540 for proportionate costs against the second defendant and directed an inquiry as to future mesne profits from the date of suit until payment. There was a like decree against the third and fourth defendants in respect of the lands in their occupation. The second defendant has alone appealed. On the question of fact we see no reason to differ from the finding of the Subordinate Judge that the possession of the second defendant was that of a trespasser. The lands in question had been leased for three years not to him but to his brother-in-law, and his case in his written statement that he paid Rs. 200 to the first defendant who promised to execute a registered lease in his favour for another two years has not been proved. As the Subordinate Judge has pointed out, there is a variance between his written statement and his evidence, which was that he obtained the lands in the first instance under an oral lease for five years. This evidence the Subordinate Judge has disbelieved and we see no reason to differ from him.

There remains, however, the important question whether the plaintiff is entitled to mesne profits against the second defendant in spite of the fact that he had transferred the whole of his term to Venkatachalla and Ponnuswami under Exhibit V. It is opposed to general principles to allow one person to sue for what belongs to another, or for damages sustained by another, and any departure from this principle would in my opinion be sure to lead to undesirable complications. Rules 78 and 79 in Dicey's *Parties to an Action*, pages 324, 330 are as follows:

"Rule 78.—No one can bring an action for any injury which is not an injury to himself."

"Rule 79.—The person who sustains an injury is the person to bring an action for the injury against the wrongdoer."

This is the foundation of the English rule which was applied in *Ramanadan Chetti v. Pulikutti Servai*(1), in *Krishna Nam-budri v. The Secretary of State*(2), and in earlier cases in India, that a lessor is not entitled to sue a trespasser for possession and mesne profits for the period during which the tenant's term is outstanding. That this rule applies equally to India was shown by Sir JOHN EDGE, C.J. in *Sita Ram v. Ram Lal*(3), with the concurrence of four Judges of that Court:

"The principle, it appears to me, must be the same all the world over, and certainly must be the same in India as in England. That principle is that where a man, whether the owner or merely a tenant, creates a tenancy under him which entitles the tenant to the exclusive use of the land or of the house, as it may be, the man creating the tenancy cannot have any right to actual possession, unless he has by the lease or by agreement with his tenant reserved to himself a right to re-enter and take possession. He has of course a right by due process of law if the facts arise, to have the tenancy created by him determined and his tenant ejected; but so long as the tenant is entitled to possession, the landlord cannot be entitled to possession. That right to possession he has parted with by the creation of the tenancy. It is no new proposition of law, and the application of that proposition of law, which I believe to be correct, does not introduce into India any new system either of law or of procedure. A landlord whose title is denied by his tenant has got a right to have the tenancy determined. A landlord whose title is questioned by any one else than the tenant has got a right to a declaration under section 42 of the Specific Relief Act; and if any one enters on the receipt of the rents and profits of the land and takes from his tenants the rents which were due to him, he is entitled as against such person, not only to a declaratory decree declaring his title and that the other person has no title, but to a decree putting him into possession, that is, what is known as, formal possession, as contradistinguished from actual or khas possession, of the land as against the person wrongfully taking the rents and profits to which he, the landlord, is entitled."

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(1) (1898) I.L.R., 21 Mad., 288.

(2) (1909) 19 M.L.J., 347.

(3) (1896) I.L.R., 18 All., 440 (F.B.), 448.

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This case was followed in *Tiruvengada Konan v. Venkatachala Konan*(1), to which my learned brother was a party, in preference to the observations of SUNDARA AYYAR, J., in *Ambalavana Chetty v. Singaravelu Udayar*(2), which had been treated in some cases, not reported in the authorized reports, as affording sufficient ground for refusing to accept the law as laid down by SUBRAHMANYA AYYAR and BENSON, JJ., in *Ramanadan Chetti v. Pulikutti Servai*(3). These observations of SUNDARA AYYAR, J., which were made with reference to the question whether the possession of a trespasser is adverse to the landlord as well as the tenant, did not take account of the different sorts of possession to which the landlord and the tenant are entitled during the pendency of the term as explained by Sir JOHN EDGE in *Sita Ram v. Ram Lal*(4), which case unfortunately was not brought to the learned Judge's notice. They were not concurred in by ABDUR RAHIM, J., who was sitting with him, and in my opinion they show no sufficient reason for differing from *Ramanadan Chetti v. Pulikutti Servai*(3).

In that and in the other cases to which I have referred the landlord has fulfilled his duty of putting the tenant in possession before the date of the trespass, whereas here he has been prevented from doing so by the trespass. That, however, does not in my opinion give the plaintiff a right to recover the possession and enjoyment of the land, khas possession as it is called in Northern India, together with compensation for the deprivation of such possession and enjoyment in the shape of mesne profits. It is not the plaintiff, but his lessees Venkatachalla and Ponnuswami who are entitled to such possession and mesne profits.

As regards possession, it seems to me that the most the plaintiff could be entitled to would be, if he had impleaded his lessees, to get a decree directing possession to be given to them. If *Bissesuri Dabeea v. Baroda Kanta Roy Chowdry*(5) went further, I agree with SUBRAHMANYA AYYAR and BENSON, JJ., in *Ramanadan Chetti v. Pulikutti Servai*(3), that it should not be followed.

The second defendant has not appealed in the present case against the decree for possession, no doubt because it would

(1) (1910) 1 L.R., 39 Mad., 1042. (2) (1912) M.W.N., 669.
(3) (1898) 1 L.R., 21 Mad., 283. (4) (1896) 1 L.R., 18 All., 440 (F.B.), 448.
(5) (1884) 1 L.R., 10 Cal., 1076.

avail him nothing as the time for which he claimed to hold has expired; but it has been necessary to consider the sort of possession to which the plaintiff would be entitled on the facts, as in my opinion he could only claim mesne profits as damages for the defendants' trespass if he was entitled to possession and enjoyment or khas possession, and he would not be entitled to claim such mesne profits when his lessee was the person entitled to such possession. He might, I think, have recovered damages for loss of rent as lessor owing to the defendants having trespassed on the lands and prevented him from giving his lessees possession, if he had in fact sustained any such damages but in the present case he has not as the effect of the trespass in this case was to relieve him from liability to pay rent to his lessor to the same extent to which he became disentitled to recover it from his lessee. I agree with the order proposed by my learned brother.

SADASIVA AYYAR, J.—This is an Appeal from the judgment of the Subordinate Judge of Tanjore in a suit brought by the plaintiff, a lessee of the suit lands for a term of four years, who demised the whole of this term to third parties, to recover possession and mesne profits from the defendants (Nos. 2 to 4) who, he says, trespassed on this property. The plaintiff succeeded in the lower Court. The second defendant is the appellant before us.

The facts appear to be that the second defendant's brother-in-law held this property on a three years' lease from the first defendant, the plaintiff's lessor. The defendants' case is that they held it not on a three years' lease but on a five years' lease: at any rate, that they became entitled in some manner or other, to remain in possession for five years. I agree with the Subordinate Judge that it is not shown, and I see no reason for differing from his finding, that the defendants were only entitled to remain in possession for three years and that their right to possession expired before the commencement of the present lease, that is, before 15th December 1917.

Mr. Kappuswami Ayyar contended that, having demised the whole of his term, the plaintiff had no right under the Transfer of Property Act, to sue for possession and mesne profits but that a suit should have been brought by his demisees. Section 108 (j)

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of the Transfer of Property Act says that "the lessee" (the plaintiff in this case) may transfer

"absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease."

Therefore, the lessee here remained under all his obligations to the first defendant (his lessor) in spite of this complete sub-demise of the lessee's interest. Therefore, he is in the position of a lessor under section 105, which says that :

"a lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service, or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms."

Thus, though the plaintiff is the lessee under the first defendant he is himself in the position of a lessor so far as the third parties to whom he has sublet the lands during the four years between 15th December 1917 and 15th December 1921 are concerned. In *Somiammal v. Vellaya Sethurayan*(1), HANNAY, J., and myself held that a landlord though he has given a lease to a third person was entitled for the purpose of putting his lessee into possession to maintain a suit to eject a trespasser and that the defendant in such a suit could succeed only if he showed that the plaintiff or his lessee had no right to possession because the defendant was himself entitled to possession either through a title paramount to the plaintiffs, or derived from the plaintiff or his lessee, or because the lessee was unwilling that the plaintiff should get possession during the term of the lease. The questions, whether the plaintiff in such a case if he is awarded possession is entitled also to recover damages against the trespasser and what the basis is on which the damages should be allowed to him, were not decided in that case. In *Tiruvengada Konan v. Venkatachala Konan*(2), NAPIER, J., and myself held that if the lessee had been put into possession and was then dispossessed by a stranger the lessor suing the trespasser during

(1) (1915) 29 M.L.J., 233.

(2) (1916) I.L.R., 39 Mad., 1042.

the currency of the lease term could only get formal possession and that he could not get any damages against the trespasser, because it is the lessee who was entitled to get the mesne profits of the land during the currency of the term and the lessor could sustain no pecuniary damages as he had put his lessee into possession and his claim for rent against the lessee had not therefore been affected by the stranger's trespass. NAPIER, J., and myself were not inclined to adopt the rather too broad view of the lessor's rights indicated in certain passages in the judgment of SUNDARA AIYAR, J., in *Ambalavana Chetty v. Singaravelu Udayar*(1). In *Kathiri Kutee Musaliar v. Kutti Chekkutti Musaliar*(2), OLDFIELD and PHILLIPS, JJ., held that the landlord was entitled to maintain a suit for possession against a trespasser when there was no collusion between the tenant and the trespasser though the tenant was unwilling to join as co-plaintiff.

In the present case, the strangers, who are the plaintiff's lessees, did not obtain possession and the principle of the decision in *Somiammal v. Vellaya Sethurayan*(3), if applied, justifies the decree for khas possession granted by the lower Court in plaintiff's favour. I might add that the second defendant has not appealed against the decree awarding possession of the lands to the plaintiff and he gave up possession of the lands in December 1919, about the time when he filed this Appeal. The defendants 3 and 4 who were in possession of a portion of the plaintiff's lands have also not appealed against the decree in the plaintiff's favour for the possession of the lands in their enjoyment. While it may be that, on principle, the decisions in *Ramanadan Chetti v. Pulikutti Serrai*(4) and *Krishna Nambudri v. The Secretary of State*(5), are entitled to more weight than SUNDARA AIYAR, J., was inclined to give to them in his elaborate judgment in *Ambalavana Chetty v. Singaravelu Udayar*(1), I think it is better to adhere to the current of the later decisions of this Court from 1912 onwards and to hold that where the lessee was not put into possession the lessor was entitled to obtain a decree for khas possession against a stranger-trespasser.

(1) (1912) M.W.N., 669.
(3) (1914) 29 M.L.J., 283.

(2) (1917) M.W.N., 339.
(4) (1898) I.L.R., 21 Mad., 283.
(5) (1909) 19 M.L.J., 347.

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As I said, however, that question is not directly before us in this Appeal as the appellant has not appealed against the decree so far as it awarded possession to the plaintiff-respondent. His Appeal is directed to the award of mesne profits past and future and to the award of costs to the plaintiff and to the disallowance of his (second defendant's) costs.

In the first place, I wish to remark that where the landlord brings a suit for *khas* possession the Court would do well to direct him to make his lessee a party to the suit, and if the lessee does not agree to be a co-plaintiff to make him a defendant along with the trespasser, so that all questions might be completely decided in the suit. It seems to me again that when the landlord is decreed *khas* possession in the case where his lessee never obtained possession the plaintiff is in his own primary right entitled only to formal possession and it is in his secondary right arising out of his obligation to put his lessee in actual possession that he is awarded actual possession. Under his primary right to formal possession he is entitled only to claim as damages the loss of rent (if any) arising from the injury caused to that primary right by the defendant's trespass, because the plaintiff's lessee was not bound to pay rent till he got possession and the plaintiff would (if he lost anything) be losing his rents only during the defendant's trespass. I would therefore hold that the plaintiff is not entitled to claim the net mesne profits. Is he entitled to claim damages in the shape of rents lost? The answer will depend on whether he has really incurred damages in the shape of rent lost. The trespass of the defendants 2, 3 and 4 deprived not only the plaintiff of formal possession but also the first defendant (the plaintiff's lessor) of such possession. No doubt the plaintiff would have been entitled to recover rent from his sub-lessees if the defendants 2 to 4 had not committed the trespass and had allowed the plaintiff's sub-lessees to take possession. In that case the amount of such rent might in reason be awarded to him, if he really incurred pecuniary loss by deprivation of that rent (rent alone was allowed as damages against trespassers to the lessor plaintiff in *Velayuthathudayan v. Angamuthudayan*(1) decided by this Bench recently). But the facts of this case are rather

(1) Appeal No. 6 of 1920 (unreported).

peculiar. The plaintiff himself would have been obliged to pay to the first defendant the same rent which he was entitled to obtain from his sub-lessees from the date on which his sub-lessees took possession of the lands from the trespassers, an obligation from which he has been freed through the trespass of the defendants 2 to 4 which gave rise to his cause of action against them to sue for possession. Prior to the date of recovery of possession from the trespassers the plaintiff was not bound to pay rent to the first defendant nor was he entitled to recover anything from the plaintiff's own lessees. Hence, the plaintiff himself personally has really lost nothing pecuniarily and it is the first defendant who has lost his rents and it is the plaintiff's lessees who have lost the difference if any between the net mesne profits and the rent. As regards the measure of damages in such cases, RATANLAL says (Law of Torts, Sixth Edition, page 317):

"The damages will vary considerably according to the plaintiff's interest in the land. This is obviously just both to prevent the plaintiff getting extravagant recompense when his interest is on the point of expiring or very remote, and to prevent the defendant being forced to pay for the same damage several times over. The same act may give rise to different injuries; the tenant may sue for the injuries to his possession and the landlord for the injuries to his reversion. And so, where several persons are entitled in succession as tenant for life, in tail, in fee, each can only recover damages commensurate to the injury done to their respective estates."

While I feel bound not to depart from the later precedents of this Court on the question of the lessor-plaintiff's right to sue trespassers in ejectment under a certain state of facts, I do not feel bound to go further and to hold that he is entitled to claim the damages which either the first defendant (plaintiff's lessor) or the third parties (plaintiff's lessees) may be entitled to recover from the trespassers. I hold therefore that the plaintiff has sustained no pecuniary damages and can recover neither rent nor mesne profits as damages.

In the result, the lower Court's decree would have to be modified by disallowing Rs. 350 awarded against the second defendant for past mesne profits, by allowing proportionate costs to the plaintiff against the second defendant on a fresh calculation entailed by such disallowance, and by omitting the direction

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for inquiries about future mesne profits. In this Appeal, the parties will bear and receive proportionate costs according to success and failure, the second defendant (appellant) having added frivolous claims in the Appeal petition such as credit for a sum of Rs. 200 falsely alleged by him to have been advanced to the first defendant.

Memorandum of Objections is dismissed.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Odgers.

1921,
January 21.

SONTAYANA GOPALA DASU AND THREE OTHERS (DEFENDANTS
1 TO 4), APPELLANTS,

v.

INAPATALUPULA RAMI AND FOUR OTHERS (PLAINTIFFS AND
DEFENDANTS 5 TO 7), RESPONDENTS.*

Void usufructuary mortgage—Possession by mortgagee as such for more than 12 years—Acquisition of title as mortgagee—Suit for redemption—Liability of mortgagee to account for the whole period of possession.

A person in possession of a property as usufructuary mortgagee under a void mortgage, for more than 12 years, acquires by prescription, the rights of a mortgagee, and is as such accountable to the mortgagor for the rents and profits not only of the last 3 years preceding the suit for redemption but for the whole period of his possession.

Madhava v. Narayana, (1886) I.L.R., 9 Mad., 244, and *Sundara Gurukkal v. Subramania Archakar*, (1912) 16 I.C., 980, followed.

SECOND APPEAL against the decree of B. C. SMITH, District Judge of Ganjām at Berhampur, in Appeal Suit No. 467 of 1917, preferred against the decree of B. ADINARAYANA NATUDU Garu, District Munsif of Chicacole, in Original Suit No. 400 of 1914.

The plaintiffs in this case sued for possession of certain lands alleged to have been usufructuarily mortgaged by them to the defendants by two mortgage deeds in 1892 and 1893, the year of redemption being fixed as 1900. The plaintiffs

* Second Appeal No. 1563 of 1919.

contended that by the receipt of rents and profits of the land the mortgages were discharged in 1900 and that the defendants were accountable to them for all the subsequent rents and profits. The defendants originally pleaded that about Rs. 950 was still due to them, and pleaded later on, that as the mortgages were of lands which were then unenfranchised service inam lands the mortgages were illegal and void on account of Madras Act III of 1905 and that by their adverse possession for more than 12 years the plaintiff's right to redeem was lost. The Munsif held that though the mortgages were illegal, being mortgages of unenfranchised service inam lands, the defendants only acquired by their possession for more than 12 years the limited right as mortgagees, and that they had not claimed any higher right at any time up to date of suit. He accordingly took an account of the rents and profits, and held that the mortgages were discharged in 1906, and gave a decree for possession and for about Rs. 1,100 being the value of the rents and profits from 1906 till the date of his decree (viz., April 1917). On appeal by the defendants, the District Judge agreed with the Munsif in all other respects but held that the plaintiffs were entitled only to the rents and profits of the last three years before suit and for subsequent rents. He accordingly reduced the amount awarded by the Munsif. The defendants preferred this Second Appeal and the plaintiffs preferred a Memorandum of Objections.

C. S. Venkata Achariyar for appellant.

S. Varada Achariyar with *B. Jayannadha Doss* for respondent.

The Court delivered the following JUDGMENT :

This is an Appeal by defendants 1 to 4 in the suit which was brought by the plaintiffs on the footing of two usufructuary mortgages, Exhibits A and B, in which the father-in-law of the first plaintiff and the father of the second plaintiff were the mortgagors and the first defendant was the mortgagee. The plaintiffs claim that the mortgage debt having been completely discharged they are entitled to possession of the mortgaged lands by ejection of the defendants. They also claim an account.

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The mortgage deeds are dated respectively 27th September 1892 and 28th April 1893. The written statement filed by the defendants admits that the father-in-law of the first plaintiff, the second defendant and certain minors became indebted up to 13th March 1877 in the sum of Rs. 560 in respect of the plaintiff mentioned registered deeds of mortgage with possession and they executed a settlement of account. They also file an account and plead that the sum of Rs. 950 and odd is still due to them and that the plaintiffs cannot redeem without paying this sum.

The issues, as originally settled, were for accounts, and on the question of non-joinder of certain alleged necessary parties. But on remand the District Munsif framed an additional issue which is the point taken in the Second Appeal before us. That issue runs as follows:

"Are the suit mortgages void on account of non-enfranchisement and, if so, is the plaintiffs' suit in time and the claim for possession of the lands not barred?"

Both the lower Courts have held that the plaintiffs are entitled to redeem.

The suit lands were unenfranchised service inam lands at the date of Exhibits A and B though they have been enfranchised since. The mortgages therefore are by the provisions of section 5 of Madras Act III of 1895, clearly void; and there is ample authority for holding that the provisions of section 48 of the Transfer of Property Act cannot be applied so as to save a transaction of this sort: vide, *Narabari Sahu v. Siva Korithan Naidu*(1), *Bachu Ramayya v. Phara Satchi*(2), and *Ramayya v. Jaganadham*(3).

The appellants contend that, as the mortgages are void, the defendants having been in possession continuously since 1892 to the date of the suit in 1914 have acquired an absolute title to the suit lands and cannot be dispossessed by the plaintiffs or anybody else. The respondents, on the other hand, contend that while admitting that the defendants have been in possession for over twelve years they have not prescribed for any higher title than that of mortgagees in possession and

(1) (1913) M.W.N., 415.

(3) (1915) M.W.N., 886.

(2) (1913) M.W.N., 999.

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are therefore liable to be redeemed and dispossessed on accounts being taken. The question for decision is which of these views is correct.

The learned vakil for the respondents relies largely on *Javerbhai Jorabhai v. Gordhan Narsi*(1), where a house and certain properties were mortgaged and the mortgage was void under the provisions of the Bhogdari Act (Bombay Act V of 1862). The mortgage deed however contained a covenant for compensation payable to the mortgagee in the event of dispossession. The defendants contended that the mortgage being void the suit was barred by limitation. It was however held that the covenant was a collateral contract independent of the invalid mortgage and that the mortgagee could recover on it. The learned Judges in that case however went further, and as justifying the plaintiff's claim for compensation for disturbance under the covenant, they decided (page 372) that the possession of the plaintiff from 1897 to 1909 gave him an absolute title to the limited interest of a mortgagee in possession, and

"in assertion of that right held adversely to the defendants who continuously attorned to him."

Adam Umar v. Bapu Bawaji(2), is authority for the proposition, if any is needed, that possession obtained through a transaction which the law prohibits and declares to be void is adverse and the learned Judges there point out that it is just such possession originating without colour of title which is contemplated by the law of limitation [cf. *President & Governors of Magdalen Hospital v. Knotts*(3), where the possession obtained under void leases was held to be adverse]. In *Budesab v. Hanmanta*(4), it was held that a partial interest in land may be lost by adverse possession as well as the whole interest and that the right to such partial interest may be asserted by suit. The learned Judges refer to two Madras decisions apparently with approval, namely, *Madhava v. Narayana*(5) (where it was held that adverse possession for 12 years of a limited, i.e., Kanom interest, in immoveable property is a good plea to a suit in

(1) (1915) I.L.R., 39 Bom., 358.

(2) (1909) I.L.R., 33 Bom., 116.

(3) (1879) 4 App. Cas., 324.

(4) (1897) I.L.R., 21 Bom., 509.

(5) (1886) I.L.R., 9 Mad., 244.

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ejection to the extent of that interest) and *Sankaran v. Periasami*(1) (where it was held that possession of a limited interest in immoveable property may be just as much adverse for purposes of barring a suit for the determination of that limited interest as is adverse possession of a complete interest in the property to bar a suit for the whole property). Further in *Sundara Gurukkal v. Subramania Archakar*(2) (a decision of this Court), it was held that by virtue of adverse possession a person does not acquire a higher title than he has prescribed for. There, the office of an archaka of a temple and the properties attached thereto were usufructuarly mortgaged and after the expiration of the period of redemption the mortgagee continued in possession for the prescriptive period. The learned Judges held that the mortgagee acquired only the right of a usufructuary mortgagee and not the right of absolute ownership.

It appears to us that the decisions quoted above must be followed. There is no evidence in this case that the defendants ever claimed or thought that they were prescribing for the whole interest. The plaint and the written statement, as pointed out above, are based entirely on the void mortgages. It was not till the remand trial before the munsif that the question of the effect of the possession of the defendants under the void mortgagee was raised and considered. No other question was argued in Second Appeal. We must therefore hold that the defendants have not prescribed for any higher title than that of usufructuary mortgagees. In this view, the Judgment of the lower Appellate Court is right and the Second Appeal must be dismissed with costs.

On the Memorandum of Objections it is argued for the appellants that only 3 years' rent and profits can be recovered on the ground that the covenants in an usufructuary mortgage are personal and that as the title of the true owner is not transferred to the adverse owner who has remained in possession for the period required by the statute of limitation [cf. *Tichborne v. Weir*(3)], the conditions do not affect the latter and cannot be

(1) (1890) I.L.R., 18 Mad., 467.

(2) (1912) 16 I.O., 960.

(3) (1882) 67 L.T., 735.

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enforced against him. *Punugu Subbian v. Mukalapati Rami Reddi*(1), is also quoted. It is admitted that had the mortgages been valid the eight years' rents and profits claimed by the respondent would be recoverable. The cases cited deal with the possession of strangers to the true owner and do not apply to the present case, where, as pointed out above, the parties all along considered that they occupied the position of mortgagors and mortgagees and the provisions (if any) made for the disposal of the rents and profits of the mortgaged property must have been perfectly well-known to them all. It appears to us that consistently with our judgment in the Appeal, that the parties after the expiration of the period of limitation in fact occupied the position of usufructuary mortgagors and mortgagees. We must hold that in the circumstances of this case rents and profits from 1906 to 1914, the date of suit, are recoverable.

The Memorandum of Objections is therefore allowed with costs; the decrees of the District Judge will be modified accordingly and that of the District Munsif restored.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Ramesam.

SARANGA SESHA NAIDU (PLAINTIFF), APPELLANT,

v.

PERIASAMI ODAYAR (DEFENDANT), RESPONDENT.*

Limitation Act (Indian) (IX of 1908), arts. 134 and 141—Hindu Law—Reversioner—Suit by reversioner to recover possession after death of daughter of the last male owner—Lands mortgaged usufructuarly by last male owner in 1866—Sale in 1900 by mortgagee after male owner's death, during daughter's life-time—Death of daughter in 1906—Suit in 1914 by reversioner against vendee for possession of lands—Bar of limitation.

A Hindu reversioner instituted a suit in 1914 to recover possession of certain lands which had been usufructuarly mortgaged by the last male owner in 1866, and had been sold for consideration by the mortgagee in 1900 after the death of the last male owner and during the life-time of his daughter who

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(1) (1916) 30 M.L.J., 331.

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had inherited his estate and died in 1906. The vendees who were impleaded in the suit relied, *inter alia*, on the bar of limitation.

Held, that article 134 and not article 141, of the Indian Limitation Act (IX of 1908) applied to the case and that the suit was barred by limitation.

SECOND APPEAL against the decree of Subordinate Judge of Kumbakonam in Appeal Suit No. 195 of 1918, preferred against the decree of K. GOPALAN NAYAR, District Munsif of Valangiman, in Original Suit No. 35 of 1917.

The material facts are set out in the judgment.

K. P. M. Menon and G. K. Narayanan for appellant.

T. R. Venkatrama Sastri and T. S. Anantarama Ayyar for respondent.

SPENCER, J. SPENCER, J.—In the course of the full and able arguments on either side to which we have listened, no reported case has been cited in which a question arose of a choice between the application of article 134 or 141 of the Limitation Act. *Kannusami Tanjirayan v. Muthusami Pillai*(1) was an instance of a conflict between article 134 and article 144. I then observed that it was clear that the plaintiff could not have resort to article 144 unless he first showed that article 134 was inapplicable, the reason being that article 144 is the residuary article for suits for the possession of immoveable property as is indicated by the words "not hereby otherwise specially provided for."

There is no indication that article 134 should not be applied to suits for possession of immoveable property which but for that article might have been governed by the period of limitation prescribed in article 141. In *Secti Kutti v. Kunhi Pathumma*(2), the learned Chief Justice after discussing the law of limitation applicable to similar actions under the English Act pointed out that article 134 of the Indian Limitation Act was in its origin wholly self-contained and was not appended as a proviso to any other section. A reversioner's disability to sue for possession while a Hindu female is the owner in possession of the estate has not been treated by the legislature on the same footing as the disability of a minor, an idiot, or an insane person, in whose favour, by section 6 of the Act, an extra period has been allowed

(1) (1917) 5 L.W., 250.

(2) (1917) I.L.R., 40 Mad., 1040 (F.B.).

for instituting their suits whatever may be the article applicable to a suit of the same description by a person not so disabled.

The transfer by the mortgagee, Vasudeva Naick, of the absolute title to the defendant was in 1900. A perusal of Exhibit III leaves no doubt in my mind that it was an absolute sale for good consideration. Kaveriammal, the last female owner, died in 1906. She had six years before her death to sue under article 134 to recover the property, and the plaintiff had six years after her death till 1912, but he neglected to move in the matter till 1914.

Kaveriammal's quiescence during those first six years will not amount to an act of alienation which the reversioner on succeeding to the estate can sue to set aside. Both were equally negligent in preserving the interests of the mortgagor which they in turn represented.

The Subordinate Judge was therefore right in holding that the present suit in respect of the one-fifth share of lands and house mortgaged by the last male owner in 1866 and afterwards transferred by the mortgagee in 1900 was time-barred under article 134. The plaintiff's claim for a three-fifths share of lands and house alleged to have been sold in 1865 is barred by adverse possession that commenced during the life-time of the last male owner, and he failed to prove that there was any other one-fifth share of the house still remaining unalienated. The result is that the Second Appeal fails and is dismissed with costs.

RAMESAM, J.—The subject matter of the suit is a house and four-fifths share of certain lands. It is common ground that one Rangaswami Naicker was the original owner of four-fifths share of the house and four-fifths share of the lands. Whether he was also owner of the remaining one-fifth share of the house will be dealt with later on. Rangaswami died in 1867 leaving three daughters and the youngest of these who survived the others died in 1906. The first plaintiff, who is the daughter's son of Rangaswami, being the sole reversioner, brought this suit in 1914, that is, within 12 years after the death of the last daughter, to recover possession of the properties. The defence is (1) as to the one-fifth share in the house and a like-share in the lands, they were mortgaged by Rangaswami in 1866, with possession to one Vasudeva who sold the property in 1900 to the defendant and hence the suit is barred by limitation under article 134 of the

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Limitation Act; (2) as to the three-fifths share in the house and a like share in the lands, they were sold with Rangaswami's consent in 1865 by Appavu, a mortgagee of Rangaswami, for discharging the mortgage debt to Vasudeva, who sold it to the defendant in 1900.

It is suggested for the appellant that there is a one-fifth share of the house, belonging to Ramaswami and left untouched by these transactions, and the plaintiff is entitled to a decree for this share, as his suit is obviously not barred having regard to article 141 of the Limitation Act. It does not appear that the plaintiff made this claim in the Courts below. Having regard to the fact that the ownership in the village, depended on the pangu right or share in a mirasi village, and the share in the house generally corresponded with the share in the lands and to the fact that Rangaswami purchased the one-fifth share in the house and a like share in the lands from his brother, Ramaswami, and had a three-fifths share in both, in his own right, it does not appear that Rangaswami had ever possessed the remaining one-fifth share in the house by purchase or otherwise. There is no evidence on record to support the right of Rangaswami to more than a four-fifths share of the house. On this ground, the last contention of the appellant must be negatived.

As to the lands said to be sold in 1865, it appears that the sale deed of 1865 was unregistered and the appellant also contends that the secondary evidence of the sale deed has been wrongly admitted. But there is other evidence in the case, including plaintiff's admissions, from which it can be reasonably inferred that Vasudeva got into possession in 1865 under an attempted sale whether the sale was valid or not, and adverse possession began during the life-time of Rangaswami as found by the Subordinate Judge. So, the appellant's case fails as to the three-fifths share also.

The only portion that remains to be considered is the one-fifth share mortgaged in 1866 and this turns on a pure question of law, viz., whether article 141 or article 134 applies to the case. At the outset, I may point out that the transfer of 1900 was accompanied by possession, thus avoiding the difficult question discussed in *Seeti Kutti v. Kunhi Pathumma*(1). As it is clear

(1) (1917) I.L.R., 40 Mad., 1040 (F.B.).

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that the language of article 134 applies literally, the argument for the appellant may be stated at its best in the form that where article 141 is applicable as well as another article, the former prevails and as an illustration *Runchordas v. Parvati bai*(1) was relied on, where it was held that article 144 did not apply and article 141 applied. The obvious reply to the argument, so far as it relates to article 144, is that the case was not a case to which both articles apply, as article 144 by its language can never be applied if there is another article which is applicable. But, the main argument has still to be considered as to other articles. The articles dealing with suits for recovery of immoveable property, including for this purpose the suit described in article 148 also, are articles 134 to 144 and article 148. Omitting article 144 from consideration, on the ground that it cannot apply where any other article applies, those that remain are articles 134 to 143 and 148. As to them, it is contended for the appellant that wherever a suit falls under article 141 and also under any one of the other articles, the former ought to prevail, as since the enactment of the Limitation Act of 1871 the intention of the Legislature was to do away with the rule that prevailed under the Limitation Act of 1859 [viz., that adverse possession against the widow is also adverse possession against the reversioner : see *Nobin Chunder Chuckerbutty v. Guru Pershad Doss*(2)] and to give the reversioner the benefit of a long period of limitation. Now, the suits of Hindu reversioners which may fall under any of the articles 134 to 140, 142, 143, and 148 (and to which article 141 may seem also to apply) may be divided into three classes :

(1) Suits where the cause of action has accrued during the life-time of the last male owner or his predecessor-in-title, and the period of limitation under the specific article has expired during the life-time of one of the intermediate female owners. Will article 141 help the reversioner in such a case and extend the period under the specific article to 12 years beyond the death of the female and enable him to recover the property? The appellant's counsel concedes that article 141 does not apply to such cases and the reason he gives is that the reversioner is

(1) (1890) I.L.R., 23 Bom., 725 (F.O.).
(2) (1868) B.L.R. Sup. Vol., 1008 (F.B.).

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not "entitled" within the meaning of article 141, to recover possession, for, the right would be already barred in these cases.

(2) Suits where the cause of action has accrued during the life-time of the last owner or his predecessor-in-title, but the period of limitation under the specific article has not expired during the life-time of the intermediate female owners. In such a case, the period of limitation has only partly run, leaving a balance of the period within which the suit may be brought by the reversioner successfully. In such a case, will the reversioner's suit be governed by article 141 so as to give him a period of 12 years from the death of the female, which will be longer than the balance left under the other articles except in the case of a suit under article 148, when the result of applying article 141 may be even to cut down the period given by article 148? The appellant's counsel concedes that article 141 does not govern such a case. But his former reason that the reversioner is not entitled on the death of the female is not available to him here, for, in this case, the reversioner is entitled to possession on the death of the female whatever article is applied. Why should article 141 be construed so as to exclude this class of cases, if the appellant's contention that article 141 should be applied to all cases to which it apparently applies is correct?

(3) Where the causes of action accrued, not during the life-time of the last male owner or his predecessor-in-title, but after his death and during or at the end of the life of the intervening female. Cases falling under this class cannot be governed by articles 136 and 137, but the other articles 134, 135, 138 to 140, 142 and 143 and 148 may be applicable to them. As to these the appellant's counsel contends that notwithstanding the applicability of any one of these specific articles, article 141 applies also to the suit and prevails over the other articles if it is for the benefit of the reversioner. This last qualification has to be added, for, in a suit of the kind described in article 148, the application of article 141 may have the effect of cutting down the period of 60 years. This argument of the appellant's counsel depends on the construction of the words "entitled to possession" as meaning "entitled to recover possession on any cause of action" thus giving a wide scope to the suits described under article 141 and, further, apart from the anomaly of giving

no explanation why it should not govern the second class of cases mentioned by me involves the two following propositions:

(i) The articles of the Limitation Act may be overlapping. Two articles may be both applicable to the same class of suits.

(ii) That the Court can pick and choose from the articles that which ought to be applied to the case—sometimes one and sometimes the other, whichever gives the longer period of limitation with reference to the facts of each case.

There is no warrant for these propositions and I do not understand *Ishur Chunder Bhaduri v. Jibun Kumari Bibi*(1) and *Natesan Chetty v. Soundararaja Ayyangar*(2), as supporting the first proposition. There is always one article applicable to a case and the Court has to find it, though more than one may seem to be applicable and such a construction of the various articles has to be adopted as to confine each article to one exclusive category of suits. One principle in the working out of this process is the *maxim Generalia specialibus non derogant, specialia derogant generalibus*.

The second proposition is still more untenable, and the fact that the appellant's argument involves it is a very strong argument against it. It is true that this strong argument is furnished only by bringing in suits described in article 148 for consideration among the suits for recovery of immoveable property. If it is said that such suits are only suits to redeem and there is no analogy between article 148 and the other articles 134, 135, 138 to 140, 142 and 143 the reply is that the suit under article 134 is certainly analogous to the suit under article 148. Both are based on a mortgage; even in article 148, the suit may be described as a suit to recover the property if it is the plaintiff's case that a mortgage is discharged; and even in a suit under article 134 the appropriate relief against a transferee is a decree for redemption as the transferee gets by the transfer at least the rights of his transferor. In this light I would construe article 141 to cover only those cases in which the cause of action is simply the death of the female and the only obstacle to the reversioner seeking to obtain possession is either an act

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(1) (1889) I.L.B., 16 Cal., 25.

(2) (1898) I.L.R., 21 Mad., 141.

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of the female or her inaction—in either case resulting in the loss of possession to a stranger and the need of a suit on behalf of the reversioner. It does not cover cases where the cause of action includes something more beyond this, e.g., a transaction by the last male owner, such as a mortgage (article 148), a mortgage by him and transfer by the mortgagee (article 184), a purchase in Court auction (article 188), a lease (article 139), or a carving by him of life-estates with a remainder or a reversion following it (article 140) or any transaction involving the possibility of forfeiture (article 143) or loss of possession by him (article 142). In these cases, the specific article applies. This is the respondents' contention and the result of accepting it would be that article 141 does not apply to the first two classes of cases; and in the third class of cases:

(a) Of the articles 134, 185, 188 to 144 and 148 no two are overlapping;

(b) Article 144 has to be applied last;

(c) Each of the other articles has to be applied when the suit is of the kind described in it, even if it is a suit by a reversioner;

(d) Only when the suit is of a kind not described in the articles 134, 185, 188 to 140, 142, 143 and 148, does article 141 apply to suits by reversioners—the discontinuance of possession in article 142 referring to a discontinuance during the last male owner's life-time.

If the intention of the legislature, when it departed from the Act of 1859 and introduced article 141 in the later Acts, was to give the reversioners the benefit of a longer period in all suits to recover possession, even where the suits are of the kind described in the other articles, such intention would have been attained and expressed better, not, by the introduction of a separate article like article 141 but a general section somewhat as follows:

"Where in the suits described in articles 134 to 144 and 148 the plaintiff is a person entitled to the right on the death of a Hindu female, and the cause of action accrues during or at the end of the life of the female the interval between the accrual of the cause of action and the death of the female shall be excluded from the computation of the period in the second column."

I am therefore of opinion that the suit is governed by article 184.

Another argument of the learned counsel for the appellant is that such a construction will leave the reversioner without a remedy, for the intervening female may allow the suit to be barred and he himself has no right to bring a suit. Apart from the consideration that the fact that some possible hardship cannot stand in the way of accepting a construction of a statute otherwise clear, I am unable to agree with the proposition that the reversioner cannot intervene for the protection of the actual reversioner if the widow neglects to take action. In support of his proposition, the learned counsel for the appellant relied on (i) the dictum of SRINIVASA AYYANGAR, J., in *Seeti Kutti v. Kunhi Pathumma*(1):

"Further, the article cannot, I think, apply to suits where, at the time of the transfer the mortgagor was not entitled to sue for possession, etc."

This dictum was not necessary for the decision of the point before the Full Bench and I respectfully dissent from it. When we see the varying attitude of the legislature in respect of the suit described in article 184 [see *Kadanath Doss v. Gisborne*(2), on the Act of 1859, *Bhagwan Sahai v. Bhagwan Div*(3), on the Act of 1871 and *Muthu v. Kambalinga*(4)], it is clear that the object of the article was to cut down the period available to the mortgagor under article 148 and to compel him to watch the conduct of the mortgagee and to intervene on a transfer, thus making the transfer a cause of action which otherwise did not exist.

(ii) *Ram Chandar v. Kallu*(5), *Vengamma v. Chelamayya*(6) hold that the reversioner cannot sue to redeem during the lifetime of the widow. Ordinarily this is true, but I do not understand the cases to lay down that in a case where the appropriate allegations are made and the facts are proved, to the effect that the intervening female's conduct is such as to raise the apprehension that the property will never be redeemed or altogether

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(1) (1917) I.L.R., 40 Mad., 1040 (F.B.), 1061.
(2) (1871) 14 M.I.A., 1, 50. (3) (1897) I.L.R., 9 All., 97.
(4) (1889) I.L.R., 12 Mad., 316. (5) (1906) I.L.R., 30 All., 497.
(6) (1913) I.L.R., 36 Mad., 484.

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lost to a transferee, the reversioner cannot maintain an action for the preservation of the property, on the same principle that actions to retain waste are allowed (see Mayne's Hindu Law, paragraph 647, and cases cited therein (especially *Nobin Chunder Chuckerbutty v. Guru Pershad Doss*(1) per Sir BARNES PEACOCK).

I am therefore of opinion that article 134 applies to the one-fifth share of the house and of the land mortgaged in 1866.

The result is the whole Second Appeal fails and is dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Ramesam.

1921,
February
28.

SANKARAN NAMBUDRIPAD (PETITIONER), APPELLANT,

v.

SANKARAN NAIR AND OTHERS (APPELLANTS), RESPONDENTS.*

Malabar Compensation for Tenants Improvements Act (I of 1900), ss. 5 and 6 (8).—Decree for ejectment—Value of improvements, ascertained and specified in the decree—Improvements effected subsequent to decree, not ascertained—Application for execution by ejectment, whether maintainable.

Where a landlord in Malabar obtained a decree for ejectment of his tenant on payment by him of an ascertained amount for compensation for value of improvements, applied for execution of the decree by ejectment of the tenant after depositing into Court the amount specified in the decree for value of improvements, held, that the landlord was entitled to an order in execution for ejectment of the tenant from all the lands specified in the decree, even though the value of improvements, effected by the tenant on some of the lands, subsequent to the decree, had not been ascertained under section 6 (8) of the Malabar Compensation for Tenants Improvements Act.

APPEAL against the order of G. H. B. JACKSON, District Judge of South Malabar, in Appeal Suit No. 524 of 1917, preferred against the order of C. R. VENKATESWARA AYYAR, District Munsif of Manjeri, in Execution Petition No. 1375 of 1917 (in Original Suit No. 420 of 1912).

(1) (1868) B.L.R. Sup. Vol., 1008 (F.B.) at pp. 1013, 1014.

* Civil Miscellaneous Second Appeal No. 27 of 1918.

This Civil Miscellaneous Second Appeal arises out of an order passed in execution of a decree, dated 28th March 1914, in a suit instituted by the appellant to redeem a kanom. The decree in favour of the plaintiff in the original suit was one for redemption; the value of improvements effected by the tenant on the lands till the date of the decree was ascertained and specified in the decree, and the said amount and the amount of kanom was directed to be paid by the plaintiff prior to his obtaining possession of the lands from the defendants. The material portion of the decree was as follows:

"That upon the plaintiff depositing into Court within six months from this date the said kanom and value of improvements amounting in all to Rs. 13,149-8-9 to the credit of the persons mentioned above . . . the defendants do deliver up to the plaintiff . . . all documents in their possession or power, etc., and do retransfer the mortgaged property free from encumbrances, etc., and do put the plaintiff into possession of the said mortgaged property."

The plaintiff (decree-holder) deposited the said amount into the Court of the District Munsif and applied for execution of the decree by ejectment of the defendants from the lands specified in the decree. The decree-holder prayed, in the alternative, that

"if a Commissioner is appointed on the objection of the defendants that any Kuzhikar chamazams have been effected subsequent to the decree in the Kudiyruppus (occupied parambas), hills, etc., it may be directed that such lands may be retained and that after retaining these, the nilams, etc., on which no such improvements were made subsequent to the decree may be immediately delivered to him."

The defendants contend that no order of ejectment could be made until the value of improvements effected by them subsequent to the decree on any of the lands included in the decree was ascertained and the entire amount of compensation due to them had been deposited by the plaintiff into Court, under the provisions of section 6 (8) of the Malabar Compensation for Tenants Improvements Act (I of 1900). The District Munsif overruled this contention and directed the ejectment of the tenants from lands other than those on which the defendants claimed to have effected improvements subsequent to the

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decree. The defendants preferred an Appeal to the District Judge, who reversed the order of the District Munsif, holding that the defendants were entitled under the Act to remain in possession of all the lands until compensation due for improvement in any portion of them was ascertained and paid to them. The plaintiff preferred this Civil Miscellaneous Second Appeal.

C. V. Anantakrishna Ayyar and T. Eroman Unni for appellant.

C. Madhava Nayar and K. Kuttikrishna Menon for respondent.

SPENCER, J.

SPENCER, J.—In this case the appellant obtained a decree for ejectment of a tenant in South Malabar and, after depositing the amount ascertained as due to the tenant for improvements under the Malabar Improvements Compensation Act, applied before the District Munsif for execution of his decree by ejectment of the tenant from all the lands mentioned in the decree, or in the alternative he added that if the tenants claimed that any improvements had been effected subsequent to the decree in kudiyruppus, parambas and hills, execution might be granted of the other properties, that is, nilams (double crop lands), palliyals (single crop lands) and nattupoyils (seed-beds).

As observed by the District Munsif, this application for partial delivery was intended to be for the benefit of the tenants and to avoid further demands for compensation owing to delay in execution. The District Munsif granted the appellant's prayer and ordered delivery of the nilams, palliyals and seed beds, and directed that execution in regard to other items should wait. He also directed that the tenant should give security for any relief that might be obtained against him in execution before he took the amount deposited for the value of improvements.

The District Judge held that partial ejectment, before compensation was finally settled upon the other lands which were left in possession of the tenant, was contrary to the provisions of section 5 of the Malabar Tenants Improvements Act, and he therefore allowed the Appeal and directed the District Munsif not to grant the petitioner's prayer till he finally determined the question of valuation.

Section 5 of Madras Act I of 1900 provides that any tenant to whom compensation is due shall be entitled to remain in possession until ejectment in execution of a decree or order of Court. The section does not make the payment of the compensation a condition precedent to ejectment. Section 6 (b) contemplates re-valuation being calculated on the condition at the time of ejectment and provides that the decree shall be varied in accordance with such order of the Court executing the decree. It does not provide that ejectment shall be stayed until re-valuation is made.

There is an observation in *Chowakkaran Keloth v. Karuvalote Parkum*(1), that a tenant retains in Malabar his status as a tenant until the improvements are paid for; but in *Mayankutti v. Kunhanmad*(2), SADASIVA AYYAR, J., doubted the correctness of the statement, and I respectfully consider that it is not warranted by the language of the section. There is no provision in section 5 or in section 6 to the effect that until compensation is paid, no ejectment should be ordered. In the Full Bench, *Kannyan Paduvan v. Alikutti*(3), SESHAGIRI AYYAR, J., held that partial ejectment was not contemplated under the Act in any circumstances, but the majority of the Full Bench held that a lessor was not entitled to eject a tenant in Malabar from a portion of his holding while an assignee of the reversion could do so on payment of the value of improvements to that part.

The District Judge was not correct in his opinion that ejectment of a tenant could only be ordered after the final determination of the value of improvements. If that was the state of the law it would be possible for a tenant to postpone eviction perpetually by continually making fresh improvements while the enquiry into the last application for re-valuation was going on.

The appellant's (the execution-petitioner's) application for execution of the whole decree was not open to any objection, even though a petition for re-valuation might be pending, and the order actually passed by the District Munsif was, as already

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(1) (1915) 29 I.O., 559 at page 560. (2) (1918) I.L.R., 41 Mad., 641, 644.
(3) (1919) I.L.R., 42 Mad., 608 (F.B.).

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observed, a concession to the tenants whose consent was assumed to a course which would naturally be preferred to immediate eviction from the entire holding. The District Munsif's order requiring security to be given for any relief that might arise in the execution of the decree was not reasonable and must be set aside.

In the result the Appeal must be allowed, and the District Munsif's order will be restored with costs here and in the Lower Appellate Court.

RAMESAM, J. RAMESAM, J.—I will only add that, even if a plaintiff decree-holder who obtained a decree under the Act is not entitled to eject the defendant until he pays the sum mentioned in the decree for improvements, it does not follow that, when he pays the amount so mentioned to the defendant or (when he refused to take it) into Court, the mere fact that the defendant is asking for the further valuation mentioned in section 6 (8) operates as a stay of execution of the decree for ejectment or that an order for ejectment should not be made until the supplemental enquiry contemplated in section 6 (3) is made. None of the cases cited by the learned Counsel for respondents, *Kannan Baduvan v. Alikutti*(1), *Paramesara Ayyan v. Kittunni Valia Mannadiar*(2), *Abdulla Koya v. Kallumpurath Kanaran*(3), *Kunhikutti Haji v. Gower*(4), support such a proposition. I agree with my learned brother in doubting the correctness of *Chowakkaran Keloth v. Karuvolote Parkum*(5). I agree with the order proposed by him.

K.R.

(1) (1919) I.L.R., 42 Mad., 608 (F.B.). (2) (1917) 38 M.L.J., 591.
(3) (1917) 38 M.L.J., 463. (4) (1918) 24 M.L.J., 472.
(5) (1915) 29 I.C., 559 at page 560.

APPELLATE CIVIL.

Before Mr. Justice Napier and Mr. Justice Krishnan.

ELUMALAI CHETTY AND ANOTHER (DEFENDANTS 1 AND 2),
APPELLANTS,

1921,
March 31.

v.

P. BALAKRISHNA MUDALIAR (PLAINTIFF), RESPONDENT.*

Negotiable instrument accompanied by deposit of title-deeds—Endorsement of negotiable instrument without transfer of equitable mortgage by registered instrument—Right of endorsee to enforce the mortgage.

The endorsee for value of a negotiable instrument, the amount of which had been secured by a mortgage by deposit of title-deeds, cannot claim to enforce the mortgage in the absence of a registered instrument conveying the mortgage right to him. *Perumal Ammal v. Perumal Naicker*, (1921) I.L.R., 44 Mad., 196, dissented from.

SECOND APPEAL against the decree of R. NARASIMHA AYYANGAR, Temporary Subordinate Judge of Chingleput, in A.S. No. 42 of 1919, preferred against the decree of T. SUNDARAM AYYAR, District Munsif of Tiruvallūr, in O.S. No. 924 of 1917.

Defendants 1 and 2 were indebted to Messrs. Oakley Bowden & Co. to the extent of Rs. 500, on account of purchase of iron, and deposited with them as security for the payment of the amount the title-deeds of their properties. They also executed a promissory-note for the amount and an unregistered memorandum which recited their liability, the execution of the promissory-note, and an undertaking that they would be liable for the payment of the amount both by means of the secured properties and personally. The Company endorsed the promissory-note to the plaintiff and handed over to him the title-deeds. In a suit to recover the amount due on the note by the sale of the properties secured, the defendants pleaded *inter alia* that the memorandum amounted to a simple mortgage, that it was not admissible in evidence for want of registration, that as it evidenced the terms of the contract no other proof *aliunde* could be let in to prove the equitable mortgage claimed by the plaintiff, and that in any

* Second Appeal No. 527 of 1920.

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event the plaintiff was not entitled to a mortgage decree for want of a registered document transferring the security. The Court of first instance held that an equitable mortgage was created by the independent deposit of the title-deeds anterior to the execution of the memorandum, that evidence of the equitable mortgage was therefore admissible, that the memorandum did not amount to a simple mortgage and did not require registration, and that the plaintiff became the transferee of the security by the receipt of the title-deeds from the Company, even without any registered deed transferring the security to him, as was held in *Dwarka Doss v. Danakoti Ammal*(1). The Court accordingly gave a mortgage decree as prayed for. On Appeal by the defendants, the Subordinate Judge agreed with the first Court in every other respect but held that the memorandum was a simple mortgage and was inadmissible in evidence for want of registration. He accordingly dismissed the Appeal. The defendants thereupon preferred this Second Appeal to the High Court.

P. Duraiswami Ayyangar and *S. Ramaswami Ayyangar* for appellants.

E. Duraiswami Ayyar and *T. N. Srinivasa Sastri* for respondents.

The Court delivered the following JUDGMENT:—

Following the ruling in *Muthia Chetty v. Kothandaramaswami Chetty*(2) on the point, we agree with the lower Appellate Court that evidence was admissible to prove the terms of the mortgage by deposit of title-deeds *aliunde*, in spite of the subsequent so-called simple mortgage, and that section 91 of the Evidence Act is no bar to the reception of the evidence. It is contended, however, that the assignment to the plaintiff did not vest the mortgage, as there was no registered instrument. It is suggested that the transfer was a sale within section 54 of the Transfer of Property Act. We do not think that that is clear. It may be that the transfer was for collection only, in which case, *Cuniah v. Gopala Chettiar*(3) would have to be

(1) (1914) 28 I.C., 139.

(2) (1916) 81 M.L.J., 847 at 858.

(3) (1919) 26 M.L.T., 242.

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considered. We must therefore call for a finding on this point. Fresh evidence is allowed. Two months are allowed for submission of findings and ten days for objections.

[In compliance with this order the Subordinate Judge of Chingleput submitted a finding that the endorsement was not for collection but was for value. Their Lordships then delivered the following JUDGMENT:]

KRISHNAN, J.—The first question that arises for our decision in this Second Appeal is whether an endorsee for value of a negotiable instrument, the amount of which had been secured by a mortgage by deposit of title-deeds, can claim to enforce the mortgage in the absence of a registered instrument conveying the mortgage rights to him.

A somewhat similar question arose before the learned Chief Justice and my learned brother with reference to an endorsee for collection in *Cuniah v. Gopala Chettiar*(1), and was answered in the endorsee's favour. That decision, however, is not conclusive in this case, as here we have an endorsee for value and the judgment of my learned brother in that case was based entirely on the fact that the endorsement was for collection; and though the learned Chief Justice makes no such distinction, my learned brother did not apparently agree with his Lordship's views. Sitting with HUGHES, J., the learned Chief Justice has again stated his view in *Perumal Ammal v. Perumal Naicker*(2), that though the rule is now that a mortgage right or debt cannot be transferred without a registered instrument under section 54 of the Transfer of Property Act it is subject to the exception, that

"where the law still admits of the separate transfer of the mortgage debt, as by the endorsement of a promissory-note secured by a deposit of title-deeds or by the attachment and sale in execution of a mortgage debt, section 8 of the Transfer of Property Act still operates to carry the security with it."

We are, of course, not concerned with court sales of mortgage debts or their effect in this case; that will be governed by the special provisions of the Code of Civil Procedure. The observation regarding promissory notes is clearly an *obiter dictum*,

(1) (1919) 26 M.L.T., 242.

(2) (1921) I.L.R., 44 Mad., 196.

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if I may say so with respect; and though the opinion of the learned Chief Justice is entitled to great weight, there is no decision binding on us and we must, therefore, consider the question raised before us on its merits.

It seems to me quite clear that a mortgage of immoveable property is itself immoveable property under the Transfer of Property Act, whatever the form of the mortgage may be; and transfer of ownership of such a right falls under section 54 and will require a registered instrument for the purpose: vide *Sakhiuddin Saha v. Sonaulah Sarkar*(1) and *Perumal Ammal v. Perumal Naicker*(2). It is true that the Chief Justice sitting on the Original side as WALLIS, J. (as he then was) held, relying on section 8 of the Act, that the transfer of a mortgage was the transfer of the debt with its attendant securities and that registration was, therefore, unnecessary for the transfer of the mortgage, vide *Dwarka Doss v. Danakoti Ammal*(3). There was some conflict of opinion on the point: see *Subramanian v. Perumal Reddi*(4) on one side and the opinion of BASHYAM AYYANGAR, J., in *Ramasami Pattar v. Chinnan Asari*(5) and the decision of CHAMIER, J. (as he then was) in *Mutsaddi Lal v. Muhammad Hanif*(6) following it, on the other side. In this conflict of view the Legislature amended the Act in 1900 and excluded a mortgage debt from the category of actionable claims. The object was plainly to remove mortgage debts from the scope of section 8, which speaks of "debt or other actionable claim," and to make it necessary to have a registered instrument for its transfer. It was on the application of section 8 that it was held that the transfer of a mortgage did not require registration, and with the non-applicability of the section resulting from the amendment one would have thought that all doubts regarding the necessity of having a registered instrument for the transfer of a mortgage right in all cases would have been removed. But the learned Chief Justice thinks, as stated above, that though the rule is now clear with reference to mortgage debts in general, there is still an exception in favour of mortgages by deposit of title-deeds where promissory notes have also

(1) (1918) 22 C.W.N., 641.

(3) (1914) 23 I.C., 129.

(5) (1901) I.L.R., 24 Mad., 449.

(2) (1921) I.L.R., 44 Mad., 196.

(4) (1895) I.L.R., 18 Mad., 454.

(6) (1912) 10 A.L.J., 167.

been taken for the mortgage amounts. With every respect for his Lordship's opinion I find it difficult to follow it. It is clear from his judgment in the case that he would have held that a registered instrument would be necessary to convey the mortgage rights even in a case of a mortgage by deposit of title-deeds if no negotiable instrument had been taken for the mortgage amounts. Does the taking of the negotiable instrument make any difference on the point? I think not, as the mortgage debt is none the less a mortgage debt because it happens to be also a promissory note debt. If it is a mortgage debt, section 8 cannot apply to it and the whole argument based on the section fails.

The fact that the promissory note can be transferred by endorsement, it seems to me, does not make any real difference to the question before us. When the note amount is so transferred, it seems to me, it is not transferred as a secured debt at all. The Negotiable Instruments Act makes no provision with reference to securities. In my view, it is only if a mortgage debt is transferred as a secured debt that it will carry the securities with it, on the principle embodied in section 8, and not otherwise. Even in the case of a mortgage where there is no promissory note it cannot, I think, be said that the law does not allow the mortgagee to transfer the debt as an unsecured or simple debt without a registered instrument if he thinks fit to do so. The security is for his benefit and he can give it up if he likes; and the transferee will then get the right to the debt but not to the security. Thus, as regards transferability in law as an unsecured debt, a mortgage debt for which a negotiable instrument has been taken does not seem to me to differ fundamentally from one where none such has been taken. In my view, in either case, if the debt is transferred by endorsement or otherwise, without the transferor taking care to transfer the mortgage right by registered instrument, the debt and the security will get dissociated and the security may possibly cease.

If we are to hold that the security passes by the endorsement of the promissory notes in cases of mortgages by deposit of title-deeds where notes have been taken for the mortgage amounts, we must hold the same view with reference to any kind of mortgage where the mortgagee happens to have taken

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a promissory note for the mortgage amount; for the argument will be just the same. We will also have to hold that not only the first endorsee but every subsequent endorsee including even blank endorsees will obtain the mortgage rights by endorsement unless, of course, a different intention is manifest. This view, I think, will introduce a grave uncertainty into the registration of mortgages and render the records of the registration office unreliable in ascertaining in whom the mortgage right subsists for the time being. Such a view, therefore, does not commend itself to me. If I am right in thinking that section 8 does not apply to mortgage debts, there is no scope for the application of the maxim *generalia specialibus non derogant*. But if it did apply, I am inclined to think it would make section 54 of the Act override section 8 rather than the other way; for section 8 refers to all kinds of securities, whereas section 54 so far as it is relevant, refers only to a limited class of securities, *vis.*, mortgage securities: see *Mutsaddi Lal v. Muhammad Hanif*(1) above quoted.

No valid argument can be based on the alleged anomaly of holding that the transfer of a mortgage by deposit of title-deeds requires registration when the creation of it does not; for that seems clearly to be the law, at any rate where there is no promissory note involved.

After careful consideration I have come to the conclusion, though not without hesitation on account of the opinion of the learned Chief Justice to the contrary, that the endorsee of a negotiable instrument does not get any right to the mortgage by deposit of title-deeds in his endorser's favour by the mere endorsement of the note, without a registered transfer of the mortgage rights.

On this view it is argued that the District Munsif had no jurisdiction to try the suit, as his jurisdiction was based solely on the fact that some of the lands mortgaged were within his jurisdiction. It is contended that on the finding that the mortgage rights did not pass to the plaintiff the Court lost jurisdiction. That is not so; jurisdiction has to be judged on the averments in the plaint, unless indeed an averment has

been fraudulently made for the express purpose of giving jurisdiction. There is no such allegation here. Jurisdiction does not depend upon the relief the Court finds itself able to give after trial. The jurisdiction of the Court in this case is, therefore, not affected by the view I am taking; but the decree so far as it gives relief against the property mortgaged must be set aside.

There will be a personal decree only against defendants 1 and 2 for the amount found due and interest at 6 per cent from date of suit to date of payment. The rest of the suit is dismissed. The order as to costs in the first Court will stand, but the parties will bear costs in this and the Lower Appellate Court.

NAPIER, J.—I agree. I had already prior to the hearing of the case before the Learned Chief Justice expressed my opinion in an unreported case I saw no reason to alter it during the argument in that case nor do I now.

N.B.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice
Coutts-Trotter.

GOVINDASAMI PILLAI (ASSIGNEE-DECREE-HOLDER),
PETITIONER, APPELLANT,

v.

DASAI GOUNDAN AND ANOTHER (JUDGMENT-DEBTORS),
RESPONDENTS.*

1921,
April, 19.

Limitation Act (IX of 1908), sec. 20—Execution of decree for sale—Part of the hypotheca taken up under the Land Acquisition Act—Compensation paid into Court—Payment of amount to decree-holder through Court—Paper showing payment, signed by Judge—Judge, whether an agent of judgment-debtor—Signature of Judge, whether sufficient under section 20.

After a decree for sale on a mortgage was passed in 1912, a part of the hypothecated property was taken up under the Land Acquisition Act, and the

* Appeal against Order No. 64 of 1920.

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Government paid the amount of compensation into Court to the credit of the suit; and the same was paid out to the decree-holder on the 11th August 1914. When the payment was made the Judge signed a paper showing that payment was made in his presence and through Court. On the decree-holder filing an application for execution of the decree on the 10th August 1917, the judgment-debtor pleaded the bar of limitation.

Held, that the Judge should be deemed to have been an agent duly authorized by the judgment-debtor to make the payment, and that the signature of the judge on the paper showing the payment satisfied the condition that the fact of payment should appear in the handwriting of the person making it, as required by section 20 of the Limitation Act; and that, consequently, the application for execution was not barred.

Chinnery v. Evans, (1864) 11 H.L. Cas., 115, applied; *Lakshmanan Chetty v. Sadayappa Chetty*, (1918) 85 M.L.J., 571, referred to.

APPEAL against the order of D. G. WALLER, District Judge of Coimbatore, in Execution Petition No. 15 of 1917, in Original Suit No. 60 of 1910.

The material facts are set out in the judgment of SADASIVA AYYAR, J.

N. S. Rangaswami Ayyangar, K. S. Krishnaswami Ayyangar and P. S. Ramaswami Ayyangar for appellant.

T. M. Krishnaswami Ayyar for respondents.

SADASIVA
AYYAR, J.

SADASIVA AYYAR, J.—The assignee-decree-holder is the appellant. The following are the relevant facts and dates: On 20th September 1912 the final decree for sale of the hypothecated properties was passed. Items 4 and 5 of the hypothecated properties were afterwards acquired by the Government under the Land Acquisition Act and Rs. 2,400 (compensation money) was deposited in Court for the Government on 11th August 1914 to the credit of the suit. The decree amount with interest on that date amounted to Rs. 3,926 according to the decree-holder. The decree-holder drew the compensation amount of Rs. 2,400 from the Court on 11th August 1914 and he filed the present execution application for sale of two other hypothecated items on 10th August 1917. The questions for consideration are (1) whether the execution petition is barred by limitation and (2) what was the balance due under the decree, whether it was Rs. 500 and odd with interest from 11th August 1914 as claimed by the decree holder or a lesser sum, and if so, what sum?

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The Lower Court on 30th September 1913 held on the second point that only Rs. 103-7-8 was the sum due on 11th August 1914 under the decree. On the first point it held that because on 11th August 1914 the compensation amount, Rs. 2,400, was paid to the decree-holder on account of the decree by consent of the judgment-debtors, section 20 of the Limitation Act gave a fresh starting point of limitation and hence the execution petition of 10th August 1917 was not barred by limitation. It accordingly directed execution to issue for the Rs. 103 and odd with interest. This Appeal by the decree-holder was based on the ground that really Rs. 500 and odd was due and not merely Rs. 103 and odd on 11th August 1914 under the decree. Having heard both sides and gone through the records I agree with the Lower Court in its conclusion that only Rs. 103 and odd was really due on the above date. So the Appeal fails and has to be dismissed with costs.

But there is a Memorandum of Objections filed by the first defendant (the judgment-debtor) and the contentions in that Memorandum are:

1. The learned Judge ought to have held that the payments made ex parte having reference to their nature and mode did not come within section 20 of the Limitation Act and the execution petition was therefore barred.

2. The Courts below ought to have held that even otherwise the decree has been fully satisfied by payments made.

As regards the second contention, that full satisfaction had been made, there is nothing in it and the District Judge was right in finding that Rs. 103 and odd still remained due on 11th August 1914.

The much more important contention remains, namely, that "the payment made ex parte" in August 1914 did not come within section 20 of the Limitation Act and could not therefore save limitation. Section 20 of the Limitation Act (omitting the words unnecessary for the decision of this case) is as follows:

"Where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when the payment was made; provided that in the case of part-payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making

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the same. Explanation. Debt includes money payable under a decree."

The payment of Rs. 3,400 was clearly part-payment of the principal of the decree debt. But two other questions remain to be considered, namely, (1) whether the fact of the payment appears in the handwriting of the person making the same, (2) whether the payment was made by the debtor or by his agent duly authorized in that behalf.

On the first question, the decree-holder in the case produced before us copies of Court records showing that when the Rs. 3,400 was paid out, the Judge signed a paper indicating that Rs. 3,400 was paid to the decree-holder in the presence of the Judge and through the Court. I think this record sufficiently satisfies the condition that the fact of payment should appear in the handwriting of the person making the same.

The only question that remains therefore for consideration is whether the Judge can be called an agent duly authorized by the judgment-debtor to make the payment.

Notwithstanding some obiter dicta of their Lordships of the Privy Council based on English decisions that the reason why an acknowledgment of indebtedness gives a fresh starting point for limitation is that it gives a fresh cause of action by reason of its implying a fresh promise to pay, I am clear that the provisions in sections 19 and 20 of the Indian Limitation Act could not have been based upon any such fiction of an implied new promise to pay. Under section 19, Explanation 1, an acknowledgment signed by the party liable is sufficient even when accompanied by a refusal to pay, whereas, in consequence of the fiction of an implied promise to pay being necessary under the English decisions, an acknowledgment accompanied by a refusal to pay is insufficient under the English law to afford a fresh starting point for limitation, as that fiction of an implied promise to pay becomes still-born in consequence of such refusal to pay. I think the Indian law must be held to have required the handwriting of the person making the payment merely in order to exclude fraudulent oral testimony as to such payment, just as the Statute of Frauds tried to prevent Courts being flooded with perjury in the case of sales of goods, etc. The fiction of an implied promise to pay and

the accrual of a new cause of action by an unregistered acknowledgment of a payment of interest as such would not help mortgage creditors to obtain decrees for sale as the new promise not being evidenced by a registered deed cannot be made to affect immoveable property. The law of limitation is partly intended to promote diligence on the part of creditors in the matter of recovery of their debts. The concessions made in favour of creditors by the provisions of sections 19 and 20 of the Limitation Act are intended to express the view of the legislature that a creditor will not be considered wanting in such diligence in bringing his suit, and he will not be penalised by the bar of limitation if he has been diligent enough to get the handwriting of the debtor to evidence an acknowledgment or the fact of part-payment within the period of limitation.

Provided therefore the evidence of the payment is in a writing binding on the debtor, it seems to me that the object of the legislature is satisfied, and in construing the words "agent duly authorized" the Courts ought, in my opinion, to be as liberal as possible. Section 21(1) of the Limitation Act says that the expression "agent duly authorized in this behalf" in sections 19 and 20 shall,

"in the case of a person under disability include his lawful guardian, committee or manager or an agent duly authorized by such guardian, committee or manager to sign the acknowledgment or make the payment."

This shows that the authorization need not be a voluntary authorization; for, the guardian of a person under disability does not get his authority through any voluntary act of the person under disability but by law. In *Rughoo Nath Doss Cookman v. Ranees Shiromanee Pat Mohadebee*(1) there is a sentence as follows:

"As regards the sale made on the 8th March 1869 from which a sum of Rs. 206 was realized we think that cannot be considered a part-payment under section 21 so as to give a new period of limitation."

Section 21 considered therein was section 21 of Act IX of 1871 which is similar to section 20 of the present Limitation Act, so far as the question under consideration is concerned.

(1) (1875) 24 W.R., 20.

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No reasons are given for the opinion. Further, the point whether the condition as to the payment appearing in the handwriting of the person making the payment or his duly authorized agent was not raised or considered in that case. In *Ramchandra Ganesh v. Devba*(1) no judgment was given and the Court discharged the rule granted in favour of the decree-holder without giving any reasons. Whether the Court intended to adopt all or only some of the arguments advanced by the vakil for the judgment-debtors as found in the report does not appear. One of such arguments was that an acknowledgment must have contained an express or implied promise to pay, quoting English decisions. I have shown that those decisions are inapplicable in construing the Indian Limitation Act. Of course from an involuntary payment a promise to pay the balance cannot be implied. *Rughoo Nath Doss Cookman v. Ranees Shiromanee Pat Mohadebee*(2) was also quoted in that case, not in the arguments before the High Court but only by the Lower Court in support of its opinion. It appears from the report that the payment relied upon was not part-payment of the principal in the handwriting of the person making the payment but payment of interest, and it was argued by the creditor that the recovery of rent decreed in a suit brought by the usufructuary mortgagee on a bond providing for payment of rent in lieu of interest was payment of interest on the mortgage bond. The defendants argued that the payment in satisfaction of the decree passed for rent is not a payment to the creditor of interest as such. It may be that this argument was accepted and so the rule was discharged by the Bombay High Court on that ground. I am unable therefore to accept the head-note of the Reporter as really representing the opinion of the Judges in that case. In *Oudh Bihari Pande v. Mahabir Sahai*(3), the only question decided was that because the part payment by sale in execution of the judgment-debtor's property did not appear in the handwriting of the judgment-debtor it could not save limitation. In *Brew v. Brew*(4), decided by four Judges, on the language of a Statute which requires that,

(1) (1882) I.L.R., 6 Bom., 626.
(3) (1909) I.L.R., 31 All., 590.

(2) (1875) 24 W.R., 20.
(4) [1899] 2 I.R., 163.

"some part of the principal money or some interest thereon shall have been paid or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable or his agent" in order to save limitation, the Court followed the principle of the decision in *Chinnery v. Evans*(1). In that case, the payment by a Receiver appointed under the Mortgage Act was held to be payment by the agent of the person liable to pay, though the Receiver was appointed by the Court and not by the mortgagor and was appointed for the benefit of the mortgagee to receive "for him particularly" the rents of the mortgagor's property. JOHNSON, J., says in *Brew v. Brew*(2):

"Whether it is by the agency of a Receiver or Sheriff, the payment is made to the creditor on foot of the debt which the debtor is bound in law to pay, and of the debtor's rents or chattels as the case may be for the debtor and on his account; to the extent of such payment the debtor is discharged from so much of the judgment debt. I therefore think that such payments by a sheriff are not payments by a stranger to the judgment-debtor but are payments out of the debtor's chattels 'by a person paying for him and on his account what he is bound to pay.' [Lord CRANWORTH in *Chinnery v. Evans*(1).]"

In *Lakshmanan Chetty v. Sadayappa Chetty*(3), a Bench of this Court held that an acknowledgment of a debt made by a Receiver appointed by the Court on behalf of a firm under dissolution is a valid acknowledgment, saving limitation by reason of the provisions of section 19 of the Limitation Act, as he was an agent authorized to make the acknowledgment.

If a Sheriff of the Court making the payment can be considered an agent of the debtor I see nothing in principle or reason which should prevent me from holding that a Court paying in the course of its duty the money due by the judgment-debtor is also a legally constituted agent of the judgment-debtor for that purpose.

In the result I think that the requirements of section 20 are satisfied and I would dismiss the Memorandum of Objections also with costs.

(1) (1864) 11 H.L.Cas., 115.

(2) [1899] 2 I.R., 163.

(3) (1918) 35 M.L.J., 571.

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COUTTS TROTTER, J.—I entirely agree. My lord has covered the ground so thoroughly that I only propose to add a word on the last point. I think the principle deducible from *Chinnery v. Evans*(1), is this : that if a debtor's assets are so placed either by his own act or by operation of law, that, if some one other than he alone can release them for the purpose of making payments due from him, then the act of that other in operating upon the debtor's assets must be treated as the act of the debtor himself, the volition of the debtor in such a case being neither requisite nor relevant. If that be so, it appears to me that the words "his agent duly authorized in that behalf" in section 20 of the Limitation Act are satisfied by the act of the Judge of the Court which authorizes the payment; and that his handwriting is rightly described as that of the person making the payment.

K.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Krishnan.

1921,
May 4.

RAJAH MUTHU KRISHNA YACHENDRA BAHADUR
(DEFENDANT), APPELLANT,

v.

W. H. NURSE (FIRST PLAINTIFF), RESPONDENT.*

Vakil—Suit on the Original Side of the High Court—Fees, non-payment of—Duty of vakil to take necessary steps in the suit—Written statement not filed in time—Refusal of vakil to file, because his fees were not paid—Refusal of vakil to consent to transfer of case to another vakil—Application for change of vakil—Order of Court—Delay in filing written statement, whether excusable—Rules of Practice, Original Side, of the High Court, rule 48.

A vakil engaged in a suit on the Original Side of the High Court is not entitled to refuse to take a necessary step in the suit on the ground that his own fees had not been paid, and at the same time refuse his consent to a change of vakalat to another vakil.

(1) (1884) 11 H.L. Cas., 115.

* Original Side Appeal No. 10 of 1921.

Delay in filing a written statement within the time fixed by the rules of the High Court caused by such refusal on the part of the vakil on the record was excused.

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ORIGINAL SIDE APPEAL preferred against the order of PHILLIPS, J., in Original Testamentary Jurisdiction T.O.S. No. 19 of 1920.

This was an Appeal against an order of PHILLIPS, J., in certain probate proceedings on the Original Side of the High Court. The respondent applied for the probate of an alleged will of the late Raja Venugopal Bahadur. The appellant, who is the brother of the testator, filed a caveat through certain vakils, and the matter was ordered to be tried as a suit under section 83 of the Probate and Administration Act. The vakils, who had been engaged by appellant to conduct the whole proceedings, did not file the written statement within the time fixed by the Rules of Practice, Original Side. They alleged that though the appellant had agreed to pay them the full amount of their fees before the written statement was filed, he had paid them only a portion of the fees. The appellant then engaged another vakil to prepare the written statement and the latter filed it on the last day allowed by the rules without the consent of the former vakils. This was returned by the Court as there had been no change of vakils and the consent of the former vakils was wanting. The appellant thereupon applied to the Court for a change of vakils. This was allowed on condition of payment of a certain sum of money to the former vakils. This amount was paid as directed. The suit having been previously ordered to be posted as an undefended suit, the defendant applied to the Court to treat the written statement already filed by him as properly presented or if necessary to excuse the delay in presenting the same under rule 48 of Rules of Practice (Original Side). PHILLIPS, J., refused to consider it as presented in time or to grant an indulgence and excuse the delay. Against that order this Appeal was preferred.

The Advocate-General, K. Raja Ayyar, K. Krishnaswami Ayyangar and T. Kumaraswamiah for appellant.

R. N. Ayyangar, for respondent.

WALLIS, O.J.—This is an Appeal from an order of PHILLIPS, WALLIS, O.J. J., refusing leave to file a written statement which was out of time,

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and raises a question of considerable importance. The cause of the delay was that the defendant's vakils refused either to file the written statement themselves or to consent to another vakil being brought on the record unless they were paid Rs. 1,000 towards the costs of the suit which they alleged the defendant had agreed to pay at this stage of the case. In these circumstances, the defendant was precluded by the Original Side Rules from filing the written statement himself or getting another vakil to file it. I take the facts from the vakil's own counter-affidavit in answer to the application for a change of vakil. The change was eventually ordered by consent upon the defendant paying the vakils Rs. 500, but the written statement was then out of time, and, as I have already said, the learned Judge has refused to excuse the delay. Now I may say at once that I have come to the conclusion, upon a consideration of authorities which were not cited to the learned Judge, that the defendant's vakils were not justified in refusing themselves to file the written statement in time or to allow another vakil to do so and that the defendant ought not to be prejudiced by their conduct. In this Court, vakils are allowed to act as well as plead on the Original Side, and as regards acting are very much in the same position as solicitors in England. Now, it is I think well settled in England that attorneys or solicitors are not entitled to refuse to go on with an action for want of funds, unless they have given their clients sufficient notice of their intention to enable him to make other arrangements. The rule is laid down even without this limitation in "*Observations addressed by Lord Westbury on behalf of the Lords of the Privy Council to a solicitor of the Court*" (1) with reference to an Indian Appeal:

"It is the duty," said Lord WESTBURY, "of a solicitor who has once undertaken to conduct a cause to carry it to a conclusion, and he cannot refuse to do that duty by reason of the client not having complied with any application that may have been made to him."

This was the old common law rule, as stated in Tidd's Practice, 9th edition, page 86, but it had also been held by Lord TENTERDEN, in *Rowson v. Earle* (2) and by TINDAL, C.J., in *Lawrence v. Potts* (3) and in *Vansaradan v. Browne* (4) that an attorney was entitled

(1) (1863) 4 B.L.R., 29 (P.C.).

(3) (1834) 6 C. & P., 428.

(2) (1829) Mood. & M., 588.

(4) (1832) 9 Bing., 402.

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to refuse to go on unless he were put in funds provided that he gave his client sufficient notice of his intention not to go on. The question was again considered in *Underwood, Son & Piper v. Lewis* (1) in which Lord ESHER laid down that a solicitor accepting a retainer was bound to go on in the absence of good cause, such as a refusal by the client to find the money for necessary disbursements, which term did not include his own costs. These cases are entirely opposed to the view that a vakil is entitled to refuse to take a necessary step in the case, because his own fees have not been paid, and at the same time refuse his consent to the transfer of the case to another vakil. It is true that on the common law side an attorney could resist a change of attorneys unless his costs were paid, by which must be understood his costs for work already done in the action, not as in the present case an agreed payment towards the general costs of the action. On the equity side a change of solicitors was allowed without insisting on the payment of costs, and this equitable rule has been held to prevail by reason of the provisions of the Judicature Act and is now embodied in Order VII, rule 8 of the Supreme Courts Rules; but even the common law rule must be read in the light of the other rule already mentioned, that it is the solicitor's duty to go on if put in funds to meet out of pocket expenses. I may further observe that the rules requiring pleadings to be filed promptly were passed to avoid delays in the disposal of the business of the Court and not as a means of enabling practitioners to obtain prompt payment of their fees, and that no previous instance of their being used for this purpose appears to have come before the Courts either in England or in India. It is also unnecessary and undesirable that they should be used for such a purpose, as solicitors and vakils are otherwise sufficiently protected. They can insist on payment of their fees in advance, or rely on their lien on the client's papers and on the fruits of the litigation as well as on their right to sue for their fees. They are also in a better position than Barristers, who cannot sue at all, and than first and second grade pleaders who under the Legal Practitioners Act cannot recover on special agreements unless they are in writing and filed in Court and then only to the extent to which they are

(1) [1894] 2 Q.B., 306.

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reasonable. It has also been argued before us that we should not interfere because the defence is a frivolous one. That however is a question to be decided at the trial. We must allow the appeal and give leave to file the written statement with costs of this appeal.

KRISHNAN, J.

KRISHNAN, J.—This Appeal arises from certain probate proceedings on the Original Side of this Court. The respondent applied for the probate of an alleged will of the late Raja Venugopal Bahadur. On citations being issued, the appellant, Raja's brother, filed a caveat and the matter was then ordered to be tried as a suit under section 83 of the Probate and Administration Act, with the respondent as plaintiff and the appellant as defendant. The Appeal is against the order of the trial Judge refusing to grant extension of time to the defendant for filing his written statement in that suit.

The circumstances that led to the application for extension are as follows: The last day under the rules for filing the written statement in the case was the 1st of November. It would appear from the defendant's vakil's affidavit that the defendant had agreed to pay a vakil's fee of Rs. 1,000 for the suit before the filing of the written statement. By the 1st of November only a portion of the money had been paid and though the vakils had prepared a written statement they refused to file it without their balance fee being paid. The appellant had some difficulty in finding the money at such a short notice, and he therefore went and engaged another vakil and got him to file a written statement in time, hoping thereby to save his defence.

Unfortunately for him under the Rules of Practice on the Original Side that written statement could not be accepted as properly filed without an order of Court for a change of vakils, and the written statement was therefore returned and the case placed on the undefended board. His vakils on record refused to give their consent to any addition or change of vakils without their fee being paid in full, and by their conduct they effectively prevented defendant from prosecuting his defence. An application was thereupon made for a change of vakils and the learned trial Judge allowed it on condition that the appellant should pay Rs. 500 to his former vakils and the money was paid.

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This was on the 22nd of November. The case came on for hearing on the 23rd, and though the defendant's written statement had been actually filed on the 1st of November it could not be treated under the rules as properly filed till the order for change of vakils was obtained, and was thus out of time. The defendant therefore applied for extension of time to cure the defect under rule 48 of the Rules of Practice. It was that application that was refused by the learned Judge with the result that the order for change of vakils granted by him the previous day was rendered altogether useless.

Now, it seems to me that the delay in filing the written statement was due more to the mistaken action of the defendant's vakils in refusing to file it without being paid their fee in full than to any wilful default on the defendant's part. I agree with the learned Chief Justice that the action of the vakils was not justifiable and that the rules were not intended for the purpose of enabling the vakils to force their clients to pay their fees at the risk of having their cases dismissed by the Court. The learned Chief Justice has dealt with this point fully and referred to all the authorities on it, and as I agree with him I do not propose to dilate on it. When therefore the vakils refused to file the written statement on the last date for it, I think the defendant was justified in seeking the help of another vakil to file it and the subsequent delay, which was solely due to his having to obtain the order of Court for a change of vakils to enable his new vakil to act for him, should not be used to his prejudice. The Court having subsequently actually ordered the change, it seems to me that the delay should not be pressed against him, at any rate, so stringently as to lead to his defence not being heard.

Furthermore, there is the fact that this is a testamentary suit, the judgment in which will be binding not only on the parties but on all the world as a judgment *in rem*, under section 41 of the Evidence Act. In such a case it seems to me the Court ought to be slow in refusing to hear the defence as it might prejudice not merely the defaulting defendant but others as well.

These important considerations were not brought to the notice of the trial Judge when he refused the extension applied for. Though in matters of discretion we should be slow to

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interfere with the order of the trial Judge, it seems to me that this is a case where we are justified in interfering.

I therefore agree to the order proposed by the learned Chief Justice.

Solicitors for respondent: *King and Partridge.*

K.H.

APPELLATE CIVIL.

*Before Sir John Wallis, Kt., Chief Justice, and
Mr. Justice Krishnan.*

GOPALA VENKANNA (PLAINTIFF). APPELLANT,

v.

GOPALA NARASIMHAM AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Hindu Law—Widow—Husband's estate—Inheritance—Moveable property—Corpus—Waste of corpus—Reversioners, right of—Suit by reversioners to prevent waste—Suit against widow and her alienees without consideration—Receiver—Right to place property in hands of Receiver—Liability of alienees to replace moveable corpus in their possession—Accountability of widow as to corpus—Nature of accountability—Duty of widow to replace corpus, if in her possession—Right to enjoy income of such property—Limitation Act (IX of 1908), art. 120.

A Hindu widow inheriting moveable property of her husband is not entitled to commit waste of the corpus of such property.

Where she commits waste of the corpus of such property, the nearest reversioner is entitled to file a suit praying that such corpus may be reduced into possession and handed over to a receiver appointed in the suit; the transferees from the widow without consideration can be directed to replace any part of the corpus of the moveable property which can be traced into their hands, and the widow herself made accountable for waste in the sense of making her replace the moveable corpus of her husband's estate which she has made away with, if she is in a position to do so, allowing her to enjoy the income of the fund so replaced.

Article 120 of the Limitation Act applies to such a suit.

Nobin Chunder Chuckerbutty v. Iscur Chunder Chuckerbutty, (1868) B.L.R. Sup. Vol., 1008 (F.B.); s.c., 9 W.R., 505 (F.B.), and *Rudha Mohan Dhar v. Ram Dad Dey*, (1869) 3 B.L.R., 362, referred to. *Sinclair v. Brougham*, [1914] A.C., 398, applied.

APPEAL against the judgment of T. A. NARASIMHA ACHARIYAR, Temporary Subordinate Judge of Visagapatam, in Original Suit No. 14 of 1913.

* Appeal No. 165 of 1918.

The plaintiff, as the nearest reversioner to the estate of his brother, Ramamurti Chetti, instituted this suit against the first defendant, who was the widow, the second and third defendants who were her brothers, and the fourth defendant who was alleged to be the adopted son. The suit was for a declaration that the will which was set up by the first defendant as having been executed by her husband was a forgery, and that a transfer to her brother, the second defendant, of a mortgage-debt for Rs. 8,000 belonging to her husband, was a sham and nominal transaction not binding on the plaintiff. The plaintiff prayed that, the widow having committed many other acts of waste, a Receiver should be appointed to prevent further waste of the estate which was comprised mostly of moveable properties, bonds, cash and jewels. In the alternative, he prayed for security being taken from the defendants and for the grant of a permanent injunction against further waste. Plaintiff further prayed that the defendants should be directed to render an account as to what they had done in respect of all the assets of his late brother. The fourth defendant was alleged to have been adopted to her husband by the first defendant in 1917, four years after the institution of the present suit, and an additional issue was raised regarding the truth and validity of the adoption. The Subordinate Judge found that the will set up was not genuine, that the adoption was not valid, and that the widow (the first defendant) had, in collusion with her brothers, the second and third defendants, committed various acts of waste of the corpus of her husband's estate. He found in effect that the first defendant, who had inherited about Rs. 45,000 from her husband in 1907, had, according to her own evidence, spent and disposed of nearly the whole of it in five or six years. The Subordinate Judge refused to appoint a Receiver as a primary relief, but granted an injunction against the widow and her brothers not to cause further waste of the estate, and directed that the first defendant should furnish security for Rs. 11,000 cash and 150 tolas of gold ornaments which he found to be still in her possession, and further directed that the second defendant should furnish security for the full amount of the mortgage-bond transferred to him by the first defendant. On their failing to furnish security within one month, the decree provided that the plaintiff was appointed Receiver to take possession of the

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NARASIMHAM. cash and jewels from the first defendant, and the mortgage-bonds from the second defendant, and that the Receiver should pay the interest accruing due from the estate into the hands of the first defendant yearly subject to the further orders of the Court. Against this order defendants 1 to 4 filed an Appeal (Appeal No. 152 of 1918) which was dismissed by the High Court.

The plaintiff preferred this Appeal against the decree of the Subordinate Judge in so far as it refused to appoint a Receiver, and to make first defendant accountable for wasting the property of her husband which came into her hands, and to make defendants 2 and 3 accountable for so much of the corpus as came into their hands.

A. Krishnaswami Ayyar with E. Vinayaka Rao, for appellant.—The lower Court is wrong in not directing the widow as well as her brothers to render an account of their dealings with the estate of the last male owner. There has been clearly waste of the corpus of the estate by the widow in collusion with her brothers (defendants 2 and 3). Under these circumstances the widow is no longer fit to be in possession of the estate. A Receiver should be appointed as a primary relief in the suit, and not merely contingent on the defendant's failing to furnish security. The widow and her brothers are liable to refund the amount traceable to their hands. The proper and effective remedy for the reversioner is the appointment of a Receiver: see *Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty*(1) and *Radha Mohan Dhar v. Ram Das Dey*(2). The brothers (defendants 2 and 3) are also liable to restore the amounts and the mortgage-bond taken possession of by them. The principle is that persons who have come into possession of other person's property without consideration are equitably bound to restore it to the owners: see *Sinclair v. Brougham*(3).

P. Narayanamurti with T. Ramachandra Rao and K. Ramamurti, for respondent.—This is not a proper case for appointing a Receiver. The widow is not in possession of any part of the cash or outstandings. The jewels do not form part of the estate. The widow has spent a considerable portion and incurred

(1) (1868) B.L.R. Sup. Vol., 1008 (F.B.); s.c., 9 W.R., 505 (F.B.).
(2) (1869) 3 B.L.R., 362.
(3) [1914] A.C., 398.

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NARASIMHAM. debts for the partition litigation against the plaintiff, which she was obliged to institute, and to prosecute at a heavy cost on account of the unreasonable pleas raised by him. The position of a widow is not that of a trustee or even manager of a Hindu family. She is not bound to account for her management of the estate. Even a manager of a joint Hindu family cannot be called ordinarily to account to the other members. No decree for accounts can be passed against defendants 2 and 3.

WALLIS, C.J.—The defendants' appeal from the decree in WALLIS, C.J. this suit has already been dismissed. This is an Appeal by the plaintiff, the next reversioner, from the decree of the Temporary Subordinate Judge in so far as it refuses to make the widow accountable for wasting the moveable property of the husband which came to her hands, and to make her brother, the second defendant, and the third defendant, his undivided brother, accountable for so much of the corpus of the estate of the husband of the first defendant, the last male owner, as has come to their hands. In the case of immoveable property, the Hindu reversioner has 12 years to sue from the date of the widow's death under Article 141 of the Limitation Act, and it is therefore unnecessary to claim such reliefs as are sought in the present suit, but as regards moveables, his right to sue is governed by Article 120 of the Limitation Act and the question when his right to sue accrues under that article is in much the same position as it was with regard to immoveable property under the earlier Limitation Act of 1859, under which it was held by Sir BARNES PEACOCK and the Full Bench of the Calcutta High Court, in *Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty*(1), that possession adverse to the widow was also adverse to the reversioner. In that case the question of the reversioner's remedies during the widow's life-time with regard to the moveable corpus of the estate which she was wasting was considered, and Sir BARNES PEACOCK observed:

"Reversionary heirs presumptive have a right, although they may never succeed to the estate, to prevent the widow from

(1) (1868) B.L.R. Sup. Vol., 1008 (F.B.); s.c., 9 W.R., 505 (F.B.).

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committing waste; and I have no doubt that, if a proper case were made out, reversionary heirs would have a sufficient interest, as well as creditors of the ancestor, by suit against the widow and the adverse holder, to have the estate reduced into possession so as to prevent their rights from becoming barred by limitation," and he goes on to say that adverse possession of Government paper or the like would give a cause of action to the heirs; so, too, JACKSON, J., observed that a reversioner aggrieved by the fraudulent action of the widow would be entitled to bring his action. On the authority of this case it was held in *Radha Mohan Dhar v. Ram Das Dey*(1), before the enactment of the present Article 141, that the next reversioners were entitled to have immoveable property of the estate, abandoned by the widow, reduced into possession and to put a manager in charge of them. This case is authority for the proposition that, as regards the moveable corpus of the estate also, it is open to the reversioners to file a suit praying that such moveable corpus may be so reduced into possession and handed over to a Receiver appointed in the suit subject to any question of limitation; transferees from the widow without consideration may be made to replace any part of the moveable corpus of the estate of the last male owner which can be traced to their hands on the equitable principle recently applied in *Sinclair v. Brougham*(2), which imposes upon people into whose hands the property of other persons has come without consideration, the duty of accounting for it and restoring it.

Then as to the widow's own accountability for wasting the moveable corpus of the estate, the authorities are meagre, because the remedy against her would rarely be effective, but on principle I see no sufficient reason for refusing to hold her accountable for waste in the sense of making her replace the moveable corpus which she has made away with, if she is in a position to do so, allowing her of course to enjoy the income of the fund replaced. She is not a trustee of her deceased husband's estate, or a tenant in tail, or for life, or the manager of a joint family, but the owner of a widow's estate with all the peculiar incidents of such ownership. As the owner of such widow's estate she is under a clear duty to abstain from wasting

(1) (1889) 8 B.L.R., 862.

(2) [1914] A.C., 398.

the moveable corpus of the estate, just as a tenant in tail or for life is bound to abstain from committing waste, and if she commits a breach of that duty I can see no reason why she should be allowed to go free and not be held accountable. The Subordinate Judge has referred to the case of the manager of a joint Hindu family who is only held accountable for the property of the joint family as it exists at the date of partition, but this now well established rule of practice is based on the ground that it is always open to the other members to put an end to the management by partition, which can even be enforced in a proper case on behalf of the minor members of the family. Confirming the reliefs already granted to the plaintiff, we must allow the Appeal and set aside so much of the decree as dismissed the plaintiff's claim for an account against the widow and the second and third defendants in the light of the above observations.

KRISHNAN, J.—I agree.

KRISHNAN, J.

K.B.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and
Mr. Justice Krishnan.

ARTHUR MALCOLM LLOYD (RESPONDENT), APPELLANT,

1921,
May 10.

v.

KATHLEEN LLOYD (PETITIONER), RESPONDENT.*

Indian Divorce Act (IV of 1869), sec. 37—Decree absolute dissolving marriage—Petition for alimony, 15 years after decree—Power of Court to grant after such delay—Delay, whether reasonable, how determined—"On any decree absolute" in sec. 37, meaning of.

A wife, whose marriage was dissolved by a decree absolute passed in 1905, petitioned to the Court in 1920 for grant of permanent alimony; Held, that the Court had no power to pass an order in her favour under section 37 of the Indian Divorce Act after such unreasonable delay after the passing of the decree absolute.

* Original Side Appeal No. 14 of 1921.

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The words "on any decree" in section 37 of the Act should be construed as meaning "at the same time as or after a reasonable time after the passing of the decree."

"What is reasonable time" must be determined upon all the circumstances of each case.

Scott v. Scott, [1921] 1 P., 107, followed.

APPEAL against the order and judgment of Mr. Justice KUMARASWAMI SASTRI, in the exercise of the Original Matrimonial Jurisdiction of the High Court, in Original Matrimonial Suit No. 6 of 1904.

This was an Appeal from an order passed by KUMARASWAMI SASTRI, J., on a petition filed by the respondent for payment of alimony. The petitioner had sued for divorce from her husband on the grounds of his adultery and cruelty, and a decree nisi was passed on 15th February 1905 which was made absolute on 15th August 1905. During the pendency of the suit there were negotiations as to alimony; and the correspondence between the parties showed that the husband agreed to pay maintenance and was making payments till two years before the filing of the present petition in 1921, when he ceased to make the payments. It appeared also that her only son had died and she had no means of support, and that the husband, who was a Major in the Army, was getting a pension of Rs. 857 per mensem, had been re-entertained in Military service, and that his total emoluments were about Rs. 1,500 per month. The petition for payment of alimony was filed by the petitioner under section 37 of the Indian Divorce Act, after fifteen years from the date of the decree absolute for divorce. The husband objected that there was unreasonable delay in making this application, and that the Court had no power to grant the petition after such an unreasonable delay. The learned Judge held that there was no unreasonable delay under the circumstances of this case, inasmuch as the husband had undertaken to pay and was paying maintenance to her until two years ago and then stopped payment without justification; his Lordship accordingly directed payment to her of Rs. 150 per mensem for her maintenance and support from 1st January 1921. The husband preferred this Appeal against the order, and the wife filed a Memorandum of Objections claiming Rs. 500 or one-third of the husband's income for her maintenance.

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R. N. Ayyangar, for appellant.—An application after such long delay does not lie under the terms of section 37 of the Indian Divorce Act (IV of 1869). The provisions of section 37 of the Act are similar to section 32 of the English Matrimonial Causes Act 1857 (20 and 21 Vic. Cap. 85), which has been replaced in similar terms by section (1) of the Matrimonial Causes Act 1907 (7 EDW. VII, ch. 12). The English cases on these sections lay down that a petition for alimony cannot be made after an unreasonable delay. In *Robertson v. Robertson*(1), where JESSEL, M.R., held that an application cannot be made after a delay of one year from the decree for dissolution of marriage, the decision of Sir JAMES HANNEN in *Bradley v. Bradley*(2) was considered; see also *Leslie v. Leslie*(3). The Court has no power to entertain the petition after a delay of fifteen years. The delay is certainly unreasonable. It was conceded by the petitioner on a former occasion that she did not rely on any agreement as to payment by the husband.

Cornish, for respondent.—The terms of section 37 of the Indian Divorce Act are clear and permit an application after the decree. No limit of time has been fixed for making an application after the decree. The word "On" in section 37 of the Indian Act should be construed as the similar language in section 32 of the English Act. Under the latter Act, it has been construed in *Bradley v. Bradley*(2) that the word "On" should be construed as meaning "after." How long after the decree is the question. It is an application to be granted at the discretion of the Court. It is in the exercise of the discretionary jurisdiction of the Court: see *Bishop v. Bishop*(4). Even in *Robertson v. Robertson*(1), JESSEL, M.R., concedes that it is a discretionary jurisdiction of the Court: see *Gooden v. Gooden*(5). The Indian Divorce Act, section 14, speaks of unreasonable delay, which has been construed as culpable delay: see *Edwards v. Edwards*(6). The delay in this case was not unreasonable or culpable delay, because the appellant had agreed to pay and was paying Rs. 200 per mensem for the petitioner's maintenance and he continued such payments till two years before the filing of this petition.

(1) (1881) 8 P.D., 94.
(3) [1908] P., 99.
(5) [1921] P., 395.

(2) (1878) 3 P.D., 47.
(4) [1887] P., 188.
(6) (1868) 17 L.T., 584.

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As regards the amount awarded by the learned Judge, the amount should be raised to Rs. 500 per mensem, or one-third of the income of the appellant, who is getting a total income of Rs. 1,500 per mensem. The English Courts award as alimony one-third of the husband's income as a rough and ready rule: see *Edwards v. Edwards*(1), *Sidney v. Sidney*(2).

The Court delivered the following JUDGMENT:

This is an Appeal from a judgment of Mr. Justice KUMARASWAMI SASTRI granting the petitioner, the divorced wife of the respondent, alimony at the rate of Rs. 150 a month. The decree absolute was made on 15th August 1905. The present application is made under section 37 of the Indian Divorce Act which empowers the Court on confirmation of any decree declaring a marriage to be dissolved to make an order for the payment of alimony. That section corresponded to section 82 of the Matrimonial Causes Act of 1857, which has now been replaced by section 1 (1) of the Matrimonial Causes Act of 1907 (7 Edw. 7, ch. 12). Both these Acts also contain similar language authorizing an order of alimony to be made on any decree for dissolution or nullity of marriage. Much learned argument was addressed to us as to the meaning to be put upon the words "on confirmation." It was objected for the appellant that an order made 15 years after the decree for divorce had been made absolute could not possibly be regarded as made on confirmation of the decree. It is unnecessary to do more than to say that the April number of 1921, Probate Division, page 107, has brought out a decision, *Scott v. Scott*(3), on this very question. In that case, an order for payment of alimony *pendente lite* had been made which of course ceased to operate on the making of the decree absolute. Payments had been continued for some time under some alleged agreement, and seven years after, an application was made to the Court under what is now the corresponding section of the Act of 1907. The learned President, Sir HENRY DUKE, conceived that he had a discretion which enabled him to make the order but that decision

(1) (1868) 17 L.T., 584.

(2) (1867) 36 L.J. (P. & M.), 78.

(3) [1921] P., 107.

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was overruled by the Court of Appeal in judgments which are equally applicable to the facts of the present case. Lord

STERNDALE said:

"The first question is what is the meaning of 'on any decree for dissolution' I was inclined at one time to think that it meant at the same time as the decree was made, or as it could not precede it, at any rate immediately following upon it. Looking, however, at the decision of Sir JAMES HANNEN in *Bradley v. Bradley*(1), and the decision of Sir JAMES HANNEN in *Sidney v. Sidney*(2) in the House of Lords, which he follows, and also *Sidney v. Sidney*(2) in the House of Lords, which he follows, and also *Robertson v. Robertson*(3) it seems to me that what Sir JAMES HANNEN calls a more elastic meaning must be given to the word 'on' and that it does not mean 'on' in the very narrow sense that I first thought it ought to be taken to mean, but that it must at any rate be limited to this extent, namely, it must be at the same time as the decree or within a reasonable time afterwards and that what constitutes a 'reasonable time' must no doubt depend on all the circumstances of the case. It appears to me that the learned President has not quite taken that view. He has, I think, taken it as meaning at the same time as or immediately after or within such time as the judge in his discretion may think the petition may be presented. That, in my opinion, is too wide. What constitutes 'a reasonable time' is I know not very easy to define; but we have some guide, although I do not think it does lay down an absolute hard and fast rule, in what was said by JESSEL, M.R. in *Robertson v. Robertson*(3). He said: "In the first place it appears that there is no instance of an application of this nature being made at so late a period as the present application. Whatever meaning may be given to the word 'on' in the Act of Parliament, it is very difficult to extend it to above a year. It is not necessary to express an opinion as to what time should be allowed, but it is not to be conceived that a period of more than a year can be included in the word 'on.' 'On' if not confined to the time of making the decree, must mean shortly after." In that case the time was eighteen months but as the decision of the Court went in agreement with that of the learned President on the merits of the application and not really on the question of time, I do not think that statement ought to be taken as a decision as to the absolute limit. It does, however, point in the direction I have already indicated, namely, that the word 'on' does not mean an unlimited time within the judge's discretion, but it

(1) (1878) 3 P.D., 47.

(2) (1867) 36 L.J. (P. & M.), 78.

(3) (1881) 8 P.D., 94.

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LLOYD. does mean within a reasonable time having regard to all the circumstances of the case. That, to my mind reduces this case to a very short question: Is the fact of the agreement or arrangement, whatever it may be called, having been made between the parties a circumstance that extends the reasonable time in this case to seven years? In my opinion it is not. It may be that parties were not quite clear as to the actual effect of the agreement or arrangement they had made. It may be that they or their advisers were under the impression that an order had been obtained for the payment of this money. I do not think either of these circumstances is one that justifies the postponement of the application for an order for maintenance for this period."

WARRINGTON, L.J., agreed and SCRUTTON, L.J. (at page 1-5), referred to some other authorities on the meaning of the word "on." He says:

"Lord DENMAN, C.J., in *R. v. Arkwright*(1) says 'the words 'on' or 'upon,' it has been decided, may either mean before the act done to which it relates or simultaneously with the act done or after the act done according as reason and good sense require, with reference to the context and the subject matter of the enactment.' A series of cases on various branches of the law have been decided in which the word 'on' has been given one or other of those meanings. Lord DENMAN does not say, as he might have said, 'I think it means all three.'"

Then the learned Judge goes on to say:

"But, although the order may be made after the decree for dissolution or nullity of marriage, there still arises the question, is there any limit of time within which it may be made? Can the wife come and say 'I am going presently to present a petition for dissolution of marriage and in the meanwhile I make an application for permanent maintenance in case I succeed? Obviously not; obviously that would have been made an unreasonable time before. Or can she say 'twenty years ago, your Lordship gave me a decree for dissolution of marriage, now will you make an order for permanent maintenance?' and say nothing more? Again it seems to me equally obviously not. There is some limitation to be implied in the temporary nature of the order for security as to the order or decree for dissolution. In my view that limitation is this, that inasmuch as the matters to be considered are the matters which

(1) (1848) 12 Q.B., 980, 970.

should be in the mind of the Judge at the time when he is making the decree for dissolution of the marriage, the limitation is that the application should be made within a reasonable time from the decree for dissolution of marriage. As to what period of time that means one has the guidance of JESSEL, M.R.'s views in *Robertson v. Robertson*(1) to which we were referred; but at the time when that case was decided there was no case in which the power had been exercised more than a year after the decree, and the learned Judge could hardly conceive that a period of more than a year could be included in the word 'on.' In that particular case the time was eighteen months. I see the same limitation has been approved in *In re Leigh*(2) where the power of the Court was sought to compel a ward of Court to make a settlement 'upon or in contemplation of' marriage,"

and the learned Judge concludes:

"I think in this particular case the application ought to have been made within a reasonable time after the decree for dissolution and I see nothing whatever in the circumstances of this case to justify an application being made seven years after the decree."

Everything that has been said in that case by these eminent Judges applies to this case and the result is that the Appeal must be allowed and the petition dismissed. In the circumstances we make no order as to costs.

The Memorandum of Objections is also dismissed.

Solicitors for appellant: *King and Partridge*.

Solicitors for respondent: *Brightwell and Moresby*.

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(1) (1881) 8 P.D., 94, 96.

(2) (1888) 40 Ch.D., 290, 295.

