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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JUDGES OF THE HIGH COURT.

1923.

1ST JANUARY TO 31ST DECEMBER.

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under rule 20 of the same rules. The provisions of Order XXI, rules 58 and 59, Civil Procedure Code, relating to claim proceedings are not applicable to Agency Courts, and the proper procedure in Agency tracts is by way of suit to establish title to property attached in execution of decrees. Where therefore a claim petition was preferred to an Assistant Agent alleging title and possession to certain property attached in execution of a decree, and was allowed on the ground of possession of the claimant, and an appeal preferred to the Agent by the decree-holder was dismissed as incompetent, on a petition preferred by the latter to the High Court to direct the Agent to review his order. *Held*, that the orders of both the Assistant Agent and the Agent were decrees, that the appeal to the Agent was competent, that the claim proceedings under the Civil Procedure Code were not applicable and that the Agent should dispose of the appeal on the merits treating the claim proceedings as a suit.

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CAUSE OF ACTION—*Money recovered under decree—Subsequent decision of Privy Council between same parties—Absence of reversal or supersession of former decree—Zamindar and tenant—Decrees as to proper patta.*] Money recovered under a decree cannot be recovered back in a fresh suit while the decree under which it was recovered remains in force; if the decree has been recovered or superseded the money paid is recoverable. Suits by a Zamindar against tenants for the acceptance of pattas at *asara* or *varam* rates for wet lands were dismissed by the Revenue Court and, on appeal, by the District Judge, it being found that certain cash rate had previously been agreed. On second appeals, the High Court in 1908 reversed those decrees and held that the pattas tendered were proper. In 1914 the Privy Council reversed the decree of the High Court on the ground that the decision was one of fact and, therefore, could not be reversed upon a Second Appeal. After 1908 the Zamindar in subsequent suits had recovered under decrees rent at the rate held applicable by the High Court. In the present suits the tenants sought to recover the amount by which the rent so paid exceeded that finally decreed in the earlier suits. *Held* that the decision of the Privy Council had not superseded the decrees under which the rent had been paid, and that the tenants were not entitled to recover *Shama Purshad Roy Chowdery* v. *Hurro Purshad Roy Chowdery* (1865) 10 M.I.A., 203, followed. *Jogesh Chunder Dutt* v. *Kali Churn Dutt* (1878) I.L.R., 3 Calc., 30 (F.B.), disapproved.

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CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 11, EXPLANATION 4—Res judicata—*Might and ought to have made a ground of attack—Previous suit for partition and recovery of possession, as co-purchaser under a common purchase with two others—Sale in name of one—Purchase held not to be joint—Subsequent suit by the same plaintiff as heir of the sole purchaser—Bar of* res judicata—*Ground of attack—Duty to join different grounds of title in one suit Suit against trespasser in ejectment.*] Where a person instituted a suit against a trespasser in possession for partition and recovery of his share in certain lands on the footing that he was a co-owner under a joint purchase made by himself and his two deceased brothers, but his claim was dismissed on the ground that the purchase was not a joint one but the sole purchase of one of the deceased brothers, and the former instituted a subsequent suit to recover his share as one of the heirs of the deceased purchaser. *Held*, that the suit was barred by the rule of *res judicata* as the plaintiff *ought* to have joined his subsequent ground of title in the former suit under section 11, explanation 4, Civil Procedure Code. *Woomatara Debia* v. *Unnapoorna Dassee* (1872) 11 B.L.R., 158; *Srimut*

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Muhammed Rowther v. *Abdul Rehman Rowthar* .. (1923) I.L.R., 46 Mad., 135

CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 64, O. XXI, R. 51—*Attachment of promissory note in the hands of private person, not by actual seizure but by prohibitory order—Endorsee of note with knowledge of order—Sections 8 and 9 of Negotiable Instruments Act (XVI of 1881)—Endorsee neither "holder" nor "holder in due course."*] The proper method of attaching a promissory note in the hands of a private person is by its actual seizure as provided by Order XXI, rule 51, Civil Procedure Code, and not by the issue of a mere prohibitory order. Hence section 64, Civil Procedure Code, does not apply to such attachment. But where a prohibitory order has been made restraining the payee of a promissory note from receiving payment for it or in any way dealing with it, an endorsee from him with knowledge of such order is neither a "holder in due course" nor a "holder" within sections 9 and 8 of the Negotiable Instruments Act and he is therefore not entitled to sue on the note. *Obiter*, an endorsee of such note from the payee with the knowledge of the prohibitory order commits fraud and hence he cannot sue on the note.

Subramania Aiyar v. *Chokkalinga Mudaliar* ... (1923) I.L.R., 46 Mad., 415

——— SEC. 73—*Rateable distribution—Attachment before judgment in a suit—Property sold pending suit and proceeds deposited into Court to the credit of the suit—Subsequent attachment of the amount by later decree-holders in the same Court—Decree in subsequent suits, obtained prior to the decree in the first suit—Rateable distribution, right to—Assets held in Court, meaning of—Right of decree-holder in first suit—Right of decree-holder who first obtained a decree.*] *A*, having instituted a suit in a District Munsif's Court, obtained an attachment before judgment of certain piece-goods belonging to the defendant; the goods were sold pending the suit and the sale-proceeds deposited in the Court to the credit of that suit on 11th April 1917. *B* subsequently instituted another suit in the same Court against the same defendant, got an attachment before judgment of the amount deposited in Court on 14th April 1917, and, having obtained his decree on 19th April 1917, applied, on 7th June 1917, in *A*'s suit, for payment of the amount in deposit in satisfaction of his decree. *C*, another creditor, obtained a decree against the same defendant on 8th June 1917 and applied for payment on the 29th of the same month. *A* obtained his decree on the 2nd July 1917 and applied on 3rd July 1917 for payment out of the whole money deposited in his suit. The District Munsif passed an order on 31st August 1917 for payment of the entire amount in Court to *A*. *B* filed a revision petition in the High Court against the order. *Held*, that the amount deposited in Court became "assets held in Court" within the terms of section 73, Civil Procedure Code, only when the Court passed an order on the application of *A* for payment in execution of his decree; that *B*'s application for payment, having been wrongly made in *A*'s suit, was incompetent, as no such payment could be made without an order in *B*'s suit; that *A*, *B* and *C* were entitled to rateable distribution under section 73 of the Code. *Viswanathan Chetty* v. *Arunachalam Chetty* (1921) I.L.R., 44 Mad., 100 (F.B.), applied. *Umma Venkatratnam & Co.* v. *Admanji Usman & Co.* (1919) I.L.R., 42 Mad., 692, and *Bisheshar Das* v. *Ambika Prasad*, (1915) I.L.R., 37 All., 575, dissented from.

Nachippa Chettiar v. *Subbier* ... ... (1923) I.L.R., 46 Mad., 506

——— SEC. 111—*Leave to appeal to His Majesty in Council—Order of a single Judge of the High Court in Revision—Order, final—No appeal before two Judges of the High Court under Letters Patent as amended—Application for leave to appeal to Privy Council, whether competent—Letters Patent (Madras), clauses 29 and 44—Act of Indian Legislature whether competent to abrogate provisions of Letters Patent—Sec. 111, Civil Procedure Code, whether abrogates clause 39 of Letters Patent.*] The High Court has no power to grant leave to appeal to His Majesty in Council filed against an order of a single Judge of the Court passed in the exercise of its revisional jurisdiction. The Letters Patent are, under clause 44, subject to modification by an Act of the Indian Legislature, and the latter has, by section 111 of the Civil Procedure Code, abrogated the right of appeal to His Majesty in Council against orders passed by a single Judge of the High Court.

Satyanarayana Varaprasada v. *Venkata Bhashyakarla.* (1923) I.L.R., 46 Mad., 958

CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 115 AND SEC. 107, GOVERNMENT OF INDIA ACT:—*See* LOCAL BOARDS ACT (XIV OF 1920), SS. 55 TO 57 536

——— ——— ——— ——— ——— SEC. 115, O. XVI, R. 19 (*b*)—*Issue of commission to witness living beyond 200 miles from Court—Right of party when no abuse of process.*] Where a party asks for the examination on commission of a witness not under his control owing to the witness residing more than 200 miles from the Court-house, a commission should issue as a matter of right unless the Court is satisfied that the application is an abuse of the process of the Court. It is not for the Court to decide whether the party will be benefitted by the issue of the commission or not; that is a matter entirely for the party. *Amirth Nath Jha* v. *Dhunput Singh Bahadur* (1873) 20 W.R., 253; *Sitamma* v. *Subraya* (1911) 21 M.L.J., 889 and *Veerabadran Chetty* v. *Nataraja Desikar* (1915) I.L.R., 28 Mad., 28, followed. *Held* further that where a Court acting contrary to law refused to issue a commission in a case like the above, the High Court can interfere in revision and set aside an interlocutory order to prevent unnecessary expense and waste of time to the parties.

Jagannatha Sastri v. *Sarathambal Ammal* ... ... (1923) I.L.R., 46 Mad., 574

——— ——— ——— ———, SEC. 150, O. IX, R. 13—*Ex parte decree by a Court as regards certain immoveable properties—Transfer of territorial jurisdiction to another Court—Application to the latter Court to set aside ex parte decree—Jurisdiction.*] After the passing of an ex parte decree by Court *P* in a suit to recover certain immoveable properties, part of its territorial jurisdiction including the locality in which the properties were situate was transferred to Court *A*. Thereafter the defendant applied to Court *A* to set aside the ex parte decree. *Held*, that under section 150, Civil Procedure Code, Court *A* had jurisdiction to entertain the application, and there was nothing in Order IX, rule 13, of the Code providing the contrary. Meaning of "Transfer" in section 150, considered.

Ranganatha Rao v. *Hanumantha Rao* ... ... (1923) I.L.R., 46 Mad., 1

———, SEC. 150, O. XXXIX, R. 2, CL. (3)—*Part of territorial jurisdiction of one Court and business therein transferred to a new Court—Breach of temporary injunction—Jurisdiction of new Court to punish.*] A newly created Court was given by a District Judge jurisdiction to try all cases arising within a portion of the area over which another Court had till then jurisdiction. *Held*, that the new Court had jurisdiction under section 150, Civil Procedure Code, to punish the breach of a temporary injunction granted by the other Court. The word "transfer" in section 150 is not confined to cases of transfer of business of one Court to another, but includes also cases where a new Court is given part of the territorial jurisdiction of an old Court and is authorized to try all the business arising within it. *Ranganatha Rao* v. *Hanumantha Rao*, (1923) I.L.R., 46 Mad., 1, followed. *Munshi Md. Kasemal* v. *Munshi Niamuddin Ahmed*, (1921) 26 C.W.N., 216, not followed.

Guruswami Naicker v. *Mahommadhu Rowther* ... (1923) I.L.R., 46 Mad., 88

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CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, R. 54:—*See* EXECUTION 736

———————————, O. XXI, RR. 58 AND 59—*Whether applicable to Agency tracts*:—*See* AGENCY RULES 35

———————————, O. XXI, R. 90:—*See* EXECUTION 736

———————————O. XXI, R. 92—*Whether a bar to Court's inherent power to refuse confirmation of sale*: *See* SALE IN EXECUTION OF A DECREE 583

———————————, O. XXXIII, R. 1:—*See* PRACTICE 811

———————————, O. XLVII, R. 1—*Review of judgment—Error of law apparent on the face of the record—Sufficient ground for review—Competency of Judge to grant review on ground of error of law—Error whether includes one of law as well as of fact under rule 1 (c) of O. XLVII.*] "Error" under rule 1, Order XLVII, Civil Procedure Code, is not limited to one of fact and an error of law committed by a Judge apparent on a perusal of the record, and is a ground for granting a review. Where a Judge dismissed a suit on the ground that, as between the plaintiffs who were the nearest agnates and the defendants who were the sister's sons of the last male owner, the latter were the preferential heirs under the Mitakshara Law prevailing in the Madras Presidency. *Held* that this was an error of law apparent on the face of the record and that the Judge was competent to grant a review.

Murari Rao v. *Balavanth Dikshit* ... ... (1923) I.L.R., 46 Mad., 955

CLAIM PETITION—*Assistant Agent's Court—Claim by a third party to property attached in execution of a decree—Petition allowed by Assistant Agent—Appeal to Agent whether competent—Orders of Assistant Agent and Agent, whether decrees—Civil Procedure Code (Act V of 1908), Order XXI, rules 58 and 59, whether applicable to Agency tracts—Decree—Agency Rules (Vizagapatam), 16 and 20*:—*See* AGENCY RULES (VIZAGAPATAM), 16 AND 20 ... 85

COMPENSATION *for Improvements—Whether and when payable*:—*See* TENANTS IN COMMON 104

COMPOUNDING AN OFFENCE—*Unlawful assembly—Criminal trespass*:—*See* INDIAN PENAL CODE, SS. 143 AND 447 257

CONTRACT—*Specific performance—Agreement to sell on payment of a price at a future time at the option of the promisee—Sale by promisor to a third party—Acceptance by promisee, after sale—Offer irrevocable—Offer at an end by the sale—No offer for acceptance—Suit for specific performance by promisee against promisor and his vendee, whether maintainable.*] *A*, the owner of certain lands agreed to sell them to *B* on payment of the price before a particular date in any future year at the option of *B* and *B* exercised his option after the lands had been sold by *A* to a third person, and with knowledge of the sale. On a suit for specific performance of the agreement being instituted by *B* against *A* and his vendee, *Held*, that the agreement was not a completed contract but only an offer by the owner to sell to the other, which could become a contract only on acceptance by the latter by payment of the price; and that the offer was at an end on the sale of the property to the third person and that there was no subsisting offer for acceptance and no contract of which specific performance could be enforced against the vendee. *Helby* v. *Mathews*, [1895] A.C., 471; and *Dickinson* v. *Dodds*, [1876], 2 Ch. D, 468, followed. *Semble*, If the undertaking not to withdraw the offer was not a mere *nudum pactum*, the promisee might maintain an action for damages against the promisor.

Papa Naidu v. *Munisamy Aiyar* ... ... (1923) I.L.R., 46 Mad., 30

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CO-OWNER—*Trustee—Mesne profits—Suit for partition—Profits claimed by a member of joint Hindu family, whether mesne profits—Interest on such profits, whether awardable—Past and future profits in a partition suit, right to—See* HINDU LAW 47

COURT-FEES—*Decision in contentious probate suit on Original Side—Appeal from decision—Court-fee thereon—"Final judgment" in serial No. 35, Appendix II, of Original Side Rules.*] The decision of a Judge on the Original Side in a contentious probate suit is a "final judgment" within serial No. 35 of Appendix II of the Original Side Rules and hence the Court-fee on an appeal from the decision, is, as therein provided, Rs. 150. Definition of "final judgment" of Lord SELBOURNE, L.C., in *Ex parte Moore, In re Faithful* (1885) 14 Q.B.D., 627 at 633 and of Lord ESHER, M.R., in *Onslow* v. *Commissioners of Inland Revenue* (1890) 25 Q.B.D., 465, followed.

Perumal Chetty v. *Kandasamy Chetty* ... ... (1923) I.L.R., 46 Mad., 592

COURT-FEES ACT (VII OF 1870), SEC. 7 (V) (*c*)—*Temple—Suit for possession of—Value of temple for purpose of Court-fees Act—Temple, whether a house Market-value, meaning of—Temple, whether has a market-value—Valuation, based on value of materials used for the building, whether proper.*] A Temple, which is devoted absolutely and in perpetuity to religious purposes, even if it is to be regarded as a house, has no market-value within the terms of section 7, clause V (*c*) of the Court Fees Act; hence a suit for recovery of possession of it by a person claiming as trustee against another also claiming as trustee falls under Schedule II, article 17 (VI) of the same Act. The principle for determining the market-value of property under the Court-Fees Act as under the Land Acquisition Act, is that the things have to be taken as they stand at the time, and as there can be no market for a temple as such, there can be no market-value for it, at the principle of valuation based on the value of the materials composing it is erroneous. *Manmatha Nath Mitter* v. *The Secretary of State for India in Council* (1848) I.L.R., 25 Calc., 194 (P.C.), followed.

Rajagopala Naidu v. *Ramasubramania Ayyar.* (1923) I.L.R., 46 Mad. (F.B.), 782

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 57:—*See* INDIAN PENAL CODE (XLV OF 1863), SS. 342, 96 TO 105 AND 81 605

———————————SEC. 195—*Death of applicant for sanction for perjury—No jurisdiction to allow legal representative to continue the application.*] Criminal proceedings instituted by a private complainant abate on his death. Hence a petition for sanction for perjury filed by a party cannot on his death be allowed to be continued by his legal representative though the latter may himself present a new application for the same purpose.

Quarishi Sahib v. *Begum Sahiba* ... ... (1923) I.L.R., 46 Mad., 88

———————————SS. 242, 256, 289, 342 AND 451—*Summons cases—Trial—Duty of Court to question accused generally on the case—Provision, whether applicable to summons cases—Calling on the accused for his defence—Entering on his defence—Hearing the accused—Calling on the accused for his defence, found in sections 256 and 289, but not in Chapter XX—Effect of.*] The mandatory provisions of section 342 of the Criminal Procedure Code (Act V of 1898), which require the Court to question the accused generally on the case after the examination of the prosecution witnesses, do not apply to trials in summons cases. The use of the expression "before the accused is called on for his defence," in section 342 itself, as well as in section 256 relating to trials in warrant cases and in section 289 relating to trials in sessions cases, and the absence of such an expression in the sections relating to trials in summons cases under Chapter XX of the Code, show that the provisions of section 342 in question are not intended to apply to summons cases.

Ponnusamy Odayar v. *Ramasamy Thathan* ... (1923) I.L.R., 46 Mad. (F.B.), 758

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CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 263, 370 AND 441—*Summary trials Bench of Magistrates—Sentence of imprisonment—Failure to record reasons for conviction—Irregularity.*] A Bench of Presidency Magistrates imposing a sentence of imprisonment for an offence is bound under sections 263 and 370 of the Code of Criminal Procedure, to record its reasons for the conviction. The omission to do so in a case where no record is made of the evidence, which, therefore is not available to the High Court, is a grave irregularity which in most cases would be sufficient ground for interference. Section 441 of the Code of Criminal Procedure does not abrogate the terms of section 263 or those of section 370 of the same Code. *Queen-Empress* v. *Shidgauda* (1894) I.L.R., 18 Bom., 97, and *In the matter of the petition of Panjab Singh* (1881) I.L.R., 6 Calc., 579, considered. Having regard, however, to the fact that the Bench Magistrates afterwards submitted their reasons for conviction under section 441, Criminal Procedure Code. *Held*, there was no ground for interference.

Dervish Hussain, In re .. .. (1923) I.L.R., 46 Mad., 253

——CHAP. XXII—*Summary trials of summons cases—Sec. 342, applicability of, to summary trials of summons cases.*] The provisions of section 342, Criminal Procedure Code, requiring the Court to examine the accused generally on the case after the examination of the prosecution witnesses, are as inapplicable to summary trials of summons cases under Chapter XXII of the Code, as to ordinary trials of such cases.

Dharma Singh v. *King-Emperor* ... ... (1923) I.L.R., 46 Mad. (F.B.), 766

——SS. 342, 256 AND 537—*Warrant case—Trial before Magistrate—Examination of the accused generally on the case, when should be made—Examination of prosecution witnesses—Cross-examination and re-examination of such witnesses recalled under section 256—Further questioning of the accused, whether obligatory on Court—Effect of omission of such questioning Illegality or irregularity—Trial, whether vitiated by omission to put questions. Held by the Full Bench*—The provision in the latter part of section 342, clause (1) of the Criminal Procedure Code, directing the Court to question the accused generally on the case, is *mandatory* and not merely discretionary, and failure to comply with the terms of the section is an illegality vitiating the trial, and not a mere irregularity which can, in a proper case, be cured under section 537 of the Code. *Held by the Full Bench* (VENKATA SUBBA RAO, J., *dissenting*.)—In a warrant case, the examination of the accused generally on the case, directed by the latter part of section 342, clause (1), should be made after the prosecution witnesses have been examined, which means, when the prosecution has finished calling evidence, and if the accused had been once so *examined*, it is not obligatory on the Court to question him again after the cross-examination and re-examination of the prosecution witnesses re-called at the instance of the accused under section 256 of the Code. *In re Maruda Muthu Vannian* (1922) I.L.R., 45 Mad., 820, overruled. If new and material matter is elicited in the cross-examination and re-examination of prosecution witnesses re-called under section 256 of the Code, it is desirable, and, if fresh evidence, on material matters in support of the prosecution case were elicited in such re-examination, it is probably obligatory on the Court, to question the accused generally on the case; and, if the prosecution calls fresh evidence after charge is framed, the accused *must* be questioned generally after this further examination of prosecution witnesses. *Per* VENKATA SUBBA RAO, J. (*contra*).—The examination of the accused under the latter part of section 342, clause (1), should be made after the entire evidence for the prosecution mentioned in section 256 has been given and before the accused is called upon to enter on his defence.

Varisai Rowther v. *King-Emperor* ... ... (1923) I.L.R., 46 Mad. (F.B.), 449

——SEC. 350 (1) (*a*)—*Warrant case—Proceedings before framing charge, only enquiry and not trial—No right for accused for a de novo examination of witnesses.*] In warrant cases all proceedings before the charge is framed are only "enquiry" and not "trial" and hence if there is a change of Magistrates before a charge is framed in such cases, the accused is not entitled to a fresh examination of witnesses as provided by section 350 (1) (a), Criminal Procedure Code. *Narayanaswamy Naidu* v. *Emperor*, (1909) I.L.R., 32 Mad., 220 (F.B.), *Sriramulu* v. *Veerasalingam*, (1915) I.L.R., 38 Mad., 585. and *Venkatachinnayya* v. *King-Emperor*, (1920) I.L.R., 43 Mad., 511 (F.B.), followed.

Ramanathan Chettiar v. *King-Emperor* .. ... (1923) I.L.R., 46 Mad., 719

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CRIMINAL PROCEDURE CODE (ACT V OF 1898). ss. 369 AND 439—*Revision—Review—Powers of the High Court—Powers of a vacation Judge—Appellate Side Rule (Madras) 4—Jail appeals—Disposal of—Dismissal for default.*] Neither section 369 nor section 439 of the Code of Criminal Procedure empowers the High Court to revise or review the judgment of one or more of its Judges in a Criminal Appeal or Revision. The dismissal by the vacation Judge of an Appeal from a convict in jail against his conviction cannot be regarded as a nullity or otherwise than as a bar to the hearing of an Appeal preferred a second time by the same accused against the same conviction. The powers of the vacation Judge are not to be looked for in the notification appointing him, as though it were a self-contained and exhaustive advertisement to the public of their scope and nature. It need not and must not be regarded as more than a general statement of the powers which the vacation Judge ordinarily will exercise, and cannot be read as derogating from those, which in virtue of Statute and rules he possesses and of which he cannot consistently with them be deprived. *Per* DEVADOSS, J.—The provision in section 421 of the Criminal Procedure Code that "no appeal presented under section 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same" does not apply to appeals presented under section 420 of the Code of Criminal Procedure. When an Appeal has once been disposed of the Court is *functus officio* and cannot hear the Appeal again. *Obiter*: In the case of a Criminal Appeal or a Criminal Revision Petition there is no provision in the Code of Criminal Procedure for dismissing an appeal or revision petition for default of appearance. In re *Ranga Rao*, (1912) 23 M.L.J., 371. doubted. In a criminal matter the question is not between party and party. It is the duty of the Court to go into the matter and dispose of it on the merits. When a Criminal Appeal or a Criminal Revision Petition is dismissed for default of appearance there is no decision on the merits and therefore there is no proper disposal of it according to law and the Court may rehear it. The order of dismissal for default of appearance in such cases is no judgment at all and the order is tantamount to an adjournment of the case till some one appears and moves the Court to hear him.

Kunhammad Haji, In re ... ... (1923) I.L.R., 46 Mad., 382

——, ss. 407 AND 520—*Order as to disposal of property—Jurisdiction—Notice to the other side—Practice.*] A Subdivisional Magistrate hearing a Criminal Appeal under section 407 (2), Criminal Procedure Code, has power to pass orders under section 520 regarding the disposal of property in respect of which an offence has been committed, either at the time of disposing of the appeal or so soon thereafter that the order may be treated as part of the appeal proceedings. *Jogi Venkiah* v. *Station House Officer of Narasapur*, (1922) 15 L.W., 534, and *In re Subba Raidu*, (1922) 15 L.W., 664. considered. Notice should ordinarily be given unless there is good reason to dispense with it before reversing on appeal an order passed under section 517, Criminal Procedure Code. *In re Lakshman Rangu Rangari*, (1911) I.L.R., 35 Bom., 253, followed.

Arunachala Thevan, In re ... ... (1923) I.L.R., 46 Mad., 162

——, SEC. 488—*Order of Magistrate awarding maintenance to an illegitimate child—Subsequent decree of Civil Court declaring that the child was not illegitimate—Application not to give effect to Magistrate's order.*] On obtaining a decree of a Civil Court that

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a child is not his illegitimate child, a person is entitled to ask the Magistrate not to give effect to his previous order awarding maintenance to the child. *Mahomed Abid Ali Kumar Kadar* v. *Ludden Sahiba*, (1887) I.L.R., 14 Calc., 276, and *Illath Narayanan Moosad* v. *Kathil Ittichery Amma*, (1917) 33 M.L.J., 449, followed.

Venkayya v. *Padamma* ... ... (1923) I.L.R., 46 Mad., 721

CRIMINAL PROCEDURE CODE (ACT V OF 1898) SEC. 520—*Order as to disposal of property—Jurisdiction—Notice to the other side—Practice* :—*See* CRIMINAL PROCEDURE CODE, SS. 407 AND 520 162

CRIMINAL TRIAL—*Evidence of witnesses taken by a predecessor exhibited before the successor—Irregularity—Consent of the accused to such procedure—Whether cures irregularity—Viva voce examination at trial—If obligatory.*] Where evidence given before a Judge in a criminal trial was exhibited in a trial *de novo* before a succeeding Judge it was held that such a procedure was irregular and the consent of the accused did not cure the irregularity. Except in certain cases covered by explicit provisions of law, the evidence of witnesses in criminal trials must be taken *viva voce* in the course of the trial in the presence of the accused. *Reg.* v. *Betrand*, (1867) L.R., I P.C., 520, followed. *In re Annavi Muthiriyan* (1916) I.L.R., 39 Mad., 449, considered. *Jainab Bibi Saheba* v. *Hyderally Sahib*, (1920) I.L.R., 43 Mad., 609 (F.B.), referred to.

Umar Hajee v. *King-Emperor* ... ... (1923) I.L.R., 46 Mad., 117

CUSTOMARY RIGHT—*Long use by villagers of village site—Grant by Government of the site for building a school—Legality of*]. In the absence of evidence of open and continuous enjoyment as of right, of village sites, by the villagers establishing in their favour any definite customary right or right by prescription, the Government can assign village sites to any one who applies for them for building purposes, *Collector of Godavari District* v. *Pedda Rengayya* (1908) 4 M.L.T., 40, followed.

The Taluk Board, Dindigul v. *Venkataramier* .. (1923) I.L.R., 46 Mad., 866

DEBT—*Personal debt of father—Liability of undivided sons—Pious obligation—Debt, not shown to be illegal or immoral—Liability of sons' shares in ancestral property—Sons' liability in father's life-time—Suit against father and his undivided sons—Form of decree—Personal decree against father—Decree against sons' shares in the ancestral property to the extent decree remains unsatisfied by the father—Recent decisions of Privy Council as to antecedent debt, effect of—Hindu Law* :—*See* HINDU LAW 64

DECREE—*Agency Rules (Vizagapatam), 16 and 20—Claim petition in Assistant Agent's Court—Claim by a third party to property attached in execution of a decree—Petition allowed by Assistant Agent—Appeal to Agent whether Competent—Orders of Assistant Agent and Agent, whether decrees—Civil Procedure Code (Act V of 1908), Order XXI, rules 58 and 59, whether applicable to Agency tracts—Proper remedy—Suit—Petition regarded as suit* :—*See* AGENCY RULES (VIZAGAPATAM), 16 AND 20 35

——— —— —*Execution—Legal representative of Judgment-debtor—Application for execution against legal representative, ordered without notice—Property attached—Application by decree-holder for settlement of terms of sale proclamation—Notice—Service by affixture—Ex parte order settling terms of sale proclamation—Subsequent application by legal representative for release of property from attachment as not liable to execution—Bar of res judicata*] The legal representative of a judgment-debtor was brought on record, for the purpose of execution, and immoveable property was attached but without notice to him, such notice not being required under Order XXI, rule 22, Civil Procedure Code. The decree-holder then filed an application for settlement of the terms of the sale proclamation; the notice thereon merely intimated the date of the hearing of the application, and was served by affixture the legal representative was declared ex parte and the terms of the sale proclamation were settled in his absence. The latter then

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applied to the Court for release of the property attached on the ground that it was not liable to attachment. The decree-holder pleaded the bar of *res judicata*. *Held*, that mere non-attendance at the hearing of an application to settle the terms of a sale proclamation did not estop the legal representative on the principle of *res judicata* from disputing thereafter the liability of the property to attachment.

Chidambaram Chetti v. *Theivani Ammal*... (1923) I.L.R., 46 Mad. (F.B.), 768

DECREE - *Money recovered under—Subsequent decision of Privy Council between same parties—if amounts to supersession of former decree—See* "CAUSE OF ACTION" 895

DISSOLUTION OF NATIVE CONVERTS' MARRIAGES ACT (XXI OF 1866). *See*—INDIAN DIVORCE ACT (IV OF 1869), SEC. 2 839

DIVORCE ACT, INDIAN (IV OF 1869). SEC. 2—"*Professes Christian faith*", *meaning of—Conversion to Christianity of one of a Hindu couple, effect of, on marriage—Dissolution of Native Converts' Marriages Act (XXI of 1866) means of obtaining dissolution of marriage, under.*] A person who was born a Christian and who was baptised a Christian and who professes some form of Christian faith does not cease to "profess the Christian religion" within section 2 of the Indian Divorce Act (IV of 1869), because the particular church to which she belonged disapproving of her conduct excommunicated her. Under the Dissolution of Native Converts' Marriages Act (XXI of 1866), conversion to Christianity of one of two married Hindu spouses does not by itself dissolve the marriage. The dissolution is effected under the Act only after a year's refusal to comply with an order for restitution of conjugal rights.

Pakkiam v. *Chelliah Pillai* ... ... (1923) I.L.R., 46 Mad., 839

——— ——— ——— ——— SS. 15 AND 37—*Suit by husband for divorce on the ground of adultery—Application by wife for maintenance—Power of Court to grant maintenance under the Act*] It is not competent to the Court dismissing a husband's petition for dissolution of marriage to award maintenance to the wife, under section 15 or 37 of the Indian Divorce Act. Though the wife might have filed an application for divorce or judicial separation on the husband's petition, under section 15 of the Act still in the absence of a decree for dissolution or judicial separation, no order for maintenance can be made under the Act.

Devasakayam v. *Devamony* ... ... (1923) I.L.R., 46 Mad., 133

DOCUMENT—*Construction—Implied term—Proprietary Estates Village Service Act (Madras Act II of 1894), SEC. 27 (4)—"Tenants", meaning of—Farmers of rent.*] Out of his share of the produce of certain villages, a Zamindar remunerated the village officers and contributed towards certain charities. He leased the villages to lessees who agreed to pay him, besides the rent the shares for charity and an amount for road-cess for which the Zamindar remained liable. They also paid the village officers, although the cowle did not make express provision for it. Later by Madras Act II of 1894, the obligation to pay the village officers was taken over by the Government, and the peshkash payable by the Zamindar was increased. *Held* (KUMARASWAMI SASTRI, J., dissenting) that the suit was not maintainable. The farmers were not agents or trustees of the Zamindar to collect and pay away the share due to the village servants nor were there implied terms in the cowles that the farmers should collect these shares and if at any time the whole or part were not required to pay the village officers they should account to the Zamindar for the unused portion. A term in a contract will only be implied when the Court is driven to the conclusion that the parties must necessarily have intended that stipulation: *The "Moorcock"* (1889) 14 P.D., 64; *Hamlyn & Co.* v. *Wood & Co.* (1891) 2 Q. B., 488. *Per Curiam*: For the purposes of section 27 (4) of Madras Act II of 1894, such farmers are "tenants" and the Zamindar is entitled to apply to have the rent increased. *Rajam Ayyar* v. *Raja Rajeswara Muthuramalinga Sethupathi*, S.A. No. 510 of 1918 (unreported), distinguished.

Tiruneelakantam Servai v. *Raja of Ramnad* ... (1923) I.L.R., 46 Mad., 177

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ELECTION—*Rule IV of election rules*—"*Taking part in ballot*," *meaning of*—*Candidate acting as Returning officer at his own election*—*Voidability of election*—*Judge enquiring into an objection to an election not a* persona designata *but a Court subject to revisional jurisdiction of High Court*—*Duty of Judge before setting aside an election*—*Revisional powers of the High Court under section* 115, *Civil Procedure Code* :—*See* MADRAS DISTRICT MUNICIPALITIES ACT (V OF 1920) 128

ESTATES LAND ACT, MADRAS (I OF 1908, ss. 13 (3) AND 187 (1)—*Improvements made by tenant at his own expense*—*Contract for higher rent made before the passing of the Act*—*Improvements made by tenant after the Act*—*Right of landholder to higher rent under the contract whether taken away by the Act.*] A landholder is not entitled to recover from his tenant rent at wet rates for land which the latter has been able to cultivate wet in consequence of improvements made at his own expense on the strength of a contract made before the Estates Land Act was passed, the improvements however having been made after the passing of the Act. Section 13 (3) of the Act read with section 187 (1) is applicable to contracts made before as well as after the passing of the Act. Dictum in *Venkata Perumal Raja* v. *Ramudu*, (1916) I.L.R., 39 Mad., 84, distinguished.

Chokkalingam Chettiar v. *Palani Ambalam* ... (1922) I.L.R., 46 Mad., 712

EVIDENCE ACT (I OF 1872) SEC. 90—*Copy of a document*—*Copy more than* 30 *years old*—*Proper Custody*—*Presumptions*—*Execution Attestation*—*Genuineness*—*Admissibility*—*Meaning of Mauja, Shrotriyam*—*Constructions of grant whether the grant is of land or of melwaram only.*] The presumption under section 90 of the Evidence Act with regard to documents 30 years old arises in the case of copies as well as originals. If the copy is proved to be a true copy a presumption may be made in favour of the genuineness of the original. *Held* also, that, on the true construction of the original grant and the evidence relating to the subject-matter of the grant at its date, the grant was of the land itself and not merely the melwaram.

Somayajulu v. *Seethayya* ... ... (1923) I.L.R., 46 Mad. (F.B.), 92

EVIDENCE OF WITNESSES TAKEN BY A MAGISTRATE EXHIBITED BEFORE HIS SUCCESSOR—IRREGULARITY : *See*—CRIMINAL TRIAL ... 117

EXECUTION SALE OF SHROTRIYAM VILLAGE—*Dismissal of application judgment-debtor to postpone sale for want of due publication*—*Subsequent petition under O. XXI, r.* 90, *Civil Procedure Code, whether barred by* res judicata—*Quit-rent payable by shrotriyam village whether "revenue" for O. XXI, r.* 54, *Civil Procedure Code.*] A judgment-debtor, whose shrotriyam village was proclaimed for sale in execution of a decree, applied for the postponement of the sale alleging want of due publication of the proclamation and the absence of publication in the Collector's office. The judge after taking evidence dismissed the application holding (1) that the proclamation was duly published in the village, (2) that publication in Collector's office was required only in case of ryotwari villages. After the sale, the judgment-debtor applied under order XXI, rule 90, Civil Procedure Code, to set aside the sale on the same grounds and the Judge rejected the application without taking evidence, holding that the matter was *res judicata* by reason of his previous order. *Held* (1) that the matter was not *res judicata*, (2) that evidence should have been taken, and (3) that the publication in the Collector's office was necessary in the case of shrotriyam villages also, as the quit-rent payable by them was "revenue" within Order XXI, rule 54, Civil Procedure Code.

Ganamma v. *Ketireddi* ... ... (1923) I.L.R., 46 Mad., 736

EXECUTOR—*Death of, without accepting office*—*Vesting of estate* :—*See* HINDU LAW 190

EX PARTE DECREE—*Application to set aside*—*Transfer of territorial Jurisdiction*—*Jurisdiction* :—*See* CIVIL PROCEDURE CODE (V OF 1908) SEC. 150 AND O. IX, R. 13 1

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EX-PARTE DECREE—*Setting aside*—*Grounds for setting aside*—*Sufficient cause*—*Duty of Court*—*Inevitable accident*—*Bona fide intent and attempt to get at Court in time, sufficient.*] Where an application is made by a defendant to set aside an ex parte decree passed against him, the question to be considered by the Court is not whether by human possibility, being wise after the event, he could not have got in time to the place where the Court is held, but whether he honestly intended to be in Court and did his best, though in his own stupid way, to get there in time ; and if the Court is satisfied that the man did try to get there and that he would have got there but for the intervention of an inevitable accident for which he was in no way responsible, it is the duty of the Court to set aside the decree, mulcting, in proper cases, the delinquent in costs. A litigant should not be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part or something which cannot be set right by his being ordered to pay costs.

Arunachela Ayyar v. *Subbaramiah* ... . (1923) I.L.R., 46 Mad., 60

EXPERT'S EVIDENCE—*Conviction based on, whether legal*—*Court's duty to verify expert's evidence.*] A court cannot refuse to convict a person on the evidence of a finger-print expert, merely on the ground that it is unsafe to base a conviction upon such evidence. If the finger-prints are clear enough, the Court must verify the evidence of the expert by examining them with a magnifying glass if necessary, and applying its own mind to the similarities and dissimilarities afforded by the finger-prints, before coming to a conclusion one way or the other ; *Emperor* v. *Abdul Hamid*, (1905) I.L.R., 32 Calc., 759; *Bazari Hajam* v. *King-Emperor*, (1922) I L.R., 1 Pat., 242, not followed; *In re Singri Bhima*, (1915) 27 I.C., 900, considered.

King-Emperor v. *Virammal* ... ... (1923) I.L.R., 46 Mad., 715

GANJAM AND VIZAGAPATAM AGENCY COURTS ACT (XXIV OF 1839)—*Rules XIV and II* (3) *under*—*Cases pending before such Agency Courts*—*Power of High Court to transfer them to its file.*] Under Rule XIV of the rules of 1920 framed under the Ganjām and Vizagapatam Agency Courts Act (XXIV of 1839) and under section 107 of the Government of India Act, the High Court has power to transfer to its file, cases pending before the Agency Commissioner. The High Court cannot transfer such cases to a District Court. *Maharajah of Jeypore* v. *Papayamma*, (1900) I.L.R., 23 Mad., 329, decided under the old rules of 1840 is no longer law.

Maharajah of Jeypore v. *Raja Gangaraju* ... (1923) I.L.R., 46 Mad., 726

GOVERNMENT BONDS—*Promissory note*—*On demand*—*Demand by creditor at debtor's Treasury*—*Demand, whether necessary for liability to arise*—*Suit on bond as a simple contract debt*—*Limitation*—*Limitation Act* (*IX of* 1908), *section* 10 *and art.* 120—*Agreement of* 1824 *between the East India Company and creditors of deposed Raja of Tanjore as to payment of debts*—*Bonds executed in* 1845 *on behalf of East India Company to creditors of deposed Raja of Tanjore*—*Sinking fund created and maintained out of Tanjore revenues for discharge of interest and principal*—*Subsequent issue of bonds*—*Effect of*—*East India Company and its successor* (*Government of India*) *whether trustees to creditors*—*Suit against Secretary of State whether against trustee and so barred by limitation*—*Specific trust.*] After the administration of the principality of Tanjore was taken over by the East India Company, an agreement dated 11th February 1824, was entered into between the Company and the creditors of the deposed Raja for payment of debts due to them from the Raja to be ascertained by certain commissioners to be appointed. The agreement provided, inter alia, that transferable bonds should be issued by the Company to the creditors for their debts found due, that interest at 4 per cent should be paid half-yearly so long as the revenues of Tanjore remained in the Company's hands, that the principal should be paid 15 months after notice published therefor by the Company and that in the meantime a fund should be started and maintained by the Company out of the Tanjore revenues collected by the Company for payment of interest and discharge of the principal of the bonds. In accordance with the

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agreement, bonds were issued to the creditors in 1845, including the suit bond in favour of the plaintiffs' assignors' ancestor; and the fund was started and maintained by the Company. The bonds provided, inter alia, that interest would be paid in cash, on demand, at the general treasury at Fort St. George, to the holder of the bond in India, or if the bond-holder resided in Europe in cash or in Bills at 12 months' date at his option. There was no payment of interest or principal of the suit bond since 1848. In 1857 and 1858, the East India Company and its successor, the Government of India, had published notices for payment of the bond-debts on tender of the notes and declared therein that interest would thereafter cease. The plaintiff obtained an assignment of the suit bond in 1909, as well as a succession certificate to collect the debts of the assignor's ancestor, issued a notice of demand on the 24th October 1916, and instituted this suit on the 15th October 1919 against the Secretary of State for India in Council, who pleaded the bar of limitation. *Held*, that the suit on the bond as a simple contract debt was not barred under article 120 of the Limitation Act, as the liability against the East India Company and its successor (the Government of India) did not arise until a demand was made by the bond-holders at the place mentioned therein, and such a demand was made by the plaintiff only within three years of the suit; and that the East India Company and its successor, the Government of India, had become trustees for a specific purpose under the agreement of 1824 for the discharge of the bonds issued in pursuance thereof, and that the suit viewed as one by the plaintiff as against the defendant as trustee was not barred by limitation by reason of section 10 of the Limitation Act. *Khaw Sim Tek* v. *Chuah Hooi Gush Neoh*, (1922) 49 I.A., 37, applied.

Secretary of State for India v. *Prasad Bapuli* ... (1923) I.L.R., 46 Mad., 259

GROSS INCOME—*Life Insurance Companies—Loading—Onus of proof—Value of negative proof that income does not exceed a certain amount—What questions of law can be referred—What questions the High Court should decide on reference—Reference under rule 17 of Schedule IV Madras City Municipal Act (IV of 1919)*:—*See* MADRAS CITY MUNICIPAL ACT (IV OF 1919) 10

GUARDIANS AND WARDS ACT (VIII OF 1890) SEC. 47—*Order refusing to remove testamentary guardian—Appeal against order, maintainability of—Hindu Law—Power of a Hindu father to appoint by will guardian for the person and separate property of his minor children.*] A Hindu died leaving a will by which he bequeathed his self-acquired property to his minor daughter and appointed a guardian for such property and for the person of the minor. On the refusal by the Court of an application to remove such guardian, under section 39 of Guardians and Wards Act, *Held* (1) that no appeal lay to the High Court under the Act from an order refusing to remove the guardian and (2) that under the Hindu Law the father was competent to appoint by will a guardian of the person of his minor children and of their property, not being joint family property. *Soobah Doorgah Lal Jha* v. *Rajah Neelanund Singh* (1867) 7 W.R., 74, followed. *Chidambara Pillai* v. *Rangasami Naicker* (1918) I.L.R., 41 Mad., 561 (F.B.), considered.

Konthalathammal v. *Thangasamy* ... ... (1923) I.L.R., 46 Mad., 873

HINDU LAW—*Adoption—Hindu dying leaving a widow and a son—Death of son unmarried at 25—Power of mother to adopt with sapindas' consent.*] A Hindu died leaving a widow and a son who died unmarried at the age of 25, *Held* that the attainment of age by the son before his death did not put an end to the power of his mother to adopt a son to her husband with the consent of the sapindas: *Venkappa Bapu* v. *Jivoji Krishna* (1901) I.L.R., 25 Bom. 306 and *Sangappa* v. *Vyasappa* (1896) 8 P.J. of Bom. H.C., p. 684, followed. Dictum in *Madana Mohana Deo* v. *Purushothama Deo* (1918) I.L.R., 41 Mad., 855 at 860 (P.C.), held *obiter dicta* in *Venkataramier* v. *Gopalan* (1918) 35 M.L.J., 698, and of WALLIS, C.J., in *Ananga Bhima Deo* v. *Kunja Behari Deo* (1919) 25 M.L.T., 204, disapproved.

Tripuramba v. *Venkataratnam* ... ... (1923) I.L.R., 46 Mad., 428

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HINDU LAW—*Coparcener—Alienation of an item of joint family property without necessity—Suit by surviving coparcener against alienee—Right of alienee to enforce partition in such suit—Whether a separate suit by alienee necessary—Property sold less in value than share of alienor in all the family property—Right of alienee to be allotted such item from his alienor's share—Equity—Right of other members.*] Where a member of a joint Hindu family sued to recover a certain item of family property alienated by another member on the ground that the alienation was not binding on him, and it appeared that the plaintiff was the only surviving coparcener and that the value of the property alienated was less than that of the alienor's share in the entire family properties at the time of the alienation. *Held* that the alienee need not be directed to institute a separate suit to work out his rights by a partition, but was entitled in the coparcener's suit as a defendant to get a decree for partition, and claim to be allotted the item purchased by him in respect of his vendor's share, if that was consistent with the rights of the other coparceners; and that, if the value of the item did not exceed the value of the alienor's share in the entire family property at the time of the alienation, the alienee was entitled to retain the entire property sold to him. *Ramkishore Kedarnath* v. *Jainarayan Ramarchhpal*, (1913) I.L.R., 40 Calc., 966 (P.C.), relied on

Ramaswami Ayyar v. *Venkatarama Ayyar* ... ... (1923) I.L.R., 46 Mad., 815

———*Debt—Personal debt of father—Liability of undivided sons—Pious obligation—Debt, not shown to be illegal or immoral—Liability of sons' shares in ancestral property—Sons' liability in father's life-time—Suit against father and his undivided sons—Form of decree—Personal decree against father—Decree against sons' shares in ancestral property, to the extent decree remains unsatisfied by the father—Recent decisions of Privy Council as to antecedent debt, effect of.*] In a suit by a creditor against a Hindu father and his undivided sons to recover a personal debt contracted by the father not for an illegal or immoral purpose, the creditor is entitled to a decree against the father personally and, in the event of the father's property proving insufficient, against the shares of the undivided sons in the ancestral property for the balance. The recent decisions of the Privy Council in *Sahu Rama Chandra* v. *Bhup Singh*, (1917) I.L.R., 39 All., 437 (P.C.), *Jogi Das* v. *Ganga Ram*, (1917) 21 C.W.N., 957 (P.C.) and *Chet Ram* v. *Ram Singh*, (1922) 43 M.L.J., 98 (P.C.) dealing with "antecedent debts" and "pious obligations" do not affect the rights of the creditor to proceed against the undivided sons' shares in ancestral property in their father's life-time. *Peda Venkanna* v. *Sreenivasa Deekshatulu*, (1918) I.L.R., 41 Mad., 136; *Arumugham Chetty* v. *Muthu Koundan*, (1919) I.L.R., 42 Mad., 711 (F.B.); *Kandasami Goundan* v. *Kuppu Mooppan*, (1920) I.L.R., 43 Mad., 421; *Hanmant Kashinath* v. *Ganesh Annaji*, (1919) I.L.R., 43 Bom., 612 and *Madhusudan Das Mohant* v. *Iswari Dayi Debi*, (1921) I.L.R., 48 Calc., 341, relied on

Sama Rao v. *Vannajee Vapuji* ... ... (1923) I.L.R., 46 Mad., 64

———*Inheritance—Sudras—Illegitimate son—Extent of share—Widow of deceased.*] The half share which, under the Mitakshara, Chapter 1, section 12, an illegitimate son of a Sudra takes in the estate of his deceased father, is a half of that which he would have taken had he been legitimate, not a half of the share which the other participants take. Thus, as against the widow of the deceased, an illegitimate son takes a half, not a third of the estate.

Kamulammal v. *Visvanathaswami Naicker* ... (1923) I.L.R., 46 Mad. (P.C.), 167

———*Insolvency—Joint family—Managing member adjudicated insolvent—Effect of adjudication—Rights of Official Assignee—Joint possession—Exclusive possession of joint family property—Personal Rights of manager, whether transferred to Official Assignee—Vesting of other members' shares—Alienee—Joint owner—Rights of Official Assignee and other members—Right of Official Assignee to deal with other members' shares—Nature of debt.*] Where the managing member of a joint Hindu family, consisting of himself and his sons, is adjudicated an insolvent, the interest of the sons does not vest in the Official Assignee by reason of the adjudication, although it would be competent to the latter to deal with their shares, if the debts of the

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insolvent were of such a nature as to be binding on their interest. *Fakir Chand Motichand* v. *Motichand Harrukchand*, (1883) I.L.R., 7 Bom., 438; *Nunna Setti* v. *Chidaraboyina*, (1903) I.L.R., 26 Mad., 214, referred to. The Official Assignee as representing the managing member is entitled to joint possession, the sons, of the family property. There are certain rights of a managing member which the Official Assignee cannot exercise by reason of the personal nature of the rights, such as the right to live in the family house or to share in the family meals; but the latter is entitled to all other rights of the insolvent including the right to possession.

Official Assignee of Madras v. *Ramachandra Ayyar* ... (1923) I.L.R., 46 Mad., 54

HINDU LAW—*Partition—Registration—Agreement providing for execution of deed—Unequal division of properties in foreign State—Decree for partition of properties in British India—Indian Registration Act* (*XVI of* 1908), *sec.* 17, *sub-sec.* 2 (v).] A joint family governed by the Mitakshara, and consisting of two brothers, owned immoveable properties some of which were in Travancore State and some in British India. They entered into a written agreement for a division, providing that a deed of partition should be executed and registered both in Travancore and in British India, and that until that was done the agreement itself should be in force. A deed dividing the Travancore properties was afterwards executed and registered, and thereby the elder brother obtained, as *jeshtabhagam*, a larger share than the younger brother. No deed having been executed, or division made of the properties in British India, the younger brother sued to enforce the agreement as to those properties. The High Court held that the agreement not being registered under the Indian Registration Act, 1908, could not be enforced. Treating the suit as one for a general partition, the High Court decreed a partition of the properties in British India, but so that the shares should be equal taking into account the division already made in Travancore. *Held*, (1) that the agreement as far as it went was admissible in evidence without registration having regard to section 17, sub-section 2 (v) of the Indian Registration Act, 1908; (2) that the plaintiff was bound by the deed as to the division of the properties in Travancore, and that there should be a partition in equal shares of the properties in British India.

Rajangam Ayyar v. *Rajangam Ayyar* ... (1923) I.L.R., 46 Mad. (P.C.), 873

———*Suit for partition—Co-owner—Trustee—Mesne profits—Profits claimed by a member of Hindu joint family, whether mesne profits—Interest on such profits, whether awardable—Past and future profits in a partition suit, right to.*] The claim for profits, made by a member of a Hindu joint family in a suit for partition, is not technically one for "*mesne profits*," as used in the Civil Procedure Code. A co-owner, who is awarded profits in a partition suit against another co-owner in possession, is not entitled to *interest* on such profits in the absence of proof of fraud or inefficiency in the realization of the profits.

Ramasamy Aiyar v. *Subramania Aiyar* .. ... (1923) I.L.R., 46 Mad., 47

———*Widow—Adopted son—Adoption invalid—Death of adoption son, as a minor, unmarried and intestate—Succession by natural mother—Suit by natural mother against adoptive mother—Death of former pending suit—Will executed by the natural mother bequeathing accumulations of income of estate inherited from the son—Accumulations deposited in Bank by order of Court—Suit continued by reversioners—Fund drawn by reversioners on giving security—Dismissal of suit—Decision by Privy Council holding adoption invalid—Reversioners in possession of the entire income of the estate—Suit by legatees for their legacies against the reversioners in possession of the fund—Bar of Limitation—Limitation Act* (*IX of* 1908), *articles* 62, 120 *and* 123—*Executor* de son tort—*Cause of action—Interest on legacies from what date due—Probate and Administration Act* (*V of* 1881), *sec.* 4—*Will, construction of—Executor, death of, without accepting office—Vesting of estate—Joinder of legal personal representative, whether necessary. Succession Act* (*X of* 1865) *ss.* 265 and 266.] The minor proprietor of the Medur estate was given in adoption in 1890 by his natural mother V to P who had inherited the Nidadavolu estate from her husband. The minor died unmarried and intestate in 1895. V sued in

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1895 in the Sub-Court to recover possession of the Medur estate from the Court of Wards and P, on the ground that the adoption was invalid and that she succeeded to it as heiress to her son. V died pending suit in March 1899, leaving a will bequeathing to several legatees her jewels, certain Government promissory-notes and cash including the accumulations of the income of the Medur estate which accrued since the death of the minor, and which were deposited in the Bank of Madras to the credit of the suit under order of Court. The suit was continued by R and VN who were the paternal uncle of the minor and next reversioners to the Medur estate, and was dismissed on 2nd December 1899 on the ground that the adoption was valid. The uncles appealed to the High Court. P died on 5th December 1899, PA, who was a co-reversioner to the Nidadavolu estate along with R and VN, sued in 1900 in the District Court for partition of his one-third share in the both the estates; the District Judge held the adoption invalid and decreed only one-third share in Nidadavolu estate to PA, who appealed to the High Court. The later disposed of the appeals in 1905, holding that the adoption was valid and that the three reversioners were each entitled to a third share in both the estates. All the parties appealed to the Privy Council which held in December 1913 that the adoption was invalid and awarded a half share to each of the two uncles in the Medur estate and a third share to each of the three reversioners in the Nidadavolu estate. In 1905 and 1907 each of the three reversioners drew out his one-third share in the accumulated income of the Medur estate on giving security to the Court under the orders of the Sub-Court and High Court, respectively. After the Privy Council decision in December 1913, the legal representatives of the two uncles applied for and obtained an order for refund of the amount drawn by PA for his share and for retention of their own shares, and the amount due by PA, was recovered by the former in execution in 1914 to 1917. Under the will of V, an executor had been appointed but he did not accept office or act as executor. The legatees under the will of V brought these suits in April 1916 to recover their legacies from the legal representatives of R and VN, who pleaded *inter alia*, that the will was inoperative as regards the accumulated income of Medur estate as V had no power to dispose of it by her will, and that the suits were barred by limitation: *Held*, that a Hindu widow is entitled to the income of her deceased husband's estate and can dispose by will of accumulations of it, at any rate when she does anything to show that she claims it as her own and does not intend such accumulations to form part of her deceased husband's estate; that as V was not in possession of the Medur estate, as she sued for the income as hers and left it specifically by her will, she must be held to have had it as her own property over which she had absolute control, and the disposition by her will was valid; that on a proper construction of the will the legacies could not be sued for until the termination of the litigation which did not occur till the decision of the Privy Council in 1913; that by the law of India, as by the law of England, legacies are not payable until there are assets available to pay them and time does not begin to run until there are available assets, and that assets were not available for distribution to legatees in this case until the decision of the Privy Council in 1913; *Lord* v. *Lord*, (1867) L.R., 2 Ch. App. 782; that article 123 of the Indian Limitation Act applies to suit for legacies against any person rightly or wrongly in possession of the estate of the testator under such circumstances that he is bound to deal with it as the estate of the deceased testator; *Maung Tun Tha* v. *Ma Thit* (1917) I.L.R., 44 Calc., 379 (P.C.), *Khetramani Dasee* v. *Dhirendra Nath Roy*, (1914) I.L.R., 41 Calc., 271, followed; that article 123 applied to these suits and they were not barred; even if article 62 or 120 applied, the suits were not barred as the amount was not received for the plaintiff's use nor did the cause of action arise before 1913; that an executor *de son tort* can be sued by a legatee in the absence of the legal personal representative when there is no such legal representative as also when a representative of the deceased or a person in possession of the estate is proved, as in this case, to have received enough to pay all demand against the estate in full; *Coote* v. *Whittington*, (1873) L.R., 16 Eq., 534; *In re Lovett Ambler Lindsay*, (1876) 3 Ch. D., 193, followed; that as between the residuary and other legatees, the rule as to the date from which the legacies bear interest is this, viz., "A

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legacy payable at a future day carries interest only from the time fixed for payment ; but where no time for payment is fixed, the legacy is payable at, and therefore bears interest from the end of a year after the testator's death, even though it be expressly made payable out of a particular fund which is not got in until after a longer interval" ; that, under the will in question the legacies were intended to be given to the legatees as from the testatrix's death and to come *due at once*, but the testatrix recognised that they were not *payable* until after the termination of the litigation ; consequently the legacies carried interest at 6 per cent from one year after the death of the testatrix. *Lord* v. *Lord*, (1869) L.R., 2 Ch. App., 782 ; *Walford* v. *Walford*, [1912] A.C., 658, followed. *Per* KUMARASWAMI SASTRI, J.—Where an executor under a will died without excepting the office or showing any indication that he took upon himself the duties of executor, the estate would not, under section 4 of the Probate and Administration Act, vest in the executor, but in the legal representative of the testator ; In order to apply the doctrine that a person claiming under a colour of hostile title cannot be deemed to be an executor of his own wrong, the claim must be made *bona-fide* ; The doctrine of executor of his own wrong in the law of wills introduced in sections 285 and 286 of the Indian Succession Act, is applicable to cases not governed by that Act on general principles of equity and good conscience, even though similar provisions have not been introduced into the Probate and Administration Act.

Rajah Parthasarathy Appa Rao v. *Rajah Venkatadri Appa Rao* (1923) I.L.R., 46 Mad., 190

INCOME-TAX ACT, INDIAN (VII OF 1918), SEC. 2 (12-A)—*Registration of some members of a joint family as a firm—Partnership of some members by a document—Liability of the joint family to super-tax.*] Registration of some members of a joint family as a firm as defined in section 2 (12-A) of the Indian Income-tax Act (VII of 1918) precludes the assessment of the family as an undivided family to super-tax on the income derived from the business of the firm unless the firm so registered has been shown to carry on its business on behalf and for the benefit of the joint family. Nor does mere constitution of a partnership between some members of the family by a formal document preclude the assessment of the income of the partnership to super-tax as part of the income of the undivided family, if the partnership is conducted on behalf of and for the benefit of the joint family.

Chief Commissioner of Income-Tax v. *Doraiswami Ayyangar* ... (1923) I.L.R., 46 Mad., 673

——————————— SEC. 3 (1)—*Company located in British India controlling business situated outside India—Accrual of income outside India—Liability of Company to income-tax.*] A Company whose Directors and head office were in Bellary wherefrom the business of the Company was controlled, had a factory in Raichur (i.e., in the Nizam's Dominions), earned all its income only in Raichur by pressing cotton for its customers and usually paid its dividends according to its agreement only at that place, *Held*, notwithstanding the fact that some money was received in Bellary from Raichur for office expenses and for convenient payment in Bellary of dividends to some share-holders, the Company cannot be assessed to income-tax in British India, as no portion of its income "accrued, arose or was received" in British India, within section 3 (1) of the Indian Income-tax Act (VII of 1918). Money remitted to the Company at Bellary is only part of the money already "accrued" to the Company at Raichur and is not come newly "received" by the Company ; *In re Aurangabad Mills, Limited*, (1921) I.L.R., 45 Bom., 1283, *Board of Revenue, Madras* v. *Ramanathan Chetty*, (1920) I.L.R., 43 Mad., 75 (S.B.), and *Sundar Das* v. *Collector of Gujarat*, (1922) I.L.R., 3 Lah., 349 (F.B.), followed.

Board of Revenue v. *Ripon Press* ... (1923) I.L.R., 46 Mad. (S.B.), 706

——————————— SS. 3 (1) (5) AND 33—*Firm in France buying goods in India through Agent but selling them for profit in France—Profit not taxable under the Act.*] As the agent of a firm situated in Paris, A bought raw skins in Madras and exported them to

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Paris where the firm sold them for profit. *Held*, that as the profits accrued solely in France they were not taxable in British India. *Held*, further that section (33) 1 of the Indian Income-tax Act did not create a new category of income which could be charged under the Act in addition to incomes mentioned under section 5 as chargeable under the Act but that section 33 (1) merely provided a machinery by which non-resident foreigners (amongst others), trading in British India or having business connexion in British India could be taxed on income derived by them in British India. *Greenwood* v. *Smidth*, [1922] 1 A.C., 417, followed.

The Board of Revenue v. *The Madras Export Company* (1923) I.L.R., 43 Mad., 360

INSOLVENCY—*Joint family—Managing member adjudicated insolvent—Effect of adjudication—Rights of Official Assignee—Joint possession—Exclusive possession of joint family property—Personal rights of manager, whether transferred to Official Assignee—Vesting of other shares—Alienee—Joint owner—Rights of Official Assignee and other members—Right of Official Assignee to deal with others' shares—Nature of debt* :—*See* HINDU LAW ... 54

——————*Managing member of joint family adjudicated insolvent—Effect of adjudication*:—*See* HINDU LAW 55

INTEREST—*Mesne profits—Suit for partition—Co-owner—Trustee—Profits claimed by a member of Hindu joint family, whether mesne profits—Past and future profits in a partition suit, right to—Hindu Law* :—*See* HINDU LAW ... 47

——————*Offer to discharge—Refusal to accept the payment—waiver of tender* :—*See* MORTGAGE 108

INTEREST ON LEGACIES—*Will, construction of—Executor, death of—Vesting of estate* :—*See* HINDU LAW 190

IRREGULARITY—*Criminal trial—Evidence of witnesses taken by a predecessor, exhibited before the successor—Consent of the accused to such procedure—Whether cures irregularity—Viva voce examination at trial—If obligatory* :—*See* CRIMINAL TRIAL 117

——————————*Summary trials—Bench of Magistrates—Failure to record reasons* :—*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), SS. 263, 370 AND 441 253

IRRIGATION CESS ACT (VII OF 1865), SEC. 2.—*See* REVENUE RECOVERY ACT (II OF 1864), SEC. 59 (1) 488

JURISDICTION—*Application to set aside* ex-parte *decree, transfer of territorial jurisdiction after passing decree* :—*See* CIVIL PROCEDURE CODE (V OF 1908), SEC. 150 AND O. IX, R. 13 1

——————*Civil Procedure Code* (*V of* 1908), *sec.* 150 *and Order* XXXIX, *rule* 2, *clause* (3)—*Part of territorial jurisdiction of one Court and business therein transferred to a new Court—Breach of temporary injunction—Jurisdiction of new Court to punish* :—*See* CIVIL PROCEDURE CODE 83

——————————*Criminal Procedure Code* (*V of* 1898), *sec.* 195—*Death of applicant for sanction for perjury—No jurisdiction to allow legal representative to continue the application* :—*See* CRIMINAL PROCEDURE CODE 88

——————————*Decree of original Court giving time to plaintiff for payment of price, in a suit for specific performance—Appeal by defendant—Powers of original Court to extend time* :—*See* SPECIFIC RELIEF ACT 148

——————————*Notice to the other side—Practice—Order as to disposal of property* :—*See* CRIMINAL PROCEDURE CODE, SS. 407 AND 520 162

——————————*Rule IV of election rules—"Taking part in ballot," meaning of—Chairman as returning officer of his own election—Voidability of election*

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—*Duty of a Judge before setting aside an election—Revisional powers of the High Court under section* 115, *Civil Procedure Code*:—*See* MADRAS DISTRICT MUNICIPALITIES ACT (V OF 1920) 123

JURISDICTION—*Specific performance—Contract for sale of lands—Decree of original Court, time for payment of price—Power of original Court to extend time—Nature of original decree—Preliminary decree—Power of Appellate Court to extend time in the appeal*:—*See* SPECIFIC RELIEF ACT (I OF 1877), SEC. 35 148

LEGACIES—*when payable—Will—Widow—Adopted son*:—*See* HINDU LAW ... 190

LEGAL REPRESENTATIVE—*Criminal Procedure Code* (*V of* 1898), *sec.* 195—*Death of applicant for sanction for perjury—No jurisdiction to allow legal representative to continue the application*:—*See* CRIMINAL PROCEDURE CODE 88

LETTERS PATENT, ART. 10—*Barrister—Advocate—Misconduct—Conviction in England for perjury—Disbarring in England Motion in High Court four years after, to disbar—Matters for consideration.*] A Barrister who was enrolled as an Advocate of the Madras High Court in 1913 was convicted of perjury in England by the London Central Criminal Court and sentenced in 1918 to imprisonment for six months, which conviction and sentence were confirmed on appeal. The Benchers of his Inn thereupon disbarred him and expelled him from the Inn in 1919. On a motion under article 10 of the Letters Patent, made in 1923 to disbar the Advocate; *Held* (1) that the loss of the privilege of being a Barrister in England, though it was his only qualification for admission here as an Advocate did not necessarily entail his disbarment in the High Court, (2) that the conviction pronounced after a fair and full trial, though by an English Court, should be recognized as valid by the High Court and (3) that though in these proceedings it was not open to question the propriety of the conviction the Court can, with a view to fix the *quantum* of punishment, look into the circumstances of the case and ascertain the degree of moral turpitude and extenuating circumstances, if any. *Held* further that though, if the motion had been made soon after the conviction, the Court would have disbarred him, yet as it was made four years later, it was open to the High Court to take into consideration such matters as would be relevant on an application to reinstate a practitioner who has been disbarred. An order of disbarment is not necessarily final or conclusive for all time; it is open to the Court to readmit a practitioner after a lapse of time, if satisfied that he has in the interval conducted himself honorably and that the sentence of exclusion has had the salutary effect of awakening in the delinquent a higher sense of honour and duty so that he might be safely entrusted with the affairs of his clients and admitted to an honourable profession without its suffering any degradation. Looking into all the circumstances of the case their Lordships suspended the Advocate from practice for a year.

Advocate, In re *an* ... ... (1923) I.L.R., 46 Mad. (S.B.), 903

LIFE INSURANCE COMPANIES—*Gross income—Onus of proving—Value of negative proof that income does not exceed a certain amount—Loading—What questions should the High Court decide on reference—What questions of law can be referred—Reference under rule* 17 *of schedule IV—Madras City Municipal Acts* (*IV of* 1919):—*See* MADRAS CITY MUNICIPAL ACT (IV OF 1919) 10

LIMITATION—*Adverse possession—Hindu charitable endowment—Decree declaring trust—Possession continuing after decree—Recovery of trust property—Indian Limitation Act* (*IX of* 1908), *sec.* 10, *sch. I, arts.* 134 *and* 144.] The appellant was trustee under a registered deed executed by his grandfather in 1890 endowing a chatram with immoveable property. In 1898 the first respondent purchased part of the property at a sale in execution

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of a decree against the appellant's father, the then trustee, for debts incurred by him; the purchaser and the other respondents, who claimed under him, had been in possession since that date. In 1904, in a suit in which the first respondent was a defendant, the appellant obtained a decree declaring the validity of the trust. In 1913 the appellant sued the respondents for possession of the purchased property. *Held*, that the decree of 1904 did not operate as *res judicata* so as to preclude the respondents from asserting that the property was now theirs, and that the suit was barred under either article 134 or article 144 of the Indian Limitation Act, 1908, Schedule I; the decree merely emphasized the fact that the purchaser's possession was adverse. Further, the exception in section 10 of that Act shows that a claim to recover trust property from an assignee for valuable consideration with notice can be defected by adverse possession. *Ishwar Shyam Chand Jiu* v. *Ram Kanai Ghose* (1911) I.L.R., 38 Calc., 526 (P.C.) and *Vidya Varuthi* v. *Balusami Ayyar* (1921) I.L.R., 44 Mad., 831 (P.C.), distinguished.

Subbaiya Pandaram v. *Mustapha Marcayar* (1923) I.L.R., 46 Mad. (P.C.), 751

LIMITATION, *Presidency Small Cause Courts Act—Application for new trial—Decree passed before vacation*:—*See* PRESIDENCY SMALL CAUSE COURTS ACT. 938

———, *Voidable sale by a qualified owner—Dispossession of purchaser under a decree obtained by one claiming paramount title—Limitation Act, article* 97:—*See* LIMITATION ACT, ART. 97 40

LIMITATION ACT (IX OF 1908), ARTS 62, 120 and 126—*Adoption—Will—Widow*:—*See* HINDU LAW 190

———, ART. 97—*Voidable sale by a qualified owner—Dispossession of purchaser under a decree obtained by one claiming paramount title—Limitation.*] A purchaser under a voidable sale-deed from a qualified owner was dispossessed in execution of a decree obtained by a person entitled to avoid the sale. *Held*, that a suit by the purchaser for the return of the price was governed by article 97 of the Limitation Act and that limitation began not from the date of the decree but from the date of actual dispossession. *Juscurn Boid* v. *Pirthichand Lal Choudhury*, (1919) I.L.R., 46 Calc., 670 (P.C.), distinguished.

Sankara Variar v. *Ummer* ... ... (1923) I.L.R., 46 Mad., 40

———, ART. 110—*Defendant, both head of a mutt, and trustee of a temple—Defendant removed from trusteeship—Plaintiff appointed Receiver for management of temple—Temple, owner of melvaram, mutt being owner of kudivaram—Suit by Receiver against defendant for arrears of melvaram due from mutt—Arrears due during defendant's trusteeship for more than three years prior to suit—Suit within three years of plaintiff's appointment—Suit, whether barred—Cause of action—Limitation, when begins.*] The defendant was both head of a mutt and trustee of a temple until he was removed from trusteeship by a decree of a Court which appointed the plaintiff as Receiver for the management of the temple. The temple was the owner of the melvaram in certain lands, while the mutt was the owner of the kudivaram therein, liable to pay the melvaram to the temple. The Receiver sued to recover from the defendant as the head of the mutt the arrears of melvaram due to the temple that had accrued during defendant's trusteeship. The suit was instituted within three years of the appointment of plaintiff as Receiver but the arrears were in part for a period more than three years prior to the suit. The defendant pleaded, *inter alia*, the bar of limitation: *Held*, that so long as the defendant was both head of the mutt and trustee of the temple, no suit for rent could be brought by him as trustee of the temple against himself as head of the mutt; nor could any one else have brought such a suit; that when there was none competent to sue, there was no cause of action, and limitation could not run, because there was none against whom it could run: *Murray* v. *The East India Company* (1821) 5 B. & Ald., 204; that the cause of action for rent arose when the plaintiff

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was appointed Receiver, and that, as the suit was brought within three years of the appointment of the plaintiff as Receiver, no portion of the claim was barred under article 110 of the Limitation Act. *Mussumat Ranee Surno Moyee* v. *Shoshee Mokhee Burmonia* (1868) 12 M.I.A., 244 and *Rangayya Appa Rao* v. *Bobba Sriramalu* (1904) I.L.R., 27 Mad., 143 (P.C.), applied.

Annamalai Desikar v. *Govinda Rao* ... ... (1923) I.L.R., 46 Mad., 579

LIMITATION ACT (IX OF 1908), ART. 124—*Suit to recover choultry building by one alleging to be hereditary trustee—Declaratory decree as to title, effect of, on adverse possession of another.*] A suit to recover possession of a choultry building belonging to a charity, by one alleging himself to be its hereditary trustee is governed by article 124 of the Limitation Act. *Pattaikara Manakkal Kuppan* v. *Choorakkapatti Munda Kottil* (1912) 14 I.C., 168, followed. A judgment of a Court declaring that a party in possession of immoveable property has no title to it has not the effect of interrupting the continuity of his adverse possession as against the real owner. If he continues in possession for 12 years before suit his title is perfected; *Mir Akbar Ali* v. *Abdul Ajij* (1920) I.L.R., 44 Bom., 934, not followed, *Raghunatha Chariar* v. *Tiruvengada Ramanuja Chariar* (1910) 9 M.L.T., 171 and *Ayissa* v. *Lakshmana Prabhu* (1911) 9 M.L.T., 420, followed.

Singaravelu Mudaliar v. *Chokkalinga Mudaliar* ... (1923) I.L.R., 46 Mad., 525

———————————, SEC. 10, SCH. 1, ARTS. 134 AND 144:—*See* LIMITATION 751

———————————, SEC. 10 AND ART. 120—*See* GOVERNMENT BONDS 259

———————————, ss. 15 AND 29 AND ART. 16:—*See* REVENUE RECOVERY ACT (II OF 1864), SEC. 59 (1) 488

LOADING—*Gross income of insurance companies—Onus of proving—Value of negative proof that income does not exceed a certain amount—What question of law can be referred—What questions the High Court should decide on the reference—Madras City Municipal Act, IV of 1919—Reference under rule 17 of schedule IV*:—*See* MADRAS CITY MUNICIPAL ACT 10

LOCAL BOARDS ACT, MADRAS (XIV OF 1920), ss. 55 TO 57—*Rule 10 of Transitory Provisions - Nomination of a retiring President as a member of the new Board under Act XIV of* 1920, *legality of—Election of the nominated member as President of new Board—Order of District Judge setting aside his election as President, on a wrong construction of statute—District Judge, a Court, and not* person a designata—*Decision of District Judge declared "final" by Act XIV of* 1920—*Revisional powers of High Court under section* 115, *Civil Procedure Code, and section* 107, *Government of India Act.*] Under a notification of the Government, the members of a Taluk Board, constituted under the Madras Local Boards Act, 1884, were to lay down their offices on 1st March 1922 and new members were to be elected or nominated before that date so as to be able to form a new Board as from 1st March 1922 under the new Local Boards Act XIV of 1920. In virtue of the statutory powers vested in him the President of the District Board nominated on 21st February 1922 the retiring President of the Taluk Board, *G*, to be a member of the new Board as from the 1st March 1922 and he was eventually elected as President of the new Taluk Board on 15th March 1922. *Held*, that the nomination was not invalid under the combined operation of section 55 and rule X of the Transitory Provisions of the new Act XIV of 1920. *Held* further, that a District Judge inquiring into an objection to an election under section 57 of the Act of 1920 was not a *persona designata* but a "Court" subject to the revisional jurisdiction of the High Court under section 115, Civil Procedure Code, and section 107, Government of India Act *Balakrishna Udayar* v. *Vasudeva Ayyar* (1917) I.L.R., 40 Mad., 793, followed. *Held* also, that the decision of the District Judge on enquiry was revisable by the High Court

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in spite of the fact that his decision was declared "final" by section 57 and rule 12 (3) of election inquiry rules framed under the Act; *Valli Ammal* v. *The Corporation of Madras* (1915) I.L.R., 38 Mad., 41, followed. *Held* further, that a decision by the District Judge setting aside the election of the new President on the ground that his nomination as a member was invalid was revisable by the High Court under section 115, Civil Procedure Code, as a case of assumption of jurisdiction on a wrong construction of a statutory rule; *Sundaram* v. *Mausa Ravuthar* (1921) I.L.R., 44 Mad., 554 (F.B.), followed.

Ramaswami Goundan v. *Muthu Velappa Goundar* .. (1923) I.L.R., 46 Mad., 536

MADRAS CITY MUNICIPAL ACT (IV OF 1919)—*Reference under rule* 17 *of Schedule IV—What questions of law can be referred—What questions the High Court should decide on reference—"Loading"—"Gross income"—of Life insurance companies—Onus of proving—Value of negative proof that income does not exceed a certain amount.*] On a reference under rule 17 of Schedule IV of the Madras City Municipal Act (IV of 1919) by the Court of Small Causes at Madras, the High Court was not bound to decide questions other than those referred for its decision. *Held*, further, that the reference should not state for decision any abstract and general question of law, that the terms of the reference must show how the question of law propounded affects the case on hand and that the High Court would answer the actual question of law arising in the case only so far as it bore on the particular case. *Mylapore Hindu Permanent Fund (Limited)* v. *The Corporation of Madras*, (1908) I.L.R., 31 Mad., 408, followed; *Held*, on the facts of the case that the Sun Life Assurance Company of Canada had, in reference to licence fees charged on it, discharged the onus that lay on it under proviso to rule 7 of Schedule IV of the City Municipal Act by showing that its gross income for the previous year could not have exceeded Rs. 25,000 and that the circumstance that the company was not able to state positively its actual gross income would not disentitle it to the benefit of the proviso. Observations on the question of what constitutes income and profits of insurance companies.

The Sun Life Assurance Company v. *The Corporation of Madras* ... (1923) I.L.R., 46 Mad., 10

MADRAS CITY POLICE ACT (III OF 1888), SEC. 53—*Society for the Prevention of Cruelty to Animals, agent of—Indian Penal Code (Act XLV of* 1860), *sec.* 21 (8)—*Public servant.*] An agent of the Society for the Prevention of Cruelty to Animals appointed, under Act III of 1888, a member of the Madras City Police force with respect to offences under section 53 of that Act only, is a public servant within the meaning of section 21 (8) of Indian Penal Code. *Upendra Kumar Ghouse* v. *The King Emperor*, (1906) 3 C.L.J., 475, followed.

Nataraja Pillai, In re ... ... (1923) I.L.R., 46 Mad., 90

———————————, SEC. 78—*Rules, dated 10th February* 1922, *and published in the* Fort St. George Gazette—*Two persons riding a cycle, one seated on the saddle, the other standing on the back-steps of the same—Whether guilty.*] A by-law made under the Madras City Police Act (III of 1888), provided "No person riding a bicycle in any street or public place shall be permitted to carry any other person on the same bicycle, either on the handle-bar or on the back-step or on the cross-bar; and no person shall ride a bicycle in any street or public place in any other manner than on the saddle." A person who allows himself to be carried on the back steps of a bicycle by another seated on the saddle of the same cycle, rides a bicycle within the meaning of the latter clause of the by-law and commits an offence against it.

King-Emperor v. *Duraiswami* ... ... (1923) I.L.R., 46 Mad., 476

MADRAS CITY TENANTS PROTECTION ACT (III OF 1922), SEC. 9—*Tenant in possession of temple lands—No right under the Act to compel trustee to sell the land to him.*] A tenant in occupation of land belonging to a temple or mosque cannot enforce a compulsory sale of the land under

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section 9 of the Madras City Tenants Protection Act and require the temple or mosque to deliver the land to him on a valuation to be made by the Court.

Parthasarathi Aiyangar v. *Doraisawmi Naicker* ... (1913) I.L.R., 46 Mad., 823

MADRAS CITY TENANTS PROTECTION ACT (III OF 1892), SS. 9 AND 10—*Decree before Act for ejecting tenant—No right to apply under section 9—No retrospective operation for section 9.*] Where a decree had been passed before the Madras City Tenants Protection Act (III of 1922) came into force for the ejectment of a tenant, he cannot thereafter apply to the Court under section 9 of the Act for an order directing the landlord to sell the land to him. Section 9 has no retrospective operation.

Latifa Bi v. *Mottai Ammal* ... ... (1923) I.L.R., 46 Mad., 836

MADRAS DISTRICT MUNICIPALITIES ACT (V OF 1920)—*Rule IV of Election Rules—"Taking part in ballot," meaning of—Candidate for chairmanship acting as chairman and returning officer at his own election—Voidability of election—Judge enquiring into an objection to an election, not a persona designata but a Court subject to revisional jurisdiction of High Court—Duty of Judge before setting aside election—Revisional powers of High Court under section 115, Civil Procedure Code, on refusal of jurisdiction by Judge.*] A person who was himself a candidate for election to the chairmanship of a municipality acted as chairman and returning officer at the station, conducting the ballot, opening the ballot box and counting the votes. *Held*, that by such action he had "taken part in the ballot" within rule 4 of the election rules and that his eventual election was voidable. *The Queen* v. *Owens*, (1859) 2 El. & El., 86 and *The Queen* v. *White*, (1867) 2 Q.B., 557, followed. *Held* further, that this action did not by itself invalidate his election and the Court had further to find before setting aside the election that as required by the rules "the result of the election has been materially affected thereby." *Shyam Chand Basak* v *Chairman, Dacca Municipality*, (1920) I.L.R., 47 Calc., 524, distinguished A Judge hearing such an election petition is *not a persona designata* but a 'Court." *Ramaswami Goundan* v. *Muthu Velappa Gounder*, (1923) 44 M.L.J., 1, followed. *Held* also, that an order of the Judge setting aside the election without giving such a finding was one passed without jurisdiction and was liable to be set aside under section 115 (c) of the Civil Procedure Code, *Balakrishna Udayar* v. *Vasudeva Ayyar*, (1917) I.L.R., 40 Mad., 793 (P.C.), followed.

Ahamad Thambi Maracayar v. *Basava Maracayar* ...(1923) I.L.R., 46 Mad., 128

MAINTENANCE:—*See* MALABAR LAW 567

———*Personal right to future maintenance, not transferable*:—*See* TRANSFER OF PROPERTY ACT 659

———*Order awarding to an illegitimate child—Subsequent decree of Civil Court declaring that the Child was not illegitimate*:—*See* CRIMINAL PROCEDURE CODE (V of 1898), SEC. 488 721

———*Suit by husband for divorce—Application for maintenance—Power of Court to grant maintenance under the Act*:—*See* INDIAN DIVORCE ACT (IV OF 1869), SEC. 15 183

MAKKATTAYAM LAW—*Thattans (goldsmiths) of North Malabar—Partibility of joint family property amongst them.*] The Thattans (goldsmiths) of North Malabar who follow Makkattayam law are governed by the ordinary Hindu law; hence amongst them joint family property is partiable until a valid custom to the contrary is proved: *Raman* v. *Muthu* (1920) 40 M.L.J., 301, followed. *Rarichan* v. *Perachi* (1892) I.L.R., 15 Mad., 281. *Raman Menon* v. *Chathunni* (1894) I.L.R., 17 Mad, 184, and *Imbichi Kandan* v. *Imbichi Pennu* (1896) I.L.R., 19 Mad., 1, explained and distinguished.
Kunhi Kutti v. *Raman* ... ... (1923) I.L.R., 46 Mad., 597

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MALABAR LAW—*Marumakkattayam Mappillas of North Malabar—"Strisothu"—Custom of settling property on females and their female descendants to the exclusion of males, validity of.*] There is no custom or usage prevailing among the Marumakkattayam Mappillas of North Malabar by which property may be settled as *strisothu* on the female members of a tarwad or tavazhi to the exclusion of the males or so as at least to authorize the female members to sell the family property otherwise than for necessary tarwad purposes without the consent of the males. Their Lordships refrained from expressing any opinion as to the existence of tarwads in which the manager or karnavathi is a female.

Muhammad Kunhi v. *Packrichi Umma.* ...(1923) I.L.R., 46 Mad. (F.B.), 650

———*Separate maintenance for junior members—Allotment by karnavan—Rate of maintenance—Revision by Court—Form of a decree for maintenance against karnavan.*] The junior members of a Malabar tarwad are entitled to separate maintenance out of the tarwad house whom there is no room for them to live in that house; and if the karnavan makes an insufficient allowance, the juniors are entitled to apply to the Court to determine what allowance is sufficient having regard to all the circumstances of the family and of the junior members, though allotments made by the karnavan will not be lightly interfered with by the Courts. Allotments made are also liable to revision by the karnavan and the Court, from time to time, according to change of circumstances. *Thayu* v. *Shungunni* (1882) I.L.R., 5 Mad., 71, followed. Ordinarily a decree for maintenance against the karnavan should direct that he should pay the same, as manager and karnavan, out of the income of the tarwad property, and should not in the absence of special circumstances be a personal decree against him.

Kunhalikutti Haji v. *Kunhamayan* ... ... (1923) I.L.R., 46 Mad., 567

MAUJA—*Copy of a document—Copy more than 30 years old—Proper custody—Presumption*:—*See* EVIDENCE ACT, SEC. 90 92

MESNE PROFITS—*Suit for partition—Co-owner—Trustee—Profits claimed by a member of Hindu joint family, whether mesne profits—Interest on such profits, whether awardable—Past and future profits in a partition suit, right to—Hindu Law*:—*See* HINDU LAW 47

MORTGAGE DEED, FRAUDULENT:—*See* REGISTRATION 435

MORTGAGE—*Interest—Offer to discharge—Refusal to accept payment—Waiver of tender—Mortgagee in possession—Fixed annual sum for variable expenses—Validity of provision.*] If a mortgagee unequivocally refuses a proposed payment of the amount due, the mortgagor is not bound to make a formal tender of it, and the mortgagee cannot recover interest accruing subsequently, even if he proves that the mortgagor had not the money or the control of it. *Hunter* v. *Daniel*, (1845) 4 Hare 420, applied. But a refusal purporting to be based upon an unenforceable provision in the mortgage, namely that upon a default the mortgagee can purchase the property for the outstanding amount, is not one which dispenses with the necessity of a tender. A term in a mortgage whereby the mortgagee in possession can charge a fixed annual sum in respect of several charges and expenses of a variable amount is not invalid as giving the mortgagee an advantage which he is not entitled to exact.

Chalikani Venkatarayanim v. *Zamindar of Tuni.*
(1923) I.L.R., 46 Mad. (P.C.), 108

NEGLIGENCE—*Railway Accident*:—*See* RAILWAY COMPANY 929

NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), SS. 8 AND 9—*Endorsee with knowledge of a prohibitory order, of "holder" or "holder in due course"*:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 64 and O. XXI, R. 51 ... 415

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OFFER—*Irrevocable—Offer at an end by the sale—No offer for acceptance—Suit for specific performance by promisee against promisor and his vendor, whether maintainable—Contract—specific performance—Agreement to sell on payment of a price at a future time at the option of the promisee—Sale by promisor to a third party—Acceptance by promisee, after sales:*—See CONTRACT 30

OFFICIAL ASSIGNEE—*Joint family—Managing member adjudicated insolvent—Insolvency—Effect of adjudication—Rights of Official Assignee—Joint possession—Exclusive possession of joint family property—Personal rights of manager, whether transferred to Official Assignee—Vesting of other members' shares—Alienee joint owner—Rights of other members—Rights of the Official Assignee to deal with others' shares—Nature of debt—Hindu Law:*—See HINDU LAW. 54

OFFICIAL RECEIVER—*Courts' power to remove:*—See PROVINCIAL INSOLVENCY ACT (V OF 1920) 405

PARTITION SUIT—*Hindu Law—Co-owner—Trustee—Mesne profits—Profits claimed by a member of a joint Hindu family, whether mesne profits—Interest on such profits, whether awardable—Past and future profits in a partition suit, right to:*—See HINDU LAW 47

PART-PERFORMANCE—*Contract to sell land worth more than Rs. 100—Payment of consideration and delivery of possession—Suit by vendor to eject purchaser for want of conveyance—Part-performance and right to specific performance, good defences—Section 54, Transfer of Property Act (IV of 1882)—"Sale" and "Price," meaning of.*] *A* agreeing to sell his lands worth more than Rs. 100 to *B*, received the consideration and put *B* in possession but did not execute a conveyance. In a suit by *A* to eject *B* from the lands based on the want of a conveyance; *Held* by the Full Bench, that part-performance by way of delivery of possession and an enforceable right on *B*'s part to specific performance are each good defences to the action; *Venkayyamma Rao* v. *Appa Rao* (1916) I.L.R., 39 Mad., 609 (P.C.), *Mahomed Musa* v. *Aghore Kumar Ganguli* (1915) I.L.R., 42 Calc., 801 (P.C.), followed. *Ramanathan* v. *Ranganathan* (1917) I.L.R., 40 Mad., 1134 and *Kurri Veerareddi* v. *Kurri Bapireddi* (1906) I.L.R., 29 Mad., 336 (F.B.), overruled. *Held*, by the Division Bench (PHILLIPS AND DEVADOSS, JJ.), (*a*) that the plea of part-performance is not limited to cases where the right to sue for specific performance is not barred on the date of subsequent suit; *Meher Ali Khan* v. *Arutwnessa Bibi* (1919) 25 C.W.N., 905, followed.

Visagapatam Sugar Co. v. *Muthuramareddi* ... (1923) I.L.R., 46 Mad., 919

PENAL CODE, INDIAN (ACT XLV OF 1860), ss. 143 AND 447—*Unlawful assembly—Criminal trespass—Compounding an offence, meaning of—Consensus of purposes*]. The essence of an offence under section 143, Indian Penal Code, is the combination of several persons, united in the purpose of committing a criminal offence, and that consensus of purpose is itself an offence distinct from the criminal offence which these persons agree and intend to commit. The compounding of an offence does not mean that the offence has not been committed, though the victim is willing either to forgive it or to accept some from of solatium as sufficient compensation for what he has suffered.

Matti Venkanna, In re ... ... (1923) I.L.R., 46 Mad., 257

———, SEC. 21 (8)—*Public servant:*—
See MADRAS CITY POLICE ACT 90

——— ss. 81, 96 TO 105 AND 342—*Wrongful confinement—Drunken person—Arrest and confinement by police officer without warrant—Police officer charged with offence under sec. 342, Indian Penal Code—Private defence or justification—Rules of English Common Law, whether applicable to Criminal Law of India—Effect of codification—Right of private defence or justification laid down in Indian Penal Code only, applicable—Criminal Procedure Code (V of 1898), sec. 57—Madras Police Act (XXIV of 1859), sec. 21—Duties and powers of Police officers.*] The purpose of a codified statute is that, on any point specifically dealt with by it,

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the law shall be ascertained by interpreting the language used. The Criminal Law of India has been codified in the Indian Penal Code and the Criminal Procedure Code; and the former Code deals specifically with offences and states what matters will afford an excuse or a defence to a charge of any offence, and the Court is not entitled to invoke the Common Law of England in such matters at all. Where a village magistrate arrested a drunken person whose conduct was at the time a grave danger to the public, he is not guilty of an offence, not by virtue of the rule of English Common Law, but by reason of the provision of section 81 and sections 96 to 105 of the Indian Penal Code. The case in *In re Ramaswami Ayyar*, (1921) I.L.R., 44 Mad., 1913, is rightly decided, not on the grounds of the English Common Law on which the decision is based, but on the provisions of the Indian Penal Code relating to private defence. Where two police officers arrested without warrant a person who was drunk and creating disturbance in a public street, and confined him in the police station though one of them knew his name and address and it was not found to what extent he was a danger to others or their property; *Held*, that the arrest having been made by the police officers without warrant, for a non-cognizable offence, their action was *prima facie* an offence under section 342 of the Indian Penal Code, unless it was justified under the provisions of the Code relating to the right of private defence or under section 81 of the same Code.

Gopal Naidu v. *King Emperor* ... ... (1923) I.L.R., 46 Mad. (F.B.), 605

PIOUS OBLIGATIONS—*Hindu Law—Debt—Personal debt of father—Liability of undivided sons—Debt not shown to be illegal or immoral—Liability of sons' shares in ancestral property—Sons' liability in father's lifetime—Suit against father and his undivided sons—Form of decree—Personal decree against father—Decree against sons' shares in ancestral property to the extent decree remains unsatisfied by the father—Recent decisions of the Privy Council, effect of:*—See HINDU LAW... 64

POLICE ACT, MADRAS (XXIV OF 1859), SEC. 21—*Duties and powers of Police Officers:*—See PENAL CODE, INDIAN (XLV OF 1860), ss. 342, 96 to 105 and 81. 605

PRACTICE—*Appeal—Withdrawal of suit in Appellate Court as against appellant alone—Withdrawal in appeal discretionary with Court—O. XXIII, r. 1, Civil Procedure Code.*] There is no provision of law allowing a respondent in an appeal to withdraw as of right his suit as against the appellant. It is discretionary with the Appellate Court to allow such a withdrawal and a Court of Appeal cannot allow a respondent to withdraw his suit as against the appellant alone when the result of such allowance will be to prejudice the appellant and other respondents who have not appealed, the proper course in such a case is to hear the appeal on the merits.

Dharmaraja v. *Pethu Raja* ... ... (1923) I.L.R., 44 Mad., 811

———*Records of Court lost in rebellion—Inherent power of Original and Appellate Courts to reconstruct records—Methods of reconstruction—Onus on appellant.*] When a Court loses its records, e.g., by accident, it has inherent power to reconstruct them and a Court hearing an Appeal from the judgment of the first Court has also inherent power to reconstruct the records lost in the first Court, or the Appellate Court, can, in such a case, call for a finding from the first Court as to what the records were; the method of reconstruction being by means of affidavits, counter-affidavits, hearing of witnesses, the admission of copies, etc., *Douglass* v. *Yellop*, (1759) 2 Bur., 722; 97 E.R., 532. *McLendon* v. *Jones*, (1845) 42 Amer. Deci., 640 and *Baboo Dyal Singh* v. *Durbares Lall Tewaree*, (1867) 7 W.R., 18, followed. On a Reference by a District Judge as to the course of a action to be taken by him in an Appeal pending before him, the records wherein were destroyed by a rebellion, before they were sent to the District Court, but the judgment of the first Court has available, their Lordships ordered the District Judge to hear the Appeal and if necessary to reconstruct the records for the purposes of the Appeal and observed (1) that the judgment of the first Court was for the purpose of reconstruction good

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evidence as a contemporaneous statement of what took place before that Court, and (2) that in the event of the Appellate Judge being unable to reconstruct the record to his satisfaction the onus was on the Appellant to establish his grounds of Appeal, and on the respondent his cross objections, if any.

Marakarutti v. *Veeran Kutti* ... ... (1923) I.L.R., 46 Mad., 679

PRACTICE—*Suits on Original Side, High Court—Gazette notification prescribing higher Court-fee for suits from date of publication in the Gazette—Publication in the evening of the day—Whether higher fee payable on plaints filed on the day.*] A notification in the *Fort St. George Gazette* Extraordinary, published on the 5th of May 1922, announced an increase of Court-fees for suits filed on the Original Side of the High Court and stated that the amendments "do come into force *from* the date of publication in the *Fort St. George Gazette*." The notification was received in the office of the High Court only, at about 5 p.m. on the 5th of May 1922, after office hours; *Held*, by the Court (KUMARASWAMI SASTRI, J., dissenting) that the increased fee was payable even on plaints filed on the 5th of May. *Per* KUMARASWAMI SASTRI, J.—The day of the notification should be excluded and the lower Court-fee was leviable on plaints filed on that day.

Court Fees, In re ... ... (1923) I.L.R., 46 Mad. (S.B.), 685

PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882), ss. 38 AND 92—*Long vacation—Notification for conduct of urgent work and receipt of papers during long vacation, validity of—Decree passed long before vacation—Application for new trial on reopening of Court after long vacation—Limitation—Revision under sec.* 115, *Civil Procedure Code.*] A notification issued under section 92 of the Presidency Small Cause Courts Act stated that during long vacation of that Court "plaints, execution applications, and other papers will be received only on the days on which the Vacation Judge sits," viz. Wednesdays and Thursdays. *Held*, that the notification was not *ultra vires* of section 92 of the Act and that an application for a new trial under section 38 of the Act which should be presented within eight days under section 38 came under the words "other papers" in the notification and was barred by limitation when after several weeks it was presented on the day the Court reopened after the long vacation. *Nachiyappa* v. *Ayyasami*, (1882) I.L.R., 5 Mad., 189 (F.B.), applied. *Held*, further that where a lower Court declines to exercise jurisdiction by refusing to entertain an appeal on account of a wrong decision on a question of limitation as to when the appeal should have been filed, the High Court has power to revise the order under section 115, Civil Procedure Code. *Sundaram* v. *Mausa Mavuthar*, (1921) I.L.R., 44 Mad., 554 (F.B.), followed. *Kuppusawmi Iyengar* v. *Narayana Iyengar*, (1916) 19 M.L.T., 24, distinguished.

British India Steam Navigation Company v. *Sharafally*. (1923) I.L.R., 46 Mad., 938

———————————————, O. XXXVII, RR. 1 AND 2—*Summons form* 13, *Appendix I*—Ultra vires.] Rules framed under statutory powers must be just and reasonable; otherwise they are *ultra vires*. By rules framed under the Presidency Small Causes Courts Act, the form of summons in a summary suit on a negotiable instrument required every defendant to apply for leave to defend three clear days before the day of hearing. But there were no rules prescribing any penalty for not so applying or compelling the service of the summons sufficiently early so as to enable a defendant to apply in time. Nor was there any power in the Court to extend the time in cases requiring extension. In the particular case the summons was not served sufficiently early and the defendant's application for leave to defend, filed only two clear days before the hearing, was dismissed by the Judge as out of time. *Held* that the dismissal was illegal and that the direction in the summons was *ultra vires*.

Kanniga v. *Devichand* ... ... (1923) I.L.R., 46 Mad., 847

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PRESUMPTION—*Execution—Attestation—Genuineness—Admissibility—Proper custody—Copy of a document—Copy more than* 30 *years old* :—*See* EVIDENCE ACT, SEC. 90 92

PRIVY COUNCIL—*Leave to appeal to His Majesty in Council, against order of a single Judge of the High Court* :—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 111 958

PROBATE AND ADMINISTRATION ACT (V OF 1881), SEC. 41—*See* HINDU LAW 190

PROPRIETARY ESTATES VILLAGE SERVICE ACT (MADRAS ACT II OF 1894), SEC. 27 (4)—"*Tenants*," *meaning of* :—*See* DOCUMENT ... 177

PROVINCIAL INSOLVENCY ACT (III OF 1907), SS. 2, 6, 24, 26 AND 30 :—*See* TORTS 852

PROVINCIAL INSOLVENCY ACT (V OF 1920), SS. 5, 57, 75—*Appointment of Official Receiver—Court's power to review order and remove him and appoint Special Receiver—Official Receiver's right to appeal as an "aggrieved person" under section* 75.] A Court acting under the Provincial Insolvency Act (V of 1920) has power to review its order and can remove for sufficient cause the Official Receiver already appointed by it to administer an insolvent's estate and appoint a Special Receiver. The Official Receiver so removed has, under section 75 of the Act, a right of appeal as "a person aggrieved" by the order. *Ex parte Sidebotham, In re Sideb tham*, (1880) 14 Ch. D., 458, and *Official Assignee of Madras* v. *Ramachandra Ayyar*, (1910) I.L.R., 38 Mad., 134, applied. In the absence of any exceptional reasons such as personal disqualifications affecting the Official Receiver he alone should be appointed receiver in case of every insolvency within his jurisdiction.

Official Receiver, Tanjore v. *Nataraja Sastrial* ... (1923) I.L.R., 46 Mad., 405

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), SCH. II, CLS. 1, 3 AND 19—*Suit for compensation by toll-gate contractor against a District Board President, suit of Small Cause nature—Sec.* 6 *of Tolls Act* (*XXI of* 1901).] A suit for damages by a toll-gate contractor against the President of a District Board for the latter's illegal obstruction to the collection of tolls is a suit of a Small Cause nature and the President is not an officer of the Government within clauses 1 and 3 of Schedule II of the Provincial Small Cause Court Act (IX of 1887). Nor is the jurisdiction of the Small Cause Court to try such a suit ousted either by clause 19 of that schedule or by section 6 of the Tolls Act (XXI of 1901).

President of the District Board, South Kanara v. *Gopalakrishna Bhatta* (1923) I.L.R., 46 Mad., 808

PUBLIC SERVANT—*Society for the Prevention of Cruelty to Animals—Agent of—Madras City Police Act III of* 1888, *sec.* 53—*Indian Penal Code* (*Act XLV of* 1860), *sec.* 21 (8) :—*See* MADRAS CITY POLICE ACT 90

PUBLIC TRUST OF A CHARITABLE OR RELIGIOUS NATURE—*Hindu law—Will—Bequest of specific income out of testator's estate for charity—Charge—Bequest for the spread of the Sanskrit language or the spread of the Hindu religion or for both—Objects, whether either or both indefinite—Trusts, whether or to what extent, void—Adoption under authority given by will—Right of adopted son to question the bequest of adoptive father—Suit against the adopted son for scheme and other reliefs, whether maintainable under section* 92, *Civil Procedure Code—Indian Trusts Act* (*II of* 1882) *sec.* 6—*Creation of trust under will, when complete.*] A Hindu executed a will by which he purported to create a charitable and religious trust by providing that a sum of Rs. 400 should be spent every year out of his estate "either for the spread of the Sanskrit language or for the spread of the Hindu religion or for both;" the amount was charged on the estate and certain persons were appointed executors who were to arrange for the conduct of the trust as the trustees from

time to time of an institution called the Hindu Samaj at Rajahmundry might deem fit; the executors declined office; the testator also authorized, under his will, his widow to adopt son; the widow adopted the defendant two years after testator's death; the defendant on attaining majority took possession of the estate from the widow and refused to pay the trust amount. The plaintiffs who were the trustees of the Hindu Samaj, having obtained the sanction of the Advocate-General, instituted a suit against the defendant for a scheme for appointment of trustees, for ascertaining the trust amount and charging it on the estate, and for other reliefs, under section 92, Civil Procedure Code. The defendant pleaded that the suit was premature and was not maintainable against him, that the trust was indefinite, incomplete and void for uncertainty of its objects. *Held*, that a suit for settling a scheme, appointing trustees and other reliefs in respect of an express or implied trust for public purposes of a charitable or religious nature was maintainable under section 92, Civil Procedure Code, against the defendant who was the heir-at-law in possession of the trust property, although he was not a *de jure* or *de facto* trustee; that a previous suit for administration of the estate was not necessary; that the trust was not bad for indefiniteness as to the fund to be applied thereto; that when a trust is created under a will, it is unnecessary that there should be a transfer of the trust property to trustees, and that the creation of the trust was not incomplete in the absence of such a transfer; and the adopted son could not, while approbating the provisions of the will under which his adoption was made, reprobate other provisions of the same will and repudiate the bequest to charity. *Ganapathi Ayyan* v. *Savithri Ammal*, (1898) I.L.R., 21 Mad., 10, followed; *Held* by SPENCER, J., that the trust as regards the spread of the Sanskrit language, was not void for uncertainty of object, but the trust as regards the spread of the Hindu religion was void for uncertainty; *Whickar* v. *Hume*, [1858] 7 H.L., 124; *Attorney-General* v. *Flood* (1816) Hays and Jo, Appx. XXI, referred to but that, as under the will, the trustees had been given an absolute discretion to spend the whole sum of Rs. 400 either for the spread of the Sanskrit language or for the spread of the Hindu religion or for both, the whole gift was void in law and unenforceable. *Held by* DEVADOSS, J., that both as regards the spread of the Sanskrit language and spread of the Hindu religion the trust was void for indefiniteness of its object. *In re Macduff, Macduff* v. *Macduff*, [1896] 2 Ch., 451; *Blair* v. *Duncan*, [1902] A. C., 37; *Grimond* v. *Grimond*, [1905] A. C., 124, *Houston* v. *Burn*, [1918] A.C., 337; *In re Jarman's Estate, Leaves* v. *Clayton*, (1878) 8 Ch. D., 584, referred to.

Venkatanarasimha Rao v. *Subba Rao* ... ... (1923) I.L.R., 46 Mad., 300

RAILWAY COMPANY—*Licence to the public to cross the line—Child injured by locomotive, while crossing the line—Damages—Contributory negligence in children—Negligence of the guardin in allowing a child to go into a danger zone, whether contributory negligence—Trap—What amounts to, in case of children.*] The plaintiff, a girl aged 7 years, while attempting to cross the Railway line at a point where to the knowledge of the Railway officials people habitually crossed the lines as licensees, was injured by a locomotive. The engine driver and the fireman neglected to keep a proper look out at the point where they knew there was special danger to be apprehended as people, both adults and children, crossed the line there. In a suit for damages, *held*: That the Railway Company was liable, and that it was no answer to the claim that if the child had taken the care that would be expected of an adult the accident would not have occurred. If a Railway Company allows children to stray over its lines it has to take all the precautions which would be unnecessary in the case of an adult but which are required to protect children against their own thoughtlessness. Whereas in the case of a licensee who is an adult the owner of premises will be liable only if he has a "trap" on the premises, in the case of children he will be liable not merely if he maintains a trap but if he is guilty of ordinary negligence. The negligence of the guardian or parent of a child in allowing it to go unaccompanied by an adult into a danger zone cannot be imputed to the child as in the nature of contributory negligence.

Jayammal v. *M. & S. M. Ry. Co.* ... ... (1923) I.L.R., 46 Mad., 929

RATEABLE DISTRIBUTION, RIGHT TO:—*See* CIVIL PROCEDURE CODE (V OF 1908), SEC. 73 506

RECORDS LOST—*Reconstruction*:—*See* PRACTICE 679

REFERENCE—*What questions of law can be referred—What questions the High Court should decide on reference—Loading—Gross income of Life Insurance Companies—Onus of proof—Value of negative proof that income does not exceed a certain amount—Reference under rule 17 of Schedule IV—Madras City Municipal Act (IV of 1919)*:—*See* MADRAS CITY MUNICIPAL ACT (IV OF 1919) 10

REGISTRATION—*Mortgage-deed fraudulently registered in wrong district by including land not intended to be mortgaged—Registration invalid to affect lands but good as regards personal covenant.*] Where land not intended to be mortgaged was included in a mortgage-deed merely to get registration of the deed before a particular registering officer who would otherwise be incompetent to register it. *Held*, (1) that the registration of the deed was a fraud on the Registration Law and did not affect the immoveable properties comprised in the deed, (2) but that the registration was good as regards the personal covenant to repay the mortgage money, and enabled the mortgagee to sue for it within six years as provided by article 116 of the Limitation Act. *Harendra Lal Roy Chowdhuri* v. *Haridasi Debi* (1914) I.L.R., 41 Calc., 972 (P.C.). *and Biswanath Prasad* v. *Chandra Narayan Chowdhury* (1921) I.L.R., 48 Calc., 509 (P.C.), and *Joginee Mahun Chatterjee* v. *Bheot Nath Ghosal* (1902) I.L.R., 29 Calc., 654, followed.

Rama Rao v. *Veddayya* ... ... (1923) I.L.R., 46 Mad., 435

REGISTRATION ACT (INDIAN) (XVI OF 1908), SEC. 17, SUB-SEC. 2 (V):—*See* LAW 373

———————————, SS. 17 AND 49—*Unregistered deed of partition—Admissibility in evidence to prove division in status.*] A deed of partition between some members of a joint Hindu family which divides by metes and bounds the family lands worth more than Rs. 100 but which is inadmissible in evidence to prove a partition on account of want of registration is still admissible as evidence to prove an intention amongst all the members to become divided in status. *Per cur.*—A deed which effects between the members of such a family merely a division in status is admissible in evidence to prove such division, though unregistered, as it does not directly affect immoveable property but only creates a change of status from which rights may indirectly arise in such property as a legal incident. *Girja Bai* v. *Sadashiv Dhundiraj*, (1916) I.L.R., 43 Calc., 1031 (P.C.), and *Varada Pillai* v. *Jeevaratnammal*, (1920) I.L.R., 43 Mad., 244 (P.C.), applied. *Pothi Naiken* v. *Naganna Naiker*, (1916) 30 M.L.J., 62 (F.B.) and *Ayyakutti Mankondan* v. *Perisawmi Koundan*, (1916) 30 M.L.J., 404 (F.B.), not followed.

Saraswatamma v. *Paddayya* ... ... (1923) I.L.R., 46 Mad., 349

RES JUDICATA:—*See* CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 11, EXPLANATION 4 135

———————————*Execution sale—Dismissal of application to postpone sale—Subsequent petition under O. XX, r. 90, Civil Procedure Code, whether barred by res judicata*:—*See* EXECUTION 736

RESTITUTION OF CONJUGAL RIGHTS—*Defence of cruelty—Cruelty, meaning of—Physical violence—Conduct of husband—His persistent conduct, such as to undermine health of wife—English decisions, how far applicable—Canon law—Common law of England—Rule of justice, equity and good conscience—Jurisdiction of Indian Courts to entertain suits for restitution of conjugal rights—Civil Procedure Code, O. XXI, r. 32.*] Courts in India have jurisdiction to entertain suits for restitution of conjugal rights and to grant relief when the parties are Hindus or Muhammadans.

Surjyamoni Dasi v. *Kali Kanta Das*, (1901) I.L.R., 28 Calc., 37, followed. Under the Indian Law, cruelty in the legal sense need not necessarily be physical violence. A course of conduct which, if persisted in would undermine the health of the wife, is a sufficient justification for refusing to the husband a decree for restitution of conjugal rights. *Thompson* v. *Thompson*, (1912) I.L.R., 39 Calc., 395; *Armour* v. *Armour*, (1904) 1 All. L.J., 318; *Kelly* v. *Kelly*, [1870] L.R., 2 P. & D., 59 and *Bethune* v. *Bethune*, [1891] Prob., 205, relied on. The matrimonial law of England is the canon law of the Church, and the matrimonial causes were formerly heard and determined by the Ecclesiastical Courts and it is only under the Matrimonial Causes Act (21 & 22 Vict., ch. 85) that the King's Courts were given jurisdiction to entertain matrimonial causes and by section 22 they were directed to determine them as far as possible on the principles of the Ecclesiastical Law and the precedents of the Ecclesiastical Courts. The decisions of the English Courts, being based on the Canon law and not on the Common law of England, are not necessarily applicable to India as containing rules of justice, equity and good conscience. Hence, even if a course of conduct does not amount to legal cruelty under the prevailing decision of the House of Lords in *Russell* v. *Russell*, (1897) A.C., 395, the Indian Courts need not follow that decision but may follow the view of the minority in that case and the dicta in later English cases.

Kondal Royal Reddiar v. *Ranganayaki Ammal* ... (1923) I.L.R., 46 Mad., 791

REVENUE RECOVERY ACT (II OF 1864), SEC. 59 (1)—*Irrigation Cess Act (VII of 1865), sec. 2—Water-cess levied for unauthorized use of water—Demand—Payment under protest—Demand whether a proceeding under former Act—Suit for recovery of amount paid against Secretary of State after six months from date of payment—Limitation—Applicability of section 59 of Revenue Recovery Act—Limitation Act (IX of 1908), ss. 15 and 29, and article 16, applicability of.*] A person, who pays water-cess to the Government under *protest on a demand being made*, and claims to recover back the amount paid, by a suit in a Civil Court, is not a party aggrieved by any proceeding under the Revenue Recovery Act (II of 1864); section 59 of the Act does not, therefore, apply to the suit which is governed by article 16 of the Limitation Act. *Ravula Vengala Reddi* v. *Secretary of State*, (1912) 15 I.C., 328 and *Pichi Reddi* v. *Secretary of State*, pp. 502 and 504 infra footnote, followed; *Orr* v. *Secretary of State*, (1900) I.L.R., 23 Mad., 571, dissented from.

Secretary of State v. *Venkatratnam* ... ... (1923) I.L.R., 46 Mad., 488

REVIEW OF JUDGMENT: – See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XLVII, R. 1 955

SALE IN EXECUTION OF A DECREE—*Leave to bid—Reserve price—Duty of decree-holder—Mis-statement—Non-disclosure—Previous auction sale—Reserve price then fixed, not brought to notice of Court—Previous bid not accepted by Court No disclosure by decree-holder either in obtaining leave to bid or in fixing reserve price—Sale held—Confirmation of sale, refused by Court—inherent power of Court to refuse confirmation—No application by any party to cancel sale—Civil Procedure Code, O. XXI, r. 92.*] A Court has an inherent power to refuse to confirm an auction sale held under its order, if it is satisfied that it has been misled either in giving leave to bid to the decree-holder or in fixing the reserve price. In order to show that the Court has been misled, it is necessary to show either actual mis-statement to the Court or non-disclosure to the Court of relevant facts unknown to the Court but known to the decree holder which there was a duty to bring before it. If a party professes to give the Court information on any particular subject with a view to guide its discretion and obtain its approval he is bound to lay before the Court all the material information he possesses on that particular subject. *Mahomed Mira Ravuther* v. *Savvasi Vijaya Raghunadha Gopalar* (1900) I.L.R., 23 Mad., 227 (P.C.), referred to. Order XXI, rule 92, Civil Procedure Code, is no bar to the Court exercising its inherent power to refuse to confirm the sale, even though no party had applied to cancel the sale. Where it appeared that at the time of application by a decree-holder for leave to bid, and at the time or fixing the reserve price, the decree-holder did not bring to the notice of the Court that the property of the judgment-debtors had been previously put up for sale in another suit with a reserve price of Rs. 45,000, and that there was then a bid for Rs 36,000 which was not accepted by the Court, but the Court in ignorance of these facts granted leave to bid, fixing the reserve price at Rs. 3,000 and the sale was held and the property purchased by the decree-holder for Rs. 3,600. *Held*, that the Court had inherent power to refuse to confirm the sale on the ground that it was misled in fixing the reserve price, and that the Court properly exercised its discretion in refusing confirmation of the sale.

Ragava Chariar v. *Murugesa Mudali* ... ... (1923) I.L.R., 46 Mad., 588

SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS—*Agent of—Madras City Police Act (III of 1888), sec. 53 – Indian Penal Code, sec. 21 (8) – Public servant:*—See MADRAS CITY POLICE ACT 90

SPECIFIC PERFORMANCE—*Contract – Agreement to sell on payment of a price at a future time at the option of the promisee—Sale by promisor to a third party—Acceptance by promisee after sale—Offer irrevocable—Offer at an end by the sale – No offer for acceptance—Suit for specific performance by promisee against the promisor and his vendee, whether maintainable:*—See CONTRACT 30

SPECIFIC RELIEF ACT (I OF 1877), SEC. 35—*Specific performance—Contract for sale of lands—Decree of original Court giving time to plaintiff for payment of price—Appeal by defendant—Power of original Court to extend time—Nature of original decree—Preliminary decree—Power of Appellate Court to extend time in the appeal by the defendant – Jurisdiction of original Court to pass necessary orders, including granting of further time.*] Where, in a suit for specific performance of a contract for sale of certain lands, the original Court passed a decree directing the defendant to execute a conveyance on the plaintiff paying the price within a certain time, the decree is in the nature of a preliminary decree, the original Court keeping control over the action and having full power to make any just and necessary orders therein, including in appropriate cases the extension of the time limited by the decree. Where the defendant had preferred an appeal against such a decree, and the plaintiff had applied to the original Court for extension of time limited in the decree before such time had expired and the Court had ordered the application to lie over pending the appeal, *Held*, that the Appellate Court had power to extend the time limited by the original decree, and that the original Court had still jurisdiction in the matter and had full powers to deal with any point that might arise, including, if necessary, an application for further time. Practice of English Courts of Equity in actions for specific performance pointed out and form of decree indicated.

Abdul Shaker Sahib v. *Abdul Rahiman Sahib* ... (1923) I.L.R., 46 Mad., 148

STAMP ACT (II OF 1899), SCH. I, ART. 1—*Acknowledgment, meaning of—Statement of account—Dominant intent to supply evidence of debt—Necessity for stamp—Creditor calling for account from debtor—Statement of account by debtor—Credit and debit entries with a balance item signed by debtor—Document sent by debtor to creditor, whether an acknowledgment—Document, unstamped, whether admissible in evidence—Construction of document—Evidence of surrounding circumstances.*] A document is not an acknowledgment within the terms of article 1, schedule I of the Stamp Act, unless it is given with the dominant intent to supply evidence of the debt. The Court has to apply its mind to the question—looking at the document and the surrounding circumstances – what was the intention with which it was given. Where a document contains entries from which it is right to deduce that the intention was to arrive at a *statement of account* or put on record payments on either side of the account, it cannot be inferred from the sending of the document by the debtor to the creditor, although it contains a balancing item at the end and is signed by the debtor, that the intention

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was to supply evidence of the debt to the creditor; such a document, though unstamped, is admissible in evidence. *Brojender Coomar* v. *Bromomoye Chowdhrani* (1879) I.L.R., 4 Calc., 885; *Broja Gobind Shaha* v. *Goluck Chunder Shaha* (1883) I.L.R., 9 Calc., 127; *Nund Kumar Shaha* v. *Shurnomoyi* (1888) I.L.R., 15 Calc., 162; and *Ambica Dat Vyas* v. *Nityanund Singh* (1903) I.L.R., 30 Calc., 687, followed. *Sitaram* v. *Ramprosad* (1914) 19 C.L.J., 87; and *Mulji Lala* v. *Lingu Makaji* (1897) I.L.R., 21 Bom., 201 (F.B.), distinguished; *Ramaswami Aiyar* v. *Gnanamoni Nachiar* (1916) 31 M.L.J., 851, dissented from.

Chandick v. *Ananta Lal Damani* ... ... (1923) I.L.R., 46 Mad., 948

SUCCESSION ACT (X OF 1865), ss. 265 AND 266—*See* HINDU LAW ... 190

SUDRAS—*Illegitimate son—Extent of share—Widow of deceased*:—*See* HINDU LAW 167

SUIT FOR PARTITION OF COMMON PROPERTIES—*Exclusion of some common properties from suit—Maintainability of suit.*] A suit for partition of common properties, and not joint properties, is not liable to be dismissed on the ground that the suit did not include all the common properties available for partition.

Pakkiri Kanni v. *Manjoor Sahib* ... ... (1923) I.L.R., 46 Mad., 844

SUITS VALUATION ACT (VII OF 1887), ss. 8 AND 11—*Under-valuation of suit—Suit instituted in a District Munsif's Court—Real valuation more than Rs.* 5,000—*Appeal to District Court—Objection taken both before District Munsif's Court and District Court—Finding by latter Court that there was no under-valuation and also that there was no prejudice on the merits—Second appeal to the High Court—Mere deprivation of right of first appeal on facts, whether a prejudice—Procedure in appeal whether proper test of prejudice.*] Where by reason of an undervaluation of the suit, it was instituted in a District Munsif's Court and not in a Sub-Court, though the real valuation was more than Rs. 5,000 and a party to the suit was thereby deprived of the right of the first appeal on facts to the High Court to which a second appeal was preferred against the decree on appeal of the District Court in the case. *Held*, by the Full Bench, that from the mere fact that a party was deprived of the right of appeal on facts before the High Court, it cannot be deemed that the undervaluation had prejudicially affected the disposal of the suit or appeal on the merits within the terms of section 11 of the Suits Valuation Act, 1887, and that consequently the second appeal should be heard on the merits. *Raghavachariar* v. *Raghavachariar*, (1910) 20 M.L.J., 726, approved; *Mohini Mohan Misser* v. *Gour Chandra Rai*, (1920) 5 Patna L.J., 397, dissented from; *Siddappa Venkatrao* v. *Rachappa Subrao*, (1912) I.L.R., 36 Bom., 628, referred to.

Kelu Achan v. *Cheriya Parvathi Nethiar* ... (1923) I.L.R., 46 Mad., (F.B.), 681

TENANTS-IN-COMMON—*Compensation for improvements by one—Whether and when payable.*] On a partition between tenants-in-common, one tenant-in-common will not be entitled to compensation from the others for improvements effected by him on the common property, unless they were either necessary or made with the concurrence of the others. *Swan* v *Swan*, (1820) 8 Price, 518, followed. *Upendra Nath Banerjee* v. *Umes Chunder Banerjee*, (1910) 12 C.L.J., 25, not followed.

Subbiah v. *Gundlapudi* ... ... (1923) I.L.R., 46 Mad., 104

TERRITORIAL JURISDICTION—*Transfer to another Court—Application to the latter Court to set aside an ex parte decree—Jurisdiction—Ex-parte decree by a Court as regards certain immoveable properties—Civil Procedure Code, sec.* 150 *and O IX, r.* 13:—*See* CIVIL PROCEDURE CODE 1

TOLLS ACT (XXI OF 1901), SEC. 6:—*See* PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), SCH. II, CLS. 1, 3 AND 19 809

TORTS—*Conversion—Action in detinue, trover or conversion—Judgment in action of detinue or conversion, whether passes property to the tortfeasor—Satisfaction, necessary to pass property—Partial satisfaction or receipt of dividend in*

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bankruptcy, whether effective to pass property—Election by creditor after judgment, whether passes property—Set off by creditor of unliquidated claim against tortfeasor against debt due to latter—Petition by creditor after set-off, to adjudicate the latter an insolvent—Maintainability of petition in Insolvency—Election by set-off—Subsequent suit by creditor to recover jewel or value from tortfeasor or his bona fide, *pledge whether maintainable—Provincial Insolvency Act (III of* 1907), *ss.* 2, 6, 24, 26 *and* 30.] A judgment in an action in conversion does not pass the property to the defendant unless and until it is satisfied; in this respect there is no difference between a judgment in an action in detinue and one in trover or conversion. *Brinsmead* v. *Harrison*, (1871) L.R., 6 Com. Pleas, 584; and *In re Gunsbourg*, [1920] 2 K.B., 426, followed. Mere proof in bankruptcy does not amount to satisfaction so as to pass the property, nor would part satisfaction by execution or by receipt of dividend in bankruptcy have that effect; but a plaintiff can, after judgment, elect to look only to his chance of obtaining satisfaction by execution or by proof in bankruptcy, and give up his claim to the property. See *Ex parte Drake, In re Ware*, (1877) 5 Ch. D., 866. The plaintiff owed Rs. 2,500 to the defendant who owed him Rs. 2,072, but the former had lent a ring valued by him at Rs. 1,000 to the defendant, who refused to return it on demand; the plaintiff applied to adjudicate the latter an insolvent by filing a petition in which he set off the amount due by him against the amount due by the defendant on both the items and used the balance as a liquidated amount to support his insolvency petition as a petitioning creditor; an order of adjudication was passed and the plaintiff proved his debt for the balance and was included in the schedule of creditors; it further appeared that the defendant had, subsequent to the petition and before the order of adjudication, pledged the ring to the second defendant who was a *bona fide* transferee for value; on a suit being filed for recovery of the jewel or its value against the pledgor, the pledgee and the Official Receiver, *Held*, that the conduct of the plaintiff amounted to a definite election to abandon all rights to the ring in favour of the insolvent, and that the suit to recover the ring or its value was not maintainable against the debtor or his pledgee; even if the pledgor had no title at the date of the pledger, he got one on the date of the adjudication, and it enured to the *bona fide* pledgee for value, on the principle of "feeding the title" or "forwarding the title":—See *Whitehorn Brothers* v. *Davison* [1911] 1 K.B., 463 and *In re a debtor, Ex parte Petitioning Creditor* (1907) 97 L.T., 140.

Sinnan Chetty v. *Alagiri Aiyer* ... ... (1923) I.L.R., 46 Mad., 852

TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 6 (*d*)—*Personal right of widow to future maintenance, not transferable.*] Where a widow who had succeeded as heir to her husband's properties surrendered her life-interest therein to the nearest reversioner, who in return agreed to her residing in the family house and sharing the meals of the family or to her receiving a certain amount of paddy annually if she chose to live away from the family house, the option being exercisable by her at her will and without her being subject to any liability to elect once and for all, *held* that the right to maintenance conferred on the widow was purely "personal" to her, within section 6 (*d*) of Transfer of Property Act and was not transferable.

Subraya v. *Krishna* ... ... (1923) I.L.R., 46 Mad. (F.B.), 659

——— SEC. 53, PROVISO—Bona fide *purchaser for value from fraudulent transferee, whether protected by.*] The proviso to section 53 of the Transfer of Property Act protects not only a *bona fide* transferee from an original fraudulent transferor but also a *bona fide* transferee from a fraudulent transferee. English cases reviewed; *Basti Begam* v. *Banarasi Prasad* [1908] I.L.R., 30 All., 297, dissented from.

Kunhu Pothanassiar v. *Raru Nair* ... ... (1923) I.L.R., 46 Mad., 478

——— SEC 54—"*Sale*" *and* "*Price*," *meaning of*:—*See* PART PERFORMANCE 919

TRANSITORY PROVISIONS, RULE 10:—*See* LOCAL BOARDS ACT, MADRAS (XIV OF 1920), ss. 55 to 57 536

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TRUSTS ACT (INDIAN) (II OF 1882), SEC. 6 :—*See* PUBLIC TRUST 800

UNDIVIDED SONS, LIABILITY OF—*Hindu Law—Debt—Personal debt of father—Pious obligation—Debt not shown to be illegal or immoral—Liability of son's share in ancestral property—Son's liability in father's lifetime—Suit against father and his undivided sons—Form of decree—Personal decree against father—Decree against son's shares in the ancestral property, to the extent decree remains unsatisfied by the father—Recent decisions of the Privy Council, effect of* :—*See* HINDU LAW 64

UNEQUAL DIVISION OF PROPERTIES IN FOREIGN STATE :—*See* HINDU LAW 373

VACATION JUDGE, POWER OF :—*See* CRIMINAL PROCEDURE CODE 382

VILLAGE MUNSIF'S COURT ACT, MADRAS (I OF 1889), ss. 48, 66 AND 67—*Execution of decree—Jurisdiction of District Munsif to withdraw execution from Village Munsif's Court and transfer it for execution to another District Munsif—Applicability of sec.* 39, *Civil Procedure Code.*] A District Munsif receiving by transfer a decree of a Village Munsif's Court under section 66 of the Madras Village Munsif's Court Act (I of 1889) or withdrawing execution of a decree to his own file under section 67 of the Act has no jurisdiction to transfer it for execution to another District Munsif under section 39, Civil Procedure Code. His power of transfer is limited to sending it for execution to another village Court in which the defendant is presented to have moveable property. The Village Munsif's Court Act is a complete code of procedure by itself and the provisions of Civil Procedure Code cannot be imported into it, except to the extent provided by the Amending Act II of 1920.

Sankaran Nair v. *Atchuthan* ... ... (1923) I.L.R., 46 Mad., 734

VIVA VOCE EXAMINATION—*If obligatory—Consent of the accused to such procedure—Whether cures irregularity—Irregularity—Evidence of witnesses taken by a predecessor exhibited before the successor* :—*See* CRIMINAL TRIAL ... 117

VOIDABLE SALE—*Dispossession of purchaser under a decree obtained by one claiming paramount title—Limitation—Limitation Act, art.* 97 :—*See* LIMITATION ACT 40

WARRANT CASE :—*See* CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 342, 256 and 537 449

WILL—*Construction* :—*See* HINDU LAW, WILL 190

WITHDRAWAL OF APPEAL :—*See* PRACTICE 811

WITNESS LIVING BEYOND 200 MILES FROM COURT, ISSUE OF COMMISSION TO :—*See* CIVIL PROCEDURE CODE (V OF 1908), O. XVI, R. 19 (*b*) ... 574

WORKMEN'S BREACH OF CONTRACT ACT (XIII OF 1859)—*Proceedings under section* 1, *not criminal proceedings—Absence of complainant—Dismissal of complaint—Power of Magistrate to review his order.*] A Magistrate's proceedings under section 1 of the Workmen's Breach of Contract Act up to the stage of his passing an order for repayment or performance under section 2 of the Act are not proceedings under the Criminal Procedure Code and hence if owing to the absence of the petitioner on any occasion before the passing of an order under section 2, the Magistrate dismisses the complaint, it is not an acquittal under section 247, Criminal Procedure Code, but is merely dismissal of the complaint which the Magistrate can review. *Hussaina Beari* v. *King Emperor*, (1920) I.L.R., 43 Mad., 443 and *Averam Das Mochi* v. *Abdul Rahim*, (1900) I.L.R., 27 Calc., 151, followed. *Girish Chandra Das* v. *Bhusan Das*, (1919) I.L.R., 46 Calc., 867, not followed.

Ramamma v. *Gurunatham* ... ... (1923) I.L.R., 46 Mad., 723

WRONGFUL CONFINEMENT—*Drunken person's arrest and confinement by Police Officer* :—*See* PENAL CODE, INDIAN 605

THE INDIAN LAW REPORTS

(MADRAS SERIES)

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Krishnan.

J. V. RANGANATHA RAO (COUNTER PETITIONER, PLAINTIFF), PETITIONER, 1922, January, 11.

v.

HANUMANTHA RAO AND TWO OTHERS (DEFENDANTS, PETITIONERS), RESPONDENTS.*

Civil Procedure Code (V of 1908), *sec.* 150 *and Or. IX, r.* 13—*Ex parte decree by a Court as regards certain immovable properties—Transfer of territorial jurisdiction to another Court—Application to the latter Court to set aside ex parte decree—Jurisdiction.*

After the passing of an ex parte decree by Court *P* in a suit to recover certain immovable properties, part of its territorial jurisdiction including the locality in which the properties were situate was transferred to Court *A*. Thereafter the defendant applied to Court *A* to set aside the ex parte decree.

Held, that under section 150, Civil Procedure Code, Court *A* had jurisdiction to entertain the application, and there was nothing in Order IX, rule 13 of the Code providing the contrary.

Meaning of "transfer" in section 150 considered.

PETITION under section 115 of Act V of 1908, praying the High Court to revise the order of T. SAMA RAO, District Munsif of Anantapur, in Interlocutory Application No. 177

* Civil Revision Petition No. 869 of 1920.

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of 1920 (in Original Suit No. 1230 of 1919 on the file of the District Munsif of Penukonda).

The facts are given in the judgment of KRISHNAN, J. The plaintiff decree-holder preferred this petition to the High Court.

K. Bashyam for petitioner.—The Anantapur Court had no jurisdiction to set aside the ex parte decree passed by the Penukonda Court. Order IX, rule 13 of Civil Procedure Code states that the application should be made "to the Court by which the decree was passed." Section 150 of Civil Procedure Code does not apply; see the words "save as otherwise provided" in section 150. Where a certain Court is mentioned as having jurisdiction in certain matters, that Court alone has jurisdiction and no other; compare Order XXXIX, rule (2), clause (3), Civil Procedure Code, and *Mathura Dass* v. *Venkat Rao*(1), *Sheik Jaharuddi* v. *Hari Charan Podder*(2), and *Paramanand Das* v. *Mahabeer Dossji*(3). The decisions relating to execution by Courts other than those which passed a decree turn on the special wording of section 37, Civil Procedure Code. Section 150 can apply only to cases where all the business of one Court is transferred to another or where the original Court is abolished and another substituted for it and not to cases where there had been only a partial adjustment of jurisdiction and transfer of its business with reference to that part alone to another Court. Moreover, the lower Court should not, under the circumstances of the case, have set aside the ex parte decree.

M. Patanjali Sastri for *B. Somayya* for respondents.—The Anantapur Court has jurisdiction. Section 150, Civil Procedure Code, is wide enough to cover such cases of partial transfer of jurisdiction; compare cases of execution

(1) (1911) 21 M.L.J., 829. (2) (1913) 18 C.W.N., 470.
(3) (1897) I.L.R., 20 Mad., 378.

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by Courts other than those that passed a decree; *Seeni Nadan* v. *Muthusamy Pillai*(1), *Panduranga Mudaliar* v. *Vythilinga Reddi*(2) and *Subbiah Naicker* v. *Ramanathan Chettiar*(3). One Court can under certain circumstances review decisions of another Court: see *Sarangapani* v. *Narayanasami*(4). If the ex parte decree cannot be set aside, the party will be without a remedy and the provision in Order IX, rule 13 that the Court shall appoint a day to rehear the suit would be meaningless. Filing an appeal from ex parte decree would be practically useless. On the merits the lower Court's order was right.

JUDGMENT.

SPENCER, J.

SPENCER, J.—Section 150 which appeared for the first time in the Civil Procedure Code of 1908 provides for a Court to which the business of any other Court is transferred having the same powers as the Court from which the business is so transferred. But this useful provision is qualified by the words "save as otherwise provided," and the question in the case before us is whether the wording of Order IX, rule 13 of the Code of Civil Procedure is such as to take away the power of a Court that has territorial jurisdiction over the subject-matter of a suit to set aside an ex parte decree passed by another Court that originally tried the suit.

That rule declares that applications to set aside ex parte decrees may be made to the Court by which the decree was passed. It goes on to state that on making an order setting aside the ex parte decree the Court shall appoint a day for proceeding with the suit.

Our attention has been drawn to reported decisions which relate to the powers of Courts other than the Court which granted an injunction to deal with a breach

(1) (1919) I.L.R., 42 Mad., 821 (F.B.). (2) (1907) I.L.R., 30 Mad., 537.
(3) (1914) I.L.R., 37 Mad., 462. (4) (1885) I.L.R., 8 Mad., 567.

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thereof—*Mathura Dass* v. *Venkat Rao*(1), *Sheikh Jaharuddi* v. *Hari Charan Podder*(2) and *Suppi* v. *Kunhi Koya*(3); also to decisions touching similar powers of Courts to execute the decrees of other Courts—*Panduranga Mudaliar* v. *Vythilinga Reddi*(4), *Subbiah Naicker* v. *Ramanathan Chettiar*(5) and *Seeni Nadan* v. *Muthusamy Pillai*(6) and to review the order and decrees of other Judges, *Sarangapani* v. *Narayanasami*(7). There is also an authority *Paramananda Das* v. *Mahabeer Dossji*(8) for holding that only the Court that passed a decree can sanction agreements to give time to a judgment-debtor under section 257-A of the Code of 1882. The above are merely analogous cases, and no direct authority on the point before us has been cited.

In matters of execution the law must now be regarded as settled by the definition of the expression "Court which passed a decree" in section 37 of the Code of 1908, and by the Full Bench judgment in *Seeni Nadan* v. *Muthusamy Pillai*(6). Applications to get a review of judgment have been peculiarly restricted by Order XLVII, rule 2, permitting them to be made only to the Judge who personally passed the decree or made the order, when they are based upon other grounds than the discovery of new and important matter or the existence of a clerical or arithmetical error. The use of the words "the Court granting injunction" was not considered by SRINIVASA AYYANGAR, J., in *Suppi* v. *Kunhi Koya*(3) or by KRISHNASWAMI AYYAR and MUNRO, JJ., in *Mathura Dass* v. *Venkat Rao*(1) to be an obstacle to a Court, to which the general business of another Court is transferred dealing with applications to enforce

(1) (1911) 21 M.L.J., 829.
(2) (1913) 18 C.W.N., 470.
(3) (1916) I.L.R., 39 Mad., 907 (F.B.).
(4) (1907) I.L.R., 30 Mad., 537.
(5) (1914) I.L.R., 37 Mad., 462.
(6) (1919) I.L.R., 42 Mad., 821 (F.B.)
(7) (1885) I.L.R., 8 Mad., 567.
(8) (1897) I.L.R., 20 Mad., 378.

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injunctions through the powers given to them under sections 150 and 37, the objection in the last named decision being only to the transfer of an application from the Court which had express power to deal with it.

The case thus being one of first impression we must put a reasonable construction on the words of the Code. It is one thing to say that an application made to the Court that passed the decree or order should not be transferred to another Court, which has by transfer acquired jurisdiction to deal with further proceedings in the connected suit; it is another thing to argue that where the whole business of one Court has been transferred to another Court, the expression "the Court by which the decree was passed" is so definite and precise as to create an exception to the general rule introduced by section 150.

To adopt the latter argument is in effect to leave a defendant against whom an ex parte decree has been passed by a Court, which is afterwards abolished, without any remedy beyond a general right of appeal against the final decree; vide *Karuppan* v. *Ayyathorai*(1), *Krishna Ayyar* v. *Kuppan Ayyangar*(2), and section 96 of the Code of Civil Procedure.

The direction at the end of this rule that upon setting aside an ex parte decree the Court shall appoint a day for proceeding with the suit would be, as my learned brother pointed out, meaningless, if such applications were to be disposed of by Courts, which had ceased to have jurisdiction over the suit itself.

I would, therefore, place a liberal construction on the wording of section 150 and of Order IX, rule 13, and hold that the District Munsif of Anantapur had jurisdiction to deal with this petition.

(1) (1886) I.L.R., 9 Mad., 445.
(2) (1907) I.L.R., 30 Mad., 54.

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As to the merits, the service of notice of suit is purported to be by affixture to the outer door of the respondent's residence, the information given by his sister being that he had gone to a village in Mysore. The statement in his affidavit that he did not know till he attended the Taluk office on 27th March 1920 that an ex parte decree had been passed against him stands uncontradicted in detail. There appears thus to have been good reason for ordering the ex parte decree to be set aside. The Civil Revision Petition is dismissed with costs.

KRISHNAN, J.

KRISHNAN, J.—The main question for our decision in the revision petition is one of jurisdiction regarding the setting aside of an ex parte decree.

The petitioner before us, who was the plaintiff in Original Suit No. 1230 of 1919 on the file of the District Munsif's Court of Penukonda, obtained a decree against the respondent and others, the decree against him being an ex parte decree. Subsequently there was a readjustment of territorial jurisdiction between that Court and the District Munsif's Court of Anantapur, as the result of which all the properties included in the decree were transferred to the jurisdiction of the latter Court. Consequently the respondent applied to that Court to set aside the ex parte decree against him and that Court has granted his prayer. The revision is against that order and it has been contended before us, that the Penukonda Court, as the Court which passed the decree, was the only Court competent to act under Order IX, rule 13 of the Code of Civil Procedure to set aside the decree and that the Anantapur Court had no jurisdiction to do so. That rule, it is true, authorizes an application to the Court that passed the decree; but the respondent relies upon section 150 of the Code of Civil Procedure as extending the power to act under that rule to the Anantapur Court in the present case, as the whole business of the former

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Court within the local area in which the suit properties are situate, has been transferred to the latter Court and he contends that section 150 applies.

The petitioner's vakil has put forward two contentions to exclude the applicability of section 150 and I shall consider them separately. He first argued that the section applied only when the whole of the business of the Court with reference to the whole of its jurisdiction is transferred to another Court or, in other words, when the Court is abolished and another is substituted for it and not to a case of partial adjustment of jurisdiction and transfer of its business with reference to that part alone to another Court. There is nothing in the language of the section which compels us to put this restricted meaning on it; to do so would greatly reduce its scope and usefulness. No authority has been cited in favour of the restricted construction, nor is any general reason shown in support of it. On the other hand, there is as much reason to apply the section to cases of transfer of defined local areas as to cases of transfer of the whole jurisdiction. What little authority there is on the point, is in favour of the view I am taking, for in the Full Bench case *Seeni Nadan* v. *Muthusamy Pillai*(1), there is an observation of AYLING, J., on page 835 which supports it, where the learned Judge says "this section (section 150 of the Code of Civil Procedure) certainly seems to cover the case of the transfer of all the litigations arising out of a tract of country from one Court to another." The first objection must therefore be overruled.

The next point taken is, that the words "save as otherwise provided" in the section prevent its applicability to the present case, as it is argued that Order IX, rule 13, requires that the application should be made to the Court that passed the decree and to no other Court.

(1) (1919) I.L.R., 42 Mad., 821 (F.B.).

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It does not say anything about other Courts, and I am unable to read it as excluding the application of section 150. The rule is an enabling one which prescribes what is to be done in the ordinary course, to get an ex parte decree set aside. It does not say that the Court that passed the decree is the only Court that can set it aside. Nor is there anything restrictive in the wording.

No authorities have been cited on the precise point before us by either side, but the petitioner's vakil has tried to argue by way of analogy with reference to certain rulings under Order XXXIX, rule 2, clause (3) of the Code of Civil Procedure that when a forum is mentioned in a rule as having authority to do a certain thing it must be held that the jurisdiction of every other forum in the matter is excluded and he cited *Sheikh Jaharuddi* v. *Hari Charan Podder*(1) and *Mathura Dass* v. *Venkata Rao*(2). It is sufficient to say that in these cases, the effect of section 150 of the Code of Civil Procedure did not arise for decision and they are thus of little value in the present case. On the other hand, with reference to this very point, SRINIVASA AYYANGAR, J., in his judgment in the Full Bench case *Suppi* v. *Kunhi Koya*(3), expresses a clear opinion when he says that,

> "where the business of one Court is transferred to another, the Court to which the business is so transferred may, I think under section 150, entertain an original application for attachment or arrest under clause (3), rule 2 of Order XXXIX."

That Full Bench overruled the rather extraordinary contention that because the clause said that the Court granting the injunction may attach the properties of or imprison in civil jail the person guilty of disobedience, even the appellate Court had no power to take action under it. If it is kept in mind that these are enabling

(1) (1913) 18 C.W.N., 470. (2) (1911) 21 M.L.J., 829.
(3) (1916) I.L.R., 39 Mad., 907 (F.B.).

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rules in which there are no restrictive words, as there is for example in Order XLVII, rule 2, under which except in certain circumstances an application for review can be made "only to the Judge who passed the decree or order" there is no difficulty in holding that the Court, given the same powers as the Court mentioned in the rules, as for example an appellate Court or a Court to which the former Court's business has been transferred under section 150 of the Code of Civil Procedure can itself exercise those powers. To hold otherwise will be, in my opinion, entirely erroneous and will defeat the very object of the legislature in extending such powers.

I have not referred to section 37 of the Code or to cases under it, for they all refer to proceedings in execution.

I agree with my learned brother that the contention that the Anantapur Court had no jurisdiction must be overruled.

The objections taken to the order of the lower Court on the merits are equally untenable. It is clear from the record that the defendant was not duly served and that his application is within time, as he has sworn in his affidavit that he was not aware of the suit or of the affixture of the summons at his residence or of the existence of the ex parte decree till the 27th March, some twelve days before his application. The matter was tried on affidavits, no application being made to take evidence or to cross-examine the defendant. The plaintiff filed no affidavit himself but he left it to his vakil to file an argumentative statement merely alleging that the defendants' affidavit could not be true. In these circumstances, the District Munsif cannot be said to have acted irregularly or even wrongly in setting aside the ex parte decree.

I agree that the Civil Revision Petition fails and must be dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Venkatasubba Rao.

1922, January, 11.

THE SUN LIFE ASSURANCE COMPANY OF CANADA, APPELLANT,

v.

THE CORPORATION OF MADRAS, RESPONDENT.*

Madras City Municipal Act (IV of 1919)—Reference under rule 17 of Schedule IV—What questions of law can be referred —What questions the High Court should decide on the reference—"Loading"—"Gross income" of life insurance companies—Onus of proving—Value of negative proof that income does not exceed a certain amount.

On a reference under rule 17 of Schedule IV of the Madras City Municipal Act (IV of 1919) by the Court of Small Causes at Madras, the High Court was not bound to decide questions other than those referred for its decision.

Held, further, that the reference should not state for decision any abstract and general question of law, that the terms of the reference must show how the question of law propounded affects the case on hand and that the High Court would answer the actual question of law arising in the case only so far as it bore on the particular case.

Mylapore Hindu Permanent Fund (Limited) v. *The Corporation of Madras* (1908) I.L.R., 31 Mad., 408, followed.

Held, on the facts of the case that the Sun Life Assurance Company of Canada had, in reference to licence fees charged on it, discharged the onus that lay on it under proviso to Rule 7 of Schedule IV of the City Municipal Act by showing that its gross income for the previous year could not have exceeded Rs. 25,000 and that the circumstance that the company was not able to state positively its actual gross income would not disentitle it to the benefit of the proviso.

Observations on the question of what constitutes income and profits of insurance companies.

* Referred Case No. 7 of 1921.

CASE referred under rule 17, Schedule IV of the Madras City Municipal Act of 1919 by the Court of Small Causes, Madras, in Miscellaneous Petition No. 61 of 1921.

The facts are given in the judgment.

The Advocate-General (C. P. Ramaswami Ayyar) with *P. Duraiswami Ayyangar* for the Corporation.—This company falls under Rule 7 (*b*) of Schedule IV of the City Municipal Act and the proviso to the rule does not apply to it. He referred to sections 98, 110 and 138 and rules 12, 14, 15, 17 of the IV Schedule of the Act.

Under the proviso the onus of showing that the company's *gross income* does not exceed Rs. 25,000 is on the company. The Small Cause Court has erred in taking into consideration the net income instead of the gross income. The actual premia levied are calculated and fixed with reference to (1) probable number of deaths amongst the assured, (2) interest derivable from the premia received and (3) expenses of office establishment. The actual profits earned by insurance companies vary with reference to these three. The Small Cause Court has erred in stating that the only source of income is the interest on investments of the premia. He referred to *Last* v. *London Assurance Corporation*(1), *Last* v. *London Assurance Corporation*(2), *Last* v. *London Assurance Corporation*(3), *Gresham Life Assurance Society* v. *Attorney-General*(4). "Gross income" is different from profits or gains; see *Gresham Life Assurance Society* v. *Styles*(5). *Scottish Provident Institution* v. *Allan*(6) shows that the onus of proving the extent of income is on the company.

The company has not discharged the onus. Quinquennial actuarial valuations available to the company have not been produced. He referred to section 8 of Act VI of 1912 and the IV Schedule thereto as to the

(1) (1884) L.R., 12 Q.B.D., 389, 393.
(2) (1885) L.R., 14 Q.B.D, 239.
(3) (1885) 10 A.C., 438.
(4) [1916] 1 Ch., 228.
(5) [1892] A.C., 309, 324.
(6) [1903] A.C., 129, 135, 136.

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method of working of an insurance company to show its income or profit and to the Indian Income-tax Act (VII of 1918) under which insurance companies are obliged to produce actuarial valuations showing their income. Moreover all the premia received in Madras from the mufassal must also be taken into account for purposes of section 110.

T. R. Venkatarama Sastri (with *A. V. Seshayya*) for the Company.—When a case is stated, not only the point referred but also the whole case is open; see *Mylapore Hindu Permanent Fund (Limited)* v. *The Corporation of Madras*(1). Compare section 113 and Order 46, Civil Procedure Code. Section 110 of the City Municipal Act does not apply to any company which does not deal in Indian currency. Section 111 is applicable to the case. Payments made to the agents in the mufassal are not payments in Madras. There cannot be double taxation for the same amount; Maxwell on Interpretation of Statutes, 6th edition, page 504. The income of an insurance company is never more than the interest on the premia collected; only a portion of it is income as the rest has to be paid back as for policies; see *Scottish Provident Institution* v. *Allan*(2) and *Gresham Life Assurance Society* v. *Styles*(3). Young on Insurance, page 156, Andras' Insurance Guide, Volume III, pages 72 and 73, Volume I, page 219. It has been found in this case that the interest received is 5½ per cent and as the premia leviable have been calculated on a 3½ per cent interest basis the net gain on the score of interest is only 2 per cent. It has been found as a fact in this case that the highest income is not more than Rs. 25,000. The company has thus discharged its onus.

The Advocate-General replied.

(1) (1908) I.L.R., 31 Mad., 408. (2) [1903] A.C., 128, 135, 136.
(3) [1892] A.C., 309, 322, 324.

JUDGMENT.

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AYLING, J.

AYLING, J.—I have had the advantage of perusing the judgment which my learned brother is about to deliver and I agree in the answers proposed by him to be given.

VENKATASUBBA RAO, J.

VENKATASUBBA RAO, J.—The Chief Judge of the Court of Small Causes has under Rule 17 of Schedule IV to Madras Act IV of 1919 (the City Municipal Act) referred certain questions for our decision.

Before stating the questions that have been so referred, I propose to set forth the facts that have led up to this reference.

The Sun Life Assurance Company of Canada has its head office at Montreal, Quebec and a branch office for India at Bombay. The company has an agent at Madras who maintains an office and has clerks under him. This office, it is admitted, is not a branch office of the Sun Life Assurance Company, but is merely a local agency. There appears to have been a finding to this effect in a suit in the Court of Small Causes, Madras, to which the Sun Life Assurance Company was a party, a finding which was accepted by the High Court.

Section 110 of the City Municipal Act provides that every incorporated company transacting business within the city shall pay by way of licence fee "a half-yearly tax on its paid-up capital on the scale shown in the taxation rules in Schedule IV," and the explanation to that section adds that "whenever a company has an office, agent or firm to represent it for the purpose of transacting business in the city such company should be deemed to transact business in the city." Under Rule 7 of the Taxation Rules contained in Schedule IV of the Act, the assessment is made to depend in the first instance upon the paid-up capital of the company. (Class A) If such

capital is over twenty lakhs of rupees the half-yearly tax will be Rs. 1,000; (Class B) If it is more than ten but less than twenty lakhs of rupees the assessment leviable is Rs. 500 for the half year. There is however an important proviso to this rule which shifts the basis of taxation in certain cases from the paid-up capital to the "gross income" of the company. It is provided that "any company, the head office or a branch or principal office of which is not in the city and which shows that its gross income received in or from the city has not in the year immediately preceding the year of taxation exceeded Rs. 25,000 shall pay only Rs. 125" for the half year.

The standing committee of the Corporation of Madras, on the ground that this was a company with a paid-up capital of more than ten lakhs of rupees and less than twenty lakhs of rupees, confirmed the assessment levied by the Revenue Officer, and by placing the company in the second or "B" Class fixed the assessment at Rs. 500.

From this order an appeal was filed by the company under rule 15 of part V of Schedule IV to Madras Act IV of 1919 to the Court of Small Causes at Madras. The learned Chief Judge of that Court found that the gross income of the company was considerably less than Rs. 25,000, that the company discharged the onus that lay upon it under the proviso referred to above and he held that the company was liable to be assessed on that basis and fixed the assessment at Rs. 125 for the half year. He delivered judgment on the 31st March 1921.

On the 11th April 1921, the Corporation of Madras applied to the Court of Small Causes that a case might be stated for the decision of the High Court on certain points; and on the 14th April 1921 the company similarly applied that a case might be stated for a decision on certain other points.

The learned Chief Judge observes:

"I have been asked to refer several points, but consider the following questions of law to be of sufficient public interest for invoking the "decision" of their Lordships, the Judges of the High Court:

(*i*) What is meant by the "gross income" of a Life Assurance Company for purpose of taxation under Rule 7, Schedule IV of the Madras City Municipal Act?

(*ii*) Is it sufficient compliance with the provisions of the Act for the Life Assurance Company to show that its gross income could not have exceeded Rs. 25,000 in the year immediately preceding the year of taxation for the purpose of obtaining the benefit of the proviso? (It is declared entitled to that benefit when it shows that its gross income received in or from the City has not exceeded Rs. 25,000.)

(*iii*) Can payments of premia made in the first instance to sub-agents of the Company in the mufassal and remitted by them to Madras be treated as part of the gross income of the Company "received" in or from the City of Madras?"

Mr. Venkatarama Sastri on behalf of the company contended before us that it was open to him to argue on this reference the whole case and that he was not to be confined to the points specifically referred to us by the learned Chief Judge. His clients in their application to the Small Cause Court under Rule 17 had asked that two further "questions of law" might be "stated for decision of the High Court." The Chief Judge presumably did not consider it necessary to refer them for our decision.

Rule 17 consists of two parts:—

(*a*) "The Small Cause Court *may*, if it thinks fit, state a case for the decision of the High Court."

(*b*) "The Court *shall* state a case whenever a question of law is involved if either the Commissioner or the appellant applies in writing in that behalf."

It seems unreasonable to hold that because a doubt is entertained on a particular question of law which

leads to an application being made under Rule 17 and to a case being stated, the High Court is bound to consider and decide all the questions of law involved in the case. In other words, it may be that the party applying, finding that the Judge does not accept his contention on a particular question of law out of several that arise in the case, applies under Rule 17 for a case being stated. Does it follow that, the moment a case is stated to the High Court, either party is at liberty to argue before the High Court all the points of law that arise in the case and request its decision on all of them? The party who is dissatisfied with the terms of reference may have other remedies open to him; and I express no opinion on this point. The question before us is: Is the High Court bound to decide questions other than the questions referred to it for decision? I am inclined to think that it is not. If the view contended for by the learned vakil is correct, it will be open to either of the parties to ask the High Court to arrive at a decision upon the *facts* of the case, and if necessary to revise *the findings of fact* of the Small Cause Court although the application to that Court under Rule 17 was due to the existence of a question of law on which the party applying and the Judge held opposite views. It will scarcely be disputed that this is a result not in the least contemplated by the legislature, and I do not think that there is anything in the terms of Rule 17 to compel us to accept the contention which will lead to this extremely undesirable and unforeseen result.

It may be useful to refer to some analogous provisions of the Civil Procedure Code. Section 113 provides:

"subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit."

Order XLVI, Rules 1, 2, and 3 contain an amplification of section 113.

Rule 1 says that "when any question of law or usage arises on which the Court entertains a reasonable doubt, the Court may draw up a statement of the facts of the case *and the point on which doubt is entertained* and refer such statement with *its own opinion on the point* for the decision of the High Court."

Rule 2 contemplates a decree being passed or order being made *contingent upon the decision of the High Court on the point referred.*

Rule 3 provides that "the High Court *shall decide the point so referred* and shall transmit a copy of its judgment to the Court by which the reference was made, and such Court shall on the receipt thereof proceed to dispose of the case in conformity with the decision of the High Court."

These provisions clearly contemplate the case being argued only in regard to the point referred and the decision being given also on the point so referred.

I may, in passing, refer to section 69 of the Presidency Small Cause Courts Act XV of 1882, which also is substantially to the same effect.

The learned vakil has relied on *Mylapore Hindu Permanent Fund (Limited)* v. *The Corporation of Madras*(1). It is a decision upon sections 176 and 177 of the Madras Municipal Act III of 1904, which correspond to Rule 17 under discussion. The wording of the sections of the old Act and Rule 17 is almost identical, and any slight difference that may exist is immaterial. I am, however, unable to agree that *Mylapore Hindu Permanent Fund (Limited)* v. *The Corporation of Madras*(1) supports the contention put forward. It does not decide that

(1) (1908) I.L.R., 31 Mad., 408.

when a case is stated, the High Court is bound to decide every question of law arising in it. In the opening paragraph of the judgment the question referred is stated, and the judgment proceeds to say

"The law hardly contemplates a reference in such general and abstract terms. It only enables the Magistrates to state a case on any appeal before them, and refer the same for the decision of the High Court; that is, to state all the matters necessary for the decision of the particular case before them on appeal and to refer the case so stated for decision."

This is an authority for the proposition that the High Court is not bound to answer an abstract and general question of law; the terms of reference must show how the question of law propounded affects the particular case on hand, and the High Court will answer it only so far as it bears on the particular case. The question referred for the decision of the High Court in *Mylapore Hindu Permanent Fund (Limited)* v. *The Corporation of Madras*(1) is:

"Does the word 'capital' used in Schedule V of the Municipal Act III of 1904 mean exclusively nominal capital or does it also include paid-up capital and, if so, should it be taken to mean paid-up capital exclusively."

The learned Judges however decided the question with reference to the facts of the case and their answer is contained in the following paragraph:—

"Our decison, therefore, is *that, with reference to the Mylapore Hindu Permanent Fund (Limited)*, the word 'capital' in Schedule V of the Madras Municipal Act III of 1904 means paid-up capital."

I therefore have no hesitation in holding that we are not bound to give a decision on the questions involved in the suit other than the questions referred to us by the Chief Judge of the Court of Small Causes.

(1) (1908) I.L.R., 31 Mad., 408.

To deal with the questions referred to us, it would be necessary to describe very briefly the main principles underlying the calculations on the basis of which premia for assurances are fixed and illustrate by a concrete example how the premiums arrived at, besides being sufficient to meet the liabilities incurred, enable Life Assurance Companies to earn a profit. A statement of these principles would necessarily lead to a consideration of the sources of surplus or profit with which alone we are concerned.

Before it is possible for a company to fix the premium it must receive in return for an undertaking to pay a specified amount at death, it is necessary for the company to know when the life or lives insured will terminate. The tables based upon observations of a large number of lives give the information required and are known as Mortality Tables. I take the following from a treatise on Life Assurance:

"The fundamental facts which a Mortality Table supplies us with are the numbers living at each age from the earliest to the latest year included in the Table, and the numbers dying in each year. From these two series of facts all the information in regard to mortality that is required for Life Assurance can be obtained. Let us suppose now that there are 10,000 people, all at the age of 40, who wish to arrange for a payment of £100 to the executors of such of them as may die before reaching the age of 41. The Mortality Table informs us that 103 of these people will die during the year, and as the death of each person involves the payment of £100, the sum of £10,300 will be required to meet the claims arising out of these 103 deaths. It is therefore necessary for each of the 10,000 persons to pay £1·03 or £1–0–7 in order to secure the payment of £100 to their executors, should death occur within the year. This leaves out of account any benefit that may be obtained by interest earned upon the £10,300 before being required for the payment of the claims, and takes no notice of the necessary expenses of transacting the business, but it

shows clearly the use of the Mortality Table. If we had no experience to guide us as to the number of people who would die within the year, we might either charge too large an amount for the assurance, or we might charge too small a sum, and not have enough money available to meet the claims when they became due. In the instance just given, the £100 is the sum assured, the £1·03 paid to secure the sum assured in the event of death is called the premium, and a policy of this nature is called a Term Policy for one year. The premiums paid by those who did not die were used in paying the claims arising from the deaths that occurred, and the value received by the survivors for the premiums of £1·03 was the certainty of their heirs receiving £100 should the assured die."

It would be next necessary to indicate the part played by interest in the subject of Life Assurance. The rate of interest is indeed a very important factor affecting Life Assurance. £100 earning £3 per annum will amount in 50 years to £438; at 6 per cent to £1,842. The information necessary is obtained from Interest Tables which are prepared and on the basis of which calculations are made by Life Assurance Companies. It is important to know not merely what £100 will amount to at a given rate of interest in a certain number of years but also how much must now be lent or invested so that in a certain number of years it will at a given rate of interest increase to £100. This is called the present value of £100 due so many years hence at such a rate per cent.

With the aid of Mortality and Interest Tables the companies are in a position to combine the result of mortality and interest and to have regard to them in fixing their premia. Going back to the illustration already given we shall have to examine how the results obtained from Interest Tables affect it.

I shall again quote from the book already referred to:

"Let us now reconsider the example given in the Chapter on Mortality of 10,000 people aged 40, who wish to arrange for a payment of £100 to the executors of such of them as may die

before reaching the age of 41. We find from the Mortality Table that 103 of them will die and that therefore £10,300 will be required at the end of the year to meet the claims arising out of these 103 deaths. On turning to the table showing the amount of £1 at the end of one year at 3 per cent, we find it is £1·03 and the amount of £10,000 is therefore £10,300; so it is only necessary for the 10,000 people effecting the assurance to pay this amount, *pro rata* between them at the commencement of the year. Thus the premium that each would have to pay would be £1 instead of the £1·03 which we saw would have been necessary when leaving interest out of the question."

The premium ascertained in this manner is the *net* or the *pure* premium; and in order to arrive at the office premium which is what a policy-holder has to pay, an amount is added to the net premium known technically as the "*loading*."

"In the case of policies which do not participate in profits, the loading only has to be sufficient to cover the expenses and such margin as may be considered necessary for contingencies, such as the death rate being in excess of that provided for by the Mortality Table or the rate of interest earned on the funds of the company being less than the rate of interest assumed in calculating the premium rates."

"In the case of policies that participate in profits, the loading is increased in order to provide, not merely for the expenses incurred, but for the bonuses or profits that will be added to the policies in the future." See also Encyclopædia Britannica, Volume 13, page 173.

The addition of loading is thus made to make provision for the expenses of the management of the business and further to provide against adverse fluctuations both in regard to mortality and in regard to interest.

In dealing with the subjects of mortality, interest and loading, I have indicated the main sources of surplus or profit.

"A favourable mortality means that the policy-holders live longer than according to the Mortality Table it was expected

they would live. Their deaths are bound to come some day, but the longer duration of their lives implies the receipt by the Assurance Company of a larger number of premiums and involves a longer time during which interest can accumulate on the funds, which are larger in amount owing to the claims not having to be paid so soon as the Mortality Table contemplates."

How does interest form a source of surplus? The originally assumed rate of interest in making the calculations may have been 3 per cent, but the interest actually earned may amount to 4 per cent and the difference constitutes the surplus.

Smaller expenses than the additions (loading) made to the net premiums constitute the third source of a surplus.

These are considered the chief sources of surplus or profit: (1) a lighter or more favourable mortality than that assumed, (2) a higher yield of interest than that calculated upon and (3) smaller expenses than the additions made to the net premiums. Of the three, the two latter sources are considered more important. *Vide* Life Assurance by S. G. Leigh, page 55.

A certain amount of profit is obtained from policies that are surrendered or that lapse.

It seems to be generally agreed that it is questionable after making all allowances whether the indirect loss to the company from surrenders does not nearly or quite balance the direct gain, and it is stated that the best offices much prefer the policies remaining on their books to their being surrendered.

It seems also to be assumed that though policies that lapse may result in a profit they cannot as a general rule be regarded as a very appreciable source of surplus.

Having made these observations in regard to the general principles that regulate the profit of a Life Assurance Company, I shall proceed to examine the conclusion of the learned Chief Judge. He, no doubt,

ignored in his judgment all sources of surplus other than interest. But in my opinion his finding has not been affected in substance by this omission.

Under the City Municipal Act IV of 1919 the company has to show that in the year immediately preceding the year of taxation its gross income did not exceed Rs. 25,000 before the company can claim the benefit of the proviso. We have it on record that the total premia received from the whole of the Presidency of Madras amounted to Rs. 4,13,550. It has also been found that the average rate of interest earned during the year by the company on the net invested ledger assets was 5·68 per cent.

It has been pointed out that even if, for the sake of argument, it should be assumed that the average rate realized by the Sun Life Assurance Company was 6 per cent and that the whole interest realized represented the profit of the company, in order to be able to earn Rs. 25,000 per annum the Sun Life Assurance Company of Canada should have received premia from the City of Madras alone amounting to Rs. 4,16,666-10-8. We have seen that its receipts for the whole presidency amounted to only Rs. 4,13,550. A portion of the interest earned has to be returned to the policy-holders as the calculations I have adverted to above, which form the basis of the premia fixed, clearly indicate. The profit earned by the company on this head can only be the difference between the figures calculated on the basis of the rate of interest assumed and the rate of interest actually earned. The Sun Life Assurance Company in fixing its premia having assumed a rate of $3\frac{1}{2}$ per cent (the rate assumed by this company in its interest calculations, is, we are informed, $3\frac{1}{2}$ per cent), its profit from the source of interest could only be the amount which represents the difference between the two sums calculated at 5·68

per cent and 3½ per cent or 2·18 per cent. The learned Chief Judge for the purposes of his judgment assumed that the company is liable to be assessed with reference to the total amount of interest earned by it, that is, "interest at 5·68 per cent" upon the premia received. The amount arrived at falls short of Rs. 25,000 and the learned Chief Judge holds that the company is entitled to the benefit of the proviso. The question to be determined would be therefore, could the profits of the company in any event exceed the total interest earned upon the premia ? We have seen that a slight variation in the rate of interest does produce an enormous difference in the interest earned, and I have pointed out that interest forms one of the three chief sources of surplus or profit.

The difficulty in dealing with this case arises from the fact that under the Municipal Act IV of 1919 the company must state its gross income received in the year preceding the year of taxation. It is said that it is impracticable to make an annual actuarial valuation, and that it is extremely difficult to make such a valuation with reference to any particular city or area in the case of a Life Assurance Company operating in different parts of the world. The company in a petition addressed to the Commissioner of the Corporation of Madras in connexion with this assessment gives the following extract from Young on Insurance:

"But a valuation is in no sense a "stock-taking" in the customary acceptation of that term. . . . The two operations are essentially distinguished from each other and differ *extoto*. In the ordinary stock-taking the trader is concerned with the value of his articles at the current prices of the period, and his results are obtained by a mechanical arithmetical process competent to average intelligence. In a valuation, however, the probable future requires to be carefully scrutinized and gauged in the light of the experience acquired

both as regards the rate of mortality likely to be exhibited among the members, the rate of interest at which the accumulated fund and prospective premiums can probably be soundly and profitably invested, and the adequacy of the loading reserved for anticipated demands And it is to be noted that this provision is not limited to the ensuing valuation period only, but necessarily extends to the entire possible duration of the whole of the existing contracts, comprising a range of time of thirty years and upwards."

The rules made by the Governor in Council under the Income-tax Act VII of 1918 in virtue of the power conferred by section 43, sub-section 1 of the said Act, proceed on the basis of a periodical actuarial valuation for assessing to income-tax Life Assurance Companies. If the periodical actuarial valuation has been made within five years previous to the year in which the assessment has to be made, then the income shall be determined with reference to the average net profits disclosed by the last preceding valuation. If the periodical actuarial valuation has been made more than five years previous to the year of assessment, the taxable income shall be determined with reference to interest, dividends and rents received by the company during the previous year, that is to say, with reference to returns upon investments." (See page 59 of the Income-tax Manual—Madras, 1919.)

I have used the word "Interest" in this judgment as a compendious term meaning "interest, dividend and rent."

The Indian Life Assurance Companies Act VI of 1912 directs every Life Assurance Company to make periodical investigations including actuarial valuations once in five years unless the instrument constituting the company directs investigations to be made at shorter intervals (*vide* section 8 of the Act).

Reading, therefore, the rules made under the Income-tax Act in conjunction with this provision of Act VI of 1912, we arrive at this result, namely, that in default of there being an actuarial valuation within five years of the year in question, the taxable income is to be regarded as the aggregate of the interest, dividends and rents received by the company during the previous year.

I think that we shall be justified in deducing from this that it was intended to make the company that is in default pay the maximum amount of tax and that this object is accomplished by making the company pay a tax upon the entire amount of the yield produced by its investments.

It may be said that there is no fixed rule in regard to the amount of profits that can be earned by a Life Assurance Company ; but surely experts conversant with matters pertaining to life assurance must be able to say that in view of competition among the concerns it would not be possible for a company of standing to earn profits beyond a certain limit. We take it that the rules framed under the Income-tax Act contain an indication that the interest, etc., from investments constitute the maximum of profits. In the very nature of things it is impossible to state the income for a particular period of a Life Assurance Company with accuracy ; and the most careful calculation can only be regarded as an estimate. I find the following passage in an historical review of Life Assurance by Andras.

"In the year 1870 the average rate of interest earned by the funds of Life Offices, after deducting income-tax, was 4·471 per cent which declined to 3·771 per cent in the year 1899, but has since increased to nearly 4 per cent, after deducting income-tax, and from the increased skill and attention brought to bear upon the question of safe investment of the funds at a satisfactory

yield, there is little doubt that the number of Life Offices now obtaining a net average yield of at least four per cent will be rapidly increased. At the same time an effort is being made to persuade the Government to mete out what is no more than justice to Assurance Office, transacting life business only, by legislation which will enable them to be assessed for income-tax on the basis of average annual profit, in lieu of the present very unfair method of assessment on interest revenue."

I may also quote here a passage from Insurance Guide and Hand-Book by Andras—Vol. I, page 219.

"During the last few years attempts have been made by Life Insurance Companies to obtain a revision of the basis of taxation, but so far without any definite success, although the Government seem disposed to view the matter favourably.

The grievance from which relief is sought is, of course, that those companies which are purely, or mainly, life offices, as distinguished from "composite" concerns, are assessed on their interest from investments in lieu of on their profits.

It is hardly necessary for me to point out here that the interest earned by an office on its life fund is not profit in any sense of the word, but rather the "raw material" of the business. It is not difficult to imagine a case in which a company might be in receipt of, and taxed upon, a very large income from interest in spite of the fact that it was earning no profit at all. Indeed, it might even be totally insolvent, on account of the low average rate of interest earned, or of the heavy rates of mortality or expenses experienced."

The idea underlying the above passages is that assessment to tax on the basis of yield from investments entails a hardship upon Life Assurance Companies.

In the present case applying this test which from the point of view of a Life Assurance Company is a most unfavourable test to apply, the gross income falls short of Rs. 25,000. I may observe in passing that Rs. 4,13,550 is the total of the premia received from the whole of the Madras Presidency and not merely from the City of Madras.

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On the materials that have been placed before us, I am unable to say that the learned Chief Judge is wrong in his view on what I think is really a question of fact, that the profits of the company cannot in any event exceed Rs. 25,000. We have not been referred to any works on the subject of Life Assurance or to any judicial pronouncements which tend to show that a different conclusion is possible.

In the judgment of the learned Chief Judge, it is assumed that the standing committee of the Corporation of Madras was of the opinion that the amounts received as premia constituted the gross income of the company. A large portion of the judgment is devoted to a criticism of this view, and the learned vakil for the Corporation seems to have conceded before the Small Cause Court that he could not support that extreme view; and the learned Advocate-General who appeared before us for the Corporation did not put forward that contention on behalf of his clients.

Dealing with the questions that have been referred to us for our decision, I think it is sufficient to say in answer to questions 1 and 2 that the Sun Life Assurance Company has discharged the onus that lay upon it under the proviso to Rule 7 of the taxation rules, by showing that its income could not have exceeded Rs. 25,000 and the circumstance that the company has not been able to state positively what its actual gross income was would not disentitle it to the benefit conferred under the said proviso.

In regard to question 3, the learned Chief Judge has held that the Act refers not merely to income received *from* the City of Madras, but also to the income received *in* the City. The contention of the company on this point was that in addition to the principal Agency at Madras there were numerous sub-agencies in the mufussal

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and that when the mufussal policy-holders paid their premia to the sub-agents who remitted the moneys to Madras, these amounts should not be taken into account in making the assessment. On the facts I have stated above it would be unnecessary to deal with this question, because on the assumption that the interest upon the premia collected in the whole of the Presidency constituted the income of the company, such interest amounted to less than Rs. 25,000. The point involved in this question is merely of academic interest, and I may in this connexion once again refer to *Mylapore Hindu Permanent Fund (Limited)* v. *The Corporation of Madras*(1). It may be inferred from it that the Court was unwilling to answer an abstract question of law and I am similarly of the opinion that unless a decision of the question is necessary for the determination of the case before it, the Court must decline to answer the question referred to it. We do not therefore propose to give our decision on question No. 3.

N.R.

(1) (1908 I.L.R., 31 Mad., 408.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Ramesam.

1922, January 19.

EGALA PEDDA PAPA NAIDU AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

P. MUNISAMY AIYAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Contract—Specific performance—Agreement to sell on payment of a price at a future time at the option of the promisee—Sale by promisor to a third party—Acceptance by promisee, after sale—Offer irrevocable—Offer at an end by the sale—No offer for acceptance—Suit for specific performance by promisee, against promisor and his vendee, whether maintainable.

A, the owner of certain lands, agreed to sell them to *B* on payment of the price before a particular date in any future year at the option of *B*, and *B* exercised his option after the lands had been sold by *A* to a third person and with knowledge of the sale.

On a suit for specific performance of the agreement being instituted by *B* against *A* and his vendee,

Held, that the agreement was not a completed contract but only an offer by the owner to sell to the other, which could become a contract only on acceptance by the latter by payment of the price; and that the offer was at an end on the sale of the property to the third person and that there was no subsisting offer for acceptance and no contract of which specific performance could be enforced against the vendee.

Helby v. *Mathews*, [1895] A.C., 471; and *Dickinson* v. *Dodds*, [1876], 2 Ch. D., 463, followed.

SEMBLE.—If the undertaking not to withdraw the offer was not a mere *nudum pactum*, the promisee might maintain an action for damages against the promisor.

SECOND APPEALS against the decrees of R. NARASIMHA AYYANGAR, the Temporary Subordinate Judge of

* Second Appeals Nos. 314 and 315 of 1920.

Chingleput, in Appeal Suits Nos. 5 and 6 of 1919, respectively, preferred against the decrees of T. SUNDARAM AYYAR, the District Munsif of Tiruvallur, in Original Suits Nos. 667 1917 and 558 of 1916, respectively.

This Second Appeal arises out of a suit instituted for specific performance of an agreement to sell the suit lands to the plaintiff. The agreement was contained in Exhibit A, dated 10th October 1913, executed by the second defendant in favour of the plaintiff, the material terms of which appear from the Judgment.

The plaintiffs did not offer to pay the amount of price with a view to get a sale-deed executed by the second defendant, who sold the property to the first defendant by a registered sale-deed, dated 14th March 1916. The plaintiffs brought this suit (Original Suit No. 667 of 1917) against the first and second defendants for specific performance of the agreement alleged to be contained in Exhibit A for the sale of lands to the plaintiffs. There was a previous suit (Original Suit No. 558 of 1916) instituted by the first defendant to recover possession of the suit lands under the sale-deed executed to him. The District Munsif who tried both suits decreed the suit for specific performance in favour of the plaintiff in Original Suit No. 667 of 1917 and dismissed the suit of the first defendant. On Appeal by the first defendant in both the suits, the Subordinate Judge reversed both the decrees and upheld the sale in favour of the first defendant in Original Suit No. 667 of 1917. The plaintiffs in Original Suit No. 667 of 1917 preferred this Second Appeal.

T. R. Ramachandra Ayyar, *T. R. Krishnaswami Ayyar* and *T. D. Srinivasa Achariyar* for appellants.

T. M. Krishnaswami Ayyar and *S. Ranga Achariyar* for respondents.

JUDGMENT.

PAPA NAIDU v. MUNISAMY AIYAR.

This Second Appeal arises out of a suit for the specific performance of a contract, for the sale of the suit land, executed by the second defendant on 10th October 1913 in favour of plaintiffs. The first defendant, to whom the land was sold by the second defendant, on 14th March 1916, is the contesting defendant. The District Munsif decreed the suit; but on Appeal by the first defendant, the Subordinate Judge held that there was no contract and dismissed the suit. The plaintiffs appeal.

The alleged contract is evidenced by Exhibit A, the material portion of which, runs as follows :—

"In respect of the lands which you and others had sold to my mother Ammayammal on the 2nd October 1902, you executed a cultivation muchilika to me on the 10th October 1913 specifying the lands with particulars of numbers. The amount mentioned in the said sale-deed is Rs. 600. And the amount of small loans taken from time to time is Rs. 200. On payment being made of the total amount of Rs. 800 (eight hundred) within the 30th Vygasi of any year whatsoever, I shall execute a sale-deed to you in respect of the lands consisting of acres (10·52) ten and fifty two cents specified in the aforesaid sale-deed. I shall not execute a sale-deed to any other person. Should a sale be so effected to any other person such sale shall not be valid."

It is clear that, under this document, the promisee has the option of paying the price agreed upon, within the 30th Vygasi of any year but that he was not bound to do so. Assuming that there was consideration for Exhibit A and that there is an agreement binding on the promisor, this agreement may, in popular language, be described as an agreement to sell. But what the second defendant really did was that she bound herself to sell to plaintiffs on certain terms, if they chose to

avail themselves of the binding offer and her agreement is, in truth, merely an offer which cannot be withdrawn and certainly does not connote an agreement to buy. It is only in this sense that there can be said to have been an agreement to sell in the present case. (*Helby* v. *Mathews*(1) per Lord HERSCHELL, L.C.). In *Dickinson* v. *Dodds*(2) JAMES, L.J., said :

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"Unless both parties had agreed there was no concluded agreement;"

and MELLISH, L.J., said :

"I am clearly of opinion that it was only an offer, although it is in the first part of it, independently of the postscript, worded as an agreement. I apprehend that, until acceptance, so that both parties are bound, even though an instrument is so worded as to express that both parties agree, it is in point of law only an offer and until both parties are bound, neither party is bound."

The learned vakil for the appellants, while conceding that the second defendant could not sue the plaintiffs for specific performance before the plaintiffs tendered the price, contended that the plaintiffs must be deemed to have agreed to buy but that only the payment of the price was postponed at their option and that this is a case of successive (as opposed to simultaneous) performance of reciprocal promises (section 54 of the Contract Act). But we find it difficult to follow this argument. So long as the second defendant cannot charge the plaintiffs with a breach of failure to perform though they are to begin, there never was a contract at all. The case in *Charamudi* v. *Raghavulu*(3) was referred to in the course of the arguments. The point now before us was neither argued nor decided in that case. The only point raised in it was whether the contract therein was void as opposed to the rule against perpetuities. It

(1) [1895] A.C., 471 at page 477. (2) [1876] 2 Ch. D., 463.
(3) (1916) I.L.R., 39 Mad., 462.

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may be that, in the case of a personal contract executed so far as one party is concerned, as in *South Eastern Railway* v. *Associated Portland Cement Manufacturers, Ltd.*,(1) it is binding between the parties and no question of the application of the rule against perpetuities arises. But where the agreement is executory on both sides, with an option to one of the parties to do as he likes, there is nothing more than a standing offer, though it may be that, during the life time of the promisor, the distinction between a binding offer and a complete agreement is not of much importance as between the parties. In *Charamudi* v. *Raghavulu*(2) the case arose between the parties and the offer was not revoked by the death of the promisor or otherwise. But when the offer is at an end, e.g., (1) by the death or insanity of the promisor, see Contract Act, section 6 (4), or (2) by the destruction of the subject matter of the offer, *Edwards* v. *West*(3) see section 56 of the Contract Act, or (3) by the promisor selling it to a third party, the sale being known to the promisee before acceptance as in *Dickinson* v. *Dodds*(4) there is nothing to accept. In the last case, if the undertaking not to withdraw the offer was not a mere *nudum pactum* but a binding undertaking, the promisee might maintain an action for damages against the promisor. But in this case the plaintiffs made no such claim against the second defendant either in the Court below or in Second Appeal. So far as the first defendant is concerned, there is no agreement, the specific performance of which can be claimed by the plaintiffs. (See *Dickinson* v. *Dodds*(4).

The result is the Second Appeal fails and is dismissed with costs of the first defendant (first respondent).

K.R.

(1) [1910] 1 Ch., 12.
(2) (1916) I.L.R., 39 Mad., 462.
(3) (1878) 7 Ch.D., 858.
(4) [1876] 2 Ch.D., 463.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Venkatasubba Rao.

THE RANI OF TUNI (PETITIONER), PETITIONER,

1922, February, 3.

v.

KORRA LATCHUNDHORA AND OTHERS (RESPONDENTS), RESPONDENTS.*

Agency Rules (Vizagapatam) 16 and 20—Decree—Claim petition in Assistant Agent's Court—Claim by a third party to property attached in execution of a decree—Petition allowed by Assistant Agent—Appeal to Agent, whether competent—Orders of Assistant Agent and Agent, whether decrees—Civil Procedure Code (Act V of 1908), Order XXI, rules 58 and 59, whether applicable to Agency tracts—Proper remedy—Suit—Petition regarded as suit.

An order passed by an Assistant Agent on a claim petition filed before him objecting to the attachment of property in execution of a decree, is a decree under Rule 16 of the Vizagapatam Agency Rules, and is appealable to the Agent, and the order by the Agent dismissing the appeal as incompetent is likewise a decree subject to interference by the High Court under Rule 20 of the same rules.

The provisions of Order XXI, rules 58 and 59, Civil Procedure Code, relating to claim proceedings are not applicable to Agency Courts, and the proper procedure in Agency tracts is by way of suit to establish title to property attached in execution of decrees.

Where therefore a claim petition was preferred to an Assistant Agent alleging title and possession to certain property attached in execution of a decree, and was allowed on the ground of possession of the claimant, and an appeal preferred to the Agent by the decree-holder was dismissed as incompetent, on a petition preferred by the latter to the High Court to direct the Agent to review his order,

* Civil Miscellaneous Petition No. 3544 of 1919.

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Held, that the orders of both the Assistant Agent and the Agent were decrees, that the appeal to the Agent was competent, that the claim proceedings under the Civil Procedure Code were not applicable and that the Agent should dispose of the appeal on the merits, treating the claim proceedings as a suit.

PETITION under rule 20 of the Agency Rules, Vizagapatam, praying the High Court to issue an order directing the Agent to the Governor at Vizagapatam to review his proceedings in D. Dis. No. 235 of 1919 preferred against the order of H. R. UZIELLI, the Special Assistant Agent, in Civil Miscellaneous Petition No. 1 of 1917.

The Rani of Tuni, who was the first counter-petitioner in the first Court and the petitioner before the High Court, obtained a decree for money against respondents 2 to 8 in the Court of Assistant Agent of Vizagapatam, and attached certain lands as belonging to the judgment-debtors, by an order passed by the Assistant Agent. The Maharaja of Jeypore filed a claim petition claiming that the land should be released from attachment, as it had passed to him under a sale-deed executed by the principal judgment-debtor on 23rd December 1916, prior to the attachment which was made some time early in 1917. The decree-holder (the Rani of Tuni) contended that the sale was not bona fide, but fraudulent and collusive, and was brought about to save the property from liability under the decree. The Assistant Agent held that the decree-holder could not contest the validity of the sale-deed *in a claim petition*, and that the judgment-debtor "must be held not to be in possession of the lands attached on the date of attachment as the property had passed to the claimant under the sale-deed." He held that the decree-holder (Rani of Tuni) was not entitled to attach the property in execution of her decree and released the property from attachment. The Rani appealed to the Agent to the Governor, Vizagapatam, who held that the appeal to him was

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inadmissible. The Rani preferred this Civil Miscellaneous Petition to the High Court to review the proceedings of the Agent under Rule 20 of the Vizagapatam Agency Rules.

D. Appa Rao for petitioner.

P. Somasundaram and *T. K. Srinivasathathachariar* for respondent.

The Court delivered the following JUDGMENT:

This is a petition asking us to direct the Agent to the Governor, Vizagapatam, to review his proceedings dismissing, as inadmissible, an appeal from a decision of the Assistant Agent.

A preliminary objection has been taken to our hearing the petition, that it does not lie, because the Agent's disposal is not a decree, to which rule 20, Vizagapatam Agency Rules, applies. The question whether the Agent's disposal is a decree is indistinguishable from the question whether the decision under appeal before him was likewise a decree. The Assistant Agent was dealing with what undoubtedly was described before him as a petition and was headed as presented under Order XXI, Rule 58, Civil Procedure Code. The circumstances were that the present first respondent was claiming the property attached by the present petitioner in execution of her decree against the second and other respondents. The Assistant Agent in dealing with the case appears to have eventually declined to decide the two issues originally framed, which related to the claimant's title, and to have restricted his enquiry to possession with reference to the terms of Order XXI, rule 59. That was all in accordance with the character of the proceedings as resembling what in non-agency tracts are known as claim proceedings. In fact, however, the petitioner who was then in the position of first counter-petitioner,

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had expressly pleaded that the claim procedure under Order XXI, Rule 58, was not in force in the Agency tracts at all, and had relied on a plea of title. The petitioner, therefore, cannot be held in any degree responsible if the Assistant Agent erred in treating the proceedings before him as claim proceedings or in limiting the scope of the inquiry consistently with their being of that nature.

The law applicable is contained exclusively in the Agency Rules already referred to. The only provision for appeal is rule 16, allowing an appeal from the Assistant Agent to the Agent, and there is, of course, the provision in rule 20 for the powers and control exerciseable by this Court. Those provisions apply only to decrees ; and we have been able to find no provision for appeals against either orders passed in execution or other orders of a miscellaneous character. If then we are constrained to regard the Assistant Agent's order as passed on a petition and as not constituting a decree, we shall have to hold that the appeal to the Agent was rightly rejected by him and to dismiss the present petition. To support the position that orders in execution are not appealable there is a decision in *Sri Sri Sri Vikramadeo Maharajulum Garu* v. *Sri Neladevi Pattamadhadevi Garu* (1) and there is clearer authority in *Venkatanagabhushanam* v. *Mahalakshmi* (2) to show that miscellaneous orders by an Agent or Assistant Agent can be displaced only by an application to the Governor in Council.

The result, however, is not, in our opinion, to limit a person in the first respondent's position to a petition, as the means by which he can make his claim. The consequence is that, if he approaches the Court in order to do so, he should be regarded rather as availing

(1) (1903) I.L.R., 26 Mad., 266. (2) (1918) I.L.R., 41 Mad., 825.

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himself of the only remedy, which the law in the Agency tracts provides ; that is, the institution of a suit. The fact that he himself described his action as a petition and referred to a provision of the Civil Procedure Code, which was wholly irrelevant, cannot prevent us from ascertaining what was the real character of the proceedings or from treating them as what they really were, especially when we have not been shown how any unfair prejudice to any of the parties to them is to be apprehended. The necessary averments for a suit by a claimant were contained in the first respondent's petition and the proper defences were put forward in the petitioner's counter-petition. If the proper issues were not joined, that was, as already pointed out, through no fault of his. It May be observed that there is no reason why the existence in the Agency Courts of a remedy by way of claim petition should be assumed. For, the claim procedure is not a part of English Law and there is no reason for regarding it as anything but a special provision of the Code or importing it into a legal system which has always stood on an independent foundation. In these circumstances, we feel at liberty to treat the proceedings as taken in the only manner available to the first respondent, by suit and therefore to regard the orders of the Assistant Agent and the Agent as decrees, the former being appealable and the latter being subject to the interference of this Court with reference to rule 20.

Taking this view, we must direct the Agency Commissioner to review his order after hearing the appeal on the merits in the light of the foregoing. In doing so, we take the opportunity to refer to a statement made by Mr. Appa Rao on behalf of the petitioner before us, which is entirely consistent with the record, that his client was not heard before the order was passed. We

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are constrained to call the attention of the Agency Commissioner to this irregularity in his predecessor's procedure. Secondly, we observe that the Agency Commissioner should, in dealing with the merits of the case, consider before deciding against the petitioner whether the scope of the trial was not unduly limited by an unnecessary regard for the provisions of the inapplicable Order XXI, Rule 59. We direct that costs of the proceedings in the Court here and in the lower Courts to date be costs in the cause and follow the result.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Odgers.

1922, March, 31.

H. M. K. V. SANKARA VARIAR (DEFENDANT), APPELLANT,

v.

T. K. UMMER AND TWO OTHERS (PLAINTIFFS), RESPONDENTS.*

Limitation Act (IX of 1908), art. 97—Voidable sale by a qualified owner—Dispossession of purchaser under a decree obtained by one claiming paramount title—Limitation.

A purchaser under a voidable sale-deed from a qualified owner was dispossessed in execution of a decree obtained by a person entitled to avoid the sale.

Held, that a suit by the purchaser for the return of the price was governed by Article 97 of the Limitation Act and that limitation began not from the date of the decree but from the date of actual dispossession. *Juscurn Boid* v. *Pirthichand Lal Choudhury*, (1919) I.L.R., 46 Calc., 670 (P.C.), distinguished.

SECOND APPEAL against the decree of ANANTANARAYANA AYYANGAR, Subordinate Judge of Ottapalam, in Appeal Suit No. 80 of 1919, preferred against the decree of A. C. KUNHUNNI RAJA, District Munsif of Ponnāni, in Original Suit No. 701 of 1917.

* Second Appeal No. 2062 of 1920.

SANKARA VARIAR v. UMMER.

One Valia Thamburatty, the then female manager of Puthia Kovilagom, in South Malabar, granted to the defendant a theethu-deed (Exhibit A) in 1903 by which she mortgaged certain lands and also sold the trees thereon. The defendant assigned his entire right in the lands and in the trees to the first plaintiff in 1904 for Rs. 1,000, and put him in actual possession. The first plaintiff in his turn assigned his rights to the second and third plaintiffs in 1906 and put them in possession. In a suit brought by the successor in office of Valia Thamburatty a decree was made on 10th February 1914, and the theethu-deed of 1903 was set aside as not binding on the Kovilagom. The decree was affirmed on Appeal on 22nd December 1914, and on 3rd July 1915 the plaintiffs were dispossessed in execution of the decree. Thereupon the first plaintiff satisfied by payment the second and third plaintiffs for the loss they sustained by the dispossession, and brought this suit on 18th December 1917 against the defendant for the return of the Rs. 1,000, viz., the consideration paid by him for the assignment. The defendant pleaded *inter alia* that the suit was barred by limitation as having been brought more than three years after the date of the decree setting aside the theethu-deed. Both the lower Courts held that the suit was not barred by limitation and gave the plaintiff a decree. The defendant preferred this Second Appeal.

K. P. M. Menon and *P. Govinda Menon* for appellant.—The suit is barred by limitation. Article 97 applies. The cause of action arose not when possession was actually disturbed but on the date of original decree. See *Juscurn Boid* v. *Pirthichand Lal Choudhury*(1).

(1) (1919) I.L.R., 46 Calc., 670 at 687 (P.C.).

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C. Madavan Nayar for respondent.—The suit is not barred. Article 97 may apply; but the starting point is the date of actual dispossession; for the consideration failed only then and not on the date of the decree. *Juscurn Boid* v. *Pirthichand Lal Choudhury*(1) does not refer to a case of disturbance of an actual possession but only to a case of symbolical possession such as that of a landlord. It is so explained in *Mahomed Ali Sheriff* v. *Venkatapathi Raju*(2). Moreover in this case the sale to the plaintiff was not void from the beginning but only voidable. The decree setting aside the sale is immaterial, and so long as the plaintiff was not disturbed in his possession the consideration for his purchase money did not fail. See *Narsing Shirbakas* v. *Pachu Rambakas*(3), *Sukmoy Sarkar* v. *Shashi Bhushan Bhattacharyya*(4), *Ramanatha Iyer* v. *Ozhapoor Pathiriseri Raman Nambudripad*(5), *Subbaroya Reddiar* v. *Rajagopala Reddiar*(6), *Ram Chandar Singh* v. *Tohfah Bharti*(7), *Meenakshi* v. *Krishna Royar*(8). If Article 97 does not help me, Article 116 applies and I am in time even if time begins from the date of the decree. See *Mahomed Ali Sheriff* v. *Venkatapathi Raju*(2).

K. P. M. Menon in reply.—This is not a suit for damages but a suit for the return of the consideration; hence Article 97 alone applies and not 116. He distinguished the cases quoted by the respondent.

JUDGMENT.

ODGERS, J.

ODGERS, J.—In this case the only point argued is that of limitation. The respondent's vendor in 1903 obtained a theethu-deed (Exhibit A) which was assigned to the respondents in April 1904 by Exhibit B for a

(1) (1919) I.L.R., 46 Calc., 670 at 637 (P.C.).
(2) (1920) 39 M.L.J., 449 at 455
(3) (1913) I.L.R., 37 Bom., 538.
(4) (1911) 10 I.C., 486.
(5) (1913) 14 M.L.T., 524.
(6) (1915) I.L.R., 38 Mad., 887 at 889.
(7) (1904) I.L.R., 26 All., 519.
(8) (1916) 32 I.C., 176.

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period of 12 years and for a consideration of Rs. 1,000. Exhibit A was granted by the then female manager of the Kovilagom styled Valia Thamburatty. It is not only a mortgage but also a conveyance of the trees on the land. The respondent obtained possession and enjoyed the property till February 1906, when he conveyed it to others who were subsequently evicted as the consequence of a suit brought by a subsequent Thamburatty to set aside the theethu-deed (Exhibit A) on the ground that the vendor had no title to sell. This decree is dated 10th February 1914 (Exhibit F) in the case and by it the defendant (appellant here) is ordered to deliver up all documents relating to the suit property and retransfer the same to plaintiff free from the mortgage and all other encumbrances created by the defendants or any person claiming under them. This decree was confirmed on appeal on 22nd December 1914 and on 3rd July 1915 the plaintiffs were dispossessed in execution thereof. The plaintiffs brought the present suit on 18th December 1917 to enforce payment of the consideration which plaintiff had paid for Exhibit B. It was, I think, admitted by both sides at the appeal before us that Article 97 of the Limitation Act applies and although at the end of the case the learned counsel for the respondents contended in the alternative that Article 116 would, in any case, apply, by virtue of the covenant for 12 years' quiet enjoyment contained in Exhibit B, I think he must be held to have admitted that the matter is governed by Article 97. The short point arising from these facts is, does limitation run from the date of the original decree (10th February 1914), in which case the plaintiff's suit is barred under article 97, or does it run from the date of actual dispossession of the plaintiffs which occurred in July 1915, in which case the suit is within time. Mr. K. P. M. Menon for the appellant who was

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unsuccessful in both the lower Courts relied exclusively on the ruling of the Privy Council reported in *Juscurn Boid* v. *Pirthichand Lal Choudhury*(1). Had their Lordships laid down a general principle which would govern all cases of this nature, we should of course be bound by it. They, however, say that the plea that the period of limitation began to run when possession was lost was "belated" and proceed to hold that the decree of the first Court is the starting point of limitation, qualifying this however by this passage,

"There may be circumstances in which a failure to get or retain possession may justly be regarded as the time from which the limitation period should run, but that is not the case here. The quality of the possession acquired by the present purchaser excludes the idea that the starting point is to be sought in a disturbance of possession or in any event other than the challenge to the sale and the negation of the purchaser's title to the entirety of what he bought involved in the decree of the 24th August 1905. If further support of this view be required, it may be found in the express provision of section 14 of the Regulation which directs that in the suit for reversal itself the purchaser is to be indemnified against all loss." (P. 679).

What was the quality of the possession in the case before them? Apparently the purchaser received an *amaldastak* or order for possession under section 15 of Bengal Regulation VIII of 1819. This does not seem to have put him in actual physical possession of the property but to have been an order to the ryots to attorn to him as the purchaser. I think the possession was different in the case before us and that actual possession was delivered to the respondent under Exhibit B. Further the deed (Exhibit B) would appear to be not void *ab initio* but only voidable. It would have been open to the succeeding Thamburatty to have confirmed the transaction (c.f., *Ananda Chandra*

(1) (1919) I.L.R., 46 Calc., 670 at 687 (P.C.).

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Bhuttacharjee v. *Carr Stephen*(1), and it seems reasonable to hold that the consideration did not fail till respondent was deprived of the possession of the property which he had acquired under Exhibit B. He had possession either personally or through his transferees from 1904 to 1915. See per MILLER, J., in *Ramanatha Iyer* v. *Ozhapoor Pathiriseri Raman Nambudripad*(2). The Privy Council case has further been distinguished by a Bench of this Court in *Mahomed Ali Sheriff* v. *Venkatapathi Raju*(3). True that was a case under Article 116 and the cause of action which was the breach of the covenant for quiet enjoyment was treated as arising as from the date of disturbance of plaintiff's possession. The learned Judges say at page 455,

"But they (i.e., Privy Council) held that the quality of possession acquired by the purchaser in that case (it was apparently merely formal and not actual possession) was such as to exclude the idea that the starting point was to be sought in the disturbance of possession. But that could not be predicated of the possession of the present plaintiffs who were in actual possession and enjoyment of the property until dispossessed in execution of the decree obtained by the reversioners,"

thus clearly distinguishing the Privy Council case from a case where the purchaser was put in actual possession and enjoyment of the property. There are other decisions which take this view—*Narsing Shivbakas* v. *Pachu Rambakas* (4), which the Privy Council says does not call for serious consideration though it is very doubtful if they meant to say that it was bad law—their Lordships do not say so directly. In the Bombay case the learned Judges dealing with *Hanuman Kamat* v. *Hanuman Mandur*(5), say at page 541.

"But their Lordships, we think, were not considering a case in which possession had actually been given, although the

(1) (1892) I.L.R., 19 Calc., 127.
(2) (1913) 14 M.L.T., 524 at 526.
(3) (1920) 39 M.L.J., 449 at 455.
(4) (1913) I.L.R., 37 Bom., 538.
(5) (1892) I.L.R., 19 Calc., 123.

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contract subsequently turned out to have been void *ab initio*. In such a case the promisee has received the only consideration he has stipulated for. In all cases of that kind it appears to us that it is only when the promisee is deprived of that consideration and the true character of the contract thus becomes revealed that he has any ground for complaint. And that is the proper time from which to compute the period of limitation. That is the principle distinctly underlying the provisions of Article 97. We think that both in terms and in spirit it does and was intended to cover cases of this kind."

The Calcutta High Court in *Sukmoy Sarkar* v. *Shashi Bhushan Bhattacharyya*(1), held that under Article 97 time runs from the date when plaintiff was actually evicted from the land and that the question of limitation must depend upon the special facts of each case. In *Subbaroya Reddiar* v. *Rajagopala Reddiar*(2), SESHAGIRI AYYAR, J., said with reference to cases where the sale is only voidable on the objection of third parties and possession is taken under the voidable sale that

"the cause of action can only arise when it is found that there is no good title. The party is in possession and that is what at the outset under a contract of sale a purchaser is entitled to, and so long as his possession is not disturbed, he is not damnified. The cause of action will therefore arise when his right to continue in possession is disturbed."

In *Meenakshi* v. *Krishna Royar*(3), PHILLIPS, J., held that as possession had been given under a contract of sale the sale was not void *ab initio* and plaintiff was entitled to recover his purchase money under Article 97, Limitation Act. He held that the starting point for limitation was not the date of the sale-deed, 1883, but the date of dispossession in 1910.

In *Ram Chandar Singh* v. *Tohfah Bharti*(4), in a suit brought on a sale-deed whereby the vendor contracted to recoup the vendees in the event of disturbance of

(1) (1911) 10 I.C., 486. (2) (1915) I.L.R., 38 Mad., 887.
(3) (1916) 32 I.C., 176. (4) (1904) I.L.R., 26 All., 519.

possession, it was held that the cause of action did not arise till possession was in fact disturbed.

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Under these circumstances it appears to me that the Privy Council decision, qualified as it is, must be taken to be applicable to the facts of the particular case before their Lordships and that we are not justified in extending it generally to cases in which actual possession of the property has been given and been enjoyed for a number of years. In such a case, on the authorities quoted above, the starting point of limitation must be (at all events in the case of a sale not *ab initio* void but only voidable) the date of dispossession. I am therefore of opinion that this Second Appeal should be dismissed with costs.

Ayling, J.—I agree. — AYLING, J.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Venkatasubba Rao.

T. RAMASAMY AIYAR (FIRST PLAINTIFF), APPELLANT, — 1922, April, 20.

v.

T. SUBRAMANIA AIYAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Suit for partition—Co-owner — Trustee—Mesne profits—Profits claimed by a member of Hindu joint family, whether mesne profits—Interest on such profits, whether awardable—Past and future profits in a partition suit, right to.

The claim for profits, made by a member of a Hindu joint family in a suit for partition, is not technically one for "*mesne profits*," as used in the Civil Procedure Code.

* Civil Miscellaneous Second Appeal No. 40 of 1919.

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A co-owner, who is awarded profits in a partition suit against another co-owner in possession, is not entitled to *interest* on such profits in the absence of proof of fraud or inefficiency in the realization of the profits.

APPEAL against the order of F. A. COLERIDGE, the District Judge of Madura, preferred against the order of V. DANDAPANI PILLAI, Subordinate Judge of Madura, in Interlocutory Applications Nos. 287 of 1909, 187 of 1910, 122 and 123 of 1914 and 266 of 1916 in Original Suit No. 19 of 1895.

The first plaintiff instituted this suit in 1895 (Original Suit No. 19 of 1895 on the file of the Sub-Court of Madura) for partition and delivery of his share of the family property together with profits appurtenant to his share for three years prior to suit and for future profits. The suit was in the first instance wholly dismissed, but on appeal to the District Court, a judgment and decree were passed on the 14th September 1899, directing the division of the family properties and awarding the plaintiff an one-fifth share of the same, as it then was. The claim for past profits was negatived, but the judgment and decree were silent as to future profits. On 22nd April 1909, the plaintiff filed an application in the Sub-Court for the appointment of a commissioner to divide the lands, and prayed *inter alia*, for the ascertainment of "mesne profits." The Subordinate Judge disposed of this and other petitions by other parties to the suit, by an order, dated 29th November 1915, under which a commissioner was appointed with certain directions; but he held as to mesne profits that the plaintiff was not entitled to the same on the ground that the *preliminary* decree did not make any mention of mesne profits nor was any provision made therein. On the report of the commissioner, what was called a final judgment and decree were passed on the 13th September 1916. In the so-called final judgment, the

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claim for mesne profits was again considered and negatived by the then Subordinate Judge who observed:

"In this order of my predecessor" (referring to the previous order of 29th November 1915 on the application for appointment of commissioner), "the claim for mesne profits was disallowed and I have no authority to vary the order."

The plaintiff preferred an appeal to the District Court against the so-called final decree of the Subordinate Judge, dated 13th September 1916, and again claimed mesne profits. The learned District Judge disposed of the appeal by a decree, dated 3rd August 1917, but negatived the claim for mesne profits, and observed in his judgment as follows:

"It has already been decided that the preliminary decree did not provide for mesne profits, and I cannot go into that in this appeal."

Against this decree, the plaintiff preferred this Civil Miscellaneous Second Appeal. The case came on for hearing before SADASIVA AYYAR and NAPIER, JJ., who held that the plaintiff was entitled not to past but only to future profits under the circumstances of this case, and called for findings on two issues regarding the same; and on receipt of the findings from the lower Court, the case was finally disposed of when the question as to interest on mesne profits was dealt with.

T. R. Venkatarama Sastri, *S. Parthasarathi Ayyar*, *M. S. Venkatarama Ayyar* and *S. Vaidyanatha Ayyar* for respondent.

T. R. Ramachandra Ayyar, *T. S. Narayana Ayyar*, *T. S. Anantarama Ayyar* and *T. L. Venkatarama Ayyar* for appellant.

JUDGMENT.

OLDFIELD, J. OLDFIELD, J.—On the second issue remanded, relating to plaintiff's share of the net profits received by second defendant and to be accounted for by him from plaintiff's

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OLDFIELD, J.

share of the lands, or rather from the lands assigned to the latter, we have been unable to ascertain and the learned vakils concerned cannot say how the total found payable to plaintiff has been reached. We, therefore, can only with the assistance of the materials now available and accepted by the lower Court indicate the lines, on which the account must be taken. The second defendant was in possession as manager of the family, until on the date of the plaint the joint family became divided and a tenancy-in-common replaced it, second defendant continuing in possession as one of the co-tenants. It is, therefore, possible to say at once that he has, from the date of the plaint (22nd August 1895), been accountable for plaintiff's share of the produce of all the lands with the exception for the present of Survey Nos. 228-B (representing items 1 and 2), and 233 (item 3 and items 4 to 6), because the special considerations applicable to these require separate treatment.

The next question is whether plaintiff is entitled to interest on his share of the profits for each year from the time when second defendant received it. As a co-owner in possession of the co-ownership property, he was, it may be conceded, a constructive trustee with reference to section 94 of the Trust Act and was subject to the same liabilities as a trustee with reference to section 95. But it does not follow that he is liable for interest on the profits. For, it has not been shown how a trustee can ordinarily be so liable in the absence of any breach of trust established against him in the special circumstances enumerated in section 23. There is no imputation on second defendant's realization of profits as fraudulent or inefficient; and, when the suit might at any moment during the long period of its suspension have been resumed and it might have been necessary for second defendant to produce the funds in his hands, we are not prepared to hold that he

was bound by section 20 to invest them. Authority is, as my learned brother has shown, against the duty of a trustee ordinarily to pay interest on profits. We accordingly cannot hold second defendant liable for it, and, taking this view, we need not consider whether the learned Judges, in holding him liable for profits, not mesne profits, in the order of remand, intended, as has been argued before us, to deal with the matter.

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* * * *

VENKATASUBBA RAO, J.—I am of the same opinion, and I should like to state my reasons for holding that the second defendant is not liable for interest.

VENKATA-SUBBA RAO, J.

On behalf of the plaintiff it is argued that the second defendant stood in a fiduciary relation to him and would therefore be liable to pay interest upon the rents received from the lands.

In the first place, I am not satisfied that there is any fiduciary relation between the plaintiff and the second defendant. After the interlocutory order of 1899 it is no doubt conceded that the parties became tenants-in-common with reference to the properties in question. But we have not been referred to any authorities in support of the proposition that the second defendant stood in any fiduciary relation to the plaintiff. The decision in *Kennedy* v. *De Trafford*(1) is the other way. Action was brought against the mortgagees of some property to set aside a sale made by them under the power of sale contained in their mortgage deed. The property mortgaged was held by two persons as tenants-in-common. They were co-owners, each possessing an undivided moiety. The mortgagees gave notice that unless the parties paid off the mortgage the former would be prepared to sell the property at a price which would realize

(1) [1897] A.C., 180 at 189.

principal, interest and costs, and finally one of the mortgagors became the purchaser. The sale was impeached by the representative of the other mortgagor on the ground that it was made to a person who was incapable of buying the property because he was in a fiduciary relation. Lord HERSCHELL observes :

"But then it is said the mere fact that Kennedy was co-owner with Dodson of this property creates such relationship between them that one co-owner could not take this property and hold it for himself, but that the other co-owner is entitled on equitable grounds to have it declared that the benefit of one-half of that purchase should be his. My Lords, no authority has been cited in support of such a proposition."

In the Court of Appeal LINDLEY, L.J., made the following observation in regard to this contention by the plaintiff, the co-tenant :—

"We are asked to say, and the point is an important one, that one of several tenants-in-common cannot get in for his own benefit an outstanding encumbrance or an outstanding estate or cannot be treated otherwise than as fiduciary owner standing in some fiduciary relation to his co-tenant. As a general proposition that appears to me not to be the law of England. *Kennedy* v. *DeTrafford*(1)."

Even assuming that there was a fiduciary relation, is the second defendant liable for interest upon the rents of the lands in his possession? In *Blogg* v. *Johnson*(2), Lord CHELMSFORD L.C., stated that generally interest cannot be recovered upon the arrears of income. Several cases are referred to in the judgment and the rule is said to be the established rule of the Court, which however, is only general and not inflexible.

In *Silkstone and Haigh Moor Coal Company* v. *Edey*(3), it was held that upon the setting aside of a sale by a trustee of a trust property to himself and the reconveyance of the property to the beneficiaries it is not the practice of the Court to charge the trustee with interest on the rents and profits received by him since the date of the sale.

(1) [1896] 1 Ch., 768 at 774. (2) [1867] 2 Ch. App., 225.
(3) (1900) 1 Ch., 167.

Lewin states the law relating to the right of the beneficiary to have the property reconveyed to him thus :

"The cestui que trust, if he chooses it, may have the specific estate reconveyed to him by the trustee or where the trustee has sold it with notice by the party who purchased, the cestui que trust on the one hand paying the price at which the trustee bought with interest at four per cent and the trustee or purchaser on the other accounting for the profits of the estate but not with interest."

STIRLING, J., in *Silkstone and Haigh Moor Coal Company* v. *Edey*(1) approves of the statement of the law in "Lewin on Trusts," page 576.

Macartney v. *Blackwood*(2), which is referred to in the judgment of STIRLING, J., is also an authority for the proposition that when the sale is set aside interest on the rents is not allowed.

In Halsbury's Laws of England, Vol. 28, at page 191, a statement of law is made to the same effect.

Interest was, no doubt, charged on arrears in some cases as *Melland* v. *Gray*(3), and *Gilroy* v. *Stephen*(4), but it seems to me that the cases fall, in the words of Lord CHELMSFORD, L.C., in *Blogg* v. *Johnson*(5), within the range of another principle of equity that where an executor or a trustee unnecessarily detains money in his hand which he ought either to have invested or to have paid over to the person entitled to it, he will have to pay interest for it. The LORD CHANCELLOR observes :

"Where money is thus improperly retained, it appears to me to be immaterial how the sum has arisen, whether from a legacy or a distributive share or a residue or the arrears of

(1) (1900) 1 Ch., 167. (2) (1795) Ridg. L. & S., 602.
(3) (1845) 2 Coll, 295. (4) (1832) 46 L.T., 761.
(5) [1867] 2 Ch. App., 225.

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income ; in the latter case the claim for interest is not made on account of arrears, but for the improper keeping back of a sum of money, from whatever source derived which the executor or the trustee ought to have paid over."

As my learned brother has pointed out, it cannot be said in this case that the second defendant was bound to invest the profits. The plaintiff had the conduct of the suit and it was quite open to him at any moment to ask for possession of the properties, for an account of the profits and for payment to him of the sum ascertained to be due. The delay is not attributable solely to the second defendant, and the plaintiff has failed to show any grounds for making the second defendant liable for interest.

K.R.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C. Chief Justice, and Mr. Justice Coutts Trotter.

1922, August, 1.

THE OFFICIAL ASSIGNEE OF MADRAS (PETITIONER), APPELLANT,

v.

ALLU RAMACHANDRA AYYAR AND OTHERS (MINOR BY MOTHER AND GUARDIAN SWARANAMBAL, RESPONDENT), RESPONDENTS.*

Hindu Law—Insolvency—Joint family—Managing member adjudicated insolvent—Effect of adjudication—Rights of Official Assignee—Joint possession—Exclusive possession of joint family property—Personal rights of manager, whether transferred to Official Assignee—Vesting of other members' shares—Alienee—Joint owner—Rights of Official Assignee and other members—Right of Official Assignee to deal with other members' shares—Nature of debt.

Where the managing member of a joint Hindu family, consisting of himself and his sons, is adjudicated an insolvent

* Original Side Appeal No. 46 of 1921.

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the interest of the sons does not vest in the Official Assignee by reason of the adjudication, although it would be competent to the latter to deal with their shares, if the debts of the insolvent were of such a nature as to be binding on their interest.

Fakirchand Motichand v. *Motichand Harruckchand*, (1883) I.L.R., 7 Bom., 438; *Nunna Setti* v. *Chidaraboyina*, (1903) I.L.R., 26 Mad., 214, referred to.

The Official Assignee as representing the managing member, is entitled to joint possession with the sons of the family property.

There are certain rights of a managing member which the Official Assignee cannot exercise by reason of the personal nature of the rights, such as the right to live in the family house or to share in the family meals ; but the latter is entitled to all other rights of the insolvent including the right to possession.

APPEAL against the order of KUMARASWAMI SASTRI, J., passed in the exercise of the Insolvency Jurisdiction of the High Court.

This appeal arises out of an application filed by the Official Assignee of Madras in the insolvency of one Narasimha Ayyar and another, praying for a declaration "that a deed of partition, dated 26th November 1919, executed by the insolvent Narasimha Ayyar was fraudulent and void as against the Official Assignee and that the interest of the minor sons of the insolvent in the family property vested in the Official Assignee by reason of the adjudication made on the 2nd December 1919 ; that the garnishee or guardian may be directed to deliver possession of the properties to the Official Assignee and for other reliefs." The partition deed was entered into between the insolvent father and his seven minor sons. The learned trial Judge, KUMARASWAMI SASTRI, J., held that it was not a bona fide transaction and that it should be set aside as not binding on the Official Assignee. The learned Judge held that the Official Assignee was not entitled to a declaration that the interest of the sons also vested in him, that the partition did not operate as a division of status, that the liability of the sons should

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be determined with reference to each debt when their shares were sought to be proceeded against, and that the Official Assignee was not entitled to be put in possession of the properties. Against this judgment, the Official Assignee preferred this appeal.

The Advocate-General (*C. P. Ramaswami Ayyar*) for the appellant.—I concede that the sons' shares do not vest in the Official Assignee. But the father as manager was in possession of all the joint family properties and the Official Assignee is entitled to that possession. The Official Assignee is entitled to exercise the father's power of sale for debts: see *Fakirchand Motichand* v. *Motichand Harruckchand*(1), *Numa Setti* v. *Chidaraboyina*(2).

M. A. Tirumarayana Achariyar for the respondent.—The Official Assignee is in the position of an alienee of an undivided share, and it is well settled that such alienees are not entitled to joint possession with other co-parceners, *Kota Balabadra Pali* v. *Khetra Doss*(3). The right of managership is purely personal to the co-parcener, and cannot pass to the Official Assignee, *Grey* v. *Lamond Walker*(4). At any rate the Official Assignee cannot be entitled to more than joint possession. To claim possession of the whole is to claim possession of shares which do not vest in the Official Assignee, *Sanyasi Charan Mandlal* v. *Asutosh Ghose*(5). The fact that the Official Assignee may in certain circumstances have a power of disposition over the son's shares does not give him a right to present possession of them.

The Advocate-General replied.

The JUDGMENT of the Court was delivered by SCHWABE, C.J.

(1) (1883) I.L.R., 7 Bom., 438. (2) (1903) I.L.R., 26 Mad., 214.
(3) (1916) 31 M.L.J., 275. (4) (1913) I.L.R., 40 Calc., 523.
(5) (1915) I.L.R., 42 Calc., 225.

OFFICIAL ASSIGNEE OF MADRAS v. RAMA-CHANDRA AYYAR.

SCHWABE, C.J.

SCHWABE, C. J.—The Official Assignee in the insolvency of N. B. Baluswami Ayyar and Narasimha Ayyar brought this suit against the minor sons of N. B. Baluswami Ayyar to set aside a deed of partition executed by that insolvent in favour of his minor sons. The learned Judge KUMARASWAMI SASTRI, J., held that the deed was fraudulent and void as against the Official Assignee. The Official Assignee asked for declarations that the interests of the minors in the property should be vested in him and that the possession of all the properties included in the deed should be delivered to him. These declarations were refused and hence this appeal. It has, however, been admitted before us that the declaration that the shares of the sons had vested was rightly refused and the only question remaining for our decision is whether possession ought to have been ordered to be delivered to the Official Assignee.

This involves a consideration of the rights of the Official Assignee to joint family property, when the managing member is adjudicated insolvent, for N. B. Baluswami Ayyar was the managing member of a joint Hindu family consisting of himself and his sons and, as such managing member, had control over the properties in question. This insolvent's interest in the partnership business belonging to the two insolvents was not an ancestral property. The minor sons had no interest in it and the debts of N. B. Baluswami Ayyar are in the main business debts incurred in the partnership business.

It can be taken as established law that the Official Assignee on the insolvency of the managing member of a joint Hindu family succeeds to two things (1) the undivided interest of the insolvent in the joint property and (2) his rights as managing member so far as they can be exercised for his own benefit. It is also established that he is not entitled to have vested in him the shares of the

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other members although he can deal with them if the insolvent could lawfully have done so if there had been no insolvency. These propositions are to be found clearly stated in the judgment of LATHAM, J., in *Fakirchand Motichand* v. *Motichand Harruckchand*(1), which has been followed in many subsequent cases. This is the combined effect of sections 7, 30 and 52 of the Presidency Towns Insolvency Act and of the Hindu Law as to the rights of a managing member—see *Nunna Setti* v. *Chidaraboyina*(2). It follows that the Official Assignee standing for this purpose in the shoes of the insolvent can alienate the minor sons' interests in the joint property for the purpose of paying the insolvent's debts unless the debts in question were incurred for an illegal or immoral purpose, the presumption being that they were not.

The question remains whether the Official Assignee is entitled to possession of the joint property. He is joint owner of the property and, in my judgment, he must be entitled to joint possession thereof. It is no doubt true that a stranger cannot by reason of having purchased a share in the joint property insist on having joint possession. But the Official Assignee is not an alienee, but the representative of the insolvent.

There are certain rights of a managing member which the Official Assignee cannot exercise by reason of the personal nature of the rights, such as the right to live in the family house or to share in the family meals. But in my judgment, he is entitled to all the rights of the insolvent including the right to possession except such rights as are in their nature personal to a member of the family as such.

I expressly refrain from deciding anything as to what the respective rights of the parties will be hereafter. It

(1) (1883) I.L.R., 7 Bom., 488. (2) (1908) I.L.R., 26 Mad., 214.

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is for the Official Assignee to decide after examining the nature of the debts whether he can exercise the insolvent's right, as managing member, of selling the assets for the benefit of the creditors; and if there are separate assets of the insolvent in which his co-parceners have no interest, to what extent they are to be used in paying the debts, in relief of the joint family property, and so on, and it may be open to the minor sons, if so advised, to object to any proposed sale on the ground that the debts that it is proposed to discharge were incurred for an immoral or illegal purpose; though it is right to point out that it has in this case already been argued that the business was of an illegal or immoral character by reason of its alleged speculative nature and this point has been decided adversely to the contention of the minor sons by the learned Judge who heard the case. In *Sanyasi Charan Mandal* v. *Asutosh Ghose*(1) where persons entitled to four-fifths of the undivided joint family property were adjudicated insolvents, but the member of the family entitled to the other one-fifth was not, the Court directed that the Receiver who was in the position of the Official Assignee should take possession of four-fifths share of the property. In this case the Official Assignee as representing the managing member is entitled to joint possession of the whole and the order in this case must be varied accordingly.

The case is one of general importance and there will be no order as to costs except that the Official Assignee will take his taxed costs of this appeal on the Original Side scale out of the estate.

V. Varadarajulu, Solicitor for appellant.

A. Kandaswami, Solicitor for respondent.

K.R.

(1) (1915) I.L.R., 42 Calc., 225.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., KC., Chief Justice, and Mr. Justice Wallace.

1922, August, 2.

R. A. ARUNACHELA AYYAR (DEFENDANT), APPELLANT,

v.

C. SUBBARAMIAH (PLAINTIFF), RESPONDENT.*

Ex parte decree—Setting aside—Grounds for setting aside—Sufficient cause—Duty of Court—Inevitable accident—Bona fide intent and attempt to get at Court in time, sufficient.

Where an application is made by a defendant to set aside an ex parte decree passed against him, the question to be considered by the Court is not whether by human possibility, being wise after the event, he could not have got in time to the place where the Court is held, but whether he honestly intended to be in Court and did his best, though in his own stupid way, to get there in time; and if the Court is satisfied that the man did try to get there and that he would have got there but for the intervention of an inevitable accident for which he was in no way responsible, it is the duty of the Court to set aside the decree, mulcting, in proper cases, the delinquent in costs. A litigant should not be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part or something which cannot be set right by his being ordered to pay costs.

APPEAL against the judgment and order of PHILLIPS, J., in the exercise of the ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 578 of 1920.

This appeal arises from an order on an application to set aside an ex parte decree passed against the appellant. The material facts appear from the following order of PHILLIPS, J., who dismissed the application :—

"This is an application to set aside the ex parte decree in this suit. The defendant obtained leave to defend the suit on condition of paying the amount claimed into Court. When the

* Original Side Appeal No. 116 of 1921.

case was finally taken up for hearing, the defendant was not present and his vakil reported that he had no instructions. The suit was in the list so early as the 19th September and was in the list the whole of that week, but was not taken up for hearing except in respect of an interlocutory application, when the defendant was not present, on the 21st September. From the 26th September for two weeks the Judge was not able to attend Court and the case was not taken up, although on several occasions during that period, that is, the whole of the first week and two days of the second week, the case appeared in the cause list. No intimation was given that the Court would not sit at all during that second week, and I may say it was a question of considerable doubt. Eventually the case was taken up on the 4th October and adjourned to the following day. It was not taken up on that day but was taken up on the 13th October. In the affidavit the defendant states that he was unable to appear on the 13th morning owing to the breach on the railway line, and that although he left Trichinopoly on the night of the 12th he did not reach Madras till 2-30 p.m., on 13th when the case had been disposed of. When he left Madras, which I must remark he did at his own risk at a time when the case was in the daily cause list, he informed his vakil that his address was in Pondicherry, and consequently when he was wanted to appear when the case was taken up a telegram was sent to Pondicherry, and had he received that telegram in proper time he could easily have come to Madras in time. He did not go to Pondicherry at all on the 4th October, but went to Trichinopoly without informing his vakil of the fact. Secondly, he says in his affidavit that he did not receive intimation until too late on the night of the 11th to catch the mail train. I may note that the telegram which he said he received has not been produced. It is therefore entirely his own fault that he did not receive intimation earlier. Even if he had started on the morning of the 12th from Trichinopoly, he could have reached Madras in time. It was contended on his behalf that owing to illness he was unable to appear, but the affidavit does not give this as the real ground, and the two medical certificates which have been produced do not show that he was unable to travel on the night of the 11th October. No doubt it may seem hard that when he has

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deposited the amount claimed into Court he should lose the benefit of putting forward his defence, but a mere case of hardship is not a sufficient ground for interference on his behalf. It is incumbent on him to show that he had sufficient cause for not attending Court. Taking into consideration all the circumstances, I am satisfied that he has been very negligent and it is his negligence alone that prevented his attendance in time. I cannot therefore hold that there was sufficient cause for his not attending Court, and must dismiss this application with costs."

The Advocate-General with *K. Jagannadha Ayyar* for appellant.

K. Bashyam Ayyangar and *V. V. Devanathan* for respondent.

JUDGMENT.

SCHWABE, C.J.

SCHWABE, C.J.—I have expressed myself on this subject in fairly strong language before and I propose to do so again.

When for some reason a man has not attended a case in Court and there is no sufficient explanation of his absence, the case, by reason of his absence, is allowed to go ex parte. If he comes to Court afterwards and asks that his case may be restored to file, the question to be considered by the Court is not whether by some human possibility, being wise after the event, he could not have got there in time or whether a man who studied his railway guide a little better, would not have got in another train or taken another route, but whether a man honestly intended to be in Court and did his best though in his own stupid way, to get there in time, and once the Court is satisfied, as was the fact in this case, that the man did try to get there and that he would have got there in time but for the intervention of an inevitable accident for which he was in no way responsible, it is the duty of the Court, in my judgment, to set aside the judgment, mulcting, in proper cases, the delinquent man in costs. In all those cases, this

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universal panacea for healing wounds, as it has been called in England, will properly be applied. It is not right in cases of this kind that the man should have his case disposed of without being heard. These Courts are here so that people who have cases can have those cases heard and determined, and it should never be the intention of the Court that a man should be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part or something which cannot be put right, as far as the other side is concerned, by making the man to blame pay for it.

The proper order in this case should have been that the case should be restored to the list and the judgment set aside on payment of all costs thrown away by the defendant, and that is the order that I propose to make. The costs of this appeal will be paid by the respondent. The costs of the application to set aside the judgment before PHILLIPS, J., will be costs in the cause.

WALLACE, J.

WALLACE, J.—I agree. Whether there was negligence precedent or not does not affect the case. Under ordinary conditions if the appellant had started from Trichinopoly by the evening train on the 12th, he would have been in time for the hearing of this case on the 13th, and the breach of the railway line is obviously a sufficient cause for his not appearing, and that is the question which the Court has to decide. I am quite clear that there is sufficient cause for his not appearing and I therefore agree with the judgment of the learned Chief Justice.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Devadoss.

1922, September, 14.

KURUKUNDI SAMA RAO (SIXTH DEFENDANT IN ORIGINAL SUIT No. 40 OF 1915, AND PLAINTIFFS IN ORIGINAL SUIT No. 40 OF 1918), APPELLANT,

v.

THE FIRM OF MARWADI VANNAJEE VAPUJI BY LAL CHAND AND OTHERS (PLAINTIFFS IN ORIGINAL SUIT No. 40 OF 1915 AND DEFENDANTS IN ORIGINAL SUIT No. 40 OF 1918), RESPONDENTS,

SWAMI RAO NAIK AND OTHERS (DEFENDANTS IN ORIGINAL SUIT No. 40 OF 1918). *

Hindu Law—Debt—Personal debt of father—Liability of undivided sons—Pious obligation—Debt, not shown to be illegal or immoral—Liability of sons' shares in ancestral property—Sons' liability in father's life-time—Suit against father and his undivided sons—Form of decree—Personal decree against father—Decree against sons' shares in ancestral property, to the extent decree remains unsatisfied by the father—Recent decisons of Privy Council as to antecedent debt, effect of.

In a suit by a creditor against a Hindu father and his undivided sons to recover a personal debt contracted by the father not for an illegal or immoral purpose, the creditor is entitled to a decree against the father personally and in the event of the father's property proving insufficient against the shares of the undivided sons in the ancestral property for the balance.

The recent decisions of the Privy Council in *Sahu Ram-Chandra* v. *Bhup Singh*, (1917) I.L.R., 39 All., 437, *Jogi Das* v *Ganga Ram*, (1917) 21 C.W.N., 957, and *Chet Ram* v. *Ram Singh*, (1922) 43 M.L.J., 98, dealing with "antecedent debts" and "pious obligations" do not affect the rights of the creditor to proceed against the undivided sons' shares in ancestral property in their father's life-time.

Peda Venkanna v. *Sreenivasa Deekshatulu*, (1918) I.L.R., 41 Mad., 136; *Arumugham Chetty* v. *Muthu Koundan*, (1919)

* Appeals Nos. 176 and 177 of 1920.

I.L.R., 42 Mad., 711 (F.B.); *Kandasami Goundan* v. *Kuppu Mooppan*, (1920) I.L.R., 43 Mad., 421; *Hanmant Kashinath* v. *Ganesh Annaji*, (1919) I.L.R., 43 Bom., 612 and *Madhusudan Das Mohant* v. *Iswari Dayi Debi*, (1921) I.L.R., 48 Calc., 341, relied on.

APPEALS against the judgment and decree of H. R. BARDSWELL, District Judge of Bellary in Original Suit No. 40 of 1915 and Original Suit No. 40 of 1918.

These two appeals arise out of two suits instituted in the District Court of Bellary. In the prior suit (Original Suit No. 40 of 1915) the plaintiff sued on a mortgage-bond, dated 9th October 1912, executed in his favour by the first defendant, and impleaded the sons of the mortgagor as defendants 2 to 5; the sixth defendant was a transferee of two prior mortgages under two bonds, dated 10th August 1912, executed by the same mortgagor and the seventh defendant was a third mortgagee. This suit was originally dismissed by the District Judge, but on appeal to the High Court in Appeal Suit No. 102 of 1918, the case was remanded to the District Court for disposal after framing proper issues regarding the rights of the sixth defendant, and the seventh defendant, who was the subsequent (third) mortgagee under a bond, dated 21st July 1914. During the pendency of the appeal in the High Court, the transferee from the prior mortgagees instituted a suit for sale on his mortgages and impleaded the two subsequent mortgagees as the sixth and seventh defendants, respectively, as well as the mortgagor and his sons as defendants 1 to 5. The latter suit and the prior suit after remand by the High Court, were tried and disposed of together by the District Judge. The validity of the prior mortgages was disputed on the ground that they were not duly executed inasmuch as the mortgagor did not sign in the presence of the attesting witnesses as

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required by law. The District Judge upheld this contention, and decreed the suit of the second mortgagee (Original Suit No. 40 of 1915) ignoring the rights of the sixth defendant who was the transferee from the prior mortgagees and plaintiff in Original Suit No. 40 of 1918, and dismissed the prior mortgagee's suit (Original Suit No. 40 of 1918) and did not pass even a personal decree in favour of the plaintiff (first mortgagee) even though he found that the bonds were fully supported by consideration and the personal remedy had not become barred on the date of the institution of the suit. The transferee of the prior mortgages filed the present appeals against the decrees of the District Court in each of the suits respectively. The respondents (the puisne mortgagees) contended that the appellants' mortgages were invalid for want of due execution, while the mortgagor's sons contended that no decree could be passed against their shares in ancestral property in favour of the appellant as there was no pious obligation to pay the father's debt in his life-time and relied on the recent decisions of the Privy Council as to antecedent debt.

P. Narayanamurti and *D. Srinivasa Rao* for appellant.

L. A. Govindaraghava Ayyar, *W. Kothandaramayya* and *V. S. Narasimhachar* for respondent.

JUDGMENT.

SPENCER, J.

SPENCER, J.—These are two suits upon mortgage documents executed by first defendant, whose sons are defendants 2 to 5. The appellant is a transferee from the first mortgagee, the plaintiff in Original Suit No. 40 of 1918, and the sixth defendant in Original Suit No. 40 of 1915, which is the second mortgagee's suit. The third mortgagee is the seventh defendant in both suits.

The District Judge dismissed Original Suit No. 40 of 1918, holding that the mortgage-deeds were not properly attested and therefore invalid. I think he was

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right in preferring the evidence of the two witnesses whose names appear on the documents as attestors when they say that the executant did not sign in their presence to the evidence of the executant and the sister and the daughter of one mortgagee, the daughter being herself a mortgagee under one of the deeds, as the latter are likely to be interested in keeping the property in the hands of relations rather than allowing it to pass into the possession of the second and third mortgagees who are strangers.

No doubt the fifth plaintiff's witness who is a pleader practising at Bellary is related to the executant and Parikshita Rao, the other signatory who is now dead, was a friend of the executant and lived in his village, but they seem nevertheless to have spoken the truth on a matter which was necessarily within their knowledge, and the appearance of the document suggests that their signatures were affixed at a different time, as indeed they say they were.

Though the suit documents are not valid as mortgages they can be enforced as bonds against the first defendant personally and the family property in the hands of defendants 1 to 5.

It is argued by the vakil for respondents 2 to 5 that their shares should not be made liable during the life-time of their father, the first respondent, for the reason that sons are not bound by any pious obligation to pay off their father's debts so long as he is alive. He relies on the Privy Council decisions in *Sahu Ram Chandra* v. *Bhup Singh*(1), and *Chet Ram* v. *Ram Singh*(2), as establishing this principle.

I do not think it is necessary for the plaintiff to invoke the doctrine of "pious obligation" here. It has always been held in this Presidency since the Full

(1) (1917) I.L.R., 39 All., 437 (P.C.). (2) (1922) 43 M.L.J., 98 (P.C.).

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Bench decision of *Ponnappa Pillai* v. *Pappuvayyangar*(1), in which Girdharee Lall's case was considered, that so long as a Hindu family remains undivided a creditor can proceed against the interest of the sons in the ancestral property for the debts of their father which have not been contracted for illegal or immoral purposes. As has been pointed out by the learned Chief Justice in *Peda Venkanna* v. *Sreenivasa Deekshatulu*(2), the prevailing judgment of Sir CHARLES TURNER, C.J., in this Full Bench has received the approval of the Privy Council in *Muttayan* v. *Zamindar of Sivagiri*(3). This principle was again confirmed by another Full Bench of this Court in *Ramasami Nadan* v. *Ulaganatha Goundan*(4) and two benches of this Court have taken the same view in *Subramania Aiyar* v. *Shaw Wallace & Co., Madras*(5), and *Kandasami Goundan* v. *Kuppu Mooppan*(6), after considering *Sahu Ram Chandra* v. *Bhup Singh*(7), and deciding that the Privy Council did not intend to alter the existing law in this respect. The Bombay High Court has come to the same conclusion in *Hanmant Kashinath* v. *Ganesh Annaji*(8). In Mayne's Hindu Law in paragraph 307 the passage occurs :—

"This limitation of the son's liability (the learned author is referring to a son's want of obligation to liquidate his father's debts during the father's life-time) has however ceased to be of any importance in view of the recent decisions which enable a creditor during the life of the father to enforce his claims by decree and execution against the entire family property :"

and reference is made in the foot-note to *Khalilul Rahman* v. *Gobind Pershad*(9), *Ramasami Nadan* v. *Ulaganatha Goundan*(4).

(1) (1882) I.L.R., 4 Mad., 1 (F.B.). (2) (1918) I.L.R., 41 Mad., 136 at 140.
(3) (1883) I.L.R., 6 Mad., 1 (F.B.). (4) (1899) I.L.R., 22 Mad., 42 (F.B.).
(5) (1920) 38 M.L.J., 402. (6) (1920) I.L.R., 43 Mad., 421 at 422.
(7) (1917) I.L.R., 39 A.M., 437 (P.C.). (8) (1919) I.L.R., 43 Bom., 612.
(9) (1893) I.L.R., 20 Calc., 328 at 338.

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The principle is explained in *Hanmant Kashinath* v. *Ganesh Annaji*(1), as due to a decree-holder's right being co-extensive with the power of a debtor-father to alienate ancestral immoveable property for the satisfaction of his antecedent debts, not being tainted with illegality or immorality. In the present case it is clear from Exhibit A that there was an antecedent debt of Rs. 2,000 incurred by the father for cultivation expenses.

If the sons effect a bona fide partition at a time anterior to the date when the debt is contracted their responsibility is different and the father's creditor cannot then proceed against their divided shares. See *Krishnasami Konan* v. *Ramasami Ayyar*(2), *Peda Venkanna* v. *Sreenivasa Deekshatulu*(3), and *Kani Venkatareddi* v. *Chelluri Sathyanarayana Moorthi*(4), but the present condition of the family of these respondents is joint. They are therefore all liable, the father personally and the sons in respect of the ancestral properties in their possession and the suit is in time.

In modification of the lower Court's decree in Original Suit No. 40 of 1918 a decree will be given accordingly with interest at 6 per cent from date of plaint to date of realization against the first respondent personally and against his share of the family properties and against the shares of respondents 2 to 5 to the extent that the decree remains unsatisfied by the father, with costs throughout.

In other respects Appeal No. 177 of 1920 is dismissed. Appellant to pay the costs of sixth and seventh respondents in Appeal Suit No. 177 (one set). Appeal No. 176 is dismissed. No separate costs.

(1) (1919) I.L.R., 43 Bom., 612. (2) (1899) I.L.R., 22 Mad., 519.
(3) (1918) I.L.R., 41 Mad., 136. (4) (1921) 40 M.L.J., 473.

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DEVADOSS, J.—Original Suit No. 40 of 1915 was brought by the plaintiff on a mortgage-deed executed in his favour by the first defendant, making the sixth defendant, a prior mortgagee, and the seventh defendant, a subsequent mortgagee, parties to the action. The defendants 2 to 5 are the sons of the first defendant. The District Judge of Bellary dismissed the suit and the plaintiff preferred Appeal Suit No. 102 of 1918. The High Court allowed the appeal and set aside the decree of the District Judge, and remanded the suit to the lower Court with directions to pass a proper decree after raising necessary issues on the claims of the sixth and seventh defendants. The District Judge of Bellary has allowed the claim of the seventh defendant and dismissed that of the sixth defendant on the ground that the mortgage-deeds relied on by him were not proved to have been properly executed as required by law.

The sixth defendant has appealed against that decree in Appeal Suit No. 176 of 1920. *During the pendency* of the said Appeal Suit No. 102 of 1918, the sixth defendant brought Original Suit No. 40 of 1918 *impleading* his mortgagor as first defendant and his undivided sons, as defendants 2 to 5, and the plaintiff in Original Suit No. 40 of 1915 as sixth defendant and the third mortgagee as seventh defendant. The suit was dismissed on the ground that the execution of the mortgage-deeds was not proved according to law and the plaintiff has preferred Appeal Suit No. 177 of 1920. In both the appeals the same person Sama Rao is the appellant, and the questions involved are the same.

The appellants' case is that of the two mortgage-deeds relied on by him, one was executed to his adoptive father Venkoba Rao on 10th August 1912 by the first defendant and the other was executed in favour of Gundamma, the daughter of the said Venkoba Rao, on the same date

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by the first defendant and that he is the transferee of both mortgages. He contends that the execution of the documents was witnessed by two persons, and that the District Judge erred in disbelieving the evidence of the two witnesses who speak to the execution. Of the two attesting witnesses one is Mr. Gunda Rao, a pleader practising in the Bellary district. His evidence is that the documents after execution by the first defendant were taken to him and he attested them and that he did not see executant sign the documents. It is urged that the pleader's evidence that he did not see the actual execution of the documents cannot be relied upon inasmuch as two witnesses Gundamma and Tolasamma speak to the execution of the document in the presence of the pleader and the other attesting witness. It is quite open to this Court to find that the execution was witnessed by the attesting witnesses even though they may not speak to the fact, if there is other and satisfactory evidence on record to show that the attesting witnesses did witness the execution—vide *Brahmadat Tervari* v. *Chandan Bibi*(1). But there is no reason why the pleader who appears to have no interest hostile to the appellant should swear falsely that he did not see the actual execution but put his signature to the documents in the assurance that they had been signed by the first defendant. It must be remembered that before the date of the Privy Council decision which laid down that the execution of mortgage-deeds in the absence of attesting witnesses would not be fulfilling the requirements of the law, it was a common practice to take documents round after execution in order to get the attestation of a number of witnesses, and that this practice must have been resorted to in this case as well is clear from the

(1) (1914) 20 C.W.N., 192.

way in which both Gunda Rao and the other attesting witness Parikshita Rao were examined at the original trial in Original Suit No. 40 of 1915. They were examined in chief by the appellants' pleader who evidently asked them whether they attested the documents and when they replied that they were not present when the executant signed them he contented himself by eliciting that the execution was admitted to them by the mortgagor. It is significant that the examination in chief stopped with the answer: "I asked if he had signed them and he said he had." Much reliance cannot be placed upon the evidence of Tolasamma, plaintiff's witness 6, who is a sister of Venkoba, the mortgagee, and it is not likely that she would have carefully noticed whether the mortgagor signed the documents after they were engrossed even though she might have been aware that the documents were being written in the hall of the house of her brother Venkoba Rao. The next witness, plaintiff's witness 7, is Gundamma, who is said to be 23 years of age in 1918, when she was examined as witness. She must have been a young girl of about 16 years of age on the date of the execution of the documents. She was then said to be a widow, and it is most unlikely that a young Brahman widow would have been present at the place where the documents were being written and where a number of men were present. I do not think that the evidence of these two women, can, in any way, outweigh the evidence of Gunda Rao, a pleader, and Parikshita Rao, a stranger. It has been urged that Parikshita Rao was a man belonging to the same village as the first defendant and therefore interested in not speaking the truth. He is dead, and his evidence is marked Exhibit III and there is no reason why he should have said something which was not true. No doubt the first defendant swears that he signed the

two mortgage-deeds (Exhibits A and B) in Original Suit No. 40 of 1918 in the presence of the two attesting witnesses. It is urged on behalf of the appellant that it is most unlikely that the first defendant would support the mortgage against the interests of his sons, defendants 2 to 5, who hotly contest the validity of the appellants' mortgages. It is suggested by Mr. Govindaraghava Ayyar, that the first defendant was anxious that the appellant who is his relation should get the benefit of the mortgages as he feared that there would be nothing left after satisfying the mortgages in favour of the plaintiff and the seventh defendant in Original Suit No. 40 of 1915. The appellant's mortgages are prior in date to those of the other two mortgages. In these circumstances it cannot be said that the learned District Judge has not correctly appreciated the evidence in the case. The mortgage documents not having been proved to have been validly executed the appeals fail and must be dismissed.

Mr. Narayanamurti who appears for the appellant asks for a personal decree against the first defendant and against the shares of the defendants 2 to 5 in the family property. The personal remedy against the first defendant is not barred.

On behalf of the sons it has been urged that such a decree could not be passed. The vakil for the sons puts forward these propositions: (1) The father in a joint Hindu family has no power to alienate the son's share unless there is family necessity. (2) The father's power to alienate is confined only to cases where there is an antecedent debt to be discharged. (3) A creditor cannot proceed against the shares of the sons in execution of a decree against the father. (4) In no case can the sons' shares be made liable during the life-time of the father if the debt was neither antecedent nor for necessity. It

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has been very vehemently urged that the three decisions of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh*(1), *Jogi Das* v. *Gangu Ram*(2) and *Chet Ram* v. *Ram Singh*(3) support the contention, that as long as the father is alive, no decree can be passed against the son's share for a debt incurred by the father, and no execution can be levied against the son's share for a decree passed against the father. As the law stands at present a creditor can proceed against the shares of the sons in the family property in execution of a decree obtained aginst the father without proving either family necessity or that the debt was incurred to discharge an antecedent debt. We have to see whether the three Privy Council decisions relied on by the vakil have really altered the law on this point. In *Sahu Ram Chandra* v. *Bhup Singh*(1) the facts were one Bhup Singh, the first defendant, father of defendants 2, 3 and 4 and the grandfather of defendants 5 and 6, on the 21st February 1882, mortgaged the family property to Sahu Rama Chandra. The suit which gave rise to the appeal to the Privy Council was brought by Ram Chandra in July 1910 making Bhup Singh, his sons and grandsons, defendants. The question was whether Bhup Singh was justified in executing the mortgage-deeds so as to bind the sons. Their Lordships held that a loan made to the father on the occasion of a grant by him of mortgage on the family estate was not an antecedent debt. In the course of their judgment they quote the following passage from the judgment in *Saraj Bunsi Koer's Case*(4) :

"That where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money

(1) (1917) I L.R., 39 All., 437(P.C.). (2) (1917) 21 C. W.N., 957 (P.C.).
(3) (1922) 43 M.L.J., 98 (P.C.). (4) (1880) I.L.R., 5 Calc., 148 (P.C.).

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to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts cannot recover that property unless they show that the debts were contracted for immoral purposes, and that purchasers had notice that they were so contracted. Secondly, that the purchasers at an execution sale, being strangers to the suit if they have not notice that the debts were so contracted are not bound to make inquiry beyond what appears on the face of the proceedings"

and observe :

"Their Lordships desire to record their adhesion to the following comment made on this pronouncement by Sir JOHN STANLEY in the case of *Chandradeo Singh* v. *Mata Prasad*(1)."

The learned Chief Justice stated :

"The first of these propositions, it will be observed, deals with cases where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt. It deals with cases in which ancestral property has passed out of the family, and with no other cases, and the words 'antecedent debt' seem to have been used advisedly. Likewise the second proposition deals with the case of a purchase at an execution sale. Neither proposition touches a case in which a mortgagee of a Hindu father seeks to enforce his mortgage as against the sons."

It is quite clear from this passage that their Lordships did not intend to alter the law as it stood as regards the right of an execution creditor to proceed against the son's share in execution of a money decree obtained against the father. At page 444, their Lordships further observe :

"Although the correct and general principle be that if the debt was not for the benefit of an estate then the manager should have no power either of mortgage or sale of that estate in order to meet such a debt, yet an exception has been made

(1) (1909) I.L.R., 31 All., 176 at 196 (F.B.).

to cover the case of mortgage or sale by the father in consideration of an antecedent debt. This being an exception from a general and sound principle, their Lordships are of opinion that the exception should not be extended and should be very carefully guarded."

In order to justify an alienation by the father there should be an antecedent debt. But the contention of the sons is that, so long as the father is alive, the share of the sons cannot be proceeded against in execution of a decree obtained against the father and that the Court cannot pass a decree against the sons' shares also in a suit brought against the father and sons on a debt contracted by the father, and the learned vakil relies very strongly upon the following passage of their Lordships in the case cited above :

" While the father, however, remains in life, the attempt to affect the sons' and grandsons' share in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, that attempt must fail ; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged. In short, responsibility to meet the father's debts is one thing and the validity of a mortgage over the joint estate is quite another thing. Accordingly, the case founded merely upon pious obligation and so strenuously argued before the Board, fails in the present instance by reason of the fact that Bhup Singh who contracted the debt, is still alive and that there is a concurrent finding by both of the Courts below to the effect that the plaintiffs have failed to prove that the debt of Rs. 200 for which the mortgage was granted, was incurred for any legal necessity or benefit to the estate."

This case was followed in *Jogi Das* v. *Ganga Ram*(1). Lord HALDANE delivering the judgment of their Lordships

(1) (1917) 21 C.W.N., 657.

of the Privy Council referred to the case of *Sahu Ram Chandra* v. *Bhup Singh*(1) in the following terms :

" In that case it was laid down in effect that the joint property could not be alienated as against co-sharers by way of mortgage, or otherwise, except for necessity or for payment of actual antecedent debt, quite distinct from the debt incurred in the mortgage itself, and that in execution the transaction could not stand, and it was added that the mere circumstance of a pious obligation does not validate the mortgage."

In the recent case of *Chet Ram* v. *Ram Singh*(2), Lord SHAW, in delivering the judgment of their Lordships quotes with approval the third passage in Sahu Ram's case extracted above. There was no contention in that case that the sons were not liable during their father's life-time for debts contracted by him. The only question in controversy, was whether an alienation by a father could be supported on the ground that there was an antecedent debt when the debt was not really antecedent but only antecedent in point of time. Their Lordships held that in order to constitute an antecedent debt to justify an alienation the debt should not be merely antecedent in point of time but that it should be antecedent in fact.

A careful examination of these cases shows that there is no warrant for saying that their Lordships intended to alter the law as regards the liability of the son's share for the father's debt. The law has been settled for over a generation as regards this point. In *Minakshi Nayudu* v. *Immudi Kanaka Ramayya Goundan*(3) it was laid down by the Privy Council that a father's debt could be impeached only on the ground that the debt was illegal or immoral, and the sons could not set aside a sale by the Court in execution of a

(1) (1917) I.L.R., 39 All., 437 (P.C.). (2) (1922) 43 M.L.J., 98 (P.C.).
(3) (1889) I.L.R., 12 Mad., 142 (P.C.).

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decree obtained against the father. In *Khalilul Rahman* v. *Gobind Pershad*(1), the learned Judges of the Calcutta High Court stated the law thus :

" In this case the mortgage-creditor sues first a mortgagor and his sons, and second, the son of a deceased mortgagor, and seeks his remedy against the ancestral property of all members of a joint family. It is certain that he is entitled to decree against the mortgagor in respect of his own share. It is also clear that the mortgage, so far as it was contracted to pay a debt not illegal or immoral, existing when the mortgage debt was contracted, is good against the shares of the sons of each mortgagor. No authority need be cited for this. It is also now established that a decree for the personal debt of the father not illegal or immoral, may be enforced by sale in execution in his life-time of the entire joint family estate. *Minakshi Nayudu* v. *Immudi Kanaka Ramayya Koundan*(2). This is one of the advances lately made on the older law which made the son's share liable in respect of the pious duty to pay the father's debts after his natural or civil death."

They quote the following passage from Mayne's Hindu Law, paragraph 283, page 309 of the 4th Edition :

" But I imagine that no suit could be brought directly against sons, based solely on their liability to pay the debt of their father, until he was either actually or civilly dead, so that the estate had legally vested in the sons "

and remark

" Recent decisions in this Court are not quite in accordance with this opinion."

So it may be taken to be settled law that the son's share could be proceeded against in execution of a decree obtained against the father. It follows from this that a Court could pass a decree against the son's share of the family property.

" It is now settled that the sons may be bound by proper proceedings taken by the creditor against the father to enforce mere money debt due to him although the sons are not made

(1) (1893) I.L.R., 20 Calc., 828 at 837. (2) (1889) I.L.R., 12 Mad., 142 (P.C.).

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parties to the suit." Mayne's Hindu Law, page 413, 8th Edition.

The case of Sahu Ram has been considered in three recent cases by the Madras High Court. In *Peda Venkanna* v. *Sreenivasa Deekshatulu*(1) the learned Chief Justice and KUMARASWAMI SASTRI, J., distinctly overruled the contention that the sons are not bound to pay the father's debt as long as he is alive. The learned Chief Justice (Sir JOHN WALLIS) observes at page 141 :

" As it appears to me that the creditor's right to bring the son's shares to sale for an antecedent debt and the long line of decisions which support it were not considered by their Lordships in the recent case, I think it should not be treated as overruling them, and that, if we are to depart from what has been the settled law of this and other High Courts for so many years, it should be in deference to a clear expression of their Lordships' opinion with reference to this particular question and not on any inference from the reasons given by their Lordships in settling a conflict in the Indian Courts on another point."

KUMARASWAMI SASTRI, J., observes at page 142 :

" The second appeal should be allowed not on the broad question raised by Mr. Parthasarathi Ayyangar as to the non-liability of a son to pay his father's debts during the father's life-time, a conclusion which according to appellant's counsel is the logical result of the recent decision of their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh*(2) but on the narrower one that a son is not after partition liable to be proceeded against in respect of a simple personal debt incurred by the father before a partition whatever his rights may have been if they had continued joint."

Sahu Ram's case was considered by the Full Bench in the case reported in *Arumugham Chetty* v. *Muthu Koundan*(3) and by a division Bench in the case reported in *Kandasami Goundan* v. *Kuppu Moopan*(4). In the latter case the learned Judges observe at page 423 :

(1) (1918) I.L.R., 41 Mad., 136. (2) (1917) I.L.R., 39 All., 437 (P.C.).
(3) (1919) I.L.R., 42 Mad., 711 (F.B.). (4) (1920) I.L.R., 43 Mad., 421.

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"We are bound by these views and must hold that the observation in Sahu Ram's case does not alter the law on the point we are considering and we must follow the rule in the earlier cases. In fact such a point was not raised at all before the Privy Council; the point that their Lordships were considering was whether the mortgage was as such binding on the sons and whether a mortgage decree could be passed against them."

Sahu Ram's case was considered by the Bombay High Court in *Hanmant Kashinath* v. *Ganesh Annaji*(1). After discussing it and the case in *Peda Venkanna* v. *Sreenivasa Deekshatulu*(2) the learned Judges observe:

"The judgment thus so far from throwing doubt on the well established remedies of the creditor in execution impliedly recognizes them."

In that case a money decree was obtained against a Hindu father for his failure to account as a trustee and in execution the ancestral property was attached. The sons having applied to raise the attachment on the ground that the money debt in the decree against their father was tainted with illegality and immorality their shares could not be made liable in execution during the life-time of their father. It was held that the decretal debt of the father for breach of Civil duty as trustee was not Avyavaharika and held further that the shares of the sons in the ancestral property could be attached and sold during the life-time of the father for the satisfaction of his personal debt not tainted with illegality or immorality. In *Madhusudan Das Mohant* v. *Iswari Dayi Debi*(3), RICHARDSON, J., observes at page 349:

"As it appears to me, the language of their Lordships in Sahu Ram Chandra's case shows that they did not intend to alter the law applicable to such a case as the present. Their Lordships' purpose was to dissipate the uncertainties which had gathered round the term "antecedent debt" in connexion with

(1) (1919) I.L.R., 43 Bom., 612. (2) (1918) I.L.R., 41 Mad., 186.
(3) (1921) I.L.R., 48 Calc., 341.

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voluntary alienations by the father of immoveable family property. The case before their Lordships was that of a mortgage."

Both the learned Judges held that the judgment in that case did not alter the law and that a decree passed against the father personally could be executed against the family property including the shares of the sons. So it is quite clear from all these cases that a creditor who obtains a personal decree against the father could execute the decree against the shares of the sons and that the Court could pass a decree for a personal debt of the father against the sons' shares as well. In *Kandasami Goundan* v. *Kuppu Mooppan*(1) OLDFIELD and KRISHNAN, JJ., indicate how this is to be done. At page 424 they observe:

"In the present case though the plaintiff prayed expressly for a decree under Order XXXIV, *rule 6*, against the ancestral property the sons did not plead or prove that the debt was illegal or immoral. They cannot be given a fresh opportunity for the purpose. The plaintiff is *therefore entitled to a decree* as he asks for under rule 6 against the first defendant personally and against the ancestral property of himself and his sons."

It is urged by the appellant that in the case of one document there was an antecedent debt, and in the case of the other the debt was incurred to pay off some other debts. Exhibit A does mention that debt of Rs. 2,000 has been previously incurred. But Exhibit B does not clearly make out that there was a previous debt. It is unnecessary to decide the question whether there were antecedent debts or not, as no mortgage decree is to be given.

The appellant will have a personal decree against first defendant, and for any unsatisfied portion thereof after selling the first defendant's share against the shares

(1) (1920) I.L.R., 43 Mad., 421.

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of the defendants 2 to 5. With this modification of the lower Court's decree the appeals are dismissed.

In the result appeal No. 176 is dismissed without costs, as the appellant has failed on a technical point. The plaintiff in Original Suit No. 40 of 1915 made the appellant a party to the suit. The subsequent mortgagees, that is, the plaintiff and the seventh defendant in Original Suit No. 40 of 1915 did not contest the validity of the mortgages. In the circumstances the respondents 6 and 7 are not entitled to their costs in appeal.

Appeal Suit No. 177 of 1920 is allowed only as regards the personal remedy against first defendant and the liability of the sons' shares in the family property. First defendant will pay the suit amount with interest at 6 per cent from date of plaint to date of realization together with costs throughout, and defendants 2 to 5 will pay out of the family assets the portion of the amount of the decree not satisfied out of the first defendant's share. Appellant will pay the costs of this appeal one set to respondents 6 and 7.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Venkatasubba Rao.

MOUNA GURUSWAMI NAICKER (PETITIONER), APPELLANT,

v.

SHEIK MAHOMMADHU ROWTHER AND ANOTHER (COUNTER-PETITIONERS), RESPONDENTS.*

1922, September, 14.

Civil Procedure Code (V of 1908), sec. 150 and Or. 39, r. 2, cl. 3—Part of territorial jurisdiction of one Court and business therein transferred to a new Court—Breach of temporary injunction—Jurisdiction of new Court to punish.

A newly created Court was given by a District Judge jurisdiction to try all cases arising within a portion of the area over which another Court had till then jurisdiction.

Held that the new Court had jurisdiction under section 150, Civil Procedure Code, to punish the breach of a temporary injunction granted by the other Court.

The word "transfer" in section 150 is not confined to cases of transfer of business of one Court to another, but includes also cases where a new Court is given part of the territorial jurisdiction of an old Court and is authorized to try all the business arising within it. *Ranganatha Rao* v. *Hanumantha Rao*, (1923) I.L.R., 46 Mad. 1, followed. *Munshi Md. Kazemal* v. *Munshi Niamuddin Ahmed*, (1921) 26 C.W.N., 216, not followed.

APPEAL against the order of V. S. KRISHNA AYYAR, Subordinate Judge of Dindigul, in Interlocutory Application No. 62 of 1921 and Miscellaneous Petition No. 112 of 1921 (Original Suit No. 16 of 1920).

B. Sitarama Rao (with *S. R. Muttuswami Ayyar*) for appellant.—Territorial jurisdiction over the area in suit was transferred from the Madura Sub-Court to the Dindigul Sub-Court with effect from the 28th June 1920 All suits in that area were transferred by order of the

* Civil Miscellaneous Appeal No. 11 of 1922.

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District Judge and the present suit is one of them. Though Order 39, rule 2, clause 3, refers to the Court which granted the injunction, yet by virtue of section 150, Civil Procedure Code, the Dindigul Court has jurisdiction to deal with this application. See *Suppi* v. *Kunhi Koya*(1). In *Ranganatha Rao* v. *Hanumantha Rao*(2), the new Court was held to have jurisdiction to deal with applications to set aside ex-parte decree passed by the other Court though Order 9 of rule 13 contains similar language. Section 150 was applied. An original application to punish for contempt is competent in the new Court; see *Mathura Dass* v. *Venkat Rao*(3).

L. A. Govindaraghava Ayyar for respondent.—Section 150 begins with "Save as otherwise provided." Order 39, rule 2, clause 3, provides otherwise by referring to the Court which granted the injunction. Section 150 is inapplicable. This language was not present in the old Code. The words were put in on purpose. See *Sheikh Jaharuddi* v. *Hari Charan Podder*(4).

The Madura Sub-Court which granted the injunction is alone competent to deal with the matter; *Seeni Nadan* v. *Muthusamy Pillai*(5). Further this suit was transferred by order of the District Judge. It is an assignment of business by the District Judge. There is no "transfer of the business" of the Madura Sub-Court. See *Munshi Md. Kazemal* v. *Munshi Niamudhin Ahmed*(6).

JUDGMENT.—This is an appeal by the plaintiff under Order 43, rule 1(*r*) of the Civil Procedure Code, against the order passed by the Subordinate Judge of Dindigul on an application made to him under Order 39, rule 2 (3) to have the defendant punished for disobedience of an injunction which had been issued to him in

(1) (1916) I.L.R., 39 Mad., 907 at 913
(2) (1923) I.L.R., 46 Mad., 1.
(3) (1911) 21 M.L.J., 829.
(4) (1913) 18 C.W.N., 470.
(5) (1919) I.L.R., 42 Mad., 821 (F.B.).
(6) (1921) 26 C.W.N., 216.

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the suit. The Subordinate Judge has declined jurisdiction on the ground that the proper Court to punish for disobedience was the Court which passed the order of injunction and that as his Court was not that Court he held he was not entitled to act under Order 39, rule 2(3).

The way in which this case came to the Dindigul Court was by an order of the District Judge transferring to that Court all the business within the areas of certain Munsifs over which the Dindigul Court was given jurisdiction for the first time.

It is contended before us that the Subordinate Judge in refusing jurisdiction misconstrued the provisions of section 150, Civil Procedure Code, and that as the business of the Court which granted the injunction, namely, the Madura Sub-Court, was transferred so far as the local jurisdiction over certain munsifs was concerned to the Dindigul Court, that Court must be held to have the same powers and authorized to perform the same duties as the Madura Sub-Court. It is perfectly clear to us that this is a case to which section 150 does apply and that there is nothing in Order 39, rule 2 (3) which prevented the Dindigul Court from acting under that rule and dealing with the application that was made to that Court by the plaintiff. The argument addressed to us by the learned vakil for the respondent against that view is first of all that because Order 39, rule 2 (3) speaks of the Court granting the injunction passing the order no other Court could be held to have jurisdiction to pass the Order and secondly, that the application of section 150 is excluded by the words "save as otherwise provided for" in that section. A very similar argument we had to consider with reference to Order 9, rule 13 where there had been a territorial re-distribution of jurisdiction between two Munsifs' Courts where we held that the words "save as otherwise

provided for" did not prevent section 150 from applying and enabling the Court to which the business had been transferred from setting aside an ex-parte decree. See *Ranganatha Rao* v. *Hanumantha Rao*(1). That was a case under Order 9, rule 13, and there were some special reasons there more than there is in this case for the view we took; but we think that it is nevertheless an authority for saying that the words "save as otherwise provided for" do not exclude the application of section 150 merely because in the rule that gives the Court power to take action, there are the words "the Court granting the injunction." As was pointed out by SRINIVASA AYYANGAR, J., in *Suppi* v. *Kunhi Koya*(2) the words "that the Court which granted the injunction" were introduced into the new Code not with any object of changing the law which existed before, but because the wording of the corresponding section in the old Code was not very happy as it implied that the injunction was "to be enforced by" imprisonment of the party whereas the imprisonment was really a punishment for disobedience. These words "may be enforced" as pointed out by the learned Judge had to be changed in the corresponding new rule and it resulted in redrafting of that rule itself. Naturally when the active form of expression was used by the legislature it was necessary to describe the Court which was to be given power to punish for disobedience, and of course that was primarily the Court granting the injunction; but it is clear to our minds that this does not prevent the Court to which the business of that Court was transferred from exercising the power under section 150. Rule 2 (3) does not say that it is only the Court granting the injunction that should make the order under it, so that there is nothing in that rule which excludes the application of section 150 by bringing it within the words

(1) (1923) I.L.R., 46 Mad., 1. (2) (1916) I.L.R., 39 Mad., 997 at 913.

"save as otherwise provided for." If the suggsetion that is made by the learned vakil for the respondent is taken, the result will be that in case the Court which passed the injunction was abolished altogether for some reason, there will be no Court to punish for disobedience of the injunction even if the whole business of the abolished Court had been transferred to some other Court and was carried on by that other Court. We are not prepared to adopt such a construction as this, unless the language is perfectly clear in favour of it. Here so far as we can see there is nothing in Order 39, rule 2 (3) and in section 150 to prevent the Court to which the business of the first Court is transferred from exercising its powers under rule 2 (3).

It is also argued for the respondent, to exclude the application of section 150 in this case, that the transfer of the business in the area over which the Dindigul Court had been given jurisdiction by the order of the District Judge was not one which fell under section 150, as there was only an assignment of the business of the one Court to another, and such an assignment, it is said, is not the same as the transfer spoken of in section 150. The learned vakil for the respondent has cited the case in *Munshi Md. Kazemal* v. *Munshi Niamuddin Ahmed*(1), to support his argument but with all respect we are unable to follow that ruling, for we do not agree with the learned Judges in that case that the word "transfer" is inapplicable to a case where the District Judge fixes the jurisdiction of the Court under the Civil Courts Act and transfers the whole of the business within the area to it. The learned Judges seem to think that in such a case there is only an assignment of business and not a transfer of the business. So far as we can see there seems to be no reason why such a

(1) (1921) 26 C.W.N., 216.

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distinction should be made. Holding, as we do, that the present case falls under section 150 we think the Subordinate Judge acted wrongly in declining jurisdiction in the matter of this application.

We set aside his order and remand the application to him for fresh disposal according to law. Costs to abide and follow the result.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Devadoss.

1922, October 26.

GULAM MOHIDEEN QUARISHI SAHIB (RESPONDENT), PETITIONER,

v.

AHAMADULLA BEGUM SAHIBA (2ND PETITIONER), RESPONDENT.*

Criminal Procedure Code (V of 1898), sec. 195—Death of applicant for sanction for perjury—No jurisdiction to allow legal representative to continue the application.

Criminal proceedings instituted by a private complainant abate on his death. Hence a petition for sanction for perjury filed by a party cannot on his death be allowed to be continued by his legal representative, though the latter may himself present a new application for the same purpose.

PETITION praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue an order revoking the sanction accorded by C.G. AUSTIN, Acting District Judge of South Arcot, in Original Petition No. 68 of 1921 on the 31st day of October to the respondent herein to prosecute the petitioner herein for an offence punishable under section 193 of the Indian Penal Code. The facts are given in the judgment.

* Civil Miscellaneous Petition No. 1030 of 1922.

QUARISHI SAHIB v. BEGUM SAHIBA.

L. S. Veeraraghava Ayyar for petitioner.

S. Ranganadha Ayyar for respondent.

The judgment of the Court was delivered by OLDFIELD, J.

ORDER.

The petitioner asks us to revoke the sanction granted by the District Court, South Arcot, for his prosecution for an offence punishable under section 193 of the Indian Penal Code. Sanction was originally refused by the District Munsif and was afterwards granted by the District Court. During the pendency of the proceedings in the District Court the original applicant for the sanction died and the application was continued by his widow, as his legal representative; and she is here to support the District Court's order.

The only question, which it is necessary for us to decide, is whether a legal representative is in such circumstances entitled to continue an application originally made by her predecessor in interest. The general rule is that any person whatever can institute a complaint of an offence other than certain offences clearly specified in the Code, such as defamation. An offence under section 193, Indian Penal Code is not one of those excepted offences. There would therefore be no objection to an application for sanction by the legal representative of a person directly affected, instead of that person himself; and that was the basis of the order of the District Judge. That, however, takes no account of another principle of equally general application, that criminal proceedings instituted by a private complainant abate on such person's death. It is not necessary to give authority in support of that principle. We may, however, point out that, when an exception is intended as in the case of proceedings under section 145, Criminal Procedure Code, such exception is specified clearly. We have not been

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shown that an application for sanction differs from other Criminal Proceedings. It is suggested that an application for sanction is merely preliminary to the making of a substantive complaint and that is true; but, at the same time, we must regard it as part of a Criminal Proceeding, since there is no justification for holding that it is not an essential stage in one.

In these circumstances we cannot agree with the lower Court that it was entitled to grant the sanction to the legal representative on a petition presented by that representative's predecessor. We must, therefore, revoke the sanction granted. We add only that it is no doubt open to the legal representative herself to apply for sanction if so advised; and we express no opinion as to the prospects of such application.

N. R.

APPELLATE CRIMINAL.

Before Mr. Justice Wallace.

1922, September, 28.

S. P. NATARAJA PILLAI (ACCUSED), PETITIONER.*

Madras City Police Act (III of 1888), sec. 53—Society for the Prevention of Cruelty to Animals, agent of—Indian Penal Code (Act XLV of 1860), sec. 21 (8)—Public servant.

An agent of the Society for the Prevention of Cruelty to Animals appointed, under Act III of 1888, a member of the Madras City Police force with respect to offences under section 53 of that Act only, is a public servant within the meaning of section 21 (8) of the Indian Penal Code.

Upendra Kumar Ghose v. *The King-Emperor*, (1906) 3 C.L.J., 475, followed.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, and section 107 of the Government of India Act, praying the High Court to

* Criminal Revision Case No. 216 of 1922.

In re NATARAJA PILLAI.

revise the order of J. NARAYANA REDDI, Second Presidency Magistrate, Georgetown, Madras, in Calendar Case No. 913 of 1922.

The facts are briefly these: One N, an agent of the Society for the Prevention of Cruelty to Animals was appointed by the Commissioner of Police, a member of the Madras City Police force, and was vested with powers, functions and privileges of a public officer in respect of offences punishable under section 53 of Act III of 1888. He was charged by the Police under section 161, Indian Penal Code, with having received an illegal gratification in the discharge of his duties. It was contended on his behalf that he was not a public servant within the meaning of section 21, Indian Penal Code. The Second Presidency Magistrate overruled this contention. Against this order the accused preferred this Criminal Revision Case to the High Court.

V. Rajagopala Acharya, counsel for the petitioner.

Crown Prosecutor on behalf of the Crown.

ORDER.

WALLACE, J.—Petitioner, an agent of the Society for the Prevention of Cruelty to Animals, has been appointed in respect of offences under section 53, Madras Act III of 1888, a member of the Madras City Police Force constituted under that Act. By virtue of that appointment he is empowered to arrest offenders under that section. WALLACE, J.

It appears to me clear that he is, so far as his inclusion in the Madras City Police force operates, an officer of Government, whose duty is to bring offenders to justice. He is therefore a public servant within the definition of section 21 (8) of the Indian Penal Code.

The case reported in *Upendra Kumar Ghose* v. *The King-Emperor*(1) is in favour of this view.

This petition fails and is dismissed.

K.U.L.

(1) (1906) 3 C.L.J., 475.

APPELLATE CIVIL—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Oldfield and Mr. Justice Coutts-Trotter.

1922, April 5.

P. SUBRAMANYA SOMAYAJULU AND ANOTHER (PLAINTIFFS), APPELLANTS

v.

Y. SEETHAYYA AND FOUR OTHERS (DEFENDANTS), RESPONDENTS.*

Evidence Act (I of 1872), sec. 90—Copy of a document—Copy more than 30 years old—Proper custody—Presumptions—Execution—Attestation—Genuineness—Admissibility—Meaning of Mauja, Shrotriem—Construction of grant—Whether the grant is of land or of melwaram only.

The presumption under section 90 of the Evidence Act with regard to documents 30 years old arises in the case of copies as well as originals. If the copy is proved to be a true copy a presumption may be made in favour of the genuineness of the original.

Held also, that, on the true construction of the original grant and the evidence relating to the subject-matter of the grant at its date, the grant was of the land itself and not merely the melwaram.

APPEALS under clause 15 of the Letters Patent against the judgment of AYLING, Officiating Chief Justice, in Appeals Against Orders 310 to 319 of 1919 preferred against the orders of K. NARASIMHAM Garu, Principal District Munsif of Tenali, in Original Suit Nos. 1061, 1065, 1066 and 1067 of 1913, and 104 of 1915, 235 of 1917, 29 of 1918, 774 of 1917, 1068 and 1069 of 1913, respectively.

These were a batch of suits filed by the inhabitants of the village of Arepalli against their immediate

* Letters Patent Appeal No. 28 of 1921

landlords, the agraharamdars of the village. The question for decision in the appeals was whether the Civil Court has jurisdiction to entertain the suits or whether their jurisdiction is ousted by the Madras Estates Land Act.

P. Narayanamurti and *K. Ramamurti* for appellants.

Ch. Raghava Rao for respondents.

JUDGMENT.

SCHWABE, C.J.

SCHWABE, C.J.—The question to be decided in these appeals is, whether the Civil Courts have jurisdiction to entertain the suits, the subject of the appeals, or whether their jurisdiction is ousted by the Madras Estates Land Act. The suits are between the inhabitants of the village of Arepalli and their immediate landlords, the agraharamdars of that village. If the agraharamdars are landholders within the meaning of section 3 (5) of the Madras Estates Land Act of 1908 the Civil Courts have no jurisdiction by reason of section 189. "Landholder" means a person owning an estate or part thereof and includes every person entitled to collect the rents of the whole or any portion of the estate. Whether this village is an "estate" or not depends on section 3 (2) which includes in the definition "any village of which the land revenue alone has been granted in inam to a person not owning the kudivaram thereof."

It has been established that, where a grant in inam is a grant of both the landlord's and the tenant's rights in the land or as they are called the melwaram and the kudivaram, the land is not an estate; but if the grant is of the landlord's rights or the melwaram alone, it is an "estate" so that the question to be decided is whether the grant is of the land itself or only of the right to the revenue from the land. There is no question in this

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case of the village being part of an estate and the question which was recently decided by a Full Bench of this Court in *Brahmayya* v. *Achiraju*(1), where it was held that a minor inamdar who was granted both varams in respect of a small part of an estate was a landholder, does not arise, because the village in question has not been shown to be part of an estate. I am conscious of the absurdity if that case was rightly decided and the view which we are about to express in this case is right, for the result is that a minor inamdar of a few acres would be a "landholder" while a major inamdar of a whole village would not. But such apparent inconsistencies are not surprising in view of the draftsmanship of the Statute.

The first question to be decided is, whether an alleged copy of the grant itself which was made in the year 1689 is admissible in evidence to prove the terms of the grant. The document, Exhibit I, purports to be a copy of two documents, of a grant in the Telugu language with a schedule annexed showing the boundaries, and of a Telugu translation of another document written in the Persian language, the translation being, it is stated, written on the right hand margin of the document in Persian. The copy is dated 11th May 1858 and is signed by the three agraharamdars at that time and contains the statement over their signatures that they "retain the original and that this copy is written and filed." At that date, litigation was pending and I have no doubt that the meaning of that statement is that this is a true copy made for use in Court in that litigation. We have examined the records in that litigation and find that the grant was put in evidence. The agraharamdars who signed the statement, that it was a true copy are all

(1) (1922) I.L.R., 45 Mad., 716.

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dead. Under the Evidence Act of 1872, section 65, secondary evidence may be given of the contents of a document where the original has been lost. Under section 90 when a document is produced from what the Court considers proper custody and purports to be more than 30 years old, the Court may presume that the signatures to the document are genuine, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested. This applies to copies as well as to originals. If the copy is proved to be a true copy, it has been held that the presumption in favour of the genuineness of the original can be made. It follows that this document is admissible as secondary evidence, provided it can be proved that it is a true copy. There is a statement in it by these three deceased persons that it is a true copy; and under section 32, clause (7), a statement of a relevant fact, made by a person who is dead, contained in any document, which relates to any such transaction as is mentioned in section 13 (*a*), which, where the question is as to the existence of any right, includes any transaction by which the right was created, is a relevant fact. In my judgment the grant is a transaction by which the right now in question was created, and the statement of the deceased persons is contained in a document which relates to that transaction. It follows that the statement that this is a true copy is admissible. There is no reason for not accepting that statement, and the document must be admitted as a true copy. That part of the document which purports to be a Telugu translation of the Persian stands on a somewhat different footing because, although it is proved that it is a true copy of the translation, there is no evidence that the translation is a correct translation and, therefore, the second of the two documents

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copied is of no value and cannot be taken into consideration.

The question then to be determined is, whether on the true consideration of the grant and on the evidence relating to the subject-matter of the grant at its date, that is 1689, the grant was of the land itself or only of the right to collect the revenue. If it were proved that there were ryots with permanent occupancy rights on the land, at the date of the grant, it would be strong evidence that the grant was of the melwaram and not of the land itself. Since the decision of the Privy Council in *Suryanarayana* v. *Patanna*(1) and *Venkata Sastrulu* v. *Seetharamudu*(2) it must be taken that there is no presumption that the grant of an agraharam in inam conveys only the melwaram, and since that decision it has been held by a Full Bench of this Court, in *Muthu Goundan* v. *Perumal Iyen*(3), that there is a presumption in law in such cases that both the melwaram and kudivaram are included.

The grant as translated by the Chief Interpreter is in the following terms:

"In the year 1610 of the era of Salivahana commencing Jaya year namely this Prabhava year on the 15th Suddah of Adhika Chaitra, the Patta or deed of charity 'dana' gift of land executed and given to Ponnapallenappa Garu who is devoted to the six duties (of a Brahman), namely, Yajana, Adhyajana, Adhyyayana, Adhyapaka, Dana and Danapratigraha, by Komaravollu Rajah, Pulligadda, Mallapparaju, Lakkaraju, Perraju and Muzumdar Papanna Desasthas (natives) of Nizampatnam. Whereas we have on the holy occasion of lunar eclipse given to you treating it as a dedication to God Siva (as) Shrotriem the village called Arepalle M., Sircar Nizampatnam (taluk), for six pagodas you shall be enjoying the Shrotriems in this manner from son to grandson and so on in succession and be happy.

(1) (1918) I.L.R., 41 Mad., 1012 (P.C.). (2) (1920) I.L.R., 43 Mad., 166 (P.C.). (3) (1921) I.L.R., 44 Mad., 658 (F.B.).

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(Sanskrit verse. Proper administration of a charity gift by another person is twice as meritorious as a charity gift by oneself.)

Signature of Rajahs ... Mallapparaju's signature.
Perra's signature.
Papanna's signature.

Sri Nageswara.

Memorandum of boundaries of the agraharam written and given to Ponnapallenappa who is devoted to the six duties of a Brahman, namely, Yajana, Adhyajana, Adhyyayana, Adhyapaka, Dana and Danapratigrahas by Komaravolu Rajahs, namely, Pulligadda Mallapparaju, Lakkaraju, Perraju and Muzumdar Papanna, natives of Nizampatnam, on the 9th Adhika Chaitra Bahula of this Prabhava year, namely, the year 1610 of the era of Salivahana commencing Jaya year.

"Whereas we, fixing the Shrotriem at six pagodas, have given to you agraharam in the village called Arepalle M., Nizampatnam taluk, the boundaries and limits shown therefor are as follow:

* * * *

Whereas we have given to you according to these boundaries you shall enjoy the agraharam paying the Shrotriem, from son to grandson and so on in succession and be happy."

It is argued on behalf of the respondents that the terms of the grant show that it was of the melwaram only, and the matters relied upon in support of this contention are four. The first, on which most reliance is placed, is the use of the letter "M" which occurs twice, once in the grant itself and once in the schedule, the words being "the village called Arepalle M." It is agreed that the letter "M" is an abbreviation for a word Mauza or Mauja. This word is derived from the Arabic and literally means "defined" and hence "a defined place", "a village" and "an inhabited village." It is then argued that this shows that in 1689, the date of the grant, there were ryots cultivating the land who had occupancy rights, from which it follows that all that was granted was a right to collect the rent from this village and not a right to the land or the village itself. This

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meaning of the word was given to it by SADASIVA AYYAR, J., in *Venkata Sastrulu* v. *Seetharamudu*(1), where, referring to another village granted in inam in 1748, he says

"that the village was then Mouja village, that is, a village in which there were peasant proprietors owning cultivable lands even then."

That case went up to the Privy Council and the decision was reversed and their Lordships deal with the matter in these words in *Venkata Sastrulu* v. *Seetharamudu*(2):

"Reliance was placed on the fact that, in the Register of 1802, Billapadu is called a Mauje (or Mauza), these expressions indicating (it is suggested) that the village was the home of proprietary inhabitants. . . . But it does not appear to their Lordships that it would be safe to build on the use of expressions of this character in 1783 and 1802 an inferences to the existence in 1748 of tenants having permanent rights of occupancy."

So, as far as authority goes, this interpretation of the word rests only on the passage I have quoted from the judgment of SADASIVA AYYAR, J. I do not find that evidence was given in that case as to the meaning of the word. But Wilson's Glossary of 1855 was referred to, as it has been in this case, in which at page 336, the meaning is given as

"A village" understanding by that term, one or more clusters of habitations and all the lands belonging to their proprietary inhabitants."

It is also stated there that it is defined in "Directions to Settlement Officers" to be a

"Parcel or parcels of lands having a separate name in the Revenue records and of known limits."

We were referred to Maclean's Manual of Administration, Vol. III, page 522, but this is merely a verbatim copy of Wilson's definition referred to above. I do not

(1) (1915) I.L.R., 38 Mad., 891. (2) (1920) I.L.R., 43 Mad., 166 at 172 (P.C.).

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think that on the material before us it is possible to say that this word necessarily imports the meaning that there were occupancy rights in the land. There is no evidence at all before us of how this word was used in 1689, and if it be a fact that at the time when Mr. Wilson compiled his Glossary it had come to have that meaning, that would not in my judgment be sufficient evidence of its meaning in 1689 to enable us to act upon it. It is, to my mind, reading much too much into the word which simply means "defined" and so "a defined place or village."

Secondly it is argued that the use of the word "Shrotriem" shows that the grant was of the melwaram rights only. This word is derived from "Shrotria" meaning a Brahman well read in the Vedas, and literally means nothing more than the grant of a land to such a person. It is used in this document in two senses, firstly as describing the rights that were granted, and secondly as meaning the rent to be paid to the grantor, in this case six pagodas. Here again reliance is placed on Wilson's Glossary. At page 490 he gives "Shrotriem" as meaning "lands or a village held at a favourable rate, properly an assignment of land or revenue to a Brahman learned in the Vedas" and he adds, "a Shrotriem grant gives no right over the lands and the grantee cannot interfere with the occupants as long as they pay the established rent." It is to be observed that he begins by saying that it is a grant of land or of revenue, and I have little doubt that the term was used of any grant to a Brahman in inam, whether the grant was of land or of revenue. It is true that in the latter part he qualifies his statement by the statement that "it gives no right over the lands." But it is to be remembered that this was written at a time when it was the accepted view of the Courts in this Presidency that in a Shrotriem grant there was a

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presumption that the melwaram only was granted, and I have little doubt that Mr. Wilson was merely stating what he understood the law to be. That view of the law, as I have pointed out, has been decided by the Privy Council to be erroneous. In the "Land systems of British India" by Baden-Powell, Vol. III, the following passages occur:

"Only in the case of grant to Brahmans, called Shrotriem, I understand that the land was not necessarily held by the grantee. Such grants in fact are assignments of revenue, and whether the land was unoccupied, and was acquired with the grant, is a question of fact in each case." (Page 140)

"All Native Governments were in the habit of rewarding favourites, providing for the support of mosques, temples, religious schools, shrines and for alms-giving and the maintenance of Brahman and Muhammadan Saints, etc., by granting the revenue on the land, whether they granted the land itself or not." (Page 79.)

"The inam commission dealt with all kinds of grants whether they included the right in the land or only the Government revenue; they were . . . Shrotriems and Agraharams, grants to certain classes of Brahmans which did not give more than the revenue, leaving the land in its original occupancy, unless it could be shown that the occupancy was also granted." (Page 80.)

In these passages it would appear that the author, in stating that the Shrotriem or Agraharam grant could be either of revenue or of the land, states what was then supposed to be the rule that the grant was to be presumed to be of the melwaram only unless the contrary was proved.

It is to be observed that in *Venkata Sastrulu* v. *Seetharamudu*(1), the grant was an Agraharam grant in inam to Brahmans; in *Ponnusamy Padayachi* v. *Karuppudayan*(2), the grant was a Shrotriem grant; in

(1) (1916) I.L.R., 38 Mad., 891. (2) (1915) I.L.R., 38 Mad., 843

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Muthu Goundan v. *Perumal Iyen*(1), the grant was a Maniam grant to a temple and in all these cases it was held that the grant was of both varams. In *the Secretary of State for India* v. *Srinivasa Chariar*(2), where a village was granted as a Shrotriem inam their Lordships of the Privy Council held that such a grant could be either an assignment of revenue or a grant of the land. In my judgment it is fully established that a Shrotriem grant may be either of the land itself or of the revenue only. The use of this word therefore is of no importance.

The third matter relied upon is that the grant being a Shrotriem grant was to Brahmans learned in the Vedas, and it is suggested that it was unlikely that such Brahmans would cultivate the lands themselves. The same contention might have been made in the cases referred to above. Ultimately the suggestion was limited to non-resident Brahmans. But all the information before us is that the Brahmans to whom the original grant was made lived about two miles from Arepalli and the argument in my judgment is of no value.

Lastly it was proved that the grantors were Deshapandyas, and it is contended that this shows that it was of revenue alone, as it is suggested that Deshapandyas were farmers of revenue only and could not, or at any rate were most unlikely to, have land to grant. This must depend upon the position of Deshapandyas in 1689 and whether there is anything inherently impossible or even improbable in their either being or acting as if they were the owners of the soil. We have had our attention called on this matter to the Manual of Kistna District of 1843, page 343, to the appendix to the fifth report of the Select Committee on the East India Company's affairs,

(1) (1921) I.L.R., 44 Mad., 538 (F.B.).
(2) (1921) I.L.R., 44 Mad., 421 (P.C.).

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Vol. III, page 24, and to Wilson's Glossary, page 132. It would appear that these Deshapandyas were originally Hindu revenue officers under Muhammadan rulers acting as accountants and registrars of the district and being under a Deshmukh. They were originally paid by commission on the revenue collected or by a grant of land. These Deshapandyas after a time became as powerful as Deshmukhs. Both, provided they produced the necessary revenue, were left without interference by the ruler. The office soon became hereditary. Gradually they obtained the position of territorial magnates in their districts somewhat resembling the feudal barons of early English history. It is to be observed that the history of the zamindars is much the same. They too originally were collectors of revenue but became in effect the owners of the territory. Before long these Hindu hereditary officers began to call themselves zamindars and to act as if they were independent princes. It follows that there is nothing to show that in 1689 it was impossible or even improbable that these particular Deshapandyas either in fact owned this village or acted as if they owned it.

Another word in Exhibit I is relied upon as showing that the land itself was granted. This is the word "Bhudana" meaning a gift of land. That the word was used I have no doubt, although it appears in Exhibit I as "Udana" with a space before it. We have been satisfied that this "U" is not used at the beginning of a word but only after and attached to a consonant and that the only consonant that could be used in this connexion is "Bh." The space is no doubt explained by the fact that it is a copy, and an accurate copy, of the original grant in which the initial letter had somehow become defaced. But unfortunately no inference can be drawn from the use of this word. It would appear from Wilson's Glossary, page 82, that the

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word is used either of a gift of land or of a gift of the revenue of the land.

I have therefore come to the conclusion that we get no assistance at all from the words of the grant and that they are equally consistent with the grant of the revenue or of the land itself. That being so, if the matter stood there, it would be sufficient to say that, on the decision of the Privy Council in *Suryanarayana* v. *Pattanna*(1), there is no presumption that the grant was of revenue only, and on the decision in *Muthu Goundan* v. *Perumal Iyen*(2), that there is a presumption that the grant is of both varams. I can find nothing in the evidence adduced in the case to negative that presumption. On the contrary I think there is cogent evidence, apart altogether from the presumption, in favour of holding this grant to have been of both varams. The evidence has been fully and most carefully analysed in this case on the issue submitted to him by Mr. M. O. Tirumala Acharya, Principal District Munsif of Tenali. I attach most importance to the inam register Exhibit G, to Exhibit V series ranging from 1750, Dumbalas, or authorities from the rulers of the country to the agraharamdars to harvest and thrash the crops and appropriate the produce, and to the documents in the litigation of 1864 Exhibits F and F-2. There is no record of the actual cultivators of the land claiming permanent occupancy rights till about 1885 and it is clear that the claims were disputed when made. It is also clear that in many instances of fairly recent date the agraharamdars were treating the land as their own, mortgaging it, selling it and letting it on terms quite inconsistent with any one else having permanent occupancy rights. I see no reason for dissenting from the findings of fact of the Principal District Munsif, and I

(1) (1918) I.L.R., 41 Mad., 1012 (P.C.). (2) (1921) I.L.R., 44 Mad., 588 (F.B.).

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hold that the grant of this agraharam village was a grant of both the kudivaram and melwaram, and that consequently it is not an estate within the Madras Estates Land Act, and that the civil courts have jurisdiction to try these cases.

The appeals are therefore allowed, the suits being remanded for admission of the plaints in the District Munsif's Court and disposal according to law. Costs in this Court and the District Court will be paid by the respondents. Costs to date in the District Munsif's Court will be in his discretion and be provided for in the decree to be passed.

OLDFIELD, J. OLDFIELD, J.—I agree.

COUTTS TROTTER, J. COUTTS TROTTER, J.—I agree.

M.H.H.*

APPELLATE CIVIL.

Mr. Justice Oldfield and Mr. Justice Devadoss.

1922, October, 26.

JAMBAPURAM SUBBIAH AND TWENTY-NINE OTHERS (DEFENDANTS), APPELLANTS,

v.

GUNDLAPUDI ALIAS MITTA MUDIVENKATRAMAYYA (PLAINTIFF), RESPONDENT.*

Tenants-in-common—Compensation for improvements by one—Whether and when payable.

On a partition between tenants-in-common, one tenant-in-common will not be entitled to compensation from the others for improvements effected by him on the common property, unless they were either necessary or made with the concurrence of the others. *Swan* v. *Swan*, (1820) 8 Price, 518, followed. *Upendra Nath Banerjee* v. *Umes Chunder Banerjee*, (1910) 12 C.L.J., 25, not followed.

* Second Appeal No. 816 of 1921.

SECOND APPEAL against the decree of C. V. SAMPATH AYYANGAR, Subordinate Judge of Cuddapah, in Appeal Suit No. 16 of 1920 (Appeal Suit No. 163 of 1918 of the District Court), preferred against the decree of M. VENKATARAMAYYA, Acting District Munsif at Proddatur, in Original Suit No. 21 of 1917. SUBBIAH v. GUNDLAPUDI.

The facts appear from the Judgment.

T. R. Arunachala Ayyar for *S. Varada Achariyar* for appellants.—The defendants who are tenants-in-common are entitled to compensation for the improvements effected by them on the common land. *Upendra Nath Banerjee* v. *Umes Chunder Banerjee*(1).

K. Kamanna (with *P. Narayanamurti*) for respondent.—The defendants have taken no such issue ; hence it cannot be allowed. Moreover one co-tenant is not entitled to compensation for improvements unless he proves the consent of others thereto or necessity ; neither is proved in this case ; *Swan* v. *Swan*(2), *Leigh* v. *Dickeson*(3), *In re Jones, Farrington* v. *Forrester*(4), which are relied on in *Upendra Nath Banerjee* v. *Umes Chunder Banerjee*(1), do notsupport the wide form in which the proposition is stated.

The JUDGMENT of the Court was delivered by OLDFIELD, J.

OLDFIELD, J.—Some argument was addressed to us on behalf of the defendants, appellants, with reference to the calculations, on which the lower Court's judgment is based. We have not, however, been shown how any question of law is raised in connexion with their correctness and we therefore decline to interfere with the conclusions, in which those calculations result.

The remaining ground on which the appeal is argued is against the lower Appellate Court's refusal to make

(1) (1910) 12 C.L.J., 25.
(2) (1820) 8 Price, 518.
(3) (1885) 15 Q.B.D., 60.
(4) [1893] 2 Ch., 461.

SUBBIAH v. GUNDLAPUDI. OLDFIELD, J.

any provision in its decree for an award to the defendants on account of the improvements they allege they have made on the suit property. The suit property is part of a larger area in common ownership of the plaintiff and the defendants. The plaintiff let his unascertained share to the defendants ; and the present suit is brought for the eviction of the defendants from that share, the form of the decree being of course a decree for partition by metes and bounds of the plaintiff's share and delivery to him of possession thereof. It cannot, therefore, at present, be said that the improvements are on the portion of which the plaintiff will be entitled to delivery. But in any case we cannot see how one tenant-in-common, who makes improvements on the property of the co-tenancy, can ordinarily be entitled to compensation for doing so. The defendant's argument has been based on the dictum of MOOKERJEE, J., in *Upendra Nath Banerjee* v. *Umes Chunder Banerjee*(1),

"If one joint owner has in good faith effected valuable improvements upon the common property at his own expense, equity will take this fact into consideration upon a partition and in some way will make an allowance to him therefor, in addition to his rateable share of the property."

The learned Judge has proceeded to explain the nature and the grounds of this equity ; but we prefer to decide whether any such principle as that relied on by him is really recognized by authority. Certainly it is not recognized in the unqualified form, in which he stated it in the cases referred to in his judgment. In *Swan* v. *Swan*(2), the Court ordered a reference for an account to be taken of what had been expended by a co-tenant necessarily or with the concurrence of the other co-tenant ; and these qualifications were fully recognized in *In re Jones*,

(1) (1910) 12 C.L.J., 25. (2) (1820) 8 Price, 518.

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Farrington v. *Forrest* r(1). No doubt the reference in that case to the observations of COTTON, L.J., in *Leigh* v. *Dickeson*(2) is at first sight in favour of the existence of a general right in one co-tenant to compensation for improvements made by him against another. But the judgments of BRETT, M.R., and of the other learned Judge in *Leigh* v. *Dickeson*(2), amply sustained the right as subject to proof of the necessity for repairs or improvements or of the co-tenant's concurrence, express or implied, in their execution. The portion of the judgment of COTTON, L.J., to which reference has been made, appears, on a perusal of his judgment as a whole, to be concerned solely with procedure, that is, with the existence of a remedy in equity by a partition suit, which the common law could not afford. In the present case defendants have never, in their written statement or elsewhere, alleged the plaintiff's concurrence, expressed or implied, in what they did ; and no issue on the point was framed or even asked for. In these circumstances this objection to the lower Appellate Court's decree must fail.

The Second Appeal is therefore dismissed with costs, including costs of Civil Miscellaneous Petition No. 2483 of 1921.

N.R.

(1) [1893] 2 Ch., 461. (2) [1885] 15 Q.B.D., 60.

PRIVY COUNCIL.*

1922, November 30.

CHALIKANI VENKATARAYANIM AND OTHERS (DEFENDANTS)

v.

ZAMINDAR OF TUNI (SECOND PLAINTIFF) AND OTHERS (DEFENDANTS).

[On Appeal from the High Court of Judicature at Madras.]

Mortgage—Interest—Offer to discharge—Refusal to accept payment—Waiver of tender—Mortgagee in possession—Fixed annual sum for variable expenses—Validity of provision.

If a mortgagee unequivocally refuses a proposed payment of the amount due, the mortgagor is not bound to make a formal tender of it, and the mortgagee cannot recover interest accruing subsequently, even if he proves that the mortgagor had not the money or the control of it.

Hunter v. *Daniel* (1845) 4 Hare, 420, applied.

But a refusal purporting to be based upon an unenforceable provision in the mortgage, namely that upon a default the mortgagee can purchase the property for the outstanding amount, is not one which dispenses with the necessity of a tender.

A term in a mortgage whereby the mortgagee in possession can charge a fixed annual sum in respect of several charges and expenses of a variable amount is not invalid as giving the mortgagee an advantage which he is not entitled to exact.

APPEAL No. 21 of 1921 from a judgment and decree of the High Court (21st November 1917) varying a decree of the Subordinate Judge of Vizagapatam.

The suit was brought by the husband, since deceased, of the first respondent to enforce a mortgage with possession of the proprietary estate of Uratla and other lands executed on 2nd March 1891. The defendants were the present appellants, assignees of the equity of redemption, and the original mortgagors. The appeal

* *Present*: Lord BUCKMASTER, Lord PHILLIMORE, Sir JOHN EDGE, Sir LAWRENCE JENKINS and Lord SALVESEN.

raised three separate questions as to the amount due under the mortgage. Those questions and the material facts appear from the Judgment of the Judicial Committee.

The most substantial point was whether any interest could be charged after 1st February 1899, when it was alleged that there had been an offer to redeem, no tender having been made as the mortgagee had refused to accept payment. On this point both Courts in India had held that the offer to redeem was not bona fide as the defendants had not the money necessary. The High Court (ABDUR RAHIM and OLDFIELD, JJ.) reversed the trial judges' judgment upon one point. The deed provided for the mortgagee in possession taking credit for Rs. 4,000 annually in respect of certain charges and expenses in connexion with the land. The trial judges held that the mortgagee was entitled to debit only the actual expense incurred; the High Court held that having regard to the variable amount of the expenses the mortgagees were bound by their agreement.

Upjohn, K.C., *Narasimham* and *C. V. Rao*, for the appellants.—Interest is not chargeable after 1st February 1899. The appellants proposed to redeem but the mortgagee by his letters refused to accept payment. That dispensed with the necessity of having a tender and rendered section 84 of the Transfer of Property Act inapplicable. A tender being waived it was not necessary to inquire whether the mortgagor had the money; had the tender not been waived he might have borrowed it. The provision as to the fixed charge of Rs. 4,000 per annum was a clog on the equity and invalid: *Kreglinger* v. *New Patagonia, etc., Co.*(1). With regard to the question as to the Rs. 10,000, the obligation to give

(1) [1914] A.C., 25, 61.

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possession was separate from the obligation to pay Rs. 10,000. [Reference was also made to *Harendra Lal Rai Chowdhri* v. *Maharani Dasi*(1)].

De Gruyther, K.C., and *Kenworthy Brown*, for the respondents.—The letters did not amount to such a refusal as dispensed with a tender. The Transfer of Property Act, 1882, section 83, expressly provides what is to be done if tender is dispensed with; consideration of the position under English decisions does not arise. There was no genuine offer to pay. The High Court found not only that the mortgagor had not got the money, but that he could not get it. That absence of ability to find the money could not be waived.

Upjohn, K.C., in reply. The principle of *Cort* v. *Ambergate Railway Co.*(2) applies where there was a waiver of all conditions.

The JUDGMENT of their Lordships was delivered by

Lord BUCKMASTER.

Lord BUCKMASTER.—Three questions are raised upon this appeal. They all arise out of the rights created under a mortgage deed which was executed on 2nd March 1891, in favour of the first plaintiff in the suit by the first defendant. The appellants are assignees of the equity of redemption of that mortgage, and claim that in the accounts taken to determine the true amount due under the deed three mistakes have been made adverse to their interests. The mortgage deed itself is in a peculiar form. It is a mortgage with possession to secure the repayment of Rs. 1,80,000 with interest at the rate of Re. 1 per cent per month; the principal of the debt is to be repaid by sums of Rs. 10,000 payable year after year, beginning on 1st February 1892, down to the 1st

(1) (1901) I.L.R., 28 Calc., 557 (P.C.); L.R., 28 I.A., 89.
(2) [1851] 17 Q.B., 127.

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February 1898, and on 1st February 1899, the entire balance of the debt and the interest is to be paid. These instalments are protected not merely by the security of the mortgaged property but also by an express agreement in these terms: "We shall pay to you at Tuni, the principal according to the aforesaid instalments and the whole of the interest upon the entire debt calculated with reference to the instalments, along with the last instalment." There was a further agreement in the deed by which certain charges which would be incurred by the mortgagee, when in possession, were fixed at the sum of Rs. 4,000 per annum. They are specified as being the usual earthwork repairs annually done to canals, etc., expenses on account of the village headmen, service inams of village headmen, village deities, contingent charges, and other business expenses. The deed also contained two further material provisions: the first that notwithstanding the arrangement by which the mortgagee was to be put into possession a lease was to be granted by him to the mortgagor for a period of two years, and the second that if the provisions of the mortgage deed as to redelivery of the estate to the mortgagee by the mortgagor at the expiration of the lease for two years were not carried out, the mortgaged estate should at the end of the time stand sold to the mortgagee for the entire amount due inclusive of the balance of principal and interest, and further that the mortgagor should not sell any portion of the estate to anybody except the mortgagee. Arrangements were also made by which the mortgagee was to pay all the necessary peshkash or quit-rent or land cess, and a provision that if that should be raised there should be a further right on his part to recover the money from the mortgagor with interest as therein mentioned. What happened consequent upon the execution of the deed

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was this: The lease for two years was duly granted to the mortgagor, but at the expiration of the term he did not pay the second instalment due on 1st February 1893, nor did he redeliver possession to the mortgagee. The mortgagee accordingly instituted a suit for recovery of possession and for the amount of the second instalment. To meet this a sum of Rs. 15,000 was paid into Court by the appellants on behalf of the mortgagor, but possession was not delivered up by him, and he was in fact in possession at the time when the third instalment became due.

Shortly before this date, namely on 16th January 1894, the mortgagor executed a sale-deed for Rs. 1,60,000 for some of the mortgaged properties, and a mortgage for Rs. 60,000 for the others in favour of the appellants, and requested them to pay to the mortgagee Rs. 2,05,000 being the total Rs. 2,20,000 after deducting the Rs. 15,000 already paid into Court. The appellants accordingly, on 10th February 1894, tendered the Rs. 10,000, due on 1st February to the mortgagee, who refused to accept the money upon the ground that there existed at that date a breach of the bargain made by the mortgagor as to redelivery of possession, and that consequently his acceptance might prejudice his rights. Their Lordships think that this is a mistaken view of the rights which the mortgagee possessed. The agreement for the payment of the instalments of the purchase-money is in fact the main obligation of the mortgage deed, and the whole of the other provisions, however extensive and far-reaching they may be, are really nothing but the security to enforce this obligation. The acceptance of Rs. 10,000 due on the 1st February 1894, would not have prejudiced the mortgagee in any way in the claim he had then pending against the mortgagor for possession, and their Lordships

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think there was consequently no justification for his refusal of the tender. The fact that the tender was nine days after the due date is of course immaterial; accordingly, in taking the accounts, interest on the sum of Rs. 10,000 according to the terms of the deed must cease to be charged against the mortgagor from 10th February 1894.

On the 13th July 1894, the mortgagee obtained a decree for possession, and entered in pursuance of its terms, so that the agreement for the annual allowance of Rs. 4,000 for the particular payments to which reference has been made became operative, and the next question is as to the validity of that agreement. It is urged on behalf of the appellants that it gives the mortgagee a collateral advantage under the deed which he is not entitled to exact, but their Lordships think that that contention cannot be supported. The truth is that it is a fixed payment to be made in respect of a variable charge, and though it may be assumed that the amount was not fixed so as to prejudice the mortgagee, there is nothing to prevent the mortgagor and mortgagee entering into a bargain as to what sum should be charged annually for expenses that may or may not exceed the agreed figure. They, therefore, think the objection to the Rs. 4,000 cannot be maintained.

There remains what is after all the most serious part of this appeal, and it is the claim that in February 1899, the appellants were willing and offered to make a tender of the whole of the outstanding principal and interest, but that the mortgagee so acted as to excuse the actual tender being made, and that in consequence there is no longer any right on the part of the mortgagee to debit interest in the mortgage accounts from that date. This controversy depends upon the true meaning to be placed on two important letters. The first is written on

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17th January 1899, by the appellants to the mortgagee. It refers to the mortgage and the assignments, and points out that the balance of the monies payable by them to the mortgagor in respect of such transaction—which appears to be stated erroneously at Rs. 2,25,000 instead of Rs. 2,05,000—had not been paid over but left with them for satisfaction of the mortgage debt, and concludes in this way :

" It is requested that, on receipt of this letter, the amount becoming due to you by that date from the estate may be made known at once. Soon after receipt of your letter, we are ready to send respectable men with money and get the repayment of the amount of your debt made in full in the forenoon on the due date. Your reply is requested."

Both the Subordinate Judge and the High Court Judges, before whom this case has been heard, have come to the conclusion that that was not a bona fide offer on the part of the appellants. They say that they had not at that time either the money or the control of the money that would have enabled them to meet the tender of the large amount that was due upon the mortgage deed. Their Lordships think, for reasons that will presently appear, that it is not necessary to consider that question. It is very difficult indeed to say whether or no a man will be able to have control of money at a future date, and the real question to be determined here is not whether that money was within the power of the appellants but whether the mortgagee in the letter he sent in answer to the offer definitely and unequivocally refused to accept the money were it tendered. Before reading this reply it is well to bear in mind what has been stated by Vice-Chancellor Wigram in the case of *Hunter* v. *Daniel*(1), as to the true position in such a case. He there says :

(1) (1845) 4 Hare, 420.

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" The practice of the Courts is not to require a party to make a formal tender where from the facts stated in the Bill or from the evidence it appears the tender would have been a mere form and that the party to whom it was made would have refused to accept the money."

Their Lordships think that that is a true and accurate expression of the law, and the question, therefore, is whether the answer that was sent on behalf of the mortgagee amounted to a clear refusal to accept the money. The letter is dated the 28th February 1899, and is in part in the form of an argument, and the substantial part is as set out in the record in these words :—

" As in the face of the suit instituted by us of late in the District Court of Vizagapatam against the proprietor for possession of the entire proprietary estate of Uratla held by us under the terms of our possessory mortgage deed, you have purchased from the proprietor, as you have stated, during the pendency of that suit and subsequent thereto, with full knowledge of the conditions, etc., of our possessory mortgage deed, and yet in contravention of the same and without necessity, a considerable portion of the estate at different times for Rs. 2,40,000 in favour of yourself and others, there is no need for us to pay any of those amounts you state under that head, inasmuch as the right to purchase that estate for that sale price has vested in us."

The explanation of the earlier part of that paragraph is due to the provisions contained in the deed which prohibit, so far as they had the power, just such a transaction as that which had taken place. The latter part of the letter is unfortunately an obvious mistake or misprint. Either it should run, " there is no need for us to receive," or " there *is no* need for you to pay us any of those amounts you state under that head." The better reading in favour of the appellants is the latter, " there is no need for you to pay any of those amounts you state under that head inasmuch as the right to

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purchase that estate for the sale price is vested in us." Accepting this as the true reading, the meaning of the letter in their Lordships' mind is this, that the rights which the mortgagee had conferred upon him have vested in him the whole of the estate, and that consequently the mortgage is at an end. It was an erroneous view based upon invalid provisions in the deed, but it by no means followed from that that if in fact the tender had been made of the whole of the principal money and interest which was due up to that date, the mortgagee would not have accepted it, and it is remarkable that in the latter part of the letter he continues in these words:

"In reply to the letter, dated 14th ultimo, from the proprietor about the balance of demand after payments made, on the Proprietary Estate of Kota Uratla, we informed him on the 27th instant, that the amount of debt due under our said deed was Rs. 3,19,946-2-2."

Now upon the view that this letter was intended to excuse the mortgagor from making any tender at all under the deed, there could have been no possible reason for stating what the amount was that was to be paid. The fact is that this letter contains a reason why the tender is unnecessary, but the reason was wrong because the right to buy according to the terms which the mortgage deed contained was a right which was not enforceable in law. But it is on that hypothesis that they say there is no need for payment to be made. If this were not accepted as correct, there is nothing to relieve the appellants from making the tender. Their Lordships are unable to construe the letter as equivalent to any such clear release to the mortgagor of his obligation to tender the money as is required in order to justify him in not having presented it for receipt. From that time to this nothing has in fact been tendered.

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No money has been paid into Court, and no effort on the part of the mortgagor has been made to satisfy his obligations under the deed. Their Lordships, therefore, think that the appellant must fail upon that part of his appeal.

It follows, therefore, that the appeal succeeds, but succeeds only to a very limited extent; but though it is small in relation to the part in respect of which he fails, he does obtain some substantial relief which could not have been obtained without coming before this Board, and their Lordships therefore think, having considered all the circumstances, that he ought to have one-half of the taxed costs of the appeal, and they will humbly advise His Majesty accordingly.

Solicitor for appellants: *E. Dalgado.*

Solicitor for respondents: *Douglas Grant.*

A.M.T.

APPELLATE CRIMINAL.

Before Mr. Justice Oldfield and Mr. Justice Ramesam.

KOTTAMMAL KALATHINGAL UMAR HAJEE (PRISONER), APPELLANT

v.

KING-EMPEROR.*

1922, September 5.

Criminal trial—Evidence of witnesses taken by a predecessor exhibited before the successor—Irregularity—Consent of the accused to such procedure—Whether cures irregularity—Viva voce examination at trial—If obligatory.

Where evidence given before a Judge in a criminal trial was exhibited in a trial *de novo* before a succeeding Judge, it was held that such a procedure was irregular and the consent of the accused did not cure the irregularity.

* Criminal Appeal No. 581 of 1922 and R.T. No. 64 of 1922.

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Except in certain cases covered by an explicit provision of law, the evidence of witnesses in criminal trials must be taken *viva voce* in the course of the trial in the presence of the accused.

Reg. v. *Bertrand* (1867) L.R., I.P.C., 520, followed. *In re Annavi Muthiriyan* (1916) I.L.R., 39 Mad., 449, considered. *Jainab Bibi Saheba* v. *Hyderally Sahib* (1920) I.L.R., 43 Mad., 609 (F.B.) referred to.

APPEAL against the order of G. H. B. JACKSON, Special Judge, Malabar at Calicut, in case No. 25-A of 1922.

Facts necessary for this report appear sufficiently from the judgment.

V. L. Ethiraj and *T. Krishna Kurup*, Counsel, *P. Markandeyulu* and *M. C. Sridharan*, Vakils for appellant.

Public Prosecutor for the Crown.

The JUDGMENT of the Court was delivered by

OLDFIELD, J. OLDFIELD, J.—These two appeals can be decided on the same preliminary point. To take first Appeal No. 581 of 1922, the accused (appellant) has been convicted of various offences in connexion with the Mappilla rebellion. In the first instance he and his father were placed on trial together before the Special Judge, Mr. EDGINGTON. But, after the trial had proceeded for sometime, it was decided to hold two separate trials. Mr. EDGINGTON then began the trial of the present accused and, rather unnecessarily so far as we can see, exhibited the evidence already given at the joint trial, instead of treating it as given for the purpose of the trial of accused, whether alone or jointly. That, however, is not the point, with which we are concerned. What we are concerned with is that Mr. EDGINGTON ceased to be the Judge, before the trial of the accused was concluded, being succeeded by Mr. JACKSON. Mr. JACKSON, apparently on his own initiative, decided to hold the trial *de novo*. He did not apparently notice that the course he

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adopted, the exhibition of the witnesses' depositions in the previous trial without actually examining them *de novo*, deprived the accused and himself of any advantage which the *de novo* proceedings would have secured. We, however, have to decide whether there was an irregularity, which makes it our duty to order a new trial.

The general rule, as stated in 2 Hawkins' Pleas of the Crown, chapter 46, is that "in cases of life no evidence is to be given against a prisoner, but in his presence." That rule is followed in this country and has been extended under our Code to all criminal trials. It is assumed in the directions regarding different kinds of trials in the Criminal Procedure Code that the witnesses are examined *viva voce* in the course of the trial; and this has been recognized frequently in judicial decisions, for instance, in *The Queen* v. *Bishonath Pal*(1) and more recent cases to be referred to. No doubt departures from it are permitted, but only (so far as we have been shown) under some explicit provision of law, for instance, in cases in which it is difficult or impossible to secure the presence of a witness or under section 145 to contradict the witness's evidence at the trial or under section 157 to corroborate it; and there is also the class of cases covered by section 288, Criminal Procedure Code. But none of these provisions has any application to what happened in the case before us, in which, to anticipate the reference to a statement of the accused's vakil to be found in the record, one witness's previous deposition was filed "in order to save cross-examination." We must therefore hold that there has been a deviation from the normal course of procedure, which would ordinarily vitiate the proceedings.

(1) (1869) 12 W.R. (Crl. R.), 3.

The question is, however, whether that deviation is cured by the consent of the accused. There is no doubt nothing in the record to show that the accused or the three vakils, by whom he was represented, consented explicitly to it. We find, however, in the record of the short examination of the third prosecution witness at the conclusion of Exhibit D, his previous statement, that a copy of that previous statement was filed "at the request of the vakil for the accused to save cross-examination again." There is further the omission to take any objection to the procedure at the trial or as a ground of appeal in this Court; and such omission, although we do not allow it to stand in the way of the accused raising the point, is significant with reference to his attitude and the attitude of his advisers in the lower Court. We therefore hold that there was an implied consent by the accused to the admission of the copies of the previous depositions of the prosecution witnesses instead of their being examined in full at the trial.

Next we have to consider whether the accused's consent cures the irregularity. It has lately been held in *Jainab Bibi Saheba* v. *Hyderally Sahib*(1), that such a consent would cure a similar irregularity in a civil suit. But that is not the rule in criminal matters. As regards them we have a clear decision of the Privy Council in *Reg* v. *Bertrand*(2), in which the common understanding in the profession, that a prisoner can consent to nothing, is referred to in connexion with consent to an irregularity, very similar to that now under consideration; and it may be added that very comprehensive reasons are given by the Judicial Committee in support of its insistence on the evidence in criminal trials being taken *viva voce*. This decision was followed, the principle of it being

(1) (1920) I.L.R., 43 Mad., 609 (F.B.). (2) (1867) L.R., I.P.C., 520.

fully adopted in *The Queen* v. *Bishonath Pal*(1) already referred to, in *The Deputy Legal Remembrancer* v. *Upendra Kumar Ghose*(2) and *In re Annavi Muthiriyan*(3). It may therefore be taken that, although the Indian Law of Evidence was enacted in 1872, the judgment of the Privy Council has been accepted as stating the law applicable in this country, although it was pronounced in 1867. *In re Annavi Muthiriyan*(3) SESHAGIRI AYYAR, J., no doubt held that there was nothing in *Reg* v. *Bertrand*(4) or in the principle therein enunciated precluding the judge hearing the case on appeal from deciding whether, notwithstanding the consent of the accused, his case has been prejudiced by the irregularity. We can say only that the Privy Council restricted the discretion of the Appellate Court in such circumstances within very narrow limits, since their Lordships said that they would (if necessary) have interfered in the case before them, although they were not able to affirm or deny the inconveniences apprehended to have in fact happened in the trial then in question, "because it was one of the evils, incident to the cause that made such affirmation and denial equally impossible" and excluded only from their decision cases in which part of the previous deposition accepted in lieu of oral evidence was "so equivocably formal or very short" as to make their remarks inapplicable. With all respect, it is therefore impossible to recognize the existence of any such general discretion as was contemplated by SESHAGIRI AYYAR, J.

Reference has also been made before us to section 167 of the Indian Evidence Act. But that section cannot affect the considerations on which the Privy Council proceeded. Its application would only require us to

(1) (1869) 12 W.R. (Cri. R.), 3. (2) (1907) 12 C.W.N., 140.
(3) (1916) I.L.R., 39 Mad., 449. (4) (1886) L.R., I.P.C., 520.

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decide whether, if all the depositions in the previous trial, which were irregularly admitted, were expugned from the record, there would remain independently of those depositions sufficient evidence to justify the conviction. We have considered whether we can come to any such conclusion; and we find that we cannot, because the exclusion of those previous depositions, consisting, as they do, both of cross-examination and examination in chief, would leave us with a record, which represents no inquiry conducted fairly or with full appreciation at the time on the part of either side of what had been or remained to be proved. We cannot deal judicially with a record compiled after such a process of elimination, when it is clear that we have no security for accused having foreseen this effect of his consent on the trial as a whole.

In these circumstances the only course is to set aside the conviction of the accused appellant and direct that he be retried, the evidence of all the witnesses being taken *viva voce* and their previous depositions being admitted, only if their admission is justified by law.

In Referred Trial No. 64 of 1922 corresponding with Criminal Appeals Nos. 585 and 769 of 1922 the same objection has been taken and our order must be the same.

K.U.L.

APPELLATE CIVIL.

Before Mr. Justice Wallace.

AHAMAD THAMBI MARACAYAR (RESPONDENT), PETITIONER,

v.

BASAVA MARACAYAR (PETITIONER), RESPONDENT.*

1922, October 10.

Madras District Municipalities Act (V of 1920)—Rule 4 of Election Rules—"Taking part in ballot," meaning of—Candidate for chairmanship acting as Chairman and Returning Officer at his own election—Voidability of election—Judge inquiring into an objection to an election not a persona designata *but a Court subject to revisional jurisdiction of High Court—Duty of Judge before setting aside election—Revisional powers of High Court under section 115, Civil Procedure Code, on refusal of jurisdiction by Judge.*

A person who was himself a candidate for election to the chairmanship of a municipality acted as Chairman and Returning Officer at the station, conducting the ballot, opening the ballot box and counting the votes.

Held, that by such action he had "taken part in the ballot" within rule 4 of the election rules and that his eventual election was voidable. *The Queen* v. *Owens*, (1859) 2 El. & El., 86 and *The Queen* v. *White*, (1867) 2 Q.B., 557, followed.

Held further, that this action did not by itself invalidate his election and the Court had further to find before setting aside the election that as required by the rules "the result of the election has been materially affected thereby." *Shyam Chand Basak* v. *Chairman, Dacca Municipality*, (1920) I.L.R., 47 Calc., 524, distinguished.

A Judge hearing such an election petition is not a *persona designata* but a "Court." *Ramaswami Goundan* v. *Muthu Velappa Goundar*, (1923) 44 M.L.J., 1, followed.

Held also, that an order of the Judge setting aside the election without giving such a finding was one passed without jurisdiction and was liable to be set aside under section 115 (*c*) of the Civil Procedure Code. *Balakrishna Udayar* v. *Vasudeva Ayyar*, (1917) I.L.R., 40 Mad., 793 (P.C.), followed.

* Civil Revision Petition No. 395 of 1922.

AHAMAD THAMBI MARACAYAR v. BASAVA MARACAYAR.

PETITION under section 115 of Act (V of 1908) and section 107 of the Government of India Act praying the High Court to revise the order of V. S. NARAYANA AYYAR, Subordinate Judge of Negapatam, in Original Petition No. 71 of 1921.

In this case *A* whose term of office as Chairman of Negapatam municipality was about to expire in a few days was duly proposed and seconded for fresh election as Chairman on 2nd November 1921. Being the then Chairman he acted as Chairman at the meeting convened to elect the new Chairman and he acted also as Returning Officer, conducting the ballot, opening the ballot box and counting the votes. Having secured larger number of votes than his rival candidate he was declared duly elected. On an objection petition by one of the Councillors, the Subordinate Judge of Negapatam set aside the election. Thereupon *A* filed this revision petition.

Dr. Swaminathan for petitioner.—The Subordinate Judge has set aside the election of the petitioner on the only ground that he took part in the ballot. This is wrong as he did not vote ; and the fact that he presided at his election is due to the obligation cast on him as the then Chairman, by section 28 of the District Municipalities Act. At the most there has been only an irregularity. The election rules further require that before an election is set aside, the Judge has to find whether the result of the election had been materially affected by the irregularity. That finding alone gives him jurisdiction to set aside ; there is no such finding in this case. Hence the High Court can set aside the lower Court's decision under section 115, Civil Procedure Code. *Balakrishna Udayar* v. *Vasudeva Ayyar*(1), *Sundaram* v. *Mausa Mavuthar*(2). In making this

(1) (1917) I.L.R., 40 Mad., 793 (P.C.). (2) (1921) I.L.R., 44 Mad., 554 (F.B.).

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inquiry the Subordinate Judge acted not as a *persona designata* but as a Court ; hence his decision is revisable by the High Court. See *Ramaswami Goundan* v. *Muthu Velappa Goundar*(1) and the cases quoted therein.

T. M. Krishnaswami Ayyar for *V. N. Venkatavarada Achariyar* for respondents.—The election must be set aside as the petitioner took part in the ballot by himself presiding at the election, opening the ballot box and counting the votes. Section 28 does not compel him to preside at his own election. He could have delegated his duty to some one else or asked the Vice-Chairman to preside. By acting as a Returning Officer, he acted as a Judge in his own cause. Such an election is invalid ; see Halsbury, Volume 12, pages 326 to 328, Rogers on Elections, Volume III, page 115 ; *The Queen* v. *Owens*(2), *The Queen* v. *Blizard*(3), *The Queen* v. *White*(4), *The Queen* v. *Mayor of Tewkesbury*(5), *The Queen* v. *Morton*(6), and the cases cited therein. Rule IV of the election rules is based on this English Law. A Returning Officer's duties are judicial ; see *Woodward* v. *Sarsons*(7). The Judge must be deemed to have held that the result of the election had been materially affected by the illegality ; see *Shyam Chand Basak* v. *Chairman, Dacca Municipality*(8), *Woodward* v. *Sarsons*(7). At any rate the burden of proving the contrary is on the petitioner and he had not discharged it. There is no ground for interference in revision as there is no want of jurisdiction in the lower Court to decide the case. The finding is not a condition precedent to the exercise of the jurisdiction ; see *Venkataramanjulu Naidu* v. *Ramasami Naidu*(9), *Hriday Nath Roy* v. *Ram Chandra Barna*

(1) (1923) 44 M.L.J., 1.
(2) (1859) 2 El. & El., 89.
(3) (1866) 2 Q.B., 55, 58.
(4) (1867) 2 Q.B., 557.
(5) (1868) 3 Q.B., 629, 633.
(6) (1892) 1 Q.B., 39.
(7) (1874) 10 C.P., 733.
(8) (1920) I.L.R., 47 Calc., 524
(9) (1915) 29 M.L.J., 353.

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Sarma(1), *Amir Hassan Khan* v. *Sheo Baksh Singh*(2), *Birj Mohun Thakur* v. *Rai Uma Nath Chowdry*(3).

Dr. Swaminathan in reply.—There is nothing express in section 28 prohibiting the petitioner from presiding at his election and we cannot imply in it such a prohibition. We cannot import English rules of election into India; *Ramanjulu Naidu* v. *Parthasarathy Aiyengar*(4).

JUDGMENT.

WALLACE, J.

WALLACE, J.—Three main points have been argued on this petition, (1) whether the statutory rules for the election of the Chairman were broken, (2) whether having found that they were broken the lower Court was not bound to find further that that breach had materially affected the result of the election, before it could set aside the election, (3) whether if the Court has neglected so to find, this Court can, and, if it can, will, interfere in revision, and in what manner it should so interfere.

As to point (1) whether the election rules have been broken, the lower Court's finding appears to me to be a finding of fact, which in revision, this Court will not ordinarily disturb. It is pleaded for petitioner that the lower Court's finding is vitiated by a fundamental misreading of the rules which are statutory rules, i.e., that it is based on an error of law. Rule 4 lays down that:

> "no candidate whose name has been proposed and seconded shall take part in a ballot."

It is admitted that petitioner, whose name had been duly proposed and seconded, himself presided at the meeting and conducted the ballot, opened the ballot box, counted the votes and acted as Returning Officer.

(1) (1921) I.L.R., 48 Calc., 138 (F.B.).
(2) (1885) I.L.R., 11 Calc., 6 (P.C.). (3) (1893) I.L.R., 20 Calc., 8 (P.C.).
(4) (1915) M.W.N., 290.

I am in full agreement with the lower Court that this is "taking part in a ballot," and that that phrase is not restricted, as petitioner argues, to the mere act of voting. The rule has clearly been framed to carry out the salutary principle that no man shall be a Judge in his own cause, and that it should not be in the power of one vitally interested in the result to decide on such questions intimately affecting the result, e.g., the validity of a particular vote, as the officer presiding at the ballot has to decide. The English Law on this subject is quite plain, see *The Queen* v. *Owens*(1), *The Queen* v. *White*(2) and other cases cited on page 115 of Volume III of Rogers on Elections, 18th Edition, viz., that a candidate is precluded from acting as Chairman at an election and is incapable of acting as a Returning Officer, and that if he so acts and is elected, his election is voidable on petition *ad hoc*. Rule 4, I have no doubt, was designed to carry out the principle of English Law.

I have no doubt then that in this case rule 4 was broken, and that the lower Court did not misinterpret the rules or the law relating to elections when it held so. It has been urged before me that this rule 4 seems to be in direct contravention of section 28 of the Madras District Municipalities Act, Act V of 1920, which implies that at every meeting of the Council at which the Chairman is present, he shall preside. The difficulty is not met in my opinion by counter-petitioner's suggestion of interpreting "absence" as including "incapacity." These two words are in fact used in section 18 separately and as not implying each other, and if the incapacity of the Chairman to preside had been contemplated in section 28, similar language to that used in section 18 could have been employed. Section

(1) (1859) 2 El. & El., 89. (2) (1867) 2 Q.B., 557.

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30 (4) has been obviously misread by the lower Court and has no application to the present point. The difficulty however is resolved by holding that the word "Chairman" in section 28, includes "Chairman-Delegate" in cases where there is no Vice-Chairman, and in fact it is clear that one must hold so, otherwise the "Chairman-Delegate" could not preside at meetings at all, a *reductio ad absurdum*. The proper procedure then in cases like the present is that the Chairman, being incapacitated from fulfilling his duty of presiding at the election meeting, should under section 18 appoint a Chairman-Delegate, who, under section 28, would preside at the meeting. Whether the salutary principle that a man should not be a Judge in his own cause is preserved by a procedure which allows him to appoint his own Judge in his cause may well be doubted, but that is, so far as I can see, the result of the present procedure as laid down in the Act and the statutory rules.

Be that as it may, the difficulty does not alter the fact that petitioner committed a breach of the election rules in presiding at the meeting and taking part in the ballot for the election at which he was a candidate. It does not, however, at all follow that the lower Court's order setting aside the election was correct. Here I come to the second point argued before me. Under the statutory rules for the decision of election disputes published in the *Fort St. George Gazette*, dated 30th November 1920, page 607, non-compliance with the provisions of the Act or rules made thereunder can invalidate an election only if

> "the result of the election has been materially affected thereby."

To that question the lower Court has, in my opinion, nowhere given its attention. Counter-petitioner argues that since the lower Court holds that the rule broken

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was a mandatory provision, it must be deemed to have held that the result of the election was materially affected, and relies on the ruling in *Shyam Chand Basak* v. *Chairman, Dacca Municipality*(1). What the Election Rules in Calcutta are, has not been stated before me. If they follow rule 13 of the English Ballot Act of 1872 as quoted at page 532 of that ruling, they are wider in principle than the rules in Madras, for under rule 13 an election conducted "not in accordance with the principles laid down in the body of the Act may be declared invalid." Under the Madras Rules no breach of the rules, whether mandatory or directory, shall invalidate an election unless the result of the election has been materially affected by such breach. It is not an axiom then in this Presidency that the breach of a mandatory rule will so affect an election. It is a question of fact to be decided and found by the Judge who hears the election petition.

It was the more necessary for the lower Court to have decided this question in this case, as it was never even alleged much less attempted to be proved by counter-petitioner, that the result of the election would have been different had the rules not been broken, and there is no suggestion that, while the ballot was going on, the petitioner had to give and did give a decision on any point which could have affected the result of the ballot, and the majority of votes in his favour was overwhelming. Counter-petitioner argues that the onus of showing that the breach did not affect the election lay on petitioner who had violated the rule. Granting so, it is still clear that the lower Court never put that issue before petitioner or called on him to prove it, while obviously it was unnecessary for

(1) (1920) I.L.R., 47 Calc., 524.

petitioner to go out of his way to set out any rebuttal to a case never stated by counter-petitioner in his objection petition to the lower Court.

The lower Court has thus neglected to put to itself and to the parties the question it had to decide before under the rules it had any legal power to set aside the election. I therefore come to the third point argued, viz., whether this Court can, and if it can, will, interfere in revision. That in a matter of this kind this Court has power to interfere under section 115 of the Code of Civil Procedure has been lately decided by a Bench of this Court, in *Ramaswami Goundan* v. *Muthu Velappa Goundar*(1). I need not recapitulate the *ratio decidendi* of the decisions of their Lordships KRISHNAN and VENKATASUBBA RAO, JJ., on this point, with which I respectfully agree. They hold that, when dealing with an election inquiry of this kind, the Judge is sitting as a Court subordinate to this Court and therefore section 115 applies.

Is the present case one then in which this Court should interfere on revision? The phrase in section 115 which can be called in aid by petitioner is—

> "if such subordinate Court appears to have acted in the exercise of its jurisdiction with material irregularity."

A good deal of discussion has centred round this point and many cases have been cited to me for the purpose of showing in what sort or class of cases High Courts in India and in England have acted in revision. I need not deal with these cases in detail since they all lead to the same conclusion that what is a "material irregularity" is a matter in itself undefinable and must be decided on the facts in each case. So far as it may be negatively defined, it is not a mere mistake of fact or law; see [*Amritrav Krishna Deshpande* v. *Balkrishna Ganesh Amrapurkar*(1), *Kuppuswami Aiyangar* v. *Narayana Aiyangar*(2), *Jhotu Lal Ghose* v. *Ganouri Sahu*(3), *Merwanji Muncherji Cama* v. *Secretary of State for India*(4)], unless that mistake has occasioned a wrong assumption or refusal of jurisdiction [*Atchayya* v. *Seetharamachandra Rao*(5), *Hindley* v. *Joynarain Marwari*(6)] since a Court which has jurisdiction to decide a case on a point of fact or law has jurisdiction to give a wrong as well as a right decision on either point. Thus where there is jurisdiction and that jurisdiction has been exercised merely wrongly so as to eventuate in a wrong decision on fact or law, section 115 cannot be called in aid; see *Amir Hassan Khan* v. *Sheo Baksh Singh*(7) and *Shew Prosad Bungshidhur* v. *Ram Chunder Haribux*(8). But when there is jurisdiction and that jurisdiction has not been exercised or has been illegally or irregularly exercised, section 115 will apply; see *Balakrishna Udayar* v. *Vasudeva Ayyar*(9).

I take the general principle to be this, that when a Court has taken up a point of fact or law for decision and has decided that point wrongly, it has acted with full jurisdiction and regularly and legally, and no revision lies unless that decision itself affects the Court's own jurisdiction; but that when, having jurisdiction, the Court has failed or refused to take up the point for decision, it has exercised its jurisdiction irregularly, and the more the failure or refusal affects the exercise of its jurisdiction, the greater the irregularity will be.

Applying that principle to the present case, and recalling my conclusions that the lower Court has

(1) (1923) 44 M.L.J., 1.

(1) (1887) I.L.R., 11 Bom., 488.
(2) (1916) 3 L.W., 36.
(3) (1918) 3 Pat. L.J., 376.
(4) (1915) 29 M.L.J., 299 (P.C.).
(5) (1916) I.L.R., 39 Mad., 195 (F.B.).
(6) (1919) I.L.R., 46 Calc., 962.
(7) (1885) I.L.R., 11 Calc., 6 (P.C.).
(8) (1914) I.L.R., 41 Calc., 323.
(9) (1917) I.L.R., 40 Mad., 793 (P.C.).

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omitted to decide whether the result of the election was materially affected by the breach of the rules, i.e., to decide the one point in this case which gave it jurisdiction to set aside the election, I cannot come to any other conclusion than that the Subordinate Judge exercised his jurisdiction with material irregularity. Clearly he exercised it irregularly, since he had no legal basis on which to set aside the election and overlooked the one factor which alone gave him jurisdiction to set it aside; and clearly the irregularity was material, because it may well be that if he had decided that question, his decision might have been in petitioner's favour, and then he would not have set aside the election.

I, therefore, under section 115 (*c*) set aside the lower Court's order and direct it to re-hear and decide afresh the petition before it according to law. In doing so, the Subordinate Judge will consider, if he decides that the election should be annulled, whether having regard to the amendments introduced by Madras Act I of 1922 into Madras Act V of 1920, a fresh election is necessary. It is a point I have not heard at length in this Court.

Costs in this petition and up-to-date in the lower Court will abide the result.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Ramesam.

DEVASAKAYAM (PLAINTIFF), APPELLANT,

v.

DEVAMONY AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1922, October 16.

Indian Divorce Act (IV of 1869), ss. 15 and 37—Suit by husband for divorce on the ground of adultery—Application by wife for maintenance—Power of Court to grant maintenance under the Act.

It is not competent to the Court dismissing, a husband's petition for dissolution of marriage, to award maintenance to the wife, under section 15 or 37 of the Indian Divorce Act.

Though the wife might have filed an application for divorce or judicial separation on the husband's petition, under section 15 of the Act, still in the absence of a decree for dissolution or judicial separation, no order for maintenance can be made under the Act.

APPEAL against the decree of P. C. LOBO, the acting District Judge of Madura, in Original Suit No. 16 of 1919.

The material facts appear from the Judgment.

K. U. Luke, Counsel for appellant.

C. Viraraghava Ayyar for respondents.

The JUDGMENT of the Court was delivered by

KRISHNAN, J.—This is an appeal from the decree of the District Judge, Madura, in a suit brought by the plaintiff for dissolution of his marriage with his wife the first defendant on the ground of her adultery with the second defendant as the co-respondent. Both the first and second defendants deny the alleged adultery, the first KRISHNAN, J.

* Appeal Suit No. 296 of 1920

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defendant also pleading that she was beaten and driven out of her house by her husband on more than one occasion.

The District Judge who tried the case after hearing the evidence came to the conclusion that plaintiff had failed to prove the adultery alleged and dismissed the suit. Further he passed an order granting permanent maintenance to the first defendant at the rate of Rs. 10 a month.

The learned Counsel for the appellant has placed the evidence in his client's favour before us and we have carefully considered that evidence. It consists of the oral evidence of five witnesses and after hearing that evidence we agree with the District Judge that it is unreliable for the reasons stated by the District Judge. We agree therefore with the District Judge in holding that the adultery is not proved ; the claim for dissolution of marriage must be rejected.

As regards the granting of alimony at the rate of Rs. 10 a month, the contention of the Counsel for the appellant is sound ; that it was an order that could not have been passed in this case. Permanent alimony can be granted under the Indian Divorce Act only under section 37. The circumstances justifying such a grant have not arisen here, the suit for dissolution of marriage having been dismissed. It is however argued for the respondent (the wife) that under section 15 of the Act it was open to the lower Court to grant maintenance on finding that the wife had been treated cruelly and had been driven out of the house. We do not think that section justifies this. It says, " In a suit instituted for dissolution of marriage," in certain cases, " the Court may give to the respondent on her application the same relief to which she would have been entitled in case she had presented a petition seeking such relief." It is

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perfectly clear that this refers to a petition which could have been filed under the Indian Divorce Act. Thus she might, in answer to her husband's suit, claim if there are circumstances which justify such relief, decree for judicial separation or for dissolution of marriage. In case such a decree is passed at her instance, the Court would be in a position to act under section 37. It is not contended that a bare application for maintenance can be put in by the wife against the husband under the Indian Divorce Act. If she wants maintenance without either judicial separation or divorce, she can have the remedy only by filing a suit or an application under the Criminal Procedure Code. The order therefore granting maintenance to the wife is *ultra vires*. It must therefore be set aside. In the result we vary the decree of the lower Court by striking out the order for maintenance and otherwise dismiss the appeal with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Ramesam.

1922, November 1.

T. S. N. MUHAMMAD ROWTHER (APPELLANT), DEFENDANT,

v.

M. M. ABDUL REHMAN ROWTHER (RESPONDENT), PLAINTIFF.*

Civil Procedure Code (Act V of 1908), sec. 11, explanation 4—Res judicata—Might and ought to have made a ground of attack—Previous suit for partition and recovery of possession, as co-purchaser under a common purchase with two others—Sale in name of one—Purchase held not to be joint—Subsequent suit by the same plaintiff as heir of the sole purchaser—Bar of res judicata—Ground of attack—Duty to join different grounds of title in one suit—Suit against trespasser in ejectment.

* Appeal No. 85 of 1921.

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Where a person instituted a suit against a trespasser in possession, for partition and recovery of his share in certain lands on the footing that he was a co-owner under a joint purchase made by himself and his two deceased brothers, but his claim was dismissed on the ground that the purchase was not a joint one but the sole purchase of one of the deceased brothers, and the former instituted a subsequent suit to recover his share as one of the heirs of the deceased purchaser.

Held, that the suit was barred by the rule of res judicata, as the plaintiff ought to have joined his subsequent ground of title in the former suit under section 11, explanation 4, Civil Procedure Code.

Woomatara Debia v. *Unnopoorna Dassee*, (1872) 11 Beng. L.R., 158; *Srimut Rajah Moottoo Vijaya* v. *Kattama Nachiar*, (1866) 11 M.I.A., 50; *Kameswan Pershad* v. *Rajkumari Ruttan Kore*, (1893) I.L.R., 20 Calc., 79 (P.C.) and *Moosa Goolam Ariff* v. *Ebruhim Goolam Ariff*, (1913) I.L.R., 40 Calc., 1 (P.C.), applied. *Payana Reena Saminathan* v. *Pana Lana Palaniappa*, (1913) 41 I.A., 142, distinguished. *Ramaswami Ayyar* v. *Vythinatha Ayyar*, (1903) I.L.R., 26 Mad., 760, explained.

APPEAL against the decree of T. N. LAKSHMANA RAO, Subordinate Judge of Madura, in Original Suit No. 56 of 1921.

The material facts appear from the judgment. The lower Court held that the previous suit was not a bar as res judicata in the present suit, and awarded a decree directing the delivery of possession of the suit lands to the plaintiff from the defendant. The latter preferred this appeal.

A. Krishnaswami Ayyar for the appellant.—The previous suit was in ejectment against the present defendant as a trespasser. So also is the present suit. The plaintiff ought to have joined his present ground of title in the previous suit, section 11, explanation 4, Civil Procedure Code. His title as residuary heir of M. ought to have been joined in the previous suit which was also on his title as owner by purchase. The matter is concluded by several decisions of the Privy Council. The learned vakil cited various authorities which are referred to in the judgment.

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share to plaintiffs 2 and 3. They have executed that decree and got possession of that share.

It is for the balance three-eighths share of the house in Madura that the plaintiff brings the present suit against the sixth defendant. He now claims as the sole residuary heir to Muthu Mahomed being his sole surviving brother. Defendant contends that the plaintiff "might and ought to have" claimed this relief in the alternative in the previous suit and not having done so he is barred by section 11 read with explanation 4 from claiming it again.

The previous suit was, so far as the present defendant is concerned, a suit for his ejectment from the suit house on the ground that he had no valid title to it or in other words that he was a trespasser; and it was based upon plaintiff's title as owner by joint purchase with two others. The prayer for partition was only against the heirs of the brother. It did not concern the present defendant. It is conceded that in that suit plaintiff might have put forward his claim to ownership by inheritance as heir to Muthu Mahomed as an alternative claim. In fact though the case of the plaintiffs 2 and 3 was also one based on Muthu Mahomed being entitled to only a third share as joint purchaser they were given a decree for their five-eighths share in the whole property on the footing that it belonged solely to Muthu Mahomed. Plaintiff could have got relief on the same footing in that suit if he had put forward his claim as Muthu Mahomed's residuary heir.

The question then is whether he "ought" to have put his present claim forward in that suit. The ruling in *Woomatara Debia* v. *Unnopoorna Dassee*(1) is in point where their Lordships of the Privy Council held that a suit to recover property on the ground that it was part

(1) (1874) 11 Beng. L.R., 158.

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of plaintiff's taluk was barred by a previous suit for the same land on the ground that it was tanfir land or land which was obtained by adverse possession as the two claims should have been combined in the first suit. In the case before us the first case was for possession against the defendant as owner on the strength of plaintiff's title by purchase ; the present case is again for possession on the strength of plaintiff's title as owner by inheritance. In both cases plaintiff is litigating under the same title namely, his ownership. He should therefore according to this ruling have combined the two claims in the first suit.

In that case their Lordships followed an earlier ruling of theirs in *Srimut Rajah Moottoo Vijaya Raganadha Bodha Gooroosawmy Periya Odaya Tevar* v. *Katama Nachiar, Zamindar of Sivagunga*(1), where in the first suit the party rested his title upon the property being the separate property of the zamindar, whereas in the second suit he claimed title under a will. That plea was held to be barred.

The case of *Woomatara Debia* v. *Unnopoorna Dassee*(2) is referred to in *Ramaswami Ayyar* v. *Vythinatha Ayyar*(3). The learned Judge while distinguishing it from the case before him which was one of redemption of a mortgage different from the one sought to be redeemed in the first case though on the same property observes that the suits in *Woomatara Debia* v. *Unnopoorna Dassee*(2) were " both suits based upon plaintiff's title as owner " and that

" the case is an authority only for the position that if one is dispossessed of land and brings a suit to recover possession on the strength of his title, he must establish his title in that very suit, by urging and proving all that would go to establish his title and cannot reserve one or more of such grounds for a

(1) (1866) 11 M.I.A., 50. (2) (1872) 11 Beng. L.R., 158.
(3) (1903) I.L.R., 26 Mad. 730, at p. 774 and 775.

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future suit, and this is what is laid down in explanation 2 of section 13, Civil Procedure Code "

which is the same as explanation 4 to section 11 of the present Code. Even taking this restricted view of the scope of the decision without deciding whether it is correct to so restrict it, it appears clear that the present case falls within it and is covered by the explanation.

The Privy Council again held in *Kameswar Pershad* v. *Rajkumari Ruttan Koer*(1) that a suit to enforce a charge on property barred a second suit for the same amount on a personal covenant to pay under the same agreement. Their Lordships say that

" the question whether the second claim ought to have been put forward in the first case depends on the particular facts of each case. When matters are so dissimilar that their union might lead to confusion, the construction of the word 'ought' would become important. In this case, matters were the same. It was only an alternative way of seeking to impose a liability upon Run Bahadur and it appears to their Lordships that the matter 'ought' to have been made a ground of attack in the former suit."

This case shows that if a person has two grounds on which he could base his claim or title to a thing he must bring forward both in the first suit itself and he will be barred from bringing a second suit, unless indeed the union leads to confusion. In the case before us the joining together of the two claims, the one under the purchase and the other as heir, would have led to no confusion or embarassment. If plaintiff failed to prove the joint purchase he alleged, the property must have necessarily been taken to be Muthu Mahomed's as the deed was in his name, and as the plaintiff claimed title through him, for his alternative claim he would then have to prove only that he is a residuary to get relief on that

(1) (1893) I.L.R., 20 Calc., 79 (P.C.).

ground. In either case the invalidity of the sixth defendant's title must be proved so that the addition of the alternative case will have led to no confusion at all and no embarassment to plaintiff in leading his evidence.

The case of *Kameswar Pershad* v. *Rajkumari Ruttan Koer*(1) was followed by their Lordships again in *Moosa Goolam Ariff* v. *Ebrahim Goolam Ariff*(2). Thus it would seem clear on the authority of the Privy Council ruling that the plaintiff should have put forward all his grounds of attack to recover the suit house from the defendant and not having put forward his claim based on his right of inheritance in the former suit he is now barred from doing so. The fact that plaintiff claimed in the first suit a one-third share by partition whereas now he claims a specific three-eighths share which alone is left with the defendant, the balance having been recovered from him by Muthu Mahomed's widow and daughter, can make no difference to the application of the rule of res judicata; for according to both his claims the defendant had no right to any portion of the property he being a trespasser. A plaintiff cannot by claiming a larger or a smaller share in the same property than in his first suit get rid of the effect of res judicata against him. In both cases the relief against the defendant is to recover possession from him of the whole or part of the same property.

Besides the above mentioned authorities the appellant cited *Masilamania Pillai* v. *Thiruvengadam Pillai*(3), *Rangaswamy Patrudu* v. *Applaswamy*(4) and *Guddappa* v. *Tinkappa*(5). The respondent, on the other hand, has quoted a number of cases where it was held that the second suit was not barred but I think it is not necessary

(1) (1893) 20 Calc., 79 (P.C.).
(2) (1913) I.L.R., 40 Calc., 1 (P.C.). (3) (1908) I.L.R., 31 Mad., 385.
(4) (1916) 1 M.W.N., 286. (5) (1901) I.L.R., 25 Bom., 189.

to discuss them all. It is not possible to reconcile all the cases; but it may be conceded that a plaintiff is not bound under Order II, rule 2, to join in one suit all the causes of action he has got against the defendant; but that principle is not the one applicable to the question before us which refers to a plaintiff's duty to bring forward all the grounds of his attack in support of the title that he is litigating. Reference must, however, be made to two of the cases relied on by the learned vakil for the respondent, *Ramaswami Ayyar* v. *Vythinatha Ayyar*(1) a decision of this Court and *Payana Reena Saminathan* v. *Pana Lana Palaniappa*(2), a decision of the Privy Council in an appeal from Ceylon. In the former case it was ruled that the dismissal of a suit to redeem one mortgage did not bar subsequent suit to redeem another mortgage on the same property. I agree with this decision as the two suits are different from one another being based on two different contracts. The title or jural relationship in the two litigations are different as the terms of the two mortgages which regulate that relationship are different. But I do not wish to be understood as agreeing to all the observations in that judgment. That case is really an illustration of the rule that a plaintiff is not bound to combine different causes of action in the same suit and does not apply here.

In the Privy Council case *Payana Reena Saminathan* v. *Pana Lana Palaniappa*(2), the first suit was on certain promissory notes, which failed as the notes were found to have been materially altered. The second suit was for money due under a certain award or settlement for which the notes had been given. The question considered in that case was not one of res

(1) (1903) I.L.R., 26 Mad., 760. (2) (1913) 41 I.A., 142.

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judicata but whether the second suit was barred by reason of section 34 of the Ceylon Procedure Code corresponding to Order II, rule 2, of our Code. Their Lordships held that the claim on the notes and the claim on the original consideration under the award or settlement were quite independent claims and constituted "two inconsistent and mutually exclusive causes of action" and therefore the second suit did not offend against the section quoted. No question of the kind before us was raised and we cannot therefore treat it as an authority on that question.

For the above reasons I hold that the present suit is barred by section 11, explanation 4, Civil Procedure Code, and must be dismissed. I allow the appeal and dismiss the suit with defendant's costs throughout.

RAMESAM, J.

RAMESAM, J.—The facts are fully stated by my learned brother.

The decision depends on a construction of the words "litigating under the same title" taken with explanation 4 in section 11 of Civil Procedure Code. As a large number of decisions, including those of the Judicial Committee are available as guides, it is futile to attempt to work out the details in the application of the section by mere consideration of the words of the section. On an analysis of the decisions cited before us, the following propositions may be gathered from them (without attempting to generalize):—

(1) Where the creditor (hypothecatee) of a Hindu widow claimed to recover the debt from a reversioner who got into possession of the estate through a surrender by the widow, a claim based on the ground of an express covenant at the time of surrender to pay the debt, is barred by a prior suit to recover the identical debt where it was based on the ground that it was beneficial

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to and binding on the reversion—*Kameswar Pershad's* case(1).

(2) Where the first suit was to redeem one mortgage it does not bar a suit to redeem a mortgage of a different date, though the property sought to be redeemed and the principal amount of the mortgage are identical. *Ramaswami Ayyar* v. *Vythinatha Ayyar*(2), *Veerana Pillai* v. *Muthukumara Asari*(3) and *Thrikaikat Madathil Raman* v. *Thiruthiyil Krishen Nair*(4).

(3) Where the first suit was based merely on the relationship of landlord and tenant between plaintiff and defendant (and not on plaintiff's title as owner or otherwise) a second suit based on title is not barred: *Mangalathammal* v. *Veerappa Goundan*(5).

In the first case the claimant litigates under the same title but not in the second and third cases.

(4) Where the plaintiff sought to recover a property as owner, a second suit to recover the same property also as owner is barred, even though the details for the ownership are different from those in the first.

It is scarcely necessary to add that in cases 1 and 4 the facts which are the basis of the second suit must have existed at the time of the first suit to attract the bar of res judicata. The fourth proposition is supported by *Woomatara Debia* v. *Unnopoorna Dassee*(6), *Moosa Goolam Ariff* v. *Ebrahim Goolam Ariff*(7), *Guddappa* v. *Tirkappa*(8), *Masilamani Pillai* v. *Tiruvengadam Pillai*(9), *Rangaswamy Patrudu* v. *Appalaswamy*(10).

In my opinion the decisions in *Subrahmanian Chetti* v. *Authinarayanan*(11) and in Second Appeal No. 1606 of

(1) (1893) I.L.R., 20 Calc., 79 (P.C.).
(2) (1903) I.L.R., 26 Mad., 760.
(3) (1904) I.L.R., 27 Mad., 102.
(4) (1906) I.L.R., 29 Mad., 153(F.B.).
(5) (1919) M.W.N., 287.
(6) (1872) 11 B.L.R., 158 (P.C.).
(7) (1913) I.L.R., 40 Calc., 1 (P.C.).
(8) (1901) I.L.R., 25 Bom., 189.
(9) (1908) I.L.R., 31 Mad., 385.
(10) (1916) 1 M.W.N., 286.
(11) (1897) 7 M.L.J., 288.

1914 and Second Appeal No. 1 91 of 1917 (unreported) are inconsistent with *Woomatara Debia* v. *Unnoppoorna Dassee*(1). I also agree with SESHAGIRI AYYAR, J.'s dissent in *Rangaswamy Patrudu* v. *Appalaswamy*(2) from the remarks at page 779 of *Ramaswami Ayyar* v. *Vythinatha Ayyar*(3).

In the application of the fourth proposition it must be remembered that the claim in the second suit must be either substantially identical with or part of the claim in the first suit.

Coming to the present case, can there be any difference for the purposes of res judicata merely because (1) the share claimed by the plaintiff in the present case is three-eighths and that in the former case was one-third and (2) there was a claim for partition in the first suit and none now ? I think not. In the first place the share to which the plaintiff was entitled in the former suit (on the footing that all the three brothers originally acquired the property) was not one-third but one-third plus three-eighths of one-third or eleven twenty-fourths, the plaintiff being entitled to the extra one-eighth by reason of succession from the second brother. Though the results of this succession were overlooked, in so far as the two-thirds claimed by all the three plaintiffs in the former suit were concerned, it was a claim for ejectment against the present defendant (whether the two-thirds consisted of one-third belonging to first plaintiff and one-third to second and third plaintiffs or eleven twenty-fourths to first plaintiff and five twenty-fourths to second and third plaintiffs). The fact that a partition was asked for because the heirs of the first brother did not join as co-plaintiffs was a mere accident and does not change the character of the suit.

(1) (1872) 11 B.L.R., 158 (P.C.).
(2) (1916) 1 M.W.N., 286.
(3) (1903) I.L.R., 26 Mad., 760.

The share now claimed (viz., three-eighths of the plaintiff) was certainly less than the eleven twenty-fourths to which he was entitled at the time of the former suit (even on the allegation of acquisition by all the three brothers) though by an oversight as to the results of the death of the second brother, his title was described as that to a third; and it certainly overlaps substantially the claim actually made. If the shares are identical though there is no claim for partition in the second suit, it cannot be said that the second suit is not barred and the non-identity of the shares is a mere accident and can make no difference for the application of the principle.

In *Balbhaddar Nath* v. *Ram Lal*(1), *Shivram* v. *Narayan*(2) and *Konerrav* v. *Gurraw*(3) the plaintiff's right as co-owner (using the term generally) was admitted in the first and only the fact of a partition resulting in plaintiff's right to a specific plot was in dispute. In the interval between the two suits, he continued to be co-owner and the second suit for partition was not barred. In *Nilo Ramchandra* v. *Govind Ballal*(4) (a suit for vatan property) some of the defendants in the first suit admitted plaintiff's right though not the one who was the contesting defendant in the second suit. In *Thandavan* v. *Valliammal*(5) the first suit was for a declaration and there was neither identity of suit nor identity of issue as to the validity of the will and in *Dhanapala Chetti* v. *Anantha Chetti*(6) the construction of the will in the second suit was not in question in the first suit. In *Allunni* v. *Kunjusha*(7) the karnavan had not exercised his right to

(1) (1904) I.L.R., 26 All., 501.
(2) (1881) I.L.R., 5 Bom., 27.
(3) (1881) I.L.R., 5 Bom., 589.
(4) (1886) I.L.R., 10 Bom., 24.
(5) (1892) I.L.R., 15 Mad., 336.
(6) (1913) 24 M.L.J., 418.
(7) (1894) I.L.R., 7 Mad., 264.

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resume as karnavan at the time of the first suit. In Second Appeal No. 1391 of 1917 if the plaintiff's right to his own undivided share was admitted in the first suit, that decision would have been distinguishable like *Balbhaddar Nath* v. *Ram Lal*(1) and the cases in *Shivram* v. *Narayan*(2). As it is, I am not able to agree with it. It cannot be said either in Second Appeal No. 1391 of 1917 or in the present suit that if the second claim was made alternatively in the first suit, the first suit would have been bad for misjoinder of parties and of causes of action either under the present Code or the old Code. In the result, I agree with my learned brother that the plaintiff's suit should be dismissed with costs throughout.

K.R.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, and Mr. Justice Wallace.

1922, November 1.

ABDUL SHAKER SAHIB, (FIRST) DEFENDANT, APPELLANT,

v.

ABDUL RAHIMAN SAHIB AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Specific Relief Act (I of 1877), sec. 35—Specific performance—Contract for sale of lands—Decree of original Court, giving time to plaintiff for payment of price—Appeal by defendant—Power of original Court to extend time—Nature of Original decree—Preliminary decree—Power of Appellate Court to extend time in the appeal by the defendant—Jurisdiction of original Court to pass necessary orders, including granting of further time.

Where, in a suit for specific performance of a contract for sale of certain lands, the original Court passed a decree directing the

(1) (1904) I.L.R., 26 All., 501. (2) (1881) I.L.R., 5 Bom., 27.

* Original Side Appeal No. 126 of 1921.

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defendant to execute a conveyance on the plaintiff paying the price within a certain time, the decree is in the nature of a preliminary decree, the original Court keeping control over the action and having full power to make any just and necessary orders therein, including inappropriate cases the extension of the time limited by the decree.

Where the defendant had preferred an appeal against such a decree, and the plaintiff had applied to the original Court for extension of time limited in the decree before such time had expired and the Court had ordered the application to lie over pending the appeal,

Held, that the Appellate Court had power to extend the time limited by the original decree, and that the original Court had still jurisdiction in the matter and had full powers to deal with any point that might arise, including, if necessary, an application for further time.

Practice of English Courts of Equity in actions for specific performance pointed out and form of decree, indicated.

ON APPEAL from the decree of Mr. Justice COUTTS TROTTER passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 80 of 1920.

The respondents instituted this suit for specific performance of a contract to reconvey lands to them by the first defendant. The first defendant had purchased the superstructure from the plaintiffs and defendants 2 to 4 and the land from a third party. It was proved that the first defendant had agreed to reconvey the lands to the plaintiffs and defendants 2 to 4 (who refused to join as plaintiffs and were therefore joined as defendants), on payment of Rs. 4,000 within one year from the date of purchase by him. The plaintiffs, alleging tender within time and wrongful refusal by the first defendant, sued for specific performance. The learned Trial Judge found the agreement and tender to be true and, overruling the plea that specific performance could not be granted as some of the parties entitled, viz., defendants 2 to 4 were not willing to be

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plaintiffs, decreed that the first defendant should execute a conveyance of the suit properties "upon payment by the plaintiffs for themselves and on behalf of defendants 2 to 4 to the first defendant on or before the 19th December 1921, the sum of Rs. 4,000," etc., and also directed that the plaintiffs and defendants 2 to 4 be put in possession of the properties. The first defendant appealed against this decree. Pending the appeal and before the expiry of the time limited in the original decree for payment of the price by the plaintiffs, the latter applied in the original Court for extension of time for payment. This application was ordered by the learned Trial Judge to lie over until disposal of the appeal. When the appeal came on for hearing, the appellant contended *inter alia* that the appeal should be allowed without going into the merits, as the plaintiff had failed to obtain extension of time to perform the condition in the decree and had thereby lost the benefit of the decree.

K. Rajah Ayyar for appellant.—I take a preliminary point. The plaintiffs have not paid the decree amount within the prescribed period. So, the decree has become infructuous because the time originally given cannot be extended by either the original or the appellate Court. Reference was made to *Ramaswami Kone* v. *Sundara Kone*(1), *Moideen Kuppai* v. *Ponnuswamy Pillai*(2) and *Gopala Aiyar* v. *Sannasi*(3).

T. L. Venkatarama Ayyar for respondents.—The real point for determination is whether the action is alive or dead. If it is alive, the power of the Court to enlarge the time fixed by the decree is really inherent, and is preserved by section 151 of the Civil Procedure Code. The decree is preliminary in its nature. It merely

(1) (1908) I.L.R., 31 Mad., 28. (2) (1914) 1 L.W, 882.
(3) (1916) 3 L.W., 29.

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declares the rights of parties under the contract. Strictly speaking the case ought to have been adjourned for further hearing after the declaration. The contract is not finally determined by the preliminary decree. In the Civil Procedure Code no form is given. But see the forms in Seton. The decree in this case does not provide for dismissal of the suit in default of payment within two months. So, by reason of the default, the action is not dead but in a comatose condition. It was open to the appellant to apply for dismissal of the suit for default in payment but until such a further order is obtained the action is pending, and time can be extended. Reference was made to *Collinson* v. *Jeffrey*(1), and to *Idumba Parayan* v. *Pethi Reddi*(2).

K. Rajah Aiyar in reply.—In *Idumba Parayan* v. *Pethi Reddi*(2) the Judges held that the decree in substance was a mortgage decree and so applied Order XXXIV, rule 8. That case has been dissented from in *Bhupal Singh* v. *Ujagar Singh*(3) where it is stated that on failure to deposit the amount the decree is tantamount to one of dismissal. So, the action is at an end.

[Their Lordships intimated that they were against the appellant on the preliminary point and proceeded to hear the appeal on the merits.]

JUDGMENT.

SCHWABE, C.J.

SCHWABE, C.J.—The respondents—plaintiffs, obtained a decree for specific performance of a contract for the sale of certain lands and superstructures thereon to them by the first defendant. COUTTS TROTTER, J., gave judgment in the following words:—"I must therefore find for the plaintiffs and give them decree for specific performance on payment of Rs. 4,000. Time for

(1) (1896) 1 Ch., 644.
(2) (1920) I.L.R., 43 Mad., 357. (3) (1921) I.L.R., 43 All., 88.

payment two months." In pursuance of this judgment a decree was passed providing (1) that, upon payment by the plaintiffs on or before the 19th day of December 1921 of a sum of Rs. 4,000 only, the first defendant do execute and register a proper deed of conveyance of the properties in the schedule, (2) that upon payment the first defendant do put the plaintiffs in possession of the properties together with all documents and title-deeds. Before the expiry of the two months, that is, before December 19th, the first defendant had given notice of appeal. Before the expiry of the two months but after the notice of appeal, the plaintiffs had issued an application before the Judge in charge of the Original Side for extension of the time for paying the money and this application was heard in January 1922, that is, after the expiration of the two months and was ordered to stand over until the hearing of this appeal. The appeal coming on, a preliminary point is taken, namely, that the two months having now elapsed neither the Original Court nor this Court has any power to extend the time and that therefore the plaintiffs have lost irrevocably all their rights under the decree except the costs, and that it is therefore useless to occupy the time of this Court in considering the merits of the case. I do not think that this is strictly a preliminary point, because the question of the costs of the suit would still remain. If the decree was right the plaintiffs would be entitled to costs from the first defendant and if wrong the plaintiffs would be liable for costs. But the question has been fully argued on both sides and raises important points on which we shall express our opinion.

The decree as drawn up, I am told, is the ordinary form of decree in use here in cases of specific performance. It may be that it is a convenient form in certain cases, though I have been unable to discover its history and

how it came to be adopted. No form for a decree for specific performance is provided by Statute or rule here, and it has been left to the Courts to devise a suitable and appropriate form. Specific performance is an equitable remedy which has been known and used by the Courts of Chancery in England for centuries and appropriate forms of judgment have been approved by learned Equity Judges in England and have now become almost stereo-typed: and those at present in use will be found set out in Seton on Judgments under the title Specific Performance. On a perusal of them the first thing to be observed is that not one of those forms contains in the first instance a limit of time for payment of the purchase money, and not one attempts to make payment of the purchase money by a certain date a condition of the continuance of the rights under the judgment. After the original judgment for specific performance, it is the definite practice in England that all consequential reliefs by reason of any party failing to comply with the terms of the judgment must be sought by application to the Court by which the judgment was passed. Such applications are made by motion in the action showing that in England after the original judgment the action is by no means ended but remains under the control of the same Court. If the default is made by the purchaser in paying the purchase money, there are several remedies open to the vendor. (1) He may on motion in the action obtain an order fixing a definite time and place for payment and delivery over of the conveyance and title-deeds and can, after the expiration of that time, levy execution for the amount, if not paid. (2) He may apply by motion in the action for an order rescinding, not the judgment but the contract, and in order to succeed in such a motion he has to satisfy the Court that there has been a positive refusal to complete,

which it may be observed in the present case, the respondent has certainly not proved. A similar right is given by section 35 of the Specific Relief Act of 1877. (3) He can enforce his unpaid vendor's lien for the purchase money and costs (4) He can by motion in the action obtain an order for sale by the Court of the property, when he will be at liberty to bid. The proceeds of sale are paid into Court and the vendor gets his contract price, interest and costs and the purchaser the balance, if any. Where the vendor is in default the remedies are even more varied.

It would seem to be absurd to hold that the mere fact that a date of completion is fixed in the original decree puts an end to the action and that the control of the Original Court expires on the expiration of that date and thus substitute in effect for all the known remedies stated above the simple expedient of treating the action and the decree as dead for all purposes and leaving the vendor in undisturbed possession of property which is not his and may, as in the present case, be of a greater value than the contract purchase money, which perhaps by some accident the purchaser has failed to produce on the date fixed. In this particular case it is worth observing that there is no evidence that the first defendant was ready to execute a conveyance or hand over the title-deeds in exchange for the money and in fact, so far from intending to complete he was appealing on the ground that the decree was wrong.

In my judgment, it was not intended by this decree that the payment of the Rs. 4,000 by the date named should be a condition, failing to comply with which would deprive the successful plaintiff of all his rights under the decree. In my judgment, this decree is in the nature of a preliminary decree, the Original Court keeping control over the action and having full power

to make any just and necessary orders therein, including in appropriate cases the extension of the time. If I am wrong in this and the proper interpretation of this decree is as contended for by the appellant, then, in my judgment, this decree is wrong and I should, if necessary, order that it be set right by eliminating the condition which ought not to have been imposed upon the successful plaintiffs, except at a much later date and upon definite refusal by him to complete. Even in that case such condition could only be imposed at the request of the defendant who, as I have pointed out, has other various remedies. As long as this form of decree is understood to be of a preliminary nature and the Court still retains full power over the action, I do not see any particular harm in the continuance of its use. Some words such as "further consideration reserved" should be added; but, personally, I should be prepared to say that the appropriate forms are those set out in Seton.

It is, however, contended that this form having been used, we are precluded by authority from holding that the time fixed is not a condition and, as I understand, also from holding that either the Original Court or this Court has power to extend the time. I do not so interpret this decree but as I have said, if that is the correct interpretation of it, in my judgment, it must be varied. Therefore, the question whether we are bound by authorities which so interpret it is not of great importance. The cases relied on are *Ramaswami Kone* v. *Sundara Kone*(1), *Moideen Kuppai* v. *Ponnuswamy Pillai*(2) and *Gopala Aiyar* v. *Sannasi*(3). In *Ramswami Kone* v. *Sundara Kone*(1) the decision of the District Munsif was that on plaintiff's paying into Court the balance of consideration within a month the

(1) (1908) I.L.R., 31 Mad., 28. (2) (1914) 1 L.W., 882.
(3) (1916) 3 L.W., 29.

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defendant should execute a sale-deed. The money was not paid into Court within the month, and after the expiration of the month, the defendant appealed. On appeal the Subordinate Judge confirmed the District Munsif's Order. The plaintiff then applied to execute this decree and the District Munsif held that the original one month granted by his decree having expired and the plaintiff not having complied with its terms, the plaintiff could not have execution. The plaintiff then applied to the Subordinate Judge to modify the appellate decree by introducing into it a fresh time limit. This having been refused, the plaintiff appealed against the District Munsif's order dismissing his application for execution. That appeal was dismissed by the Subordinate Judge. The case came on appeal before a Bench of this Court which held that on the proper construction of the first appellate decree of the Subordinate Judge, the time was not extended and that therefore execution could not be granted. The Court, however, did lay down that the Subordinate Judge could extend the time for performing conditions precedent granted by the original decree on appeal from that decree. It is, however, to be observed that no application was at any time made to the District Munsif to extend the time allowed by the decree, and this case does not therefore touch the point in question here.

In *Moideen Kuppai* v. *Ponnuswamy Pillai*(1) this Court on second appeal directed that on payment of Rs. 50 within three months by the plaintiff to the defendant a moiety of the suit properties should be delivered to the plaintiffs. Subsequently, the plaintiffs applied to the Lower Court to extend the time. That was refused by the Lower Court, and on appeal, by this Court on the ground that the

(1) (1914) 1 L.W., 882.

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Lower Court had no power to extend the time fixed by the Appellate Court. The plaintiffs then petitioned this Court to extend the time and this Court held that it had no power to modify its own order, except on a proper application for review which that application was not. The Court held that the time fixed by its order in that case was an essential term and that non-compliance with it could result in plaintiffs losing their rights unless they could put the matter right by review. But, in that case, the question was not under consideration whether the Original Court, if it directed that specific performance should be performed within a certain time could extend that time.

In *Gopala Aiyar* v. *Sannasi*(1) the Court of First Instance gave a decree for specific performance giving the plaintiff one month's time to pay the price, which decree was, on appeal to the Subordinate Judge, confirmed by him. More than one month after the date of the appellate decree the plaintiff applied to the Subordinate Judge to extend the time fixed by the original decree. The application was granted, but on a revision petition it was held by SRINIVASA AYYANGAR, J., that the Appellate Court had no jurisdiction to extend the time fixed by the Original Court. This may be right: but the learned Judge said that it had been decided by this Court in *Ramaswami Kone* v. *Sundara Kone*(2) that the Court which passed the decree had no power to extend the time, much less any Appellate Court. As I have pointed out, *Ramaswami Kone* v. *Sundara Kone*(2) did not decide so, and with that part of the judgment of SRINIVASA AYYANGAR, J., I do not agree.

I therefore do not feel in this matter in any way hampered by authority and this preliminary point fails.

(1) (1916) 3 L.W., 29.

(1) (1908) I.L.R., 31 Mad., 28.

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Turning to the merits, the main question is a pure question of fact. The learned Trial Judge has, I think, correctly stated, "different judges or different juries might take different views of the facts." But there was ample evidence to support his finding that the contract alleged was made and I see no reason to differ from it.

Further the contract alleged is to re-convey the property, when the Rs. 4,000 is tendered within one year. There is no evidence of an actual tender, but there is evidence that the first plaintiff attended upon the first defendant with P.W. 6 who had the money with him and on the first plaintiff asking the first defendant to take it the first defendant said he would not. This, in my judgment, was a waiver of and dispensed with any actual tender. See *Polglass* v. *Oliver*(1) and many subsequent cases.

A further point was taken that, as certain persons entitled to the benefit of the contract refused to join the plaintiffs in the suit and have been joined by them as defendants the decree for specific performance could not be granted. I do not agree with this contention and I have nothing to add to the judgment of COUTTS TROTTER, J., on the point.

Lastly it was contended, and this is a more difficult point, that as two years had elapsed from the date of the original offer of the money, the plaintiffs were too late in bringing this suit. It is a well-established principle that persons who desire the assistance of the Court in obtaining equitable relief must come quickly. In each case it is a question to be decided on the facts whether the delay on the part of the plaintiff is such that the Court ought not to exercise its powers. In

(1) (1831) 2 C. & J., 15.

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this case on the facts I think that the delay should be excused, for on the evidence, the plaintiffs were put off for some time by the first defendant himself. The case has been brought very late, but in my judgment not late enough to compel us to refuse relief, it not being shown that the defendant has been prejudiced.

The appeal will, therefore, be dismissed with costs. The time for the completion will be extended by this decree for a period of two months. It must be understood that the Original Court still has jurisdiction in this matter and has full powers to deal with any point that may arise including, if necessary, an application for further time.

WALLACE, J.

WALLACE, J.—I agree. On the first point of law taken, I wish to say this: No special form for drafting a decree for specific performance is supplied by the Civil Procedure Code, as is supplied by it in the case of a decree in a pre-emption suit by Order XX, rule 14, which directs that, if the purchase money is not paid as stipulated in the decree, the suit shall be dismissed with costs. Hence, the analogy of decrees, etc., in pre-emption suits and reported rulings thereon are not of assistance in this case. The form of decree drawn up in the trying Court is the general form adopted in this Presidency for such decrees. But that it is in the nature of a preliminary and not a final decree is, I think, placed beyond doubt by section 35 of the Specific Relief Act. As I read that section, it lays down that when a decree for specific performance of a contract of sale has been passed and the purchaser makes default in payment of the sum which the Court has ordered him to pay, the vendor may either file a fresh suit for rescission of the contract or may, in the specific performance suit itself, apply to the Court to rescind the contract. It is perfectly clear that the contract is not

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determinable or determined by the mere failure to comply with the terms of the decree. It is not determined until the Court orders that it is determined. By the decree for specific performance the Court sets out what it finds the real contract between the parties was, and declares that such a contract exists and gives what it considers a reasonable time within which the contract shall be carried out. Regarding the decree from this point of view as a contract, it is clear in this case, as in most others of the same kind, that time is not of the essence of the contract, and that until the contract is rescinded by formal order or decree, such time for performance, not being an essential part of the contract, may be varied by the Court which has declared what the essential terms of the contract are. It is clear, as the learned Chief Justice has shown, that it must be within the power of the Court to vary the time within which the contract shall be performed, as difficulties might arise through no fault whatever of the parties preventing performance within the time specified in the decree, e.g., when a third party has within that period set up a bona fide claim of title to the property, it may even be necessary to direct specific performance to stand over for a reasonable but indefinite period, until that claim has been adjudicated.

I take it then that where specific performance of sale has not been effected within the period laid down by the decree, it is open (*a*) to the purchaser to apply to the Court for an extension of time for payment of the purchase money, and (*b*) to the vendor to apply either for a final and peremptory order for specific performance or for an order rescinding the contract either immediately or to follow automatically on the expiry of the period peremptorily granted. The original action is thus open until a final decree or order of such

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a nature and scope is passed, and the Original Court has until then ample power to extend the time for specific performance. The case reported in *Moideen Kuppai* v. *Ponnuswamy Pillai*(1), is not a case in point. It was apparently not a case of a decree for specific performance since no reference was made to section 35 of the Specific Relief Act. In *Gopala Aiyar* v. *Sannasi*(2), also no reference is made to that section, and in any case the application to extend the time was made after the time granted by the decree had expired. In *Ramaswami Kone* v. *Sundara Kone*(3), there was no application for extension of time at all, and the decision turned on the propriety of interpreting the appellate decree in terms of the original decree. In the present case an application to extend the time was put in by plaintiffs to the Court which passed the decree and no final order has yet been passed on that. I am, therefore, quite clear that the Original Court has, in this case, full power to extend, on proper application made to it, the time fixed by its decree for specific performance and equally so has the Appellate Court in an appeal which is of the nature of an appeal from a preliminary decree. The argument that plaintiffs should not be allowed to get a fresh extension of time because defendant has appealed against the decree does not impress me. His appeal was tantamount to declaration that he would not receive the money and carry out his part of the contract, and thus made it useless for plaintiffs to attempt to carry out their part of it. On the other points of the case I have nothing to add to the judgment of the learned Chief Justice.

K.R.

(1) (1914) 1 L.W., 882. (2) (1919) 3 L.W., 29.
(3) (1908) I.L.R., 31 Mad., 28.

APPELLATE CRIMINAL.

Before Mr. Justice Krishnan.

1922, November 13.

ARUNACHALA THEVAN (COMPLAINANT), PETITIONER.*

Criminal Procedure Code (Act V of 1898), ss. 407 and 520—Order as to disposal of property—Jurisdiction—Notice to the other side—Practice.

A Subdivisional Magistrate hearing a Criminal Appeal under section 407 (2), Criminal Procedure Code, has power to pass orders under section 520, regarding the disposal of property in respect of which an offence has been committed, either at the time of disposing of the appeal or so soon thereafter that the order may be treated as part of the appeal proceedings.

Jogi Venkiah v. *Station House Officer of Narasapur*, (1922) 15 L.W., 534, and *In re Subba Raidu*, (1922) 15 L.W., 664, considered.

Notice should ordinarily be given unless there is good reason to dispense with it before reversing on appeal an order passed under section 517, Criminal Procedure Code.

In re Laxman Rangu Rangari, (1911) I.L.R., 35 Bom., 253, followed.

PETITION under sections 435 and 439 of the Code of Criminal Procedure (1898) and section 107 of the Government of India Act praying the High Court to revise the order of N. NARAYANASWAMI NAYUDU, Subdivisional Magistrate of Usilampatti, dated 29th November 1920, and made on the petition of one Vellachami Thevan of Avalsurampatti in Criminal Appeal No. 94 of 1920, preferred against the Judgment of the Court of the Stationary second class Magistrate of Tirumangalam in Calendar Case No. 422 of 1920.

Facts necessary for this report appear sufficiently from the Judgment.

S. Subrahmanya Ayyar, vakil for the petitioner.

K. Ramanath Shenai, Advocate for the first respondent.

* Criminal Revision Case No. 373 of 1922.

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KRISHNAN, J.

JUDGMENT.

KRISHNAN, J.—This is an application by the complainant in Calendar Case No. 422 of 1920 on the file of the second class Magistrate of Tirumangalam to have an order passed by the Subdivisional Magistrate of Usilampatti, who heard the appeal against the conviction in that calendar case, regarding the disposal of two bulls which formed the subject matter of the complaint, set aside.

The complainant's case was that the bulls were entrusted to the accused, and that he committed breach of trust in respect of them. The accused was convicted in the first Court, and the bulls were ordered by that Magistrate to be handed over to the complainant under section 517, Criminal Procedure Code. On appeal the conviction was reversed by the Subdivisional Magistrate, but apparently he forgot to pass any orders regarding the bulls at the time. A month afterwards on a petition filed by one Vellachami Thevan, the person from whom the bulls were seized, he passed an order directing that the two bulls should be handed over to him, and this order he passed without any notice to the complainant. It is this order that the complainant asks this Court to revise.

Several points are taken before me in revision. It is first argued that the Subdivisional Magistrate had no jurisdiction whatever under section 520, Criminal Procedure Code, to pass the order that he did pass. It seems to me that this depends on the question whether the petition filed a month after the disposal of the appeal could be considered as part of the proceedings in the appeal itself or a new proceeding altogether. If it is to be treated as a new proceeding, I must follow the ruling of this Court in *Jogi Venkiah* v. *Station House Officer of Narasapur*(1), which says that the District

(1) (1922) 15 L.W., 534.

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Magistrate alone can pass orders on an application under section 520, when such an application is made to himself. But I have no doubt that that ruling will not apply, where on hearing an appeal against a conviction the Subdivisional Magistrate is asked to set aside an order under section 517. It seems to me that he can, treating it as part of the proceedings in the appeal itself, make an order under section 520, for the disposal of the property concerned in the case.

I sent for the records of the two cases cited in *Jogi Venkiah* v. *Station House Officer of Narasapur*(1) namely, Criminal Revision Cases Nos. 525 of 1905 and 84 of 1908, and I find they are both cases where the applications were confined to section 520, and were entirely unconnected with any criminal appeals. The expression in section 520 "any Court of Appeal" has no doubt been construed in these cases as meaning "Courts to which appeals ordinarily lie"; but, I think, when a District Magistrate has directed a case or a certain class of cases to be heard by a Subdivisional Magistrate, and under section 407 he hears the appeal, his Court comes within the words "Court of Appeal" as used in section 520 for that particular case or class of cases. In fact, it is the common practice in this Presidency for such Magistrates to pass orders under section 520, if necessary, when disposing of the appeal. I see no reason to interfere with this practice. Objection has never been taken to such orders as having been passed without jurisdiction. It will also be noted that section 423 (*d*) authorizes appellate Magistrates to pass consequential orders and orders under section 520 are usually consequential orders based on the findings in the appeal. According

(1) (1922) 15 L.W., 534.

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to the contention of the petitioner in every case where some question of disposal of property comes in, the Subdivisional Magistrate after hearing the appeal will have to stay his hands and let the parties go before the District Magistrate for an order regarding the disposal of property. This would seem to introduce an unnecessary and cumbersome procedure. Section 517, clause 3, which directs that an order for disposal of property should not be carried out until the period for filing an appeal is over or when an appeal is filed, until that appeal is disposed of, clearly indicates that the Court which hears the particular appeal can pass orders regarding the disposal of the property at the time the appeal is heard. But it is altogether a different question when an appeal is confined entirely to a question of disposal of property for, in such a case, I agree that the District Magistrate should hear the petition.

There is another case *In re Subba Raidu*,(1) where it was held that where a Subdivisional Magistrate disposing of a Criminal Appeal fails to pass an order under section 520, it will be open to his successor to do so. This would depend upon whether the subsequent order could be treated as part of the original appeal proceedings. I see no reason why it should not ordinarily be treated as such unless it is very clear from the circumstances of the case that the two are so dissociated in fact that they could not be treated as parts of the same proceedings. That may happen when the time that has elapsed is so very great that such an inference can be drawn.

I am, therefore, of opinion that the first objection that the Subdivisional Magistrate had no jurisdiction to pass the order, must be overruled.

(1) (1922) 15 L.W., 664.

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The next point taken is that notice should have been given of the petition before any orders were passed. Ordinarily in such cases it is desirable that notice should be given, especially if the order is not passed on the day the appeal is disposed of; but there is no rule of law that requires that such notice is absolutely necessary. However, as in this particular case, it is not unlikely that the absence of notice of the hearing of the petition by the Subdivisional Magistrate has led to the passing of a wrong order, for it is not very clear from the records whether the bulls really belong to the petitioner or to the accused, I think it better that this case should be sent down to the Subdivisional Magistrate, requesting him to give a reasonable opportunity to the complainant to place his contention before him, and then to pass final orders as regards the disposal of the bulls.

I may refer in this connexion to a case *In re Laxman Rangu Rangari*(1) where it was held by a Bench of that Court that in reversing an order under section 517 the Magistrate should not act without giving notice to the complainant; the learned Judges went to the length of saying that the Magistrate (who in that case was the District Magistrate) was clearly wrong in upsetting the order of the trying Magistrate merely on the representation of the opponent. I think this rule should ordinarily be followed, unless there is good reason for dispensing with it. As in this case no notice was given, the case, as I have said, will be sent back to the Subdivisional Magistrate for fresh disposal. He should come to a clear finding on the question to whom the bulls belong on the materials which may be placed before him before passing his final orders.

(1) (1911) I.L.R., 35 Bom., 253.

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It is also argued that the first Magistrate having once given over the bulls to the complainant in the first Court, it is no longer open to any Court to direct them to be returned to the accused. There is no provision in the new Code of Criminal Procedure which restricts the powers of the Court in this manner under section 520. In fact, the new section has added the words "and make any further orders that may be just." These words seem to me to be quite wide enough to empower the Court to direct the return of property. This contention also must therefore be overruled.

The order of the Subdivisional Magistrate, dated the 29th November 1920, is set aside, and he is directed to pass fresh orders in the light of the observations above made.

K.U.L.

PRIVY COUNCIL.*

KAMULAMMAL, SINCE DECEASED (DEFENDANT),

v.

VISVANATHASWAMI NAICKER, SINCE DECEASED (PLAINTIFF) AND OTHERS (DEFENDANTS).

1922, December, 20.

[On Appeal from the High Court of Judicature at Madras.]

Hindu Law—Inheritance—Sudras—Illegitimate son—Extent of share—Widow of deceased.

The half share which, under the Mitakshara, Chapter I, section 12, an illegitimate son of a Sudra takes in the estate of his deceased father, is a half of that which he would have taken had he been legitimate, not a half of the share which the other participants take. Thus, as against the widow of the deceased, an illegitimate son takes a half, not a third of the estate.

* *Present* :—Lord BUCKMASTER, Lord PHILLIMORE, Mr. AMEER ALI, Sir LAWRENCE JENKINS and Lord SALVESEN.

KAMULAMMAL v. VISVANATHASWAMI NAICKER.

APPEAL No. 45 of 1919, from a judgment and decree of the High Court (25th October 1915), varying a decree of the Subordinate Judge of Madura (14th October 1905).

The suit related to the estate of the zamindar of Bodinayakkanur, a Hindu of Sudra caste, who died in 1888, and was brought by the first respondent (since deceased) against the appellant (since deceased) who was the widow of the zamindar, his daughter, and other collateral relations, all of whom were defendants and respondents to the appeal. The zamindar left no legitimate sons.

Both Courts in India had found that the plaintiff was illegitimate and had rejected his claim to the impartible zamindari. The trial Judge, upon a remand, had found that the estate of the deceased included much property which was his self-acquired property, and he held that the plaintiff was entitled to one-third of that property, and the widow to two-thirds. Upon appeal to the High Court the decree was varied, it being held that the illegitimate son and the widow were each entitled to a half of the self-acquired property.

The litigation involved other points, but upon the present appeal the only substantial question was which of those views was right.

The learned Judges of the High Court (MILLER and ABDUR RAHIM, JJ.) in dealing with the question in point said as follows :—

"The first question to be decided is whether the plaintiff as the illegitimate son of his deceased father is entitled to share equally with his widow, the first defendant, or whether he is only entitled to half of her share, i.e., to one-third of the properties. In a series of cases in Madras, beginning with *Ranoji* v. *Kandoji*(1), it has been held that an illegitimate son succeeding to his deceased father along with a widow, daughter

(1) (1885) I.L.R., 8 Mad., 557.

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or daughter's son is entitled to half of the properties and not merely to one-third : *Parvathi* v. *Tirumalai*(1) ; *Chinnammal* v. *Varadarajulu*(2), *Meenakshi Anni* v. *Appakutti*(3). In *Rahi* v. *Govinda Valad Taja*(4), WESTROPP, C.J., elaborately reviewed all the texts of Hindu Law dealing with the rights of an illegitimate son and came to the conclusion (as we understand the judgment) that the illegitimate son was entitled to a half share of the properties; and in *Seshagiri* v. *Girewa*(5), SARGENT, C.J., who delivered the judgment of the Court, took the same view and understood the decision in *Rahi* v. *Govinda Valad Teja*(4) as laying down the same rule. The learned vakil for the respondent invited us to construe for ourselves the original text of the Mitakshara which he says is clearly in his favour. He also cited the commentary of Aparârka on the text of Yajnavalkya and the commentary of Medatithi, the well-known commentator of Manu on the same text. He further contended that all the text-book writers on Hindu Law who knew Sanskrit have construed the passage of the Mitakshara in the way he construes it. Much may no doubt be said in favour of this construction. But the decisions of this Court are not based merely on the interpretation of the text of the Mitakshara. In *Ranoji* v. *Kandoji*(6), in which the position of an illegitimate son was fully considered, reliance was placed on a passage from the Dattaka Chandrika which states in clear terms that the illegitimate son shares equally with the widow, daughter, and daughter's son. It was this very passage of the Dattaka Chandrika which was relied on as authority for not excluding the widow from the succession when there is an illegitimate son, whereas the Mitakshara omits the widow from the category of persons who are not excluded by the illegitimate son. The Dayabhaga which gives the illegitimate son an equal share with the daughter and daughter's son was also referred to. In this state of things, we are not prepared to depart from the course of decisions in this Court which hold that the plaintiff is entitled to share equally with the widow."

De Gruyther, K.C., and *Dube* for the appellant.—Upon the true construction of the Mitakshara, Chapter I, section 12, the illegitimate son took only half the share

(1) (1887) I.L.R., 10 Mad., 334, 343. (2) (1892) I.L.R., 15 Mad., 307.
(3) (1910) I.L.R., 33 Mad., 226. (4) (1875) I.L.R., 1 Bom., 97.
(5) (1890) I.L.R., 14 Bom., 282. (6) (1885) I.L.R., 8 Mad., 557.

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which the widow took; he therefore took one-third and the widow two-thirds. That view is supported by *Chellammal* v. *Ranganatham Pillai*(1) and *Gangabai Peerappa* v. *Pandu*(2). The latter, a decision of the Bombay High Court, is directly in point. In the decisions relied on in the High Court the extent of the share was not the real point at issue, and previous cases and the view expressed in Mayne's Hindu Law, paragraph 550, was given effect to without discussion The decision of the Bombay High Court in 1915 already referred to was arrived at upon a full consideration of the texts which had not been made in the earlier cases. The Dattaka Chandrika is against the appellant's contention, but it is a treatise upon adoption not upon inheritance. Reference was made to Setlur's Hindu Law of Inheritance, part I, page 163; Sarvadhikari's Law of Inheritance, pages 942–943; Ghose's Hindu Law, page 771.

Mathew, K.C., and *Ingram* for the first respondent.—The illegitimate son takes a half of the share which he would have taken had he been legitimate; consequently he and the widow take equally. That view is supported by a current of authority in Madras. Although the decisions do not always discuss the question it is significant that over a long period of years the contrary view does not appear to have been contended for. This respondent's contention is supported by the statement in Strange's Hindu Law, volume 2, page 70, by West and Buhler, and by Mayne. None of the Bombay cases deal with the case of a widow. Further, the text of the Mitakshara does not expressly mention the case of a widow competing with the illegitimate son; it cannot be assumed that the same principle applies as in the case of a daughter or daughter's son. The rule contended

(1) (1911) I.L.R., 34 Mad., 277. (2) (1911) I.L.R., 49 Bom., 369.

for makes the share definite whereas the contrary view would give rise to less clear results.

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DeGruyther, K.C., replied.

Kenworthy Brown for respondents Nos. 3 to 8.

The JUDGMENT of their Lordships was delivered by

Sir LAWRENCE JENKINS.—This is an appeal from a decree, dated 26th October 1915, of the High Court of Judicature at Madras, which varied a decree, dated 14th October 1905, of the Court of the Subordinate Judge of Madura.

SIR LAWRENCE JENKINS

The case started as far back as 25th April 1902, and is one of much detail in which numerous issues have been raised; but the points now in contest have been reduced to two, and it will only be necessary to set forth so much of the complicated story as relates to them.

In December 1888, Kamaraja Pandiya Naicker, the Zamindar of Bodinayakkanur, a Sudra by caste, died, and there survived him (among others) his illegitimate son the original plaintiff in the suit, his wife the original first defendant his daughter the second defendant, and certain collateral agnates who are parties to the suit. He left no legitimate male issue. The appellant set up a paper-writing as her husband's last will. Both Courts have held it not proved. Though this finding has been questioned in the appellant's case, its propriety is, in their Lordships' opinion, concluded by the concurrent findings of the Courts in India. And so the only point left for decision is whether the plaintiff, as the sole illegitimate son of the late zamindar, was entitled as against the appellant, the lawfully-married widow, to a one-third or a one-half share in the personal or self-acquired properties of the zamindar.

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The Subordinate Judge decreed only one-third in his favour; the High Court held him entitled to one-half. From this decision the widow has appealed. Both the widow and the illegitimate son have died during the litigation, and representatives have been substituted in their place. The rights of the illegitimate son of a Sudra in the Madras Presidency rest principally on a text of Yajnavalkya as explained and developed in the Mitakshara and other authoritative commentaries.

In the concluding section of chapter I of the Mitakshara the rights of a son by a female slave in the case of a Sudra's estate are considered. It is conceded that the plaintiff comes within the scope of the section. In paragraph 1 the text of Yajnavalkya is quoted, and in the second paragraph it is interpreted. According to Colebrooke's translation they run as follows :—

"1. The author next delivers a special rule concerning the partition of a Sudra's goods. 'Even a son begotten by a Sudra on a female slave, may take a share by the father's choice. But, if the father be dead, the brethren should make him partaker of the moiety of a share: and one, who has no brothers, may inherit the whole property, in default of daughter's sons.'

"2. The son, begotten by a Sudra on a female slave, obtains a share by the father's choice or at his pleasure. But after [the demise of] the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate for half a share: that is, let them give him half [as much as is the amount of one brother's] allotment. However, should there be no sons of a wedded wife, the son of a female slave takes the whole estate, provided there be no daughters of a wife nor sons of daughters. But, if there be such, the son of the female slave participates for half a share only."

The words enclosed in the brackets are a gloss by Balambhatta or Subodhini.

Here the contest is between the illegitimate son and the widow, and though the widow is not named in the text it is well settled that as a preferential heir to the daughter's son she is included among those who share

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with the illegitimate son, and it would serve no useful purpose to speculate why she was not mentioned in the text. But the measure of the respective shares still has to be determined. The text and the commentary speak of the illegitimate son being made partaker of a moiety of a share or participating for half a share, but there is no explicit statement as to the unit in which he is to take his half-share. There are two possible views—either that he is to take one-half of the other participant's share, or one-half of what the illegitimate son would have taken had he been legitimate.

Mr. J. R. Gharpure, an able Sanskritist and a vakil of the Bombay High Court, in his recent translation of the Mitakshara, renders the text of Yajnavalkya as providing that the brothers should make the illegitimate son "a half-sharer;" and his translation of Vijnaneswara's commentary on this text is

"these brothers should make that son of the female slave a half-sharer, i.e., they should give him a half from their own allotment."

He appends a footnote in which he says this is made clearer by Balambhatta and Subodhini, and gives what purports to be a quotation from Balambhatta and Subodhini in these words,

"From the entire estate a half of what would be regarded as his share, i.e., one-half of the amount allotted to a legitimate issue."

Their Lordships have unfortunately had no opportunity of examining these authorities. This rendering "half-sharer," which is not without significance, is also to be found in Rao Sahib Mandlik's translation of Yajnavalkya's text.

In the Sarasvati Vilasa this text is cited, and the comment on it is in these terms,

"The meaning is that even when there is a daughter's son, the son of the female slave takes only a half" (paragraph 396).

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The Dattaka-Chandrika, chapter V, 31, deals with the text as follows:

"Therefore if any, even in the series of heirs down to the daughter's son, exist, the son by a female slave does not take the whole estate, but only shares equally with such heir."

Though the Dayabhaga is not a governing authority in Madras, it is worthy of notice that in commenting on this text Jimuta Vahana lays down that if there be a daughter's son the illegitimate son shall share equally with him, adding the explanation that as no special provision occurs it is fit that the allotment should be equal (chapter IX, 31).

The Daya-Krama-Sangraha, another Bengal authority, is to the same effect (VI, 1–35). In Colebrooke's Digest the rule is further elaborated, and it is there said that

"after the death of the father, if no such will had been declared, the brethren born of a wife legally married shall allot him half a share—that is, half of such share as would have been assigned had his mother been legally married. Consequently a son by a female slave not superior in class to her Sudra master shall obtain the moiety of a full share."

These last cited commentaries, while not of governing authority in Madras, at any rate show the sense in which the text has been understood elsewhere.

Though in chapter I, section 12, of the Mitakshara, there is no explanation of how the half-share is to be computed, still in another part of the treatise there are directions which indicate the method of computation approved by its author in the ascertainment of fractional shares. Thus in chapter I, section 7, paragraph 5, it is provided that

"sisters should be disposed of in marriage, giving them, as an allotment, the fourth part of a brother's own share."

In paragraph 6 it is said that the meaning is that the girl shall be allowed to participate for a quarter of such a share as would be assignable to a brother of the same

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rank with herself. This is worked out in paragraph 7 as follows:—

"For example, if a person had only a Brahmani wife and leaves one son and one daughter, the whole paternal estate should be divided into two parts and one such part be sub-divided into four; and the quarter being given to the girl, the remainder shall be taken by the son. Or, if there be two sons and one daughter, the whole of the father's estate should be divided into three parts; and one such part be sub-divided into four, and the quarter having been given to the girl, the remainder shall be shared by the sons. But, if there be one son and two daughters, the father's property should be divided into thirds, and two shares be generally sub-divided into quarters; then, having given two quarter shares to the girls, the son shall take the whole of the residue. It must be similarly understood in any case of an equal or unequal number of brothers and sisters alike in rank."

In the second volume of Norton's Leading Cases, page 499, reference is made to a case of *Annasamy Moodelly* v. *Tandavaraya*(1), and the ruling is stated in these terms,

"Where plaintiff (illegitimate) and defendant (legitimate) were two brothers the father's property was divided one-quarter to the plaintiff, three-quarters to the defendant."

This would be in conformity with the rule of division that would give an illegitimate son one-half of the share to which he would have been entitled had he been legitimate.

Reference, however, has been made to *Gangabai Peerappa* v. *Bandu*(2), where it was decided by the Bombay High Court, that in a competition between the widow and an illegitimate son the son took only one-third. But from the judgment delivered it is apparent that this conclusion was not in accordance with the view that the learned Judges took of the text and the commentaries, but was founded on what they understood to be the case-law of the Bombay Presidency.

(1) (1860) Mad. S.R., p. 11. (2) (1916) I.L.R., 40 Bom., 369.

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If the true method of computation be to allot to the illegitimate son one-half of what he would have taken had he been legitimate, then where the competition is between the illegitimate son and the widow the allotment of the respective shares presents no difficulty. Such a son if born of a lawfully-wedded wife would have taken the whole; by reason of his illegitimacy this would be reduced to one-half; and so he and the lawfully-married widow would take in equal shares.

In Madras this result, according to the judgment of the High Court now under appeal, has the support of the case-law of that Presidency, and it was definitely stated in the course of the present argument, without being controverted, that as between an illegitimate son and a lawfully-wedded widow there has been no departure in Madras from the rule of equal shares.

The learned Judges of the High Court, after a reference to the decisions, say,

> "In this state of things we are not prepared to depart from the course of decisions in this Court, which hold that the plaintiff is entitled to share equally with the widow."

This, in their Lordships' opinion, was the right conclusion at which to arrive, and they will accordingly humbly advise His Majesty that this appeal be dismissed with costs. There will be only one set of costs.

Solicitor for appellant.—*H. S. L. Polak.*

Solicitor for respondent No. 1.—*D. Graham Pole.*

Solicitor for respondents Nos. 3 to 8.—*Douglas Grant.*

A.M.T.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Coutts Trotter and Mr. Justice Kumaraswami Sastri.

1922. January 6.

THIRUNEELAKANTAM SERVAI (APPELLANT IN APPEAL No. 159 OF 1919 ON THE FILE OF THE HIGH COURT), APPELLANT,

MUTHANAN SERVAI *alias* THIRUNEELAKANTAM SERVAI (APPELLANT IN APPEAL No. 315 OF 1919 ON THE FILE OF THE HIGH COURT), APPELLANT,

v

B. RAJA RAJESWARA SETHUPATHI *alias* MUTHU RAMALINGA SETHUPATHI AVARGAL, RAJA OF RAMNAD (RESPONDENT IN BOTH APPEALS), RESPONDENT.*

Document—Construction—Implied term—Proprietary Estates Village Service Act (Madras Act II of 1894), sec. 27 (4)—"Tenants," meaning of—Farmers of rent.

Out of his share of the produce of certain villages, a Zamindar remunerated the village officers and contributed towards certain charities He leased the villages to lessees who agreed to pay him, besides the rent, the shares for charity and an amount for road-cess for which the Zamindar remained liable. They also paid the village officers, although the cowle did not make express provision for it. Later by Madras Act II of 1894, the obligation to pay the village officers was taken over by the Government, and the peshkash payable by the Zamindar was increased.

Held (KUMARASWAMI SASTRI, J., dissenting), that the suit was not maintainable. The farmers were not agents or trustees of the Zamindar to collect and pay away the shares due to the village servants nor were there implied terms in the cowles that the farmers should collect these shares and if at any time the

* L.P.A. 21, etc., of 1920.

whole or part were not required to pay the village officers they should account to the Zamindar for the unused portion.

A term in a contract will only be implied when the Court is driven to the conclusion that the parties must necessarily have intended that stipulation: *The "Moorcock"* (1889) 14 P.D., 64; *Hamlyn & Co.* v. *Wood & Co.* [1891] 2 Q.B., 488.

Per Curiam: For the purposes of section 27 (4) of Madras Act II of 1894, such farmers are "tenants" and the Zamindar is entitled to apply to have the rent increased. *Rajam Ayyar* v. *Raja Rajeswara Muthuramalingam Sethupathi*, S.A. No. 510 of 1918 (unreported), distinguished.

APPEALS under clause 15 of the Letters Patent preferred against the decision of Sir JOHN WALLIS, C.J., and SADASIVA AYYAR, J., in Appeals Nos. 159 and 315 of 1919, preferred against the decrees of P. SUBBAYYA MUDALIYAR, the Subordinate Judge of Rāmnād at Madura, in Original Suit Nos. 24 and 59 of 1917. The material facts are set out in the judgment of the Chief Justice.

C. V. Anantakrishna Ayyar for appellant.—I am the transferee, second defendant, and the only interested party. Suit was to recover amount under the lease. Rent was in kind. Government increased peshkash and resolved to pay village servants in coin instead of in kind. Zamindar asks me to pay an amount not in the cowle. Prior to the cowle, out of every 100 measures, 48 were taken by Zamindar. Out of these he made certain payments of 12 shares. In effect the Zamindar claims to revise the cowle. From the date of cowle I have paid these village servants. What the Zamindar claims is this: Government have asked me to pay more, therefore pay me the amount you have been paying the servants. In fact he wants more than he has been paying to Government. The peshkash for the village is about Rs. 425. This was increased by 4 per cent. He would have to pay about Rs. 17 extra, whereas he is claiming to be

paid the whole Rs. 300 which is about the value of nine shares of the melwaram. When a lease is granted by a Zamindar it is not open to him to vary the terms if during the term of the lease there is a disturbance of the rights of the parties by an Act. Reference made to *Subbaraya* v. *Srinivasa*(1), *Baskarasami* v. *Sivasami*(2).

T. Ranga Acharya, *S. Srinivasa Ayyangar* and *S. Soundararaja Ayyangar* for respondents.—The village was granted on the terms of Exhibit A subject to his paying rent in two ways—in cash to me and discharging my liabilities to third parties. He undertook to be agent to collect and pay over. Under the law he is not capable of coming to any terms with the village servants. He is an agent and as such is accountable. I am personally liable, my property is liable and I am liable to arrest. Where A has to pay me and pay certain amount to others due by me it is part and parcel of the rent. Under the terms of the agreement it is really to be paid to me although he is discharging my liabilities. It may be agency coupled with interest.

[CHIEF JUSTICE.—Could the landlord say, pay me and ask them come to me for payment.

No, it is to the interest of the defendant to pay these men. They are necessary to him.]

He receives it without any just right to it. There was no intention to benefit transferee. It was money received which he had no right to retain and I am entitled to recover it.

As regards the charities and the village officers I was only a trustee. I had no beneficial interest. I did not assign this interest. I have merely appointed an agent.

(1) (1884) I.L.R., 7 Mad., 580, 582. (2) (1885) I.L.R., 8 Mad., 196.

TIRUNEELA-KANTAM SERVAI v. RAJA OF RAMNAD.

SCHWABE, C J.

JUDGMENTS.

SCHWABE, C. J.—This is a claim by the Raja of Rāmnād against the farmers or tenants of villages in that zamindari to recover from them the money value of certain annual payments received by them from the ryots of those villages. In 1894 two cowles were executed by the then Raja in favour of those farmers. Before the cowles the Raja or Zamindar received 48 per cent of the total produce, the ryots or actual cultivators of the land keeping the other 52 per cent. Of that 48 per cent one-fourth or 12 per cent of total was received by the Raja for certain purposes—3 per cent for charities and 9 per cent for the payment of village officers whom the Raja was liable to pay. By the cowles, the Raja let for a term of years all his interest in the villages to the farmers. The villages are defined by boundaries and most of the land in them was in the occupation of ryots, but there were offices, buildings, tanks, trees and possibly waste land and jungle, which were in the occupation of the Raja himself. Therefore, what was let was his interest in the lands in the occupation of the ryots in respect of which he received the 48 per cent melvaram and such buildings, lands, trees, etc., as were in his own occupation. There was an obligation on the part of the farmers to do certain repairs. After the cowles the farmers, in fact, received the whole 48 per cent melvaram and paid the village officers in kind. They agreed by the cowles to pay to the Zamindar in addition to the rent reserved the 3 per cent for the charities and an amount which they collected for road cess for which the Zamindar remained liable as between him and the Government though between him and the farmers they took over this obligation.

Sir JOHN WALLIS, C.J., with whose judgment I entirely agree, holds that the effect of the cowles was

TIRUNEELA-KANTAM SERVAI v. RAJA OF RAMNAD.

SCHWABE, C.J.

that the farmers took over with the village and the waram the obligation to pay thereout what were, in fact, charges on that waram, that is, payments to be made to the village officers out of the waram. SADASIVA AYYAR, J., held that the obligation was taken over by the farmers by custom. This is probably also correct, but, if there is, as I hold, an implied term as found by WALLIS, C.J., it is unnecessary to rely upon the custom. At a later date, by the Madras Act II of 1894, the payment of these officers in kind was abolished, and it would follow, if the matter rested there, that the farmers would be freed from liability to make these payments but could keep that part of the melwaram which was leased to them in order that they could make these payments, that is the 9 per cent. It is argued that they were receiving and paying away the 9 per cent to the village officers as agents of, or trustees for, the Raja. I am unable to accept this view or to say that there was an implication of the term in the cowle that the farmers should collect 9 per cent on behalf of the Raja and that, if at any time the whole or any part were not required for the payment of the village officers, they should account to him for any unused amounts. Now, it is a well established rule that a term will only be implied when the Court is driven to the conclusion that the parties must necessarily have intended that stipulation. This is generally known as the rule in *The Moorcock* (1), which was followed and clearly enunciated in *Hamlyn & Co.* v. *Wood & Co.* (2). I can find no such necessity, for the cowle is equally consistent with the farmers taking over the whole waram and taking the risk of what they might have to pay to these village servants. It would be a perfectly intelligible contract and this, in my view, is the

(1) (1889) 14 P.D., 64. (2) [1891] 2 Q.B., 488.

proper interpretation of this contract. Acting under the statute in question, the Government which had taken over that liability to pay the village servants and relieved the Raja from that liability increased the peshkash payable by the Raja with the result that, but for a further provision in the statute in a case like this, the Raja would have to pay the extra peshkash, whereas the farmers would receive and keep what was still being received from the ryots to provide for the payment of the village officers, that is, the 9 per cent. This would be most inequitable and hence section 27(4) of the Act provides as follows: "If, in any case, the rent payable to a proprietor in respect of any land has been fixed under an agreement subsisting on the date of this Act coming into force, to the effect that any portion of the remuneration of the village officers shall be borne by the tenant or the proprietor, as the case may be, it shall be lawful for the proprietor or tenant to apply to the Collector for sanction to increase the said rent or to demand its reduction; and the Collector shall, upon receipt of such application and upon satisfactory proof of the justice of the claim, grant such sanction and increase or reduce the rent to the amount at which it would have been fixed had no such agreement been entered into." This applies to this case unless it can be successfully contended that the farmers in question are not tenants within the meaning of that section, as was held by SADASIVA AYYAR, J., and was also held in *Rajam Ayyar* v. *Raja Rajeswara Muthuramalingam Sethupathi*(1) by OLDFIELD and KRISHNAN, JJ. I cannot attach importance to the latter case—we do not know what was argued or whether this question was necessary for the decision in that case. I do not agree with SADASIVA AYYAR, J., on this point or with that other judgment,

(1) S.A. No. 510 of 1918 (unreported).

if it so held. In my view, these farmers were tenants in the proper ordinary sense of the word for the reasons I have pointed out above. Further, I am quite clear that they are tenants within the meaning of this section for on any other construction of this section, persons in the position of these farmers who were many and known to be many at the time when the Act was passed, would have been left in possession of the produce of the land to which morally they had no sort of right, and I do not think I am driven to such an absurd construction. I do not attach any importance to the fact that it has been held under another or other statutes, such as the Madras Rent Recovery Act, that "farmers"—I use the word in the sense of persons farming the rents—are not "tenants" within the meaning of certain sections of those Acts. It follows that, in my judgment, the Raja is entitled to apply under that section to the proper authority to have the rent payable by the farmers adjusted in accordance with the terms of that section, namely, by increasing the rent to the amount at which it would have been fixed had no agreement been entered into providing that the farmers should pay the village officers. As far as I can see, the result will be that the Raja will obtain all that he is asking for in this action. But in my view, this action was entirely misconceived and accordingly the appeal must be allowed with costs and the decree of the Subordinate Judge will be modified by disallowing the value of the manibham and swatantram with interest. The parties will pay and receive proportionate costs both in the Subordinate Judge's Court and before the Division Bench.

I agree with the observations of COUTTS TROTTER, J., as regards the decision in *Nallayappa Pillian* v. *Ambalavana Pandara Sannadhi*(1).

(1) (1904) I.L.R., 27 Mad., 465.

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COUTTS TROTTER, J.—I entirely agree, and I only desire to add two observations of my own. The first is this: It seems to me that, where a Court feels itself driven, as we do in this case, to make an implication in a contract which is not there in terms, it should endeavour strictly to limit that implication to what is absolutely necessary to carry out what is believed to be the intention of the parties. In this case that appears to be effected by holding that what was intended was that the defendant undertook, as a personal covenant, the duty of discharging the claims of the village officers and of indemnifying the Zamindar against those claims. That seems to me to carry out sufficiently what we hold the parties to have meant, and I decline to go further and imply such conceptions as that of trusteeship or agency into such a matter.

The other observation that I desire to make is with regard to section 27 (4) of the Madras Act II of 1894. I think it is most important in this country to construe the terms of an Act taken from the English Law strictly in relation to the immediate context and to decline to be guided by evidence as to their meaning or judicial interpretations of them when they occur in another context or in other statutes. I look at section 27 (4) of this Act and I find these words:—If the rent payable to a proprietor in respect of any land has been fixed under an agreement to the effect that any portion of the remuneration of the village officers shall be borne by the tenant or the proprietor, as the case may be, then certain consequences shall follow. I think that, for the purposes of that section, it is abundantly clear that the word "tenant" must be so construed as to mean a person in the nature of those defendants whose case we are considering here. It seems to me that once you have got it that the Zamindar here, who is clearly the proprietor

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within the meaning of this statute, sues for payment of rent—and, in fact, the first branch of Mr. Ranga Achariyar's argument was to insist upon it that what was covenanted for here was rent and nothing else—and if you look at this clause and nothing else, it is inevitable to conclude that the person described as a "tenant" is the person who pays rent to the proprietor and that the one is the mere correlative of the other. Therefore, I think that there is nothing to prevent our holding that the defendant here is a tenant within the meaning of that statute, and I find nothing in *Nallayappa Pillian* v. *Ambalavana Pandara Sannadhi*(1), to alter that opinion. I would also point out that that case itself very wisely, if I may respectfully say so, proceeded on very much the same lines as I have indicated, namely, of construing the words in strict relation to the exact context and the portion of the statute in which they occur. I only desire to add this that I am not prepared to hold that the learned Judges, who decided *Subbaraya* v. *Srinivasa*(2) and *Baskarasami* v. *Sivasami*(3), were wrong.

KUMARASWAMI SASTRI, J. — KUMARASWAMI SASTRI, J.

KUMARASWAMI SASTRI, J.—If the cowles can be construed to be assignments by the Zamindar of the 48 shares in the produce which were allotted to the Raja's share at the division of the produce subject to the obligation of the transferee to meet the obligations to discharge which 12 out of the 48 shares were liable and an indemnity in favour of the Zamindar, I agree with my Lord and my brother COUTTS TROTTER, J., that the remedy of the Zamindar is to proceed under section 27 of the Proprietary Estates Village Service Act (Act II of 1894). Having regard to the terms of the cowles which are not mere transfers of the melvaram without any transfer of interest in the lands but which transfer

(1) (1894) I.L.R., 27 Mad., 465. (2) (1884) I.L.R., 7 Mad., 580, 582.
(3) (1885) I.L.R., 8 Mad., 196.

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in addition the waste forest and other lands in which the Zamindar had a proprietary interest and which also require certain services to be rendered, the cowledar will be a tenant in the ordinary acceptation of the terms. This distinguishes the case from the decision of OLDFIELD and KRISHNAN, JJ., in S.A. No. 510 of 1918, *Rajam Ayyar* v. *Raja Rajeswara Muthuramalinga Sethupathi*(1).

He will be a person liable to pay rent to the Zamindar which has been fixed with reference to an implied agreement to the effect that he shall pay the remuneration to the village officers and clause 4 of section 27 will in terms apply to him.

I find it, however, difficult to hold that there was any transfer to the cowledar of the 12 shares out of the 48.

The immemorial practice in the zamindari was for the produce being brought to the threshing floor for division between the tenants and the Zamindar. The tenants took 52 shares and left 48 shares for the Zamindar who had to remunerate the village servants and to contribute towards certain charities (Mahamais). So far as the remuneration of the village munsif, karnam and watchman were concerned it was a statutory duty. What the Zamindar did was to set apart 1 share of the 48 left after the tenants took their share to the Dharma Mahamai, 2 shares to the Jari Mahamai and 9 shares for the remuneration of the village officers. The village officers had the right to receive their shares at the threshing floor at the time of the division. They had the right of suit against the Zamindar if they were not paid and could recover their share of the produce both personally and against the estate of the Zamindar. As regards the charities the Zamindar was bound to account

(1) S.A. No. 510 of 1918 (unreported).

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and could be proceeded against for breach of trust if he did not set apart and hand over the share due to the charities. It is clear that at the date of the cowles the Zamindar had no interest in the 12 shares which had, by long custom, been set apart for the discharge of obligations which were perfectly well known to everybody and could be enforced against the Zamindar. These obligations could not be got rid of by the Zamindar by assignment of the melvaram to somebody else, and he remains liable in spite of the assignment. An assignment of the 12 shares would not benefit the cowledar while it would not place the Zamindar in any better position than he would have been if there was no assignment. At the date of the cowle the position was this. As soon as the tenants took away their 52 shares, 36 shares were set apart for the Zamindar, 3 shares for the charities and 9 shares for the village officers, each party taking what was due. The terms of the cowle show, in my opinion, that what the Zamindar did was to transfer to the cowledar the 36 shares due to him and as to which he had absolute power of disposal and to ask the cowledar to collect and pay over to him the 3 shares which were due for the charities and make the various payments to be made to the village officers out of the shares. The terms of the cowles in the two appeals are similar and I shall take one of them by way of illustration.

The cowle, Exhibit A in Appeal No. 159, begins by stating that the sarasari for each fasli on a ten years' average was Rs. 982–10–1 and it fixes the rent at Rs. 425–3–1 on this basis. It is found by the Subordinate Judge and not disputed before us that Rs. 982–10–1 represents the amount calculated on the 36 shares which belonged to the Zamindar and excluded the 12 shares which were being set apart

for the charities and payment to the village officials so that it is clear that the whole basis of the transaction was on the footing that what was being transferred was the net share of the Zamindar and not the whole of the 48 shares that remain after the tenants took their shares. The deed proceeds to stipulate that the cowledar should "along with the said poruppu (rent) amount pay the road cess, Jari Mahamai, Dharma Mahamai, etc., amount fixed upon the respective accounts." It is not disputed that these payments were to be made and were, in fact, being made during all these years to the Zamindar and not to the Government or the charities direct. No adequate reason is given as to why the Zamindar should require the road cess and charity amounts to be paid over to him if the 48 shares were assigned with the obligation to meet the liabilities direct. It is suggested that he wanted the charity amounts to be paid over to him direct in order that he might misappropriate a portion of what would otherwise go to the charities. It is extremely unlikely that a man who was assigning a village yielding more than double of what he required the transferee to pay him as rent would stipulate for the delivery to him of 3 per cent of the income in order that he might have the opportunity of misappropriating a small portion of that amount. The absurdity of it is patent. The reason why the Zamindar wanted these sums to be paid back to him is because he assigned over only the net amount after deducting the 12 shares and the 12 shares will have to be distributed between the charities and servants, neither the Zamindar nor the transferee having any beneficial interest in it. The village servants having the right to take their share out of the 9 shares of the produce set apart for them there was no necessity for the share being paid to the Zamindar and again paid over by him to the servants, convenience

obviously suggesting that the cowledar should deliver it direct to the servants. As regards the Dharma Mahamai and Jari Mahamai which represented the 3 shares, as the practice was for the Zamindar to take 3 shares for payment over to the charities he required the cowledar to collect and pay over the 3 shares to him.

It is significant that the cowles nowhere state that the cowledar should discharge the obligations to third parties which the Raja was under an obligation to discharge. It simply states that the cowledar should pay over to the Raja the road cess and 3 shares allotted to the charities. It says nothing about the 9 shares payable to the village officers, a fact which is unlikely if there was a transfer of the 9 shares to the cowledar under an agreement of indemnity should the cowledar not pay the village servants. I agree with the following observations of SADASIVA AYYAR, J., whose knowledge of the land laws and tenures of this Presidency is unique, "both the lessee and the Raja knew and contemplated that the lessee will pay it according to custom to the village officers direct instead of through the Raja. The Raja's direct receipt of it himself at the granary and paying it over at once to his village officers would have resulted in a mere circumlocution and unnecessary trouble." I also agree with him in thinking that the 12 per cent was received by the cowledar as agent of the Raja and not by virtue of his right as assignee of the shares with an obligation to discharge the liability of the Raja to pay 3 per cent to charities and 9 per cent to the village officials.

I would confirm the decrees of the Subordinate Judge and dismiss the Letters Patent Appeals with costs.

M.H.H.

APPELLATE CIVIL.

1922
April 4.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Coutts Trotter and Mr. Justice Kumaraswami Sastri.

SRI RAJAH PARTHASARATHY APPA RAO BAHADUR VARU, ZAMINDAR OF BHADRACHALAM (PLAINTIFF), APPELLANT,

v.

SRI RAJAH VENKATADRI APPA RAO, ZAMINDAR GARU AND TWO OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Widow—Adopted son—Adoption invalid—Death of adopted son, as a minor, unmarried and intestate—Succession by natural mother—Suit by natural mother against adoptive mother—Death of former pending suit—Will executed by the natural mother bequeathing accumulations of income of estate inherited from the son—Accumulations deposited in Bank by order of Court—Suit continued by reversioners—Fund drawn by reversioners on giving security—Dismissal of suit—Decision by Privy Council holding adoption invalid—Reversioners in possession of the entire income of the estate—Suit by legatees for their legacies against the reversioners in possession of the fund—Bar of Limitation—Limitation Act (IX of 1908), articles 62, 120 and 123—Executor de son tort—Cause of action—Interest on legacies from what date due—Probate and Administration Act (V of 1881), sec. 4—Will, construction of—Executor, death of, without accepting office—Vesting of estate—Joinder of legal personal representative, whether necessary—Succession Act (X of 1865), ss. 265 and 266.

The minor proprietor of the Medur estate was given in adoption in 1890 by his natural mother V to P who had inherited the Nidadavolu estate from her husband. The minor died unmarried and intestate in 1895. V sued in 1895 in the Sub-Court to recover possession of the Medur estate from the Court of Wards and P, on the ground that the adoption was

* Letters Patent Appeal Nos. 20, 24 and 26 of 1921.

invalid and that she succeeded to it as heiress to her son. V died pending suit in March 1899, leaving a will bequeathing to several legatees her jewels, certain Government promissory-notes and cash including the accumulations of the income of the Medur estate which accrued since the death of the minor, and which were deposited in the Bank of Madras to the credit of the suit under order of Court. The suit was continued by R and VN who were the paternal uncles of the minor and next reversioners to the Medur estate, and was dismissed on 2nd December 1899 on the ground that the adoption was valid. The uncles appealed to the High Court. P died on 5th December 1899. PA, who was a co-reversioner to the Nidadavolu estate along with R and VN, sued in 1900 in the District Court for partition of his one-third share in both the estates; the District Judge held the adoption invalid and decreed only one-third share in Nidadavolu estate to PA, who appealed to the High Court. The latter disposed of the appeals in 1905, holding that the adoption was valid and that the three reversioners were each entitled to a third share in both the estates. All the parties appealed to the Privy Council which held in December 1913 that the adoption was invalid and awarded a half share to each of the two uncles in the Medur estate and a third share to each of the three reversioners in Nidadavolu estate. In 1905 and 1907 each of the three reversioners drew out his one-third share in the accumulated income of the Medur estate on giving security to the Court under the orders of the Sub-Court and High Court respectively. After the Privy Council decision in December 1913, the legal representatives of the two uncles applied for and obtained an order for refund of the amount drawn by PA, for his share and for retention of their own shares, and the amount due by PA, was recovered by the former in execution in 1914 to 1917. Under the will of V, an executor had been appointed but he did not accept office or act as executor. The legatees under the will of V brought these suits in April 1916 to recover their legacies from the legal representatives of R and VN, who pleaded, *inter alia*, that the will was inoperative as regards the accumulated income of Medur estate as V had no power to dispose of it by her will, and that the suits were barred by limitation:

Held, that a Hindu widow is entitled to the income of her deceased husband's estate and can dispose by will of accumulations of it, at any rate when she does anything to show that she claims it as her own and does not intend such accumulations to form part of her deceased husband's estate;

that as V was not in possession of the Medur estate, as she sued for the income as hers and left it specifically by her will, she must be held to have had it as her own property over which she had absolute control, and the disposition by her will was valid;

that on a proper construction of the will the legacies could not be sued for until the termination of the litigation which did not occur till the decision of the Privy Council in 1913;

that by the law of India, as by the law of England, legacies are not payable until there are assets available to pay them and time does not begin to run until there are available assets, and that assets were not available for distribution to legatees in this case until the decision of the Privy Council in 1913; *Lord* v. *Lord*, (1867) L.R., 2 Ch. App., 782;

that article 123 of the Indian Limitation Act applies to suits for legacies against any person rightly or wrongly in possession of the estate of the testator under such circumstances that he is bound to deal with it as the estate of the deceased testator; *Maung Tun Tha* v. *Ma Thit*, (1917) I.L.R., 44 Calc., 379 (P.C.), *Khetramani Dasee* v. *Dhirendra Nath Roy*, (1914) I.L.R., 41 Calc., 271, followed;

that article 123 applied to these suits and they were not barred; even if article 62 or 120 applied, the suits were not barred as the amount was not received for the plaintiff's use nor did the cause of action arise before 1913;

that an executor *de son tort* can be sued by a legatee in the absence of the legal personal representative when there is no such legal representative as also when a representative of the deceased or a person in possession of the estate is proved, as in this case, to have received enough to pay all demands against the estate in full; *Coote* v. *Whittington*, (1873) L.R., 16 Eq., 534; *In re. Lovett, Ambler* v. *Lindsay*, (1876) 3 Ch.D., 198, followed;

that as between the residuary and other legatees, the rule as to the date from which the legacies bear interest is this, viz., "A legacy payable at a future day carries interest only from the time fixed for payment; but where no time for payment is fixed, the legacy is payable at, and therefore bears interest from, the end of a year after the testator's death, even though it be expressly made payable out of a particular fund which is not got in until after a longer interval";

that, under the will in question the legacies were intended to be given to the legatees as from the testatrix's death and to become *due at once*, but the testatrix recognized that they were not *payable* until after the termination of the litigation; consequently the legacies carried interest at 6 per cent from one year after the death of the testatrix. *Lord* v. *Lord*, (1867) L.R., 2 Ch. App., 782; and *Walford* v. *Walford*, [1912] A.C., 658, followed.

Per KUMARASWAMI SASTRI, J.—Where an executor under a will died without accepting the office or showing any indication that he took upon himself the duties of executor, the estate would not, under section 4 of the Probate and Administration Act, vest in the executor, but in the legal representative of the testator.

In order to apply the doctrine that a person claiming under a colour of hostile title cannot be deemed to be an executor of his own wrong, the claim must be made *bona fide*.

The doctrine of executor of his own wrong in the law of wills introduced in sections 265 and 266 of the Indian Succession Act, is applicable to cases not governed by that Act on general principles of equity and good conscience, even though similar provisions have not been introduced into the Probate and Administration Act.

THESE appeals are under the Letters Patent and arise out of a difference of opinion between SADASIVA AYYAR and PHILLIPS, JJ., on the question of limitation arising in certain appeals preferred to the High Court from the decrees in suits filed in the Sub-Court of Bezwada. The plaintiffs in the original suits were some of the legatees and an assignee from other legatees who sued to recover the legacies bequeathed to them under a will executed by the late Rani of Medur, who had inherited to her minor son Naraya Appa Row, who died a minor, unmarried and intestate in 1895. The minor had been given away in adoption by his widowed mother Venkayamma in 1890 and adopted by Rani Pappamma Row, who was the heiress to the estate of her husband called the Nidadavolu estate. On the death of the minor Naraya Appa Row, his natural mother Venkayamma claimed the Medur estate as his heiress, contending that the alleged adoption by Rani Pappamma Row was invalid for want

of authority of the latter's husband and some other reasons. The further facts and contentions appear from the earlier portion of the Judgment of KUMARASWAMI SASTRI, J., in these Letters Patent Appeals.

The material portions of the will of Venkayamma were as follows:—

EXHIBIT A.

Will executed on the 30th day of January 1899 by Sri Rajah Venkata Rajagopala Venkayamma Rao Bahadur Garu, widow of late Sri Rajah Venkataramayya Appa Rao Bahadur, Zamindar Varu.

I have been ill for about four months past and now there is much swelling and hard breathing and therefore, being afraid that I will not survive, I, while in a sound state of consciousness and understanding, make the following arrangements:—

1. Out of the jewels and other valuables belonging to me, I have already sold a major portion and spent that amount as well as the amount borrowed from my brother Sri Rajah Muganti Venkata Rajagopala Buchi Thammayya Bahadur Garu and from my younger brother Chiranjivi Sri Rajah Muganti Rajagopala Venkatarama Chinna Rao, for the expenses of the Medur estate suit and for our maintenance and other expenses.

2. Out of the minor jewels that are remaining with me at present, the jewels set with diamonds and pearls shall be divided into three shares, and out of those shares, one share shall be given to my brother Sri Rajah Muganti Buchi Thammayya Garu and two shares to my younger brother Sri Rajah Chinna Rao.

3. Further, the remaining gold and silver jewels, utensils, etc., and also cattle shall be given to my two brothers as specified in paragraph 2.

4. The two silver maces of chobdars and orderlies, which belong to us shall be given to my junior brother-in-law Sri Rajah Venkata Narasimha Appa Rao Bahadur Garu.

5. The Government promissory notes and cash relating to Medur estate which have been in the custody of Court till this day, as well as the interest accruing thereon till payment

of the amount, shall be divided into four shares, and out of them, one share shall be given to my elder brother Buchi Thammayya Garu, and three shares to my younger brother Chinna Rao.

6. Out of the Government promissory-notes and cash of the Medur estate which are remaining in deposit in Court and the jewels, etc., the amount specified hereunder shall be first expended and only out of the remaining amount, one share shall, as stated in paragraph 5, be paid to my elder brother and three shares to my younger brother.

Particulars of the expenses to be incurred:—

	RS.	A.	P.	
(1)	80,000	0	0	Rupees eighty thousand only to my younger sister-in-law Inuganti Kastur Ammah.
(2)	40,000	0	0	Rupees forty thousand to my elder sister-in-law Inuganti Venkataramanayamma Garu.
(3)	40,000	0	0	Rupees forty thousand to my younger sister Damera Venkatrajagopala Seethayamma.
(4)	2,000	0	0	Rupees two thousand to Lakkaraju Bapayya Garu.

The Subordinate Judge dismissed the suit as barred by limitation. On appeals preferred against the decrees in the original suits, the learned Judges SADASIVA AYYAR and PHILLIPS, JJ., who heard the appeals differed on the question of limitation; the former held that the suits were barred by limitation and confirmed the decree of the lower Court, while the latter held that there was no bar of limitation; and against the decision of the former which prevailed, these appeals were preferred under the Letters Patent.

P. Venkataramana Rao (with him *P. Chenchayya*, *P. Somasundaram* and *B. Satyanarayana*) for the appellant.

This is a suit for the recovery of a legacy. It falls under article 123 of the Limitation Act. The legacies became payable only after the decision of the Privy Council in 1913. These suits instituted in April 1916 are within time. The question is when the legacies were payable or deliverable. Under the will itself, the legacies are payable only on the termination of the litigation which was finally decided by the Privy Council in 1913. The will shows that the testator intended that the legacies should be payable at the end of the litigation, i.e., only after the executor could realize the fund at the end of the litigation. See *Lord* v. *Lord*(1), and *Luff* v. *Lord*(2). As a matter of construction of the will itself, the legacies are payable only after the end of the Medur litigation.

Under the English Law the executor must be in possession of sufficient assets which can be used for the payment of legacies before a cause of action arises for the legatees. This principle has been followed in India. *Treepoorasoondery Dossee* v. *Debendronath Tagore*(3). In this case assets can be said to be received only after the decision of the Privy Council in 1913; the receipts by the two uncles of the minor proprietor of Medur in 1905 on giving security and of the third reversioner of the Nidadavolu estate in 1907 were not receipts of assets available for payment of the legacies, for they were under an obligation to refund the amounts when called upon by the Court. The money continued to be in the order and control of the Court.

Even if 1905 or 1907 be taken as the starting point, the suits are within time under article 123, which is the proper article to be applied to these suits. This article is not restricted in its application to suits against

(1) (1867) L.R., 2 Ch. App., 782. (2) (1864) 34 Beav., 220.
(3) (1877) I.L.R., 2 Calc., 45.

executors and administrators only. It has been applied to suits against persons other than executor or administrator. See *Khetramani Dasee* v. *Dhirendra Nath Roy*(1), The question of applicability of article 123 to such suits is concluded by the decision of the Privy Council in *Maung Tun Tha* v. *Ma Thit*(2). The decision in *Sithamma* v. *Narayana*(3), is no longer good law, after the abovementioned decision of the Privy Council. See also *Shirinbai* v. *Ratanbai*(4).

Even if article 62 or 120 were applicable, the suits are not barred, as the defendants received the money free from the control of the Court only in 1913.

S. Srinivasa Ayyangar (with him *T. Ramachandra Rao*, *K. Raja Ayyar* and *K. Balasubrahmanya Ayyar*) for respondents.

There are three questions in this case:—(1) The Medur Rani had no power under the Hindu Law to dispose of the accumulations of the income of the estate by a will; (2) the claim is for mesne profits, and is not assignable under law and cannot be bequeathed, and (3) the suits are barred by limitation.

As regards the second point, the testator claimed the income as mesne profits under her plaint. As representing such mesne profits, the income cannot be assigned. If she had herself collected them, she could assign or bequeath it, but not if it is collected by a third party.

As regards the power of the widow to deal with the accumulations, the will itself shows that the testator made no distinction between the corpus and the income and regarded the latter as part of the estate. See *Sridhar Chattopadhya* v. *Kalipada Chuckerbutty*(5) and *Isri Dutt Koer* v. *Hansbutti Koerain*(6).

(1) (1914) I.L.R., 41 Calc., 271.
(2) (1917) I.L.R., 44 Calc., 379 (P.C.). (3) (1889) I.L.R., 12 Mad., 487.
(4) (1919) I.L.R., 43 Bom., 845.
(5) (1911) 16 C.W.N., 106. (6) (1884) I.L.R., 10 Calc., 324 (P.C.).

As regards limitation, article 123 does not apply to these suits, as they are not suits against executors or administrators or their representatives. The defendants are not even executors *de son tort*. The plaintiff must sue for administration of the estate and the present suits are not such suits. An administration suit cannot be brought even against executors *de son tort* without the legal personal representative. Sections 265 and 266 of the Indian Succession Act are not applicable to cases not covered by that Act. They have not been introduced even in the Probate and Administration Act. The defendants' fathers (R. and VN) are not executors *de son tort*, as they took the money in their own right as reversioners of the Medur estate. They took possession under a claim of hostile title or under a colour of title, and they are not therefore executors *de son tort*. See Williams on Executors, Vol. I, pp. 182, 195. As regards article 123, the current of authority is in favour of its inapplicability to these suits. The decision of the Privy Council in *Maung Tun Tha* v. *Ma Thit*(1) has not disposed of this particular question. See *Nurdin Najbudin* v. *Bu Umrao*(2). Reference was made to the following cases among others :—*Mahomed Riasat Ali* v. *Hasin Banu*(3), *Sithamma* v. *Narayana*(4) and *Khadesa Hajee Bappu* v. *Puethen Veettil Ayissa Ummah*(5).

The heir under the Hindu Law is not liable to pay or distribute the legacies. Nor are the defendants executors *de son tort* as already stated.

P. Venkataramana Rao in reply.—A suit for an account lies against an executor *de son tort* to the extent of assets received by him, and an action for

(1) (1917) I.L.R., 44 Calc., 379 (P.C.). (2) (1921) I.L.R., 45 Bom., 519.
(3) (1894) I.L.R., 21 Calc., 157 (P.C.). (4) (1889) I.L.R., 12 Mad., 487.
(5) (1911) I.L.R., 34 Mad., 511 (F.B.).

general account lies against him, if he has received all the assets.

See *Coote* v. *Whittington*(1). The principles underlying sections 265 and 266 of the Indian Succession Act are applicable to these cases. Such principle has been applied to cases governed by the Probate and Administration Act, though there are no similar sections in the latter Act. See *Amir Dulhin* v. *Baij Nath Singh*(2) and *Narayanasami Pillai* v. *Esa Abbayi Sait*(3).

JUDGMENT.

SCHWABE, C.J.—This case is an instance of the appallingly protracted litigation in this country which has been recently described by the Privy Council "as a disgrace to any civilized community." The money in dispute was left by will by a large number of legacies, some of them of small amounts, to persons in humble positions. The plaintiff sues as assignee of some of the larger legacies. The testatrix died in 1899 and, assuming the money in dispute to have been disposable by will by the testatrix, there was enough to pay all legatees, but up to now nothing has been paid to any of them; and those who are still alive and can be traced are now told that they will not receive anything until this case has been once more to the Privy Council, for the case has been brought before us with documents prepared in the form of a Privy Council appeal, and we have been told by the defendants that our views on the subject are only being taken in passing. I venture to hope that other counsels may prevail and this litigation has at last come to an end, for, in my view, the defendants have no sort of merits on their side and no sort of defence to the action.

(1) (1873) L.R., 16 Eq., 534. (2) (1894) I.L.R., 21 Calc., 311.
(3) (1905) I.L.R., 28 Mad., 351.

The facts are fully set out in the judgment of the Subordinate Judge, but I think it is necessary for me to recapitulate them shortly so far as they are relevant to the present dispute. In 1892, the boy known as the Medur minor, whose father had died in 1888 but whose mother, Venkayamma, known as the Medur Rani, the testatrix, was still alive, was adopted by Papamma Rao, the widowed Rani of Nidadavole. The Medur minor died in 1895, still a minor and unmarried. Litigation at once began between his mother and his adoptive mother as to whether the adoption was legal or illegal, each claiming a widow's estate in the Medur property, which up to the time of his death was being administered by the Court of Wards, and after his death either by the Court of Wards or by Court Receivers. A large sum of money representing the income of the Medur estate, and including the income arising between the death of the minor and the death of the testatrix which took place in March 1899, was paid into a Bank to the credit of the Subordinate Judge in whose Court the litigation between the widows was then pending. Shortly before the testatrix's death she made a will in favour of some of the plaintiffs and persons who have assigned their rights to the first plaintiff and others. An executor was named in the will but he did not act and died shortly after the testatrix. The pending litigation was continued by the fathers of the present defendants who were the paternal uncles of the Medur minor and claimed, on the basis that the adoption was bad, to succeed to the testatrix as the heirs of the Medur minor and his father. On December 2, 1899, the Subordinate Judge held that the adoption was good and that, therefore, Papamma Rao succeeded to him. On December 5, 1899, Papamma Rao died. Her heirs were the first plaintiff and the two uncles of the Medur minor

referred to above, who happened to be closely related to the Nidadavole Raja as well as to the Medur Raja. On the death of Papamma Rao, the first plaintiff filed a suit for partition and he claimed, on the basis that the adoption was valid, one-third of the Medur estate, and he also became a party to the pending appeal as a representative of Papamma Rao. But the uncles on the other hand, on the basis that the adoption was bad, claimed half each. It is to be remembered that, if their contention was right, the testatrix had a Hindu widow's estate in the Medur property from the time of the death of the minor until her own death. In 1903 the District Judge held the adoption to be invalid. Every one appealed and the cases were heard together and in November 1905 the High Court of Madras held that the adoption was valid. The position then was that the testatrix had no interest in the money in Court and the first plaintiff and the two uncles divided the Medur property including the money in Court as heirs of Papamma Rao. The uncles and the first plaintiff then applied to the Court for payment out of the money and, notice having been given of appeal to the Privy Council, they, all being men of position and means, were allowed to take the money out giving bonds that they would return it if the Court so ordered. Owing to what seems to be most unreasonable delay on the part of the parties, it took no less than nine years before the case was disposed of by the Privy Council. Their Lordships reversed the decision of the High Court and held that the adoption was invalid, and the present appellants, who are the sons and representatives of the uncles, who had meanwhile died, were held entitled to divide the Medur estate. They had said nothing to the Privy Council about the testatrix's will and so they got a decree for the whole estate including the money in

Court. They knew perfectly well all about the will all the while: in fact, their fathers had been litigating about some jewellery which was the private property of the testatrix and had been disposed of by her under that will and had themselves put forward the will, which they said they disputed, as one ground why neither of them should have the custody of the whole of that private property; and execution proceedings in that suit were being continued against the present defendants as late as 1916.

As between the parties to the Privy Council appeal, the defendants were entitled to the money, and that is all their Lordships had before them and all that their Lordships decided or intended to decide. There is no reason to think that the defendants were acting in any way improperly or dishonestly in saying nothing about the will, and, in my view, they must be held to have taken what was given by the judgment on the terms that they would hold so much of it as passed under the will of the testatrix as her representatives, if the will was good and the property hers, but would take it for themselves if, as they were about to allege, either the will was invalid or she had no power of disposal over the money.

The money in question was the income of the Medur estate during the period the testatrix was entitled to a Hindu widow's estate in it. After judgment the defendants applied for payment to them by the first plaintiff of the one-third he had had out of Court and to be allowed to retain the two-thirds which their fathers had got on the terms of the security bonds referred to above. And it was in due course ordered that the first plaintiff should repay his share to them and that they might retain their shares. In my judgment, the date of this order, viz., January 30th, 1915, is the date on which they first became possessed of any of the moneys in

dispute. Before that their fathers had had a part and they had had that part only on terms that they should hold it at the disposal of the Court and they could have resisted any claim for payment of it by any one else. The one-third which had been in the possession of the first plaintiff was, in fact, repaid between 1914 and 1916 and received by the defendants in 1917 and that one-third, we are told, and it has not been contradicted, was in itself sufficient to satisfy all the claims in this case. This suit was filed in April 1916. The defences raised were that the will was not genuine, that the testatrix had no right to dispose of the property, and the Limitation Act. The first failed and has disappeared from the suit. The second failed but it is one of the grounds of appeal. The law is that a Hindu widow is entitled to the income of the estate and can dispose by will of accumulation of it, at any rate when she does anything to show that she claims it as her own, and does not intend such accumulation to form part of her deceased husband's estate. It has been held, and in my judgment rightly held, that she had done all that was necessary. She could not handle the money as it was in Court; but she sued for it as hers and she left it specifically by the will.

There remains the question of the Limitation Act, which, if intended to simplify the law of limitations of actions in this country, seems, as far as my short experience goes, to have signally failed in its object. For it seems almost common form to raise the statute as a defence in litigation here, and a very large amount of judicial time is occupied in deciding difficult points under that statute. The article which was relied on by the appellants was article 62 barring suits for money had and received in three years, and, failing that, article 120 barring suits not otherwise provided for in six years. It is contended that the defendants or their

fathers received the money in 1905 to the use of the legatees, or, at any rate, could have been sued for it more than six years before action. The respondents, on the other hand, say that, if any article applies, it is article 123 barring suits for legacies in twelve years. But, in my judgment, the short answer to this defence is that, as stated above, the defendants or their fathers did not receive any money which could be considered as available for the legacies until 1915 and, further, as regards that part which they received from the first plaintiff and which is, we are told, enough to satisfy these claims, they did not receive it until 1917.

Further, on the proper construction of the will, in my judgment, the legacies could not be sued for until the termination of the litigation which did not occur until the decision of the Privy Council in 1913, that is, within three years of the commencement of the suit. By the will the testatrix purports to leave Government promissory notes and cash relating to the Medur estate then in the custody of the Court and interest accruing thereon till payment. She recognized that the money was not then available for the legacies and could not become avilable until the Court had released it, and this the Court never did until after the Privy Council decision; for a temporary release to the defendants or to their fathers and the first plaintiff on the terms stated above is, in my judgment, for this purpose not a release at all; and the money must be treated as having remained in Court. If that is right, those legacies did not become payable till 1913. Further, by the law of India, as by the law of England, the legacies are not payable until there are available assets to pay them and, therefore, time under the Statutes of Limitation does not begin to run until there are available assets; see *Lord*

v. *Lord*(1), *In re. Johnson, Sly* v. *Blake*(2), *Adams* v. *Barry*(3), *Rameshvar Singh* v. *Homeshvar Singh*(4), *Nandlal* v. *Gopilal*(5).

In this case there was none available until after the Privy Council decision. Even if there had been available assets before that, the earliest date on which it has been suggested that they were available is 1905. In my judgment, the article that applies is article 123 and the action is in time. But it is contended that this article only applies to actions against executors and administrators and that neither the defendants nor their fathers were either. But, in my judgment, this article applies to any one in possession of the estate and bound to pay legacies. If the defendants or their fathers did not take this money as representatives of the testatrix they took it as executors *de son tort*, for their fathers intermeddled with the estate and had possession of it or part of it in 1905, and they themselves intermeddled after their respective fathers' deaths, and as to part after the decision of the Privy Council in 1913. An executor *de son tort* takes all the liabilities of an executor, and it would be a curious thing if claims to legacies against an executor were not barred until the lapse of twelve years but claims against executors *de son tort* were barred in a shorter period. That this article applies to persons other than the executors in possession of an estate has been decided in several cases. In *Khetramani Dasee* v. *Dhirendra Nath Roy*(6), it was held to apply to a case of a son of the executor in possession of an estate. In *Maung Tun Tha* v. *Ma Thit*(7), the Privy Council held that article 123 applied to a case of a claim to a share

(1) (1867) L.R., 2 Ch. App., 782.
(2) (1885) 29 Ch. D., 964 at 971.
(3) (1845) 2 Coll., 285.
(4) (1921) 40 M.L.J., 1 (P.C).
(5) (1907) 9 Bom. L.R., 316.
(6) (1914) I.L.R., 41 Calc., 271.
(7) (1917) I.L.R., 44 Calc., 379 (P.C.).

of the estate against co-heirs in possession of an estate where there was intestacy; see also the observations of MACLEOD, J., in *Shirinbai* v. *Ratanbai*(1), where he points out that this section applies to any one who is the executor of a will or otherwise represents the estate of the testator. In my view, article, 123 applies to suits for legacies against any person rightly or wrongly in possession of the estate under such circumstances that he is bound to deal with it as the estate of the deceased.

It is argued finally that an executor *de son tort* cannot be sued by a legatee, at any rate, in the absence of the legal personal representative. But, in my view, this rule, if it be a rule, applies only where there is any legal representative. In England there would seem to have been some difference of opinion between MALINS, V.C., and JESSEL, M.R., on the point, and if it was necessary for me to express an opinion, I should say that I prefer the reasoning on this point of the former; see *Coote* v. *Whittington*(2), *Rowsell* v. *Morris*(3); *In re. Lovett, Ambler* v. *Lindsay*(4). Nor do I think that when a representative of the deceased or a person in possession of the estate is proved, as in this case, to have received enough to pay all demands against the estate in full, any such rule can apply. In my judgment, this action for the legacies lies against the defendants.

The question arises as between the other legatees and the residuary legatee as to the date from which the legacies bear interest. The rule is stated by Lord CAIRNS in *Lord* v. *Lord*(5), thus:

"A legacy payable at a future day carries interest only from the time fixed for its payment. On the other hand, where no time for payment is fixed, the legacy is payable at, and

(1) (1919) I.L.R., 43 Bom., 845 at 860. (2) (1873) L.R., 16 Eq., 534.
(3) (1873) L.R., 17 Eq., 20. (4) (1876) 3 Ch.D., 198.
(5) (1867) L.R., 2 Ch. App., 782 at 789.

therefore bears interest from, the end of a year after the testator's death, even though it be expressly made payable out of a particular fund which is not got in until after a longer interval."

In the same case, ROMILLY, M.R., put this instance:

"If the testatrix had said, "I give £2,000 to my brother," and had then directed that this should be paid to him when the litigation was over, and when the money was received, he would have been entitled to receive that £2,000, with interest from one year after the death of the testatrix; but it is quite a different thing where the payment of the money is part of certain trusts which are to arise at a future period."

This rule as stated by Lord CAIRNS is approved by the House of Lords in *Walford* v. *Walford*(1).

In my view, the true construction of this will is that the legacies are intended to be given to the legatees as from the testatrix's death and to become due at once, but that it was recognized by the testatrix that they would not in fact be paid until the determination of the litigation as the funds would not be available for their payment until then, and, in my view, these legacies come within the first part of the rule enunciated by Lord CAIRNS and within the instance given by Lord ROMILLY above. In *Walford* v. *Walford*(1), Lord HALDANE referring to the will in that case says,

"There is not to be found a direction in the will that the legacies are not to be paid till the fund falls in."

In this case there is no direction to be found that the legacies are not to be paid until the determination of the litigation though, no doubt, as I have pointed out, it was recognized that they would not be; but as the funds were invested and bearing interest, I can see no reason for holding that the testatrix's intention as expressed in the will was that the legatees should not get interest, but that the interest should accumulate for

(1) [1912] A.C., 658.

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the sole benefit of the residuary legatee. It follows that, in my judgment, these legacies bear interest at the rate of 6 per cent from one year after the death of the testatrix.

The plaintiff in this case claims legacies of Rs. 80,000 and Rs. 40,000 and interest thereon and also as residuary legatee. To arrive at the amount due to him as residuary legatee, an account will have to be taken and, for that purpose, the case will have to be remanded; he is entitled now to a declaration that he is entitled to the amounts claimed for the two specific legacies and interest thereon at 6 per cent from one year after the death of the testatrix and to a declaration that he is entitled to receive from the defendants whatever amount is found on taking an account to be the residue of the estate.

Letters Patent Appeal No. 26 of 1921.

The plaintiff is entitled to a declaration that she is entitled to her legacy of Rs. 40,000 and interest at 6 per cent from one year after the death of the testatrix.

Letters Patent Appeal No. 24 of 1921.

The plaintiff is entitled to a declaration that he is entitled to the legacy of Rs. 2,000 and interest at 6 per cent from one year after the death of the testatrix.

Accounts will have to be taken and the judgment of the Court will be in the form proposed by KUMARASWAMI SASTRI, J. The respondents must pay the costs of the appeal; those in the lower Court are provided for in the judgment of KUMARASWAMI SASTRI, J.

COUTTS TROTTER, J.

COUTTS TROTTER, J.—I am of the same opinion.

The facts of this case are extremely complicated and it is, no doubt, that complication which has led to so much litigation and to such divergences of judicial opinion. But, when the facts are once understood and marshalled,

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it seems to me that the points that emerge as sufficient for the determination of this case are comparatively simple and it is not necessary to refer to much of the vast record that has been piled up. I need not go over again the task of analysing those facts, which my Lord has fully done.

The only plea urged before us is that of limitation. Two questions arise, "when were the legacies actually payable?" and "when were these assets available for the purpose in the hands of those whom it is sought to make responsible for that payment?"

As to the first question, I confess I feel no difficulty whatever. It arises on the construction of the will of Venkayamma. At the time when she made that will, by common consent she was not in possession of the properties of which she purported to dispose, and to her knowledge they were the subject of litigation which was still in progress. Apart from the express reference to the litigation in the will, it appears to me that, as a matter of construction, to ascertain her intention, it must be supposed that she did not intend her executors to pay the legacies until they had effectual possession of the assets. That principle is recognized expressly by Lord Justice TURNER in *Lord* v. *Lord*(1), though, no doubt, in that case there were also express words in the will. It seems to me a most unreasonable construction to suppose that the testatrix gave a mandate to her executors which *ex hypothesi* they would be unable to carry out until the happening of events, which to the knowledge of the testatrix might never happen at all. So much for the construction of the will.

Apart altogether from the intention of the testatrix, there is no obligation on the executors to pay the legacies

(1) (1867) L.R., 2 Ch. App., 782.

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until they have effective possession of the assets of the testatrix. It seems to me clear that they never obtained effective possession of the assets until the fructifying of the final decision of the Privy Council in 1913, which was not till some years after the judgment. I am utterly unable to appreciate the argument that the taking out of the actual money from Court in 1905 on deposit of security was, in any sense, an effective possession of the assets such as, in my opinion, the law requires. The money which they were taking out was taken on condition of its being returned in a certain event and its place was taken in Court by an obligation to repay and the deposit of security which the Court, for practical convenience and to prevent the cash being tied up uselessly, agreed to treat as the equivalent of the cash originally deposited. It seems to me that the assets were throughout *in custodia legis* and that, if the executors had been called upon to pay the legacies when they took out the money, it would have been a complete answer for them to say that they had only conditional possession of the assets and that they could not be compelled to pay away sums of money which they might never be able to recover, and which in certain contingencies they were personally bound to account for and replace in Court. I agree, further, with my Lord in thinking that article 123 applies to such a case as the present even where the person sued is not an executor but a person who is, in fact, in possession of the estate in circumstances which render him accountable in equity to those having claims upon the estate. This is in accordance with the observations of MACLEOD, J., in *Shirinbai* v. *Ratanbai*(1), and, although there is no record of any argument on the point, it is clear that the decision in *Maung Tun Tha* v. *Ma Thit*(2) could not have

(1) (1919) I.L.R., 43 Bom., 845 at 860. (2) (1917) I.L.R., 44 Calc., 379 (P.C.)

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taken the form it did, if the construction contended for by the respondents was sound.

As regards the relief to be given, I am a little more doubtful. Assuming the decision of Sir GEORGE JESSEL, M.R., to be right and that of MALINS, V.C., in *Coote* v. *Whittington*(1), to be wrong, I do not think that that involves more than that the executor, if such exists, is a necessary party to a suit against an executor *de son tort*. But I agree with the form of order proposed by KUMARASWAMI SASTRI, J., which follows the usual form of order in these suits on the Original Side of this Court. With regard to the date from which interest should be calculated, I agree that we should apply the doctrine of *Lord* v. *Lord*(2), and treat this bequest as *debitum in praesenti, solvendum in futuro*. I do so not merely out of respect for the authority of that case; there are many English rules as to the construction of wills and administration of estates which I should hesitate to apply to this country, where large dispositions of property are made without any recourse to professional assistance. But in this case, the testatrix may well be supposed to have contemplated that, if and when the assets came to hand, they would come increased by an award of interest—as in fact they did.

KUMARASWAMI SASTRI, J.

KUMARASWAMI SASTRI, J.—These appeals arise out of a will executed by the Rani of Medur. The appellant in Letters Patent Appeal No. 20 of 1921 respresents the residuary legatee under the will and the appellants in Letters Patent Appeals Nos. 24 and 26 of 1921 are two of the pecuniary legatees. The respondents who are the same in all the appeals are the persons who have been declared by the decree of the Privy Council to be entitled to the Medur estate. In order to understand

(1) (1873) L.R., 16 Eq., 534. (2) (1867) L.R. 2 Ch., App., 782.

the contentions of the parties, it is necessary to refer to the litigation in connexion with the Medur and Nidadavole estates which originally formed part of the Nuzvid zamindari.

In 1890 the Medur estate was held by Narayya Appa Rao who was a minor and the Court of Wards was in management. He was adopted on the 27th of December 1890 by Papamma Rao who succeeded to the Nidadavole estate on the death of her husband, but the Court of Wards continued to hold possession of the estate in spite of the adoption. On the 4th of August 1895 the adopted son died a minor and unmarried, and disputes arose as to the succession to the Medur estate. The natural mother of the Medur minor claimed to succeed to the estate as his heir on the grounds *inter alia* that the adoption of her minor son by the proprietrix of the Nidadavole estate was invalid and that assuming it to be valid the adoption divested the minor of his right to the Medur estate. The contention of Papamma Rao, the adoptive mother, was that the adoption was valid and that on the death of the adopted son she became entitled to the Medur estate. On the 21st of October 1895, Venkayamma, the natural mother of the minor, filed Original Suit No. 35 of 1895 on the file of the Ellore Sub-Court against Papamma Rao and the Court of Wards claiming the Medur estate and the accumulations in connexion with that estate which were in the possession of the Court of Wards, and subsequent mesne profits. Various defences were raised which it is unnecessary to consider for the purpose of these appeals. During the pendency of this suit, on the 30th of January 1899, Venkayamma executed the will marked Exhibit A whereby she disposed of her stridhanam jewels and other moveable properties belonging to her and also the Government promissory notes and cash relating to the Medur estate

which were in the custody of Court as well as the interest accruing thereon. After providing for certain pecuniary legacies set out in the will she bequeathed the residue of the Government promissory notes and cash to her two brothers. The appellant in Letters Patent Appeal No. 20 of 1921 who is the Raja of Bhadrachalam got an assignment of two legacies of Rs. 80,000 and Rs. 40,000 which were bequeathed to the sister-in-law of the Medur Rani and also of the residue which was bequeathed to her brothers. The appellant in Letters Patent Appeal No. 26 of 1921 got a legacy of Rs. 40,000, and Bapayya, whose legal representative is the appellant in Letters Patent Appeal No. 24 of 1921 got a legacy of Rs. 2,000. Venkayamma, the testatrix, died on the 9th of March 1899, and Rangayya Appa Rao and Venkata Narasimha Appa Rao, two of the paternal uncles of the last male-holder who were the reversionary heirs to the Medur estate, were brought on record as her legal representatives. Under Hindu Law they would also be the legal representatives of the deceased testatrix and in the absence of a will they would thus be not only the heirs of her husband but also of her deceased son and her own stridhanam heirs. They applied to be brought on record on the ground that they became entitled to the Medur estate and to continue the suit as laid by her, and on the 20th of July 1899 they were brought on record. On the 2nd of December 1899, the suit was dismissed, the Subordinate Judge holding that the adoption was valid and that in consequence of the adoption Venkayamma was not entitled to succeed to her son, the Medur estate having passed, by reason of the adoption and on the death of the adopted boy, to Papamma Rao. The two legal representatives who were brought on record as reversioners filed Appeals Nos. 122 and 123 of 1900 in the High Court against the decree of the Subordinate

Judge of Ellore. Before the appeals were filed, Papamma Rao died on the 5th of December 1899. So far as the Nidadavole estate was concerned, the reversionary heirs to that estate on the death of Papamma Rao were the reversioners to the Medur estate and also Parthasarathi Appa Rao, the Rāja of Bhadrachalam. So that the position was that if the decision of the Subordinate Judge with regard to the Medur estate was right, both the Medur and Nidadavole estates would be divided into three shares between the two reversioners claiming the Medur estate and Parthasarathi Appa Rao, whereas, if the appeal was successful and the contentions of Venkayamma were upheld, the Medur estate would be divided into two shares between the two reversionary heirs of Venkayamma and the Nidadavole estate would be divided into three shares between the three reversionary heirs to the Nidadavole estate, two of whom also happened to be the reversionary heirs to the Medur estate. On the death of Papamma Rao, Parthasarathi Appa Rao, the Raja of Bhadrachalam, filed Original Suit No. 44 of 1899 on the file of the District Court of Gōdāvari for a partition of both the Nidadavole and Medur estates, claiming one-third share in each, against Rangayya Appa Rao and Venkata Narasimha Appa Rao. In this suit the contention was raised by the defendants that Papamma Rao was coerced into adopting the Medur minor, that she had no authority to make the adoption, and that consequently the plaintiff had no right to any share in the Medur estate. The District Judge dismissed the suit as regards the Medur estate and gave a decree to the plaintiff for a third share in the Nidadavole estate. An appeal was filed against this decree of the District Court. The appeals filed against the decree of the Subordinate Judge's Court, Ellore, in the suit filed by the Medur Rani and the appeal filed against the decree of the

Gōdāvari District Court edur reversioners recovered the Appa Rao were heard to Bhadrāchalam in execution in judgment was pronounce

The High Court, while with the litigation to the Medur Subordinate Judge of personal property belonging to estate and holding thattaken possession of by Rangayya the title of Venkayamwo heirs to her personal property held that the Nidadavi the other heir Venkata Narasimha a decree dividing botthe 10th of March 1902, Original into three shares, gi n the file of the Sub-Court, Kistna, claimants. An appAppa Rao, claiming one half of the against the decree. The value of the property was stated of December 1913. 9-0-10, and the plaintiff claimed held that the adoing the half share. No reference was want of authorit In the written statement filed by the quently succeeded ted that he heard that Venkayamma that after her de will leaving certain legacies, that the reversioners. ought a suit, and that, unless it can be Privy Council we will was not genuine or the provisions into two shareot valid, the entire property in the suit shares. The would pass to the legatees. It was also pleaded that, in view of the contingency of the suit by the legatees succeeding, the plaintiff should execute an agreement undertaking to give one half of the property to them. Although the will was set up in this suit, the Subordinate Judge decreed a partition on the ground that the plaintiff and the defendant were the Stridhanam heirs of Venkayamma and that the pendency of a suit by the legatees under the will was no ground for refusing relief. The suit by the two legatees, to whom, under the terms of the will of Venkayamma, her jewels and moveable properties were bequeathed, was filed on the 10th of March 1902 against Rangayya Appa Rao and Venkata Narasimha Appa Rao and was numbered as Original Suit No. 15 of 1902. The plaint set out the

will and alleged that the executor who was appointed under the will died without making any arrangement regarding the property, that the first defendant took possession of the moveables and that the second defendant was also laying claim to the same. The defendants filed a written statement pleading that they were not aware of the execution of the will, the burden of proving which was on the plaintiffs, that the testatrix was not in a position to execute the will and that, even if the will was genuine, the properties specified in the will pertained to the Medur estate which the testatrix had no power to will away. They stated that, if the will was genuine and the testatrix had disposing power, they had no objection to the properties disposed of being decreed to the plaintiffs. A decree was passed on the 30th of March 1904 holding the will to be genuine and that the testatrix had power of disposition over the moveables claimed in the suit and decreeing the claim of the two legatees. Execution proceedings went on till 1916 and the decree was executed. The present suits were brought in 1916 to recover the residuary legacies and also the four pecuniary legacies bequeathed under the will. The Subordinate Judge dismissed the suits as barred by limitation. An appeal was filed to the High Court. Mr. Justice SADASIVA AYYAR held that the decision of the Subordinate Judge was right, while Mr. Justice PHILLIPS held that the suits were not barred by limitation, and hence these Letters Patent Appeals against the decision of SADASIVA AYYAR, J., dismissing the suits as barred.

The main contentions raised by the defendants before us are (1) that the Medur Ranee had no disposing power over the profits of the Medur estate which were deposited in Court, (2) that, even if she had, the plaintiffs have no cause of action against the present defendants, and (3) that the suit is barred by limitation.

Before proceeding further, it is necessary to consider the terms of the will, as to the genuineness of which there is no dispute. Paragraphs 1 to 4 relate to the jewels and other moveable properties which belonged to the testatrix and which were in her possession. She states that she had to sell the major portion of them for litigation and for personal expenses and that she had in addition to borrow money from her two brothers. She directs that her jewels, vessels, utensils, etc., which are specified in paragraphs 2 and 3, should be divided between her two brothers, her elder brother getting one share and her younger brother getting two shares; she gives two silver maces to her brother-in-law, Venkata Narasimha Appa Rao (who was one of the reversioners to the Medur estate and brought himself on record as such). Paragraphs 5 and 6, which are material to the present suit, run as follows:—

"5. The Government promissory notes and cash relating to the Medur estate which have been in the custody of Court till this day as well as the interest accruing thereon till payment (or more correctly realization) of the amount, shall be divided into four shares, and, out of them, one share shall be given to my elder brother, Buchi Thammayya Garu, and three shares to my younger brother, Chinna Rao; 6. Out of the Government promissory notes and cash of the Medur estate which are remaining in deposit in Court and the jewels, etc., the amounts specified hereunder shall be first expended and, only out of the remaining amount, one share shall, as stated in paragraph 5, be paid to my elder brother and three shares to my younger brother."

Then follow under the heading "Particulars of the expenses to be incurred," the 27 pecuniary legacies. The first and second legacies of Rs. 80,000 and 40,000 have been assigned over by the legatees to the Raja of Bhadrāchalam who in addition has got an assignment from the residuary legatees under paragraphs 5 and 6

of the will of the residue which will go to them. The third legacy of Rs. 40,000 is given to Seetayamma, the appellant in Letters Patent Appeal No. 26 of 1921, and the legacy of Rs. 2,000 (item 24) is given to Bapayya whose legal representative is the appellant in Letters Patent Appeal No. 24 of 1921.

As regards the disposing power of Venkayamma, I have little hesitation in holding that she had power to dispose of the income which arose from the Medur estate from the 4th of August 1895, the date of the death of her son, to the 9th of March 1899, the date of her death. It has now been settled that a Hindu widow has absolute control over the income of the property which she inherits from her husband, subject of course to the payment of the debts left by him, and that, unless it can be shown that she intended to make the savings part of the estate of her husband, she would have full power of disposal over it. In *Saodamini Dasi* v. *The Administrator-General of Bengal*(1), it was held that a widow was entitled to dispose of the income which accumulated during her tenure as widow of her husband's estate. Dealing with the contention that the savings of a Hindu widow should be presumed to have been made for the benefit of her husband's estate, their Lordships observed on the facts of that case that the widow never got her husband's estate in her possession, that there was no room for any such presumption, and that she did nothing to indicate an intention to make the fund received or interest on it part of her husband's estate, or to justify the inference that she wished it to revert to her husband's heirs. These remarks apply with equal force to the present case where Venkayamma was never in possession of her son's estate as heir, it having

(1) (1893) I.L.R., 20 Calc., 433 (P.C.).

remained in the possession of the Court of Wards from the date of her son's death, when her title accrued, to the date of her own death in 1899. The estate was under litigation and the income of the estate was being deposited in Court subject to the result of the suit which she had filed. There was therefore nothing to raise any presumption that she intended the income to be an accretion to the estate. All that was held in *Isri Dutt Koer* v. *Hansbutti Koerain*(1) is that where a widow has made no attempt to dispose of her savings in her lifetime, those savings will follow the estate from which they arose, but that where a widow who might have spent the income as it accrued has in fact saved it and has not added it to the estate, she is entitled to dispose of the savings as she pleases. The question depends upon her intention which is evidenced by her conduct in dealing with the after-purchases. In *Akkanna* v. *Venkayya*(2) it was held that the presumption is that the acquirer of property intends to retain dominion over it and that in the case of a Hindu widow the presumption is none the less so when the fund with which the property is acquired is one which, though derived from her husband's property, was at her absolute disposal. A similar view was taken in *Subramanian Chetti* v. *Arunachelam Chetti*(3), *Veeraraghava Reddi* v. *Kota Reddi*(4) and *Keshav* v. *Maruti*(5).

It has been argued for the respondents that as the testatrix deals in the will not only with the income derived from the property between the date of her son's death and her own but also with the accumulations that were in the hands of the Court of Wards during the minority of her son and called them "Government

(1) (1884) I.L.R., 10 Calc., 324 (P.C.). (2) (1902) I.L.R., 25 Mad., 351.
(3) (1905) I.L.R., 28 Mad., 1. (4) (1916) 31 M.L.J., 465.
(5) (1922) I.L.R., 46 Bom., 37.

promissory notes and cash relating to the Medur estate" in her will, she must be taken to have treated the income during the period to which she was entitled to the estate, as an accretion to the estate. I do not think that the will can be read so as to indicate any such intention. She clearly wanted to treat the property as property over which she had absolute dominion and the fact that she purported to deal with properties to which she had no such right along with properties over which she had a right of disposal would not indicate an intention on her part to treat one as an accretion to the other. That she purported to act beyond her powers as regards some of the items cannot defeat her right to dispose of items over which she had absolute disposing power.

It was also argued that the income of the estate between the period of her son's death and her own was in the nature of mesne profits which in law she had no power to assign, and reliance was placed on section 6, clause (*e*), of the Transfer of Property Act. The Transfer of Property Act applies only to alienations *inter vivos* and has no application to disposal of property by will. Reference has been made to *Shyam Chand Koondoo* v. *The Land Mortgage Bank of India*(1); *Durga Chundra Roy* v. *Koilash Chunder Roy*(2); *Sridhar Chattopadhya* v. *Kalipada Chuckerbutty*(3); *Seetamma* v. *Venkataramayya*(4); *Govindasawmi Pillai* v. *Ramaswami Aiyar*(5). I do not think that these cases have any application. On the date of the will, the income arising from the estate was in the Bank of Madras to the credit of the suit and held for the successful litigant. The monies were collected and the case is not one where there is an assignment of the right to recover mesne profits. What

(1) (1883) I.L.R., 9 Calc., 695.
(2) (1898) 2 C.W.N., 43.
(3) (1911) 16 C.M.N., 106.
(4) (1913) 25 M.L.J., 410.
(5) (1916) 30 M.L.J., 492.

the testatrix does is to dispose of property which, in the event of her success in the suit, would belong to her and which was in Court. There is no authority for holding that a fund in Court to which the testatrix has laid a claim and to which she will be entitled, if successful, cannot be disposed of by will. I am therefore of opinion that Venkayamma had absolute disposing power over the income that accrued during the period when she held the estate and that the will executed by her is valid.

The next question is whether the legatees have a right of action against the defendants. Though, under the will of Venkayamma, Gopalakrishnamma was appointed executor, it is found that he did not accept the office and that he died without doing anything in connexion with the estate. The exact date of his death does not appear, but it is common ground that he died soon after the testatrix. As he did not accept office, there was no person to assent to the legacies given by the testatrix in her will and consequently section 112 of the Probate and Administration Act which requires the assent of the executor to complete the legatee's title to his legacy can have no application. As the will in question was executed by a Hindu outside Madras and as it does not comprise any immoveable properties in Madras, the Hindu Wills Act does not apply to the will and consequently section 187 of the Succession Act which enacts that no right as executor or legatee can be established in any Court of Justice unless a Court of competent jurisdiction within the province shall have granted probate of the will under which the right is claimed or shall have granted letters of administration and which is made applicable under the Hindu Wills Act to wills to which that Act applies, does not govern the present case. There was therefore no necessity to take out probate or

letters of administration for the purpose of enabling the legatees under the will to claim the bequests given to them. So far as the decisions of Courts in India go, a right of suit has always been given to the legatee direct against an executor or administrator or the heirs of the deceased or the person in possession of assets out of which the legacy is to be paid even though there has been no assent to the legacy. In *Khetramani Dasee* v. *Dhirendra Nath Roy*(1), a suit by a residuary legatee against the heir of an executor for the recovery of a legacy due to her and for an account was held to lie. JENKINS, C.J., in reversing the decree of RICHARDSON, J., and sending the case back for the determination of the question whether the plaintiff is entitled to the legacy claimed and for the purpose of taking accounts if such accounts were necessary, observed :

"It is true that the executor is dead, but his estate which would be liable at least to the extent to which it was enriched, is represented by the presence before the Court of his sole heir and representative. That does not mean that the heir or representative is personally liable for his father's breach of obligation, if breach there was, but that he is liable to the extent of the assets received from the father's estate."

In *Nandlal* v. *Gopilal*(2), a suit by one of the residuary legatees under the will of her father against the widow of the deceased who was in possession of the properties of the deceased and who claimed them adversely to the legatees was held to lie. As regards the form of the present suits, there is a prayer in the plaint in O.S. No. 30 of 1916 filed by the Raja of Bhadrachalam, which is the subject matter of L.P.A. No. 20 of 1921, for the taking of accounts and for necessary directions for the purpose of affording adequate relief to the plaintiff. The plaint in O.S. No. 88 of 1916, which is

(1) (1914) I.L.R., 41 Calc., 271. (2) (1907) 9 Bom. L.R., 316.

the subject-matter of L.P.A. No. 24 of 1921, in addition to the prayer for the taking of accounts and for directions, also contains a prayer for the administration of the property of the testatrix under the orders of Court. No authority has been cited to show that a residuary legatee cannot file a suit for the taking of accounts for the determination of the amount due to him in respect of the legacy. In order to remove any technical objection that may arise as regards the form in the absence of a prayer for taking accounts in O.S. No. 87 of 1916, which is the subject-matter of L.P.A. No. 26 of 1921, we have allowed the plaintiff to add a prayer for the taking of accounts. It should be remembered that the defendants are also the legal representatives of Venkayamma, who, in the absence of the will, would be entitled to the personal properties of Venkayamma. In a suit by one residuary legatee for the taking of accounts and the payment to him of his share, the other residuary legatees are not necessary parties.

There is also the fact that in the present case the executor died without accepting office or showing any indication that he took upon himself the duties of executor. Under these circumstances, I agree with the view taken by PHILLIPS, J., that the estate would not, under section 4 of the Probate and Administration Act, vest in him. Section 4 no doubt declares that the executor or administrator of a deceased person is his legal representative for all purposes and that the property of the deceased person vests in him as such; but it is difficult to see how, in the absence of the acceptance of office by the executor, the property can still vest in him. In cases where the Hindu Wills Act applies and where probate is necessary, the estate does not vest in the executor until he obtains probate. In such cases the application for probate itself is an

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indication of the acceptance of office. Section 12 of the Probate and Administration Act enacts that probate of a will, when granted, establishes the will from the death of the testator and renders valid all intermediate acts of the executor as such. But in cases where probate is not necessary, there should be some indication that the person appointed executor is willing to accept office and perform the duties of the executor. In cases where he does not accept office, I think, the estate must vest in the legal representative until an application is made by some person competent to obtain a grant under the Probate and Administration Act. In the present case the legal representatives of Venkayamma were the fathers of the present defendants and they took possession of the moveable properties of Venkayamma on her death and divided the same between them under a decree of Court which I have already referred to above. They have also laid claim to the income of the Medur estate which would under the terms of the will go to the legatees, and they drew monies from Court. I do not think the fact that they claimed to be reversioners to the Medur estate and not heirs of Venkayamma when they drew the monies, makes any difference. The nature of the claim made by a legal representative who takes possession of properties bequeathed under a will is immaterial in discussing the question whether the legatees have a cause of action to recover the legacies bequeathed to them under the will, though it may have an important bearing on the question as to whether article 123 of the Limitation Act applies to such cases. All that is necessary to give the legatees a cause of action is that the defendants should be in possession of assets left by the deceased to which under the terms of the will they are entitled and which have to be applied for the payment of the legacies left by the will. Even

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assuming my view that the estate vested in the legal representatives of the deceased owing to the executor not having accepted office is wrong, I think the defendants and their fathers are in the position of executors of their own wrong in that they inter-meddled with the estate of the deceased and were in possession of assets and they would be liable as such. It is clear that the fathers of the present defendants were aware of the will left by Venkayamma. The position that they took up in the suit relating to the moveable properties, which I have already referred to, was that they heard that Venkayamma left a will but were not personally aware of it, and that, even if the will was executed by her, the properties specified in the will belonged to the Medur estate which she had no power to will away, but that, if the Court should hold that the will was genuine and that she had disposing power, they had no objection to the terms of the will being carried out. It is clear from the evidence that, so far as the moveable properties in the possession of Venkayamma and disposed of by her in paragraphs 2 to 4 of the will are concerned, they were taken possession of by Rangayya Appa Rao and subsequently divided between him and Venkata Narasimha Appa Rao by a decree of Court. The will was found to be genuine in the suit brought by the legatees and a decree was obtained by them in respect of the properties mentioned in paragraphs 2 to 4 of the will. As regards the Government promissory notes and cash representing the income of the estate between the date of the death of the son of the testatrix and her own death, they must have known perfectly well that they were also disposed of by the same will. In the application to be brought on record in the Medur suit after Venkayamma's death it was alleged that Rangayya Appa Rao and Venkata

Narasimha Appa Rao were the legal representatives and that they were entitled to the Medur estate as reversioners. An order was made on the 20th of July 1899 bringing them on record on the ground that they being the reversioners of the plaintiff's husband and son, were entitled to continue the suit. In the application to be brought on record, nothing was said of the will, and the income of the estate was evidently treated by them as part of the Medur estate. It is argued on their behalf that, whatever may be their position as regards the moveable properties disposed of in paragraphs 2 to 4 of the will, they could not be treated as executors of their own wrong as regards the income of the Medur estate which they claimed not as the heirs of Venkayamma but as reversioners to the Medur estate. Reference has been made to Williams on Executors, pages 182 and 195, where the learned author observes that, if a person sets up in himself a colourable title to the goods of the deceased, as when he claims a lien on them though he may not be able to make out his title completely or if he takes goods of the deceased by mistake supposing them to be his own or if he seizes the testator's goods claiming property in himself though it afterwards appears that he had no right, he shall not be deemed an executor *de son tort*. Having regard to the written statements filed in the suit relating to the moveable properties of Venkayamma, where the reversioners in effect put the plaintiff to the proof of the will and of the disposing power of Venkayamma over the properties disposed of by the will and admitted their readiness to the terms being carried out, should the Court hold the will to be genuine, and that the testatrix had disposing power, I think the position taken up by them was that as regards the properties referred to in paragraphs 2 to 4 of the will and the

legacies given by the will, they were holding the properties for themselves if the Court should hold against the will, and for the legatees, should the decision be in favour of the will. In the Medur suit they alleged that they were the reversionary heirs, but it should be remembered that, in addition to being the reversionary heirs to the estate, they were also the heirs of Venkayamma as regards her own private properties, and that the mesne profits that were disposed of by the will and over which Venkayamma had disposing power bore a very small proportion to the entire value of the estate and the interest involved in the suit.

In his petition, Exhibit, B5, Venkata Narasimha Appa Rao states that he is the nearest agnate now alive and is also the legal representative of the deceased plaintiff (Venkayamma) and that the cause of action as laid by her entirely survives to him. Rangayya Appa Rao, in his counter petition B6, states that he is also a reversioner. Their application was opposed by Papamma Rao (first defendant) on the ground that, as each of them was entitled to a half share, they could not continue the suit. The Subordinate Judge in his order on B5, dated 20th July 1899, held that Venkata Narasimha Appa Rao and Rangayya Appa Rao were entitled to be brought on record as legal representatives. No question was raised as to the petitioners not being the heirs of Venkayamma's personal properties, and I do not think the order bringing them on record as her legal representatives can be construed as an adjudication that they could not be recognized to have come on record as her own legal representatives. When the same heirs are brought on record in a suit covering both the personal properties of the widow and the properties in which she had a limited estate, I do not see why the legal representatives should not be

said to be on record as her own legal representatives. Whatever doubts there might have been about the will on the date when the reversioners applied to be brought on record in the Medur suit, it is clear that after the disposal of the suit relating to the moveable properties left by Venkayamma and disposed of in the earlier part of her will, there could be no doubt as to the genuineness of the will left by her, and as a matter of fact it was not suggested at any time thereafter that the Will was not genuine. As regards the income of the Medur estate disposed of by her, it is difficult to see what reasonable grounds the defendants had for believing that it was part of the Medur estate. The testatrix was never in possession of the Medur estate and there were no circumstances to support the view that she treated the income as part of the accretions to the estate. *Saodamini Dasi* v. *The Administrator-General of Bengal*(1), decided by the Privy Council so long ago as 1892, and *Akkanna* v. *Venkayya*(2), decided by this High Court as early as 1901, made the law on this question as to the rights of Venkayamma to bequeath the mesne profits perfectly clear. When, therefore, the reversioners applied to the High Court in 1904 for payment to each of them of a one-third share of the monies standing to the credit of the Medur suit, pending the determination of the title of Venkayamma to the Medur estate, they must have known perfectly well that part of the money which they received as attributable to the income of the estate between the date of the death of the last male holder and of Venkayamma, represented property to which they had no right, and which, under the will of Venkayamma, had to be distributed between the various legatees mentioned in the will, should her

(1) (1893) I.L.R., 20 Calc., 433 (P.C.). (2) (1902) I.L.R., 25 Mad., 351.

title to the Medur estate as heiress of her son be ultimately upheld. Under these circumstances, I do not think that, even assuming that they intermeddled with that money asserting a hostile claim to Venkayamma, they would be freed from their liability as executors of their own wrong. It seems to me that, in order to apply the doctrine that a person claiming under colour of a hostile title cannot be made executor of his own wrong, a claim must be made *bona fide*. I do not see how the assertion of an unreasonable claim by one who intermeddles with the estate which he must have known to be untenable could absolve the person who takes possession of the assets from liability.

It was suggested during the course of the argument that after the decree of the Subordinate Judge in the Medur suit the Medur estate must be deemed to have belonged to Papamma Rao after the death of her adopted son and that consequently the moneys were drawn by the parties to the Medur suit as Pappamma Rao's heirs under the decree in the suit in the Gōdāvari District Court. If this is so, then, on the reversal of the decree by the Privy Council, their legal representatives (the present defendants) must be deemed to have drawn the moneys when they got orders of Court adjusting the accounts and setting off instead of putting back the moneys in the Medur suit and drawing them out again, and they will be liable as executors *de son tort*.

So far as the position of an executor of his own wrong in Indian law is concerned, section 265 of the Succession Act enacts that a person who intermeddles with the estate of the deceased, or does any other act which belongs to the office of executor, while there is no rightful executor or administrator in existence, thereby makes himself an executor of his own wrong. Section 266 provides that where a person has so acted

as to become an executor of his own wrong, he is answerable to the rightful executor or administrator, or to any creditor or legatee of the deceased, to the extent of the assets which may have come to his hands after deducting payments made to the rightful executor or administrator and payments made in due course of administration. Section 2, sub-clause (11) of the Code of Civil Procedure (1908), defines "legal representative" as a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased. The policy of the Indian Legislature has evidently been to make the mere fact of intermeddling with the estate and taking possession of the assets a ground of liability. It is argued that there is no provision analogous to sections 265 and 266 of the Succession Act in the Probate and Administration Act and that consequently there can be no executor of his own wrong in India. The Probate and Administration Act unlike the Succession Act deals only with the grant of probate and letters of administration and with the relation between executor or administrator legally entitled to the office as such and the legatees and next of kin. In fact, the preamble to the Act clearly states that it is expedient to provide for the grant of probate of wills and letters of administration to the estates of deceased persons in cases to which the Indian Succession Act, 1865, does not apply. The omission of provisions in the Probate and Administration Act analogous to sections 265 and 266 of the Succession Act cannot, therefore, in my opinion, be taken to indicate that the legislature did not intend to apply that portion of the law to wills in India. Courts in India are, in cases where there is no statutory enactment, bound to administer the law on the general principles of equity

and good conscience, and the provisions of Indian enactments not strictly applicable or the English law on branches which are not peculiar to English practice or jurisprudence have been applied in analogous cases in India if the interests of justice require it. For example, in *Magaluri Garudiah* v. *Nurayana Rungiah*(1), the learned Judges applied the rule laid down in the Succession Act limiting the liability of an executor *de son tort* to the amount of assets received by him to cases under Hindu law and decided that, although under strict Hindu law the liability of a person who takes any portion of the estate of a deceased person extends to the whole of his debts, justice demands that the liability should be enforced to the extent of assets received, on the analogy of the provisions of the Succession Act as regards the liability of executor *de son tort*. It is contended that, even if the persons who came on record as the legal representatives of Venkayamma can be treated as executors of their own wrong, the present defendants, who are only their sons, cannot be saddled with the same liability. So far as the present defendants are concerned, they are the heirs of the original legal representatives and came on record as such. The fund in Court which represented the mesne profits which Venkayamma disposed of was drawn by their fathers under a bond by which they were liable to bring back the moneys. On the reversal of the decree of the Madras High Court by the Privy Council those moneys had to be brought into Court, but the present defendants applied that accounts may be adjusted instead of the moneys being brought into Court. The legal effect of the order passed upon their application was the same as if they brought back the moneys into Court as the heirs

(1) (1881) I.L.R., 3 Mad., 359 at 365.

of Pappamma Rao whose title was negatived, and took it again as the heirs of Venkayamma. So far therefore as the moneys in Court are concerned, they would have intermeddled with the estate and be equally liable and in any event they cannot escape liability as the legal representatives of executors of their own wrong. It is argued that, if the suit against them is as executors of their own wrong, the suit would be bad for non-joinder of the legal representatives of the estate, and reference has been made to *Rowsell* v. *Morris*(1), where it was held by Sir George JESSEL M. R., that the legal personal representative of a testator is a necessary party to a suit for the administration of his real and personal estate and that, if he is not made a party, no decree can be made in such a suit even though an executor *de son tort* and the trustees of the real estate are before the Court. A contrary view was taken by MALINS, V.C., in *Coote* v. *Whittington*(2), where he held that where a person possesses himself of the assets of a testator without having administered, a bill for an account to the extent of the assets he has received, will lie against him as executor *de son tort*, though there is no legal personal representative on record, and this view was, in spite of the dissent of Sir GEORGE JESSEL, M.R., in *Rowsell* v. *Morris*(1), re-affirmed by him in *In re Lovett, Ambler* v. *Lindsay*(3), where very good reasons are given by the Vice-Chancellor for the view he has taken. This decision has been followed in *Amir Dulhin* v. *Baij Nath Singh*(4). I am of opinion that where an executor *de son tort* takes possession of all the assets of the deceased, a suit for a general administration can be filed without joining the legal representatives, and in cases where he

(1) (1873) L.R., 17 Eq., 20.
(2) (1873) 16 Eq., 534.
(3) (1876) 3 Ch. D., 198.
(4) (1894) I.L.R., 21 Calc., 811.

takes possession of only a part of the assets he can be made accountable for the part he actually took possession of without joining the legal representatives: but where administration is sought for the entire estate in cases where the executor *de son tort* has taken possession of only a part, the legal representatives would also have to be added. In the present case the defendants and their fathers have taken possession of all the properties of Venkayamma. They first took possession of the moveables and then took possession of the fund in Court and it is not suggested that any property of Venkayamma is outstanding in the hands of any other person. Under these circumstances I think the defendants are liable and that there is a good cause of action against them.

The plea of limitation however raises questions of considerable difficulty. Article 123 of the Limitation Act provides a period of twelve years for a suit for a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate, the starting period being the date when the legacy or share becomes payable or deliverable. It should be remembered that, when Venkayamma executed the will, Exhibit A, she was not in possession of the Medur estate or of the promissory notes and cash referred to in paragraphs 5 and 6 of the will, out of which the legacies were payable. She filed a suit which was resisted on the ground that she had no title to the estate, and the income of the estate which she disposed of by will was in Court. Under the order, Exhibit C (10), dated the 29th of July 1898, the Receiver who was discharged was ordered to deposit in the Bank of Madras at Cocanada the jewels and securities belonging to the estate in his possession and to pay into the Bank any balance of cash that remained in his hands after payment of all legal

charges for investment to stand to the credit of the suit. Security was given by Papamma Rao, and the order of the High Court became absolute. Venkayamma knew perfectly well that until the suit was decided in her favour she could not get possession of the promissory notes and cash disposed of by her will, and on the date of her death the suit had not come on for trial. Clause 5 of the will states that the Government promissory notes and cash relating to the Medur estate which were in the custody of Court on the date of the will as well as the interest accruing thereon till payment of the amount should be divided after payment of the legacies referred to in clause 6. Having regard to all the circumstances under which Venkayamma was placed and to the fact that moneys could only come into the hands of the executor after the disposal of the suit in her favour, I think the proper inference to draw under the terms of the will is that she intended that the legacies should be paid only after the disposal of the Medur suit. Till then the legatees had no right of action against the executor. It seems to me that, if a suit were filed by the legatees before the title of Venkayamma in the Medur suit was established, they would be met with the answer of the executor that he had no assets and that he was not in a position to get in the assets until the disposal of the suit. In *Luff* v. *Lord*(1), the testatrix appointed Mr. Lord as executor and bequeathed certain properties in the following terms :

"And further, with regard to the property comprised in the said second schedule, upon trust that, as soon as proceedings in law and equity shall be terminated and the same shall come into his possession, that he (Mr. Lord) shall pay, etc., to each of my brothers and sister Mary Fuller (meaning the plaintiff Mrs. Luff) the sum of £2,000."

(1) (1864) 34 Beav., 220.

There was a litigation as regards the title of the testatrix. The Master of the Rolls was of opinion that the legacy was payable only when the litigation had finally ceased and the property had come into the hands of Mr. Lord and that upon the dismissal of the appeal in the House of Lords the litigation was at an end, at least so far as related to the establishment of a fund applicable to pay the legacy. He was also of opinion that the legacy was neither a reversionary interest nor a contingent legacy, but that it was a vested legacy payable on the happening of a future event, which was somewhat uncertain. The matter was carried in appeal [*Lord* v. *Lord*(1)], and the decision of the Master of the Rolls was confirmed. Sir G. J. TURNER, L. J., in dealing with the terms of the will observed :

"But however the case might stand upon the strict literal construction, there can, I think, be no reasonable doubt of the intention. The testatrix refers to property with which she is dealing, as being the subject of litigation, and as property to come into possession. Is it possible to suppose that she could intend her executor to pay the legacies before the litigation was ended, and before the property came into his possession? Besides this she has distinguished, by her will, between the property which she could immediately dispose of, and that which she could not, and, moreover, these legacies are part of a series of dispositions, the last of which, the residuary disposition, seems to me to have been evidently intended to be subject to the termination of the litigation and the possession of the property."

Lord CAIRNS, L. J., agreed with the Master of the Rolls in his construction of the will as to the time when the litigation can be said to have ended. In the present case the testatrix makes a distinction between the properties which were actually in her possession at the date of the will and properties which she had to get on

(1) (1867) L.R., 2 Ch. App., 782.

the termination of the litigation. Clauses 1 to 4 of the will deal with properties in her actual possession which she disposed of at once, and clauses 5 and 6 refer to properties in litigation. The observations of Sir G. J. TURNER, L.J., apply therefore with equal force to the terms of this will. *Walford* v. *Walford*(1), was relied on by the vakil for the respondents. In that case the testator was absolutely entitled in reversion expectant on the death of his father to a fund appointed to him under the will of his mother subject to the father's life interest therein and bequeathed to his sister £10,000 to be paid out of the estate and effects inherited by him from his mother in terms of her last will and testament. The question was whether on the death of the father the legacy carried interest from the date of the expiration of one year from the testator's death or from the falling in of the reversionary fund. Viscount HALDANE, L. C., was of opinion that unless there was expressly or by implication a direction that the legacy was not to be payable and that there was no right to payment until a certain time, the right to interest was not postponed. While pointing out that the decision turning on the terms of a particular will is not of much use in construing the terms of another will, he was of opinion on the terms of the will under consideration that there was no postponement. Lord MACNAUGHTEN was of opinion that, having regard to the circumstances of the case, the relationship of the parties, the language of the mother's will and the testator's own language, it was more probable than not that the testator intended that his sister should have no claim for payment until the death of the father but that that intention was not made sufficiently plain by the terms of the will. Lord ATKINSON was of opinion that,

(1) [1912] A.C., 658.

having regard to the terms of the will in question, there was not any sufficiently clear expression of an intention that the payment of the legacy should be postponed. I may state that the title of the testator in that case to the estate and effects inherited by him from his mother was clear and beyond dispute, and it was therefore not a case where, as in *Luff* v. *Lord*(1), it was dependent on the successful termination of the proceedings which might or might not end in favour of the testatrix. Having regard to the litigation and to the impossibility of the testatrix getting any money into her hands till she succeeded in her suit, I think the facts of the present case fall within the decision in *Luff* v. *Lord*(1) and *Lord* v. *Lord*(2). As the legacies could only be paid after the termination of the proceedings in the suit instituted by Venkayamma for the recovery of the Medur estate, as there was absolutely no other property except the fund in Court which could come to Venkayamma or to her executor only after the termination of the proceedings in her favour, as the suit for the recovery of the legacies by the residuary or pecuniary legatees would be infructuous till the title itself to the property was settled and as the title to the fund in Court was negatived both by the Subordinate Judge by his decree, dated the 2nd of December 1899, and in appeal by the decree of the High Court, dated 20th of November 1905, and was only established by the decision of the Privy Council, dated the 10th of December 1913, which reversed the decrees of the Subordinate Judge and the High Court, I am of opinion that the legacies became payable after the termination of the proceedings on the 10th of December 1913 when their Lordships of the Privy Council reversed the decrees of both the lower Courts and held that Venkayamma was

(1) (1864) 34 Beav., 220. (2) (1867) L.R., 2 Ch. App., 782.

entitled to the Medur estate. A suit either by a residuary legatee or pecuniary legatee for the purpose of recovering a legacy will not lie until the expiration of one year from the testator's death. I need only refer to *Cursetjee Pestonjee Bottliwalla* v. *Dadabhai Eduljee*(1), and to section 117 of the Probate and Administration Act, which enacts that an executor is not bound to pay or deliver any legacy until the expiration of one year from the testator's death, and to article 123 of the Limitation Act which makes the period to run from the date when the legacy or share becomes payable or deliverable. As Venkayamma died on the 9th of March 1899, the legacies were payable only after the 9th March 1900, but on the 2nd of December 1899 Venkayamma's suit was dismissed and her title was found against, and it was not until 1913 that the Privy Council reversed the decisions of both the lower Courts, and held that she was entitled. I agree with PHILLIPS, J., in thinking that until the right of the testatrix to dispose of the fund was recognized by the Privy Council in 1913, the legatees could not enforce their claim to the legacies and that the cause of action did not accrue until that date.

It is argued that whatever might have been the course of the proceedings in the Medur and Nidadavole suits it was open to the executor or the legatees to start an independent litigation challenging the decisions of the Subordinate Judge and the High Court and claiming a trial on the question whether Venkayamma was or was not entitled to the mesne profits of the estate between her son's death and her own. It seems to me that such a litigation would be perfectly useless. It is not suggested that the litigation which was continued after the death of Venkayamma was not properly

(1) (1896) I.L.R., 19 Mad., 425.

contested or conducted. Every available material was placed before the Court by the legal representatives who continued the suit regarding the Medur estate and it seems to me that the executor or the legatees would be embarking on a perfectly fruitless litigation with the decision in the Medur suit before them. Any suit filed by the executor or the legatees in the Sub-Court would have been dismissed for the reason that Venkayamma was, in the opinion of the Judge who tried the Medur suit, not entitled to the Medur estate, and beyond spending monies in litigation they would have had no relief. It is contended that the executor or persons entitled could have sold the claim of Venkayamma to the fund and paid the legacies. It is difficult to see who would have purchased a claim which was negatived by the Subordinate Judge and the High Court. It would have been a most imprudent thing to do. In *Remeshvar Singh* v. *Homeshvar Singh*(1), a decree was passed on the 27th of July 1906 in favour of the Maharaja of Dharbhanga declaring that the amount decreed was to be realized by the sale of the property belonging to one Janeshvar and left in Ekradeshvar's possession and that the decree-holder was not entitled to make any portion of the property of Janeshvar which was in the possession of any one else liable for the decree. On the death of Janeshvar in April 1906, his widow obtained possession of his share of the property and a suit was brought in the Civil Court by Ekradeshvar against the widow, claiming that, in accordance with the custom, the property was his. On the 15th of August 1908, the Subordinate Judge decided in his favour, but on the 2nd of August 1909 the High Court at Calcutta reversed this judgment. Ekradeshvar

(1) (1921) 40 M.L.J., 1 (P.C.).

appealed to the Privy Council and on the 22nd of July 1914 the judgment of the High Court was reversed and the suit decreed in his favour. The property remained in the possession of the widow and came into the possession of Ekradeshvar only after the judgment of the Privy Council. In December 1914, after the decision of the Privy Council in favour of Ekradeshvar, the decree-holder applied to the Subordinate Judge for the execution of the decree of 1906. The plea was raised that execution was barred. The Subordinate Judge decided the plea in favour of the decree-holder on the ground that the decree became capable of execution for the first time only after the decision of the Privy Council, but in appeal the High Court held that there was no inherent defect in the decree which prevented execution in 1908, when the Subordinate Judge decreed in favour of Ekradeshvar. Their Lordships of the Privy Council reversed the decision of the High Court and held that execution was not barred. Their Lordships observed as follows :

"They are of opinion that when the Limitation Act of 1908 prescribes three years from the date of a decree or order as the period within which it must be enforced, the language, read with its context, refers only, as they have already indicated to an order or decree made in such a form as to render it capable in the circumstances of being enforced. This interpretation appears to them not only a reasonable one in itself but to be in accordance with the previously expressed opinion of this Board in *Shaik Kamar-ud-din Ahmad* v. *Jawahur Lal*(1). The case may also be put in this way. The decree against Ekradeshvar could not have been executed without a further application. This application could not have been made till Ekradeshvar had come into possession of the property of Janeshvar, and, by article 181 in the schedule to the Limitation Act, the period of

(1) (1905) L.R., 32 I.A., 102.

limitation for making an application is three years from the time when the right to apply accrues."

In *Lakhan Chunder Sen* v. *Madhusudan Sen*(1), which was affirmed by their Lordships of the Privy Council in *Nrityamoni Dassi* v. *Lakhan Chandra Sen*(2), it was held that limitation would be suspended during the time the parties were litigating *bona fide* as to title. The principle on which these cases were decided is that circumstances may exist which would render a suit or application infructuous and that a party should not be compelled to sue until the impediment is removed.

It is argued that, as the legatees were no parties to the Medur suit, they could not take advantage of the litigation and that consequently the decisions above referred to would not apply. I think the legatees stand in a position analogous to the Maharaja of Darbhanga. It should also be borne in mind that in the present case the persons who were brought on record as the legal representatives of Venkayamma were not only the reversioners to the Medur estate but were also Venkayamma's own stridhanam heirs, and that as the executor appointed under the will did not act and took no steps (he according to the allegations of the legatees in the suit having died within a few days after the testatrix), and as the legatees would not, till the grant of probate with Will annexed to them, be legal representatives, the two reversioners who came on record as legal representatives in the Medur suit sufficiently represented Venkayamma's estate. In *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar*(3), it was held that where a person who is not the legal representative is in fact brought on record as such and the Court allows the wrong representative to be brought on record and to

(1) (1908) I.L.R., 35 Calc., 209.
(2) (1916) I.L.R., 43 Calc., 660 (P.C.). (3) (1903) I.L.R., 26 Mad., 230.

continue the litigation, the benefit of that litigation may be taken advantage of by the proper legal representative, and that the representatives on record will be accountable to him. If this is so, the legatees and creditors can proceed against the proper legal representatives if their claim is not barred. Their proper legal representatives will be in a position to get the benefit of the decree and thus to be in possession of assets. The position is simplified by the reversionary heirs to the Medur estate and the stridhanam heirs being the same individuals. It should be remembered that Venkayamma died in 1899 when the Civil Procedure Code of 1882 was in force. *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar*(1) and other decisions which were passed under the old Code would apply. I do not see why under the circumstances of this case the legatees should not be entitled to wait until the termination of the proceedings continued by the two reversioners who came on record as the legal representatives of Venkayamma and why the period during which Venkayamma's title to the Medur estate was being contested should not be excluded. In the view I take of the case, that the legacies were payable only after the termination of the Medur litigation and the decision of the Privy Council on the 10th of December 1913 and that in any event the period during which the litigation was pending should be excluded and it was useless for the legatees to file any suit for establishing their claim owing to the title of Venkayamma to the Medur estate being negatived, the suits will be in time either under article 123 or 62 or 120 as they were instituted within three years from the date when the legacies became payable.

(1) (1903) I.L.R., 26 Mad., 230.

Article 123 of the Limitation Act comprises two classes of suits: the first is suit for a legacy or for a share of a residue bequeathed by a testator, and the second is suit for a distributive share of the property of an intestate. Till the decision of the Privy Council in *Maung Tun Tha* v. *Ma Thit*(1), it was held by all the High Courts following the view in *Mahomed Riasat Ali* v. *Hasin Banu*(2), that article 123 of the Limitation Act was not applicable to a suit for partition by one Muhammadan against his co-heirs and that it was not a suit for a distributive share of the property within the meaning of article 123 of the Limitation Act, as one heir was not under legal duty to distribute the estate to his co-heirs. In *Maung Tun Tha* v. *Ma Thit*(1) a Burmese Buddhist claimed one-quarter share in the estate of his father who died on the 19th of December 1906 against the defendants who were his mother and the other children. The suit was dismissed by the Chief Court of Burma on the ground that, under the Burmese Buddhist law, a son claiming one-quarter share in the joint estate on his father's death must excercise his option, that the right given to the eldest son to claim a quarter share in the joint estate must be exercised as soon as possible, and that if there was unreasonable delay it lapsed. On appeal their Lordships of the Privy Council held that the plaintiff was at liberty to exercise the right within any period that was not outside the period that was fixed by article 123 of the Limitation Act as the period within which a claim must be made for a share of property on the death of an intestate. The question as to which article of the Limitation Act is applicable to cases like the one in question was not

(1) (1917) I.L.R., 44 Calc., 879 (P.C.).
(2) (1894) I.L.R., 21 Calc., 157 (P.C.).

discussed. *In Shirinbai* v. *Ratanbai*(1), Sir BASIL SCOTT, C.J., was of opinion that article 123 of the Limitation Act applied to every suit where the plaintiff seeks to recover a distributive share of the property of an intestate irrespective of whether the defendant was under a legal obligation to distribute it or not, and that the decision of the Privy Council in *Maung Tun Tha* v. *Ma Thit*(2) displaced the line of Indian cases upon which reliance was placed for the defendants. MACLEOD, J., was of opinion that a suit for a distributive share may be against any person in possession of the estate and not necessarily against the administrator or one in law bound to distribute. In *Nurdin Najbudin* v. *Bu Umrao*(3), it was held that when members of a Muhammadan family continued to live as tenants in common without dividing the estate of a deceased ancestor, limitation would not run from the time of his death and that a suit for a distributive share of the deceased's estate would be governed by article 141 and not article 123. FAWCETT, J., was of opinion that *Maung Tun Tha* v. *Ma Thit*(2) was not a pronouncement of the Privy Council which should necessarily be held to conclude the question and that the word "distributive" in article 123 has a peculiar meaning of distribution of an estate which has vested in an executor or administrator. Whatever doubts there may be as regards cases of intestacy, I do not see any reason for holding that a suit for a legacy or for a share of a residue bequeathed by a testator can fall under article 123 only if it is against an executor and not if it is against one in possession of assets which are liable for payment of the legacies. The wording of article 123 is general. It refers to a suit for a legacy or for a share of a residue bequeathed

(1) (1919) I.L.R., 43 Bom., 845. (2) (1917) I.L.R., 44 Calc., 379 (P.C.).
(3) (1921) I.L.R., 45 Bom., 519.

by a testator, and if the legatee has a cause of action against the person in possession of the assets of the testator, I do not see why there should be a further qualification that the person in possession of the assets should be an executor or administator. I think it will be reading into the article words which are not there, namely, that the suit should be for a legacy or for a share of a residue against an executor or administrator. In *Khetramani Dasee* v. *Dhirendra Nath Roy*(1), the suit was not against an executor but against the legal representative of an executor who was in possession of the assets. JENKINS, C.J., and MOOKERJEE, J., applied article 123 to the suit. The legal representative in possession of the assets of a testator is bound to pay the legacies to the extent of the assets and an executor *de son tort* is liable to be sued by the legatees and will have no defence to the action if he is proved to be in possession of assets. It will not be open to an executor *de son tort* to deny that he is under all the duties of a rightful executor. The law is thus stated by Williams in his book on Executors, 11th edition, Vol. 1, p. 184:

"When a man has so acted as to become in law an executor *de son tort*, he thereby renders himself liable, not only to an action by the rightful executor or administrator, but also to be sued as executor by a creditor of the deceased or by a legatee, for an executor *de son tort* has all the liabilities though none of the privileges that belong to the character of an executor."

Reference was made by the respondents' vakil to *Sithamma* v. *Narayana*(2), where it was held that article 123 of the Limitation Act was not applicable when the suit was by a legatee against an executor *de son tort*. If he is liable to pay the legacy and if he has all the liabilities of an executor, there is no reason why a suit by a legatee should not fall under article 123. The only

(1) (1914) I.L.R., 41 Calc., 271. (2) (1869) I.L.R., 12 Mad., 487.

reason given by the learned Judges is that if the contention were to prevail the suit would not be barred before the expiration of twelve years. There is no reason why it should not be so long as it is a suit for a legacy and is against a person who has in law all the duties of an executor cast on him owing to his having intermeddled with the estate or having taken possession of the assets. In *Khetramani Dasee* v. *Dhirendra Nath Roy*(1), article 123 was applied to a suit by a residuary legatee against the legal representatives of an executor. In *Rajamannar* v. *Venkatakrishnayya*(2), the son of the deceased the executor was a party defendant and article 123 was applied so far as he was concerned. No doubt the surviving executor was also a defendant, but it was not suggested that a different period applied to the heir of executor. Even assuming that article 123 does not apply, article 120 or article 62 would be applicable. On the termination of the Medur litigation by the decision of the Privy Council, it became clear that the persons who came on record as the legal representatives of Venkayamma had no right to take the mesne profits which accrued between the date of the death of Venkayamma's son and her own death and that, if they received mesne profits, they must hold it for the benefit of the legatees under the will. Treating the suit as a suit for the recovery of money had and received, article 62 would apply. Limitation under article 62 cannot commence earlier than the date of the Privy Council decision as it is only on that date it can be said that money was recived for plaintiff's use. If article 62 does not apply, then the residuary article 120 would be applicable.

(1) (1914) I.L.R., 41 Calc., 271.
(2) (1902) I.L.R., 25 Mad., 361.

There is also another aspect of the case as regards limitation which has to be considered. After the dismissal of the suit brought by Venkayamma and continued by her legal representatives as regards the Medur estate, and during the pendency of the appeal in the High Court, the legal representatives on record applied to the High Court for the drawing out of a third share each out of the amount standing to the credit of Original Suit No. 35 of 1895, and orders were passed by the High Court that, on their giving security to the satisfaction of the Subordinate Judge of Masulipatam for the amount to be paid to them, a third of the amount standing to the credit of Original Suit No. 35 of 1895 on the file of the Court of the Subordinate Judge of Masulipatam in the hands of the Bank being the principal and interest up to that date was to be paid out to them, and the Subordinate Judge of Masulipatam was directed to call for the money and securities from the Bank and to pay one-third share to each of the petitioners. Venkata Narasimha Appa Rao and Rangayya Appa Rao executed security bonds, Exhibits L(1) and L(2), on the 18th of December 1904 and the 3rd of March 1905: Exhibit L(2) executed by Rangayya Appa Rao recited that in pursuance of the order of the High Court he was going to receive a third share from Court amounting to Rs. 3,50,000 and proceeds as follows:—

"Therefore if this Court should order either for return or for payment to any others of such sums as we might receive from your Court, we hereby undertake to do so."

The immoveable properties specified in the security bond were given as security. Exhibit L(1) executed by Venkata Narasimha Appa Rao, after reciting that Rs. 3,47,971-13-6 was payable, states that if any disputes should arise from any one in future and consequently the Court should order a refund the amount would be refunded

and that in default of refunding the amount, if ordered, it might be recovered from the properties given as security. As owing to the result of the decision of the Subordinate Judge and of the High Court the Medur estate was divisible into three shares, Parthasarathi Appa Rao, after the decision of the High Court, applied for the payment to him of a third share. On the 14th of February 1907, an order, Exhibit F(2), was passed permitting Parthasarathi Appa Rao to execute his decree which entitled him to a third share of the cash and net profits relating to the Medur estate on giving security. He executed a security bond on the 22nd of July 1907 and took out a third share of the monies that were originally deposited to the credit of the Medur suit. The terms of the bond were that he would refund the money in the event of the decree of the High Court in his favour being wholly or partially reversed by His Majesty in Council. As the result of the decision of the Privy Council was adverse to him, he was under the terms of the bond bound to refund the money representing the Medur mesne profits on the termination of the proceedings in the Privy Council in 1913. The two legal representatives of Venkayamma in the Medur suit (Venkata Narasimha Appa Rao and Rangayya Appa Rao) applied to get the monies which Parthasarathi Appa Rao was bound to refund, and they executed the decree between 1914 and 1916. So far as the amounts received by Venkata Narasimha Appa Rao and Rangayya Appa Rao are concerned, I do not think the monies received by them under the security bonds of 1904 and 1905 can be said to be monies which the legatees were then entitled to claim. The monies were received by them on giving security and undertaking to return the monies if the litigation should be unfavourable. It was an arrangement

between the Court and the parties to the suit as to the monies deposited by the Receiver and the right to return the money was conditional on the establishment of Venkayamma's title to the Medur estate. I think the actual receipt for purposes of limitation should be the date when the litigation ended in their favour. It was in December 1913 that Venkayamma's title was established. As regards the amount which Parthasarathi Appa Rao had to refund and which they recovered in execution, the receipt of the sum of Rs. 7,00,000 and odd was between 1914 and 1916 and so far at least as that amount was concerned the claim of the legatees to be paid out the portion of that amount which represented Venkayamma's absolute property arose only after the receipt of the sum. Limitation begins to run from the time when the assets are successively received and, where assets are received from time to time, a suit by a legatee will be in time if within twelve years from the receipt of any particular assets. In *Adams* v. *Barry*(1), where the question arose as to the period of limitation in a suit filed by the representative of one of the executors and the residuary legatee against the representative of the co-executor to recover the residuary assets of the testator alleged to have been taken possession of by the co-executor, it was held that the plaintiffs were barred by the statute, 3 and 4 Will. IV, C. 27, S. 40, as to assets possessed by the executor more than twenty years before the filing of the bill but not as to assets possessed by them since that date. I may also refer to Lightwood on Time Limit to Actions, page 171, Banning on Limitation, page 191, and Darby and Bosanquett, page 185.

In the view I take of the case the suit is not barred whichever article of the Limitation Act is applied.

(1) (1845) 2 Coll., 285.

RAJAH PARTHASARATHY APPA RAO v. RAJAH VENKATADRI APPA RAO. — KUMARASWAMI SASTRI, J.

I would reverse the decree of the Subordinate Judge and pass a preliminary decree declaring (*a*) that Venkayamma, the testatrix, had disposing power over the income of the Medur estate between the 4th day of August 1895, the date of the death of her son, and the 9th day of March 1899, the date of her death, and that the will executed by her on the 30th day of January 1899 and the dispositions made therein are valid and binding on all the parties hereto; (*b*) that the legatees under the will are entitled to the payment of their respective pecuniary legacies with interest at 6 per cent from the 9th March 1900 to the date of the final decree; (*c*) that Raja Parthasarathi Appa Rao, the plaintiff in Original Suit No. 30 of 1916, and appellant in Appeal No. 128 of 1918, is entitled to the residue; (*d*) that the defendants are liable to pay so much of the sums drawn by them or by their fathers from Court and recovered from the plaintiff in Original Suit No. 30 of 1916 as are attributable to the mesne profits of the Medur estate between 4th August 1895 and 9th March 1899 with interest at 6 per cent from the dates of the receipts thereof.

I direct the Subordinate Judge to make the necessary enquiries and to take an account (1) of the sums which under the declaration above are repayable by the defendants and direct them to pay the sum so found into Court, (2) of the debts and liabilities, if any, of the deceased Venkayamma which are now payable out of her estate, and (3) of the amounts due to the respective legatees.

The Subordinate Judge will, on making the necessary enquiries and taking the necessary accounts, pass a final decree. The respondents will pay the costs in this Court and provision will be made in the final decree for the costs of the appellants in the suits.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Wallace.

DERVISH HUSSAIN (ACCUSED), PETITIONER.* 1922, November

Criminal Procedure Code (Act V of 1898), ss. 263, 370 and 441—Summary trials—Bench of Magistrates—Sentence of imprisonment—Failure to record reasons for conviction—Irregularity.

A Bench of Presidency Magistrates imposing a sentence of imprisonment for an offence is bound under sections 263 and 370 of the Code of Criminal Procedure, to record its reasons for the conviction. The omission to do so in a case where no record is made of the evidence, which, therefore, is not available to the High Court, is a grave irregularity which in most cases would be sufficient ground for interference.

Section 441 of the Code of Criminal Procedure does not abrogate the terms of section 263 or those of section 370 of the same Code. *Queen-Empress* v. *Shidgauda* (1894) I.L.R., 18 Bom., 97, and *In the matter of the petition of Panjab Singh* (1881) I.L.R., 6 Calc., 579, considered.

Having regard, however, to the fact that the Bench Magistrates afterwards submitted their reasons for conviction under section 441, Criminal Procedure Code, *Held*, there was no ground for interference.

PETITION under sections 435 and 439, Criminal Procedure Code, 1898, praying the High Court to revise the order of the Court of the Honorary Presidency Magistrate, Royapettah, Madras, dated 31st January 1922, in Calendar Case No. 16472 of 1921.

The facts are briefly these: One Dervish Hussain along with three others was charged by the police for being drunk and disorderly and was put on his trial before the Honorary Presidency Magistrates, Royapettah, Madras. At the final hearing which came on after repeated adjournments the learned Magistrates while

* Criminal Revision case No. 114 of 1922.

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refusing further adjournment convicted Dervish of the offence charged without recording any reason for the conviction. Against that order this petition was presented.

M. A. T. Coelho, vakil for the petitioner.

Crown Prosecutor, on behalf of the Crown.

JUDGMENT.

WALLACE, J.

WALLACE, J.—Two points are taken by petitioner (1) that he was refused opportunity to have his defence evidence produced. (2) that the Bench Court has recorded no reasons for his conviction.

As to point (1) after a good deal of searching of records rendered necessary by the inaccurate reports of the Honorary Presidency Magistrate's Court, it was verified that the petitioner had paid batta for a subpœna for the production on 20th December 1921 of two police diaries from D. 2 and D. 3 stations and that subpœnas were issued accordingly. Service was effected too late and neither diary was produced on 20th December 1921. The case was taken up on several dates after that, on 3rd, 10th and 24th January 1922, but on none of these dates did petitioner ask for any further subpœnas or warrants for the production of these diaries nor was any taken out. On the date of final hearing, 31st January 1922, the Bench Court refused further adjournment on the ground that defence witnesses though served were absent. In the circumstances I consider the refusal was fully justified.

As to point (2) it is the case that the Bench Court has recorded no reasons whatever for convicting petitioner and the question is whether this omission to obey the terms of section 263 (*h*), Criminal Procedure Code, is an irregularity which wholly vitiates the trial, or, if not, whether petitioner has been gravely prejudiced

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by the omission. This is not a case which section 370 (1) will remedy since a substantive sentence of imprisonment has been passed and therefore under section 370 (1) as equally under section 263 (*h*) the Honorary Presidency Magistrates should have recorded reasons. The Crown Prosecutor argues that the defect is cured by section 441 which permits a Presidency Magistrate to submit with the record, when called for under section 435, a statement setting forth the grounds of his decision. But as a matter of law, it is clear that section 441 does not abrogate the terms of section 263 or section 370. I take it that it merely allows the Presidency Magistrate to supplement the reasons which have been already stated under sections 263 and 370.

Under section 537, however, this Court will not upset a conviction on the ground of irregularity in the judgment unless a failure of justice has resulted. My attention has been called by petitioner to certain rulings, e.g., *Queen-Empress* v. *Shidgauda*(1) and *In the matter of the petition of Panjab Singh*(2) passed under section 263 (*h*) or its equivalent section 227 (*h*) in the former Code, wherein these Courts held that the omission to record reasons was in itself a sufficient ground for interference in revision. Neither of these cases was a case of judgment by a Presidency Magistrate. As a general rule I consider the principle of these rulings viz., that the Magistrate must state reasons so that the High Court may judge whether there were sufficient materials before him to support the conviction, perfectly sound. Rulings quoted on the opposite side such as *King Emperor* v. *Alagarisami Pathan*(3), *Tilak Chandra Sarkar* v. *Baisagomoff*(4) deal with other sections of the Code

(1) (1894) I.L.R., 18 Bom., 97.
(2) (1881) I.L.R., 6 Calc., 579.
(3) (1902) I.L.R., 25 Mad., 546.
(4) (1886) I.L.R., 23 Calc., 502.

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WALLACE, J.

such as sections 202 or 367 and neither deals with a case of a Presidency Magistrate or of a summary trial. It is one thing to hold that in a case where all the record before the original trying Court is also available before the High Court in revision, no substantial failure of justice has occurred by the omission of the trying Court to record reasons. It is a very different case when the conviction was passed without reasons therefor on evidence of which no record is taken and which therefore is not available to the High Court. In such a case I agree with the rulings already quoted that the omission to record reasons is a grave irregularity which in most cases would be sufficient ground for interference.

But in the case of convictions by Presidency Magistrates there is the saving section 441 and when the record submitted under that section discloses sufficient grounds for the decision, it may be taken into consideration. The reports submitted in this case by the Bench on 25th February and 17th October 1922 show that the Magistrates had a clear recollection of the case and the evidence recorded therein and had good grounds for their decision. Considering these, as under section 441, they may be considered, as setting forth the reasons for the conviction of petitioner I am of opinion that no substantial failure of justice has occurred in this case.

I dismiss the petition.

I would impress on the Bench the necessity of obeying sections 263 and 370, Criminal Procedure Code, in future.

K.U.L.

APPELLATE CRIMINAL.

Before Mr. Justice Wallace.

MATTI VENKANNA AND ELEVEN OTHERS (ACCUSED), PETITIONERS.*

1922, November 15.

Indian Penal Code (Act XLV of 1860), ss. 143 and 447—Unlawful assembly- Criminal trespass—Compounding an offence, meaning of—Consensus of purpose.

The essence of an offence under section 143, Indian Penal Code, is the combination of several persons, united in the purpose of committing a criminal offence, and that consensus of purpose is itself an offence distinct from the criminal offence which these persons agree and intend to commit. The compounding of an offence does not mean that the offence has not been committed, though the victim is willing either to forgive it or to accept some form of solatium as sufficient compensation for what he has suffered.

PETITION filed under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of J. HUSAIN, Subdivisional Magistrate of Bandar, dated 29th August 1921, in Criminal Appeal No. 46 of 1921, preferred against the judgment of the Court of the Stationary Sub-Magistrate of Bandar in Calendar Case No. 377 of 1920.

The facts appear sufficiently from the judgment.

T. Ramachandra Rao, vakil for the petitioners.

Public Prosecutor on behalf of the Crown.

JUDGMENT.

WALLACE, J.

WALLACE, J.—The only point raised in this petition is that the conviction under sections 143 and 447 of the Indian Penal Code was illegal since the offence under section 447, Indian Penal Code, was compounded.

* Criminal Revision Case No. 239 of 1922.

In re. MATTI VENKANNA. — WALLACE, J.

It appears that on 5th July 1920 a compromise petition was put into the lower Court signed by first petitioner (first accused) and prosecution witnesses 1 and 2, prosecution witness 1 being the alleged owner of the field on which the alleged trespass took place. The case was being prosecuted by the police and the compromise petition was rejected by the lower Court as the offence under section 143 of the Indian Penal Code is not compoundable.

The common object charged against the accused as members of the unlawful assembly is the criminal trespass aforesaid. Petitioner contends that since the parties had a legal right to compound that trespass, such a composition has the effect of annulling the common object charged, and therefore the charge under section 143, Indian Penal Code, falls to the ground.

I am not prepared to support this contention. The essence of the offence under section 143, Indian Penal Code, is the combination of several persons, united in the purpose of committing a criminal offence, and that consensus of purpose is itself an offence distinct from the criminal offence which these persons agree and intend to commit. The compounding of one offence does not mean that the offence has not been committed, but that it has been committed, though the victim is willing either to forgive it or to accept some form of solatium as sufficient compensation for what he has suffered. The law allows prosecuting witness 1 to so deal with the offence of criminal trespass but not with the offence of five or more persons combining to effect that criminal trespass.

Petitioner refers me to the ruling quoted in *Sheikh Basiruddi* v. *Sheikh Khairat Ali*(1), but that ruling does

(1) (1913) 17 C.W.N., 948.

In re MATTI VENKANNA. — WALLACE, J.

not say that the composition of the offence of house-trespass and grievous hurt in that case had the effect in law of compounding the offence of being members of unlawful assembly, whose common object was the commission of those offences. It rather implies the opposite.

The petitioners' objection therefore fails. I dismiss this petition.

K.U.L.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice and Mr. Justice Wallace.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT), APPELLANT,

v.

PANDIT RADHIKA PRASAD BAPULI (PLAINTIFF), RESPONDENT. *

1922, October 5.

Government Bonds—Promissory-note—On demand—Demand by creditor at debtor's Treasury—Demand, whether necessary for liability to arise—Suit on bond, as a simple contract debt—Limitation—Limitation Act (IX of 1908), section 10 and art. 120—Agreement of 1824 between the East India Company and creditors of deposed Raja of Tanjore as to payment of debts—Bonds executed in 1845 on behalf of East India Company to creditors of deposed Raja of Tanjore—Sinking fund created and maintained out of Tanjore revenues for discharge of interest and principal—Subsequent issue of bonds—Effect of—East India Company and its successor (Government of India), whether trustees to creditors—Suit against Secretary of State, whether against trustee and so barred by limitation—Specific trust.

* Original Side Appeal No. 29 of 1921.

After the administration of the principality of Tanjore was taken over by the East India Company, an agreement, dated 11th February 1824, was entered into between the Company and the creditors of the deposed Raja for payment of debts due to them from the Raja to be ascertained by certain commissioners to be appointed. The agreement provided, inter alia, that transferable bonds should be issued by the Company to the creditors for their debts found due, that interest at 4 per cent should be paid half-yearly so long as the revenues of Tanjore remained in the Company's hands, that the principal should be paid 15 months after notice published therefor by the Company and that in the meantime a fund should be started and maintained by the Company out of the Tanjore revenues collected by the Company for payment of interest and discharge of the principal of the bonds. In accordance with the agreement, bonds were issued to the creditors in 1845, including the suit bond in favour of the plaintiffs' assignors' ancestor; and the fund was started and maintained by the Company. The bonds provided inter alia, that interest would be paid in cash, on demand, at the general treasury at Fort St. George, to the holder of the bond in India, or if the bond-holder resided in Europe in cash or in Bills at 12 months' date at his option. There was no payment of interest or principal of the suit bond since 1848. In 1853 and 1858, the East India Company and its successor, the Government of India, had published notices for payment of the bond-debts on tender of the notes and declared therein that interest would thereafter cease.

The plaintiff obtained an assignment of the suit bond in 1909, as well as a succession certificate to collect the debts of the assignor's ancestor, issued a notice of demand on the 24th October 1916, and instituted this suit on the 15th October 1919 against the Secretary of State for India in Council, who pleaded the bar of limitation.

Held, that the suit on the bond as a simple contract debt was not barred under article 120 of the Limitation Act, as the liability against the East India Company and its successor (the Government of India) did not arise until a demand was made by the bond-holders at the place mentioned therein, and such a

demand was made by the plaintiff only within three years of the suit;

and that the East India Company and its successor, the Government of India, had become trustees for a specific purpose under the agreement of 1824 for the discharge of the bonds issued in pursuance thereof, and that the suit viewed as one by the plaintiff against the defendant as trustee was not barred by limitation by reason of section 10 of the Limitation Act.

Khaw Sim Tek v. *Chuah Hooi Gnoh Neoh* (1922) 49 I.A., 37, applied.

APPEAL from the decree and judgment of Mr. Justice COUTTS TROTTER, in the exercise of the ordinary Original Civil Jurisdiction of the High Court, in Civil Suit No. 689 of 1919.

A bond, called a promissory-note, executed by the Governor in Council of Fort St. George, on behalf of the East India Company in 1845 was issued in favour of one Madhu Sahai, one of the creditors of the deposed Raja of Tanjore, Amar Singh, after the administration of the principality of Tanjore was taken over by the East India Company about the end of the eighteenth century. The East India Company subsequently proposed to pay and discharge the lawful debts of the deposed Raja on ascertainment by certain commissioners to be appointed for the purpose. In 1824, an agreement was entered into between the Company and the Raja's creditors who signed the same. Under this agreement, the creditors agreed to the ascertainment of their debts by commissioners, to payment of 4 per cent interest on their debts from the dates of their origin to 1823 and the same interest thereafter on the consolidated amount of principal and interest already stated; there was to be a sinking fund created and maintained by the East India Company out of the revenues of Tanjore then in the Company's hands, and it was provided that

transferable bonds should be issued to the creditors under the authority of the Company, that interest should be paid half-yearly at the general treasury of the Company, and that the principal should be discharged on notice at the option of the Company, and there were also some other provisons detailed in the judgments. In pursuance of, and in accordance with, this agreement, bonds, called promissory-notes, were issued to creditors in 1845 including the suit bond in favour of Madhu Sahai, the ancestor of Madhu Lal, the assignor of the plaintiff. There was payment of interest endorsed on the bond up to 1848, but no interest or principal was paid thereafter. The fund was started and maintained by the Company as contemplated by the agreement of 1824 (Exhibit C). Under the terms of the bonds, the interest was payable half-yearly on demand, at the general treasury of Fort St. George, in cash or in the case of bond-holders bona fide resident in Europe in cash or in Bills of Exchange at 12 months as such bond-holders might desire, and the principal of the bonds was payable on 15 months' notice of payment given at the option of the Company for the purpose. In 1853 and in 1858, it appeared that the Company and its successors, the Government of India, had given notices of payment and intimated that interest thereafter on the bonds would cease. The plaintiff who had obtained an assignment of the suit bond on 22nd March 1909, and had also obtained a succession certificate under the Succession Certificate Act, 1887, to collect the debts of Madhu Sahai, issued a notice of demand on the Government of Madras on the 24th October 1916 and instituted this suit on the 15th October 1919, against the Secretary of State for India in Council. The latter pleaded the bar of limitation.

The material portion of the bond (Exhibit A) was as follows:—

EXHIBIT A.

"Bond issued by the Governor in Council of Fort St. George in favour of Madhu Sahai.

Tanjore Debt.

Promissory-note at four per cent for

Registered in the Accountant-General's office No. (torn).

Company's . . . . (not legible) Rupees.

Dated at Fort St. George this 28th day of July 1845.

The Governor in Council of Fort St. George, in pursuance of an order from the Court of Directors of the United Company of Merchants trading to the East Indies, in that behalf made, does hereby acknowledge and certify that, on the thirtieth day of April One thousand Eight Hundred and Twenty-three, there was due and owing from his late Highness Amar Singh deceased, the late Raja of Tanjore, to Madhu Sahai, the aggregate sum of eight thousand nine hundred and forty-eight Company's rupees, three annas and five pies of principal and interest at that date, as appears by the award of the Commissioners in England appointed to investigate the debts of His said Highness, such award being No. 76 (seventy-six) in Certificate No. 65 (sixty-five) and dated the . . . (not legible) day of December 1836 and the said Governor in Council, in further pursuance of the said order, and also in conformity with and in pursuance of the articles of agreement made and executed between the said United Company of the one part, and the several creditors of the said Raja of the other part, bearing date the 11th day of February 1824, and the Statute thereupon, in that behalf made and provided, does hereby promise for and on behalf of the said United Company to pay the said sum of eight thousand nine hundred and forty-eight Company's rupees, three annas and five pies, to the said Madhu Sahai, his executors or administrators, or his or their order, on demand at the general treasury at Fort Saint George, after the expiration of fifteen months' notice of payment to be given by the said Governor in Council in the *Madras Government Gazette*. And so long as the revenues of Tanjore shall continue to be in possession of the said United Company, the said Governor in

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Council does hereby promise for and on behalf of the said United Company to pay the interest accruing on the said sum of eight thousand nine hundred and forty-eight Company's rupees, three annas and five pies, from 30th April 1823 (twenty-three) at the rate of four per cent per annum by half-yearly payments to the said Madhu Sahai, his executors, administrators or his or their order, on the thirtieth of October and thirtieth of April in each year. The interest shall be payable at the general treasury at *Fort Saint George* in cash only if the proprietor of this note be resident in India at the time such interest is payable; if the proprietor of this note be *bona fide* resident in Europe, the interest shall be payable at his option in cash or bills to be drawn on the Honourable Court of Directors at the rate of two shillings and one penny the Calcutta rupee (at the exchange of one hundred and six and a half Company's rupees per one hundred Calcutta Sicca rupees) payable twelve months after date.

Signed by authority of the Governor in Council.
(not legible).
Secretary to Government.

Issued—
28*th July* 1845."

His Lordship Mr. Justice COUTTS TROTTER, who tried the suit, held that the suit was not barred by limitation inasmuch as the East India Company and its successors (the Government of India) were trustees under the agreement of 1824 and that such an obligation did not cease to exist on the execution of the bond in 1845; and decreed the plaintiff's claim for the principal and interest due thereon without deducting the amount of interest alleged to have been paid previously. His Lordship's Judgment was as follows:—

This is a remarkable and interesting case and raises some complex questions both of general legal principle and of construction; and if I thought that further consideration would throw more light upon it, I should reserve my judgment; but I have come to the conclusion that, especially as one part of the case turns upon principles of equity with which I am necessarily

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unfamiliar it would be best if I give judgment while the learned and helpful arguments of counsel are fresh in my mind.

The history of the matter is as follows:—At the end of the 18th century the Mahratta dynasty were on the throne of Tanjore as independent princes. On the death—it is not necessary to go back further than that—of Raja Tulzaji in 1787 he had no son. He adopted before his death Carabhoji but the adoption was set aside and his half brother Amarsingh succeeded with the sanction of the East India Company. A treaty was made with Raja Amarsingh by the Company upon his accession the general nature of which was to provide for payment of subsidies to carry on the wars in which the Company was then engaged in Southern India against Hyder Ali and other princes. After some years had elapsed it was found that Carabhoji had been ill-treated by Raja Amarsingh who had taken over the charge of the boy. He was removed to Madras and on a petition by his adoptive mothers as the widows of Tulzaji he was declared finally by the Home Government to have been adopted duly and effectively and in the result after making a treaty in the year 1792 for the better government of his principality which meant the greater share of the East India Company in the Government, Amarsingh was deposed and Carabhoji was put in his place. Amarsingh was given a pension and residence somewhere near Kumbakonam and a commission was appointed to inquire into the condition of the country and the result of that commission was the treaty of the 25th of October 1799 whereby provision was made for the maintenance of Carabhoji's rank and dignity. He practically resigned the government of the country and the collection of the revenue into the hands of the East India Company. I need only cite three articles of the treaty. Article 5 provides that "the revenues shall be collected according to the rates of assessment to be established by the third article by the said Governor in Council for that purpose and the said Raja shall exercise no control whatever nor in any manner interfere in the administration of said revenues." Article 6 likewise provides that the whole revenue shall be collected and accounted for by the said Company, in the manner hereafter provided, the said Company charging themselves with the payment of that part of the registered private debt which had not already been transferred

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to their account; and by Article 8 "it is stipulated and agreed that the sum of twenty-five thousand star pagodas shall in all cases be appropriated to the support of the late Raja Amarsingh and shall be considered as a charge on the revenue to be deducted previous to the calculation of the proportion of one-fifth above mentioned. The residue of the revenues after the foregoing deductions, shall be at the disposal of the said Company."

Now when Amarsingh was deposed and went into retirement on his pension he left a great many persons who professed to have claims on his estate, some of them were in England and some of them in India, and he having no income except his guaranteed pension was not in a position to discharge those debts. In the year 1823 the East India Company came to the conclusion that they were in honour bound to liquidate the debts of Amarsingh, the late Raja, and they consequently entered into articles of agreement with the various claimants as creditors of Amarsingh. These articles are very important and I propose to set out those which appear to me to be material. They begin like this: "Articles of agreement indented, had, made, concluded and agreed upon, this 11th day of February in the fifth year of the reign of our Sovereign Lord George the Fourth by the Grace of God of the United Kingdom of Great Britain and Ireland, King Defender of the Faith, and in the year of our Lord 1824 between the United Company of Merchants of England trading to the East Indies of the one part and the several persons whose hands and seals shall be hereto set and affixed and who respectively are or who claim to be creditors of his late Highness Amarsingh, formerly Raja of Tanjore in the East Indies, now deceased of the other part." Then comes the recital "Whereas the said United Company are now in the possession under and by virtue of certain treaties and acts of state of the revenues which were formerly in the possession of His Highness the said Amarsingh and they have deemed it to be fit and expedient and have determined to make an arrangement as hereinafter is mentioned, for the satisfaction of the just debts of the said Amarsingh contracted for good and valuable considerations whilst he was Raja of Tanjore. Now these presents witnesseth and it is hereby mutually covenanted concluded declared and agreed by and between the said United Company for themselves and their successors on the one

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part and the said several other parties hereto for themselves severally and for their several and respective heirs, executors, administrators, representatives and assigns on the other part in manner and form following: that is to say," and then follow the operative clauses. "First, that the said several parties hereto of the second part and their heirs, executors, administrators, representatives and assigns shall be considered creditors of the said Amarsingh for such principal sums of money as they shall severally establish to the satisfaction of the commissioners hereinafter mentioned to have been originally due and owing to them respectively by the said Amarsingh for good, just, valid, lawful and valuable considerations together with simple interest thereon at the rate of 4 per cent per annum from the time when such debts were severally so contracted as aforesaid computed to the 30th day of April 1823" and then there is a provision which I need not read in detail for the deduction of anything that has been paid or satisfied. Then it goes on "and the amount of such principal and interest at the rate aforesaid, or the balance of such principal and interest as the case may be shall be satisfied by transferable bonds or certificates to be issued by the Madras Government by order of the Court of Directors of the said United Company to the person or persons in whose favour the same shall be awarded as hereinafter mentioned and such bonds or certificates for such consolidated principal and interest or the balance thereof shall bear interest at the rate of 4 per cent per annum from the said 30th day of April 1823 such interest to be payable half-yearly on the 30th day of October and the 30th day of April in every year so long as the revenue of Tanjore shall continue to be in the possession of the said United Company, and such interest shall be paid at Madras in money or in case of creditors or holders of such bonds or certificates *bona fide* residents in Europe, then at their option in money at Madras or by bills of exchange on the said Court of Directors in London at 12 months' date at an exchange equivalent to 2*s*. 1*d*. for a sicca rupee; that the principal be paid at Madras only, at the pleasure of the said United Company or their successors upon 15 Calendar months' notice thereof to be duly published at Madras and that a sinking fund be established in the manner and for the purpose hereinafter agreed." I need not read the rest of the article

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because it is a matter which I am not concerned with. Then I come to the 10th article which is as follows: "And the said United Company for themselves and their successors do hereby declare that when and as soon as the said Commissioners in England shall have ascertained the total amount of the principal of the debts to be allowed as the debts of the said Amar Singh due to the several parties hereto of the second part and in respect of which they are to be entitled to bonds or certificates as hereinbefore mentioned, the said United Company shall and will cause a sufficient sum to be set apart from the Tanjore revenues from time to time so long as they shall remain in possession of the said United Company to answer the interest of such bonds and certificates at the rate hereinbefore mentioned and shall and will apply the same in manner hereinbefore mentioned and shall and will also set apart a further annual sum equal to five per cent upon the amount of the principal of the said bonds and certificates, to accumulate as a sinking fund for the redemption or discharge of the principal of the said bonds and certificates and the said United Company shall and will allow simple interest at the rate of four per cent per annum, upon so much of the sum to be set apart for the said sinking fund as from time to time may remain in their hands." Then comes Article 11 "That it shall be lawful for the said United Company and their successors at any time and from time to time to apply the whole or any part of the said accumulating fund to the purchase of such bonds or certificates so to be issued as aforesaid at such price or prices as they may be able to obtain the same either by public competition or private contract; but nevertheless the sinking fund charge of five per cent in respect thereof shall still continue to be a charge upon the said Tanjore revenues and shall be set apart therefrom until all the bonds or certificates so to be issued shall be discharged." Then follows the 12th article "That whenever the accumulating sinking fund hereinbefore mentioned shall amount to a sum sufficient to pay off and discharge all the said bonds or certificates which shall be then standing unredeemed or bought in, the same shall be applied to the discharge thereof at par." Then there is a final article which is only really material for one phrase in it. It is a provision for giving further powers to the Commissioners in case the powers

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hereby conferred are inadequate for them to discharge their commission, and there occurs in the course of that article this language "in case the said Commissioners in England shall be of opinion . . . that the trusts, intents, and purposes of these presents cannot effectually be carried into execution, according to the true intent and meaning of these presents," then all the parties are to try their best to get an Act of Parliament to carry it out. In accordance with that three Commissioners sat for the purpose of ascertaining the just amount of the claims of the various claimants and when they had completed their labours they published a list of all the people that they deemed to be entitled with the amount that they held they were entitled to. *Inter alia* they reported that there was due to one Gopaldoss Begamchand a sum of 15,339 star pagodas. In the year 1845 four bonds or certificates to use the description in the articles of agreement of 1824, were issued in the names of four different persons, representatives of Gopaldoss Begamchand. The bonds were numbered 305, 306, 307 and 308 and No. 307 with which I am concerned in this suit was issued to one Madhoo Sahee. What happened to these bonds is a matter of conjecture but it seems to be clear that Madhoo Sahee never got either the principal or the interest due on his bond nor did any of his descendants and although it is quite likely that various payments of interest, it is not known how many, were made to a person called Harkissendoss who it is said was not the authorized representative of Madhoo Sahee, the fact remains that the bonds in question disappeared for nearly a century.

Before I come to the wording and the construction of the bond, it is necessary to set out this much of it—that the Company by the words of the bond promised to pay the principal sum of Rs. 8,948-3-5 on demand at the General Treasury at Fort St. George after the expiration of 15 months' notice of payment to be given by the Governor in Council in the Madras Government Gazette and further "so long as the revenues of Tanjore shall continue to be in the possession of the said United Company the said Governor in Council does hereby promise for and on behalf of the said United Company to pay the interest accruing on the said sum of Rs. 8,948-3-5 from 30th of April 1823 at the rate of 4 per cent per annum by half-yearly payments to the

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said Madhoo Sahee his executors, administrators or his or their orders on the 30th of October and 30th of April in each year." The effect of the document therefore was that the principal was repayable only after notice of payment had been given by the Government so that it was redeemable only at the option of the Government and if and when they gave the notice. On June 24, 1853, a notice was given. It would appear from the notice that all the notes had been repaid except the four notes referred to above. At any rate the notice runs as follows :—" As the parties in whose favour the undermentioned promissory notes of the Tanjore debt were issued have declared that they have not received them and it is essential to ascertain in whose possessions the said notes now are, notice is hereby given that promissory notes (then follows a description of the notes) will be discharged at the General Treasury on the 30th day of September 1854 and that this notice will be held equivalent to a tender of payment on the said 30th day of September 1854, from which date all interest on the said notes will cease." I may state in passing that no one contends that that declaration of the Government relating to tender could possibly limit any legal rights possessed against them or any legal obligations under which they rested. There have been put in some proceedings of the Government, dated the 9th of February 1864, and some documents, dated May 1853, were read ; but in the view I take of this case they are of no importance at all. Meanwhile the plaintiff in this case who describes himself as Pandit Radhika Prasad Bapuli had apparently been making inquiries and got on to the track of these bonds and he appears to have succeeded in getting in touch with the heirs of Madhoo Sahee and the other persons to whom the other promissory notes were issued and to have bought up their claims. Having done that, he went before the District Judge of Benares and got a succession certificate under the Act of 1889 which set out this promissory note No. 307 and purported to empower him to collect the money due on the note. That was on the 19th of July 1916 and the outcome of that is that the plaintiff brings this suit to enforce such rights as the possession of the bond may enable him to enforce against the Government. What he claims is the principal together with interest from the date of issue of the bond as payable by its tenor.

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The plaintiff puts his case in the first place as being a claim which is not controlled by any of the restrictions of the Limitation Act because he says it comes under section 10 as being a claim in substance for the enforcement of a trust. Section 10 runs as follows :—" No suit against a person in whom property has become vested in trust for any specific purpose . . . for the purpose of following in his or their hands such property or the proceeds thereof . . . shall be barred by any length of time." Mr. Raja Ayyar says that on the true construction of the documents in this case there was established in respect of the Tanjore revenues in the hands of the United Company such a trust as is described in section 10 of the Limitation Act. When one turns to the documents it is quite clear that no trust can be spelt for the benefit of any private person enforceable in any Municipal Court out of the treaty of 1799 because that is a treaty in which the contracting parties were both independent sovereigns. That is sufficiently established by the case of *Rustomjee* v. *The Queen*(1). That was a case where the Emperor of China had agreed to pay 3,000,000 dollars to the British Government on account of debts due to British subjects from certain Chinese merchants who had become insolvent being largely indebted to British subjects. One of them, the plaintiff Rustomjee brought a petition of right against the Crown claiming to have paid to him his proportion of the moneys that the Crown had received from the Emperor of China in respect of such claims. A Court of four Judges including the Chief Justice Lord COLERIDGE held that no such proceeding would lie and they observed as follows :—" The Queen acted throughout the making of the treaty and in relation to each and every one of its stipulations in her sovereign character, and by her own inherent authority ; and, as in making the treaty, so in performing the treaty she is beyond the control of Municipal Law and her acts are not to be examined in her own Courts. It is a treaty between herself as sovereign and the Emperor of China as sovereign and though he might complain of the infraction, if infraction there were, of its provisions, her subjects cannot. We do not say under no circumstances can the Crown be a trustee ; we do not even say that under no

(1) (1876) 1 Q.B.D., 69.

circumstances can the Crown be an agent ; but it seems clear to us that in all that relates to the making and performance of a treaty with another sovereign the Crown is not, and cannot be, either a trustee or an agent for any subject whatever." A similar decision was *Kinloch* v. *Secretary of State for India in Council*(1) where by a Royal warrant the Queen granted to the Secetary of State for India in Council booty of war, that had been taken by Sir George Whitlock's column during the Indian Mutiny of 1857 in trust to distribute it amongst the persons who were entitled to share it and the plaintiff sued the Secretary of State as a trustee of his proper portion of the booty. The Court of Appeal held that no trust was created by the use of the mere word and that what was done merely amounted to directions by the sovereign to one of the officers of the State with regard to a portion of the Crown property with which no Municipal Court could interfere. I am, therefore, of opinion that even if the treaty of 1799 could be thought to contain provisions which may be considered as being a trust—I do not think in fact it does—nevertheless by its character it is not competent for a Municipal Court to extract provisions of trust in favour of private persons out of it.

The next question is does the deed of the 11th of February 1824 constitute a trust in favour of the persons entitled to put themselves forward as creditors of Raja Amarsing. The learned Advocate-General cited to me a recent decision of this Court *Muthuramalinga* v. *Ponnusami Devar*(2), a decision of the learned Chief Justice and my brother SADASIVA AYYAR which lays down that the 10th section of the Limitation Act only applies to cases of what in English Law are called express trusts and not to constructive trusts and that the doctrine of the well-known case of *Soar* v. *Ashwell*(3), has no applicability to India —the doctrine, I mean, that limitation will not on the analogy of the statute be applied to certain kinds of constructive trusts. I am bound by that decision and I respectfully agree with it and I do not therefore think it necessary for me to consider some of the other authorities like *Burdick* v. *Garrick*(4), or *Richards* v.

(1) (1880) 15 Ch. D., 1. (2) (1921) M.W.N., 37.
(3) [1893] 2 Q.B., 390. (4) (1870) 5 Ch. A., 236.

Delbridge(1), which were brought to my notice, because I think it is clear that if this document contains a trust at all, it is an express trust ; it is either that or nothing. It is quite clear that the East India Company could be trustees and it is equally clear that in their character of trustees when the British Government took over the government of this country from the Company, they would of course carry any of the obligations in the nature of trust which rested upon the East India Company, their predecessors. I need only refer to the case of the *Secretary of State for India* v. *Bapuji Mahadeo*(2), for that principle. That was a curious case because one Chinto Mahipat Govarkar of Satara, ancestor of the plaintiff, owed money to one Sheik Syed Mufati of Aurangabad and in order to satisfy that debt Srimant Partapsingh Maharaj, the then Raja of Satara, caused Chinto Mahipat's immoveable property to be sold in 1835 and out of the sale-proceeds the debt was paid off and the balance of Rs. 1,793-0-5 was credited in the Government Treasury in the name of Chinto Mahipat and finally after many years the plaintiff who stood in the shoes of Chinto Mahipat for the purpose of the case sued for the money and it was held that the East India Company and the Government after it was a trustee, following the well-known case of *Walsh* v. *Secretary of State for India*(3). It was held accordingly that as the facts showed that the Government was a trustee no question of limitation arose and the matter came under section 10 of the Limitation Act. It being clear that it is possible for the Government to be a trustee in certain circumstances and it being clear that if it is a trustee, section 10 of the Limitation Act will apply if it was a direct trust or to use the language of the section, a trust for any specific purpose, I must now turn to the articles of the agreement to see whether or not a trust was created or what was the relation between the parties. The passages relied upon mainly are those contained in the 10th and 11th articles together with a description of the purpose of the agreement as effecting certain trusts. I do not attach importance to the latter any more than the Court did in the case of *Kinloch* v. *Secretary of State for India in Council*(4). It is a different matter where

(1) (1874) 18 Eq., 11. (2) (1915) I.L.R., 39 Bom., 572.
(3) (1863) 10 H.L. Cas., 367. (4) (1880) 15 Ch. D., 1

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the general tenor of the document as a whole may be considered as pointing to a trust : then of course the fact that it is described as a trust is much more important than if you merely had that fact in isolation as in Kinloch's case. What is it that the company undertook to do ? "The said United Company shall and will cause a sufficient sum to be set apart from the Tanjore revenues from time to time so long as they shall remain in possession of the said United Company, to answer the interest of such bonds and certificates at the rate herein before mentioned." That is as to the interest. It seems to me what that provides for is that the Company having taken over the revenues of Tanjore definitely pledged themselves to set apart a sum that was necessary to meet the claims for interest from the funds in their hands. I must assume that they did that, and if they did that and a fund was created what view can any one take but that it was held in trust for the late creditors of Amarsing as holders of bonds ? I had cited to me a great number of cases one way or the other, but they really do not help me very much. It seems to me that the plain meaning and intent of that provision must and can only be to create a trust. That is as regards interest. The next declaration is this "and shall and will also set apart a further annual sum equal to five per cent upon the amount of the principal of the said bonds and certificates to accumulate as a sinking fund for the redemption or discharge of the principal of the said bonds and certificates" and then follows the provision for interest. By Article 11 it is provided that "the sinking fund charge of five per cent shall still continue to be a charge upon the said Tanjore revenues and shall be set apart therefrom until all the bonds or certificates so to be issued shall be discharged." I ask once more what the plain meaning of that can be except that money is to be kept apart from the general revenues of Tanjore and is to be held for the express purpose of meeting the demands of the holders and owners of those bonds. If that fund had been applied to general revenue purposes or had been allowed to go into the general treasury I can think of no language more apt to describe that act than a breach of trust : and it seems to me that the effect of these articles is undoubtedly to create a trust in the United Company and hence in its successors the Government with regard to the moneys to be set aside from the

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Tanjore revenues. It appears to me that the moment they were set aside and ear-marked for the purpose provided by the articles they became as and when so set aside trust moneys in the hands of the Government which they could in conscience only apply to the satisfaction of the particular purpose. That is only the first step in the case because the articles which were signed both by the Company and the claimants provide as follows :—"The sums found due to the claimants by the Commissioners (to use a compendious expression) shall be satisfied by transferable bonds or certificates to be issued by the Madras Government by order of the Court of Directors of the said United Company to the person or persons in whose favour the same shall be awarded." Then it is provided that "Such bonds or certificates . . . shall bear interest at the rate of 4 per cent per annum from the said 30th of April 1823 such interest to be payable half-yearly . . . so long as the revenues of Tanjore shall continue to be in the possession of the said United Company." Then follows this proviso. "Such interest shall be paid at Madras in money or in case of creditors or holders of such bonds or certificates *bona fide* resident in Europe then at their option in money at Madras or by Bills of Exchange on the said Court of Directors in London at 12 months' date at an exchange equivalent to 2*s*. 1*d*. for a sicca rupee and that the principal be paid at Madras only at the pleasure of the said United Company."

The next question I have to decide is this. Assuming I am right in holding that the articles of 1824 constitute a trust, was that position in any way reversed or modified by the bonds which were in fact issued in accordance with the articles ? That entails that I should turn to the bond and scrutinize its provisions. The bond is described as a "Promissory-note at 4 per cent" and after some recitals it goes on thus : "The Company does hereby promise to pay the sum due to the said Madhu Sahai, his executors or administrators or his or their order on demand at the General Treasury at Fort St. George after the expiration of 15 months' notice of payment to be given by the said Governor in Council in the Madras Government Gazette and (so long as the revenues of Tanjore shall continue to be in the possession of the said United Company) the said Governor in Council does hereby promise for and on behalf of the said United Company

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to pay the interest accruing on the said sum of Rs. 8,948-3-5." One thing is absolutely clear and that is that this is not a promissory-note in the sense of a negotiable instrument for the simple reason that it is not an unconditional promise to pay because the Government need never pay the principal at all until they have chosen to give the notice set out in the document and they need only pay interest so long as they are in possession of the revenues of Tanjore. Therefore it is not a negotiable instrument; and so one has to ask what is it? It is a promise on the part of the Government to discharge their obligations under the articles of 1824. I am unable to hold as suggested to me by the learned Advocate-General, that the taking of that bond amounted to an abandonment of the position of *cestui que trust* in favour of the position of being a mere claimant of a money debt. If the taking of the document gave up all claim to the trust fund *qua* trust fund, I am of opinion for reasons which I shall give presently that the plaintiff's case can't succeed; but I am of opinion that the taking of the bond did not alter the fundamental character of the relations between the parties. I think the bond was a mere indication or warrant to the bond-holder of the appropriate manner in which he should get possession of his share of the trust fund and of the interest that was to be paid to him and I do not think that it converted the obligation of the Company as trustees of the fund into a mere simple contract debt subject to the ordinary operation of the Law of Limitation. But of course in deference to the very illuminating arguments that have been put before me I must deal with the case on the footing that what was taken by this document was only a mere contractual relation. Mr. Raja Ayyar says that nevertheless he is entitled to succeed at least as for the principal even if I take that view of the position because he says that as the money is only payable on demand and it is not contended that any demand was ever made until 1916 therefore the limitation will only run from 1916 and that would not bar this claim. All the well-known cases have been cited to me which deal with that subject and they all have been very fully dealt with in the arguments. The result of the English cases is clearly this that where you merely have "on demand" without its being a necessary factor in the determination of

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the time of payment it means nothing more than the money is to be paid unconditionally as in the ordinary cases of promissory-notes "on demand I promise to pay" the "on demand" does not import that it is a condition precedent to the liability arising that a demand should be made; but where demand is necessary to fix some subsequent date or where the obligation is collateral and therefore a contingent liability, so that until the demand is made the person said to be liable does not know that his liability has come into being then demand is a condition precedent to a successful claim. I shall now just run through the main cases where a demand has been held to be a condition precedent. In *Dixon* v. *Nuttall*(1) the words used were "at sight" and it was held that no action was maintainable without presentment for sight. In *Thorpe* v. *Coombe*(2), the words used were "two years after demand" and it was held that the statute of limitations did not begin to run until the two years after demand had elapsed. *Moore* v. *Petchell*(3). There the words "at six months' notice" were used and it was held that notice was a condition precedent. *Holmes* v. *Kerrison*(4). The words here were "payable at sight" and it was held that no debt arose upon a bill payable after sight until the presentment for payment. *Bradford Old Bank, Ltd.*, v. *Sutcliffe*(5). There the liability was contingent that of a surety and it was held that until the surety was demanded he could not tell that the principal debtor had not discharged his obligations. Similarly in *In re Brown's Estate*(6). I do not think I need refer to the cases of *Atkinson* v. *Bradford Third Equitable Benefit Building Society*(7) and *In re Tidd, Tidd* v. *Overell*(8) because those were cases of a very special kind where things were entrusted for safe custody and it was held that no cause of action arose until the person who deposited the things in question had signified his intention to determine the pledge. On the other hand, though I am perfectly clear about the general trend of the English cases and I am also clear that they are logical and reasonable, there is a case *Kuttissan* v. *Suppi*(9) which has given me a

(1) 1 C.M. & R., 307.
(2) 8 Dowl. and Ry., 347.
(3) (1856) 22 Beav., 172.
(4) (1810) 2 Taunt, 323.
(5) (1918) 2 K.B., 833.
(6) [1893] 2 Ch., 300.
(7) (1890) 25 Q.B.D., 377.
(8) (1893) 3 Ch., 154.
(9) 3 M.L.J., 199.

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good deal of trouble. I think on the whole I can distinguish that case on the ground that it turns on the construction of the very special words which were used there "I shall pay you whenever you may demand after you attain the age of majority" and I think it is possible to hold that that makes the distinction : inasmuch as the person who entered into the obligation might not know for certain when the other person would attain the age of majority, it may be reasonable to hold that notice was a condition precedent to liability. I am quite clear that in this case the words "on demand" do not import a demand as a condition precedent because they come not before but at the end of a fixed period. After the 15 months provided for the notice have expired then forthwith the note becomes payable ; so that demand is of no value as a terminus a quo in fixing the period of 15 months. The second argument is that this is not a general acceptance within the meaning of the cases, because it is payable at the General Treasury, Fort St. George, and reference was made to *Rowe* v. *Young*(1). That case held that a bill accepted payable at the house of Perring and Co., Bankers, was only due if and when it was presented at that particular bank. That was at once altered by statute under pressure from the mercantile community owing to the great inconvenience of the decision and it is now settled law that a mere indication of the bank at which the note will primarily be met does not prevent it from being a general acceptance of the bill and does not make presentation at that bank a condition precedent to payment. It is said on the other hand it is settled law that if the bill is made payable only on some particular bank that is not a general acceptance and the presentation at that bank is a condition precedent. I do not think it makes the least difference. Assuming that this document was in substitution for the rights under the articles, I can't correct the document by the articles—it makes to my mind no difference that the articles do provide for the principal being paid at Madras only. I, therefore, hold that there is nothing in this contention of the plaintiff and if the bond, to use a non-committal term, was an acceptance by him of the contractual relation in full discharge of all his rights under the articles that liability to pay the principal accrued on the 30th of September 1854 and

(1) (1820) 2 Bligh., 391.

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would therefore both as regards interest and principal be barred by limitation and he would be entitled to recover nothing.

Now, there are two other matters I may deal with shortly. The bond has at the end of it an endorsement—we do not know who by—"Pay to Girdharjee Maharaj" whose interests are not represented by the plaintiff. The plaintiff only represents the interests of the original payee Madhu Sahai but on that I am of opinion that that matter is concluded as between the Government and the plaintiff by the succession certificate of the District Judge of Benares. That seems to me to follow from the clear language of section 16 of the Succession Certificate Act and I so decide.

Last, I come to a matter which is one of some difficulty. It is said that the trend of plaintiff's real argument shows that his claim if any should have been framed not under the bond but under the Articles of 1824 and by framing his claim under the bond he has virtually accepted the position that the bond is his only deed of title and that his relation to the Government is a contractual one. I do not think that I can accede to that argument. I see the force of it. I see the difficulty of it. The view I take of the bond being that it is not a contractual relation at all but merely a statement by the Government of their intention to carry out their obligations under the deed of 1824, I think it may be regarded as a mere label to indicate the plaintiffs' predecessors-in-title and the person to whom it was issued as one of the *cestui que trusts* entitled to have handed to him that portion of the trust fund specified in the bond and I think I can treat the claim as a good claim by the plaintiff to take the portion of the trust fund which the bond declares to be his share.

There will be judgment for the plaintiff for Rs. 48,504-11-8 and costs.

Against this judgment, the Secretary of State preferred this appeal.

Advocate-General (*C. P. Ramaswami Ayyar*) for the appellant.—The suit is on a bond executed in 1845 on behalf of the East India Company in favour of one of the creditors of the late deposed Raja of Tanjore (Amar Singh). The revenues of Tanjore were assigned over

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to the East India Company by the treaty concluded about 1799. As a matter of grace, the Company thought themselves bound in honour to pay the debts of the deposed Raja, and accordingly in 1824 entered into an agreement with the creditors of the Raja for payment of their debt to be ascertained by certain commissioners. Exhibit C is the agreement. Under the agreement, a sinking fund was to be created and maintained, which was done by the Company. Bonds or certificates were to be issued to creditors and 4 per cent interest was to be paid half-yearly on demand at the general treasury. Principal was to be paid on 15 months' notice issued by the Company. In 1853, a special notice (Exhibit F) was issued, and in 1858 a general notice was also issued by the Government of India in the *Calcutta Gazette*. The fact that the notice in 1853 required production of the bond, does not mean that other modes of proof of note were not allowed to the party in case the bond was not available to be produced. In any event the notifications show that the bonds had become exigible on those dates, and limitation for recovery of principal as well as for interest had begun from that time or rather after 15 months thereafter in respect of the principal amount. The plaintiff relies on section 10, Limitation Act. The East India Company are not trustees, in whom property had become vested for specific purpose under section 10, which does not therefore apply. See *Khaw Sim Tek* v. *Chuah Hooi Gnoh Neoh*(1). There is no trust at all in the documents (bonds) of 1845, though there may be a specific trust in the agreement of 1824. There is no trust property. The Tanjore revenue is not charged with a trust for the principal in any event even under the

(1) (1922) 49 I.A., 37.

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agreement of 1824. As for the sinking fund, it is not a trust fund, it is only a mode suggested to the Company to pay the principal. The document (Exhibit C) of 1824 provides for the issue of bonds in substitution of the original obligation, if indeed the latter was in the nature of a trust obligation. The bonds provided a substituted obligation in contract of a fuller character than the limited obligation of a trust fund under the agreement of 1824, and not a cumulative obligation. The agreement of 1824 was exhausted and carried out and was no longer in force after bonds were issued as directed by the agreement of 1824. The assignment to the plaintiff is only of the contractual right under the bond and not the right as *cestui que trust*; the certificate under the Succession Certificate Act gives only a right to collect the principal and a specific sum of Rs. 2,000 for interest. The plaintiff cannot sue on the deed of 1824, and he is not in fact so suing; whatever may be the relation between the creditors and the Company under the agreement of 1824, after the consolidation under the bonds, there is no obligation of trustee and *cestui que trust* after the bonds of 1845. The bond is not a trust but only creates a simple contract debt. The bonds do not refer to the sinking fund or Tanjore revenues. Reference was made to Lewin on Trusts, page 11, Godefroi on Trusts, page 1, and Indian Trusts Act, section 4 (definition of a Trust).

Next, does the obligation as on a simple bond arise only "on demand" in this case? This is a sum payable on demand. See *Norton* v. *Ellam*(1) *Joachimson* v. *Swiss Bank Corporation*(2). In current account with a bank, a demand is necessary but in general cases, no demand is necessary. The

(1) 2 (1837) 2 M. & W., 461.

(2) [1921] 3 K.B., 110.

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Young(1); for interest also, the creditor must make a demand under the bonds. The assignment is complete; though it refers to a certain sum as interest, there is no reservation in the bond to the assignor or his heir. All the powers of the assignor will pass to the assignee. See section 8 of the Transfer of Property Act. *Chellappa Chetty* v. *Subramanian Chetty*(2), *Bijraj Nopani* v. *Pura Sundary Dasee*(3). The succession certificate gives a right to recover whatever might have been recovered by the original ancestor. Reference was made to section 10 and articles 59, 71, 72, 73, Limitation Act, and to *Narayanan Chetty* v. *Suppiah Chetty*(4).

K. Jagannatha Ayyar for the Advocate-General briefly replied, and referred to *Mukundi Kuar* v. *Balkishen Das*(5), *D. N. Shaha & Co.* v. *The Bengal National Bank, Ltd.*(6).

JUDGMENT.

SCHWABE C.J.

SCHWABE, C.J.—The history of this matter is so clearly stated in the judgment of COUTTS TROTTER J., that it is unnecessary for me to repeat it and I have nothing to add to his statement of the facts except as to the plaintiff's title and I will deal with that first.

The plaintiff is the assignee of one Mukund Lal who is the direct lineal descendant of Madhu Sahai who, in the year 1845, had issued to him a document called a promissory-note of the Tanjore debt No. 307. The plaintiff has also obtained from the District Court of Benares a succession certificate under the Succession Certificate Act of 1889 in the matter of the estate of Madhu Sahai declaring him entitled to collect the money and the interest due on the said promissory-note

(1) (1820) 2 Bligh., 391; 4 E.R., 372. (2) (1918) 8 L.W., 221.
(3) (1915) I.L.R., 42 Calc., 56 (P.C.).
(4) (1920) I.L.R., 43 Mad., 629. (5) (1880) I.L.R., 3 All., 328.
(6) (1920) I.L.R., 47 Calc., 861.

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(Exhibit M). The effect of that certificate is that the plaintiff is declared to have whatever rights Madhu Sahai would have had in that promissory-note if he had been alive, and payment to him will be a good discharge to the Government. The assignment to the plaintiff (Exhibit J) was made in 1909 and in my judgment it assigns all the rights that the assignor had as representing Madhu Sahai. It is true that it recites that the assignor is entitled to the promissory-note and to a specified amount of interest Rs. 2,833–15–0½. That is the amount of interest accrued due from the date of the last payment referred to hereafter, up to the time when by Exhibit F published in the *Fort St. George Gazette*, it was announced that, as Madhu Sahai had declared that he had not received the promissory-note No. 307, it would be paid on 30th September 1854, and that the notice would be held equivalent to a tender of payment on that date, from which date all interest on the said note would cease. It has not been contended before us that that notice had any effect on the rights of Madhu Sahai, but apparently the parties to the assignment thought that it had the effect of stopping the interest as from that date, and that is apparently the meaning of this recital. However, the operative part of the document assigns all the interest in the promissory-note which the assignor had. In the translation before us the words are "right and authority." But we have had before us the Court interpreters of Hindi and Guzarati and they agree that the words mean literally "the rights and powers" and convey what we understand by such words as "all the right, title and interest" and include particularly all powers of recovering by action or otherwise the amount due on the promissory-note. This, in my judgment, is wide enough to cover both principal and all interest due and to become due. It follows that

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the plaintiff had both by the assignment and by virtue of the succession certificate all the rights of the estate of Madhu Sahai.

I propose now to consider the rights of the plaintiff apart from the Limitation Act, and then whether that Act applies. The history of the matter as far as we can ascertain it, is that in 1847 one Hur Kissen Doss received through his agent one Pattam Narayanaswami Chetti, the arrears of interest up to 30th October 1846 from the date of the agreement of 1824 referred to hereafter, i.e., Rs. 8,411–5–1 (Exhibit 1-A). The promissory-note itself has a column on the back for acknowledgment of the receipt of interest. That column contains what purports to be an order by Madhu Sahai to pay to Hur Kissen Doss and it also contains what purports to be a further order signed by Madhu Sahai to pay to one Shri Girdharji Maharaj. This is the best that can be made out of the endorsement on the original somewhat dilapidated promissory-note, and of a copy of this endorsement made by the plaintiff when it first came into his possession some 13 years ago. It is suggested that these endorsements are forgeries, and there is some support for that theory in that in 1853 Madhu Sahai's statement that he had never received the promissory-note is officially accepted as is shown by Exhibit F. But the United East India Company paid this interest to Hur Kissen Doss in 1844 on what purports to be the direction of Madhu Sahai and, in the absence of evidence that it was not done by his direction, in my judgment the plaintiff has failed to establish that this amount of interest was not properly paid; and therefore in my judgment his claim to that amount fails.

At later dates other persons made claims under the promissory-note, but they were all rejected, one by the

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High Court made by V. Muniswami Chetti, as appears from Exhibit G at some date before 1864. In 1892 one Shri Jivan Lalji put in a claim which was rejected (see Exhibit H). It would appear that Shri Jivan Lalji was the grandson of Shri Girdharji Maharaj, who in Exhibit E is stated to have died in 1842, and Jivan Lalji left surviving him, a widow and two sons, one also called Girdharji Maharaj (see Exhibit K). If Exhibit E, which does not seem to have been proved by any one, is accurate, that Girdharji whose name appears endorsed on the promissory-note was dead before the promissory-note was issued in 1845 and it is not surprising that doubts were thrown in Exhibit H on the honesty of any claim made through him. At any rate, no payment was made of principal or interest to Girdharji Maharaj or any one claiming under him, and the plaintiff has by Exhibit K taken the precaution of obtaining a release deed from the present representatives of Girdharji Maharaj, and in my judgment the supposed endorsement to him can be disregarded. It is not relied upon by the Secretary of State. Where the promissory-note was until between 1901 and 1906, when it is stated that it came into the hands of the heirs of Madhu Sahai, we do not know. But it was originally issued to Madhu Sahai and was throughout his and his legal representatives' property, and I find no assignment of his rights thereunder, except to the interest dealt with above, until the assignment to the plaintiff. I therefore hold that the plaintiff has the full rights that Madhu Sahai would have had if he were alive now.

Those rights, apart from limitation, are to be paid the principal, the requisite notice having been given in 1853 and apparently again in 1858 (see Exhibit G) and interest at 4 per cent from October 1846 until the decree herein.

It is contended that all rights to the principal and consequently also to the interest are barred. It is argued that under article 120 of the schedule to the Limitation Act of 1908, if under no other article, the right to recover is barred six years after the principal debt became payable, i.e., from the date of expiry of the 15 months' notice given in 1853 or 1858. There are two answers made to this: first, that time can only begin to run from the date of demand for payment made at Madras which was not until October 1916; and secondly, that the Government, who it is admitted have succeeded to the rights and liabilities of the United East India Company were and are in the position of trustees and that, under section 10 of the Limitation Act, no period of limitation can apply. The learned Judge has found the first point against the plaintiff and the second in his favour. In my judgment the plaintiff is right on both points.

The first point turns on the terms of the promissory-note itself. By it the Company agrees to pay to Madhu Sahai, on the expiration of 15 months' notice of payment, on demand at the general treasury at Fort St. George the principal sum and to pay interest half-yearly as long as the Company was in possession of the revenue of Tanjore. The interest was to be paid at the Treasury in cash to proprietors if resident in India and in cash or by bills at 12 months at the option of the proprietors, if resident in Europe.

According to the law of England when money is payable on demand and nothing further is said, it is payable at once and without demand and time under the Statute of Limitations begins to run at once. The most common instances of the application of that principle are of money lent repayable on demand or at request, and promissory-notes payable on demand.

Norton v. *Ellam*(1). It is worth noticing that this principle of the English common law has been held not to apply to cases in the mufassal. *Tarinee Pershad Ghose* v. *Pran Kishen Banerjee*(2). However the principle is in terms applied by articles 59 and 73 of the Limitation Act to cases of money lent and bills of exchange and promissory-notes payable on demand. But it is not extended to any other case. Article 73 does not apply to this case as the so-called promissory-note is not a promissory-note within the definition of the Limitation Act. Further, in England the question in such cases is stated clearly by SCRUTTON, L.J., in *Bradford Old Bank* v. *Sutcliffe*(3), and by BANKES and ATKIN, L. JJ., in *Joachimson* v. *Swiss Bank Corporation*(4), where it was established that the principle did not apply to cases between customers and bankers. The question to be considered is whether the words "on demand" are mere words, or whether, looking at the whole document, it is really intended that the demand should be made before the liability to pay arises. Now in this connexion, I attach very great importance to the fact that the payment is to be made at a named place by the person liable, which place is the address of the debtor and not of the creditor. In the case *Rowe* v. *Young*(5), it was held that the presentment for payment of a bill of exchange payable at a named place was a condition precedent to the right to sue on the bill. It is true as pointed out by COUTTS TROTTER, J., that that particular rule has since been altered by Statute, but the principle of the decision is, in my judgment, in no way thereby affected and I consider it directly in point. Further, it is worth

(1) (1837) 2 M. & W., 461.
(2) (1870) 14 W.R., 224.
(3) [1918] 2 K.B., 833 at p. 849.
(4) [1921] 3 K.B., 110.
(5) (1820) 2 Bligh., 391; 4 E.R., 372.

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observing that there has been no similar statutory alteration of the law in India. Looking at the whole documents in my judgment, it was the intention of the Company to insist on a demand at the place named; for I cannot think that it was intended that the Company should be under a duty to seek out the creditors and pay them, especially as the payment under the promissory-note was to be to the payees or their order and the Company would not know who they would be at the expiration of 15 months' notice to be given at some future date. Further, as to the interest the Company would require to know if the proprietor for the time being was in India, in which case it was to be paid in cash at the general treasury, or in Europe, in which case he had an option, the exercise of which he would have to communicate. In my judgment, the Company came under no liability to pay either the principal or interest until the demand was made for payment at a particular place and in some cases in a particular manner; and if the Company had been sued without a demand, it would, in my judgment, have been a good defence to the action that no demand had been made. It follows, in my judgment, that the rights under the promissory-note looked upon as a simple contract debt are not barred.

Secondly, are the Government trustees within the meaning of section 10? Following the words of that section, is the Government a person in whom property has been vested in trust for any specific purpose and is the action for the purpose of following the trust property? A specific purpose is a purpose that is either actually and specifically defined in the terms in which the trust is created, or a purpose which from the specified terms can be certainly affirmed. *Khaw Sim Tek* v. *Chuah Hooi Gnoh Neoh*(1). In this case the terms are to be

(1) (1922) 49 I.A., 37 at p. 43.

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found in the articles of agreement of 1824 (Exhibit C) of which, I think, if this case goes further, articles 15 and 16 should be printed. It was an agreement between the Company and amongst others, Madhu Sahai's predecessor-in-title. In my judgment, by that agreement the United Company undertook to set aside a sufficient part of the Tanjore revenue to be received by it, to provide for the payment to the creditors of Amar Singh, who had signed the agreement, of their debts. Those creditors were to receive transferable bonds or certificates, and sufficient revenue was to be set aside and applied to paying the interest on those bonds, and also to creating and accumulating a sinking fund for the redemption in due course of the principal. In pursuance of this agreement a transferable bond, called a promissory-note, was issued as the note states in conformity with and in pursuance of the articles of agreement of 1824, and is now held by the plaintiff. It is true that by the terms of the document the Company agrees to pay in the events that have happened, the interest and principal due on the bond to Madhu Sahai or his order. He or his assignees could have sued on the promissory-note itself; and the Company undertook the liability to pay interest so long as they received the Tanjore revenue, and principal after 15 months' notice given by them, and it would have been no defence that the Company had not received sufficient revenue or that, after giving the notice had not got sufficient sinking fund in its hands; but, this does not in my judgment prevent the Company from being trustees of the fund that it did get into its hands, that is, of that part of the revenue required for the purpose of meeting the principal and interest of these bonds. I agree with the judgment of COUTTS TROTTER, J., that a trust was created by the articles of agreement and in my judgment,

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the Company and the Government and its successors are trustees of the funds in their hands for the purpose specifically defined in the articles of agreement, namely, the payment of interest and of principal of the transferable bonds to be issued under that agreement of which the bond in suit is one. I therefore hold that section 10 of the Indian Limitation Act applies.

The judgment must be reduced by Rs. 8,411-5-1 referred to above. That is however a minor part of the case, but the appellant's case partially succeeded and I think that the justice of the case will be met by awarding to the plaintiff three-fourths of the taxed costs of this appeal.

Time for payment three months from to-day.

WALLACE, J.

WALLACE, J.—The plaintiff is suing to recover money due on a bond Exhibit A, dated the 28th July 1845, under which the Governor in Council promised on behalf of the East India Company to pay certain principal and interest to one Madhu Sahai and his successors-in-title. The said Madhu Sahai represented a creditor of the deposed Raja of Tanjore Amar Singh, whose debts so far as they had been proved to the satisfaction of the Company under a Commission appointed for the purpose, the Company took over, and for the due payment of which they made themselves responsible. The manner in which this was done is set out in Exhibit C, dated the 11th February 1824, articles of agreement between the Company and those claiming to be the creditors of Amar Singh.

A great deal of discussion has centred round this document. On the best consideration that I can give it the important provisions in it appear to me to mean this:—the creditors who put their hands to it agreed to abide by the decision of the Commission appointed to

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determine the extent of their debts. The Company who were then in possession of the revenues of Tanjore, formerly in the possession of Amar Singh, on their part agreed to take over these debts so determined with simple interest on the balance found due at 4 per cent from the date of the debt to the 30th April 1823, to consolidate that sum as the principal of bonds to be issued by them to the creditors in full satisfaction of such debts due by Amar Singh, the bonds to carry simple interest at 4 per cent per annum to be paid half-yearly from the 30th April 1823; such interest was payable only so long as the Company retained the Tanjore revenues, while the payment of principal was not so conditioned such payment to be made only after 15 months' notice by the Company. In order to provide means for the redemption of these bonds, the total principal of which amounted, we are told, to nearly nine lakhs of rupees, a reserve fund sufficient to pay the interest was to be set apart by the Company out of the Tanjore revenues plus a sum equal to 5 per cent of the principal annually out of the same revenues as a sinking fund, to meet the principal; and on this sinking fund the Company would pay 4 per cent per annum to be paid from general revenues. This latter stipulation is important as showing that the Company regarded the sinking fund as a separate fund with them belonging to and for the benefit of others. The sinking fund was to remain in existence and be a charge on the Tanjore revenues until all the bonds were discharged. Article 15 of the deed further stipulates that the deed shall not operate to make the Company's property apart from the Tanjore revenues, liable for these debts or any other debts owing to these creditors of Amar Singh, or to make even the Tanjore revenues liable unless these are received by the Company at

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Madras. The effect of this agreement clearly is, I think, that the Company, who had come into possession of the Tanjore revenues and recognized the justness of the claims of Amar Singh's creditors on these revenues, took on themselves the obligation to pay these debts and constituted themselves trustees, so far as they were and remained in possession of the Tanjore revenues, for the payment of these bonds so issued, and undertook to set apart a sufficient portion of these revenues as a trust fund to be used for the payment of interest on, and the ultimate redemption of, these bonds until all of them were discharged.

In pursuance of this agreement, bonds, as contemplated were issued, and Exhibit A, the bond under which the plaintiff sues, is one of them. It is not denied that it is undischarged as regards the principal and most of the interest.

The plaintiff's contention is twofold: firstly, he sues on Exhibit A on the ground that he is entitled to be paid on it from the trust fund maintained *ad hoc* by the Government and therefore his claim cannot be barred since the Government cannot plead limitation against a trust obligation, and secondly, that apart from any question of trust, and even if there is no trust fund, the payment is not barred by limitation. The Government claims that the trust, if created (and its creation is not strenuously disputed) came to an end when Exhibit A was issued, and that Exhibit A is only an ordinary contractual bond between debtor and creditor, whereon payment is barred by limitation. Exhibit A itself states that it was issued in pursuance of the agreement (Exhibit C) detailed above and the whole tenor of it shows that this was so. The Advocate-General's chief contention is that, in Exhibit C, it was laid down that the amount of principal and interest found by the Commission to be

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due to any particular creditor of Amar Singh was to be satisfied by the bond to be issued and that implied that, on the issue of the bond, the trust ultimately ceased. That view I cannot accept. The debt of Amar Singh was indeed to be satisfied once and for all by the bond, but the agreement went on to make distinct provision for the ultimate satisfaction of the bond itself, by announcing a promise of a sinking fund to be maintained until the bonds were fully discharged. It is not denied that the sinking fund was maintained, and the Government notifications of the 24th June 1853 (Exhibit F), and 18th December 1858 (filed in this Court) indicate that it was so being maintained, and of course Government was bound under Exhibit C so to maintain it until all the bonds were discharged. Government has been, since the date of Exhibit C, in possession of the Tanjore revenues and I must presume that it has carried out the promise contained in that document.

So then we have the position that *pari passu* with the issue of and running of the bonds, the sinking fund to pay them off was being accumulated, until, by 1858, all except four bonds, of which Exhibit A was one, had been paid off, and that in 1858, Government had sufficient sinking fund to clear these also. It is plain then that Government had been all along holding in trust for the bond-holders the amount necessary to pay off each bond. The trust had in fact not ceased by the issue of the bonds, but continued and was to continue according to the agreement so long as any obligation to pay remained on any bond, and the trust fund could be dissolved only when every bond was discharged. Exhibit A has not been discharged. The trustee must therefore meet it from the trust fund so far as that fund is sufficient to meet it, and he cannot be heard to plead that he is not bound to do so or that the

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payment is barred by time, and thus in effect appropriate to himself the trust fund. To this part of the case no defence can be put forward against payment other than one of two pleas: (1) that such a loss in the Tanjore revenues has taken place that the trust fund was exhausted so that the bonds cannot be redeemed from it; or (2) that all the bonds have been discharged. Neither plea has been here advanced.

Another argument to show that the trust came to an end with the issue of the bonds is based on the wording of Exhibit A itself. Exhibit A no doubt does not mention any sinking fund or reproduce article 15 of Exhibit C, which makes only the Tanjore revenues liable for the debt. So far as its wording goes, the Governor in Council is prepared to meet the obligation to pay the principal and interest from general revenues. Interest, no doubt, would not be payable if the company had wholly lost the Tanjore revenues, but apparently the obligation to pay from general revenues would continue even if the Tanjore revenues, while not wholly lost, nevertheless proved insufficient to meet the bond. Incidentally, this shows that Exhibit A was something more than a mere warrant or declaration of intention to carry out Exhibit C, or a mere label to indicate to the holder of Exhibit A what his share in the trust fund was.

But apart from that, the present question is, was the original trust obligation charged on Tanjore revenues then converted, when Exhibit A was issued, into an ordinary contractual obligation to pay from general revenues so that the trust obligation had come to an end? I can find no ground for such a conclusion. The wording of Exhibit A so far from indicating any innovation from the agreement (Exhibit C), directly purports to be in pursuance of Exhibit C. The probable explanation of the use of language in Exhibit A loose enough to make

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the Company's general revenues liable for the bond, is that the risk of the Company losing the Tanjore revenues, which was a real risk in 1824, had by 1845 become negligible, and it became a matter of indifference to the Company whether the bond was redeemed from the trust fund fed by the Tanjore revenues, or from general revenues; while beyond that Government always had the safe guard that interest was not payable, if the Tanjore revenues were lost, while principal was not payable until Government chose to give notice. Had there been any real risk at the time of the issue of the bond in 1845, it is obvious that the full terms of the agreement in Exhibit C, would have been strictly set out in Exhibit A, and that a bond professedly issued in pursuance of that agreement would have, if it had been at all necessary, limited the liability of the Company to a charge on the Tanjore revenues as set out in Exhibit C. There is nothing in the wording of Exhibit A, then, to indicate that Exhibit C, was not being carried out, that the trust fund was not in being, or that there was any fresh agreement at the time of Exhibit A which put an end to the trust. In fact its wording implies that the trust set out in Exhibit C, had been accepted and was being carried out thereby.

My conclusion on this part of the case then is this: there is and ought to be a trust fund in existence for the payment of the amount due under this bond. Government cannot be heard to say, nor is it in fact pleaded, that they have broken that trust or have not maintained the fund. The plaintiff, assuming that he is the real beneficiary under the bond, is entitled to enforce his claim under Exhibit A, as if he were, as he is, one of the beneficiaries under this trust, and if there is sufficient money in the fund to discharge what is due on this bond, the money due under it must be paid, and payment of it

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cannot be barred by limitation, since a trustee cannot be allowed to vouch a statute of limitation against a breach of trust; and the present suit is clearly one for the purpose of following, i.e., for recovering for the *cestui que trust*, in the hands of Government, trust property vested in it for a purpose specific and specified in this case by the author of the trust. So far then as the trust fund will discharge Exhibit A, it must do so, but if, and in so far as, the trust fund is insufficient to discharge Exhibit A and therefore the obligation to discharge it falls on the ordinary revenues, Exhibit A, is enforceable against these general revenues only as an ordinary contract between a debtor and a creditor. It might in certain circumstances therefore have been necessary to inquire how far the trust fund will suffice to meet Exhibit A, but, fortunately, in the present case it is not necessary for two reasons. First, Government has not pleaded that the trust fund is insufficient to meet Exhibit A; and secondly, I hold, in agreement with the learned Chief Justice that even as an ordinary contract, Exhibit A, is enforceable in plaintiff's favour.

Turning to this second part of the case, viz., whether, apart from any trust, payment under the bond is barred by limitation, I agree with, and have very little to add to what the learned Chief Justice has said. As to the question of the meaning of the phrase "on demand" at a particular place I would note the significance of the general notification of 1858 filed in this Court, which, after giving the necessary 15 months' notice announced that, "on presentation of the notes to the Accountant-General at Fort St. George" a certificate for payment both of principal and interest would be issued. It is clear then that before Government became liable to pay on the notes, whether principal or interest, that is, before any of the debt became due, there was to be a

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specific demand accompanied by presentation of the note at the Accountant-General's office at Fort St. George.

I have nothing to add to what the learned Chief Justice has said regarding what plaintiff has acquired under the assignment deed, Exhibit J, except that I do not think it necessary to consider the scope of Exhibit M, or to decide whether it is co-extensive with Exhibit J or not. Personally I think it is limited to the sums named in it, but it is not a point of importance at present.

As to the disallowance of Rs. 8,411–5–1 the plaintiff clearly has no right to that sum. The assignor believing, no doubt, that under the notification of 1853 Exhibit F, interest ceased from 30th September 1854, calculated the interest due to him up to that date from 30th October 1846, the date up to which, according to the endorsement on the note Exhibit A, interest had been paid by Government to Hari Kishen Doss, described in Exhibit A as the general attorney of Madhu Sahai, the original holder, and Rs. 2,833–15–0½ represents that sum. The plaintiff has shown no reason for us to suppose that the sum of Rs. 8,411–5–1 was not paid to the holder's attorney, and the Government books, Exhibit I (*a*), show that it was so paid. The plaintiff's assignor claiming from Madhu Sahai and therefore the plaintiff himself could have no right to have this sum paid over again, and the plaintiff's assignor evidently was quite aware of this, and therefore refrained from assigning that sum over to the plaintiff.

I therefore agree in the order proposed by the learned Chief Justice.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Devadoss.

1922, October 5.

SRI GADICHERALA VENKATANARASIMHA RAO GARU (DEFENDANT), APPELLANT,

v.

NYAPATHY SUBBA RAO PANTULU GARU AND TWO OTHERS (PLAINTIFFS), RESPONDENTS.*

Public trust of a charitable or religious nature—Hindu Law Will—Bequest of specific income out of testator's estate for charity—Charge—Bequest for the spread of the Sanskrit language or the spread of the Hindu religion or for both—Objects, whether either or both indefinite—Trusts, whether or to what extent, void—Adoption under authority given by will—Right of adopted son to question the bequest of adoptive father—Suit against the adopted son for scheme and other reliefs, whether maintainable under section 92, *Civil Procedure Code—Indian Trusts Act (II of* 1882), *sec.* 6*—Creation of trust under will, when complete.*

A Hindu executed a will by which he purported to create a charitable and religious trust by providing that a sum of Rs. 400 should be spent every year out of his estate "either for the spread of the Sanskrit language or for the spread of the Hindu religion or for both"; the amount was charged on the estate and certain persons were appointed executors who were to arrange for the conduct of the trust as the trustees from time to time of an institution called the Hindu Samaj at Rajahmundry might deem fit; the executors declined office; the testator also authorized, under his will, his widow to adopt a son; the widow adopted the defendant two years after testator's death; the defendant on attaining majority took possession of the estate from the widow and refused to pay the trust amount. The plaintiffs, who were the trustees of the Hindu Samaj, having obtained the sanction of the Advocate-General, instituted a suit

* Appeal No. 301 of 1921.

against the defendant for a scheme, for appointment of trustees, for ascertaining the trust amount and charging it on the estate, and for other reliefs, under section 92, Civil Procedure Code. The defendant pleaded that the suit was premature and was not maintainable against him, that the trust was indefinite, incomplete and void for uncertainty of its objects.

Held, that a suit for settling a scheme, appointing trustees and other reliefs in respect of an express or implied trust for public purposes of a charitable or religious nature was maintainable under section 92, Civil Procedure Code, against the defendant who was the heir-at-law in possession of the trust property, although he was not a *de jure* or *de facto* trustee; that a previous suit for administration of the estate was not necessary; that the trust was not bad for indefiniteness as to the fund to be applied thereto; that when a trust is created under a will, it is unnecessary that there should be a transfer of the trust property to trustees, and that the creation of the trust was not incomplete in the absence of such a transfer; and that the adopted son could not while approbating the provisions of the will under which his adoption was made, reprobate other provisions of the same will and repudiate the bequest to charity. *Ganapati Ayyan* v. *Savithri Ammal*, (1898) I.L.R., 21 Mad., 10, followed.

Held by SPENCER, J., that the trust as regards the spread of the Sanskrit language, was not void for uncertainty of object, but the trust as regards the spread of the Hindu religion was void for uncertainty; *Whicker* v. *Hume*, (1858) 7 H.L., 124; *Attorney-General* v. *Flood*, (1816) Hayes and Jo., Appx. XXI, referred to; but that, as under the will, the trustees had been given an absolute discretion to spend the whole sum of Rs. 400 either for the spread of the Sanskrit language or for the spread of the Hindu religion or for both, the whole gift was void in law and unenforceable.

Held by DEVADOSS, J., that both as regards the spread of the Sanskrit language and spread of the Hindu religion the trust was void for indefiniteness of its object.

In re Macduff, Macduff, v. *Macduff*, [1896] 2 Ch., 451; *Blair* v. *Duncan*, [1902] A.C., 37; *Grimond* v. *Grimond*, [1905] A.C., 124; *Houston* v. *Burn*, [1918] A.C., 337; *In re Jarman's Estate, Leavers* v. *Claryton*, (1878) 8 Ch.D., 584, referred to.

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APPEAL against the decree of S. SUBBAYYA SASTRI, Additional Subordinate Judge of Rajahmundry, in Original Suit No. 31 of 1920 (Original Suit No. 25 of 1919 of the District Court, Gōdāvari).

The plaintiffs, who were the members and trustees of an institution called the Gōdāvari Hindu Samaj, at Rajahmundry and who had obtained sanction of the Advocate-General, instituted this suit in the District Court of Gōdāvari (which was transferred to the Additional Sub-Court of Rajahmundry for trial and disposal). The suit was for settling a scheme, for appointment of trustees and for other reliefs in respect of a trust alleged to be created under the will of a Hindu testator, named Gadicherala Chinna Seethayya Garu. The defendant was the adopted son of the testator. The testator left a will (Exhibit A), which was executed and registered on 4th April 1909, and died on 15th April 1909.

Under clause 5 of the will, the testator appointed three persons as executors to manage his estate and carry out the provisions of the will; under clause 6, the testator gave authority to his wife to take in adoption any one she liked in his own Sakah and his own Gotra; and in clauses 11 and 12 of the will he purported to create a trust "either for the spread of Sanskrit learning or the spread of the Hindu religion or for both."

Clauses 11, 12 and 13 of the will were as follows:—"(11) A sum of Rs. 400 (rupees four hundred) should be spent every year out of my estate, either for the spread of the Sanskrit language or for the spread of the Hindu religion or for both. The said sum must be a charge on my estate. The executors must make arrangements necessary therefor to have the same conducted as the then existing trustees of the Rajahmundry Hindu Samaj might deem fit.

(12) Further it is my desire that the Vedas relating to my Sakah (branch) should be encouraged. And for that purpose it is my desire chiefly a Sanskrit or Vedic or Oriental Library should be established at Rajahmundry in my name. The executors must make the arrangements necessary therefor.

(13) In case my wife should not make an adoption during her lifetime, my entire property existing then should be utilized for the spread of the Hindu religion."

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Under clause 17, he provided as follows:—"(17) The said executors should manage my entire estate consisting of moveable and immoveable property, should improve the same as far as possible, and should in case my wife should make an adoption, manage until the adopted son attains majority, and should put him in possession of the same after he attains majority."

The executors declined office and the widow was in possession of the estate; she adopted the defendant on 4th June 1911, who, on coming of age on 1st November 1917, took over the estate from the hands of his adoptive mother. During the time of the widow's management of the estate, the trustees of the Rajahmundry Hindu Samaj issued a notice to her on 1st January 1913 to pay the arrears of the amount allotted to the charity under clause 11 of the will, and the latter paid on 17th March 1915 an amount of Rs. 1,050 being the arrears due up to the end of June 1913. Afterwards nothing was paid in respect of it to the plaintiffs (trustees of the Samaj) and the first plaintiff issued a notice on 18th January 1918 to the defendant to pay the arrears; the defendant replied by pleading inability to comply with the provisions of the will in this respect. Thereupon the plaintiffs, having obtained the sanction of the Advocate-General as already stated, instituted this suit against the defendant for settling a scheme for carrying out the trusts in the will, for appointment of trustees for the charity, for taking accounts of moneys due by the defendant and declaring the amount found due a charge on the property and giving other necessary directions. The defendant pleaded, *inter alia*, that the suit was not maintainable against him under section 92 of the Civil

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Procedure Code, that a prior suit for administration was necessary, that there was no valid and complete creation of the trust, that the trust was bad as there was no definite trust fund, that the trust was invalid in law as the objects of the trust were too vague and indefinite to be enforced in law and that the gift to charity under the will was not binding on him as adopted son. The Subordinate Judge held that the objects of the trust were definite and the trust enforceable in law, and that the same was binding on him though he was the adopted son. He accordingly passed an order calling on both sides to submit proposals for a scheme, etc., and passed a final judgment and decree embodying a scheme and granting other reliefs in the suit. Against the decree, the defendant preferred this appeal to the High Court; and the plaintiffs preferred a memorandum of objections contending that the trust under clause 12 of the will for establishing a library was valid and that the trust should be declared a charge on the entire estate.

P. R. Ganapati Ayyar (with him *A. Venkatachalam*) for appellant.—(1) The suit is not maintainable against the defendant under section 92, Civil Procedure Code. The section contemplates a breach of trust by a trustee and the suit should be brought against a trustee. It does not apply to a case where the defendant is not a trustee, *de jure* or *de facto*. The defendant is not even a trustee *de son tort*. The section does not apply to a case, like the present, in which the defendant claims the property under some title in denial of the trust. Further section 92 can refer only to trusts in which the property is vested in a trustee; it applies only to trusts in the English sense as laid down by the Privy Council in *Vidya Varuthi* v. *Balusami Ayyar*(1). Under the will, no trustee has been appointed but only executors.

(1) (1921) I.L.R., 44 Mad., 831 (P.C.).

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(2) The suit is premature. This suit for a scheme, etc., must be preceded by an administration suit. The estate must be first administered. See *Annavarapu Maucharamma* v. *Venkatadri*(1).

(3) The bequest "for the spread of the Sanskrit language or that of the Hindu religion or for both" is void for uncertainty. The vernacular word used for spread is "Abhivirddhi" which means development. Giving presents to those already versed in the Sanskrit language, which the trustees have a discretion to do, is not a charitable object; the Court cannot prevent the trustees from using the fund for such a purpose, as their discretion is absolute under the will. The term "Hindu religion" does not denote any definite object. There are different sects, doctrines and branches under the term Hindu religion. It is not clear if it is the Vedic religion or religion as practised in modern times. There are different schools included in the term Hindu religion, it is not possible to say what species of it he intended to spread. Again it is not indicated by what means the Hindu religion is to be promoted. Conversion to Hindu religion is not allowed, it is therefore not possible to find out the methods for promoting the Hindu religion.

Bequests to charitable or benevolent or useful purposes, as trustees may think proper, or for religious acts and purposes, or for worship in general, have been held to be void. See *Dunne* v. *Byrne*(2), *Blair* v. *Duncan*(3), *Grimond* v. *Grimond*(4), *Hauston* v. *Burns*(5), *Scott* v. *Brownrigg*(6), *Kendall* v. *Granger*(7), *Dwarkanath Bysack* v. *Burroda Persaud Bysack*(8), *Chandi Charan Mitra* v. *Haribola Das*(9), *Trikumdas Damodhar* v.

(1) (1922) 31 M.L.T., 63.
(2) [1912] A.C., 407.
(3) [1902] A.C., 37.
(4) [1905] A.C. 124.
(5) [1918] A.C., 337.
(6) (1881) 9 Ir., 246.
(7) (1842) 5 Beav., 300; 49 E.R., 593.
(8) (1879) I.L.R., 4 Calc., 443.
(9) (1919) I.L.R., 46 Calc., 951.

Haridas(1), *Sarat Chandra Ghose* v. *Pratap Chandra Ghose*(2), *Bai Chandunbai* v. *Daday Nusserwanji*(3).

(4) The bequest is not binding on the defendant who is the adopted son. When adoption is made, the son takes the ancestral property by survivorship and not by inheritance. The will of the father is not binding on the adopted son. The testator had not already parted with the property. See *Balakrishna Motiram* v. *Sri Uttar Narayan Dev*(4), *Byri Appamma* v. *Byri Chennammi*(5), *Pratap Singh Shiv Singh* v. *Agarsingji Rajasangji*(6). Unless there was an agreement between the natural father of the adopted son and the adoptive mother, and the adoption was made conditional on the bequest being accepted as binding, the disposition under the will is not binding on the adopted son. *Visalakshi Ammal* v. *Sivaramien*(7).

G. Lakshmanna for respondents.—(1) Section 92, Civil Procedure Code, is very comprehensive and is not confined to cases where there are trustees nor to cases of breaches of trust by trustees. There may be cases where trustees were not appointed or cases where there is a vacancy in the office of trustee owing to trustee's death or his resignation or non-acceptance of office. Denial of the trust by the defendant does not oust the jurisdiction of the Court under section 92. Suits under section 92 have been allowed against trespassers. Whenever the direction of the Court is necessary for administering the trust, the suit is maintainable. See *Neti Rama Jogiah* v. *Venkatacharulu*(8), *Budh Singh Dudhuria* v. *Niradbaran Roy*(9), *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev*(10).

(1) (1907) I.L.R., 31 Bom., 583.
(2) (1913) I.L.R., 40 Calc., 232. (3) (1902) I.L.R., 26 Bom., 632.
(4) (1919) I.L.R., 43 Bom., 542. (5) (1920) 12 L.W., 17.
(6) (1909) I.L.R., 43 Bom., 778 (P.C.).
(7) (1904) I.L.R., 27 Mad., 577 (F.B.).
(8) (1903) I.L.R., 26 Mad., 450. (9) (1905) 2 C.L.J., 431.
(10) (1891) I.L.R., 15 Bom., 612.

(2) A preliminary administration suit is not necessary in this case. When there is a specific fund charged on the estate for the trust, there is no necessity for an administration suit. In *Annavarapu Maucharamma* v. *Venkatadri*(1), there was no sufficient surplus, after payment of legacies, available for the trust.

(3) As far as possible the Court should give effect to charitable bequests unless the intention of the testator could not be ascertained. In this case the subject matter is a definite sum of Rs. 400 and is charged on the whole estate.

The objects of the trust are the spread or advancement of the Sanskrit language or the Hindu religion or both. The objects are clear and definite. It is only the mode or ways and means of carrying out the objects that is left to the discretion of the trustees of the Samaj. The ways and means of carrying out an object for which a scheme can be settled, should be distinguished from the object. The testator was a member of the Samaj from its inception which had kindred objects as the trusts under his will, and he had confidence in the trustees of the Samaj, who were to carry out the objects named by him in the will. A charitable trust does not fail for uncertainty, if once a trust for general charitable purposes is established. The English decisions as to what are charitable purposes are based upon technical definitions of what is charity and are based on the English Statute, viz., 43 Elizabeth, Chap. 4, regarding charitable trusts. In India, charitable purpose ought to be determined apart from English decisions as to what is technically a charitable purpose under the English Law. The limitations as to what is charitable trust under the English Law do not apply to what is charitable or religious trust under the Indian Law. In

(1) (1922) 31 M.L.T., 63.

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English Law, where a discretion is given to trustees to apply the fund for alternative purposes one of which may not be charitable under the Statute, the trust was held void, on the ground that one of the objects, was not charitable and not on the ground that the object was intrinsically indefinite. In India there is no distinction between religious and charitable objects and objects which may not be charitable under the English Law may be so under the Indian Law. Under the Indian Law the use of the disjunctive "or" is not fatal as under the English Law. Even under the English decisions, liberal interpretation has been given to the words of the statute of Elizabeth. See *The Attorney-General* v. *Stepney*(1), *Mitford* v. *Reynolds*(2), *Whicker* v. *Hume*(3), *In re White*, *White* v. *White*(4), *Townsend* v. *Carus*(5), *Re Louisa Kenny*; *Clode* v. *Andrews*(6), *Dick* v. *Audsley*(7).

(4) The plaintiff is adopted under an authority given by the same will which created the charity. He cannot approbate and reprobate the will. See *Ganapati Ayyan* v. *Savithri Ammal*(8). Even as regards the provisions under clause 12 of the will, the objects are definite, and a Library for any of the three purposes is not an indefinite object.

JUDGMENT.

SPENCER, J.

SPENCER, J.—This suit was instituted by three plaintiffs styling themselves members and trustees of the Gōdāvari Hindu Samaj, with the sanction of the Advocate-General under section 92 of the Civil Procedure Code, for the purpose of getting a scheme framed

(1) (1804) 10 Ves., 22; 32 E.R., 751.
(2) (1842) 1 Ph., 185; 41 E.R., 602.
(3) (1858) 7 H.L., 124; 11 E.R., 50.
(4) [1893] 2 Ch., 41.
(5) (1844) 3 Hare, 257; 67 E.R., 378.
(6) (1907) 97 L.T., 130.
(7) [1908] A.C., 347.
(8) (1898) I.L.R., 21 Mad., 10.

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by the Court for carrying out the trust contained in clauses 11 and 12 of the will of the late Rajah Gadicherla Seethayya of Rajahmundry who executed it on April 4th and died on April 15th, 1909. By the same will the testator gave authority to his widow to adopt a son which she did on June 4th, 1911, by adopting the present appellant.

Clauses 11 and 12 of the will run as follows:—

"11. A sum of Rs. 400 should be spent every year out of my estate, either for the spread (*abhivrithi*) of the Sanskrit language or for the spread of the Hindu religion, or for both. The said sum must be a charge on my estate. The executors must make the arrangements necessary therefor to have the same conducted as the then existing trustees of the Rajahmundry Hindu Samaj may deem fit."

"12. Further it is my desire that the Vedas relating to my Sakha (branch) should be encouraged. And for that purpose, it is my desire that chiefly a general Sanskrit or Vedic or Oriental Library should be established at Rajahmundry, in my name. The executors must make the arrangements necessary therefor."

The will names three executors, one of whom is the first plaintiff. They all declined office and the appellant who came of age on November 1st, 1917, has taken over the estate from the hands of his adoptive mother.

The first objection argued at the hearing of the appeal related to the maintainability of the suit. It was urged that the defendant, not being a trustee either by appointment or *de son tort*, could not be sued under section 92 merely because he was in possession of the estate, that for every suit under that section there must necessarily be a trustee (see observations in *Ashraf Ali* v. *Mohammad Nurajjoma*(1), but here there was none,

(1) (1918) 23 C.W.N., 115.

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and that the proper course for the plaintiffs to adopt was to bring a suit for administration in order to get the terms of the will carried out. I do not consider that any of these are fatal objections to the present suit. If a trust has been "created for public purposes of a charitable or religious nature" a suit will lie for settling a scheme "where the direction of the Court is deemed necessary for the administration of such trust" (vide *Neti Rama Jogiah* v. *Venkatacharulu*(1), and the person who is the heir at law and in possession of the property which is impressed with the character of trust property has an interest and is a proper party to such a suit.

Mr. Ganapati Ayyar then cited *Annavarapu Maucharamma* v. *Venkatadri*(2) and *Official Assignee* v. *Abdul Hussein*(3), in support of his argument that the present suit was premature as there was no definite fund for the trustee to administer and that the trust was thus incomplete. But the circumstances of those cases appear to be distinguishable. In the latter there was no fund ear-marked to be impressed with the trust, and in the former there was no appropriation of assets and the trust fund was yet to be ascertained. Here the will definitely assigns a sum of Rs. 400 to trust purposes to be spent every year out of the testator's estate and makes it a charge on the estate. Whatever may be thought of clause 12, there is a definite fund set apart for the purposes mentioned in clause 11. As noticed by the learned Subordinate Judge, when there is a will in existence section 6 of the Indian Trusts Act makes it unnecessary that there should be a transfer of the trust property to the trustees. The suit is in my opinion maintainable.

(1) (1903) I.L.R., 26 Mad., 450. (2) (1922) 31 M.L.T., 63.
(3) (1915) 28 I.C., 116.

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I pass now to a consideration of the more serious question whether the trust is void owing to uncertainty as to its objects.

If it is possible to ascertain with any degree of certainty the intentions of the testator, the Court will give effect to them. If, however, the trust fails on account of uncertainty of the objects, the trustee cannot repudiate it but holds it for the benefit of the testator's heir as a resulting trust--vide *Briggs* v. *Penny*(1). If the testator's meaning is so extremely vague that the execution of his purposes practically amounts to some one else making a will for him, then the Court will not lend its assistance or recognize the trust as one capable of execution. See *Blair* v. *Duncan*(2) and *Grimond* v. *Grimond*(3). This is the principle followed by SESHAGIRI AYYAR, J., in *Muthukrishna Naicken* v. *Ramachandra Naicken*(4), though the learned Judge does not refer to those English cases. He says at page 497—

> "the primary rule is to ascertain whether the object aimed at by the testator could be carried out without making a new will for him."

The objects of the trust as disclosed by clause 11 of the will, namely, the spread of the Sanskrit language or the spread of the Hindu religion appear to be partly for the benefit of one branch of human knowledge, viz., the Sanskrit language and partly religious. In this country religious objects are not necessarily charitable objects, and learning is not quite synonymous with education. But it is unnecessary to embark on a disquisition upon the question whether a religious purpose is also a charitable purpose, which formed the main consideration

(1) (1851) 3 Mac. & G., 546. (2) [1902] A.C., 37.
(3) (1905) A.C., 124. (4) (1919) 37 M.L.J., 489.

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in *Baker* v. *Sutton*(1), in *Townsend* v. *Carus*(2) and *In re White, White* v. *White*(3), as section 92, Civil Procedure Code, speaks of—

> "any express or constructive trust created for public purposes of a charitable *or* religious nature."

It does not signify whether it is of a charitable nature or of a religious nature provided that it is one of these two and also that it is a public purpose.

In order to understand the real intentions of the testator I am willing to read clause 12 of his will along with clause 11 and not to treat clause 12 by itself as creating a precatory trust.

I think we should also take notice of the reference in clause 11 to the Rajahmundry Hindu Samaj as an aid to discovering what the testator meant. It was also material to take into consideration, as the learned Subordinate Judge has done in paragraph 10 of his judgment, the evidence of P. W. 1 that the testator was a member of the Rajahmundry Hindu Samaj almost from its inception and was keenly interested in the working of this society. In *Re Louisa Kenny, Clode* v. *Andrews*(4), use was made of the knowledge that a certain Dr. Maclean was engaged for many years in the work of Christian Missions to interpret a reference to missionary objects connected with his name in a will, and in *The Attorney-General* v. *Stepney*(5), the known objects of the Welch Circulating Charity Schools were referred to in order to understand the meaning of a will which had as its object the improvement of Christian knowledge coupled with a mention of those schools. But I am unable to agree with the Subordinate Judge that the objects of the Hindu Samaj set

(1) (1836) 1 Keen, 224; 48 E.R., 292.
(2) (1844) 3 Hare, 257; 67 E. R., 378.
(3) [1893] 2 Ch., 41.
(4) (1907) 97 L.T., 130.
(5) (1804) 10 Ves., 22; 32 E. R., 751.

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out in clause 2 of their rules exhibited as Exhibit C are almost exactly the same as the purposes indicated by the testator in his will. The teaching of Sanskrit is not one of the professed objects of the association. A library is mentioned as one of the means of carrying out its objects but it is not clear what kind of library is intended. On this point the will, which speaks of a general Sanskrit, vedic or oriental library is more specific. Again the association aims at the diffusion of the principles of Hinduism, the study of Hindu civilization and the advancement of the Hindu community. The testator desired to see the spread of the Hindu religion with special attention to the Vedas relating to his branch (sakha), he being a Yagnavalkya Brahman. If the testator had absolute confidence in the Managing Committee of the Hindu Samaj, he might have made an outright bequest in their favour and left the spending of the money entirely in their hands without directing his executors to make arrangements to have the trust conducted according to the discretion of the trustees of the Hindu Samaj. In *Grimond* v. *Grimond*(1), Lord MONCREIFF, whose judgment was adopted by the House of Lords, observes that the trustee's own religious views do not affect the question when the trustees have been left with unlimited discretion as to what religious institutions are to be selected for being benefited. So here, if one of the objects of the trust is the spread of Hinduism generally, then in my opinion the object is too wide and indefinite to be carried into effect. The scheme framed in the lower Court provides for the submission to the Court by the trustees of a programme for the utilization of the annual grant of Rs. 400 and for the Court sanctioning the same with such modifications as may be found necessary. How is any Christian, Hindu or Muhammadan Judge to decide

(1) (1905) A.C., 608

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whether the proposal so submitted will advance the Hindu religion in the manner contemplated by the testator ? If, on the other hand, we hold that the scheme should be directed to the best means for inculcating the peculiar sectarian doctrines of the testator's own branch of the Hindu faith, then it may reasonably be doubted whether this purpose is such a public one as section 92 of the Code was intended to cover. The learned Subordinate Judge, who was in favour of upholding the trust as a good one, has been driven after considering clause 12 to the conclusion in paragraph 19 of his judgment that the object is not clear enough and he has been obliged to treat this clause as merely recommendatory. To my mind the trust is even more vague and indefinite, if clause 12 is omitted from consideration. The words "for the spread of the Hindu religion" are no more definite than the words "for missionary purposes" which were held in *Scott* v. *Brownrigg*(1), to be too vague and uncertain to create an executable trust,or than the words "most conducive to the good of religion in this diocese" in *Dunne* v. *Byrne*(2). It is not enough that in those cases there could be no doubt that the settlor was thinking of the Christain religion when he spoke of missionary or religious purposes, or that in the present case the Hindu religion is designated by name. God is worshipped in many forms by Hindus. A general endowment for the worship of God without specifying the deity for whose benefit the endowment is to take effect is void for uncertainty. (Vide *Chandi Charan Mitra* v. *Haribola Das*(3).

On the other hand, I am inclined to regard the promotion of the knowledge of the Sanskrit language as a valid charitable bequest. In *Whicker* v. *Hume*(4), a fund

(1) (1881) 9 Ir., 246.
(2) [1912] A.C., 407.
(3) (1919) I.L.R., 46 Calc., 951.
(4) (1858) 7 H.L., 124.

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given to be applied by trustees according to their discretion "for the advancement and propagation of education and learning all over the word" was held to be not too vague ; and in *Attorney-General* v. *Flood*(1), a gift for promoting education in the Irish language was upheld. See also Halsbury's Laws of England, volume 4, article 174. Here the word "spread" denotes that the testator was thinking of education. The Sanskrit language could only be spread by teaching persons hitherto ignorant of it. It would not be spread by rewarding those who are already learned.

If the object is definite enough, the Court will find suitable modes for carrying out the wishes of the testator. See *Gordhan Das* v. *Chunni Lal*(2). Of course it is necessary that if a Sanskrit library is to be founded, it should be one open to the public (unlike the Hindu Samaj's library which is limited to Hindus who pay a certain subscription and are grouped in two classes) ; if Sanskrit schools are to be formed, they must be schools which can be freely attended by the public. Otherwise this will not be a trust for public purposes falling under section 92, Civil Procedure Code.

The trust for the spread of Hinduism being too vague, and that for the spread of the Sanskrit language being valid, we must next take note of the fact that the trustees of the Hindu Samaj have been given an absolute discretion to spend the whole sum of Rs. 400 on one or the other object, or on both. In such a case where one object is void for uncertainty the whole gift is void, since owing to the use of the disjunctive "or" there is no indication as to what proportion is to be devoted to the charitable purpose of advancing education—vide *In re Macduff*, *Macduff*

(1) (1816) Hayes and Jo., Appx. XXI.
(2) (1908) I.L.R., 30 All., 111 at 114.

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v. *Macduff*(1), *Blair* v. *Duncan*(2), *Houston* v. *Burns*(3) and Theobald's Law of Wills, 7th Edition, page 369. So in the present case the testator, having left the application of the fund entirely to the discretion of the trustees of the Rajahmundry Hindu Samaj, it would be open to that body to apply the whole amount to the vague purpose of spreading the Hindu religion, leaving nothing for the encouragement of Sanskrit learning.

But on the principle of the above English cases the whole bequest thus is bad and unexecutable. The trustees under the will in such a case cannot exercise their discretion and allot the whole to charity. *In re Jarman's Estate, Leavers* v. *Claryton*(4).

I am therefore of opinion on the second and the third issues that no enforceable trust is created in clause 11 or 12 of the will, and I would allow the appeal and dismiss the plaintiffs' suit with costs throughout.

A third point which is the subject of the fifth issue has been raised, namely, whether the adopted son who takes by survivorship can repudiate dispositions of a portion of the ancestral property made by his adoptive father without its being proved that his natural father was aware of the contents of the will at the time of the adoption. Mr. Ganapathi Ayyar quotes *Balkrishna Motiram* v. *Sri Uttar Narayan Dev*(5), in support of his arguments that he can. In the present case the testator was childless when he made his will and was free to make an absolute gift. Following *Ganapati Ayyan* v. *Savithri Ammal*(6), I feel clear that the adopted son cannot, while approbating the provisions of the will under which his adoption was made, reprobate other provisions of the same will. It is unnecessary in view of my finding on

(1) [1896] 2 Ch., 451.
(2) [1902] A.C., 87.
(3) [1918] A.C., 337.
(4) (1878) 8 Ch. D., 584.
(5) (1919) I.L.R., 43 Bom., 542.
(6) (1898) I.L.R., 21 Mad., 10.

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issues 2 and 3 to pursue this point further. It has also become unnecessary to discuss the objections and the cross-objections to the scheme framed by the Court. The decree of the lower Court is set aside and the suit is dismissed with costs. The memorandum of objections is dismissed.

DEVADOSS, J.

DEVADOSS, J.—I have had the advantage of perusing the judgment of my learned brother and I agree with his conclusions on the points argued before us. Inasmuch as this appeal was argued at great length very ably on both sides and as the points involved are of considerable importance, I wish to add in my own words the reasons for agreeing with my learned brother.

The plaintiffs are the members and trustees of the Gōdāvari Hindu Samajam commonly known as the Hindu Samajam located at Rajahmundry; and they have brought this suit for the settlement of a scheme for carrying out the intentions and directions contained in clauses (11) and (12) of the will of Sri Gadicherla Chinna Sitayya Garu who died on the 15th April 1909, possessed of zamindari villages and other properties yielding an annual income of Rs. 4,000. The defendant is the adopted son of the said Sitayya Garu. The Additional Subordinate Judge of Rajahmundry has granted a decree in plaintiffs' favour and the defendant has preferred this appeal.

The main contentions raised on behalf of the appellant are (1) the suit is not maintainable under section 92 of the Civil Procedure Code inasmuch as there is no trustee in charge of the alleged trust estate; (2) the terms of the will are so vague that the bequest must fail on account of uncertainty; and (3) the defendant being the adopted son of the testator is entitled to repudiate the bequest made by the will as he succeeded to the whole of the testator's property by right of survivorship.

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The first contention, that there is no trustee in charge of the trust estate and therefore a suit under section 92 is incompetent, is an untenable one. Section 92 was enacted for the purpose of safeguarding public trusts of a charitable or religious nature. The section says :—

> "In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature or where the direction of the Court is deemed necessary for the administration of any such trust, two or more persons having an interest in the trust can sue"

after fulfilling certain formalities.

It is quite plain that the section is applicable to cases where the direction of a Court is deemed necessary for the administration of any trust, and it is nowhere said that the suit could only be against trustees *de facto* or *de jure*. When the Court is put in possession of facts from which it can infer that there is a public trust of a charitable or religious nature and that for its proper administration the direction of the Court is necessary, the Court has jurisdiction to frame a scheme for the proper administration of the trust. The appellant relies on a number of cases in which it was held that section 92 did not apply to suits against trespassers. A trespasser claims adversely to the trust and in order to evict him or to claim damages from him no scheme is necessary and the intervention of the Court under section 92 is uncalled for. It is the duty in such cases of a trustee or trustees to seek the proper remedy against the trespasser or against the person holding the property adversely to the trust.

In *Gholam Mowlah* v. *Ali Hafiz*(1) the suit was against the purchaser of the trust property. The Court held

(1) (1918) 47 I.C., 111.

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that, the defendant being an alienee of the trust property, section 92 had no application.

In *Arunachella Chetti* v. *Muthu Chettiar*(1) the suit was by a trustee against a trespasser. The suit was decided under the Civil Procedure Code of 1877 in July 1880. It was held that section 539 had no application to the case.

In *Budree Das Mukim* v. *Chooni Lal Johurry*(2), WOODROFFE, J., held that suits brought not to establish a public right but to remedy a particular infringement of an individual right were not within the section and that, as against strangers, such as alienees from the trustee and mere trespassers holding adversely to the trust, that section did not apply.

In *Bapuji Jagannath* v. *Govindlal Kasandas*(3) it was held that section 92 had no application where remedy asked for was not for the infringement of a public right but for a private right. In that case one executor sued another executor for accounts and for an injunction against further management. The Court held that the suit was not bad for want of sanction under section 92, Civil Procedure Code.

In *Subbayya* v. *Krishna*(4) the Full Bench held that a trustee could be removed though section 539 did not expressly give the power to the Court.

In *Ashraf Ali* v. *Mohammad Nurojjoma*(5) the Court held that to a suit against the lessee in which the trustee was a party, section 92 had no application as no scheme was asked for, the suit being for a declaration that the lease was invalid and that possession should be handed over to the plaintiffs.

(1) (1912) 23 M.L.J., 347.
(2) (1906) I.L.R., 33 Calc., 789.
(3) (1916) I.L.R., 40 Bom., 439.
(4) (1891) I.L.R., 14 Mad., 186.
(5) (1918) 23 C.W.N., 115.

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Strong reliance was placed by the appellant on a decision of the Madras High Court reported in *Annavarapu Maucharamma* v. *Venkatadri*(1). There the late Chief Justice and KUMARASWAMI SASTRI, J., held that a suit under section 92, Civil Procedure Code, for enforcing the terms of a will which contained provisions for the administration of public trusts was not maintainable. On a careful reading of the judgment I think the decision does not support the appellant's contention. All that was decided in that case was that it was not competent for persons to invoke the provisions of section 92 for the purpose of administering the estate of a deceased person with a view to compel the executors to give effect to charitable bequests. What was found on the evidence in that case was that there was no fund from which the charity could be maintained. The learned Judges held that, in the absence of a specific finding that a trust had been created, a suit of that nature would not lie. But the facts of this case are different. Here the amount to be spent on the charity is charged on the whole estate. The estate is worth Rs. 4,000 a year and the amount of the charitable bequest is only Rs. 400 a year. Funds for the trust have been provided by pointing out the source of the funds and by making the whole of the property bear the charge for the trust. Where it is quite clear that a trust has been properly constituted by will, it is not necessary that there should first be an administration suit before the trust could be the subject of a suit under section 92. In the mufassal, administration suits are almost unknown, and, if it is considered that an administration suit is an essential preliminary to a suit under section 92, the question would arise as to who should

(1) (1922) 31 M.L.T., 63.

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bring the administration suit. The heirs of the testator may be quite unwilling to bring the administration suit and anybody who would ordinarily be entitled to bring an administration suit might be found unwilling to do so. I do not think that the case supports any wide proposition as is contended for by the appellant. Where it is doubtful whether there would be funds for the purpose of satisfying the bequest for charity, there it might be necessary to have an administration suit in order to fix the amount that might be available for charitable purposes after meeting the legitimate demands of creditors and specific legatees.

The contention that there must be trustees in charge of the funds in order to entitle persons to sue under section 92 is an obvious fallacy. One can conceive of cases where all the trustees die or refuse to act. It is in such cases the interference of the Court would be deemed most necessary and beneficial and it is to prevent charities lapsing for want of proper management that section 92, Civil Procedure Code, was enacted on the lines of Lord Romilly's Act.

In *Neti Rama Jogiah* v. *Venkatacharulu*(1) the suit was brought under section 539 of Civil Procedure Code for a declaration that the defendants were not Dharmakarthas of certain temples and to have trustees appointed for the due administration of those temples. The learned Judges observe at page 452 as follows:—

"The substantial question therefore for determination in the case is whether the defendants are the lawful trustees of the temple as claimed by them. If they are so, there is an end of the suit, but, if they are not, then there is a vacancy in the office of one or both of the trusteeships, and the plaintiffs, as persons interested in the institution, pray for an order of Court directing the appointment of new trustees for the due

(1) (1903) I.L.R., 26 Mad., 450.

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administration of trusts of the temple. In our opinion such a suit is comprised in thewords of the section, namely, 'Whenever the direction of the Court is deemed necessary for the administration of such trust,' and the suit therefore falls under section 539 (*a*) of the Civil Procedure Code. In support of this view we may refer to the opinion of the Judicial Committee of the Privy Council in *Bishen Chand Basawut* v. *Syed Nadir Hossein*(1), in which Sir BARNES PEACOCK in delivering the judgment of the Committee stated, 'If there had been any objection that he (i.e., the plaintiff) was illegally substituted as trustee, an application might have been made by any person interested in the performance of the trusts to have him removed and a new trustee appointed by the Court under the Code of 1877.' As pointed reference is made to the Code of 1877 in which for the first time section 539 was introduced, there having been no section corresponding to it in the Code of 1859, it is quite clear that the provision referred to by the Privy Council in section 589."

In cases where there are no trustees, or where all the trustees choose to claim adversely to the trust, the interference of the Court is necessary for the protection of the trust.

In *Raghubar Dial* v. *Kesho Ramanuj Das*(2), the four defendants between them by an endowment created a trust in respect of the temple of Janaki Ballabhji and of the idol contained therein, which endowment consisted of five biswas of land, the income of which was to be devoted to the expenses of the temple. The plaint alleged that, since November 1894, the donors changed their minds and had stopped the payment for expenses. STRAIGHT, J., observes at page 22:

"Now it is not necessary if I read that section aright, that there should have been any breach of trust; but it is sufficient if there be a public religious trust, and the direction of the Court is considered necessary for the administration of such trust. This view has been adopted by the learned Judges of the Calcutta High Court in *Latifunnisa Bibi* v. *Nazirun Bibi*(3). Therefore this may be fairly regarded as a suit, to put it in its

(1) (1887) 15 I.A., 1. (2) (1889) I.L.R., 11 All., 187 (F.B.).
(3) (1885) I.L.R., 11 Calc., 33.

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narrowest form, in which the plaintiff asks to have the trust administered by the Court. That being so, it seems to me that the sanction of the Collector or such officer as the Local Government might appoint was necessary, for the purpose of empowering the plaintiff to bring such a suit."

That the defendant need not be a trustee, nor need he admit the existence of a trust in order to enable the plaintiffs to sue under section 92 is made clear by the judgment of the Calcutta High Court in *Budh Singh Dudhuria* v. *Niradbaran Roy*(1), MUKERJEE, J., observes at page 437:

"The case is no authority for the proposition that the Court is ousted of the jurisdiction it possesses under section 539, Civil Procedure Code, by the bare denial on the part of the defendant of the existence of the trust alleged by the plaintiffs. If the view urged by the appellants were well-founded, every case of public charity might be excluded from the jurisdiction of the Court by reason of the most groundless allegation on the part of the defendant that there is no public trust. But, it is an elementary principle that when the jurisdiction of a Court to take cognizance of a suit instituted before it, is disputed, the Court must adjudicate upon that question * * * I must hold accordingly that if in a suit instituted under section 539, Civil Procedure Code, the defendant disputes the jurisdiction of the Court to make any decree under that section on the ground that the trust alleged by the plaintiffs does not exist, the Court is not ousted of its jurisdiction but must determine the question upon the evidence."

The same principle was laid down in *Jafar Khan* v. *Daud Shah*(1). BATCHELOR, J., who delivered the judgment of the Court observes at page 53:

"We think that a difficulty is caused by the use of the words 'any alleged breach of any trust' occurring in section 539, for we do not read those words as equivalent to any alleged breach of any admitted trust. The construction which we put upon the section in this respect has, so far as we are aware,

(1) (1905) 2 C.L.J., 431. (2) (1911) 13 Bom. L.R., 49.

been consistently followed in this Court and the case of *Chintaman Bajaji Dev* v. *Dhondo Ganesh Dev*(1) is an illustration of that. Reference being made to page 616 of the report, it will be seen that the defendants there pleaded that the Savasthan was not a public, religious or charitable institution and that they were not the trustees but the owners of the property in that suit."

It is quite apparent from these decisions that the jurisdiction of the Court is not ousted by the defendant pleading that he is not a trustee or that there is no trust for which a scheme could be framed. In this case the defendant claims to repudiate the provisions of the will as the adopted son of the testator. His interests are no doubt adverse to that of the plaintiffs, who want to maintain that there is a trust. But in the case of a suit under section 92, it is not necessary that there should be any active contest as to any breach of trust by a trustee. If the circumstances are such that the intervention of the Court is deemed necessary for the purpose of framing a scheme for any trust which is proved to exist, the Court has jurisdiction to frame a scheme. No doubt the defendant in this suit could not be made to pay amounts due or to surrender the property, if any, belonging to the trust, he being a stranger to the trust. On the framing of a scheme and on the appointment of trustees, he should be proceeded against by the trustees for such reliefs as they may deem fit. In that sense, no doubt, the suit against the defendant is unsustainable, but the suit is perfectly competent for the purpose of enabling the Court to frame a scheme in respect of the charitable bequest contained in the will, provided the bequest fulfils other conditions.

The second point is one of more difficulty. The contention that the bequest is void for uncertainty

(1) (1891) I.L.R., 15 Bom., 612.

should be considered in the light of the provisions of the will relating to the bequest. Paragraph 11 of the will runs thus :—

"A sum of Rs. 400 should be spent every year out of my estate, either for the spread of the Sanskrit language or for the spread of the Hindu religion or for both. The said sum must be a charge on my estate. The executors must make the arrangements necessary therefor to have the same conducted as the then existing trustees of the Rajahmundry Hindu Samajam might deem fit."

The next clause runs thus :

"Further, it is my desire that the Vedas relating to my sakha should be encouraged; and for that purpose, it is my desire chiefly a general Sanskrit or Vedic or Oriental library should be established at Rajahmundry in my name. The executors must make the arrangements necessary therefor."

Clause 12 does not present much difficulty. It is what I may call a precatory trust. There is no definiteness about the trust. The amount to be spent for establishing the Sanskrit or Vedic or Oriental library is not mentioned and the direction to found a general Sanskrit or Vedic or Oriental library is very vague. What sort of Sanskrit books should be in the library or what sort of Vedic books should be collected or what sort of Oriental library it should be, there is no indication in the will. I do not think it is necessary to consider this matter further. I hold that, in the first place, it is precatory and, in the second place, that it is so vague that it cannot be given effect to. Clause 11 contains a bequest of a sum of Rs. 400 to be spent annually for the spread of the Sanskrit language or the spread of Hindu religion or for both, and the executors should make the arrangements necessary therefor and should conduct as the then existing trustees of the Rajahmundry Hindu Samajam might deem fit. Here again the testator's directions are so vague that it will not be possible for

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any Court of law to decide what is necessary for the spread of Sanskrit language or for the spread of Hindu religion, and the executors are asked to make "such arrangements as the trustees of the Rajahmundry Hindu Samajam might deem fit." The trustees of the Samajam may change and the objects of the Samajam are as vague and as comprehensive as they can be. The objects of the Samajam are the diffusion of the principles of Hinduism, the study of Hindu civilization and, in general, the advancement of the Hindu community. Some of the objects of the association could not be considered charitable or religious under section 92. The bequest may be a good one if it is to the samajam; but, where a trust is indicated and the Court is asked to frame a scheme under section 92, the provisions of that section should be complied with before the Court can be induced to act. In the first place, the trust should be for a public purpose, and, in the second place, it should be of a charitable or religious nature. There are many public purposes which are neither charitable nor religious. There are many purposes which are charitable or religious, but not of a public nature. The discretion is given to the executors to make arrangements for the spread of the Sanskrit language. The expression "spread of the Sanskrit language" is not capable of any clear definition. It may be spread in the sense of intensive culture or of culture benefiting a large number of people. The expression "for the spread of Hindu religion" is also vague. It is very difficult for people belonging to various sects to agree as to what the Hindu religion is. Without in any way being disrespectful to the Hindu religion or in any way disparaging the religion, the words "Hindu religion" do not connote anything specific. It may be the Vedantic religion or the religion of a particular sect, and it is not within the

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province of a Civil Court to say what the Hindu religion is and what should be done to spread it. The trustees of the Rajahmundry Hindu Samajam may all cease to promote the particular form of Hindu religion which for a time the same trustees were prepared to promote, and the Court will then be called upon to frame another scheme by which the trustees of this particular estate may be left to manage things without reference to the trustees of the Rajahmundry Hindu Samajam. These are some of the difficulties which will face any Court which is called upon to frame a scheme for the purpose of carrying out the intentions of the testator. It is a well established principle of law that, where the intention of the testator is so vague, the Court cannot give effect to it. The Court can only interpret the will of a testator, but it cannot be called upon to make a will for the testator. It is sometimes thought that a charitable bequest should not be allowed to lapse, and therefore, some sort of scheme should be framed in respect of it. But with all respect to that view, I think the Court is bound to follow certain principles which have guided the Courts of Chancery for a very long time. The idea of making charitable bequests by will is new to this country, and it would not be right to throw aside altogether the principles which have guided the Courts of Chancery in England in interpreting wills containing bequests for charitable and religious purposes.

I shall proceed to examine the English cases that have been cited to us, but before entering upon the mazes of the decisions of the Chancery Courts, it is but right that one should remember that the law of trusts in England is subject to certain peculiar restrictions. In the first place the laws of mortmain prevent bequests of lands being made to associations and corporations, and, in the second place, realty cannot be disposed of in

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perpetuity by will and only personalty can be disposed of for a charitable or religious purpose, and even in the case of personalty there is a difference between impure and pure personalty. It was by 51 and 52 Vic., Chap. 42 the law relating to mortmain and the dispositions of land for charitable purposes was consolidated. By 43 Eliz., Chap., 4, charitable bequests were validated. It has been the attempt of Chancery lawyers to bring bequests within the purview of 43 Elizabeth, and that is the reason why we find, that in the earlier cases the Court of Chancery gave a wide interpretation to the word "charity."

I shall first deal with the cases relied upon for the respondent in support of the validity of the bequest.

The earliest case relied on is *The Attorney-General* v. *Stepney*(1). There a bequest of the residue of personal estate for the use of the Welch Circulating Charity Schools, as long as they should continue, and the increase and improvement of Christian knowledge and promoting religion, and to purchase Bibles and other religious books, pamphlets, and tracts, as the trustees should think fit, to go to the same uses with those already bought, and to be kept in a house, devised for that purpose, was held good. The Lord Chancellor (ELDON), in the course of his judgment, after referring to the case of *Browne* v. *Yeall*(2), observes :—

"Lord THURLOW's opinion was, that the testator, not having given this Court more of specific direction as to the nature of the books to be purchased and circulated, than that they were to be such as may have a tendency to promote the interests of virtue and religion, and the happiness of mankind, had not given direction enough: and therefore Lord THURLOW held the next of kin entitled. If this was that very case, I should certainly feel myself bound to follow that decision. But this, independent of

(1) (1804) 10 Ves., 22; 32 E. R., 751.
(2) (1878) 7 Ves., 50; 32 E.R., 104.

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the peculiarities belonging to it, is very different; and if that will had specified Bibles and Testaments, the Court could not have refused to execute that purpose. If therefore there was nothing more in this will, I should be bound to say, that, whether there is more or less objection to the words "other religious books and tracts," there is a denotation of a religious purpose, to which the fund may be applied, with an option, how it should be applied; and I must execute one term of that option."

The next case is that of *Mitford* v. *Reynolds*(1). In this case the testator's will contained a bequest in the following terms :—

"I will, devise, give, and bequeath the remainder of my property to the Government of Bengal, for the express purpose of that Government applying the amount to charitable, beneficial, and public works at and in the city of Dacca in Bengal, the intent of such bequest and donation being that the amount shall be applied exclusively to the benefit of the native inhabitants in the manner they and the Government may regard to be most conducive to that end."

The Lord Chancellor (LYNDHURST) construed it as valid and observed,

"According to the construction which I put upon the words of this bequest taken together, it is a bequest of money to be applied in the construction or establishment of some works for the general benefit of the native inhabitants of Dacca, for the poor as well as for the rich; and I think that comes within the principle of the cases I have stated and constitutes, under the statute of Elizabeth, a good charitable bequest."

In *Whicker* v. *Hume*(2), a bequest to trustees of funds to be applied by them according to their discretion for the advance and propagation of education and learning all over the world was held to be a good charitable bequest and was not void for uncertainty. The discussion in that case turned mainly upon the meaning of the word "learning." If "learning" had stood alone, the

(1) (1842) 1 Ph., 185; 41 E.R., 602. (2) (1858) 7 H.L., 124.

Court would have held the bequest bad for uncertainty, but inasmuch as the word "education" was in front of the word "learning" the Court upheld the bequest. Lord CHELMSFORD, in delivering the judgment, stated as follows:—

"Now, the question is, in what sense did the testator use this expression? I apprehend that if there are two meanings of a word, one of which will effectuate and the other will defeat a testator's object, the Court is bound to select that meaning of the word which will carry out the intention and objects of the testator; and I think that your lordships are not without aid in giving the particular limited interpretation (if I may use the expression) to the word "learning" which is required for the purpose of establishing the validity of this bequest, because when you find that the testator associates with that word "learning" the word "education" I think, that from the society itself in which you find the word, your lordships may gather the meaning which it is necessary to put upon it, and that he means the word "learning" in the sense of imparting knowledge by instruction or teaching. Well, if this construction be correct, then I apprehend there is no difficulty whatever, because it will range itself pretty much within the meaning of the word "education" although not precisely synonymous with it, and it is admitted in the argument that if the word "education" had stood alone, the bequest would have been valid."

Lord WENSLEYDALE said:—

"Learning, in this case, I consider as equivalent to teaching; learning, as part of education. No portion of the charitable fund could be devoted by the trustees for the purpose of rewarding learned men unconnected with education."

Now applying this case to the case before us, can it be said that the trustees are bound to spend the money in educating people in the Sanskrit language? If they choose to give the whole of the amount to a person well versed in Sanskrit so that he may improve his knowledge of the language or as a reward for his past labours, can it be said that they aid a public charitable purpose?

This makes it quite clear that the bequest can be good only if education is the object.

The next case relied on by the respondent is a case under the Income-tax Act. In *Commissioners for Special Purposes of Income Tax* v. *Pemsel*(1), the House of Lords had to consider whether certain allowances in respect of the income-tax imposed by schedule A are to be granted by the Commissioners for Special Purposes of the Income-tax. The words 'charitable purpose,' they held, as used in the Income-tax Act, were not restricted to the meaning of relief from poverty, but must be construed according to the legal and technical meaning given to these words by English Law. Lord MACNAGHTEN, in the course of his judgment (at page 580), observed.

"That, according to the Law of England, a technical meaning is attached to the word 'charity' and to the word 'charitable' in such expressions as 'charitable uses' 'charitable trusts' or 'charitable purposes' cannot, I think, be denied. The Court of Chancery has always regarded with peculiar favour those trusts of a public nature which, according to the doctrine of the Court, derived from the piety of early times, are considered to be charitable. Charitable uses or trusts form a distinct head of equity. Their distinctive position is made the more conspicuous by the circumstance that owing to their nature they are not obnoxious to the rule against perpetuities, while a gift in perpetuity not being a charity is void."

This case does not throw any light on the question what are charitable bequests and what are not.

In *In re White*; *White* v. *White*(2), the Court of Appeal held that a bequest to a religious institution or for a religious purpose is *prima facie* a bequest for a 'charitable' purpose. "The testator gave his property 'to the following religious societies to be divided in equal shares among them.

(1) [1891] A. C., 531. (2) [1893] 2 Ch., 41.

The testator did not give a list of the religious societies among whom he wished the property to be divided. Lord LINDLEY, in the course of his judgment, observes,

"the gift is for religious purposes; and secondly, that being for religious purposes, it must be treated as a gift for 'charitable' purposes, unless the contrary can be shown. If once this conclusion is arrived at, the rest is plain. A charitable bequest never fails for uncertainty: *Mills* v. *Farmer*(1), settles that point. Lord ELDON was clearly of opinion that the nomination of particular objects is only the mode and not the substance of a gift to 'charity'."

In England charity must be of a public nature, but in India it is not so. There can be bequests for charity for private purposes and there can be a bequest for a religious purpose of a private nature. There can be a good bequest in favour of an idol or for the performance of shradh. As I have stated above, section 92 is only concerned with trusts for public purposes of a charitable or religious nature and so the reasoning of the learned Lord Justice cannot apply in its entirety to bequests in Hindu Wills.

In *Baker* and *Sutton*(2), a bequest of the residue of personal estate for such religious and charitable institutions and purposes within the Kingdom of England as in the opinion of the testator's trustees should be deemed fit and proper was held to be a good charitable bequest. In the case before us the question is not whether the bequest is a good bequest, but whether the Court should be called upon to administer the funds given for a particular purpose. If the bequest was to the Hindu Samajam at Rajamundry, it would be a good bequest. But the real difficulty is in finding out the intention of the testator and in controlling the discretion of the trustees who are

(1) (1815) 1 Mer., 55, 35 E.R., 597. (2) (1836) 1 Keen, 224; 48 E.R., 292.

to administer the trust. The case of *Mills* v. *Farmer*(1), is relied upon as showing that a charitable bequest never fails. Lord ELDON, in the course of his judgment, laid down the law thus:

"I am fully satisfied as to all the principles which have been laid down in the course of this argument, and accede to them all. There is no question, that the Court has not the power to make a will for the testator, but only to carry into execution that which he has made himself: and this it can do only by giving to it such a construction as former precedents have established to be the right construction in every particular instance. Neither is there any doubt that the same words in a will, when applied to the case of individuals, may require a very different rule of construction from that which would govern them if applied to the case of charity. If I give my property to such person as I shall hereafter name to be my executor, and afterwards appoint no executor; or, if having appointed an executor, he dies in my lifetime and I appoint no other to supply his place, in either of these cases, as to individuals, the testator must be held intestate, and his next of kin will take the estate. But to give effect to a bequest in favour of charity, the Court will, in both instances, supply the place of an executor and carry into effect that which, in the case of individuals, must have failed altogether. This distinction has proceeded partly, perhaps, on principles in the Roman Law which we do not at this time perfectly comprehend; and partly, no doubt, on the religious notions which formerly obtained in this country, according to which it fell to the Ordinary's province to distribute, in case of intestacy. A third principle, which it is now too late to call in question, is, that in all cases in which the testator has expressed an intention to give to charitable purposes, if that intention is declared absolutely and nothing is left uncertain but the mode in which it is to be carried into effect, the intention will be carried into execution by this Court, which will then supply the mode which alone was left deficient."

(1) (1815) 1 Mer., 55; L.R., 35 E.R., 597.

In *Cocks* v. *Manners*(1), it was held by Sir JOHN WICKENS, V.C., that the bequest to the Dominican convent at C was neither within the letter nor the spirit of 43 Eliz. C. 4. At page 585, he observes,

"A voluntary association of women for the purpose of working out their own salvation by religious exercises and self-denial seems to me to have none of the requisites of a charitable institution, whether the word 'charitable' is used in its popular sense or in its legal sense. It is said, in some of the cases, that religious purposes are charitable but that can only be true as to religious services tending directly or indirectly towards the instruction or the edification of the public: an annuity to an individual, so long as he spent his time in retirement and constant devotion, would not be charitable, nor would a gift to ten persons, so long as they lived together in retirement and performed acts of devotion, be charitable. Therefore the gift to the Dominican convent is not, in my opinion, a gift on a charitable trust."

In this case it has been very vehemently urged that inasmuch as the trustees have the choice of spreading the Hindu religion, therefore the bequest is for a religious purpose and could not fail for uncertainty. *Cocks* v. *Manners*(1), is an answer to that. As I said above the trustees may take into their heads to promote the Hindu religion or to contribute to the spread of the Hindu religion by giving the whole of the amount to one person or to a particular Mutt. A religious purpose, which in England should necessarily be a public purpose in order to validate a bequest, need not be so in India.

In *Townsend* v. *Carus*(2), WIGRAM, V.C., held that a gift to be applied to promote the spiritual welfare of God's creatures was for religious, and therefore, charitable purposes.

It is contended that a general bequest for the spread of Sanskrit language is good on the authority of *Attorney-*

(1) (1871) 12 Eq., 574. (2) (1844) 3 Hare, 257 ; 67 E.R., 378.

General v. *Flood*(1). In that case a bequest was given to the Trinity College, Dublin, for the study of Irish language. There can be no objection at all to a bequest to the University or to a College, or even to the Rajahmundry Hindu Samajam, being held good if it is for the study of Sanskrit or any other language. Where the bequest is not to a society but to trustees who are asked to do certain things, and where the Court is not in a position to control the discretion of the trustees, there the Court has to see whether the intention of the testator is specific enough to control the discretion of the trustees. In *In re Scowcroft, Ormrod* v. *Wilkinson*(2) a bequest to the vicar of a parish for the time being of a building used as a village club and reading room "to be maintained for the furtherance of conservative principles and religious and mental improvement and to be kept free from intoxicants and dancing" was held good. In this case the intention is clear and the object is of a charitable and of a public nature.

In re Louise Kenny, Clode v. *Andrews*(3) the testatrix directed her trustees to pay trust monies to M to be applied by him "for such missionary object or objects at home, abroad, or in the colonies as he shall in his absolute discretion select." M was known by the testatrix to have been engaged in assisting the Christian Mission in foreign countries and abroad. WARRINGTON, J., held the bequest to be good. He said :

"It is suggested that the words of the gift are too vague, as the words 'Missionary objects' are not necessarily confined to Christian Missions. But there is a widely spread use of the word 'Missionary' as one engaged in the work of religious and particularly Christian Missions. I think that I am entitled to

(1) (1816) Hayes and Jo., Appx. XXI.
(2) [1898] 2 Ch., 638. (3) (1907) 97 L.T., 130.

consider who Dr. Maclean was, and that he was engaged for many years in the work of Christian Missions, and that he and his work were known to the testatrix. I think that the testatrix used the word 'Missionary' in its ordinary and popular sense, and I hold that the gift was a valid charitable gift."

In the course of the arguments, the Irish case of *Scott* v. *Brownrigg*(1) was quoted to show that the word missionary was not capable of any definite meaning. WARRINGTON, J., as the report shows, declined to follow it.

In *Morice* v. *The Bishop of Durham*(2), a bequest in trust for such objects of benevolence and liberality as the trustee in his own discretion shall most approve, was not held to be a charitable legacy. The Lord Chancellor (ELDON) in meeting the contention that it was a charitable bequest and that the trustee might devote every shilling to charitable use, observed as follows :

"But the true question is whether, if upon the one hand he might have devoted the whole to purposes, in this sense charitable, he might not equally according to the intention have devoted the whole to purposes benevolent and liberal, and yet not within the meaning of charitable purposes, as this Court construes those words; and if, according to the intention it was competent to him to do so, I do not apprehend, that under any authority upon such words the Court could have charged him with maladministration, if he had applied the whole to purposes, which according to the meaning of the testator are benevolent and liberal, though not acts of that species of benevolence and liberality, which this Court in the construction of a Will calls charitable acts..... But the question is, whether, according to the ordinary sense, not the sense of the passages and authors alluded to, treating upon the great and extensive sense of the word 'charity' in the Christian religion, this testatrix meant by these words to confine the defendant to such acts of charity

(1) (1881) 9 Ir., 246.
(2) (1805) 10 Ves., 522; 32 E.R., 947.

or charitable purposes as this Court would have enforced by decree, and reference to a Master. I do not think, that was the intention; and, if not, the intention is too indefinite to create a trust. But it was the intention to create a trust; and the object being too indefinite, has failed."

In the present case if the trustees choose to apply the whole of the amount to a religious purpose which is not of a public character, could the Court say that it is not within the discretion of the trustees to do so? If the trustees be held to have a discretion under the will to do so, then the Court would be powerless to control that discretion, and applying the principle of the case of *Morice* v. *The Bishop of Durham*(1), I must hold that the discretion is too wide to be controlled by a Court and, therefore, the bequest is bad.

In re Macduff, *Macduff* v. *Macduff*(2), a bequest of money for some one or more charitable purposes philanthropic or . . . was held not bad simply by reason of the existence of the blank, but must be treated as one for charitable or philanthropic purposes. Such a bequest is not a good charitable bequest as there are philanthropic purposes which are not charitable. Lord LINDLEY, after referring to Lord ELDON's dictum in *Morice* v. *The Bishop of Durham*(1), observes at page 463 :

"Therefore when we are dealing with general words, we must consider whether there is such an indication of purpose or of trust that the Court if called upon to execute it can see what it has to do—can see the limits of its own powers. The words here are 'purposes charitable or philanthropic'." 'Charitable,' I suppose is there used in the popular sense. * * * Then what is the meaning of the word 'philanthropic?' * * * The Attorney-General says, "'What philanthropic purpose is not charitable'? My answer is, you are dealing with two words of so vague a meaning that it is extremely difficult to say, but we

(1) (1805) 10 Ves., 522; 32 E.R., 947. (2) [1896] 2 Ch., 451.

can suggest purposes which might be philanthropic and not charitable—purposes indicating good will to rich men to the exclusion of poor men. Such purposes would be philanthropic in the ordinary acceptation of the word—that is to say, in the wide, loose sense of indicating good will towards mankind or a great portion of them; but I do not think they would be charitable. I am quite aware that a trust may be charitable though not confined to the poor, but I doubt very much whether a trust would be declared to be charitable which excluded the poor."

He refers to the judgment of Lord MACNAGHTEN in *Commissioners for Special Purposes of Income-Tax* v. *Pemsel*(1) and observes :

"Now Sir Samuel Romilly did not mean, and I am certain Lord Macnaghten did not mean, to say that every object of public general utility must necessarily be a charity. Some may be, and some may not be. In *Kendall* v. *Granger*(2), where the language was 'for encouraging undertakings of general utility, Lord Langdale came to the conclusion that that was not a charity and I am not aware that his decision has ever been overruled or questioned. Now, what Lord Macnaghten said is obviously a paraphrase of the words of Sir Samuel Romilly which I have just read: 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion and trusts for other purposes beneficial to the community not falling under any of the preceding heads, leaving out those somewhat significant words of Sir Samuel Romilly as to the fourth head, 'which is the most difficult' which showed perfectly plainly that Sir Samuel Romilly saw, and I do not doubt that Lord MACNAGHTEN saw also, that there might be some purposes of public general utility which might be charitable and some which might not. In deciding the case we must fall back upon the Statute of Elizabeth, not upon the strict or narrow words of it, but upon what has been called the spirit of it, or the intention of it. As Lord ELDON says, this Court has taken

(1) [1891] A.C., 531, 583.

(2) (1842) 5 Beav., 300; 49 E.R., 593.

great liberties with charities, but the liberty is always restricted by falling back or professing to fall back upon the Statute of Elizabeth."

I may observe that the high water mark of liberal interpretation as regards the intention of a testator was reached when the House of Lords held that a bequest that a hospital be established at Dundee to accommodate 100 boys was a good bequest. In *In re The Magistrate of Dundee* v. *Morris*(1), the LORD CHANCELLOR observed at page 156,

"It is said on the part of the respondents that the mere *wish* to establish an hospital for a number of boys is so indefinite and uncertain that it is impossible to carry it out without the danger of defeating instead of effectuating the testator's intention. That it is at the best but the indication of a mere floating desire, not of any former and settled determination. But the expression of a wish by a testator that his property should be applied to a particular object amounts to a bequest for that object: and the language of this Will appears to convey with sufficient certainty what the testator desired should be carried into effect. The words 'establish an hospital' must, I think, be taken to express an intention that a building should be provided which seems to have been assumed as the meaning of the word 'establish' in the case of the *Attorney-General* v. *Williams*(2)."

He held,

"that the testator having intimated his wish to devote his property to the establishing an hospital, every subsequent writing of the testator upon the same half sheet of paper, is to a certain extent a confirmation of the previous charitable bequest. It amounts to a declaration that the fund which he had appropriated to that purpose is to be subject to a reduction to the amount of the legacies, and the first of them, after those which relate to the hospital had an express reference to this appropriation of his property by its commencing with the words, 'I further wish.'"

(1) (1857) 3 Macq., 134 (H.L.).

(2) (1794) 2 Cox, Eq. Cas., 387.

The later decisions of the Court of Chancery in England are for a narrower construction not only of the word "Charity" but also of the terms of the will regarding the intention of the testator. In *Dunne* v. *Byrne*(1), the Privy Council held that a residuary bequest to

"the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese"

is not a good charitable bequest and is void. The words of the will are

"I will and bequeath . . . that the residue of my estate should be handed to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese."

Lord MACNAGHTEN, who delivered the judgment of their Lordships of the Privy Council, observes at page 411,

"the language of the bequest (to use Lord Langdale's words) would be 'open to such latitude of construction as to raise no trust which a Court of Equity could carry into execution.' *Baker* v. *Sutton*(2). If the property, as Sir William Grant said in *James* v. *Allen*(3), might consistently with the Will be applied to other than strictly charitable purposes, the trust is too indefinite for the Court to execute."

In this case the bequest was to the Archbishop of Brisbane and his successors to be used in a way most conducive to the good of the religion. It may be taken for granted that the Archbishop of Brisbane would not use the income of the property bequeathed to any other purpose than for the good of religion in his diocese. But inasmuch as a discretion was given him to use

(1) [1912] A.C., 407. (2) (1836) 1 Keen, 224, 233; 48 E.R., 292.
(3) (1817) 3 Mer., 17.

the amount wholly or in part for such a purpose, the bequest was held void, because the discretion of the Archbishop could not be controlled by the Court.

Can it be said in this case that if the trustees choose in conjunction with the trustees of the Hindu Samajam at Rajahmundry to use the funds for a religious purpose which is not of a public character or a purpose which is not strictly religious as the Courts understand, the Court could pull them up or charge them with mal-administration? When such a thing cannot be done and when the trustees could always plead a discretion under the will to waive the control of the Court, the bequest cannot be held to be a valid bequest.

In *Blair* v. *Duncan*(1), where a testatrix by codicil in her own handwriting directed her trustee, in the events which happened, that one-half of the residue of her estate should be applied for "such charitable or public purposes as my trustee thinks proper," the House of Lords held that the direction was void for uncertainty. Lord HALSBURY in the course of his judgment observes:

"It appears to me that it would be equally the law of England as it would be the law of Scotland that the disposition here given to A.B. to determine what particular public purposes should be the object of the trust is too vague and uncertain for any Court either in England or Scotland to administer."

Lord ROBERTSON says at page 49:

"The Courts have, I think, as matter of historical fact, reflected more or less consciously or unconsciously, the bias which disposes everyone favourably towards charity; and this never appeared more plainly or was avowed more frankly, than in the decision of your Lordship's House in the Morgan Case, *Magistrates of Dundee* v. *Morris*(2). To this favour for charities I ascribe the decision in favour of the validity of a bequest for

(1) [1902] A.C., 37. (2) (1857) 3 Macq., 134 (H.L.).

such charitable purposes as a trustee may select. Accordingly, when I am asked to apply, by analogy, to public purposes decisions about charitable purposes, I decline to do so. The proper inference from those cases is, not that the law that the testator must select a particular class or particular classes of objects before he can leave it to a trustee to select the object of the bequest, is relaxed, but merely that it is settled that charitable purposes form such a particular class."

As I have said above the House of Lords adopted a very liberal interpretation, as Lord ROBERTSON says, in the case of the *Magistrates of Dundee* v. *Morris*(1). The most important case in my opinion which bears upon this question is the case of *Grimond* v. *Grimond*(2). There a testator directed his trustees to divide a portion of the residue of his estate to and among such "charitable or religious institutions and societies" as they might select. The House of Lords held that the bequest was void for uncertainty. The dissenting judgment of Lord MONCREIFF applies with great force to the conditions prevailing in India. Speaking of religious purposes he says (page 608):

"It is said that the term 'religious purposes' is more restricted and definite 'than public purposes' This may be true, but it does not follow that the term 'religious purposes' is sufficiently specific to be enforced. Indeed there may be as much doubt and dispute as to its interpretation and limits as in regard to 'public purposes.'"

This view was upheld by the House of Lords. If there is so much difficulty in understanding the words "religious purposes" in a place like Scotland, where there are not many religions, in India, the difficulty will be all the greater, where it is not possible to postulate definitely what the Hindu religion is. No two persons will give the same answer to the question "What is Hindu Religion?"

(1) (1857) 3 Macq., 134 (H.L.). (2) [1905] A.C., 124.

The popular expression "Hindu religion" includes in its ambit the highest aspirations of the human soul and the noblest ethics as well as the lowest and debased forms of animal and demon worship.

Lord HALSBURY says (at page 126):

"In my opinion the testator here has not given a class from which he allowed his trustees to select individually but he has left his directions so vague that it is in effect giving some one else power to make a will for him instead of making a will for himself, which I conceive to be the objection always entertained where the directions are so extremely vague that you cannot say what it is that the testator meant. In this case the testator has not made any will himself; he has allowed some one else to make a will for him after his death, and that the law will not allow."

Lord JAMES said,

"I concur for the reasons which have been given by Lord MONCREIFF in his judgment."

What the respondent wants us to do here is to make a will for the testator. He says if the objects are not plain the Court should frame a scheme and make the objects plain. That is not the function of the Court and as Lord HALSBURY has laid down no Court can make a will for any testator.

In *Kendall* v. *Granger*(1), a bequest of personalty to trustees to be applied for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility was held void as a charitable bequest. Lord LONGDALE laid down the law thus:

"Now a charitable purpose may very well, I conceive, be a purpose of general utility; but the question which seems to me to arise in this case, as in the case of a gift to benevolent purposes, is, are all purposes of general utility necessarily such purposes as this Court deems to be charitable? I own that in

(1) (1842) 5 Beav., 300; L.R., 49 E.R., 593.

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my opinion according to the decisions which have taken place in this Court, they are not. The words 'general utility' are so large, that they comprehend purposes which are not charitable, and comprising purposes which are not charitable, the trustees have an option to apply them to purposes which are not charitable, and consequently to divert the trust fund from those purposes which this Court is in the habit of considering charitable."

I will now consider briefly the Indian cases on the point. In *Chandi Charan Mitra* v. *Haribola Das*(1), it was held that under the Hindu system of law a general endowment for the expenses of worship of God without giving the name of the deity for whose benefit the endowment is to take effect was void for uncertainty. This case follows the case in *Phundan Lal* v. *Arya Prithi Nidhi Sabha*(2), where it was held that a dedication not to any particular deity which was subsequently to be installed in a temple but to Thakurji in a Thakurdwara without mentioning the particular Thakurji to whom the property was dedicated was void for uncertainty RICHARDS and BANNERJEE, JJ., held that

"it was not a dedication to any particular deity which was subsequently to be installed in a temple. It was a dedication to the Thakurji in his Thakurdwara without mentioning the Thakurji to whom the property was dedicated. As we have already said there was no Thakurji and no Thakurdwara, therefore the dedication was bad on the ground of uncertainty."

In *Parbati Bibee* v. *Ram Barun Upadhya*(3), the residuary clause of the will of a Hindu governed by the Mitakshara school of Hindu Law was as follows:

"As to the rest and residue of my estate I give and devise the same to my executor in trust to spend and give away the whole thereof in charity in such manner and to such religious and charitable purposes as he may in his discretion think proper."

(1) (1919) I.L.R., 46 Calc., 951.

(2) (1911) I.L.R., 33 All., 793. (3) (1904) I.L.R., 31 Calc., 895.

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The bequest of the residuary estate was held to be a valid and charitable bequest. HENDERSON, J., observes at page 899,

"In my opinion, however, the direction to spend and give away the whole of the residue in charity governs the words that immediately follow and, therefore, the purposes for which the fund is to be spent must be charitable though they may at the same time be religious. Upon this construction the executor will not be justified in applying the subject of the trust to objects which are not charitable. In that view, I declare the bequest of the residuary estate of the testator to be a valid charitable bequest."

If the objects of the charity are not definite but if the purpose is definite the Court will uphold the bequest. In *Gordhan Das* v. *Chunni Lal*(1), it was held that a settlement of the income of seven villages to the extent of Rs. 500 a month to be applied to charitable purposes at a dharmasala which he had founded was held to be a good bequest. The learned Judges observe at page 114:

"The dedication in the case before us is for charitable purposes and for charitable purposes alone. A trust for such purposes, that is, for charity generally, will always be carried out notwithstanding that the objects of the charity are not specifically defined. The Court can, if necessary, in such a case, settle a scheme for its proper administration."

In the present case also, if the whole amount is to be spent for only a charitable purpose, it will be competent for the Court to indicate the objects of the charity.

In the light of these decisions I must hold that the bequest contained in clause 11 of the will is void for uncertainty.

The next point urged is that the defendant is not bound to give effect to the terms of the will as he, by right of survivorship, is entitled to the whole of the

(1) (1908) I.L.R., 30 All., 111.

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property. It is urged that unless at the time of the adoption it was made a condition that the bequest should not be disturbed by the adopted son and unless the natural father had agreed to such a condition, the adopted son could repudiate the terms of the will making a bequest in favour of charity. Before I consider the law on the point, it is necessary to notice a few facts. The testator died in 1909. The adoption was not made till 1911. The widow was in possession of the property and carried out the terms of the will. The testator was a well-known man in the place. The widow made the adoption by virtue of the power given in clause 6 of the will. The will is a registered will. It cannot be contended that the natural father was unaware of the terms of the will and did not tacitly acquiesce in the terms of the will. The appellant urges that the plaintiffs should have specifically pleaded that there was such a consent on the part of the natural father. I do not think that in the circumstances it was incumbent on the plaintiffs to plead that. The Court is entitled to draw an inference of tacit consent from the evidence in the case. It is unnecessary to discuss this point at length on account of my decision on point 2.

The appellant relies upon *Balkrishna Motiram* v. *Sri Uttar Narayan Der*(1), *Bhyri Appamma* v. *Bhyri Chinnammi*(2), and *Lakshmi* v. *Subramanya*(3). In *Balkrishna Motiram* v. *Sri Uttar Narayan Der*(1), a Hindu who was in possession of ancestral property executed when he took the defendant in adoption a Vyavastapatra with the consent of the natural father of the defendant whereby he directed payment of an annual sum for the purpose of lighting lamps in a specified

(1) (1919) I.L.R., 43 Bom., 542. (2) (1920) 12 L.W., 17.
(3) (1889) I.L.R., 12 Mad., 490.

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temple. The Court held that the grant in favour of the temple was invalid as not having been recognized by custom to be appropriate at the time of adoption or binding upon the adopted son in modification of the strict rules of Hindu Law. The learned Judges observe at page 549:

"It would appear to have been established by these decisions that agreements for reasonable provision for widows ought to be upheld as valid according to general custom modifying the strict terms of Hindu Law. But no authorities have been quoted before us in favour of any other persons in such connexion or in support of a general extension of the modification so as to include as here claimed, reservations in favour of charities and religious endowments. The burden of establishing any such extension would lie upon the person seeking to prove such modifications of the strict rules of the Hindu Law. That burden has here not been discharged."

A Hindu can settle a portion of his ancestral property upon anybody he likes and then take a boy in adoption. The adopted boy could not under such circumstances impeach an alienation made before the date of his adoption. The Court would view with suspicion only such arrangements as are unreasonable and subversive of the interests of the adopted son.

The 12 Law Weekly case decided that in the absence of any agreement with the natural father at the time of adoption, if there is a bequest in favour of the widow in the will of the testator the adopted son could repudiate the bequest. A widow can at the time when she makes the adoption with the consent of sapindas stipulate for the maintenance of herself in cases of disputes arising between her and her adopted son and such an arrangement is reasonable. The Courts would uphold such an arrangement, but where a widow makes an adoption by virtue of the power given under the will of her husband then, unless the natural father was aware of the

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provisions of the will, it might be contended that if the father was aware of the provisions he would not have given his boy in adoption and therefore the adopted son is not bound. In *Ganapati Ayyan* v. *Savithri Ammal*(1), SUBRAHMANYA AYYAR, J., observes as follows :

"If, from the hypothetical case, we turn to the actual facts of the case before us, there is no doubt that the title of the adopted son could not affect the right of the charity for the latter right had vested long before the adopted son's right arose. The second defendant's rights must therefore be held to be subject to that created in favour of the charity by the oral devise, and it is hardly necessary to point out that Exhibit A does not evidence an alienation by the widows, but is a mere formal declaration executed by the persons appointed by the testator to bring into existence such written evidence of his disposition and who held possession of the property devised till they transferred the same to the duly constituted manager of the charity only as the trustees for the charity. Compare *Basker Purushotam Saraswatibai*, I.L.R., 17 Bom., 485."

In the present case the widow acted in conformity with the will and it cannot on the evidence before us be said that the natural father was unaware of the terms of the will. The adopted son cannot approbate and reprobate the will at the same time. He owes his existence to the will and in the circumstances of the case the onus lies heavily upon him to show that his father was unaware of the provisions in the will and he has not discharged the burden. I find this point against the appellant. The question of arrears need not be considered as I hold that the defendant cannot be directed in this suit even if it were held that the suit is maintainable, to pay up any amount due to the trust.

The appeal therefore should be allowed.

K.R.

(1) (1898) I.L.R., 21 Mad., 10.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Venkata-subba Rao.

SARASWATAMMA (SECOND DEFENDANT), APPELLANT,

1922 October 11.

v.

PADDAYYA AND THREE OTHERS (PLAINTIFF, FIRST, THIRD AND FOURTH DEFENDANTS), RESPONDENTS.*

Indian Registration Act (XVI of 1908), ss. 17 *and* 49—*Unregistered deed of partition—Admissibility in evidence to prove division in status.*

A deed of partition between some members of a joint Hindu family which divides by metes and bounds the family lands worth more than Rs. 100 but which is inadmissible in evidence to prove a partition on account of want of registration is still admissible as evidence to prove an intention amongst all the members to become divided in status.

Per Cur.—A deed which effects between the members of such a family merely a division in status is admissible in evidence to prove such division, though unregistered, as it does not directly affect immoveable property but only creates a change of status from which rights may indirectly arise in such property as a legal incident. *Girja Bai* v. *Sadshiv Dhundiraj*, (1916) I.L.R., 43 Calc., 1031 (P.C.), and *Varada Pillai* v. *Jeevarathnammal*, (1920) I.L.R., 43 Mad., 244 (P.C.), applied. *Pothi Naicken* v. *Naganna Naicker*, (1916) 30 M.L.J., 82, and *Ayyakutti Mankondan* v. *Periasawmi Koundan*, (1916) 30 M.L.J., 404, not followed.

APPEAL against the order of C. V. VISWANATHA SASTRIYAR, District Judge of Kistna, in Appeal Suit No. 7 of 1920, filed against the decree of K. SAMBASIVA RAO NAYUDU, Subordinate Judge of Bezwada, in Original Suit No. 3 of 1918.

The facts are given in the judgment of VENKATASUBBA RAO, J.

C. V. Anantakrishna Ayyar for *A. Krishnaswami Ayyar* (with *V. Suryanarayana*) for appellant.—There

* Civil Miscellaneous Appeal No. 422 of 1921.

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was a division in status between all the members of the family. Exhibit V is admissible as a piece of evidence to prove a division in status. Exhibit V by itself may be useless to prove an actual division amongst all the members of the family but it is certainly an expression of the intention of some of them to separate themselves in interest. If such intention is communicated to others it effects a division in status. A document which merely effects a division in status does not directly affect immoveable property and does not therefore require registration, *Ramalinga Annavi* v. *Narayana Annavi*(1), *Girja Bai* v. *Sadashiv Dhundiraj*(2), *Suraj Narain* v. *Iqbal Narain*(3), *Kawal Nain* v. *Budh Singh*(4), *Amritrao* v. *Mukundrao*(5) and *Natesa Iyer* v. *Subramania Iyer*(6). Merely because the indirect legal consequence of the document according to Hindu Law will be to affect immoveable property the document does not become compulsorily registrable; *Subrahmania Aiyar* v. *Savitri Ammal*(7), and SPENCER, J.'s view in *Ayyakutti Mankondan* v. *Periasawmi Koundan*(8). The views in *Pothi Naicken* v. *Naganna Naicker*(9) and *Ayyakutti Mankondan* v. *Periasawmi Koundan*(8) are no longer good law. Exhibit V is admissible to prove the subsequent character of the possession, *Varada Pillai* v. *Jeevarathnammal*(10).

P. Narayanamurti for respondent.—Exhibit V is inadmissible in evidence. I rely on *Ayyakutti Mankondan* v. *Periasawmi Koundan*(8) and *Pothi Naicken* v. *Naganna Naicker*(9), which are Full Bench judgments not yet dissented from in any later case. They clearly show that

(1) (1922) I.L.R., 45 Mad., 489 (P.C.).
(2) (1916) I.L.R., 43 Calc., 1031 (P.C)
(3) (1913) I.L.R., 35 All., 80 (P.C.).
(4) (1917) I.L.R., 39 All., 496 (P.C.)
(5) (1921) 13 L.W., 112 (P.C.).
(6) (1918) 23 M.L.T., 307.
(7) (1909) 19 M.L.J., 228.
(8) (1916) 30 M.L.J., 404.
(9) (1916) 30 M.L.J., 62.
(10) (1920) I.L.R., 43 Mad., 244 (P.C.).

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even a document which creates a division in status requires registration if it affects immoveable property. Section 17 of the Registration Act requires registration of documents which not merely *create* rights in land but also of those which *affect* rights in land. The direct and express result of such a document is to put an end to joint tenancy and to create newly a tenancy in common in the lands. One other result is to destroy the right of survivorship.

JUDGMENT.

VENKATA-SUBBA RAO, J.

VENKATASUBBA RAO, J.—The Temporary Subordinate Judge held that Exhibit V was admissible in evidence and the District Judge disagreed with him and refused to admit it, on the ground that it was unregistered. The material question to be decided in this appeal is, whether there was a division between the plaintiff, the first defendant and the second defendant's husband and whether the document above referred to can be admitted in evidence. The facts necessary for the decision of this question may be very briefly stated.

The first defendant and the deceased husband of the second defendant were brothers, being the sons of the plaintiff. The suit is for partition. The second defendant contends that a partition was effected during the lifetime of her husband and that Exhibit V embodies the terms thereof, that under it, of the 12 acres of land which the family possessed, each son obtained about 5 acres and odd, and the plaintiff, the father, was allotted for his maintenance one acre and 50 cents. It may be stated that the plaintiff ignoring this arrangement claims in the suit a moiety of the property; but there is an alternative prayer in the plaint to the effect that he may be allotted one-third of the property in the event of the Court

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holding that there was a partition in the lifetime of the second defendant's husband. The Subordinate Judge, holding that there was a completed partition, dismissed the plaintiff's suit, and the District Judge, having decided that the partition was effected only between the two brothers and that the plaintiff was not a party to it and was not bound thereby and therefore that the plaintiff was entitled to a half share, reversed the decree of the Subordinate Judge and remanded the suit for disposal on the other issues framed in the case.

It must be stated at the outset that Exhibit V, the deed of partition relied on by the second defendant, was executed only by the first defendant and the deceased husband of the second defendant and that it was not registered.

The question whether the plaintiff was a consenting party to the division is a question of fact, and Mr. Anantakrishna Ayyar on behalf of the second defendant (appellant) argued that, though this finding of fact is binding upon him, it is open to him to contend that there was a division in status between the members of the family and that the District Judge acted erroneously in refusing to admit Exhibit V for the purpose of showing that there was such severance.

The Subordinate Judge observes as follows in regard to Exhibit V:

> "The plaintiff and the first defendant objected to its admissibility on the ground that it required registration. I overruled the objections, because the second defendant was tendering the document to prove the status of the family but not the title of any particular sharer to any particular item."

The District Judge, while holding that there was no actual division, fails to consider the question whether there was a division of status. In this, I think, he was clearly wrong. It has been held that, to effect a

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severance of rights, an actual division by metes and bounds is not necessary. A deed which is ineffectual to effect a *de facto* actual division of the subject matter may operate to effect a separation in interest and in right. In *Appovier* v. *Rama Subba Aiyan*(1), their Lordships of the Privy Council had to consider the effect of a deed of partition executed by all the members of an undivided Hindu family which spoke of a division having been agreed upon to be thereafter made, and the contention that the deed was ineffectual to convert the undivided property into divided property until it had been followed up by an actual partition by metes and bounds, was rejected by their Lordships. Mr. Anantakrishna Ayyar on behalf of the second appellant, argued that Exhibit V effected in any event a division of right and that the document was admissible in evidence to prove such a division. The question then arises, is a document which operates to convert a change in the status of the family and effects a division of right, when it is unregistered, admissible in evidence? Mr. Narayanamurti on behalf of the respondent strongly relied on *Ayyakutti Mankondan* v. *Periasawmi Koundan*(2), and *Pothi Naicken* v. *Naganna Naicker*(3). Both were Letters Patent Appeals and three learned Judges decided each of them, and the judgments are entitled to great weight. It was held in both the cases that a document merely effecting a division of status required registration, and if it was not registered, it was inadmissible in evidence. But the authority of these rulings is considerably weakened by the fact that in *Natesa Iyer* v. *Subramania Iyer*(4), AYLING and SESHAGIRI AYYAR, JJ. (it will be noticed that

(1) (1866) 11 M.I.A., 75.
(2) (1916) 30 M.L.J., 404.
(3) (1918) 30 M.L.J., 62.
(4) (1918) 23 M.L.T., 307.

the latter took part in both the Letters Patent Appeals) observed at page 309 as follows :—

"In this view it is unnecessary to consider how far the decisions of this Court in *Pothi Naicken* v. *Naganna Naicker*(1), and *Ayyakutti Mankondan* v. *Periasawmi Koundan*(2), are reconcilable with the pronouncement of the Judicial Committee in *Girja Bai* v. *Sadashiv Dhundiraj*(3)."

In Subrahmania Aiyar v. *Savitri Ammal*(4), SANKARAN NAYAR, J.,held that a document effecting merely a division in status did not require registration and in *Ayyakutti Mankondan* v. *Periasawmi Koundan*(2), SPENCER, J., adopted the same view and referred with approval to *Subrahmania Aiyar* v. *Savitri Ammal*(4). SADASIVA AYYAR, J., took a different view and the difference of opinion between the two learned Judges led to the Letters Patent Appeal. In *Pothi Naicken* v. *Naganna Naicker*(1), SANKARAN NAYAR and OLDFIELD, JJ., differed, the former adhering to the view already expressed by him, and this difference of opinion led to the other Letters Patent Appeal. Speaking for myself, with great respect, I am inclined to agree with SANKARAN NAYAR, J., and SPENCER, J., for, in the words of SANKARAN NAYAR, J., the alteration in the nature of the estate is an incident attached by Hindu Law to the divided status of the members of a Hindu family. A document merely creating a separation in status does not itself create any interest in immoveable property. Such an interest is created not by virtue of the instrument but by the operation of the rules of the Hindu Law. Were it necessary to decide this question, we might refer it to the decision of a Full Bench, but it seems to me that for the determination of this case, the question as presented to us in the argument does not arise.

(1) (1916) 30 M.L.J., 62.
(2) (1916) 30 M.L.J., 404.
(3) (1916) I.L.R., 43 Calc., 1031 (P.C.).
(4) (1909) 19 M.L.J., 228.

It has been repeatedly pointed out that an agreement between all the coparceners is not essential to the disruption of the joint status; and that separation so far as the separating member is concerned, is a matter of individual volition. A very clear exposition of this principle is contained in the judgment of their Lordships of the Privy Council in *Girja Bai* v. *Sadashiv Dhundiraj*(1). Their Lordships observe :

"Some of the Courts in India have supposed Lord WESTBURY's expressions in *Appovier* v. *Rama Subba Aiyan*(2) to imply that the severance of status can take place only by agreement. Their Lordships have no doubt that this is a mistaken view."

Then it is pointed out that the intention to separate may be evidenced in different ways, either by explicit declaration or by conduct, and if it is an inference derivable therefrom, it will be for the Court to determine whether the conduct or declaration was unequivocal and explicit. To the same effect was the law laid down in *Suraj Narain* v. *Iqbal Narain*(3).

"What may amount to a separation," their Lordships say, "or what conduct on the part of some of the members may lead to disruption of the joint undivided family and convert a joint tenancy into a tenancy-in common must depend on the facts of each case. A definite and unambiguous indication by one member of an intention to separate himself and to enjoy his share in severalty may amount to separation. But to have that effect, the intention must be unequivocal and clearly expressed."

These and similar observations make it perfectly clear that an inference of intention may be derived either from declaration or from conduct. For effecting a division in status in addition to conduct or declarations, the intention must be unequivocally and clearly expressed to the other members of the family. For ascertaining whether a deed amounts to such conduct or contains

(1) (1916) I.L.R., 43 Calc., 1031 (P.C.).
(2) (1866) 11 M.I.A., 75.
(3) (1913) I.L.R., 35 All., 80 (P.C.) at 87.

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evidence of it, or contains declarations of intention, I fail to see why it should not be looked at, although it may refer to immoveable property, and is not registered. Coupled with declaration or conduct, there must be a communication of intention to the other members, then alone a division in status would result. A document, therefore, which merely contains a declaration or affords evidence of conduct, does not of itself create a division in status, and I find no difficulty in holding that Exhibit V, which, as I already pointed out, is not an agreement between all the members of the family, and does not therefore as such, operate to create a division in status, is admissible in evidence for the purpose of proving the declaration or the conduct of the executants.

It was argued in *Natesa Iyer* v. *Subramania Ayer*(1), already referred to, that an unregistered document was inadmissible to evidence a unilateral declaration and the argument was rejected, the learned Judges observing,

"We are not able to hold therefore that the documents cannot be looked into to ascertain the intention of the executants."

Section 49 (*c*) of the Registration Act enacts

"No document required by section 17 to be registered shall be received as evidence of any transaction affecting such property."

The document containing a declaration or which affords evidence of conduct is not tendered as evidence of a transaction but only in evidence, in other words, the section makes inadmissible a document which records a transaction affecting immoveable property. It does not mean that no single piece of evidence affecting immoveable property can be admitted, if the evidence is contained in a writing which is not registered. For instance, if the question to be decided is whether a gift of

(1) (1918) 23 M.L.T., 307.

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a property is real or benami and if a letter written by the donor to the donee is sought to be put in evidence, it cannot be ruled out on the ground that it affects immoveable property. What is prohibited by the section is receiving a document as evidence of a transaction, not merely receiving it in evidence, that is, as a piece of evidence having a bearing on the question to be ultimately decided.

Then there is another aspect of the question to be considered. It is said that the document itself refers to immoveable property and we cannot therefore look at it for any purpose whatsoever. This argument appears to me wholly untenable in view of the decision of the Privy Council in *Varada Pillai* v. *Jeevarathnammal*(1), where their Lordships holding that the recitals in certain petitions could not be used as evidence of a gift, still held that the petitions could nevertheless be referred to as explaining the nature and character of the possession thenceforth held by the donee.

Now turning to Exhibit V it affords clear evidence of conduct from which an intention to divide on the part of the executants is deducible and the declarations in it also lead to the same inference. Lakshminarayana, the first defendant, and Sitaramayya, the deceased husband of the second defendant, who are the executants, begin by describing the document as a "list of shares of division." Lands are first divided, then the residential house. The debts are said to amount to Rs. 1,060–14–10. They are divided and the document contains the statement, "Both of us have agreed to the said shares and effect settlement without any dispute whatever." The treasure box and cart are also divided and the document contains the further recital, "Out of the hayricks, the northern

(1) (1920) I.L.R., 43 Mad., 244 (P.C.).

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side of the hayrick has fallen to Lakshminarayana's share and the southern side to Sitaramayya's share." All the co-parceners not being parties to this document, it did not effect an immediate division in status, but the document is the clearest possible indication of the intention of the executants to remain divided.

We have been referred to some evidence that this intention has been communicated to the plaintiff, but the question was not definitely before the minds of the parties and it seems to me that the proper order to make would be to direct an additional issue to be raised; "Whether there was a division in status between the members of the joint family during the life-time of second defendant's husband" and to allow the parties to adduce evidence in regard to this issue. It is scarcely necessary to add that to effect a division in status a document is not necessary and evidence may be given of acts of parties or declarations independent of any document. As the attention of the Subordinate Judge was not directly called to this question, there being no issue upon the point, and as the District Judge has altogether failed to consider it, I think the course suggested would be the proper course to follow. The order of the District Judge remanding the suit for disposal will stand, but the Court of the First Instance will be directed to frame an additional issue in the terms already mentioned and to try it.

SPENCER, J. SPENCER, J.—I agree with my learned brother both as to the admissibility of Exhibit V to prove division of status and as to the order proposed by him to be made for an additional issue to be framed.

I adhere to the opinion which I expressed in *Ayyakutt-Mankondan* v. *Periasawmi Koundan*(1), following what SANKARAN NAYAR, J., said in *Subramania Aiyar* v. *Savitri*

(1) (1916) 30 M.L.J., 404.

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Ammal(1), that even an unregistered document can be used as evidence of an intention on the part of members of an undivided family to become divided in status. I am glad to find that my learned brother agrees with the opinion which I then gave and that there have been several later pronouncements of great weight which tend to show that my view was correct.

I have the highest respect for the opinion of SADASIVA AYYAR, J., but I think he stretched too widely the meaning of the verb "affect" in section 49 of the Registration Act. All sorts of transactions may remotely affect immoveable property. Section 49 of the Registration Act has to be read in the light of section 17 of the same Act and section 91 of the Evidence Act. If this is done, the word "affect" will be seen to be only a compendious term for expressing the longer phrase of "purporting or operating to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent to." Thus applications for the mutation of names in the Government registers or agreements to become divided in status may be said to "affect" in an indirect sense immoveable property, but they do not of themselves purport to pass any right to immoveable property and so do not require to be registered. The decision of the Privy Council in *Varada Pillai* v. *Jeevarathnammal*(2) has made this clear as regards the former kind of documents. On the same principle I think that documents which are instruments of partition, as defined in section 2 (15) of the Stamp Act, that is, instruments whereby co-owners of any property divide or agree to divide such property in severalty, are required by section 17 of the Indian Registration Act to be registered when the property to be divided is immoveable

(1) (1909) 19 M.L.J., 228. (2) (1920) I.L.R., 43 Mad., 244 (P.C.).

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property over Rs. 100, in value, and if they are not so registered they cannot by reason of section 49 be admitted as evidence of the transaction they purport to effect; but they may be used for the collateral purpose of proving division of status among the parties to the documents. When so used they do not "affect" immoveable property nor is the division of status a "transaction affecting immoveable property" in the sense intended by the Act to be given to the word "affect." Documents that do not fall under the above description are not required to be registered at all and are admissible in evidence without registration. All costs hitherto incurred to be costs in the cause.

N.R

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice and Mr. Justice Wallace.

1922, October 30.

THE SECRETARY, BOARD OF REVENUE (INCOME-TAX), MADRAS, REFERRING OFFICER

v.

THE MADRAS EXPORT COMPANY (ASSESSEE).*

Ss. (1) 3 (1) (5) *and* 33 *of Indian Income-tax Act (VII of 1918)—Firm in France buying goods in India through agent but selling them for profit in France—Profit not taxable under the Act.*

As the agent of a firm situated in Paris, *A* bought raw skins in Madras and exported them to Paris where the firm sold them for profit.

Held, that as the profits accrued solely in France they were not taxable in British India.

* Referred Case No. 4 of 1922.

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Held, further that section 33 (1) of the Indian Income-tax Act did not create a new category of income which could be charged under the Act in addition to incomes mentioned under section 5 as chargeable under the Act but that section 33 (1) merely provided a machinery by which non-resident foreigners (amongst others), trading in British India or having business connexion in British India could be taxed on income derived by them in British India.

Greenwood v. *Smidth* [1922] 1 A.C., 417, followed.

CASE stated under section 51 of Act 7 of 1918 by the Secretary, Board of Revenue (Income-tax), Madras.

The facts and the question referred for decision are given in the first paragraph of the judgment of WALLACE, J.

R. N. Ayyangar with *O. T. Govindan Nambiyar* for assessee.—The foreign company derives no profits in India. The sales are made solely outside India and all the profits accrue only outside India. Hence the foreign company is not taxable in India. All taxable income is mentioned in section 5 of the Act and section 33 (1) does not add to it. Section 33 (1) merely mentions the machinery by which certain persons like non-resident foreigners can be taxed upon incomes derived by them in India either directly from their trade in India or by their business connexions in India. The test is whether the profits sought to be charged arise in India. He referred to section 31 (2) of the Finance Act of 1915 and *Smidth & Co.* v. *Greenwood*(1), *Smidth & Co.* v. *Greenwood*(2), *Greenwood* v. *Smidth & Co.*(3), *Sulley* v. *The Attorney-General*(4), *Board of Revenue, Madras* v. *Ramanadhan Chetty*(5), *Grainger & Son* v. *Gough*(6).

C. Madhavan Nayar for Government.—The profits are taxable income though earned outside India provided they are derived through some business connexion

(1) [1920] 3 K.B., 275. (2) [1921] 3 K.B., 568.
(3) [1922] 1 A.C., 417. (4) (1860) 5 H. & N., 711.
(5) (1920) I.L.R., 43 Mad., 75. (6) [1896] A.C., 325, 334.

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in British India. "Business connexion" is wider than trade or business. Section 33 (1) is in a chapter headed liability to tax and it is a new section designed to cover such cases and it mentions a class of chargeable income in addition to those mentioned in section 5. See the words "other sources of incomes" in section 5. Section 33(1 does not merely provide a machinery by which to tax non resident traders. He referred to section 3 for the definition of "income" under which incomes like these are deemed to accrue in India. The English Act is not in *pari materia* with the Indian Act and the English cases are not good guides for construing the Indian Act.

JUDGMENT.

SCHWABE, C.J.

SCHWABE, C.J.—The question for determination in this case is whether the profits made by a resident in France with a branch or agent here—which profits are received and retained in France—are liable to income-tax.

The relevant facts are that a French firm has a branch in Madras whose sole duty is to buy leather goods here and ship them to France. The French firm are a firm of commission agents and they make the profits in question by being paid at a defined rate commission on the value of the goods shipped. I had some doubt whether the fact that the French firm made this profit by commission distinguished the case from that in which a similar firm bought here through agents and made a profit by re-sale in France, but have come to the conclusion that it is an irrelevant consideration how it makes its profits, if it is in fact made and received in France and not here. By section 3 (1) the Act is to apply to all income from whatever source it is derived if it accrues or arises or is received in British India, or is under the provisions of the Act deemed to accrue or

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arise or to be received in British India. By section 5, which is the charging section, certain classes of income are chargeable to income-tax and they include "(IV) income derived from business." Chapter 4 of the Act, headed "liability in special cases," contains a group of sections providing for taxation of certain persons although not the actual persons entitled to the income in question such as guardians, trustees, agents and partners in a firm which has discontinued business. Section 33 (1), one of those grouped sections, is in the following words:—

> "In the case of any person residing out of British India all profits or gains arising to such person, whether directly or indirectly through or from any business connexion in British India, shall be deemed to accrue in British India and shall be chargeable to income-tax in the name of the agent of any such person, and such agents are to be deemed for the purposes of this Act to be assessees in respect of such income-tax."

It is argued on behalf of the Government that this section brings into tax income wherever earned or whether received in British India or not by a foreign resident if any part of the business which ultimately results in profits is conducted in British India. If this contention is right it would result in all foreign purchasers of goods in India for the purpose of manufacture or re-sale elsewhere being liable for Indian income-tax on any ultimate profits made in the countries to which the goods are exported. This would be a startling innovation and quite contrary to the established principle of taxation in England, and as far as I know, elsewhere and one which might lead to protest on the ground that it was contrary to the comity of nations, and would also in all probability result in residents in foreign countries as far as possible avoiding purchasing in this country its products, though these are considerations with which the Courts are not concerned if the statute clearly imposes

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such taxation, though they are material considerations in selecting between alternative interpretations if there is found to be an ambiguity. It may be that the words of section 33 (1) taking its language literally, would be sufficient to impose this taxation though, it is to be observed, the words "through or from any business connexion in British India" are very vague and the meaning thereof is not defined. The words are in my view most unsuitable if intended to have a wider meaning than the well-known meaning of the words in the charging section 5 (iv) "income derived from business" and bring into tax in respect of foreign residents *something* which is not covered by those words. I think the right view is that section 33 (1) is not a charging section at all, but a machinery section and is not intended to impose any taxation upon any income which would not otherwise be liable to tax, but to point to the method of collecting the income-tax where a person whose income is to be taxed is not himself available. In this view, we are supported by authority for much the same point arose in England. Section 31 (2) of the Finance Act II of 1915 is in the following terms :—

A non-resident person shall be chargeable in respect of any profit or gains arising whether directly or indirectly through or from any branch, factorship, agency, receivership, or management, and shall be so chargeable under section 41 of the Income-tax Act of 1842 in the name of the branch, factor, agent, receiver or manager.

In *Greenwood* v. *Smidth & Co.*(1), the House of Lords affirming the decision of ROWLATT, J., in *Smidth & Co.* v. *Greenwood*(2), and of the Court of Appeal in *Smidth & Co.* v. *Greenwood*(3), decided that this section, though in terms wide enough to bring into tax non-residents in respect of

(1) [1922] 1 A.C., 417. (2) [1920] 3 K.B., 275.
(3) [1921] 3 K.B., 583.

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profits earned abroad through direct or indirect dealing through an agency in England, did not bring into tax profits unless they were earned or received in Great Britain and held that that section was a machinery section and not a charging section. Lord Buckmaster at page 423 stated the principle in the following words :—

"It is important to remember the rule which the Courts ought to obey that when it is desired to impose a new burden by way of taxation it is essential that the intention should be stated *in plain terms*. The Courts cannot assent to the view that if a section in a taxing statute is of doubtful and ambiguous meaning it is possible out of that ambiguity to extract a new and added obligation not formerly cast upon the tax-payer."

In my judgment this rule applies to this case.

Nor is the matter without authority here, for in *Board of Revenue, Madras* v. *Ramanadhan Chetty*(1), this Court, although it was not necessary for the decision of that case, expressed its view that section 33 (1) was merely a machinery section and not a charging section, and I agree with the reasoning on that point, and particularly with that of OLDFIELD and SESHAGIRI AYYAR, JJ.

For these reasons the judgment of this Court must be in favour of the assessee with costs to be taxed.

WALLACE, J.

WALLACE, J.—This is a case referred to this Court under section 51 of the Income-tax Act VII of 1918 by the Board of Revenue. The stated case rests on the following facts. A firm with headquarters in Paris purchases skins in British India to the orders of constituents in various parts of Europe and America, and makes its profit by commission on the sales. The skins are bought in British India for the firm by an agency called the Madras Export Company resident in Madras.

(1) (1920) I.L., 43 Mad., 75.

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This company buys skins at the lowest prices it can get, subject to a maximum fixed by the Paris firm, and ships them in the raw state, as purchased, under the directions of the Paris firm. It is admitted that the Madras Export Company makes none of the profit on the sales of these skins, and that no part of the profits of the firm in Paris are remitted as such to Madras. It is presumed that the Paris firm puts the Madras Export Company in funds for the purchases out here. The question is whether the Madras Export Company is assessable by force of section 33 (1) of the Income-tax Act VII of 1918 as the agent of the Paris firm on the profits made in Paris by the Paris firm through or from its business connexion with the Madras Export Company in British India.

The section of the Act called in aid by the Board, section 33 (1), runs as follows :—

"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 within British India, and shall be chargeable to income-tax in the name of the agent of any such person, and such agent shall be deemed to be for all the purposes of this Act the assessee in respect of such income-tax."

The phrase "shall be deemed to be income accruing or arising within British India" relates back to section 3 (1) where under the heading "Taxable income," it is enacted 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, or is, under the provisions of this Act, deemed to accrue or arise or to be received in British India."

Hence sections 3 (1) and 33 (1) read together import that the Act shall apply to all income accruing or arising to a non-resident in British India, whether directly or indirectly, through or from any business connexion in

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British India. The Government Pleader, on behalf of the Board of Revenue, contends that this renders liable to income-tax all business profits made by a non-resident received not only within but outside of British India in so far as these accrue or arise through or from any business connexion in British India. If the phrase "business connexion" is to be read as the Government Pleader contends as something much wider than the term "trade or business" itself, then the far-reaching effects of such a claim are obvious, and will extend far beyond what had been hitherto recognized in British India as the territorial limit of taxation of income derived from trade. Hitherto such taxation has been limited to incomes accruing or arising in or received in British India from trade carried on in British India whether the recipient resides in British India or not, and to income received in British India though derived from a foreign source when the recipient resides in British India. The general scope of sections 3 and 5 of the Act of 1918 does not seem to me to alter the previous general principle that the profits taxed should accrue in British India. If it was intended to abandon this well-recognized restriction and to reach profits accruing outside British India, more apt and express terms should have been employed in those sections.

The term "business connexion" has not been defined in the Act. That perhaps is not surprising in an Act which does not even define the source of gain which it sets out to tax ; but when it is contended that "business connexion" was designed to mean something different from and wider than the business itself, which *ex-hypothesi* takes place outside British India, and thus to cast wider the net of the income-tax gatherer, it behoves us to be cautious and not to accept the contention, unless we find it justified by the legal maxim enunciated by

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Lord STERNDALE, M. R., in *Smidth & Co.* v. *Greenwood*(1), that the well-known canon of construction of taxing Acts is that no one is to be taxed except by express words. Does the Act then expressly charge income accruing outside British India, but derived through or from a business connexion in British India?

The charging section of the Act is section 5. Sub-section (iv) makes chargeable "income derived from business" and "income" for the purposes of this case has the meaning read into section 3 (1) which I have set out above: that is, it would cover income accruing or arising outside British India through or from any business connexion in British India. Thus such income itself is only chargeable when it is "Income derived from business" by force of section 5. The phrase in section 5 is not "income derived from or through any business connexion." At one stage of his argument the Government Pleader contended that such a phrase might be implied under sub-section (vi) of section 5, "income derived from other sources" but such a contention I cannot accept, as it violently contravenes the principle enunciated above that taxation must be imposed by express words. The real question for decision is, is the phrase "through or from any business connexion" in section 33 (1) governed and controlled by the phrase "derived from business" in section 5 (iv) or not? That it is, seems to me to be obvious from the fact that section 33 (1) is not designed or situated in the Act as a charging section in addition to section 5. It is not found under the chapter "Taxable income" alongside the charging section, but under the chapter headed "Liability in special cases," a chapter which is designed to provide

(1) [1921] 3 K.B., 583 at 588.

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for the collection of the tax from persons other than the direct beneficiaries of the income received, that is guardians, trustees, agents, receivers and so on. That is, it is a part of the "machinery" sections setting out the method by which the tax, if otherwise chargeable, is to be collected in certain cases when the direct beneficiary cannot be got at, and it is not a charging section designed to declare some other gains taxable beyond what has been declared by section 5 to be taxable. I am fortified in this conclusion by the remarks of OLDFIELD, J., no doubt *obiter dicta*, in *Board of Revenue, Madras* v. *Ramanadhan Chetty*(1), that section 33 is intended to provide for the liability to tax of a person through whose hands in one capacity or other the profits in question will pass in British India, and whom therefore the Crown can reach in order to collect it, and also by the rules framed under section 33 by the Governor in Council, printed at page 76 of the Income-tax Manual of 1920, where it is laid down that profits in a case like this may be calculated on the percentage of the turnover of the business carried on in British India. The object of section 33 (1) then is merely to provide for an agent being the assessee in place of his non-resident principal, so far as that principal is liable under section 5, as hitherto interpreted, to the tax, i.e., in respect of income derived by the principal from business in British India. The condition precedent to assessability is business in British India and not merely a business connexion in British India, and it is not laid down in that Act that the two phrases are identical in meaning. The test, I take it is:—Is the non-resident firm by its agency out here in British India, making profits in British India which pass to it through

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

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the hands of its agent? If it is, then section 33 (1) applies. If not, not. I am therefore unable to hold, in the absence of more clear and express words, that section 33 (1) was intended in any way to enlarge the scope of section (5) or to bring into the net any income accruing outside British India but not derived from business within British India merely because that income was received through or from a business connexion in British India.

Section 33 (1) then is governed and controlled by section 5 and really applies and was intended to apply to cases where a non-resident firm takes income or profits from business carried on by it in British India, which are transmittable and are transmitted to it through its resident agent. The agent will be taxed and will be the assessee for the purposes of the Act for the profits in British India of that business, and, in order to guard against the section being taken to mean that it is merely the agent's own profits which are chargeable, language is used implying that it is the profits of his firm accruing in or arising through its business connexion in British India which are taxable through the agent.

In the present case the non-resident firm in India is merely buying raw material for shipment and sale abroad, and the profits realized from the sale are realized in Paris. There is clear authority in the leading case of *Sulley* v. *The Attorney-General*(1), which is an exactly parallel case, for holding that the firm does not thereby carry on trade or business in British India. It was there held that the place of trade is the place where the profits come home to the firm, and a non-resident firm is not assessable on profits made abroad merely because it has a resident agent for purchasing and

(1) (1860) 5 H. & N., 711.

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shipping raw material, and that it is no part of the Income-tax Law so far as laid down that the firm shall be taxable in every country in which it has established buying agents. To a similar effect is the decision in *Smidth & Co.* v. *Greenwood*(1) where it is laid down that a trade is exercised in the place where the business transactions are closed, that is, in the case of a selling business, the place where the sales are effected and the profit thereby realized. The latter decision interprets section 31 (1) and (2) of the British Finance Act II of 1915, which closely resembles section 33 (1) of the British India Income-tax Act of 1918, and it is noteworthy that, though in the case of *Sulley* v. *The Attorney-General*(2), the Nottingham partner in the case was obviously a "Branch" of the New York firm, the Court in *Smidth & Co.* v. *Greenwood*(1) held that the decision in Sulley's case had not been radically affected by the new legislation, and held in effect that the extension of the Income-tax Act of 1842, which made a non-resident firm chargeable in the name of its branch did not mean that the existence of a branch sufficed to imply that the non-resident firm carried on trade in the United Kingdom or sufficed to make the profits of the non-resident firm received outside the United Kingdom taxable.

In the present case, no profits of a non-resident firm exist in this country or pass from it through the hands of the Madras Export Company. That company transmits to the Paris firm raw material, and not profits derived thereon; it realizes for the Paris firm no income made in British India which is taxable before it leaves British India. To my mind then there is no income chargeable with income-tax under section 5 of the Act,

(1) [1921] 3 K.B., 583. (2) (1860) 5 H. & N., 711.

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and section 33 (1) read with section 3 does not bring within the scope of section 5 income accruing or arising wholly outside British India to the firm of which the Madras Export Company is the local agent.

Therefore, the answer to the reference is that the Madras Export Company is not liable to be taxed on the profits of the business carried on in Paris by its Paris principal which are realized by the latter's business connexion with British India.

King and Partridge—Attorneys for Assessee.

N.R.

PRIVY COUNCIL.*

RAJANGAM AYYAR (DEFENDANT),

v.

RAJANGAM AYYAR (PLAINTIFF).

1922, July 31.

[On Appeal from the High Court of Judicature at Madras.]

Hindu Law—Partition—Registration—Agreement providing for execution of deed—Unequal division of properties in foreign State—Decree for partition of properties in British India—Indian Registration Act (XVI of 1908), sec. 17, sub-sec. 2 (v).

A joint family governed by the Mitakshara, and consisting of two brothers, owned immoveable properties some of which were in Travancore State and some in British India. They entered into a written agreement for a division, providing that a deed of partition should be executed and registered both in Travancore and in British India, and that until that was done the agreement itself should be in force. A deed dividing the Travancore properties was afterwards executed and registered, and thereby the elder brother obtained, as *jeshtabhagam*, a larger share than the younger brother. No deed having been executed, or division made of the properties in British India, the younger brother sued to enforce the agreement as to those properties. The High Court held that the agreement not being registered under the Indian Registration Act, 1908, could not be enforced. Treating the suit as one for a general partition, the High Court decreed a partition of the properties in British India, but so that the shares should be equal taking into account the division already made in Travancore.

Held, (1) that the agreement as far as it went was admissible in evidence without registration having regard to section 17, sub-section 2 (v) of the Indian Registration Act, 1908; (2) that the plaintiff was bound by the deed as to the division of the properties in Travancore, and that there should be a partition in equal shares of the properties in British India.

APPEAL (No. 113 of 1921) from a judgment and decree of the High Court (24th February 1920) varying a decree of the District Judge of Tinnevelly (29th October 1918).

* *Present*:—Lord DUNEDIN, Lord PHILLIMORE, Sir JOHN EDGE, Mr. AMEER ALI and Mr. Justice DUFF.

RAJANGAM AYYAR v. RAJANGAM AYYAR.

This suit was brought by Subrahmanya Ayyar, deceased and represented by his son the respondent, against the appellant, son of Krishna Ayyar, under a partition agreement entered into by Subrahmanya Ayyar and Krishna Ayyar on 7th January 1915. The circumstances appear from the judgment of the Judicial Committee.

The plaintiff by his plaint alleged that under a division of the joint family properties in Travancore State which had been carried out by a later deed of 4th February 1915, Krishna Ayyar had obtained as *jeshtabhagam* a greater share than that to which he was entitled; but he expressly stated that in respect of the properties in Travancore he was prepared to get relief in the Courts of that State; he however prayed for a decree declaring that certain of the properties in the Tinnevelly district were solely his, as having fallen to his share under the agreement of 7th January 1915 and for an equal division of other properties there situated; he further prayed that the execution of a partition deed as to the properties in the Tinnevelly district should be ordered.

The defendant by his written statement, among other defences, pleaded that certain of the properties were not joint properties and that the deeds of 7th January and 4th February 1915, were inadmissible in evidence in the absence of registration in British India under the Indian Registration Act, 1908.

The District Judge, to whose Court the suit was transferred, held that the documents were admissible upon a claim for specific performance; he further held that, there being a nucleus of family property, the property which the defendant alleged was his separate property must be regarded as joint in the absence of evidence. The learned Judge made a decree as prayed

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and directed the appointment of a Commissioner to divide the properties where necessary.

An appeal to the High Court was heard by Sir JOHN WALLIS, C.J., and KRISHNAN, J., and was allowed—a decree being made remanding the case to the District Judge "to ascertain what properties in British territory should be allotted to the plaintiff to give him his half share in the whole family properties."

The learned Judges held that the two documents required registration under section 17 of the Indian Registration Act, 1908, and that in the absence of registration the plaintiff could not enforce the division provided for in the agreement. It was pointed out that the document of 7th January 1915, provided that "from this day forward each party shall enjoy the properties in the schedule allotted to his share," and further, that pending the execution of the later deed contemplated, "this itself shall be in force"; and it was held that it did not come within section 17, sub-section 2 (v) of the Indian Registration Act, 1908, as not itself creating a right in immoveable property but "merely" a right to obtain another document. They considered however that the case could be treated as one for a general partition, apart from the agreement. In reference to the terms of the order, KRISHNAN, J., the learned Chief Justice concurring, said:—"In dividing the joint family property in British territory the Court will of course take into consideration the joint family properties in Travancore which were divided and allotted by Exhibit Az to each brother for adjusting the plaintiff's share in the properties in Tinnevelly. Exhibit Az is admissible in evidence with reference to the Travancore properties, as our Registration Act does not apply to that country; it can be relied on to show what properties in that State were allotted to each brother."

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Upjohn, *K.C.*, and *Dube* for the appellant.—The suit was for specific performance of the agreement, and could not be treated as a suit for a general partition: *Ma Shwe Mya* v. *Maung Mo Hnaung*(1). The decision of the High Court that the agreement was not admissible in evidence in the absence of registration is not appealed from by the respondent. Further, all the necessary parties are not before the Court so as to enable a decree to be made. If, however, the plaintiff on his pleading can ask for a general partition, he cannot re-open the division in Travancore. He expressly disclaimed doing so, and is bound by the deed of partition as to the properties there situated. It cannot be assumed that the division of the properties in Travancore was contrary to the law there applicable.

De Gruyther, *K.C.*, and *Narasimham* for the respondent.—The form of the suit is not material; it was in effect a claim for a partition of the joint family properties in British India. (They were stopped.)

The JUDGMENT of their Lordships was delivered by

MR. AMEER ALI.

MR. AMEER ALI.—This appeal arises out of a suit brought by the plaintiff, Subrahmanya Ayyar, since deceased, in the Court of the Subordinate Judge at Tinnevelly, in the Madras Presidency, on 21st December 1915, under the following circumstances. Subrahmanya Ayyar, with his brother Krishna Ayyar, who died before the institution of the suit, formed a joint and undivided Hindu family subject to the Mitakshara Law. They possessed considerable immoveable properties both within the Travancore State and in British Territories. The landed properties belonging to

(1) (1921) I.L.R., 48 Calc., 882 (P.C.).

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them in British India are situated in the Tinnevelly district. In 1915 they decided to separate and make an amicable division of the properties belonging to them, both immoveable and moveable. By a *yadast* or memorandum of agreement, dated 7th January 1915, which is marked as Exhibit Ay in these proceedings, they agreed to divide their properties both in Travancore and in British Territories according to certain specified shares. Later, on the 1st February of the same year, effect was given to this agreement in respect of the properties in Travancore, under which Krishna Ayyar, as the elder brother, obtained, under the designation of *jeshtabhagam*, a larger share than would have come to him otherwise. This document was registered in Travancore, and effect appears to have been given to it in respect of the properties situated in that State. No division, however, was made of the properties in Tinnevelly or separate possession delivered to the parties of their respective shares. Krishna Ayyar having died in the meantime, his son, the present defendant, evaded the fulfilment of the agreement embodied in Exhibit Ay; and accordingly Subrahmanya Ayyar brought the present suit for its enforcement.

In the plaint the relief asked for is a decree for partition by metes and bounds, and a direction to the defendant to execute a conveyance of the properties that should fall to the share of the plaintiff in terms of the agreement.

The defendant in his written statement raised three objections to the suit: firstly, that the agreement (Ay) had been obtained by Subrahmanya Ayyar from his father under undue influence; secondly, that a large portion of the properties in which the plaintiff claimed a share was his father's self-acquisitions and did not form part of the ancestral estate; and thirdly, that the agreement, not

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having been registered in British India, could not be admitted in evidence, and no suit for specific performance could be based on it.

The District Judge held that the defendant had failed to prove his allegation of undue influence to invalidate the agreement on which the plaintiff relies. He also held that the defendant having admitted that there was a nucleus of ancestral property, it lay upon him to establish that the properties, which he claimed exclusively, were acquired by his father, and this onus he had wholly failed to discharge.

With regard to the non-registration of the agreement the District Judge said as follows:—"I do not think that the fact that the *yadast* (Exhibit Ay) and the document of partition (Exhibit Az) referred to in paragraph 8 of the plaint were not registered in British India precludes their admission in evidence." And relying upon a decision of the High Court of Madras, he held that "if a present right is created, the instrument, though unregistered, is admissible in evidence in a suit for specific performance, and I hold that they are admissible in evidence in this suit." He accordingly made a decree in favour of the plaintiff, declaring in the first place that the properties claimed by the plaintiff had fallen to his share, and directing that the defendant should put the plaintiff in possession of the properties detailed in schedules 1, 4 and 6 of the plaint and half of certain other properties, after dividing by metes and bounds. He made certain other directions on the same basis.

On appeal to the High Court the learned Judges held, in agreement with the first Court, that the defendant had utterly failed to prove that the memorandum had been obtained by undue influence, but they also held that the agreement, Exhibit Ay, not having been

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registered in British India, was not admissible in evidence. Having regard, however, to the facts of the case and the admitted jointness of the parties until 1915, they directed a general partition in equal shares of the properties both in British India and the Travancore State.

The effect of the High Court's decision on the latter point is that it upsets the completed settlement embodied in Exhibit Az, which was duly executed and registered in the Travancore State, and which appears to have been carried into effect, the defendant or his father having got possession of the properties which fell to his share.

With regard to the properties in Tinnevelly, the High Court considered, in agreement with the District Judge, that the defendant having admitted an ancestral nucleus, it lay upon him to prove that the properties which he claimed were self-acquired.

The defendant, on appeal, contends that the High Court were not justified in turning a suit for specific performance of an agreement which, not having been registered, could not be given in evidence, into a suit for general partition, and that accordingly the present claim should be dismissed. He also contends that the High Court were wrong in decreeing a partition of the properties in the Travancore district.

In their Lordships' judgment the High Court, in upsetting the division of the Travancore properties, appear to have proceeded upon a misapprehension.

The *yadast*, as its name implies, was a memorandum regarding the cesser of jointness, which amounted to a declaration that from that time forth the parties became entitled to the possession and enjoyment of their properties in separate shares; and it provided for the execution of a further deed effectuating the partition. It says:

"A partition deed in terms hereof shall be executed and registered in the office of the Sub-Registrar of this place, as also at Tinnevelly, as early as possible; that until then this shall itself be in force."

It then goes on to give a larger share to Krishna Ayyar, as the elder brother. In accordance with the provisions of the agreement, a formal deed of partition (Az) was executed and registered in Travancore relating to the Travancore properties. It was entered into between two persons *sui juris* fully competent to enter into the transaction. It is difficult to perceive how that transaction can be upset in a suit which relates to properties in Tinnevelly, and asks for a partition of *those* properties alone. Subrahmanya Ayyar, no doubt, in his plaint had said that he would bring a suit in the Travancore Court to set aside the division effected by Exhibit Az, and it is possible that the statement led the defendant to throw every possible obstacle in the way of the plaintiff to get the relief he asked for. But it furnishes no ground, in their Lordships' opinion, to upset a completed transaction. The present suit must consequently be confined to the joint family properties situated in Tinnevelly.

It has been contended that this is a suit for the specific performance of an unregistered contract; and that the High Court dealt with it as one for general partition.

As regards the non-registration of the agreement, it is to be observed that section 17 of the Indian Registration Act, 1908, makes the registration of certain classes of documents compulsory. Among others:—

(*b*) "non-testamentary instruments which purport to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property."

From this, proviso (*v*) to sub-section 2 excepts the following:—

"any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immoveable property but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest."

Exhibit Ay is not a document by itself creating, assigning, limiting, or extinguishing any right or interest in immoveable property; it merely creates a right to obtain another document which will, when executed, create a right in the person claiming the relief, and on that ground their Lordships think Exhibit Ay did not require registration, and accordingly is admissible in evidence, so far as it goes.

The learned Judges of the High Court were, however, perfectly right in the view that the onus was on the defendant to establish that the properties he claimed as the self-acquired properties of his father, Krishna Ayyar, bore that character.

The defendant examined a number of witnesses on commission, apparently in support of his statement, but the depositions of these witnesses do not appear to have been put in evidence, and the list attached to the District Judge's judgment, after mentioning the exhibits filed on the plaintiff's behalf and giving the names of his witnesses, contains the following entries:

"Defendant's exhibits ... ... Nil.
Defendant's witnesses ... ... Nil."

Their Lordships are, therefore, of opinion that the decree of the High Court should be varied by confining the decree for partition to the properties held by the parties in the Tinnevelly district; that save and except this variation the Appeal should be dismissed. The case

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will go back to the High Court for remission to the District Judge in order that he may appoint a Commissioner to make the division of the properties by metes and bounds in equal shares and to allot to the plaintiff his half-share of the whole of the joint family properties situated in Tinnevelly; that in case, owing to any circumstance, equal division cannot be made of any particular property to one party or the other, the difference should be arranged for by the Commissioner, subject to the decision of the District Judge. As the suit was one substantially for partition, their Lordships think that the parties should bear throughout the proceedings their costs, save and except that the defendant should pay to the plaintiff his half-share of the Court fees. Their Lordships will, therefore, humbly advise His Majesty accordingly.

Solicitor for appellant: *Barrow Rogers* and *Nevill.*

Solicitor for respondent: *Douglas Grant.*

A.M.T.

APPELLATE CRIMINAL.

Before Mr. Justice Oldfield and Mr. Justice Devadoss.

1922, October 11.

KUNHAMMAD HAJI (THIRD PRISONER), APPELLANT.*

Criminal Procedure Code (Act V of 1898), ss. 369 and 439—Revision—Review—Powers of the High Court—Powers of a vacation Judge—Appellate Side Rule (Madras), 4—Jail appeals—Disposal of—Dismissal for default.

Neither section 369 nor section 439 of the Code of Criminal Procedure empowers the High Court to revise or review the judgment of one or more of its Judges in a criminal Appeal or Revision.

The dismissal by the vacation Judge of an Appeal from a convict in jail against his conviction cannot be regarded as a nullity or otherwise than as a bar to the hearing of an Appeal

* Criminal Appeal No. 695 of 1922.

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preferred a second time by the same accused against the same conviction.

The powers of the vacation Judge are not to be looked for in the notification appointing him, as though it were a self-contained and exhaustive advertisement to the public of their scope and nature. It need not and must not be regarded as more than a general statement of the powers which the vacation Judge ordinarily will exercise, and cannot be read as derogating from those, which in virtue of Statute and rules he possesses and of which he cannot consistently with them be deprived.

Per DEVADOSS, J.—The provision in section 421 of the Criminal Procedure Code that "no appeal presented under section 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same" does not apply to Appeals presented under section 420 of the Code of Criminal Procedure.

When an Appeal has once been disposed of the Court is *functus officio* and cannot hear the Appeal again.

Obiter: In the case of a criminal Apepal or a criminal Revision petition there is no provision in the Code of Criminal Procedure for dismissing an appeal or revision petition for default of appearance.

In re Ranga Rao, (1912) 23 M.L.J., 371, doubted.

In a criminal matter the question is not between party and party. It is the duty of the Court to go into the matter and dispose of it on the merits. When a criminal Appeal or a criminal Revision Petition is dismissed for default of appearance there is no decision on the merits and therefore there is no proper disposal of it according to law and the Court may rehear it. The order of dismissal for default of appearance in such cases is no judgment at all and the order is tantamount to an adjournment of the case till some one appears and moves the Court to hear him.

APPEAL against the sentence of the Court of the Special First-class Magistrate, Tirur, in Summary Case No. 3 of the Calendar for 1923.

S. T. Srinivasagopala Acharya for the appellant.—This appeal has been admitted as to sentence only; but I submit that a restrictive admission is bad and inoperative and the whole case is open to argument.

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The Public Prosecutor (*J. C. Adam*) on behalf of the Crown.—There is a preliminary objection to your Lordships hearing the appeal. A previous Appeal preferred by this very appellant and his co-accused from the jail—Criminal Appeal No. 395 of 1922—was dismissed by Mr. Justice KRISHNAN, the vacation Judge, on 2nd June 1922, who passed the following order :

"This appeal is out of time and there is no proper ground for excusing the delay. The case is proved against the accused by the prosecution evidence which there is no reason to discredit. The sentence is correct. The appeal is dismissed."

S. T. Srinivasagopala Acharya.—I submit the previous order of dismissal is no bar to the hearing of this Appeal The order rejecting the jail appeal should be taken along with the subsequent order of the same learned Judge admitting the present appeal preferred through Counsel. The present appeal was filed in ignorance of the previous one preferred from jail: and it was admitted also in ignorance of the order of dismissal.

Firstly, the order of dismissal is *ultra-vires* and a nullity and there is therefore no legal bar to the hearing of the present appeal on the merits. For, the vacation Judge had no power to dispose of matters which were not urgent. His power was confined only to dealing with urgent matters. Section 14 of the Charter Act empowers the Chief Justice to arrange for the sittings and the constitution of the Benches in the High Court. By virtue of these powers the vacation Court was constituted to dispose of urgent work only—vide Notification issued over the signature of the Registrar. There was no application for bail, and there was no urgency about the jail appeal. Even assuming the vacation Judge had larger powers, the public notification defines the nature of the work to be done by the

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vacation Judge, i.e., only to receive jail appeals, but not to hear or dispose of them. Otherwise, the accused might possibly have taken steps to have themselves represented by Counsel. As a matter of fact, the present appeal was presented on the re-opening day. Secondly, even if the prior order of dismissal was passed with jurisdiction the subsequent order admitting the present Appeal may be treated as one admitting a Review. No doubt the present appeal was not admitted by way of review, but if the Court has jurisdiction to grant a review it should be treated as a review.

[OLDFIELD, J.—If it is a review, then only Mr. Justice KRISHNAN could hear the present appeal.]

There is, in criminal cases, no special procedure like Order XLVII, Civil Procedure Code, as to who should hear a Review. As for grounds of review the order of the vacation Judge dismissing the Appeal as out of time and stating there is no ground for excusing delay is wrong. The new Limitation Act, X of 1922, applies to the case and if the time required for obtaining a copy is deducted under the provisions of that Act the appeal is in time. Obviously the new Act was not present to his Lordship's mind at the time when he dismissed the appeal as out of time. As for jurisdiction to review, there is section 369 of the Criminal Procedure Code. There is no legal warrant for limiting the *prima facie* general language of that section to the special provision in section 434 of the Code. *Queen-Empress* v. *Durga Charan*(1), *Queen-Empress* v. *C. P. Fox*(2), and *In the matter of Gibbons*(3), are, I submit, not correct; see on the other hand *Anonymous*(4), *The King-Emperor* v. *Romesh Chandra Gupta*(5), *Rajjab Ali* v. *Emperor*(6).

(1) (1885) I L.R., 7 All., 672.
(2) (1886) I.L.R., 10 Bom., 176 (F.B.).
(3) (1887) I.L.R., 14 Calc., 42 (F.B.).
(4) (1873) 7 M.H.C.R., App., 29.
(5) (1917) 22 C.W.N., 168.
(6) (1919) I.L.R., 46 Calc., 60.

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In re Ranga Rao(1), does not touch the present case. On the contrary, his Lordship Mr. Justice SPENCER has recently restored a Criminal Revision Case dismissed for default.

Moreover, the High Court as a Court of record has an inherent power of review. It is its duty as such to see that its records are not tainted by any manifest error or injustice: vide section 106 of the Government of India Act, Stephen's Commentaries, Volume III, page 501.

The Public Prosecutor.—The powers of the Judges of the High Court are regulated by the Charter Act and cannot be derogated from by any notification issued under the orders of the Chief Justice. His powers are limited to constituting the Benches and assigning work: see sections 13 and 14 of the Charter Act, *In the matter of Abdool Sobhan*(2), *Queen* v. *Zuhiruddin*(3), and *Ex-parte George Wise*(4). Under rule 4 of the Appellate Side Rules, the entire jurisdiction of the High Court is vested in the vacation Judge.

Again, the practice has been for vacation Judges to dispose of jail appeals as well. The order of dismissal is therefore good and passed with jurisdiction.

As for review, there is no general power of review in criminal cases. Section 369, Criminal Procedure Code, should be read with section 434. The matter is concluded by a series of decisions of all the High Courts and it is now too late to question the same; *Queen-Empress* v. *Durga Charan*(5), *Queen-Empress* v. *C. P. Fox*(6), *In the matter of Gibbons*(7), and *In re Ranga Rao*(1).

As a Court of record, the High Court has no special powers in this behalf.

(1) (1912) 23 M.L.J., 371.
(2) (1882) I.L.R., 8 Calc., 63.
(3) (1876) I.L.R., 1 Calc., 219.
(4) 127 L.T., 391.
(5) (1885) I.L.R., 7 All., 672.
(6) (1886) I.L.R., 10 Bom., 176 (F.B.).
(7) (1887) I.L.R., 14 Calc., 42 (F.B.).

JUDGMENT.

KUNHAMMAD HAJI, *In re.*

OLDFIELD, J.

OLDFIELD, J.—This appeal is by the third accused in S.C. No. 3 of 1922 on the file of the Special First-class Magistrate, Tirur, against his conviction and sentence therein. The Public Prosecutor opposes it on the ground that Criminal Appeal No. 395 of 1922 against that conviction and sentence has already been dismissed by a learned Judge of this Court. The facts are that Criminal Appeal No. 395 was presented by the accused under section 420, Criminal Procedure Code, through the officer in charge of the jail, where he was, on 6th May 1922, and was dismissed under section 421 as out of time by KRISHNAN, J., sitting as vacation Judge, on 2nd June 1922. The accused, presumably in ignorance of this, presented the present appeal on 17th July 1922, on the reopening of the Court, through Counsel. It is not disputed that unless the decision of 2nd June 1922 can on some ground be disregarded, we are debarred from disposing of the present Appeal on the merits.

We have been asked first to meet this difficulty by treating the present Appeal as an application for the revision of the previous decision of KRISHNAN, J. But that is not the way in which it is expressed; and in any case section 439, Criminal Procedure Code, notwithstanding the reference in it to section 273, which deals with an incident of procedure ordinarily peculiar to trials in a High Court, does not empower a High Court to revise the judgment of one or more of its own Judges. For, that reference may be explained either, as it was by MITTER, J., in *In the matter of Gibbons*(1), as applicable to the exceptional cases, in which the High Court procedure has been extended to other Courts, or as intended *ex abundanti cautela* to prevent any possible conflict

(1) (1887) I.L.R., 14 Calc., 42 (F.B.).

KUNHAMMAD HAJI, *In re.*

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with the Letters Patent or other legislation by which High Courts are affected. It cannot be read as conferring or recognizing by implication a power, the existence of which is negatived by the wording of the remainder of the section. This is supported by the case already referred to; and the obvious anomalies, which the contrary view entails, are probably the reason for the absence of further authority against it. On behalf of the accused we have been referred to no case in which revision of the judgment of one or more Judges of a High Court has been allowed. The conclusion must be that there is no power to revise it.

The next suggestion is that the appeal before us should be treated as an application for a review of KRISHNAN, J.'s previous order; and here again that is not the form of the petition. But, if that can be treated as immaterial, the accused relies next on the fact that the present appeal was, as it happens, actually admitted by KRISHNAN, J., sitting in admission, and urges that this amounts to a setting aside by the learned Judge of his previous order and a reopening of the case on its merits, such as takes place, when an application for review is granted in civil proceedings. This can be rejected on the short ground that, as Mr. Srinivasagopala Acharya admits on accused's behalf, the learned Judge was not conscious that there was any previous decision, which would be a bar to the present appeal and which would have to be set aside before that Appeal could be heard.

We have then to deal with the argument that we can ourselves review the decision of KRISHNAN, J., as that of the Court, although it was given by a single Judge; and it is not necessary to rely on the fact that the Court is now constituted differently from the Court which passed that decision, in order to hold that we cannot do so, with reference either to any power conferred by the Code, or

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to the position of the High Court as a Court of record, or any general inherent power. As regards the Code, section 369 expressly negatives (subject to certain exceptions not at present in question) the power of Courts other than High Courts to review and, no other provision authorizing High Court to exercise that power, their exclusion from the purview of the section cannot be read as conferring it by implication. High Courts, no doubt, under section 106 (1), Government of India Act (5 & 6 Geo. V, Ch. 61), are Courts of record and in a Court of record,

> "if there appear any mistake of the clerk in making up the record, the Court will direct him to amend it; and in general all slips in legal proceedings may be amended by an order of the Court to be obtained in a summary way."

(Stephen's Commentaries, Sixteenth Edition, III, 502.) But this, which in fact goes no further than section 369 does as regards inferior Courts, is not sufficient to support accused's argument, since the question is of a dismissal, which may or may not have been mistaken, but which was certainly deliberate, on a ground of limitation, to which the Court must be supposed to have applied its mind. As regards authority, decisions such as *Rajjab Ali* v. *Emperor*(1), and *Anonymous*(2) (if the latter was really given judicially), are not in point, because they deal with cases in which the accused not having had the reasonable notice enjoined in section 420, Criminal Procedure Code, a condition precedent to the exercise of the Court's jurisdiction, was not fulfilled, the conclusion not being reached strictly in review, but on the ground that there was no previous valid adjudication to bar a hearing on the merits; and the absence of reasonable notice is not in question here, since it is not disputed that accused had the notice to which

(1) (1919) I.L.R., 46 Calc. 60. (2) (1873) 7 M.H.C.R., App., 29.

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appellants from jail are entitled under Criminal Rules of Practice No. 59. Generally, the course of authority is plain against the power to review. For a fact conclusive in the nature of the case against the existence of an inherent power, no instance of its exercise has been produced and it is negatived in the case last referred to and in *In the matter of Gibbons*(1), *Queen-Empress* v. *Durga Charan*(2), *Queen-Empress* v. *C. P. Fox*(3) and *In re Ranga Rao*(4). The accused's claim must, therefore, fail if it is regarded as to a review.

The accused finally argues for his right to a hearing of this appeal on its merits on the ground that the dismissal of his previous appeal is void, because it was not within the power of KRISHNAN, J., sitting (as he was) as vacation Judge, to deal with it at all. This can no doubt at first sight be supported to some extent by the terms of the notification of 20th March 1922 regarding KRISHNAN, J.'s sittings. For it is notified that the vacation Judge will dispose of "urgent applications which require to be heard immediately" and, in spite of the wording of Appellate Side Rule 1 (1) (*f*) it is doubtful whether an appeal can be described as an application; the only reference to appeals is that implied in the specification of "urgent Criminal work" to be disposed of by an Appellate Court of two Judges; and, although there is no doubt provision for the reception of appeals under section 420, Criminal Procedure Code, from appellants in jail, it is made in the portion of the notification which refers to the Registrar's office, not to the Judge. But, even so, the appointment of KRISHNAN, J., as vacation Judge was notified with no qualification of his powers in the usual way in accordance with an order of

(1) (1887) I.L.R., 14 Calc., 42 (F.B.). (2) (1885) I.L.R., 7 All., 672.
(3) (1886) I.L.R., 10 Bom., 176 (F.B.). (4) (1912). 23 M.L.J., 871.

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the Chief Justice nominating him for that function, which we have seen; and, even if no definition of the powers and duties of the vacation Judge could be deduced from Statute or rules, the practice of the Court would afford guidance and the fact that, as we have ascertained, some vacation Judges in past years have admitted or dismissed appeals from accused in jail without complaint would go some way towards negativing the argument before us. In fact, however, the answer to that argument is that the powers of the vacation Judge are not to be looked for in the notification, as though it were a self-contained and exhaustive advertisement to the public of their scope and nature. For it need not and must not be regarded as more than a general statement of the powers, which the vacation Judge ordinarily will exercise, and cannot be read as derogating from those, which in virtue of Statute and rules he possesses and of which he cannot, consistently with them, be deprived. Appellate Side Rule 4, which has the force of law, directs that during the vacation of the Court its appellate jurisdiction may be exercised by a single Judge acting as vacation Judge, this being subject only to an exception not alleged to be in question at present. Section 108, Government of India Act, 1915 (5 & 6 Geo. V., Ch. 61), provides that "each High Court may by its own rules (the Appellate Side Rules above referred to) provide, as it thinks fit, for the exercise by one or more Judges of the Appellate jurisdiction vested in the Court, and that "the Chief Justice shall determine what Judge is in each case to sit alone." Appellate Side Rule (1) (*f*) provides for the hearing and determination by one Judge of applications for the admission of appeals from the judgment or order of a criminal Court. It is not necessary for the present purpose to attempt an exhaustive enumeration

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of the vacation Judge's powers or to go beyond these references to establish that KRISHNAN, J., was competent to dismiss accused's Appeal. Its dismissal therefore cannot be regarded as a nullity or otherwise than as a bar to the hearing of a second Appeal against the same conviction.

The result is that the Appeal cannot be heard and must be dismissed.

DEVADOSS, J.

DEVADOSS, J.—This is an Appeal presented under section 419, Criminal Procedure Code, by one Kunhammad Haji against his conviction by the Special First-class Magistrate of Tirur under section 436, Indian Penal Code. The appellant presented under section 420, Criminal Procedure Code, what is commonly known as a jail appeal which was dismissed by Mr. Justice KRISHNAN, the vacation Judge of 1922, with the remark:

"The appeal is out of time, and there is no proper ground for excusing the delay and the case is proved against the accused by the prosecution evidence which there is no reason to discredit. The sentence is correct."

Mr. Srinivasagopala Acharya who appears for the appellant urges that the judgment of KRISHNAN, J., on the Appeal presented by the appellant through the Superintendent of Jails was passed without jurisdiction, and that this Court has power to hear the Appeal presented by him on the merits.

He urges three points: (1) the order of KRISHNAN, J., having been passed without jurisdiction, the order is no order at all and therefore his Appeal should be heard on the merits; (2) the appellant had no reasonable opportunity of being heard in support of his Appeal and so the Appeal could be reheard; (3) the order of KRISHNAN, J., could be reviewed by a Bench of two Judges hearing Criminal Appeals.

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The appellant was convicted on 13th April 1922, the copy of the lower Court's judgment was given to him on 24th April 1922, and the jail appeal was forwarded to the High Court on 4th May 1922. The High Court was closed for the long vacation on 6th May 1922, and the jail appeal was dismissed on 2nd June 1922. Mr. Srinivasagopala Acharya presented the appeal petition on behalf of the appellant on 17th July 1922. It was moved before KRISHNAN, J., who was sitting in the admission Court and he ordered notice on 27th July 1922 with the remark "Admitted as regards sentence only. It is not clear why the third accused should have been given a fine also." It is conceded by Mr. Srinivasagopala Acharya that the learned Judge was not informed of the dismissal of the jail appeal when he moved for notice on his appeal, and that both Counsel and Judge were not aware at the time of the order of 2nd June 1922.

The learned Counsel's contention is that the vacation Judge could only hear urgent applications and the jail appeal not being an application regarding an urgent matter, Mr. Justice KRISHNAN had no jurisdiction to dispose of it and that the notice published under the signature of the Registrar simply said that the office of the Registrar would be open for the receipt of urgent applications, jail appeals under section 420 and applications in non-contentious matters.

The question for determination is whether a Judge of the High Court sitting as vacation Judge has or has not jurisdiction to dispose of not only urgent matters but also matters which come up before him.

By section 2 of 24 & 25 Vict., Ch. 104, an Act for establishing High Courts of Judicature in India, it was provided that the High Court of Judicature at Madras shall consist of a Chief Justice and as many

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Judges, not exceeding 15 as Her Majesty may from time to time think fit and appoint. By section 13 of the Act it is provided:

"subject to any laws or regulations which may be made by the Governor-General in Council, the High Court established in any Presidency under this Act may, by its own rules, provide for the exercise, by one or more Judges, or by Divisional Courts constituted of two or more of the Judges of the said High Court of the original and appellate jurisdiction vested in such Court in such manner as may appear to such Court to be convenient for the due administration of justice."

Section 14 is in these terms:

"The Chief Justice of each High Court shall from time to time determine what Judges in each case shall sit alone, and what Judges of the Court whether with or without the Chief Justice, shall constitute the several division Courts as aforesaid."

It is clear from these two sections that the High Court may by its own rules provide for the exercise by one or more Judges or by Division Courts of the original and appellate jurisdiction of the Court. The rules framed by the High Court under section 13 would give jurisdiction to Judges to dispose of any matter excepting those which by Statute they could not dispose of. The function of the Chief Justice is to determine what Judge in each case shall sit alone, and what Judges of the Court shall constitute Division Benches. He has to assign work and when work has once been assigned, the Judge or Judges have full jurisdiction to dispose of it. The contention of Mr. Srinivasagopala Acharya is that the learned Chief Justice restricted the power of the vacation Judge to urgent applications. In the first place there is no evidence that the learned Chief Justice, granting he has the power to do so, ever intended to restrict the jurisdiction of the vacation Judge to urgent matters only. The notification published under the signature of the Registrar is only to

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inform the public that the vacation Judge was prepared to hear urgent applications and not that the vacation Judge had power only to hear urgent matters. Secondly, the jurisdiction of a Judge can only be restricted by Statute as in the case of appeals by persons under sentence of death (vide section 377, Criminal Procedure Code) and as in trials under the Indian Criminal Law Amendment Act of 1908, section 11 or by rules framed by the High Court under section 13.

In the matter of Abdool Sobhan(1) throws considerable light on this question. In that case an application for transfer was made before a Division Bench consisting of Mr. Justice CUNNINGHAM and Mr. Justice PRINSEP. When the Counsel opened the case for transfer, the learned Judges intimated there was no use in going on further with the matter and dismissed the application. Whereupon another Counsel moved the Chief Justice to have the matter reheard on the ground that the learned Judges composing the Division Bench did not give full hearing to the case. In the course of the argument Chief Justice GARTH observed:

"Suppose I did the same thing, who is to set me in order? Is a Division Bench consisting of two Puisne Judges in a different position from a Division Bench consisting of myself and another Judge? In such a case the proper course is to appeal to Government?" The Counsel answered: "Your Lordship is undoubtedly above the other Judges of the Court." To which he replied: "As Chief Justice I have certain functions to perform in constituting Benches, but having done so, have I power to call them to account?"

The learned Chief Justice held that he as Chief Justice could not ask the learned Judges to rehear the case. In that case the application was an application for transfer of a case from one Court to another which

(1) (1882) I.L.R., 8 Calc., 63.

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could be renewed on proper grounds as the order on a transfer application is not *res judicata*. The learned Chief Justice intimated that they might renew the application or ask the Judges if they were disposed to do so to hear Counsel fully. In the course of the Judgment reference was made to a precedent which happened during the time of Sir BARNES PEACOCK, Chief Justice of Bengal. To quote the words of Chief Justice GARTH in respect of that case:—

"A Criminal Bench of this Court, consisting of two Judges had been appointed by the Chief Justice in the usual way, for the purpose of hearing Criminal Appeals; instead of sitting together to hear these appeals, the Judges thought proper to hear them separately, that is to say, one Judge sitting alone heard some of them, and the other sitting alone heard the rest; but the judgments in all the cases were signed by both Judges. Upon this being represented to the Chief Justice he considered that in point of law there had been no hearing at all of these appeals, because they had not been heard by a legally constituted Court, and one Judge sitting alone had no jurisdiction to hear them. He therefore ordered the same Criminal Bench to hear them again; and upon the Judges of that Bench declining to do so upon the ground that they had been already judicially decided, the Chief Justice sent them to another Division Bench, by whom they were finally determined. In this view of my learned predecessor I entirely agree. It is the province and duty of the Chief Justice under section 14 of the High Courts Act, to determine what Judge or Judges shall decide each case; and if two Judges are appointed by him to hear an appeal, it is quite clear, I think, that no single Judge has any jurisdiction to hear it."

With regard to *The Queen* v. *Zuhiruddin*(1) the learned Chief Justice observed:

"In that case a prisoner was committed to take his trial at Patna. On the application of the Disirict Magistrate by letter to this Court, the Judge in the English Department made a summary order transferring the case for trial to Shahabad. The prisoner then applied to this Court for a rule calling on the

(1) (1876) I.L.R., 1 Calc., 219.

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Crown to show cause why the order of transfer should not be rescinded, upon the ground that it had been made without notice to him, and that the Judge in the English Department had no power to make it. This rule was heard by a Full Bench, of which the Judge of the English Department was a member, and with his entire concurrence the rule was made absolute."

It is clear therefore that where a Judge or a Bench of Judges is asked to dispose of a certain matter they have jurisdiction to dispose of it. The constitution of the Benches is the province of the Chief Justice and if the Judges refuse or neglect to be constituted into Benches as arranged by him and choose to dispose of cases as they please they would be acting without jurisdiction. If a learned Judge who has been asked to do admission work takes it into his head to do Sessions work or without his being asked to do Original Side work calls up Original Side cases of his own accord and disposes of them, he may be said to be acting without jurisdiction. That a vacation Judge has all the powers of the High Court can be inferred from clause (36) of the Letters Patent which is in these terms:

"We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Madras in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court thereof, appointed or constituted for such purposes under the provisions of the 13th section of the aforesaid Act of the 24th and 25th years of our reign."

The Government of India Act of 1915, 5 & 6 Geo. V, Ch. 61, section 108, reproduces sections 13 and 14 of the older Act. In England the rules of the Supreme Court regulate the sittings during vacation. Order LXIII, rule 11, provides for the selection of two Judges at the commencement of the long vacation to be vacation Judges. Rule 12 provides for the arrangement of the sittings. Two Judges sit separately or together as a Dvisional Court as occasion shall require and may hear

and dispose of all causes, matters and other business to whichever division the same may be assigned. In *Ex parte George Wise*(1), HAMILTON, J. (now Lord SUMNER) issued a *Writ of Mandamus* during the vacation. In the course of the argument by Mr. F. E. SMITH (now the Lord CHANCELLOR), the learned Judge observed:

"If you satisfy me that I have the jurisdiction to do so, I should certainly grant a rule *nisi*. A vacation Judge is not a Divisional Court."

The learned Counsel answered:

"It is provided by Order XLIII, rule 12, that vacation Judges may sit either separately or together as a Divisional Court as occasion shall require and may hear and dispose of all causes, matters and other business to whichever division the same may be assigned."

HAMILTON, J., said "You may take your rule *nisi*" and passed an order to that effect. This shows that an application for a prerogative *Writ of Mandamus* which, according to the Supreme Court's orders, has to be made to a Divisional Court of King's Bench, was made before a single vacation Judge who granted a rule *nisi* and considering who the learned Judge is and who the learned Counsel who appeared before him is we may assume that the issue of the rule was within the jurisdiction of the single vacation Judge.

The practice of the office is to circulate jail appeals presented under section 420 to the Judges. Jail appeals are disposed of by only one Judge. Notice is issued on jail appeals or they are dismissed summarily by the Judge in Court after the appellant's name has been called. The vacation Judge has been pursuing this practice at least for some years. The vacation Judge disposes of matters which are ordinarily disposed of by a Bench of two Judges. Transfer applications are, as a rule, made to a Bench of two Judges. But during the

(1) 127 L.T., 391.

vacation the single Judge disposes of transfer applications. Till recently it was the practice in the High Court to post Second Appeals for notice before a single Judge sitting in the Admission Court. The Admission Judge either ordered notice or dismissed the Appeal. For the last few years the practice has been changed, and Second Appeals are circulated to the Judges who order notice if they find there are sufficient grounds for notice and if they find there are no points of law they order the cases to be posted under Order XLI, rule 2, and they come up before a Bench of two Judges who after hearing appellant's Counsel or Vakil either order notice or dismiss them.

If the practice obtaining here is an indication of what is considered to be the jurisdiction of a vacation Judge, we find he disposes of matters which are usually disposed of at other times by a Bench of the High Court consisting of two Judges. I hold that KRISHNAN, J.'s jurisdiction to dispose of jail appeals was not in any way restricted by the notification of the 20th March 1922 under the signature of the Registrar.

The next contention is that the appellant had no opportunity to engage Counsel to argue his case because the notification specifically stated that only urgent applications could be made. The notification runs thus:

"The vacation Judge will dispose of urgent applications which require to be heard immediately whether in proceedings on the Appellate or Original Side of the High Court. In any case of great urgency, application may be made by delivering to the Registrar a request to transmit the necessary papers to the vacation Judge."

Under the heading "Registrar's office" the notification is:

"Except petitions and applications in non-contentious, testamentary and intestate matters and appeals received under

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section 420 of the Code of Criminal Procedure from appellants who are in jail, no application other than an urgent application as above mentioned will be received or filed during the vacation."

The appellant contends that the office would not receive a memorandum of appearance on behalf of an appellant in jail during the vacation because in the case of a jail appeal, unless there is a bail application, the appeal is considered not to be an urgent matter. Under section 420 of the Criminal Procedure Code an appellant in jail may present his petition of appeal to the officer in charge of the jail who shall thereupon forward the same to the appellate Court. Section 421 provides that:

"No appeal presented under section 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same."

This provision does not apply to appeals presented under section 420, Criminal Procedure Code. Rule 50 of Criminal Rules of Practice lays down

"that no appeal shall be summarily rejected until seven days have elapsed after its receipt by the appellate Court. In forwarding such an appeal the officer in charge of the jail shall invariably certify that the appellant has been informed that if he intends to appoint a pleader an appearance must be put in within seven days from the date on which his petition may reach the appellate Court."

Seven days' time is allowed before a jail appeal is circulated to the Judges. So an appellant has an opportunity of engaging Counsel if he wishes to do so. I do not think the office could have refused to receive a memorandum of appearance from a practitioner on behalf of an appellant in jail if it was brought to the notice of the office that the jail appeal might be disposed of during the vacation. There is nothing to show that in this case the appellant had not had an opportunity of engaging Counsel before his appeal was disposed of. So there is no substance in this contention.

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It is further urged that as the appellant was not heard there ought to be a rehearing of the case. When an appeal has once been disposed of, the Court is *functus officio* and cannot rehear the appeal. This is quite clear from a number of decisions of the Madras High Court as well as of other High Courts. In *In re Ranga Rao*(1), it was held that if a criminal revision petition is dismissed on account of the non-appearance of the practitioner who has filed it, the High Court is not competent to restore to its file such a petition. In the course of the judgment reference is made to Referred Trial No. 40 of 1905 of this Court. It appears that after the dismissal of the appeal the learned Chief Justice thought that his order was wrong and he wanted to allow the appeal. On the matter being argued before him and Mr. Justice MOORE, they both thought that they were *functus officio* the moment they delivered their judgment and that they had no power to reopen the matter and they directed that a letter be addressed to Government for the exercise of the prerogative of mercy in view of the doubt which they entertained as to his guilt. It has been brought to our notice that in a recent case Mr. Justice SPENCER who dismissed a criminal revision petition for default of appearance of a practitioner restored it to file and heard the case on the merits. In the case of a criminal appeal or criminal revision petition there is no provision in the Code of Criminal Procedure for dismissing an appeal or revision petition for default of appearance. In a criminal matter the question is not between party and party. It is the duty of the Court to go into the matter and dispose of it on the merits. The only way of reconciling the conflicting decisions on this point is to hold that when a criminal appeal or a criminal revision petition is

(1) (1912) 23 M.L.J., 371.

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dismissed for default of appearance there is no decision on the merits and therefore there is no proper disposal of it according to law and the Court may rehear it. The order of dismissal for default of appearance in such cases is no judgment at all and the order is tantamount to an adjournment of the case till some one appears and moves the Court to hear him. With due respect to the learned Judges who decided *In re Ranga Rao*(1) I think that the High Court, though it is not bound to hear the practitioner in support of a criminal revision petition, is not entitled to dismiss it for default of appearance but could only dispose of it on the merits.

In *Anonymous*(2) a ruling is given to the effect that when a criminal appeal has been rejected without hearing the appellant's pleader under the corresponding section 421 of the Criminal Procedure Code and if it appears that an adequate excuse has been made for the pleader's non-appearance the Court could restore the case to its file and hear him. In *Emperor* v. *Kallu*(3) it was held that a Judge, who passed an order on a jail appeal to the effect that no appeal lay and that no sufficient ground appeared for interference in revision was not precluded from entertaining the application for revision presented by a Counsel in relation to the same matter. It has been held in some cases that a judgment or order is not complete until it is signed and sealed and therefore the matter could be reopened. Under section 369 of the Criminal Procedure Code when a judgment has been signed it is final, and there is no power left in the Court to reopen the case.

The Bombay High Court in *Empress* v. *Mahomed Yashin*(4) takes a narrow view with regard to the power to rehear criminal appeals and revision petitions

(1) (1912) 23 M.L.J., 371.
(2) (8731) 7 M.H.C.R., App., 29 (Crl.).
(3) (1905) I.L.R., 27 All., 92.
(4) (1880) I.L.R., 4 Bom., 101.

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dismissed for default. But with great respect to the learned Judges of the Bombay High Court I consider that when a criminal appeal or revision petition is dismissed without hearing, there is no judgment at all and the learned Judge or the Bench which disposed of the matter for default of appearance could rehear the matter.

The third point argued is that the High Court has power to review an order passed in a criminal matter. I think this is concluded by authority. The earliest case on the point is *Queen* v. *Godai Raout*(1). A Full Bench of the Calcutta High Court presided over by Sir BARNES PEACOCK held that the High Court could not entertain an application to revise a judgment passed by it in a criminal case. The learned Judge observed at page 63:

"The Code of Criminal Procedure does not contain any provision expressly authorizing a review of judgment in a criminal case after the judgment has been recorded. The Code of Criminal Procedure was passed after the Code of Civil Procedure. The latter contains a section expressly authorizing review of judgment but the former contains no corresponding section. From this it may reasonably be inferred that the Legislature did not intend to confer in criminal cases a power similar to that which they had given in civil cases."

Now the Code of Criminal Procedure has been amended a number of times, and the Legislature has not chosen to give a power of review to any Court in a criminal case. Section 369 is relied upon as showing that the High Court has power by implication to review a judgment passed in a criminal case. I think such a contention is untenable. Section 369 runs thus:

"No Court other than a High Court, when it has signed its judgment shall alter or review the same, except as provided in sections 395 and 484 or to correct a clerical error."

(1) (1866) 5 W.R. (Crl.), 61.

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The exception contained in section 369 is with reference to the power of review in regard to cases decided by a Judge of the High Court presiding over the Sessions when points are reserved for consideration by the Full Bench or on the certificate of the Advocate-General. *Queen-Empress* v. *Durga Charan*(1), *In the matter of Gibbons*(2), *Queen-Empress* v. *O.P. Fox*(3), are all authorities for the position that a Division Bench of the High Court has no power to review its judgment pronounced in a criminal revision case or a criminal appeal.

In this case the appellant has not applied for Review and I consider that this Bench which did not hear the case originally has no power to review the order. In these circumstances the order of Mr. Justice KRISHNAN made during the vacation on the appeal of the appellant is good and the matter cannot be reopened. That being so we cannot hear the appeal before us and it must be dismissed.

K.U.L.

(1) (1885) I.L.R., 7 All., 672.
(2) (1887) I.L.R., 14 Calc., 42 (F.B.). (3) (1886) I.L.R., 10 Bom., 176 (F.B.).

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Venkatasubba Rao.

THE OFFICIAL RECEIVER, TANJORE, APPELLANT,

1922, December 22.

v.

NATARAJA SASTRIAL AND FOUR OTHERS (SPECIAL RECEIVER, RESPONDENTS AND PETITIONER), RESPONDENTS.*

Provincial Insolvency Act (V of 1920), ss. 5, 57, 75—Appointment of Official Receiver—Court's power to review order and remove him and appoint Special Receiver—Official Receiver's right to appeal as an "aggrieved person" under section 75.

A Court acting under the Provincial Insolvency Act (V of 1920) has power to review its order and can remove for sufficient cause the Official Receiver already appointed by it to administer an insolvent's estate and appoint a Special Receiver. The Official Receiver so removed has, under section 75 of the Act, a right of appeal as "a person aggrieved" by the order. *Ex parte Sidebotham, In re Sidebotham,* (1880) 14 Ch.D., 458, and *Official Assignee of Madras* v. *Ramachandra Iyer* (1910) I.L.R., 33 Mad., 134, applied.

In the absence of any exceptional reasons such as personal disqualifications affecting the Official Receiver, he alone should be appointed Receiver in case of every insolvency within his jurisdiction.

APPEALS against the orders of C. V. VISWANATHA SASTRI, District Judge of East Tanjore at Negapatam, in Insolvency Petition No. 3 of 1921.

The facts are given in the judgment of SPENCER, J.

T. V. Muttukrishna Ayyar (with *A. V. Viswanatha Sastri* and *T. V. Ramanatha Ayyar*) for respondents took a preliminary objection that an Official Receiver had a right of appeal as an "aggrieved person" under section

* Civil Miscellaneous Appeals Nos. 307 and 308 of 1922.

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75 of the Provincial Insolvency Act only as representing the general body of creditors and not for redressing wrongs personal to himself as in the present case. *Ex parte Sidebotham, In re Sidebotham*(1), *Radha Mohan* v. *Ghasi Ram*(2).

T. M. Krishnaswami Ayyar for appellant.—The Official Receiver is an "aggrieved person." As soon as the adjudication order was passed and he was appointed as the Receiver, the estate of the insolvent vested in him by law and he had a legal right to administer the same. Now the Judge's order had wrongfully deprived him of that right. Section 75 expressly includes the Receiver as a person who might be "aggrieved." See *Ex parte Official Receiver, In re Reed Bowen & Co.*(3), *Official Assignee of Madras* v. *Ramachandra Iyer*(4) and *Ex parte Sidebotham, In re Sidebotham*(1).

On the merits:—In this case the Official Receiver was appointed the Receiver at the time of the adjudication order. The Court has no power to review its own order and appoint another. There is no power of review under the Provincial Insolvency Act. Further, an Official Receiver once appointed cannot be removed afterwards. He is appointed by the Local Government. As soon as an adjudication order is made, the property vests in him, for the Official Receiver is the Receiver for all insolvencies arising within his jurisdiction, unless the Court otherwise directs under section 57, clause (2). The only moment when the Official Receiver can be superseded is when the adjudication order is made and a Special Receiver is appointed under section 57, clause (2). Rule 12 of the Insolvency rules expressly negatives any power in the Court to remove an Official

(1) (1880) 14 Ch. D. 458.
(2) (1917) 41 I.C., 96.
(3) (1887) 19 Q.B. D., 174.
(4) (1910) I.L.R., 33 Mad., 134.

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Receiver after the estate had once vested in him. The proviso to rule 11 only refers to cases where the adjudication order is passed by the Official Receiver himself. Even assuming that such power of removal exists in the Court, it can only be exercised for "sufficient reasons," i.e., personal reasons affecting the Official Receiver. Here the District Judge puts it only on convenience which is not sufficient.

T. V. Muttukrishna Iyyar for respondents.—The Insolvency Court has power of review; see section 5 of the Act. Its provisions are general; a power of review is inherent in every Court; otherwise a wrong committed can never be rectified. Section 57, clause (2) does not refer to any particular point of time. It cannot mean that the Court has at no other time a power of removal. Otherwise the Official Receiver cannot be removed even for misconduct. The Court has general superintendence over the Receiver's administration. Rule 11 recognizes such power. Rule 12 is ultra vires if it negatives a power of removal at all times. A power of appointment includes a power of removal. See section 16 of the General Clauses Act. See also *Srimati Mathuria Debya* v. *Shibdayal Singh Hajari*(1). In this case the District Judge has exercised his discretion which should not be lightly interfered with. All the creditors and even the insolvent's vakil supported the appointment of the Special Receiver.

JUDGMENT.

SPENCER, J. SPENCER, J.—The appellant is the Official Receiver of the Tanjore district. He appeals against the order of the District Judge of East Tanjore appointing a Special Receiver in Insolvency Petition No. 3 of 1921 instead of the Official Receiver, in whom the insolvent's

(1) (1909) 14 C.W.N., 252.

property would ordinarily vest under section 57 of Act V of 1920. It appears that when the adjudication of insolvency was made, the District Judge vested the property in the Official Receiver on the 26th July 1922. The next day, at the instance of the vakil for some of the insolvents, the District Judge reconsidered his order and substituted "Special Receiver" for "the Official Receiver" in his order. Section 57, clause (2) permits the Court to make such an order for special reasons The Official Receiver moved the Court to reconsider this second order, but the District Judge declined to do so on the 15th August 1922.

In these appeals a number of points have been raised on either side. It is contended that the Official Receiver is not entitled to appeal under section 75 and that, even if he is so entitled, the Court has given good easons for appointing a Special Receiver in the present case, and that we should not interfere with the District Judge's discretion. On the other hand, the appellant contends that the Court having passed a final order on the 26th of July had no power under the Provincial Insolvency Act to review that order; secondly, that the rules framed under the Madras Provincial Insolvency Act, which have the effect of law by virtue of section 79, clause (3), give no power to a Court to remove an Official Receiver once appointed (vide rule 12); and, lastly, that the reasons given by the District Judge for appointing a Special Receiver are not sufficient reasons for making an exception to the general rule.

On the first point it is clear from section 75 that the Official Receiver is one of the persons who has a right of appeal if he is aggrieved by the order of a Court acting in its insolvency jurisdiction. *Official Assignee of Madras* v. *Ramachandra Iyer*(1) affords an instance

(1) (1910) I.L.R., 33 Mad., 184.

where the Official Assignee, who stands in a similar position to the Official Receivers in the mufassal, was regarded as a person "aggrieved" and was permitted to appeal. That case proceeded largely on the authority of an English case *Ex parte Sidebotham, In re Sidebotham*(1). It appears from the notes at page 459 that the question of the removal of the trustee was one of the matters that came up for consideration, and the learned Judges declared that a trustee in bankruptcy would be entitled to appeal from an order of the Court if he thought it unjust and that he would be a person "aggrieved" if a decision had been pronounced which had wrongfully refused him something to which he was entitled. I hold therefore that the appellant has a right of appeal.

Although the Provincial Insolvency Act does not contain any provision for reviewing orders already passed, section 5 provides that the Court—

> "shall have the same powers and shall follow the same procedure as it has and follows in the exercise of its orginal civil jurisdiction."

I am therefore not prepared to hold that the District Judge acted illegally in altering his order after it had been passed.

Next the provision in rule 12 that "the Court may remove or discharge any Receiver or interim Receiver other than an Official Receiver" appears to have been so worded in consideration of the fact that under section 57 of the Act the power of appointing Official Receivers is vested in the Local Government and, therefore, no Court has the power to remove an Official Receiver from his office. Where the appointment of an Official Receiver to take charge of a particular insolvency is concerned, the proviso to rule 11 allows the parties to

(1) (1880) 14 Ch.D., 458.

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apply to the Court to set aside the appointment of the Official Receiver and to ask that a Special Receiver may be appointed in his place. Even if that proviso was intended to apply particularly to cases where orders of adjudication have been made by the Official Receiver himself, unless the contrary appears, we may assume that Courts have power to make such orders from time to time as are necessary for dealing with the insolvent's estate. Under section 16 of the General Clauses Act whenever a power to make an appointment is conferred, the authority having such power must be deemed to have power also to remove any person appointed by it in exercise of that power. I therefore hold that the District Judge was legally empowered to set aside his own order appointing the Official Receiver if there were special reasons for doing so.

The reasons given in the District Judge's order are that it was better in the interest of all parties concerned that a Special Receiver residing in Negapatam should be appointed to deal with the insolvent's property. The Official Receiver was an interim Receiver before the adjudication and there is nothing to show that any personal reason existed for his being superseded. The property of the insolvents is not situate at Negapatam where the Special Receiver lives but in a village which is accessible from Tanjore as well as from Negapatam; and during the management of the interim Receiver he was leasing out the lands and doing much other necessary acts for the management of the insolvent's estate. The remuneration of Official Receivers who are paid a fixed salary by Government depends partly upon the receipts obtained by them in administering various estates in their district; and those receipts will be diminished if Special Receivers are appointed superseding the authority of the Official Receiver. The reasons

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given by the District Judge and those appearing in the affidavits of the creditors are not sufficient in my opinion to outweigh the general importance of keeping all insolvencies within the control of the Official Receiver, unless very exceptional reasons, such as reasons connected with the personality of the Receiver, are put forward to deprive him of that control.

The District Judge's order must be vacated and in lieu thereof the Official Receiver will be directed to take charge of the insolvent's estate. The appellant's costs in Civil Miscellaneous Appeal No. 307 of 1922 in this Court will be defrayed out of the insolvent's estate. There will be no order as to costs in Civil Miscellaneous Appeal No. 308 of 1922. The first respondent will bear his own costs in Civil Miscellaneous Appeal No. 307 of 1922 in this Court.

VENKATASUBBA RAO, J. — VENKATASUBBA RAO, J.

VENKATASUBBA RAO, J.—The first question to be decided is whether the Official Receiver is entitled to appeal against the orders passed. Is he "a person aggrieved" under section 75 of the Act? On the 26th July 1922 an order of adjudication was made and the Official Receiver was appointed Receiver of the property of the insolvents. On the following day the District Judge varied his order of the 26th and appointed a Special Receiver, thereby rescinding the appointment of the Official Receiver. The latter applied for the setting aside of the order made on the 27th July, and on the 15th August the District Judge passed an order refusing to reconsider his decision. The Official Receiver has filed two appeals, one against the order of the 27th of July and the other against that of the 15th August.

Various cases were cited in the argument bearing on the interpretation of the words "a person aggrieved." But I think it is sufficient to refer to two of them. In

Ex parte Sidebotham, In re Sidebotham(1) JAMES, L.J., observed that if the Court acted on a report by the Comptroller in bankruptcy that the trustee had been guilty of a misfeasance or neglect by which the estate had sustained a loss which the trustee ought to make good, the trustee would be entitled to appeal from the order of the Court, if he thought it unjust. This observation is no doubt obiter but is entitled to great weight. The Lord Justice said, "'A person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something." Lord ESHER, M.R., in *Ex parte Official Receiver, In re Reed Bowen & Co.*(2) referring to the definition given by JAMES, L.J., observed that the words used were "legal grievance" and not "pecuniary grievance or grievance to person or property," and further added that "a person aggrieved" must be a man against whom a decision has been pronounced which has wrongfully refused him something which he had a right to demand.

I think the Official Receiver suffered a legal grievance and he was "wrongfully deprived of something." He was removed from office and his application to reconsider the order was refused. He was entitled to say that his appointment should not have been set aside; he had a right to ask that he should be restored to office. He was aggrieved by the orders made against him.

This leads me to the consideration of the second question: can the Court remove an Official Receiver who has been appointed Receiver of an insolvent's estate

(1) (1880) 14 Ch.D., 458.

(2) (1887) 19 Q.B.D., 174.

from his office of such Receiver of that estate? The answer would depend upon the construction of section 57, clause (2).

Section 56, clause (1) and clauses (1) and (2) of section 57 run thus:—

Section 56, clause (1).—The Court may, at the time of the order of adjudication, or at any time afterwards, appoint a Receiver for the property of the insolvent and such property shall thereupon vest in such a Receiver.

Section 57, clause (1).—The Local Government may appoint such persons as it thinks fit to be called Official Receivers under this Act within such local limits as it may prescribe.

Section 57, clause (2).—Where any Official Receiver has been so appointed for the local limits of the jurisdiction of any Court having jurisdiction under this Act, he shall be the Receiver for the purpose of every order appointing a Receiver or an interim Receiver issued by any such Court, unless the Court for special reasons otherwise directs.

It will be seen that an Official Receiver becomes in virtue of his holding that office, a Receiver of the property of the insolvent, if a Receiver for the property is appointed. The Court however for special reasons may otherwise direct. In my opinion the words "otherwise direct" refer not only to the point of time when the appointment of a Receiver under section 56 is made, but also the period subsequent to the appointment. That is to say, the Court may not only at the initial stage appoint a Special Receiver for valid reasons, but it may, if good grounds are shown, remove the Official Receiver appointed originally at any time whatsoever. This construction will avoid an absurdity, viz., that the Official Receiver once appointed can never be removed by the Court even though he may be guilty of misappropriation or fraud or is shown to have an interest adverse to that of the creditors of the insolvent. I am therefore of the opinion that under section 57,

clause (2), the Court has the power to remove the Official Receiver from his office of Receiver for the property of an insolvent.

It has been argued that rule 12 of the Insolvency Rules negatives this power. I must say that there is considerable force in this argument. If this be the effect of rule 12, I am prepared to hold that it is ultra vires.

It has next been pointed out that rule 11 specifically provides for the setting aside of the appointment of the Official Receiver and for the appointment of a Special Receiver. If this be the right construction, rule 11 would be inconsistent with rule 12. I am inclined to think that the proviso refers only to the case specified in clauses (4) and (5), i.e., to the Official Receiver appointed for the property of the insolvent "in cases where the Official Receiver is empowered to make orders of adjudication." The decision of the question however does not depend on a construction of these rules but I would take this opportunity to suggest that a revision of rules 11 and 12 may be made.

The third point relates to the merits of the appeal. The Official Receiver was removed on the ground that his headquarters was at Tanjore, that there was a single Receiver appointed by the Government for the two districts, the East and West Tanjore, and that, therefore, a person in the locality should be preferred. The Government has appointed one Official Receiver for the area comprised within the two districts and if the reasons given by the District Judge should be held sufficient to appoint a Special Receiver, the reason would exist in every case and the Official Receiver could never be appointed Receiver for any property within the jurisdiction of the District Judge of East Tanjore.

I am utterly unable to regard this as a special reason under section 57 of the Act.

I therefore agree with the order proposed by my learned brother.

N.R.

OFFICIAL RECEIVER, TANJORE v. NATARAJA SASTRIAL. — VENKATA-SUBBA RAO, J.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Devadoss.

SUBRAMANIA AIYAR (RECEIVER, PLAINTIFF), APPELLANT,

v.

CHOKKALINGA MUDALIAR AND THREE OTHERS (DEFENDANTS 1 AND 3 TO 5), RESPONDENTS.*

1922, November 21.

Civil Procedure Code (V of 1908), Sec. 64 and O. XXI, r. 51—Attachment of promissory note in the hands of private person, not by actual seizure but by prohibitory order—Endorsee of note with knowledge of order—Sections 8 and 9 of Negotiable Instruments Act (XVI of 1881)—Endorsee neither "holder" nor "holder in due course."

The proper method of attaching a promissory note in the hands of a private person is by its actual seizure as provided by Order XXI, rule 51, Civil Procedure Code, and not by the issue of a mere prohibitory order. Hence section 64, Civil Procedure Code, does not apply to such attachment. But where a prohibitory order has been made restraining the payee of a promissory note from receiving payment for it or in any way dealing with it, an endorsee from him with knowledge of such order is neither a "holder in due course" nor a "holder" within sections 9 and 8 of the Negotiable Instruments Act and he is therefore not entitled to sue on the note.

* Second Appeals Nos. 180 and 181 of 1922

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Obiter, An endorsee of such a note from the payee with the knowledge of the prohibitory order commits fraud and hence he cannot sue on the note.

SECOND APPEALS against the decree of A. J. KING, District Judge of East Tanjore at Negapatam, in Appeal Suits Nos. 17 and 18 of 1921, preferred against the decree of T. K. SUBBA AYYAR, Subordinate Judge of Tanjore at Mayavaram, in Original Suit No. 50 of 1919.

The facts are set out in the judgment of PHILLIPS, J.

T. M. Krishnaswami Ayyar for appellant.—The attachment of the note was valid; the issue of the prohibitory order instead of seizing the note as provided by Order XXI, rule 51, is only an irregularity. Moreover, what was really attached was the original book debt and not the promissory note which is only a conditional substitute for the debt. There cannot be a merger of a book debt in a note. Even if the attachment be invalid as the second defendant got the note endorsed to him with knowledge of the prohibitory order he must be deemed to have committed a fraud on the Court and cannot get a title to the note. There was also prohibitory order on the second defendant himself as regards this note and he must be deemed to have abused the process of the Court by obtaining a transfer of the note. Further as there was a prohibitory order on the payee restraining him from endorsing it, a defect existed in his title and hence the second defendant who got it endorsed to him with the knowledge of such order is neither "holder" nor "holder in due course" within sections 8 and 9 of the Negotiable Instruments Act. As the amount due to the appellant was borrowed by the deceased father of the judgment-debtor it is a charge on the properties in the hands of the judgment-debtor: *Assamathem Nissa Bibee* v. *Roy Lutchmeeput Singh*(1).

(1) (1879) I.L.R., 4 Calc., 142 (F.B.).

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K. Bhashyam (with *A. Sriranga Acharya* and *A. V. Viswanatha Sastri*) for respondents.—There can be a merger of a debt in a note. Moreover it is a question of fact depending on intention of parties, see *Jambu Chetty* v. *Palaniappa Chettiar*(1), *Subramaniah Chetty* v. *Muthia Chetty*(2). It was the note that was attached. The attachment not having been effected as provided by Order XXI, rule 51, it is invalid and section 64, Civil Procedure Code, does not apply and there can be a valid transfer of the note: *Nur Ahmad* v. *Altaf Ali*(3), *Sri Rajah Rama Row* v. *Rajah of Pittapur*(4), and *Sinnappan* v. *Arunachalam Pillai*(5). No fraud or abuse of process has been found by the lower Courts. It is not found that the second defendant actually disobeyed any order of the Court or induced the endorser to disobey. As the endorser can even after the prohibitory order maintain a suit on the note, there is no defect in his title. Hence the endorsee is "a holder in due course." The endorsee is at least "a holder;" and under section 78 of the Negotiable Instruments Act payment must be made only to him in order to discharge the maker. *Assamathem Nissa Bibee* v. *Roy Lutchmeeput Singh*(6) relates to substantive law governing Muhammadans, and is inapplicable to Hindus.

T. M. Krishnaswami Ayyar in reply.—The endorser having no good title to transfer he cannot give a better title to the endorsee. Hence endorsee is not even a holder.

JUDGMENT

PHILLIPS, J.—The facts of this case are as follows:— PHILLIPS, J.

One Chokkalinga Mudali (called the first defendant) received a sum of Rs. 3,000 from one Kumarasami Pillai. The latter died and on the 29th June 1917 the

(1) (1903) I.L.R., 26 Mad., 526.
(2) (1912) I.L.R., 35 Mad., 639.
(3) (1880) I.L.R., 2 All., 58.
(4) (1916) I.L.R., 39 Mad., 396.
(5) (1919) I.L.R., 42 Mad., 844 (F.B.).
(6) (1879) I.L.R., 4 Calc., 142 (F.B.).

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first defendant executed a promissory note for the Rs. 3,000 to Kumarasami Pillai's son Sadasiva Pillai. There were many creditors of Sadasiva Pillai and suits were brought against him and several orders were passed in respect of this promissory note. Subramania Aiyar (called the plaintiff) is the Receiver in one of these suits in which a decree was obtained against Sadasivam. In that suit an order was passed on the 31st July 1917 attaching this promissory note. On the 20th August 1917 a similar attachment was taken out by Kuppuswami Ayyangar (called the second defendant). There were various other attachments also, and, on the 18th March 1918, the promissory note was endorsed by Sadasivam to Kuppuswami Ayyangar. The plaintiff now brings the suit to recover Rs. 3,000 from the maker of the note, and Kuppuswami Ayyangar the 2nd defendant in that suit has also filed a suit to recover the amount due under the promissory note. The lower Courts have found that there was no valid attachment of the promissory note and that the second defendant is a holder in due course and have consequently decreed the second defendant's suit and dismissed the plaintiff's suit. The plaintiff therefore appeals in both cases.

Under Order XXI, rule 51, the method of attaching a promissory note is by actual seizure and by bringing it into Court. Admittedly this has not been done with reference to the promissory note executed by the first defendant. The orders that were passed are said to be orders of attachment but are really prohibitory orders that were addressed to Sadasiva Pillai and the first defendant forbidding them to receive or pay, respectively, the amount due under the note. It does appear from one execution petition of the 7th October 1917 that an attempt was made to seize the note but it could not be found and an attachment was not effected.

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It is now contended in appeal firstly that the attachment was a valid attachment and that therefore, the endorsement in favour of the second defendant was invalid and under section 64 of the Civil Procedure Code is void as against the plaintiff's claim; and secondly, that, even if the attachment is not a valid attachment, the second defendant has abused the process of the Court by getting an endorsement of the note after he had obtained the orders of the Court prohibiting the parties to the note from taking action thereon. As regards the first ground it is said that, although there was no attachment in the form prescribed for attachment of negotiable instruments, the prohibitory orders must be deemed to be attachment of the original book debt which has not been discharged by the promissory note. The execution of a promissory note in satisfaction of a debt does not necessarily mean that the original debt is extinguished but the note may operate as a substitute for that debt and the original debt is kept in abeyance pending the discharge or otherwise of the promissory note. It is, however, certainly open to parties to treat the original debt as discharged and substitute therefor the obligation under the promissory note, and, in this case, we have the finding of both the lower Courts that the book debt of Rs. 3,000 was discharged by the execution of the promissory note. This finding is based on the intention of the parties and consequently I do not think it is open to this Court in Second Appeal to interfere with that finding. We must take it therefore that the book debt had been discharged on the date of the prohibitory order, and consequently the procedure prescribed for the attachment of debts not secured by negotiable instruments is inapplicable to the present case. It is therefore quite clear that the attachment of the promissory note was not a valid attachment.

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One of the most important questions to be considered in deciding whether an attachment is valid or not is whether the order has been communicated to all parties concerned so as to make it effective. If a promissory note is left in the hands of a party and there is merely a prohibitory order telling him not to receive the money due thereunder it is always possible that he may negotiate the instrument or in the case of a note payable to bearer, he may hand it on to a third party, who would be quite unaware that there was any order of Court restricting dealings with the note. Unless therefore the actual note is seized there is always a danger that third parties may bona fide become possessed of it, and, if the prohibitory order were held to be a valid attachment, they would be prejudiced by such an order of which they were unaware. I therefore agree with the lower courts that the attachment was invalid, and consequently section 64 of the Civil Procedure Code is not applicable.

I next have to consider the question whether the second defendant has abused the process of the Court. The order obtained by him, Exhibit II, was an order prohibiting Sadasivam from receiving any amount on account of the promissory note from the first defendant and an order prohibiting the first defendant from paying any amount under the note. Most of the prohibitory orders were in similar terms but it does appear that one of them Exhibit II (*c*) prohibited the first defendant from receiving any amount on account of the promissory note or from adjusting that promissory note in any other way. The second defendant died during the pendency of the proceedings, but Sadasivam was examined and he admits that the second defendant was a friend of his and that he was probably aware of these prohibitory orders. I think we may take it that the second

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defendant was undoubtedly aware of the many orders which had been passed against Sadasivam and realized the risk he was taking in dealing with this promissory note. He himself obtained an order of Court prohibiting the first defendant from paying the amount and Sadasivam from receiving the amount, and having obtained this order and knowing that many similar orders had also been obtained, he went to Sadasivam and obtained an endorsement from him in contravention of the letter of Exhibit II and of the spirit of the other prohibitory orders. It seems to me that this action on his part was fraudulent, being designed to secure himself and to defeat the claims of the other creditors, who had obtained prohibitory orders.

It is suggested that he did not actually disobey the order of Court or induce Sadasivam to disobey it, but assuming that he was aware of Exhibit II (*c*) that argument is certainly incorrect; and even as regards the other orders it is clear that he intended to obtain the money from the first defendant notwithstanding the order prohibiting the payment. I am therefore inclined to hold that the whole of this transaction of endorsement is vitiated by fraud and that second defendant's claim being based on his own fraud should not be allowed, but in the view I take of the next ground of appeal it is unnecessary to finally decide the case on this point.

There is yet another point which has been taken in appeal and that is that the second defendant was not a holder in due course as found by the lower courts, and this I think is a valid objection. Under section 9 of the Negotiable Instruments Act a holder in due course means the payee or endorsee thereof (namely the promissory note) if payable to order before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the

person from whom he derived his title. In this case the title to the note still remained in Sadasivam after the prohibitory order, but he was unable to deal with the note or to receive money under it and to that extent his title was defective, for I do not think it can be said that, when a person is under a disability with respect to his property, his title thereto is without defect, as is argued for the respondents. The second defendant was aware of this disability and therefore he had sufficient cause to believe that a defect existed. He is not therefore a holder in due course.

It is then argued that, although he is not a holder in due course, he is yet the holder of the note and that under section 78 of the Negotiable Instruments Act, payment of the amount due on a promissory note must, in order to discharge the maker or the acceptor be made to the holder of the instrument. A holder of the promissory note means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto. At the time the second defendant became the actual possessor of the note, Sadasivam was restrained from receiving the amount from the maker and also from adjusting the note in any way. He cannot transfer any better title to the second defendant.

The endorsement is invalid for the purpose of making the second defendant a holder in due course and I do not think that it can then be treated as being sufficient to make the second defendant a holder, for it is an invalid endorsement.

Apart from that endorsement the second defendant is not entitled in his own name to the possession of the note nor to receive or to recover the amount due thereon. If he is neither the holder nor the holder in due course, within the meaning of the Act it follows that he has no

right to recover the amount of the note from the first defendant.

On the other hand the plaintiff is entitled to recover the amount from the first defendant as garnishee and therefore these appeals must be allowed and the plaintiff's suit decreed with costs throughout and the second defendant's suit similarly dismissed. The first defendant is in no way liable for these proceedings and his costs in each case must be paid by the unsuccessful party.

DEVADOSS, J.—I agree.

N.R.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, and Mr. Justice Wallace.

TRIPURAMBA AND ANOTHER (DEFENDANTS), APPELLANTS, 1922, December 20.

v.

VENKATARATNAM AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Hindu Law—Adoption—Hindu dying leaving a widow and a son—Death of son unmarried at 25—Power of mother to adopt with sapindas' consent.

A Hindu died leaving a widow and a son who died unmarried at the age of 25,

Held that the attainment of age by the son before his death did not put an end to the power of his mother to adopt a son to her husband with the consent of the sapindas: *Venkappa Bapu* v. *Jivaji Krishna* (1901) I.L.R., 25 Bom., 306 and *Sangappa* v. *Vyasappa* (1896) 8 P.J. of Bom. H.C., p. 684, followed. Dictum in *Madana Mohana Deo* v. *Purushotthama Deo* (1918) I.L.R., 41 Mad., 855 at 860 (P.C.), held *obiter*

* Second Appeal No. 1568 of 1920.

dicta in *Venkataramier* v. *Gopalan* (1918) 35 M.L.J., 698, and of WALLIS, C.J., in *Ananga Bhima Deo* v. *Kunja Behari Deo* (1919) 25 M.L.T., 204, disapproved.

SECOND APPEAL against the decree of F. A. COLERIDGE, District Judge of Guntur, in Appeal Suit No. 481 of 1916 preferred against the decree of S. VENKATASUBBA RAO, Additional Temporary Subordinate Judge of Guntur, in Original Suit No. 11 of 1916.

The following facts are taken from the judgment of the lower Appellate Court:

"Plaintiff as nearest reversioner of one Subbanna Sastri sued for a declaration that the adoption of second defendant by the first defendant, mother of Subbanna Sastri, is not valid and that he has no right to the properties inherited by first defend ant (from her deceased son).

The first defendant after the death of her son Subbanna Sastri applied to the various reversioners to be allowed to adopt and it is alleged that all refused except two, Subbayya and Venkata Krishnayya by Exhibit III and Exhibit VII. Venkata Krishnayya has been adopted into another family and so his authority would be useless, but the authority given by Subbayya is a registered document and is valid so far as he has power to give authority. This raises the question whether an adoption can take place after a son has died who had attained full legal capacity to continue the line either by the birth of a natural born son or by the adoption to him of a son. It is in evidence that Subbanna Sastri lived to the age of 25 or 26 years and performed the ceremonies of his father."

On these facts the Court of first instance held the adoption to be valid and dismissed the suit. On appeal the District Judge following *Madana Mohana Deo* v. *Purushothama Deo*(1), and *Venkataramier* v. *Gopalan*(2), held the adoption to be invalid and allowed the

(1) (1918) I.L.R., 41 Mad., 855 (P.C.). (2) (1918) 35 M.L.J., 698.

suit. Thereupon the defendants preferred this Second Appeal.

P. Narayanamurthi for appellants.—The object of an adoption is that there must be some one to continue the line of the deceased. Unless and until there is such a person the power of the widow of the last male owner does not come to an end. As in this case the son died unmarried, his mother had power to adopt though he died at the age of 25, i.e., after attaining full age. Reference was made to *Madana Mohana Deo* v. *Purushothama Deo*(1), *Ramkrishna* v. *Shamrao*(2), Mayne's Hindu Law, 8th Edition, paragraphs 115 and 116, *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*(3), *Venkappa Bapu* v. *Jivaji Krishna*(4), *Sangappa* v. *Vyasappa*(5), *Ram Soondur Singh* v. *Surbanee Dossee*(6), *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*(7), *Thayammal* v. *Venkatarama*(8), *Padmakumari Debi Chowdhrani* v. *Court of Wards*(9), *Madana Mohana* v. *Purushothama*(10), *Verabhai Ajubhai* v. *Bai Hiraba*(11), *Ananga Bhima Deo* v. *Kunja Bihari Deo*(12).

WALLIS, C.J., has in the last of the abovementioned cases wrongly understood the *obiter dictum* on page 860 of *Madana Mohana Deo* v. *Purushothama Deo*(1).

P. Somasundaram for respondents.—A widow's power to adopt comes to an end after the husband's estate vests in another. It cannot be exercised if her son dies leaving a widow or dies unmarried after attaining full age. Reliance was placed on *Mussumat Bhoobun*

(1) (1918) I.L.R., 41 Mad., 855 (P.C.).
(2) (1902) I.L.R., 26 Bom., 526 at 530 and 531.
(3) (1865) 10 M.I.A., 279.
(4) (1901) I.L.R., 25 Bom., 306.
(5) (1896) 8 P.J. of Bom. H C., 684.
(6) (1874) 22 W.R., 121 (C.R.).
(7) (1876) I.L.R., 1 Mad., 174 (P.C.).
(8) (1887) I.L.R., 10 Mad., 205 (P.C.).
(9) (1882) I.L.R., 8 Calc., 302 (P.C.).
(10) (1915) I.L.R., 38 Mad., 1105, 1113.
(11) (1903) I.L.R., 27 Bom., 492 at 499 (P.C.).
(12) (1919) 25 M.L.T., 204, 217 and 219.

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Moyee Debia v. *Ram Kishore Acharj Chowdhry*(1), *Tarachurn Chatterji* v. *Sureshchunder Mukerji*(2), *Madana Mohana Deo* v. *Purushothama Deo*(3), Mayne's Hindu Law, paragraph 111 and *Venkataramier* v. *Gopalan*(4). There is greater laxity in Bombay in this matter. Such previous decisions as go against the latest Privy Council decisions in this matter are wrong.

JUDGMENT.

SCHWABE, C.J.

SCHWABE, C.J.—The facts of this case are, one Venkata Somayajulu died leaving a widow and a son, Subbanna Sastri. The son died 26 years ago unmarried at the age of 25. In 1913, the widow adopted the second defendant with the consent of the sapindas as the son of her late husband The question to be decided is whether this adoption is good or bad.

That a Hindu widow can adopt a son in order to carry on the line and provide for the due performance of the obsequies of her husband, either with the authority of the husband or with the consent of the husband's sapindas, is well established in this Presidency. It is also well established that this power of adoption can be exercised on the death of a son or adopted son, as often as occasion arises; but it is also established that there is some limit to the exercise of this power and that it can become exhausted. It is argued in this case that the limit is reached as soon as a son, natural or adopted, either marries, or attains an age which is put alternatively as that of attaining majority, that is 18, or that of attaining full legal capacity to himself adopt a son, which was held in *Tarachurn Chatterji* v. *Sureshchunder Mukerji*(2), to be sixteen. No direct authority for this proposition can be found in any of the Indian Reports,

(1) (1865) 10 M.I.A., 279 at 310 and 311.
(2) (1890) I.L.R., 17 Calc., 122 at 127 (P.C.).
(3) (1918) I.L.R., 41 Mad., 855 (P.C.).
(4) (1918) 35 M.L.J., 698, 705 and 706.

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but it is based on a dictum of the Privy Council in *Madana Mohana Deo* v. *Purushothama Deo*(1), which I will deal with more fully hereafter. The limit to the authority to adopt is stated in the judgment of the Privy Council in *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*(2), which judgment was explained and the principle re-affirmed in *Pudmakumari Debi Chowdhrani* v. *Court of Wards*(3), and *Thayammal* v. *Venkatarama* (4). The principle to be deduced from these three cases is stated in the judgment of CHANDAVARKAR, J., in the Full Bench case of *Ramakrishna* v. *Shamrao*(5), thus:

> "where a Hindu dies leaving a widow and a son, and that son himself dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived."

This principle so laid down has the approval of the Privy Council in *Madana Mohana Deo* v. *Purushothama Deo*(1). No subsequent adoption will be allowed, which will divest a right vested by inheritance in some person other than the son or the mother herself as representing the son; so if a son dies leaving either a son or a widow, the mother can no longer adopt as the estate is vested in the son's son or if there be no son, in his widow, she having a right to adopt a son to her husband. There is direct authority that the limit is not reached when the son dies though of age without leaving a son or widow in *Venkappa Bapu* v. *Jivaji Krishna*(6), where a son had attained the age of 30 before his death and had married but left no widow and in *Sangappa* v. *Vyasappa*(7), where he attained the age of 30 and died

(1) (1918) I.L.R., 41 Mad, 855 (P.C.).
(2) (1865) 10 M.I.A., 279 at 310 and 311.
(3) (1882) I L.R., 8 Calc., 302 (P.C.).
(4) 1887) I.L.R., 10 Mad., 205 (P.C.).
(5) (1902) I.L.R., 26 Bom., 526 at p. 531.
(6) (1901) I.L.R., 25 Bom., 306. (7) (1896) 8 P.J. of Bom. H.C., 684.

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unmarried. This very point was also mentioned in *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*(1), in the judgment of Lord KINGSDOWN, where he stated:

"If Bhowanee Kishore (that is, the son) had died unmarried, his mother would have been his heir and the question of adoption would have stood on quite different grounds. By exercising the power of adoption she would have divested no estate but her own, and this would have brought the case within the ordinary rule."

The ordinary rule referred to there is, as I understand it, the rule subsequently so clearly stated in the judgment of CHANDAVARKAR, J. This statement was obiter but that is a clear indication of the then view of the Privy Council.

Turning now to *Madana Mohana Deo* v. *Purushothama Deo*(2), in that case a widow adopted a son who died leaving a widow, and it was held following the cases quoted above that the right of adoption by the first widow had been exhausted. But after approving the principle laid down in the judgment in *Ramkrishna* v. *Shamrao*(3), their Lordships stated that they were of opinion that

"the principle must be taken as applying so as to have brought the authority to adopt conferred on the first widow to an end when the son whom she had originally adopted died after attaining full legal capacity to continue the line either by the birth of a natural born son or by the adoption to him of a son by his own widow."

It is to be observed that it does not say, "after himself attaining full age or the right to adopt a son." Their Lordships however went on to say that

"they do not desire to be understood to say that, even in the absence of authority in the son's widow to adopt, the

(1) (1865) 10 M.I.A., 279 at 311.
(2) (1918) I.L.R., 41 Mad., 855 (P.C.). (3) (1902) I.L.R., 26 Bom., 526.

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succession of the son and his dying after attaining full legal capacity to continue the line would not in themselves have been sufficient to bring the limiting principle into operation and so to have determined the authority of the first widow, who was not the widow of the last owner, and could not adopt a son to him."

I understand this to mean that their Lordships wish it to be understood that they do not give any decision on the point, which is the point in this case, and perhaps indicate that the inclination of their minds was against the contention that such adoption was permissible. But the point was not before the Council and did not arise in that case, and it would be most dangerous to treat a dictum of that kind as an authority.

When a point directly arises for decision it is the duty of the Court to consider the point for itself, giving of course due weight to any words which fell, although *obiter*, from their Lordships. I can find no authority in any decided case and the respondents have been unable to call our attention to any authority from the usual sources for ascertaining Hindu law, in support of the proposition. If there is any such limit, it is not in my judgment, open to us to find it on the material before us. It is to be observed that in *Verabhai Ajubhai* v. *Bai Hiraba*(1), Lord LINDLEY, in delivering the judgment of the Privy Council remarked referring to this point that no authority had been produced before the Privy Council in support of it. I wish to refer to two cases which give some appearance of support to the suggestion of the existence of this limit, viz., *Ananga Bhima Deo* v. *Kunja Bihari Deo*(2), the head note of which runs as follows:

"The power of a widow to adopt is not limited in point of time by the fact that a line of her husband's heirs have in succession come into possession of the estate. The limit to such

(1) (1903) I.L.R., 27 Bom., 492 (P.C.). (2) (1919) 25 M.L.T., 204.

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power is when the husband's adopted son attains full age and so full capacity to continue the line by naturally born sons or by adoption."

That head note is, in my judgment, incorrect, for the case does not decide anything of the kind. It is true that WALLIS, C.J., in his judgment states that the Privy Council in *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*(1), so decided: but that observation does not appear to be borne out by a study of the judgment of the Privy Council in the case. It was unnecessary for the decision of the case in *Ananga Bhima Deo* v. *Kunja Bihari Deo*(2), and must be treated as *obiter*. In *Venkataramier* v. *Gopalan*(3), the decision in which case appears to be right, both the Judges explained what they understood to have been decided by the Privy Council in *Madana Mohana Deo* v. *Purushotthama Deo*(4). They took the dictum which I have discussed above and read it as though it were a judgment. I do not agree with the observations of either Judge on the true meaning to be attached to the judgment of the Privy Council in that case.

The District Judge in this case took the interpretation put up on the words in *Madana Mohana Deo* v. *Purushothama Deo*(4), by this Court in *Venkataramier* v. *Gopalan*(3), and therefore held that this adoption is bad. For the reasons stated above I think his conclusion is wrong.

The appeal will be adjourned a fortnight for further consideration and for enquiries to be made as to what took place in the Court below, so that we can decide whether to enter judgment or to send the case back to the District Judge. The respondents must pay the costs throughout.

(1) (1865) 10 M.I.A., 279. (2) (1919) 25 M.L.T., 204.
(3) (1918) 35 M.L.J., 698. (4) (1918) I.L.R., 41 Mad., 855 (P.C.).

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WALLACE, J.

WALLACE, J.—The respondent relies, as the District Judge has relied, on the phraseology in certain passages in the Privy Council judgment in *Madana Mohana Deo* v. *Purushothama Deo*(1), and on the interpretation of those passages by a Bench of this Court in *Venkataramier* v. *Gopalan*(2).

2. The first passage is that the mother's authority to adopt must have come to an end when the son she originally adopted died, after attaining full legal capacity to continue the line either by the birth of a natural born son (as distinguished from an adopted son) or by the adoption to him of a son by his own widow. The events which put an end to the mother's power to adopt to her husband in that view are either that her son or adopted son should have a legitimate son or should leave a widow, that is, the essential prerequisite is not the attainment of his majority or even his succession to the estate, but that he has or has had a wife with the result that he leaves either a son to her or that she survives him as his widow. The common result in either event is that the deceased son's estate is on his death vested not in his mother but in his son or widow. Therefore their Lordships, I consider, are not propounding any new principle but are taking their stand on the old principle enunciated by the Privy Council in *Atchama* v. *Ramanadha*(3), and *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*(4), namely, that when the estate is vested in some heir succeeding to, but directly from the deceased son, his mother will not be allowed to adopt to her husband so as to divest that heir.

3. The second passage in their Lordship's judgment relied on does not seem to me to carry the case any further. It is to the effect,

(1) (1918) I.L.R., 41 Mad., 855 (P.C.). (2) (1918) 35 M.L.J., 698.
(3) (1846) 4 M.I.A., 1. (4) (1865) 10 M.I.A., 279.

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"that their Lordships do not desire to be understood as saying that even in the absence of any power in the son's widow to adopt, the succession of Brozo Kishore (that is the son) and his dying after attaining full legal capacity to continue the line would not in themselves have been sufficient to bring the limiting principle into operation, and so to have determined the authority of Adikonda's widow, who was not the widow of the last male owner, and could not adopt a son to him."

Here again the phrase "succession to Brozo Kishore" does not to my mind mean anything more than that he has come into the estate. Had it meant attainment of his majority, that simpler phrase would have been used. I note further that succession in itself is not sufficient to have determined the authority of Adikonda's widow, but that it must be coupled with the capacity to continue the line as previously explained, that is, coupled with a legal marriage. It is only from such a marriage that there will emerge a heir to continue the line in legitimate descent and, therefore, until such marriage, the full legal capacity to continue the line is not consummated. That marriage itself is not the whole test, but such a marriage as leaves a heir, a son or a widow, to the deceased, has been laid down in *Venkappa Bapu* v. *Jivaji Krishna*(1).

4. That I think is the meaning of *Madana Mohana Deo* v. *Purushothama Deo*(2) in which their Lordships were dealing with a case where the adoption pleaded before them would have divested the adopted son's widow of the estate, it not having been shown that the son's widow herself had no power to adopt to her husband, and the Board purported to follow and were in full agreement with the decision in *Ramakrishna* v. *Shamrao*(3) based on *Mussamat Bhoobun Moyee Debia*

(1) (1901) 25 Bom., 306. (2) (1918) I.L.R., 41 Mad., 855 (P.C.).
(3) (1902) I.L.R., 26 Bom., 526.

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v. *Ram Kishore Achraj Chowdhry*(1), *Padmakumari Debi Chowdhrani* v. *Court of Wards*(2) and *Thayammal* v. *Venkatarama*(3) and held that the principle laid down in this case determined that case also. I find nothing in *Madana Mohana Deo* v. *Purushothama Deo*(4) on which to find a principle that the mere attainment of majority by the son or the adopted son divested his mother of the power to adopt to her husband in the event of that son's death without heir. Under the Hindu Law a minor can marry, beget legitimate sons and his widow can adopt to him; so that even a minor may fulfil the tests laid down in *Madana Mohana Deo* v. *Purushothama Deo*(4) though he has not yet come into full disposing possession of his estate.

5. There is therefore nothing in that case to support the District Judge's interpretation of it as meaning that the full legal capacity to continue the line is equivalent to attaining majority, in a case where the son has attained age but dies unmarried. In this matter there appears to be no virtue in law in the attainment of majority and hence, when that is the only bar pleaded, there seems no reason for distinguishing between a mother's power to adopt to her husband when the minor son or adopted son has died, from the power to adopt to him when the major son or adopted son has died leaving no heir to himself who will be ousted from the estate by such adoption. [See again *Venkappa Bapu* v. *Jivaji Krishna*(5).]

6. Hence the mere attainment of majority introduces into the problem no new factor on which the respondent can rely for its solution. The purpose of adoption is to perpetuate the line, and if the only son dies

(1) (1865) 10 M.I.A., 279. (2) (1882) I.L.R., 8 Calc., 302 (P.C.).
(3) (1887) I.L.R., 10 Mad., 205 (P.C.). (4) (1918) I.L.R., 41 Mad., 855 (P.C.).
(5) (1901) I.L.R., 25 Bom., 306.

without leaving any one to perpetuate the line, there seems no good reason for restricting the power of his mother to perpetuate it in the only way she can by adopting a son to her own husband. No direct authority to the contrary has been produced by the respondent while there is much authority in its favour.

7. I therefore agree with the view of the learned Chief Justice.

This second appeal having been posted for further consideration the Court delivered the following

JUDGMENT.—This matter coming up for further consideration, we think that judgment should be entered for the defendants in the suit.

The question was raised before the Subordinate Judge as to whether the sapindas have in fact consented to the adoption or whether they or some of them must be taken to have consented. The Subordinate Judge decided that issue in favour of the defendants and the question formed part of the grounds of appeal before the District Judge. The District Judge's notes show that it was argued before him that these sapindas had no power to authorize the adoption. It also appears from his notes that the question covered by the first issue, namely, whether the relations or persons who were described as remoter reversioners could authorize adoption, was argued before him, for we find his notes on issue I, contain reference to the question whether the reversioners were invited and reference to the defendant's witnesses 1, 3 and 4 and a suggestion that the witnesses 4 and 5 were interested witnesses. I can see no reason why this matter has been gone into at all before him unless it was on the question whether or not the sapindas had duly authorized this adoption. Further I find in the judgment itself of the District Judge (paragraph 2) a passage in which he discusses whether the

consent of two of these reversioners was in fact given, and in answer he finds that in respect of one of them, as he had been adopted himself into another family his consent was unnecessary, and as to the other one, after examining the exhibits, he finds that he had power to give authority to adopt. This is enough in my judgment to show that the learned judge did dispose of the question of fact before him, and of course, on that question of fact, no second appeal lies.

I therefore think that the whole matter has been disposed of and Judgment must be entered for the defendants. The respondents must pay the costs throughout.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Devadoss.

1922, December 9.

DRONAMRAJU RAMA RAO AND 3 OTHERS (DEFENDANTS NOS. 1, 2, 4 AND 11), APPELLANTS,

v.

VISSAPRAGADA VEDAYYA AND 6 OTHERS (PLAINTIFF AND DEFENDANTS NOS. 5 TO 10), RESPONDENTS.*

Registration—Mortgage deed fraudulently registered in wrong district by including land not intended to be mortgaged—Registration invalid to affect lands, but good as regards personal covenant.

Where land not intended to be mortgaged was included in a mortgage deed merely to get registration of the deed before a particular registering officer who would otherwise be incompetent to register it.

Held, (1) that the registration of the deed was a fraud on the Registration Law and did not affect the immoveable properties

* Second Appeal No. 2078 of 1920.

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comprised in the deed, (2) but that the registration was good as regards the personal covenant to repay the mortgage money, and enabled the mortgagee to sue for it within six years as provided by article 116 of the Limitation Act. *Harendra Lal Roy Chowdhuri* v. *Haridasi Debi*, (1914) I.L.R., 41 Calc., 972 (P.C.), and *Biswanath Prasad* v. *Chandra Narayan Chowdhury*, (1921) I.L.R., 48 Calc., 509 (P.C.), and *Joginee Mohun Chatterjee* v. *Bhoot Nath Ghosal*, (1902) I.L.R., 29 Calc., 654 followed.

SECOND APPEAL against the decree of A. VENKATARAMAYYA, Subordinate Judge of Rajahmundry, in Appeal Suit No. 89 of 1919 preferred against the decree of D. CHIDAMBARA Rao, District Munsif of Amalāpuram, in O. S. No. 239 of 1913.

The facts are given in the judgment of DEVADOSS, J.

P. Narayanamurti (with *K. Ramamurti*) for appellants.—The finding that registration was procured by fraud makes the registration void and of no effect. It cannot be bad for one purpose and good for another. Hence the deed is good only as an unregistered money bond. The suit being filed more than three years after the date of the bond is barred by limitation: *Harendra Lal Roy Chowdhuri* v. *Haridasi Debi*(1), *Biswanath Prasad* v. *Chandra Narayan Chowdhury*(2), *Amba* alias *Padmavathi* v. *Shrinivasa Kamathi*(3), *Ram Narayan Singh* v. *Adhindra Nath Mukherji*(4), *Sham Lal* v. *Tehariya Lakhmi Chand*(5) and *Kalka* v. *Mathura Das*(6).

G. Lakshmanna (with *P. Somasundaram*) for respondents.—As registration was procured only with a view to give effect to the mortgage, the mortgage alone can be affected. The deed is composed of two separable parts, (*a*) creation of a mortgage security and (*b*) a personal covenant. A personal covenant can be

(1) (1914) I.L.R., 41 Calc., 972 (P.C.).
(2) (1921) I.L.R., 48 Calc., 509 (P.C.).
(3) (1921) 26 C.W.N., 369 (P.C.). (4) (1917) I.L.R., 44 Calc., 388 (P.C.).
(5) (1920) 18 All. L.J., 476. (6) (1919) 50 I.C., 220.

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registered by the parties in any Sub-Registry office: see section 29 of the Registration Act. Hence registration is good so far as the personal covenant is concerned and the creditor can sue within six years: *Joginee Mohun Chatterjee* v. *Bhoot Nath Ghosal*(1). It is on this view alone that the remand in *Biswanath Prasad* v. *Chandra Narayan Chowdhury*(2), can be understood: see the facts and arguments of this case in *Mathura Prasad* v. *Chandra Narayan Chowdhury*(3), and see also *Ram Narayan Singh* v. *Adhindra Nath Mukherji*(4).

JUDGMENT.

PHILLIPS, J.

PHILLIPS, J.—In this suit it has been found that one square yard of house-site was included in the mortgage deed merely to give jurisdiction to the Peddapur Sub-Registrar, who registered the document, whereas the property really intended to be mortgaged was situated in Amalapur. Following the decisions in *Harendra Lal Roy Chowdhuri* v. *Haridasi Debi*(5) and in *Biswanath Prasad* v. *Chandra Narayan Chowdhury*(2) it has been held that the mortgage deed is invalid as being "in fraud of the Registration Law." The learned Subordinate Judge has however found that the personal covenant to repay is not invalid and has given a decree for that part of the claim that is not barred by limitation, holding that article 116 of the Limitation Act is applicable in accordance with the ruling of AMIR ALI, J., in *Joginee Mohun Chatterjee* v. *Bhoot Nath Ghosal*(1). In appeal it is contended that that ruling is wrong, and that as the registration of the mortgage-deed is invalid, the document as a whole must be treated as unregistered, and consequently the convenant to repay must also be treated as an unregistered covenant.

(1) (1902) I.L.R., 29 Calc., 654. (2) (1921) I.L.R., 48 Calc., 509 (P.C.).
(3) (1921) 25 C.W.N., 985 (P.C.). (4) (1917) I.L.R., 44 Calc., 388.
(5) (1914) I.L.R., 41 Calc., 972 (P.C.).

What was held by the Privy Council in *Harendra Lal Roy Chowdhuri* v. *Haridasi Debi*(1) and upheld in *Biswanath Prasad* v. *Chandra Narayan Chowdhury*(2) was that

> "an entry intentionally made use of by the parties for the purpose of obtaining registration in a district where no part of the property actually charged and intended to be charged in fact exists is a fraud on the Registration Law and no registration obtained by means thereof is valid."

The principle which I take to underlie this decision is that no person shall be allowed to take advantage of his own fraud. If that principle be applied to the present case, the object attained by the fraud was the registration of the mortgage-deed as such, for had the document been merely a covenant to repay, the Peddapur Sub-Registrar would have had jurisdiction under section 29 of the Registration Act (Act XVI of 1908); for under that section parties are at liberty to choose their own place of registration. In so far then as the document evidenced a mere covenant to repay there was no fraud upon the Registration Law, and to hold that such registration was invalid would be to extend the principle above mentioned so as to deprive a party of a right which he had not obtained by fraud as well as of the advantage gained by his fraud. To do this appears to me to extend the principle to inequitable length and I am supported in this view not only by the direct ruling of AMIR ALI, J., in *Joginee Mohun Chatterjee* v. *Bhoot Nath Ghosal*(3), but also by the action of the Privy Council in the case reported in *Biswanath Prasad* v. *Chandra Narayan Chowdhury*(2); for that case was remitted to the Calcutta High Court for a decision as to whether the plaintiff had a valid alternative claim for a personal

(1) (1914) I.L.R., 41 Calc., 972 (P.C.).
(2) (1921) I.L.R., 48 Calc., 509 (P.C.). (3) (1902) I.L.R., 29 Calc., 654.

judgment for the mortgage debt. No doubt there was no finding that the claim for a personal decree was based upon a contract in writing registered but it would appear from a perusal of the argument in the case reported in *Mathura Prasad* v. *Chandra Narayan Chowdhury*(1), that a period of limitation of six years was contemplated, the argument being that a payment of interest in 1903 would save limitation for the suit brought in 1908. Unless it was the opinion of the Court that the debt was secured by a registered instrument, the argument would have been of no avail, for such a payment was not within three years of institution of the suit, and as the suit would have been barred if based upon the personal covenant. Had that been the case it appears to me improbable that the case would have been remitted for a consideration of the claim. I am therefore of opinion that the decision in *Joginee Mohun Chatterjee* v. *Bhoot Nath Ghosal*(2) is right and that the registration of the personal covenant to repay is not procured by fraud and is consequently valid. The other cases cited viz. *Amba* alias *Padmavathi* v. *Shrinivasa Kamathi*(3) and *Ram Narayan Singh* v. *Adhindra Nath Mukherji*(4), do not appear to have any bearing on the present case and the facts reported in *Sham Lal* v. *Tehariya Lakhmi Chand*(5) are too vague to give that case any value here.

The Second Appeal is accordingly dismissed with costs.

The memorandum of objections must also be dismissed with costs as the lower Court exercised its discretion in awarding a personal remedy and was entitled in so doing to reduce the rate of interest contracted for in the mortgage-deed.

(1) (1921) 25 C.W.N., 985 (P.C.). (2) (1902) I.L.R., 29 Calc., 654.
(3) (1921) 26 C.W.N., 369 (P.C.). (4) (1917) I.L.R., 44 Calc., 388 (P.C.).
(5) (1920). 18 All. L.J., 476.

RAMA RAO v. VEDAYYA. DEVADOSS, J.

DEVADOSS, J.—The plaintiff brought the suit as transferee of an hypothecation bond executed by the first defendant in favour of one Seshayya, impleading defendants Nos. 2 to 4, the sons of the first defendant, defendants Nos. 5 to 7, the undivided sons of Seshayya, and the alienees of some portions of the hypotheca. Various contentions were raised by the defendants. The District Munsif of Amalāpuram dismissed the suit on the ground that the registration of the document was invalid as a parcel of land not belonging to the defendants Nos. 1 to 4 was included in the document only for the purpose of giving jurisdiction to the Sub-Registrar who registered the document and that the claim was barred by limitation. On appeal the Subordinate Judge of Rajahmundry held that the document was invalid as a mortgage-deed and that the suit was not barred by limitation and gave a money decree to the plaintiff. The defendants Nos. 1, 2, 4 and 11 have preferred the Second Appeal.

It is contended by Mr. Narayanamurti for the appellants that the registration of the document was in fraud of the registration law and that the document cannot be treated as a registered document for any purpose and therefore article 116 of the Limitation Act did not apply to the case, and he relied upon *Harendra Lal Roy Chowdhuri* v. *Haridasi Debi*(1), *Biswanath Prasad* v. *Chandra Narayan Chowdhury*(2), *Amba* alias *Padmavathi* v. *Shrinivasa Kamathi*(3) and *Kalka* v. *Mathura Das*(4). In *Harendra Lal Roy Chowdhuri* v. *Haridasi Debi*(1), the plaintiff brought the suit upon a mortgage-deed registered in Calcutta. The defendant contended among other things that the deed had not been legally registered because no portion of the property mortgaged was situate in Calcutta. It was found that

(1) (1914) I.L.R., 41 Calc., 972 (P.C.). (2) (1921) I.L.R., 48 Calc., 509 (P.C.).
(3) (1921) 26 C.W.N., 369 (P.C.). (4) (1919) 50 I.C., 220.

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the only portion of the property alleged to be in Calcutta was described as "25, Guru Das Street." But the property so described was found to be non-existent. Their Lordships of the Privy Council held

"that this parcel is in fact a fictitious entry and represents no property that the mortgagor possessed or intended to mortgage, or that the mortgagee intended to form part of his security. Such an entry intentionally made use of by the parties for the purpose of obtaining registration in a district where no part of the property actually charged and intended to be charged in fact exists, is a fraud on the Registration Law, and no registration obtained by means thereof is valid. To hold otherwise would amount to saying that mortgages relating solely to land in other parts of the Presidency could be validly registered by the Sub-Registrar at Calcutta if the parties merely took the precaution to add as a last parcel, Government House, Calcutta, or any similar item."

In *Biswanath Prasad* v. *Chandra Narayan Chowdhury*(1), a mortgage bond for Rs. 8,000 which purported to mortgage a seven-anna share in a village in the Dharbanga district and a one kauri share in the Muzhaffarpur district was registered only in the Muzhaffarpur district. The mortgagor had purchased the one kauri share shortly before the execution of the mortgage in order that he might register in Muzhaffarpur. He paid Rs. 50 for the one kauri share, but there was no registered instrument or delivery of possession as required by section 54 of the Transfer of Property Act, 1882. Their Lordships found that none of the parties intended that the one kauri share should vest in the mortgagor or pass under the mortgage. Viscount FINLAY in delivering the judgment of their Lordships observed:

"In coming to the conclusion that this appeal must be dismissed, their Lordships' judgment rests on the view that none

(1) (1921) I.L.R., 48 Calc., 509 (P.C.).

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of the parties ever intended that the one kauri share in Mauza Kolha should vest in Udit (Narayan) or should pass by the mortgage from him to the mortgagee. This case differs *toto cælo* from the case suggested in argument of a mere failure to make a good title to property dealt with by the instrument and which both parties had intended should form part of the security."

With regard to the contention that a personal decree should be passed in favour of the plaintiff, the noble Viscount observed:

"As regards the alternative claim for a personal judgment for the mortgage debt, it is to be observed that no such claim was made in the Courts in India. There is nothing in the evidence or in the judgments which would enable their Lordships to deal with such a claim. At the same time their Lordships think it desirable in this case that the plaintiffs should have an opportunity of bringing this matter before the High Court. If any such application is made, it will be for the High Court to consider whether any such claim is open upon the present pleadings and, if not, whether any amendment raising it should be made and further whether under all the circumstances the claim should be entertained at this stage of the proceedings. If the High Court should think it right to enter upon the consideration of this claim, all defences on the merits or arising out of the lapse of time must be open to the defendants, and the High Court should have power to impose any terms which it thinks just and to deal with the costs. The appeal so far as it relates to the enforcement of the mortgage on the land must in their Lordships' opinion be dismissed."

In that case the mortgage bond was dated 27th February 1902 the amount of the bond was payable on 7th September 1902. The suit was instituted on 14th September 1908. It may be safely assumed that the plaintiff could not have expected to get a personal decree against the mortgagor unless article 116 was held applicable to the case. No doubt the respondents were not represented before the Privy Council. But it is quite clear from the order of their Lordships remanding the

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case to the High Court to enable the plaintiff to amend his plaint and claim a personal decree that they thought that the personal remedy was not barred. Though their Lordships did not say so in so many words in their judgment, it is quite apparent what their view was from the observation of their Lordships in the course of the argument.

With reference to the contention of the appellant's counsel that "in any case there is no reason why we should not have a personal decree for money", Sir JOHN EDGE observed "if this was merely a suit to recover money would not limitation have run?" and counsel for the appellant answered "no, payment of interest saves it." Then Lord SHAW said: "Last payment of interest was in 1903."

The contention that the registration which is ineffectual to validate a document required by law to be registered cannot avail for any other purpose seems untenable.

Under section 17 of the Registration Act certain classes of documents—

(1) gifts of immoveable property;

(2) non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish any title or interest in immoveable property of Rs. 100 and upwards in value.

(3) Non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right or interest.

(4) Leases of immoveable property from year to year, or for any term exceeding one year or reserving a yearly rent—

are required to be registered in order to be valid and if they are not registered, under section 49 of

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the Act, they cannot affect the immoveable property comprised therein or shall be received as evidence of any transaction affecting such property. Other documents are registrable at the option of the parties. Under section 28 of the Act the class of documents mentioned in section 17, sub-section (1), clauses (*a*), (*b*), (*c*) and (*d*), and section 18, clauses (*a*), (*b*) and (*c*), shall be presented for registration in the office of a Sub-Registrar within whose sub-district the whole or some portion of the property to which such document relates is situate. By section 29 every document other than those referred to in section 28 may be presented for registration either in the office of the Sub-Registrar in whose sub-district the document is executed, or in the office of any other Sub-Registrar at which all the parties desire the same to be registered. There is nothing in the Registration Act therefore to prevent the registration of a simple money bond in the office of any Sub-Registrar at which the parties desire to have the document registered.

A simple mortgage usually contains a personal covenant to pay. In fact in almost all the mortgage transactions in this Presidency there is a personal covenant by the mortgagor to repay the mortgage amount personally. The portion of the document in which there is a transfer of specific immoveable property as security for money is severable from the portion in which the mortgagor undertakes to repay personally the money advanced or to be advanced to him. Where a document consists of two or more parts, or where there are two or more covenants in a document, the mere fact that one part becomes inoperative or invalid by reason of non-compliance with or violation of the provisions of the Registration Act need not necessarily make the other parts of the document invalid or inoperative. Though that portion of the document which by law is

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required to be registered would be invalid unless registered in accordance with the rules governing registration of documents, yet the portion of the document optionally registrable would be valid as the parties have consented to present it in the office of the Sub-Registrar by whom it is registered. It is clear from the observation at page 517 in *Biswanath Prasad* v. *Chandra Narayan Chowdhury*(1):

> "the appeal so far as it relates to the enforcement of the mortgage on the land, must, in their Lordships opinion, be dismissed"

that their Lordships did consider the document to be a valid one so far as the claim for a money decree was concerned.

Amba alias *Padmavathi* v. *Srinivasa Kamath*(2) has no application to this case. Their Lordships observe.

> "It was not and is not disputed that those two deeds cannot be given in evidence or enforced if they have not been duly registered. Their Lordships are clearly of opinion that as the appellant was not only a minor but a married woman, her father had ceased to be her natural guardian and had never been appointed her legal guardian and was not therefore her assignee or representative within the meaning of section 3 of the Registration Act, 1877. He was not an executant of the said deeds or either of them. Neither was he within the meaning of section 34 of that Act the representative, assignee or agent duly authorized on behalf of Krishna Kamathi deceased, the only executant. The presentation by him of the two deeds for registration was in direct conflict with the express provisions of the 34th section. The deeds were consequently never legally registered. The registration of them which was procured was illegal, invalid and a nullity, and if that be so, as in their Lordships' opinion, it must be held to be, it is not disputed that the deeds would be void and unenforceable."

In that case there was no valid presentation of the document and not as in the present, all the parties to

(1) (1921) I.L.R., 48 Calc., 509 (P.C.). (2) (1921) 26 C.W.N., 869 (P.C.).

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the document wanted to get round the provisions of the Registration Act by recitals intended to mislead the Sub-Registrar to do what he would not otherwise have done. The registration of a document by false personation would be no registration at all, and the document being a fraudulent document becomes unenforceable against the party sought to be bound by it as he never consented to the registration being effected by a person falsely personating the executant. That class of cases differs from the present where both parties with their eyes open get a document registered with the intention of treating the document as a validly registered document, but for purposes of convenience or other reasons they violate the specific provisions of section 28 which requires that documents of a certain class should be registered by a Sub-Registrar within whose sub-district the whole or any portion of the property comprised in the document is situate. The case in *Kalka* v. *Mathura Das*(1) is of the Judicial Commissioner's Court of Oudh. No doubt the Judicial Commissioner held that when registration is invalid for one purpose it is invalid for all purposes. This view is evidently on the assumption that all the covenants in a document and all the parts of the document form one indivisible whole. A mortgage-deed, as I have said above, contains more than one part and more than one covenant. A mortgagee can give up his security and sue on the personal covenant alone. He may choose to sue for all or any of the remedies in respect of it. To read an ordinary mortgage document as one indivisible whole is opposed to the recitals therein and the intention of the parties to the document.

(1) (1919) 50 I.C., 220.

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Mr. Lakshmanna for the respondent relied upon *Ram Narayan Singh* v. *Adhindra Nath Mukherji*(1). It was a case in which a mortgage document which by law is required to be attested by two or more witnesses was not so attested. Their Lordships of the Privy Council held that the document could not be treated as a mortgage document as it contravened the provisions of law which laid down the essentials for a valid mortgage-deed and the absence of the necessary requisite prevented the document taking effect as a mortgage. But it was treated as a simple money bond. The case which is directly in point is the decision of Mr. Justice AMEER ALI (now a member of the Judicial Committee of the Privy Council) reported in *Joginee Mohun Chatterji* v. *Bhoot Nath Ghosal*(2). The learned Judge observed:

"I am not satisfied that there was any such property as No. 251–2 belonging to the defendant within the jurisdiction of the Sub-Registrar of Sealdah so as to give him under section 23 of the Registration Act jurisdiction to register the document. If I am right in that conclusion, it follows that the document cannot take effect as a mortgage-deed; but as it is registered, although the suit has been brought more than three years after the date of execution, the claim is not barred as was contended for by the defendants' counsel."

This decision was long before the ruling of the Privy Council reported in *Harendra Lal Roy Chowdhuri* v. *Haridasi Debi*(3) which settled the law on this point. Though the learned Judge did not give reasons for holding that the document which was invalid as a mortgage on account of want of jurisdiction of the Sub-Registrar who registered the document was a valid document for purposes of limitation, yet his opinion is entitled to great weight, and it is in consonance with

(1) (1917) I.L.R., 44 Calc., 388 (P.C.). (2) (1902) I.L.R., 29 Calc., 654 at 663.
(3) (1914) I.L.R., 41 Calc., 972 (P.C.).

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reason. The Registration Act does not prohibit the use of a document as a registered one if the provisions of section 28 of the Act are contravened. If a document is otherwise properly registered there can be no objection to the use of it as a registered one. I therefore hold that the plaint document is a registered document so far as the personal covenant contained in it is concerned, and therefore article 116 of the Limitation Act applies to the case. The Subordinate Judge has rightly held that the suit is not barred by limitation. The Second Appeal fails and is dismissed with costs.

The plaintiff did not sue in the first instance on the personal covenant alone. He based his suit on the footing of a valid mortgage and prayed for a mortgage decree. In the circumstances the rate of interest allowed to him by the lower Appellate Court is fair, and there is no reason to interfere with the discretion of the lower Appellate Court.

The memorandum of objections is dismissed with costs.

N R.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Phillips, Mr. Justice Devadoss, Mr. Justice Venkata Subba Rao and Mr. Justice Wallace.

VARISAI ROWTHER AND ANOTHER ACCUSED (PETITIONERS)

v.

KING-EMPEROR.*

1922, November 27 and 28, and December 22.

Criminal Procedure Code (Act V of 1898), ss. 342, 256 and 537—Warrant case—Trial before Magistrate—Examination of the accused generally on the case, when should be made—Examination of prosecution witnesses—Cross-examination and re-examination of such witnesses recalled under section 256—Further questioning of the accused, whether obligatory on Court—Effect of omission of such questioning—Illegality or irregularity—Trial, whether vitiated by omission to put questions.

Held by the Full Bench.—The provision in the latter part of section 342, clause (1) of the Criminal Procedure Code, directing the Court to question the accused generally on the case, is *mandatory* and not merely discretionary, and failure to comply with the terms of the section is an illegality vitiating the trial, and not a mere irregularity which can, in a proper case, be cured under section 537 of the Code.

Held by the Full Bench (VENKATA SUBBA RAO, J., *dissenting*).—In a warrant case, the examination of the accused generally on the case, directed by the latter part of section 342, clause (1), should be made after the prosecution witnesses have been examined, which means, when the prosecution has finished calling evidence; and if the accused had been once so *examined*, it is not obligatory on the Court to question him again after the cross-examination and re-examination of the prosecution witnesses recalled at the instance of the accused under section 256 of the Code.

In re Maruda Muthu Vannian (1922) I.L.R., 45 Mad., 820, overruled.

* Criminal Revision Case No. 384 of 1922.

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If new and material matter is elicited in the cross-examination and re-examination of prosecution witnesses recalled under section 256 of the Code, it is desirable, and, if fresh evidence on material matters in support of the prosecution case were elicited in such re-examination, it is probably obligatory on the Court, to question the accused generally on the case; and, if the prosecution calls fresh evidence after charge is framed, the accused *must* be questioned generally after this further examination of prosecution witnesses.

Per VENKATA SUBBA RAO, J. (*contra*).—The examination of the accused under the latter part of section 342, clause (1), should be made after the entire evidence for the prosecution mentioned in section 256 has been given and before the accused is called upon to enter on his defence.

PETITION under sections 435 and 439 of Act V of 1898, praying the High Court to revise the judgment of GEORGE BATTY, the Subdivisional Magistrate of Rāmnād, in Criminal Appeal Nos. 10 and 15 of 1922 preferred against the order of G. TIRUNAGALINGAM, the Second-class Magistrate of Paramakudi, in Calendar Case No. 163 of 1922.

The accused were convicted by the Sub-Magistrate of Paramakudi of the offence of receiving stolen property under section 411, Indian Penal Code, and the conviction and sentence were affirmed on appeal by the Subdivisional Magistrate. The charge of an offence under section 411, Indian Penal Code, being a warrant case, the trial was held before the Sub-Magistrate as a warrant case. The prosecution examined its witnesses, but the accused, though they had the opportunity to do so, did not cross-examine the witnesses. The accused were then questioned generally on the case for the purpose of enabling them to explain the circumstances appearing against them, and they stated that they would put in a written statement, but did not file any. On the same date (3rd September 1921), the Sub-Magistrate framed a charge under section 411, Indian Penal Code. The

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accused pleaded "not guilty" and the plea was recorded on the same date. On 3rd October 1921 and on the 21st October 1921, the accused recalled the prosecution witnesses, who were cross-examined and re-examined, and on the latter date they entered upon their defence and adduced their evidence. The accused were not questioned generally on the case on the latter date after the cross-examination and re-examination of prosecution witnesses. The accused through their vakil addressed the Court, and were convicted of the offence charged. On appeal by the accused, the conviction and sentence were affirmed by the appellate Magistrate, as already stated. The accused preferred this Criminal Revision Petition to the High Court. The accused contended that the trial was wholly vitiated by the omission of the Sub-Magistrate to question the accused generally on the case after the cross-examination and re-examination of the prosecution witnesses recalled on 21st October 1921, as required by section 342 of the Criminal Procedure Code. This objection was not taken before the lower Courts or even specifically in the grounds of the Criminal Revision Petition before the High Court, and was based on the ruling of the High Court reported in *In re Madura Muthu Vannian*(1). The Criminal Revision Petition came on for hearing before KRISHNAN, J., who referred the case to a Full Bench under the following order:

ORDER OF REFERENCE TO A FULL BENCH.

The point taken here is based on *In re Madura Muthu Vannian*(1). This point is being taken in a good many cases and it is argued that the trial in the lower Courts is vitiated entirely by the omission to question the accused after the taking of the prosecution evidence is completed. I am inclined to think this requires further consideration. The case is referred to a Bench.

(1) (1922) I.L.R., 45 Mad., 820.

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ON THIS REFERENCE

Dr. S. Swaminathan for the petitioners.—The provisions of the latter part of clause (1) of section 342, Criminal Procedure Code, 1898, are mandatory. The Court "*must*" question the accused generally on the case, after the examination of prosecution witnesses is over and before he is called on for his defence. Examination of prosecution witnesses includes their cross-examination and re-examination when they are re-called under section 256, Criminal Procedure Code. In a summons case under Chapter XX of the Code, section 342 (1) has been held to be obligatory; *a fortiori* in a warrant case after charge is framed an examination of the accused is obligatory. Section 342 (1) applies also to sessions trial: Section 289 says that in sessions trials the accused shall be questioned. Section 342 is under the chapter headed "general provisions" and applies to all trials and enquiries. See sections 209, 289, 451 of the Code. Any question put by the Magistrate to the accused before all the prosecution evidence is taken, will not be of the character contemplated by section 342, clause (1), i.e., a question on the case.

The case of *In re Madura Muthu Vannian*(1) is rightly decided. Reference was made to the following cases:—*Futu Santal* v. *Emperor*(2), *In re Nainamalai Konan*(3), *Raja Padaiachi*(4), *Gulam Rasul* v. *King-Emperor*(5), *Emperor* v. *Gulabjan*(6), *Emperor* v. *Fernandez*(7), *Mitarjit Singh* v. *The King Emperor*(8), *Mahomed Hossain* v. *Emperor*(9).

An entire absence of questioning of the accused is clearly evasion of section 342; section 537 of the Code

(1) (1922) I.L.R., 45 Mad., 820.
(2) (1921) 6 P.L.J., 147.
(3) (1921) 14 L.W., 418.
(4) (1890) 2 Weir, 405.
(5) (1921) 6 P.L.J., 174.
(6) (1922) I.L.R., 46 Bom., 441.
(7) (1921) I.L.R., 45 Bom., 672.
(8) (1921) 6 P.L.J., 644.
(9) (1914) I.L.R., 41 Calc., 743.

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does not cure the defective procedure as it is not a mere irregularity but an illegality. See *In re Nainamalai Konan*(1), *Subramania Ayyar* v. *King Emperor*(2), *Emperor* v. *Savalya*(3), *Emperor* v. *Basapa Ningapa*(4), *Raghu Bhumij* v. *Emperor*(5).

In the following cases there was an examination of the accused, but not after cross-examination of prosecution witnesses, and yet the trial was held to be vitiated. *Emperor* v. *Nga Po Mya*(6), *Paltu Singh* v. *Emperor*(7).

The Public Prosecutor (*Mr. Adam*) for the Crown.—There is nothing in section 342 to show that the examination of the accused should be made after cross-examination and re-examination of the prosecution witnesses. The phrase "call on for his defence" is not defined in the Code. Section 256 cannot be reconciled with section 342. The word "after" in section 342, does not mean "immediately after" or "before" mean "immediately before." Judicial interpretation should avoid consequences which are inconvenient and unjust. When there has been an examination of the accused after prosecution witnesses have been examined in chief, section 342, clause (1) is complied with. If accused is examined, the examination must be recorded in an elaborate manner under section 364. It will take considerable time and cause enormous delay in the administration of justice. When a Magistrate examines the accused and frames a charge, the Magistrate need not again examine him under section 342. Reference was made to sections 209, 289, 253 to 257 of the Code.

Dr. Swaminathan in reply.—If the prosecution examines witnesses after accused enters on his defence,

(1) (1921) 14 L.W., 418 (421).
(2) (1902) I.L.R., 25 Mad., 61 (P.C.).
(3) (1907) 9 Bom. L.R., 356.
(4) (1915) 17 Bom. L.R., 892.
(5) (1920) 5 P.L.J., 430.
(6) (1917) 42 I.C., 176.
(7) 20 Cri. L.J., 37; 48 I.C., 677; 3 P.L.J., 641.

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section 342 will not apply, but will apply if they are cross-examined and re-examined under section 256 of the Code.

After arguments were over, the Full Bench passed the following order on the 28th November 1922:—

ORDER.

This petition will be dismissed. We propose now only to say that the Court are of opinion that the recent decision of OLDFIELD and RAMESAM, JJ., in *In re Madura Muthu Vannian*(1) is wrongly decided and cannot be relied on on a future occasion. What our reasons are for that judgment will be stated later on. *In re Madura Muthu Vannian*(1) is wrong and as there are many cases pending it is right that the view of the Court should be stated as soon as possible though there must be some slight delay in formulating our reasons.

This case having been posted on the 22nd December 1922 for formulating the reasons, the Court made the following

ORDER.

SCHWABE, C.J.

SCHWABE, C.J.—This Criminal Revision Petition has been ordered to be referred to a Full Bench by reason of a large number of similar cases pending in which decisions of Magistrates throughout the Presidency would be vitiated if the recent decision of this Court in *In re Madura Muthu Vannian*(1) was correctly decided.

The facts are that the accused were charged by the police in a warrant case for receiving stolen property before the Second-class Magistrate of Paramakudi. The procedure adopted by him was the following:— Witnesses for the prosecution were examined. The accused being given the opportunity to cross-examine the witnesses when their examination was completed did not avail themselves of that opportunity. The

(1) (1922) I.L.R., 45 Mad., 820.

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accused were then questioned generally on the case for the purpose of enabling them to explain the circumstances appearing from the evidence against them, and they stated that they would put in a written statement. The Magistrate then, under section 254 of the Criminal Procedure Code, being of opinion that there was ground for presuming that the accused had committed an offence which was triable as a warrant case and which he was competent to try, framed in writing a charge against the accused under section 411 of the Indian Penal Code. The accused pleaded not guilty and the case was adjourned. At a later date, at their request, and in exercise of their rights under section 256, Criminal Procedure Code, the prosecution witnesses were recalled for cross-examination by the accused, and where necessary, were re-examined. Evidence was then called for the defence and the accused through their counsel addressed the Court. The accused were not further questioned generally on the case after the cross-examination and re-examination of the prosecution witnesses. It is contended that the omission to question the accused again at this stage was an illegality, being a failure to comply with section 342 and vitiated the whole trial. The point was not taken before the Magistrate who heard the case or on appeal before the Subdivisional Magistrate of Ramnad who affirmed the conviction, but comes before us in Revision.

Section 342, Criminal Procedure Code, requires in all cases that the accused shall be questioned generally on the case in order to enable him to explain any circumstance appearing in the evidence against him, and this has to be done, in the words of the section, "after the witnesses for the prosecution have been examined and before he (the accused) is called on for his defence." That this is mandatory and not discretionary has been

held in many cases and I think by all the High Courts in India, and this must be taken as established. That failure to comply with the terms of the section is an illegality vitiating the trial and not a mere irregularity which can in a proper case be excused under section 537 of the Criminal Procedure Code has also been held in many cases, though that has not been with such unanimity. In my judgment, failure to comply with the provisions of section 342 is an illegality and that must be considered as established in this Presidency.

The question remains as to the point of time at the trial when this questioning of the accused has to take place. Under the section it must be *after* the prosecution witnesses have been examined and *before* the accused is called on for his defence. In my judgment "after the prosecution witnesses have been examined" means when the prosecution has finished calling evidence. Generally speaking, in most cases, the examination will include the cross-examination and re-examination of the prosecution witnesses, if there is any.

In sessions cases this will always be the case as the witness remains in the witness box until the re-examination is complete. But the position is different in proceedings before Magistrates. In a warrant case, which is all we are concerned with here, the procedure authorized by the Code is that the prosecution witnesses are called and can then be cross-examined on behalf of the accused and if necessary re-examined. The prosecution witnesses called at this stage are generally the whole prosecution evidence and the prosecution is closed. The Magistrate then either dismisses the case on the ground that no case is made out or, after questioning the accused generally to enable him to explain any circumstance appearing against him from the evidence, formulates a charge under section 254, Criminal Procedure Code.

The charge is then read over and explained to the accused and he is asked whether he is guilty or has any defence to make. This procedure is directly in accordance with the Code, and it is difficult to see how any other is possible. It may be that the accused is not going to ask that the witnesses for the prosecution be recalled for cross-examination under section 256, but proposes at once to call his evidence; or it may be that he is not going to call any evidence, but to rely only on his address to the Court. In either event he will have been called on for his defence and by the words of the statute, the questioning has to be after the termination of the prosecution evidence and before he is called on for his defence. It is true that, under section 256, although he has not availed himself of the first opportunity of cross-examining prosecution witnesses, he can ask for them to be re-called for that purpose. That does not in my judgment make that cross-examination part of the examination of the prosecution witnesses within the meaning of section 342. Nor does re-examination generally amount to giving fresh evidence for the prosecution, but is merely explanatory of the cross-examination. If new and material matter in support of the prosecution case is elicited in cross-examination or in the re-examination, it is desirable that the accused should again be questioned on the case and asked generally to explain the circumstances, and, indeed, if fresh evidence on material matters in support of the prosecution case were elicited in re-examination, it would probably be obligatory on the Court to question the accused on that. It is open to the prosecution to call fresh evidence after the formulation of the charge, and if this is done, on the termination of that evidence, the accused must be questioned generally under section 342 after this further examination of the prosecution witnesses. This procedure provides a reasonable method of

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carrying out the obligation of the statute in the interests of the accused, the object being that he should have an opportunity of explaining the prosecution evidence after it is completed. That this is the proper interpretation and in fact the only workable one seems clear from an examination of section 257, because that section provides that after the accused has entered upon his defence, the Magistrate may on the application of the accused have the prosecution witnesses re-called for examination. The questioning of the accused under section 342 has to take place before the accused is called on for his defence; and it follows that if this cross-examination of re-called prosecution witnesses is examination of prosecution witnesses within the meaning of section 342, it would be impossible to comply with the statute, because the questioning would then be taking place after the accused had been called on for his defence and not before as the section requires. It was probably for this reason that the word "examination" is used in section 342, so that in warrant cases, in which under the earlier section the cross-examination of prosecution witnesses might take place after the accused had been called on for his defence, the time occupied in this cross-examination should not be included in the time before which questioning was to take place. Nor is there anything unreasonable in this because the accused has already had an opportunity of cross-examining and knows the whole force of the prosecution case, and if he chooses to exercise his right of cross-examination at a later stage this cross-examination can be fairly treated for the purpose of this section as being rather evidence for the defence than evidence for the prosecution.

Direct authorities against this view are *Mitarjit Singh* v. *The King Emperor*(1), in which it was held that

(1) (1921) 6 P.L.J., 644; 63 I.C., 825.

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examination under section 342 means examination-in-chief, cross-examination and re-examination, and *In re Madura Muthu Vannian*(1) to the same effect, but with neither of these for the reasons given above, do I agree.

In the result, this petition will be dismissed.

PHILLIPS, J.—I agree.

PHILLIPS, J.

WALLACE, J.—I agree.

WALLACE, J.

DEVADOSS, J.—The question referred to the Full Bench is whether a trial is "vitiated entirely by the omission to question the accused after the taking of the prosecution evidence is completed." The objection that the trial is vitiated by such an omission is based upon a recent decision of a Bench of the High Court, reported in *In re Madura Muthu Vannian*(1) which, in the opinion of KRISHNAN, J., required further consideration.

DEVADOSS, J.

The facts necessary to appreciate the objection are: the accused were charged by the Police with an offence under section 411, Indian Penal Code. After the prosecutor examined his witnesses, the accused were questioned evidently under section 253, Criminal Procedure Code. The accused said that they would put in a written statement but did not file any; and a charge was framed against the accused under section 411, Indian Penal Code, on 3rd September 1921. The accused pleaded "not guilty," and their plea recorded on the same day. They cross-examined the prosecution witnesses on 3rd october 1921 and on 21st October 1921. On 21st October 1921 they entered upon their defence and adduced their evidence. The accused were not questioned generally on the case to explain the circumstances appearing in evidence against them

(1) (1922) I.L.R., 45 Mad., 820.

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after the cross-examination of the prosecution witnesses was over and before they entered upon their defence. The contention is that the accused should have been questioned generally on the case as required by the latter part of section 342, Criminial Procedure Code, and the omission to do so vitiated the whole trial. In *In re Madura Muthu Vannian*(1) it was held that the omission by the Magistrate to examine the accused generally on the case, after the cross-examination of the prosecution witnesses was over, vitiated the trial, and the conviction was on that ground illegal.

It may be taken as settled law that the omission to examine the accused under section 342, Criminal Procedure Code, generally on the case after the prosecution witnesses have been examined is an illegality and not an irregularity, which vitiates the whole trial. Two questions have to be settled in this case. The first is, when should the examination of the accused take place in order to comply with the mandatory provisions of section 342, and the second, whether the examination prior to the close of prosecution case will fulfil the requirements of section 342. The first clause of section 342 consists of two portions. The first is optional with the Court and the second is obligatory on the Court. The first portion runs as follows :—"For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial without previously warning the accused put such questions to him as the Court considers necessary," and the second, "(The Court) shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence." The

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non-compliance with the first portion does not render a trial illegal or the proceedings irregular ; and under the second portion it is the duty of the Court to question the accused, and that after the witnesses for the prosecution have been examined and before he is called on for his defence. Chapter XX of the Criminal Procedure Code relates to the trial of summons cases by Magistrates, Chapter XXI relates to the trial of warrant cases by Magistrates, Chapter XXII relates to summary trials, and Chapter XXIII relates to trials by High Courts and Courts of session. Under section 245, the Magistrate may, if he thinks fit, examine the accused, but he is not bound to do so. Under section 253, the Magistrate may examine the accused if he thinks necessary. Section 342 is in the chapter containing general provisions as to inquiries and trials. Under section 209, which is in the chapter relating to inquiry preliminary to commitment, the Magistrate may if he thinks necessary :

"examine the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him."

Section 342 makes the examination of the accused obligatory only in cases where the accused is called on for his defence. A Magistrate may discharge an accused without framing a charge, in which case his non-examination would not vitiate the proceedings. But where a Magistrate, or Judge in a sessions trial, finds that the prosecution has made out a case which the accused has to meet, then it is incumbent upon the Magistrate or Judge to question the accused generally on the case for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him. It may be taken that the stage at which the examination is to be held is before the accused is called on for his defence. In the chapter relating to the

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trial of warrant cases, provision is made in section 254 for the framing of a charge against the accused before the whole of the prosecution evidence is completed, if there is ground for presuming that the accused has committed an offence triable under the Chapter. The difficulty in interpreting section 342 is caused by the amendment to sections 254 and 256, which were made in the Criminal Procedure Code of 1898. Under the Code of 1882, under section 252 the Magistrate was required to

> "take all such evidence as may be produced in support of the prosecution," and under section 254, "If when this evidence and examination have been taken and made, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this chapter, he should frame a charge in writing against the accused."

Under the Code of 1882 therefore the Magistrate could not frame a charge against the accused till the evidence for the prosecution was completed. Under the Code of 1898 the Magistrate could frame a charge before the prosecution evidence is completed, if he thinks there is ground for presuming the accused has committed an offence. Under section 256 of the old Code after the charge was framed the accused had the right to cross-examine any of the witnesses for prosecution present in Court or its precincts. But under section 256 of the Code of 1898 the duty was cast upon the Court to ask the accused whether any of the prosecution witnesses should be recalled for cross-examination. He has, therefore, an undoubted right to have all or any of the prosecution witnesses recalled for cross-examination after the charge is framed and after he exercises such right the evidence of any of the remaining witnesses for prosecution should be taken and after cross-examination and re-examination they should be discharged. So then, if

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a Magistrate frames a charge against the accused before the examination of all the prosecution witnesses is over, he shall ask the accused whether he wishes to recall any or all the prosecution witnesses for cross-examination, and after such cross-examination he shall take the evidence of the remaining prosecution witnesses. It is only after that, that the accused shall be called upon to enter upon his defence and he can be said to enter upon his defence only when he begins to adduce evidence on his behalf. The contention that, if an accused person cross-examines any of the prosecution witnesses under section 256, the Magistrate is bound once more to examine the accused generally on the case seems untenable. Section 342 says:

> "the Court shall question the accused after the witnesses for the prosecution have been examined and before he is called on for his defence."

That can only mean that the examination of the accused should take place after the prosecution has placed its whole case before the Court. If the accused chooses not to cross-examine or reserves his right to cross-examine the prosecution witness after a charge is framed, I do not think the Magistrate is bound to question him after cross-examination of the prosecution witnesses is over, provided he questions him after the prosecution has placed its whole case before him. If the Magistrate frames a charge before the whole of the prosecution evidence is placed before him, he should examine the accused under section 342 after the remaining witnesses for the prosecution have been examined and cross-examined. The accused in a warrant case has three opportunities of cross-examining the prosecution witnesses, once before the charge is framed, secondly under section 256, and thirdly after he has entered on his defence. He can apply to the Magistrate

under section 257(1) to issue process for compelling the attendance of one or more prosecution witnesses for cross-examination. It cannot be the intention of the legislature to make it obligatory on the Magistrate to question the accused if he chooses to cross-examine any of the prosecution witnesses after all the defence evidence has been taken. Such cross-examination could only be to help him in his defence, and therefore it must be taken that such cross-examination is part of his defence. The words in section 342 are, "after the witnesses for the prosecution have been examined," and the expression cannot reasonably be interpreted to mean:

> "after the accused has chosen to exercise his right of cross-examination at the very end of his defence."

If the prosecution applies to the Court to allow it to adduce fresh evidence after the charge is framed and if such evidence is adduced, then it is the duty of the Court under section 342 to question the accused generally, for, it cannot be said that the witnesses for the prosecution have been examined till the whole of the prosecution case is before it. But where the prosecution has let in all the evidence it wishes to rely on, and if the Magistrate questions the accused after taking all such evidence before framing a charge, whether the accused has cross-examined the witnesses or not, I think the mandatory provisions of section 342 must be held to be substantially complied with. It therefore follows that any examination of the accused, which is made before all the evidence for the prosecution has been let in cannot satisfy the mandatory provisions of section 342.

I shall briefly deal with the cases quoted in argument before us. The cases quoted fall under three heads:

(1) Cases in which the Sessions Judge did not question the accused generally on the case after the close of the prosecution. In those cases the High Court held

that the whole trial was vitiated by the failure to question the accused to explain the circumstances appearing in evidence against him even though his statement before the Magistrate was read as part of the prosecution evidence. They are reported in *Fatu Santal* v. *Emperor*(1), *Raghu Bhumij* v. *Emperor*(2), *Emperor* v. *Savalya*(3), *In re Nainamalai Konan*(4) and *Raja Padaiachi*(5).

(2) The following are cases in which a Magistrate did not question the accused generally, and the High Court held that the trial was vitiated by the omission to comply with the mandatory provisions of section 342. *Suraj Pandey* v. *Emperor*(6), *Gulam Rasul* v. *King-Emperor*(7), *Emperor* v. *Harischandra*(8), *Emperor* v. *Gulabjan*(9), *Emperor* v. *Basapa Ningapa*(10) and *Mahomed Hossain* v. *Emperor*(11).

(3) In the following cases the Magistrate examined the accused before framing the charge, but did not question the accused generally on the case under section 342 after cross-examination under section 256 was over, and the High Court held that the trial was vitiated by the omission to comply with the mandatory provisions of section 342: *Mitarjit Singh* v. *The King-Emperor*(12), *Tilak Gope* v. *Bhaya Ram*(13), *Ramnath Rai* v. *Emperor*(14), *Emperor* v. *Nga Po Mya*(15), *Abbas Ali* v. *Emperor*(16) and *Emperor* v. *Fernandez*(17).

In *Raghu Bhumij* v. *Emperor*(2) Mr. Justice JWALA PRASAD of the Patna High Court, observed:

(1) (1921) 61 I.C., 705; 6 P.L.J., 147. (2) (1920) 58 I.C., 49; 5 P.L.J., 430.
(3) (1907) 9 Bom. L.R., 356. (4) (1921) 14 L.W., 418.
(5) (1890) 2 Weir, 405.
(6) (1920) 58 I.C., 521, 21 Cri. L.J., 793. (7) (1921) 6 P.L.J., 174.
(8) (1908) 10 Bom. L.R., 201. (9) (1922) I.L.R., 46 Bom., 441.
(10) (1915) 17 Bom. L.R., 892. (11) (1914) I.L.R., 41 Calc., 743.
(12) (1921) 63 I.C., 825; 6 P.L.J., 644. (13) (1921) 62 I.C., 870.
(14) (1921) 61 I.C., 844, 18 Cri. L.J., 244.
(15) (1917) 42 I.C., 176. (16) 4 Cri. L.J., 476.
(17) (1921) I.L.R., 45 Bom., 672.

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"The accused adhered to the retraction of their confessions. They were not examined as to the circumstance disclosed in the prosecution evidence which the learned Sessions Judge has used against the accused and this, to my mind, amounts to an omission to examine the accused under section 342 and to prepare a proper record thereof under section 364, so much essential in a sessions trial where an accused is entitled to have his statement considered by assessors and the appellate Court."

This omission was held by the learned Judge to vitiate the whole trial. In *Tilak Gope* v. *Bhaya Ram*(1) Justice BUCKNILL held that:

"omission to examine the accused after the case for the prosecution has been closed, or rather after all the witnesses for the prosecution have been examined, is a fatal defect and cannot be cured by trying to bring into operation the provisions of section 537, Criminal Procedure Code."

In that case, after the accused had been examined by the Magistrate, one witness at any rate for the prosecution was subsequently examined. The learned Judge qualified his first statement, "after the case for the prosecution has been closed" by adding the words, "or rather after all the prosecution witnesses have been examined."

Section 342 makes it obligatory on the Magistrate to examine the accused after the witnesses for the prosecution have been examined, and does not require the Magistrate to wait till the accused has exercised his right of cross-examination of the prosecution witness after the charge is framed. As I said above, the amendments to sections 254 and 256 were made in 1898 without in any way altering the wording of section 342, and a reasonable construction must be put upon the words without attributing to the legislature the fault of enacting inconsistent provisions. It is a well known

(1) (1921) 62 I.C., 870.

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canon of construction that where a reasonable construction would reconcile the provisions of an enactment, that construction ought to be adopted.

In *Mitarjit Singh* v. *The King-Emperor*(1) a Bench of the Patna High Court held that "until the witnesses have been cross-examined and re-examined it cannot be said what the exact case that the accused will have to meet, is; and if he is forced to disclose his defence before cross-examination it might very well be that the prosecution witnesses would be on their guard and the value of the cross-examination to a great extent destroyed. Considering, then, both the wording of the section and its intention it appears to me clear that the Court must question the accused generally on the case after the cross-examination and re-examination of the prosecution witnesses." No doubt, this is a direct authority for the contention of the petitioner, but with great respect to the learned Judges it is not easy to conceive how an accused person would be prejudiced by disclosing his defence after the whole of the prosecution evidence has been taken and before he exercises the right to re-cross-examine them. No doubt, if before the whole of the prosecution evidence is taken, he is asked to disclose his defence the prosecution witnesses who remain to be examined may change their version in order to meet the defence of the accused. But where the prosecution has definitely put forward the whole of its case the mere fact that the prosecution witnesses are not subjected to a second cross-examination would not in any way prejudice the accused, if he discloses his defence before such cross-examination. It is open to the accused not to make any statement. The law does not cast upon him the duty of making a statement. If

(1) (1921) 63 I.C., 825; 6 P.L.J., 644.

he feels that by disclosing his defence before the whole of the cross-examination is over his case will suffer, he need not answer the Court questions. We are only concerned with the duty of the Court under section 342, and not with the option of the accused. It may be said that his answers to the questions put to him by the Court even after the whole of the cross-examination is over might prejudice him. But that is left to the discretion of the accused and his legal advisers. The Court is not asked to cross-examine the accused but its duty is only to ask the accused to explain the circumstances appearing in evidence against him. I therefore consider, with all respect, that the reasoning of the learned Judges does not militate against the view that I take that the duty of the Magistrate under section 342 is discharged if he questions the accused generally after the prosecution has placed its whole case before the Court.

In *Shamlal Kalwar* v. *Emperor*(1) after the examination and cross-examination of the prosecution witnesses a charge was framed against the accused. The accused were asked if they would cross-examine any of the prosecution witnesses, but they declined, and then they were called on to enter upon their defence. On a subsequent date, at the instance of the Public Prosecutor, a charge under section 325, Indian Penal Code, was added against one of the accused and the charge under section 147, Indian Penal Code, was verbally altered. The prosecution witnesses were then re-called and cross-examined. It was not disputed that the prosecution evidence was closed when the accused were called on to enter upon their defence. It was contended that after the alteration of the charge under section 147, Indian

(1) (1922) 65 I.C., 610.

Penal Code, and the addition of a charge under section 325, Indian Penal Code, the accused should have been examined and the omission to do so contravened the mandatory provisions of section 342. Mr. Justice JWALA PRASAD and Mr. Justice ADAMI held,

"The trial does not commence *de novo* so that if the accused had already been called on to enter upon his defence there is no further obligation upon the Magistrate to examine the accused under section 342 of the Code."

They also observe

"The authorities of which we are so well cognisant do not at all apply to the present case."

In *In re Madura Muttu Vannian*(1) the Magistrate in trying a warrant case examined the accused before framing the charge, but did not examine the accused generally on the case after cross-examination. The learned Judges held that the omission of the Magistrate vitiated the whole trial. If the whole of the prosecution case had been before the Magistrate before he framed the charge and if he questioned the accused generally on the case before framing the charge, I think he satisfies the mandatory provisions of section 342. It is not necessary that the accused should make a statement by word of mouth. No doubt, section 364 requires the Magistrate and a Court other than a High Court to record the whole of the examination,

"Including every question put to him (accused) and every answer given by him in the language in which he is examined, or, if that is not practicable, in the language of the Court or in English; and such record shall be shown or read to him, or, if he does not understand the language in which it is written shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or to add to his answers."

(1) (1922) I.L.R., 45 Mad., 820.

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Section 256, clause (2), makes provision for the accused putting a written statement and the Magistrate filing it with the record. When the Magistrate questions the accused, if he says, "I will put in a written statement," I think it is the duty of the Magistrate to take the written statement as an answer to his questions. In other words, in such a case the accused does not wish to answer by word of mouth questions put to him, but prefers to put in a written answer.

In the present case after the examination of the witnesses for the prosecution, a charge was framed against the accused on 3rd September 1921. The accused were examined by the Magistrate on the same date. They cross-examined the prosecution witnesses on 3rd October 1921 and 21st October 1921. The examination of the accused by the Magistrate after the prosecution had let in all their evidence, satisfied the provisions of section 342, and therefore the trial is not vitiated by any omission to examine the accused after the cross-examination of the prosecution witnesses was over. The accused did not answer the questions put by the Magistrate but said they would put in a written statement, and the default, if any, is on their part. The Magistrate did what was required of him under section 342, and if the accused did not choose to put in any written statement, they could not contend that the proceedings before the Magistrate were vitiated by an illegal omission.

The petition, therefore, ought to be dismissed.

My answer to the question referred to the Full Bench is that a trial is not vitiated by the omission to question the accused generally on the case after re-cross-examination of all the prosecution witnesses is completed, provided the Magistrate examines the accused after the whole of the prosecution case has been placed before him.

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VENKATA-SUBBA RAO, J.

VENKATASUBBA RAO, J.—I regret I am not of the same opinion and as I venture to take a different view I shall very briefly state my grounds.

The Magistrate says in his judgment

"Accused 1 and 2, who were questioned after the prosecution evidence was heard, preferred to put in a written statement, but no such statement was filed. . . . There were grounds for presuming that accused had committed an offence under section 411 Indian Penal Code, and a charge was accordingly framed. . . . "

This happened on 3rd September 1921. There was further cross-examination of the prosecution witnesses on 3rd October 1921 and 21st October 1921. The accused was not further examined and he commenced to produce evidence in his defence on the latter date.

Section 342 consists of two parts. The first part leaves it to the option of the Magistrate to put such questions to the accused as he considers necessary. The accused may be similarly examined under sections 209, 210, 245, 253 and 254. Whereas the latter sections indicate the stage when the examination may at the discretion of the Magistrate be made, the first part of section 342 gives the Magistrate a wider discretion, as it permits him to put questions to the accused at any stage of the inquiry or trial.

Then we come to the second part of section 342. The provision here is mandatory. It is agreed on all hands that it is the duty of the Court to make the examination of the accused at some stage of the case. The more difficult question remains:—At what stage is this examination to be made? The point of time is indicated by the words "after the witnesses for the prosecution have been examined and before he (the accused) is called on for his defence."

Comparing these words with the words used in the last portion of section 256 which runs thus: "The

evidence of any remaining witnesses for the prosecution shall next be taken and after cross-examination and re-examination (if any) they also shall be discharged. The accused shall then be called upon to enter upon his defence and produce his evidence," the conclusion seems irresistible that the point of time indicated is between the close of the prosecution case and the entering by the accused upon his evidence.

It is said that an examination of the accused immediately upon the taking under section 252 of the evidence in support of the prosecution, complies with the mandatory provision contained in section 342. I am unable to accept this view. *In the first place*, at that stage it cannot be said that all the witnesses for the prosecution have been examined, because section 256 contemplates further evidence likely to be forthcoming on behalf of the prosecution. *In the second place*, the accused is not called upon to enter upon his defence upon the taking of the evidence referred to in section 252. Far from the accused entering on his defence at that stage, if the Magistrate is of the opinion that there is ground for presuming that the accused has committed an offence, the Magistrate is required to frame a charge against the accused. It cannot be said that the stage preceding the framing of the charge is the point of time conveyed by the words "before the accused is called on for his defence."

The words used in section 342 are "called on for his defence." I may notice in this connexion two other sets of words. Section 255 (1) runs thus:—The charge shall then be read and explained to the accused and he shall be asked whether he has "any defence to make." Section 256 contains the following sentence:—"Accused shall then be called upon to enter upon his defence and produce evidence." In my opinion the words in section 342 "called on for his defence" are used in the same sense as

the words "to enter upon his defence" in section 256. I must point out that neither side has attempted to argue that the stage when the accused should be examined under section 342, is after the charge has been framed, read and explained and before the accused is asked under section 255 whether he has "any defence to make." The rival contentions before us were (1) on behalf of the crown—the examination indicated in section 342 should be made after the taking of the evidence in support of the prosecution mentioned in section 252 and before the framing of the charge under section 254; (2) on behalf of the accused—the said examination should be made after the entire evidence for the prosecution mentioned in section 256 is given and before the accused is called upon to enter upon his defence. I am clearly of the opinion that the right construction is that contended for on behalf of the accused. If the other construction were right, it would follow that the accused would be "called on for his defence" before a charge against him is framed, that is, at a point of time which is anterior to his being asked whether he "has any defence to make." I see no warrant for this position in the sections to which I have referred.

I have so far given my reasons for construing the section in the manner I have done. The learned Public Prosecutor has argued that this interpretation should be avoided, as it would lead to consequences inconvenient and unjust. I think, on the contrary, this construction alone carries out the object underlying the enactment of section 342.

Under section 342 it is only one examination that is made imperative. The other view will lead in certain events to the result that the Court will be bound to have a double examination of the accused; *once* when the evidence referred to in section 252 has been taken and *again*

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when further witnesses for the Crown, if any, have been examined under section 256. Moreover, the object of section 342 can be most effectually carried out, only if the accused is examined at the very close of the case for the Crown and previous to his entering upon his defence. Not only may very material evidence be given in examination-in-chief of any further witnesses examined under section 256 but matters unfavourable to the accused may be elicited in the cross-examination and re-examination of the witnesses already examined under section 252.

It is intended that the accused should have an opportunity, in answer to a general question "What have you to say" to explain any circumstances appearing in the evidence against him.

This seems to me a very useful provision.

It must also be noted that the accused cannot give evidence on oath. Whether this is a privilege which he enjoys or a disability under which he labours, the statement, if any, that the accused makes under this section corresponds, as nearly as possible, to his evidence on oath and it is distinctly provided by clause 3 of section 342 that the answers given by the accused may be taken into consideration by the Court. A mere statement of the accused at this stage may conceivably lead to his acquittal without any production of evidence on his behalf.

It seems to me that this view alone makes section 342 consistent with section 253. Otherwise the words in the latter section *vesting a discretion* in the Magistrate

"of making such examination (if any) of the accused as the Magistrate thinks necessary" will be not only redundant but positively misleading because, at that point the Magistrate, according to the other view, is under an obligation to examine the accused.

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It has been said on behalf of the Crown that section 257 lends some support to the view contrary to what I have taken. I am unable to agree. It is no doubt true that section 257 gives a further opportunity to the accused to cross-examine any prosecution witnesses even after he has entered upon his defence. But this circumstance can have no bearing upon the right interpretation of the terms of section 342. The latter section fixes a point of time not only with reference to the examination of the witnesses for the prosecution but also with reference to the accused being "called on for his defence." The mere fact that some prosecution witnesses may be cross-examined at the instance of the accused even after he has entered upon his defence cannot alter the interpretation which the plain words in section 342 should receive.

Then turning to section 537, I am of the opinion that the infringement of the rule enacted in section 342 is not a mere error, omission or irregularity. Assuming for a moment that the disregard of the rule amounts only to an error, omission or irregularity, how can it ever be ascertained that such an error, etc., has in fact or has not occasioned a failure of justice? We shall be left to speculate what the statement of the accused would have been or in what manner it would have influenced the mind of the trying judge. I would for that reason assume in every instance that the non-observance has in fact occasioned a failure of justice.

The result is that in my view the decision in *In re Madura Muttu Vannian*(1) on both the questions is correct. I would therefore set aside the conviction of the accused and order a retrial.

K.R.

(1) (1922) I.L.R., 45 Mad., 820.

APPELLATE CRIMINAL.

Before Mr. Justice Krishnan.

1922, December 8.

THE KING-EMPEROR, APPELLANT,

v.

A. DURAISWAMI, ACCUSED, No. 2.*

Police Act (Madras Act III of 1838), sec. 78—Rules dated 10th February 1922, and published in the Fort St. George Gazette*—Two persons riding a cycle, one seated on the saddle, the other standing on the back-steps of the same—Whether guilty.*

A by-law made under the Madras City Police Act (III of 1888), provided "No person riding a bicycle in any street or public place shall be permitted to carry any other person on the same bicycle, either on the handle-bar, or on the back-step or on the cross-bar; and no person shall ride a bicycle in any street or public place in any other manner than on the saddle." A person who allows himself to be carried on the back-steps of a bicycle by another seated on the saddle of the same cycle rides a bicycle within the meaning of the latter clause of the by-law and commits an offence against it.

CRIMINAL APPEAL under section 417 of the Code (I of 1898) against the acquittal by the order of the Honorary Magistrates, Egmore, in Calendar Case No. 9555 of 1922.

The facts are briefly these:—One D. along with another was tried by the Bench Magistrates, Egmore, for riding a bicycle in contravention of a by-law made under section 78 of the Madras City Police Act. The question considered was whether D. who stood on the backsteps of the cycle and allowed himself to be carried by the other who sat on the saddle of the same cycle came within the mischief of the by-law. The learned Magistrates held that he did not and acquitted him. Against the order of acquittal this appeal was filed by the Crown.

* Criminal Appeal No. 1196 of 1922.

The by-law in question runs as follows:—

"No person riding a bicycle in any street or public place shall be permitted to carry any other person on the same bicycle, either on the handle-bar, or on the back-step, or on the cross-bar, and no person shall ride a bicycle in any street or public place in any other manner than on the saddle."

The *Crown Prosecutor* (*K. P. M. Menon*) for the Crown.

Prima facie, the second accused falls directly within the clear wording of the second portion of the above by-law. He was "riding a cycle, sitting elsewhere than on the saddle." The word "ride" is defined in Webster:—"to make progression; or to be carried on the back of an animal; to travel or to be carried in a vehicle; to be borne on; to be supported in motion; to rest on something."

Therefore although it was the first accused who was pedalling the machine and had control over its movements, the second accused who was only being carried about, is guilty under the second part of the by-law.

Even otherwise he is guilty of the abetment of an offence under the first part of the by-law.

Accused was not represented.

JUDGMENT.

KRISHNAN, J.—The interpretation put by the Honorary Magistrates on the rule referred to by them and published in the *Fort St. George Gazette* of 28th March 1922, Notification No. 81 seems to be erroneous. The first part of the rule applies to the person who pedals the bicycle and takes with him another on the same cycle; and the latter part of the rule clearly applies to the person who allows himself to be so carried, for he rides the bicycle but not on the saddle. The word "ride" does not necessarily imply that the person riding should

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propel the bicycle himself. It may be that the rule as worded covers the case of a single person riding a bicycle without being seated on the saddle but it certainly covers also the case of a person riding a bicycle in the manner the second accused did. He pleaded guilty and therefore he should have been convicted, but as the Crown Prosecutor does not ask for a sentence it is not necessary to inflict one now. But his acquittal is set aside.

K.U.L.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Ramesam.

1922, December 13.

POTHAN PUTHAN VEETTIL KUNHU POTHANASSIAR AND ANOTHER (DEFENDANTS 5 AND 6), APPELLANTS

v.

ANDRESSERI RARU NAIR AND FOUR OTHERS (PLAINTIFF AND DEFENDANTS 1 TO 4), RESPONDENTS.*

Transfer of Property Act (IV of 1882), sec. 53—Proviso—Bona fide purchaser for value from fraudulent transferee, whether protected by.

The proviso to section 53 of the Transfer of Property Act protects not only a *bona fide* transferee from an original fraudulent transferor but also a *bona fide* transferee from a fraudulent transferee. English cases reviewed; *Basti Begam* v. *Banarsi Prasad* (1908) I.L.R., 30 All., 297, dissented from.

SECOND APPEAL against the decree of G. H. B. JACKSON, District Judge of South Malabar, in Appeal Suit No. 747 of 1919, preferred against the decree of T. KRISHNAN NAYAR, Principal District Munsif of Tirur, in Original Suit No. 469 of 1918.

The facts are given in the judgment of RAMESAM, J.

* Second Appeal No. 1502 of 1920.

KUNHU POTHANASSIAR v. RARU NAIR.

K. Krishna Variyar for *C. Madhavan Nayar* for appellants.—The lower Court has held that the sale-deed by defendants 3 and 4 to first defendant is fraudulent and that the assignment in favour of defendants 5 and 6 by the first defendant is *pendente lite*. Although the sale in favour of the first defendant is fraudulent still defendants 5 and 6 will be protected if they are *bona fide* purchasers under section 53 of Transfer of Property Act. Also there is no *lis pendens*; *Krishnappa Chetti* v. *Abdul Khader Sahib*(1) is wrong and it has been dissented from in *Pethu Ayyar* v. *Sankaranarayana Pillai*(2).

K. P. Ramakrishna Ayyar for respondents.—Under section 53 of the Transfer of Property Act it is only the first transferee that is protected if bona fide, and a bona fide transferee from a fraudulent transferee is not protected. See *Basti Begam* v. *Banarsi Prasad*(3). In England this matter is treated as one of conflicting equities. *Coachell* v. *Taylor*(4), *Ogilvie* v. *Jeaffreson*(5), *Parker* v. *Clarke*(6). In these cases the second transfer although *bona fide* was set aside. Cases under 13 Eliz., Chap. V and 27 Eliz., Chap. IV, are *Lloyd* v. *Attwood*(7), *George* v. *Milbanke*(8), *Mouat, In re*; *Kingston Cotton Mills Company* v. *Mouat*(9), *Wallwyn* v. *Lee*(10), *Doe* v. *Routledge*(11), Bigelow on Fraudulent Conveyances, page 369.

K. Krishna Variyar in reply, cited *French* v. *Hope*(12), *Bickerton* v. *Walker*(13), *Rice* v. *Rice*(14), *Prodgers* v. *Langham*(15) and *Halifax Joint Stock Banking Company* v. *Gledhill*(16).

(1) (1915) I.L.R., 38 Mad., 535. (2) (1917) I.L.R., 40 Mad., 955.
(3) (1908) I.L.R., 30 All., 297.
(4) (1851) 15 Beav., 103. (5) (1860) 2 Giff., 353.
(6) (1861) 30 Beav., 54. (7) (1859) 3 De. G. and J., 614.
(8) (1803) 9 Ves. Jun., 190. (9) (1899) 1 Ch. D., 831.
(10) (1803) 9 Ves. Jun., 24. (11) (1777) 2 Cowp., 705.
(12) (1887) 56 L.J., Ch. D., 363. (13) (1885) 31 Ch. D., 151.
(14) (1853) 2 Drew., 73. (15) (1660) 1 Sid., 133.
(16) (1891) 1 Ch. D., 31.

KUNHU POTHA-NASSIAR v. RARU NAIR.

OLDFIELD, J.
RAMESAM, J.

JUDGMENT.

OLDFIELD, J.—I agree with the order proposed by my learned brother and can add nothing to his reasons for it.

RAMESAM, J.—The facts out of which this Second Appeal arises may be briefly stated as follows:—The plaintiff obtained on the 31st March 1914 a decree in Original Suit No. 500 of 1912 against the present defendants 3 and 4 and in execution of the decree attached the suit properties. The defendants 1 and 2 relying on a sale-deed (Exhibit III, dated 5th October 1914) preferred a claim objecting to the attachment (M.P. No. 328 of 1918). The claim was allowed on 21st February 1918 (Exhibit A). The present suit was filed on 10th August 1918 for a declaration that the sale under Exhibit III was made with intent to defraud creditors and cannot affect plaintiff's right to attach the properties. On 24th February 1918 (three days after the disposal of the claim petition) the property was purchased from defendants 1 and 2 by defendants 5 and 6 under Exhibit VI. They contend that they are *bona fide* purchasers for consideration and without notice of the intention to defraud, if any, on the part of the parties to Exhibit III. The Courts below have held that Exhibit III was executed as alleged by the plaintiff. As to defendants 5 and 6, they held relying on *Krishnappa Chetti* v. *Abdul Khader Sahib*(1) that their sale under Exhibit VI was void against plaintiffs as being made *pendente lite* and did not express any opinion on the question whether they are *bona fide* purchasers for value. Defendants 5 and 6 appeal. The finding that Exhibit III is voidable by the plaintiff is not challenged in appeal.

It is contended on behalf of the appellants that the case in *Krishnappa Chetti* v. *Abdul Khader Sahib*(1)

(1) (1915) I.L.R., 38 Mad., 538.

KUNHU POTHA-NASSIAR v. RARU NAIR.

RAMESAM, J.

is not correctly decided, that it has been dissented from in *Pethu Ayyar* v. *Sankaranarayana Pillai*(1), and that a finding should be called for from the lower Appellate Court on the question whether defendants 5 and 6 are *bona fide* purchasers for value.

It is contended for the respondent that, even if the sale to defendants 5 and 6 is not vitiated by the doctrine of *lis pendens*, it is unnecessary to have a finding on its *bona fides* as the proviso to section 53 of the Transfer of Property Act does not protect *bona fide* purchasers for consideration from a fraudulent transferee but protects only *bona fide* purchasers from the first transferor. In support of this contention he relied on *Basti Begam* v. *Banarsi Prasad*(2). The conclusion stated at page 308 of that case

> "Basti Begum took the transfer subject to all defects in the title of her transferors and cannot in equity set up the fictitious documents against the *bona fide* mortgage. The fictitious instrument received, we think, no new force against the plaintiff from the transfer. The *proviso* to section 53 of the Transfer of Property Act, which was relied on by Mr. Dillon, does not appear to us to help his client. That *proviso* was intended to safeguard rights which have been already acquired—"

seems to support the respondent, though the last sentence is not quite intelligible. In this case, the first transaction is a mortgage, but, as I do not see any reason to distinguish between a mortgage and a sale or between a mortgage of immoveable property and one of moveables in the application of section 53 of the Transfer of Property Act, the case requires further consideration. A number of English cases were cited in it. In the first one *Halifax Joint Stock Banking Company* v. *Gledhill*(3),

(1) (1917) I.L.R., 40 Mad., 955. (2) (1908) I.L.R., 30 All., 297.
(3) (1891) 1 Ch. D., 31.

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the provisions of 13 Eliz., Ch. V, were referred to; but the conclusion of KAY, J., does not support the conclusion in *Basti Begam* v. *Banarsi Prasad*(1), and no reasons are given in the latter to show how the former was intended to be got over. I will refer to this case again. The other cases cited in *Basti Begam* v. *Banarsi Prasad*(1) fall into two groups:—In the first group consisting of *Coachell* v. *Taylor*(2), *Ogilvie* v. *Jeaffreson*(3), *Parker* v. *Clarke*(4), the second transaction though *bona fide* did not prevail; in the second group consisting of *French* v. *Hope*(5), *Bickerton* v. *Walker*(6) and *Rice* v. *Rice*(7), the second transaction was upheld on the ground that it was *bona fide* transaction for consideration without notice of the prior equity. In all these six cases there is no question of the application of 13 Eliz., Ch. V, or 27 Eliz., Ch. IV. The earlier transactions in the first three cases were not valid even as between the parties—Collett was defrauded by Taylor in *Coachell* v. *Taylor*(2), Ogilvie was defrauded by his Solicitor in *Ogilvie* v. *Jeaffreson*(3), and Cruchley executed the mortgage while in prison and under the undue influence of Thomas in *Parker* v. *Clarke*(4). In each of the other three cases the first transaction was perfectly valid—there being no fraud or undue influence vitiating it. The second transferees obtained valid titles by estoppel. It seems to me these six cases are illustrative of the rule now embodied in India in section 41 of the Transfer of Property Act. In the first three cases there was not the free consent of the original owner so as to confer a title by estoppel on the second transferee. I do not think it is necessary to say as KEKEWICH, J., thought in

(1) (1908) I.L.R., 30 All., 297.
(2) (1851) 15 Beav., 103.
(3) (1860) 2 Giff., 353.
(4) (1861) 30 Beav., 54.
(5) (1887) 56 L.J., Ch. D. 363.
(6) (1885) 31 Ch. D., 151.
(7) (1853) 2 Drew., 73.

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French v. *Hope*(1) that *Parker* v. *Clarke*(2) was overruled by *Bickerton* v. *Walker*(3). I may also add that the Vice-Chancellor's summary of the facts in *Ogilvie* v. *Jeaffreson*(4) shows that the second transferee in that case cannot be regarded as a *bona fide* purchaser for value. However this may be, I do not think any of these cases are a guide in the discussion of section 53 of the Transfer of Property Act. It seems to me that the conclusion in *Basti Begam* v. *Banarsi Prasad*(5) is not justified by the cases cited in it.

The case of *Doe d. Bothell* v. *Martyr*(6) is similar to the case above cited and does not help us. On the other hand there are a number of other English cases on 13 Eliz., Ch. V, and 27 Eliz., Ch. IV, which will now be considered. I will divide them into two groups:—

(*a*) Those decided with reference to 27 Eliz., Ch IV—*Prodgers* v. *Langham*(7), where it was held that the feoffee for valuable consideration from the first feoffee whose feoffment was covenous has a good title against a second feoffee from the original owner. This case was followed by Lord ELDON in *George* v. *Milbanke*(8), cited below. The case of *Lloyd* v. *Attwood*(9), seems to decide differently (see especially TURNER, L.J., at p. 655, and Knight BRUCE, L.J., at p. 647); but in that case the two Misses Attwood parted with the title-deeds and their mortgage lost its priority by reason of their laches and the Misses Medley who obtained a sub-mortgage and could have asked for and known the absence of the title-deeds could not be regarded as *bona fide* transferees for value. Nor did TURNER, L.J., and

(1) (1887) 56 L.J., Ch. D., 363.
(2) (1861) 30 Beav., 54.
(3) (1885) 31 Ch D., 151.
(4) (1860) 2 Giff., 353.
(5) (1908) I.L.R., 30 All., 297.
(6) (1805) 1 Bosanquet and Puller N.R., 332.
(7) (1860) Sid., 133.
(8) (1803) 9 Ves. Jun., 190.
(9) (1859) 3 De. G. and J., 614.

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Knight BRUCE, L.J., regard them as *bona fide* transferees for value. I doubt if the passage in May on Fraudulent Conveyances, page 254, relating to this case is justified, especially in view of the cases cited at page 253.

(*b*) Cases decided under 13 Eliz., Ch. V.

(1) *George* v. *Milbanke*(1). For the purposes of the decision the fact that until the Voluntary Conveyances Act of 1893, all voluntary conveyances, though made without a fraudulent intention were void against creditors, does not make a difference. This case supports the appellant.

(2) *Payne* v. *Mortimer*(2). In this case TURNER L.J., says:

"Lord ELDON however, in *George* v. *Milbanke*(1), did not put the case upon the statute of Elizabeth. He had regard no doubt, and indeed the report shows, although but obscurely, that he had regard, to the provision in the statute which protects alienees for value only in the case of absence of notice and he puts the case upon the ground of the assignee for value having a better equity than the general creditors of the settlor. That principle seems to me to reach the present case."

(3) *Halifax Joint Stock Banking Company* v. *Gledhill*(3). On the facts, the settlor's reservation of an interest not being tainted by intent to defraud creditors —the point does not seem to arise but KAY, J.'s opinion is in favour of the appellant. He also seems to think that TURNER, L.J.'s opinion in *Payne* v. *Mortimer*(2) is to the same effect.

(4) *Mouat, In re Kingston Cotton Mills Company* v. *Mouat*(4). The opinion of STIRLING, J., at page 834 in favour of the appellant is only an *obiter dictum*.

(5) *Morewood and Bayne* v. *The South Yorkshire Railway and River Dun Company*(5). The opinion of

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(5) (1858) 8 H. and N., 798.

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the Court (POLLOCK, C. B. and WATSON, BRAMWELL BB.) is in favour of the appellant.

Generally, I am unwilling to refer to American decisions. But, having regard to the paucity of authority in India and the somewhat inconclusive nature of the English cases, I now refer to two of the American Cases. In *Lee* v. *Abbe*(1), and in *Anderson* v. *Roberts*(2), it was held that *bona fide purchasers* from a fraudulent grantee without notice of the fraud will be protected. I agree with the remarks of SPENCER, C.J., at page 241.

"Again, the proviso is general, it exempts any conveyance upon good consideration and *bona fide* to any person not having notice of the fraud or collusion from the effects of the enacting clause. And why should not its benefits be extended to any *bona fide* purchaser for valuable consideration, whether he purchases from the fraudulent grantor or the fraudulent grantee? I think it has sufficiently appeared that the fraudulent grantee takes the entire interest of the fraudulent grantor, and that the deed is voidable at the instance of the creditor, not legally and strictly void."

He then refers to MARSHALL, C.J.'s decision in *Fletcher* v. *Peck*(3) to show that a *bona fide* purchase from the fraudulent grantor is protected and proceeds,

"It is in vain that we search for any difference between a conveyance by a fraudulent grantor whose intention was to deceive subsequent purchasers and a conveyance by a fraudulent grantor when the intention was to defraud present or future creditors."

He then refers with approval to *Prodgers* v. *Langham*(4).

I am, therefore, of opinion that the appellants' contention is right and that we must have a finding on the question whether they are *bona fide* purchasers for

(1) (1796) 2 Root 359 = 1 Am. Dec., 76.
(2) (1820) 18 Johnson 513 = 9 Am. Dec., 235.
(3) 6 Cranch., 133.
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(4) (1660) 1 Sid., 133.

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consideration and without notice of the fraud relating to Exhibit III. The question of *lis pendens* will be decided if necessary, after the finding is returned. The finding will be returned with reference to the evidence on record. Six weeks are allowed for finding and ten days for objections.

In compliance with the order contained in the above judgment the District Judge of South Malabar at Calicut submitted a finding that the fifth and sixth defendants were *bona fide* purchasers for value, and without notice of the fraud relating to Exhibit III.

The Second Appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.

The lower Court was called on to find on the question whether the appellants (fifth and sixth defendants) were *bona fide* purchasers for consideration without notice of the fraud involved in Exhibit III. In returning its finding it has dealt separately with the question whether the fifth and sixth defendants were *bona fide* purchasers and whether they had notice. The attempt to separate these two questions is not usually sound. For it is seldom possible to form an adequate or correct opinion of the conduct of a transferee without considering whether his good faith extends to his possession of actual or constructive notice with reference to the whole circumstances of the case. It is, however, sufficient for us to deal with the portion of the finding which relates to the fifth and sixth defendants' possession of notice. For the lower Court has, in our opinion, entirely mistaken the legal position created by the facts.

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The lower Court says that the fifth and sixth defendants would not, even if they made inquiries, have obtained information from the first and second defendants' witnesses or the mortgagee Narayana Nair, because the first and second defendants' witnesses of course would not disclose any fraud, and Narayana Nair equally would not do so, as he was to get his mortgage redeemed by them. The lower Court then goes on :—"The document which the defendant 6 says he saw would tell him nothing" and that may be correct. But then it goes further and says that the defendants were not bound to pursue the matter of the claim petition and ascertain what objections to the claim were raised by the decree-holder. This, in our opinion, is entirely wrong. The decree-holder, the person who was alleging fraud in connexion with Exhibit III was the person, to whom inquiries as to any objections to the title to the property would naturally be addressed, and he would certainly be in the best position to say what objections in the shape of fraud were available against the title. The lower Court says also that, even if the sixth defendant knew of the claim petition, that would tell him nothing; on the other hand the order allowing the claim would lead him to think that the title of the claimants was good. This is an absolute misrepresentation of the effect of the order, Exhibit A; and even if this were the only objection to the lower Court's finding we should be unable to accept that finding on account of it. Exhibit A after stating the facts and the case of the decree-holder as being that Exhibit III evidences a fraudulent and collusive transaction, goes on to say that the claimant must establish his case in a regular suit properly framed for the purpose. That statement is presumably made with reference to authority, as it then stood, that a transfer can be impeached as fraudulent, not by way of a plea

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in defence, but in a suit properly framed for the purpose. True, the next sentence in Exhibit A is to the effect that the claimants have established a *bona fide* title to the properties, whatever that may mean. But it is clear that the effect of Exhibit A, as a whole, was simply to decide in favour of the continuance of the attachment and that the order did not, and indeed could not, do more than make the title to the attached property contingent on the result of the suit, if any, which might be brought within a year. That being the real effect of Exhibit A and the possession being with the fifth and sixth defendants, they have on their own showing failed to make any inquiry of the person, who could have given them the best information as to the defects in the title. We cannot hold that they were transferees in good faith without notice. We must therefore reject the lower Court's finding.

The result is that the appeal fails and is dismissed with costs.

N. R.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., *K.C., Chief Justice, (on a difference of opinion between Krishnan, and Venkatasubba Rao, JJ.).*

1923, January 19.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT), APPELLANT,

v.

CHELLASAMI VENKATRATNAM (PLAINTIFF), RESPONDENT.*

Revenue Recovery Act (II of 1864), sec. 59 (1)—Irrigation Cess Act (VII of 1865), sec. 2—Water-cess levied for unauthorized use of water—Demand—Payment under protest—Demand whether a proceeding under former Act—Suit for recovery of amount paid against Secretary of State after six months from date of payment—Limitation—Applicability of section 59 of Revenue Recovery Act—Limitation Act (IX of 1908), ss. 15 and 29, and article 16, applicability of.

A person who pays water-cess to the Government under *protest on a demand being made*, and claims to recover back the amount paid by a suit in a civil court, is not a party aggrieved by any proceeding under the Revenue Recovery Act (II of 1864); section 59 of the Act does not, therefore, apply to the suit which is governed by article 16 of the Limitation Act.

Ravula Vengala Reddi v. *Secretary of State*, (1912) 15 I.C., 328 and *Pichi Reddi* v. *Secretary of State*, pp. 502 and 503 *infra* footnote followed; *Orr* v. *Secretary of State*, (1900) I.L.R., 23 Mad., 571, dissented from.

* Appeal against Order No. 26 of 1922.

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CIVIL MISCELLANEOUS APPEAL against the order of P. RAMA RAO PANTULU, the Subordinate Judge of Masulipatam, in Appeal Suit No. 92 of 1921 preferred against the order of U. VAMAN NAYAK, the Additional District Munsif of Gudivada, in Original Suit No. 431 of 1919.

In this case, the Government recovered from the plaintiff penal assessment, under the Madras Irrigation Cess Act (VII of 1865), section 1, for alleged unauthorized use by the plaintiff of water belonging to the Government. Government levied penal water-tax for such unauthorized use of water. When the village karnam issued a demand for the amount on the plaintiff on 25th January 1918 it was paid by him under protest on the same date on the demand notice being served on him. Plaintiff instituted the present suit in the District Munsif's Court of Gudivada on 10th January 1919 against the Secretary of State for India in Council, represented by the Collector of Kistna. The plaintiff had given two months' notice reqired by section 80 of the Civil Procedure Code to be given to the defendant. The defendant pleaded, *inter alia*, that the suit was barred by limitation under section 59 of the Revenue Recovery Act. The District Munsif held that section 59 of the Revenue

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Recovery Act applied to the case and that the suit was barred by limitation and he dismissed the suit. On appeal by the plaintiff the Subordinate Judge held that section 59 of the Revenue Recovery Act applied, that a demand was a proceeding under the Act, but that the plaintiff was entitled under section 15 of the Limitation Act, to a deduction of the period of notice (viz., two months) given to the defendant by the plaintiff, in computing the limitation of six months limited by section 59 of the Revenue Recovery Act and that consequently the suit was not barred by limitation, and he accordingly reversed the decree and remanded the suit for trial on the merits. The Secretary of State preferred this Civil Miscellaneous Appeal against the order of remand. The case came on for hearing originally before KRISHNAN and VENKATASUBBA RAO, JJ., who differed in opinion on the question of limitation and delivered differing judgments. The case was referred to a third Judge for disposal under section 98, Civil Procedure Code. The judgments of the learned Judges were as follow :—

KRISHNAN, J.—The question that arises for decision in this case is one of limitation. Plaintiff sues the Secretary of State for India in Council for the refund of excess water-cess collected from him for certain lands of his on the ground that he had unauthorizedly used Government water for their irrigation. He contends that he did not take any water unauthorizedly and that he was not liable for the cess so collected from him. The cess was imposed on him under section I of the Irrigation Cess Act VII of 1865. Section 2 of that Act provides that "water cess payable under this Act shall be realised in the same manner as arrears of land revenue are or may be realised by law." The reference is to the Revenue Recovery Act II of 1864. The water-cess in question here was paid by the plaintiff under protest when a demand notice by the Collector was served on him under the latter Act ; he now seeks by the present suit to get a refund of it with interest. The suit was filed within 8 months from the date of payment but beyond 6 months therefrom.

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The District Munsif applied the six months' rule in section 59 of Act II of 1864 and, rejecting the argument that plaintiff was entitled to deduct in his favour under section 15, clause (2) of the Limitation Act the two months' period of the notice he had to give under section 80, Civil Procedure Code, before bringing his suit, he dismissed the suit as barred by limitation. The Subordinate Judge on Appeal took a different view and held relying on *Srinivasa Ayyangar* v. *Secretary of State*(1) that plaintiff was entitled to the deduction claimed and that the suit was in time. He reversed the decree of the first Court and remanded the case for disposal on the merits. The present Appeal to us is by the Secretary of State against that order.

Before deciding whether plaintiff is entitled to the deduction claimed or not, it is necessary to consider what rule of limitation applies, for it is argued that the limitation applicable is not the six months' rule under section 59 but the one year's rule under article 16 of Limitation Act. If this argument is correct the suit is well within time. Though the lower Courts have decided this point against the respondent it is no doubt open to him to support the order of the Subordinate Judge on the ground urged. It seems to me, however, that the argument is not sound ; for in my opinion the suit is one falling within the very words of section 59 and if that view is correct the application of article 16 will be excluded even if the suit fell within the words of that article also, for the former is a Special Law and as such it must prevail. Section 29 (*b*) of the Limitation Act also expressly enacts so.

The water-cess we are concerned with in this case was as already stated imposed on the plaintiff under Act VII of 1865. Section 2 of that Act applies the procedure for the collection of land revenue to the collection of water-cess. Now it was argued for the respondent that the wording of section 2 does not apply all the sections of the Revenue Recovery Act to the collection of water-cess but only such of the sections that deal with the method of collection or the procedure prescribed for it and it was contended that section 59 did not fall under that description and was not attracted by section 2 of the Cess Act.

(1) (1915) I.L.R., 38 Mad., 92.

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Reliance was placed for this argument on certain rulings under the Abkāri and Income-tax Acts where it was held that similar provisions applying the procedure of the Revenue Recovery Act for collection of arrears under those Acts did not make section 42 of the Act applicable to sales for such arrears. See *Ramachandra* v. *Pichaikanni*(1), *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar*(2). The learned Government Pleader, on the other side, pointed out that it has been held that these rulings are not applicable to the case of water-cess in *Vellappayal Ambalam* v. *Karupiah Pillay*(3) and *Gunnam Dorayya* v. *Vadapalli Ayyamacharyulu*(4), the reason given being that the Revenue Recovery Act II of 1864 itself by the definition of the term Public Revenue in section I made that term include water-cess; so that all the provisions of that Act by their own force would apply to the collection of arrears of water-cess. The respondent in answer has drawn our attention to the fact that section I of Act II of 1864 deals only with water-cess imposed for water *supplied* by the Government for irrigation and he has contended that it cannot therefore apply to water *unauthorizedly taken* and not so *supplied*. Assuming that the respondent's contention is correct and that the view expressed in *Gunnam Dorayya* v. *Vadapalli Ayyamacharyulu*(4) that section 2 is a mere surplusage is incorrect, and that we must rely upon that section to make Act II of 1864 applicable to the collection of arrears of water-cess charged for water unauthorizedly taken, I am still of opinion that the words of section 2 are sufficient to make section 59 applicable to this case, whether section 42 applies or not. Section 59 applies by its own language to all suits brought by parties aggrieved by any proceedings taken under the Revenue Recovery Act, whether such proceedings were taken to collect arrears of water cess or dues authorized to be collected under it. As pointed out by SADASIVA AYYAR, J., in *Ramaswami Iyer* v. *Secretary of State for India*(5), the ambit of section 59 is very different from that of section 42. The period of limitation provided under section 59 was applied in

(1) (1884) I.L.R., 7 Mad., 434.
(2) (1903) I.L.R., 26 Mad., 230.
(3) (1914) I.L.R., 37 Mad., 49.
(4) (1903) 27 M.L.J., 245.
(5) (1915) M.W.N., 154 at p. 156.

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that case and not article 16, to a suit arising under the Kudimaramath Act (I of 1858) which authorized the Collector to recover the value of labour which the plaintiff had to contribute "in accordance with the procedure prescribed under Act II of 1864." The same view was taken by the late Chief Justice Sir ARNOLD WHITE and Mr. Justice BENSON in *Orr* v. *Secretary of State for India in Council*(1), with reference to fees payable to village servants collectable under section 52 of Act II of 1864 itself "in the same manner as arrears of land revenue." It will also be noticed in connexion with the next argument that in that case money was paid under protest and no further proceedings were taken. The case in *Sankarappa Naicken* v. *The Secretary of State*(2), also takes the same view. Following these rulings I hold that section 59 applies.

It was next argued that as money was paid on demand being served on the plaintiff under Act II of 1864, and nothing further was done there were no "proceedings" under the Act about which plaintiff was complaining in this suit but he is only seeking to get a refund of his money under the general law and therefore section 59 does not apply. Certain unreported decisions in S.A. Nos. 838 and 844 of 1910 and the rulings of this High Court in *Ravula Vengalu Reddi* v. *Secretary of State*(3), and *Ravula Nagamma* v. *Secretary of State*(4), were cited in support of this argument. With all respect I am quite unable to follow these rulings. As against them there are the cases in *Orr* v. *Secretary of State for India in Council*(1), *Sankarappa Naicken* v. *The Secretary of State*(2) already cited. It seems to me the proceedings begin by the distraining officer producing a demand in writing from the Collector giving the name of the defaulter and the amount of water-cess payable by him, and showing it to the defaulter. That is a part of the proceeding under section 8 of that Act, in fact it is the first step. I see no reason to hold that the proceedings mentioned in section 59 refer only to subsequent proceedings after demand and not to the demand itself. There does not seem

(1) (1900) I.L.R., 23 Mad., 571.
(2) (1910) 20 M.L.J., 977.
(3) (1912) 15 I.C., 328.
(4) (1913) 18 I.C., 699.

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to be any justification for making such an artificial distinction. The cases referred to by the respondent have never been followed or treated as good law. It is clear to my mind that the plaintiff in this suit is a person who deems himself aggrieved by proceedings under the Revenue Recovery Act by which he was compelled to pay water-cess for which according to his case he was not liable and that he is seeking redress in this suit by suing for a refund of the money. The case falls, in my view, exactly within the language of section 59 and the rule of limitation provided in it applies.

The next question is whether plaintiff is entitled to the deduction he claims. No doubt the ruling in *Srinivasa Ayyangar* v. *Secretary of State*(1) is exactly in point in his favour but after the ruling in the Full Bench case reported in *Lingayya* v. *Chinna Narayana*(2), that case cannot be considered to be good law, though it was not formally overruled. The principle adopted in that Full Bench case is directly against the reasoning on which *Srinivasa Ayyangar* v. *Secretary of State*(1), is based. It has now been taken as settled that the application of the general provisions of the Limitation Act in sections 5 to 25 to the limitation prescribed by special or local laws would "affect or alter" the periods so prescribed and is therefore prohibited by section 29 of the Limitation Act. The distinction sought to be made in *Srinivasa Ayyangar* v. *Secretary of State*(1), between Special Acts which do not contain "a complete body of provisions with regard to limitation of suits coming within their purview" and other Acts which do contain them was rejected in the Full Bench case and I have therefore no hesitation in holding that plaintiff was not entitled to the deduction he claims under section 15, clause (2). The Calcutta High Court has taken the same view in *Secretary of State for India* v. *Shib Narain Hajra*(3). The point is, however, of little importance hereafter as the amending Act X of 1922 has made provision for it. But it is not argued that that Act applies to the present case for the suit here was barred before that Act came into force. In the view I take, the plaintiff's suit is barred by limitation. I would

(1) (1915) I.L.R., 38 Mad., 92. (2) (1918) I.L.R., 41 Mad., 169 (F.B.).
(3) (1919) I.L.R., 46 Calc., 199.

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therefore reverse the order of the Subordinate Judge and restore the decree of the District Munsif with costs here and in the lower Appellate Court.

VENKATASUBBA RAO, J.—The Government recovered from the plaintiff penal assessment under the Madras Irrigation Cess Act (VII of 1865) for unauthorized use of water and the plaintiff claimed in this suit refund of the amount so recovered from him. The Government pleaded that the suit was barred by limitation. The District Munsif accepted the contention and dismissed the suit. On appeal the Subordinate Judge reversed the decision of the District Munsif on the question of limitation and remanded the suit for disposal on the merits. The present appeal is by the Government against the order of remand.

On behalf of the plaintiff it is argued—

1. That the provision of law applicable is article 16 of the Limitation Act under which the period of limitation is one year and not section 59 of the Madras Revenue Recovery Act (II of 1864) under which the period is six months.

2. Where there was a mere demand by the Government and money was paid and no further proceeding was taken, that section 59 of the Revenue Recovery Act is not applicable because there was no proceeding under that Act.

3. Should the period of limitation be held to be six months under section 59 of Act II of 1864, that the plaintiff is entitled to exclude the period of notice prescribed by section 80, Civil Procedure Code, in computing the said period of six months.

In my opinion, the provision of law applicable is article 16 of the Limitation Act and not section 59 of the Revenue Recovery Act. I shall presently state my grounds for this opinion and as I entertain no doubt on the point, I consider it unnecessary to deal with the other two contentions urged before us. As already stated the penal assessment was collected from the plaintiff under the Irrigation Cess Act (VII of 1865). Section 1 of the said Act, so far as it is relevant for the present purpose, enacts

(*a*) "Whenever water is supplied or used for purposes of irrigation from any river . . . belonging to or constructed by Government and also,

(*b*) "Whenever water by direct or indirect flow or by percolation or drainage from any such river, irrigates any land

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under cultivation or flows into a reservoir, and is thereafter used for irrigating any land . . . it shall be lawful for the Government . . . to levy . . . a separate cess for such water."

Section 2 provides "arrears of water-cess payable under this Act shall be realized in the same manner, as arrears of land revenue are, or may be realized by law in the Madras Presidency."

Arrears of land revenue are realized under the Madras Revenue Recovery Act (II of 1864) and the reference in the section above quoted is to the provisions of the said Act.

Section 2 may be rendered thus—

"Arrears of water-cess payable under this Act shall be realized in the manner prescibed by the Revenue Recovery Act in regard to arrears of land revenue." In my opinion, the meaning of section 2 is, that all the sections of the Revenue Recovery Act, that relate to the manner of realizing arrears of land revenue, shall be read as if they form part and parcel of the Irrigation Cess Act.

Section 59 of the Revenue Recovery Act runs as follows:—

"Nothing contained in this Act shall be held to prevent parties deeming themselves aggrieved by any proceedings under this Act . . . from applying to the Civil Courts, for redress; provided that Civil Courts shall not take cognizance of any suit instituted by such parties for any such cause of action unless such suit shall be instituted within six months from the time at which the cause of action arose."

The learned Government Pleader argues that section 59 is applicable to this case and this argument implies that the said section deals with the manner of realizing arrears of revenue. Section 59 does nothing of the kind. It presupposes that the revenue has been realized and it prescribes the remedy to an aggrieved person against the Government. It refers to parties aggrieved by any proceedings "under this Act," that is, under the Revenue Recovery Act. It refers to a suit instituted by "such parties" and for "such cause of action," "such parties" being parties deeming themselves aggrieved by any proceedings under the Revenue Recovery Act and "such suit" and "such cause of action" can only refer to what is contemplated by the section.

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I fail to see how section 59 can come within the group of sections which refer to the manner in which land revenue is realized. If the legislature, instead of merely saying "arrears shall be realized in the same manner as arrears of land revenue are under the Revenue Recovery Act," had reproduced *en bloc* all the sections of the latter Act which deal with the mode of realizing revenue and re-enacted them in the Irrigation Cess Act, could it for a moment be contended that section 59 of the Revenue Recovery Act would be applicable to suits filed for the refund of penal assessment collected under the Irrigation Cess Act? I have no doubt whatever, that section 2 of the Irrigation Cess Act merely incorporates by reference only those sections of the Revenue Recovery Act that deal with the manner of realizing land revenue. Section 59 is clearly not one of those sections.

Let me now turn to article 16 of the Limitation Act "against Government to recover money paid under protest in satisfaction of a claim made by the revenue authority, on account of arrears of revenue or on account of demand . . . recoverable as such arrears, *one year* . . . when the payment is made."

This article in terms applies to the present suit. The only argument advanced on behalf of the Government against its applicability, is that a special rule is enacted in section 59 of the Revenue Recovery Act and that an article in a general Act should not be applied when a section of a Special Act is applicable.

It will be noticed that the article of the Limitation Act is quite general in its terms. It refers to arrears of revenue. Land revenue alone is removed from the scope of the said article by reason of the fact that a special provision is enacted in respect of it by section 59 of the Revenue Recovery Act.

Section 66 of the Madras Forest Act (V of 1882) provides that all money payable to the Government under that Act may be recovered "as if it were an arrear of land revenue." Similarly section 84 of the Madras Salt Act (IV of 1889) provides that all sums recoverable under that Act, may be recovered "as if they were arrears of land revenue." Again section 28 of the Madras Abkāri Act (I of 1886) enacts that certain sums due to the Government may be recovered "as if they were arrears of land revenue." It is unnecessary to refer to various other Acts in

which similar provisions occur. Does it then mean that section 59 of the Revenue Recovery Act applies to suits instituted for recovery of money paid to Government on account of alleged arrears of revenue under any of these Acts? If this view should be taken, article 16 of the Limitation Act would practically be a dead letter. I fail to see why the plain provisions of article 16 of the Limitation Act should not be given effect to and why a forced construction should be placed upon section 2 of the Irrigation Cess Act for the purpose of enabling the Government to plead a rule of limitation in bar of an admitted right to sue.

Land revenue being the most important item of revenue due to the Government, the legislature has in the Revenue Recovery Act enacted in detail the procedure for realizing it. When the legislature came to deal with other sources of revenue like Salt, Abkāri, Income-tax, Irrigation Cess, the legislature thought it sufficient to enact that all sums payable to the Government in respect of each particular head of revenue could be recovered as if it were an arrear of land revenue. The legislature could not have intended by mere reference to the procedure for realization of land revenue, that a provision of the Revenue Recovery Act which does not deal with such procedure should be incorporated in the Special Acts.

The District Munsif refers to section 1 of the Revenue Recovery Act, and by some argument which I am unable to follow, comes to the conclusion that by reason of the wording of that section, section 59 applies to this case. The material portion of section 1 is as follows:—

"Public revenue due on land shall for the purposes of this Act be taken to include cesses or other dues payable to Government on account of water supplied for irrigation."

Whether section 1 of the Revenue Recovery Act and section 2 of the Irrigation Cess Act overlap each other or not, it is unnecessary for me to discuss. But one thing is certain: in this case water-cess was not levied for water *supplied* for irrigation. On the other hand as the District Munsif remarks at the close of his judgment, it was the unauthorized *use* of water that entailed penal assessment. The Irrigation Cess Act refers not only to water supplied but also to water *used*. In this suit we are concerned only with water used and not with water supplied

and the reference by the District Munsif to section 1 of the Revenue Recovery Act seems altogether irrelevant.

For these reasons I have come to the conclusion that the suit is not barred by limitation and I would therefore dismiss the appeal with costs.

By the Court.—As we have differed on a point of law, viz., whether the suit is barred by limitation or not, we refer the point under section 98, Civil Procedore Code, to the decision of a third Judge.

In pursuance of the above order, the appeal was posted for hearing before the Chief Justice.

ON THIS REFERENCE:

The Government Pleader (*C. Madhavan Nayar*) for the appellant.—The suit is barred by limitation. Section 59 of the Revenue Recovery Act clearly applies. There was a demand for payment under section 8 of the Act. Demand is a proceeding under the Act. There was payment by the plaintiff on demand. Demand is a proceeding though it was not followed by distraint or any further proceedings. Section 29 (1) of the Limitation Act *excepts* the application of the provisions of the sections and articles of the schedule of the Act to a case governed by a special or local Act. Revenue Recovery Act is a special Act. Article 16 of the Limitation Act does not therefore apply. Nor does section 15 of the Limitation Act apply so as to permit the deduction of two months' period occupied by the notice of suit given to the defendant from the six months' time limited by section 59 of the Revenue Recovery Act. This latter question is concluded by the decision of the Full Bench in *Lingayya* v. *Chinna Narayana*(1), the decision in *Srinivasa Ayyangar* v. *Secretary of State*(2) is practically overruled by the above Full Bench case. The application of section 59 of Revenue Recovery Act to this case is

(1) (1918) I.L.R., 41 Mad., 169 (F.B.). (2) (1915) I.L.R., 38 Mad., 92.

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supported by the decision in *Orr* v. *The Secretary of State for India in Council*(1). See also *Ravula Nagamma* v. *Secretary of State*(2), *Ramaswami Iyer* v. *Secretary of State for India*(3), *Sankarappa Naicken* v. *Secretary of State*(4). The Judgment of KRISHNAN, J., in this case supports the appellant on both the points.

Apart from section 1 of the Revenue Recovery Act, and the Irrigation Cess Act, section 2, the Public Demands Recovery Act will make the arrears recoverable as public revenue. No doubt the decision in *Ravula Vengala Reddi* v. *Secretary of State*(5) is against the appellant as to the applicability of section 59. That case follows a certain unreported decision referred to therein, namely, *Pichi Reddi* v. *Secretary of State.*†

V. Krishna Mohan for respondent was not called upon.

JUDGMENT.

SCHWABE, C.J.

SCHWABE, C.J.—In this case claim was made for water cess. The assessee paid under protest, gave notice claiming the amount he paid and commenced this suit seven months after the payment but within eight months of it. It is contended by the Crown that the suit is barred by limitation under section 59 of the Revenue Recovery Act (II of 1864). That section runs thus :

"Nothing contained in this Act shall be held to prevent parties deeming themselves aggrieved by any proceedings under this Act from applying to the Civil Courts for redress : provided that Civil Courts shall not take cognizance of any suit instituted by such parties for any such cause of action unless such suit shall be instituted within six months from the time at which the cause of action arose."

I will assume that that section applies to cases arising out of the collection or imposition of cess under

(1) (1900) I.L.R., 23 Mad., 571. (2) (1913) 18 I.C., 699.
(3) (1915) M.W.N., 154. (4) (1910) 20 M.L.J., 977.
(5) (1912) 15 I.C., 328, infra p. 502 footnote. † Infra p. 503 footnote.

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the Madras Irrigation Cess Act (VII of 1865). By article 16 of the Limitation Act a period of one year is given for suits "against Government to recover money paid under protest in satisfaction of a claim made by the revenue authorities on account of arrears of revenue or on account of demands recoverable as such arrears." That section applies in terms to this case unless there is something in section 59 of the Revenue Recovery Act which prevents its applying. Section 29 (1) (*b*) of the Limitation Act says :

"Nothing in this Act shall affect or alter any period of limitation specially prescribed for any suit by any special or local law now or hereafter in force in British India."

There is a further provision in section 15 (2) of that Act that, "in computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force, the period of such notice shall be excluded," and under section 80 of the Code of Civil Procedure, no suit can be instituted against the Secretary of State in Council unless two months' notice is given. It has therefore to be contended for the Crown that section 59 of the Revenue Recovery Act, by reason of section 29 of the Limitation Act, not only excludes article 16, but also by reason of the same section, prevents the application of section 15 of the Limitation Act so that the period of two months is not in this particular instance to be excluded. In my judgment, this is not a case under section 59 of the Revenue Recovery Act at all, because it is not the case of a party deeming himself aggrieved by any proceeding under that Act. I doubt very much whether a demand of payment is a proceeding under the Act at all as contemplated by that section. I am quite clear that a person, who pays under protest when a demand is made and claims to recover back, is not a person aggrieved by any

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proceeding under the Act. He has taken a wise course, which prevents his having a grievance.

There is direct authority in support of this view in *Ravula Vengala Reddi* v. *Secretary of State*(1),* which followed a series of appeals, Second Appeals Nos. 838 and 844 of 1910 and 240 to 244 of 1911,† the Judgments in which, I regret, have not been published, because the point is fully discussed there and decided. The only authority to the contrary is the case of *Orr* v. *Secretary of State for India in Council*(2). In that case, without giving any reasons the Court expressed a view that, in the circumstances of that case, section 59 applied where there had been a payment under protest, to the exclusion of article 16 of the Limitation Act. It was unnecessary for that decision (which no doubt explains why no reasons were given) because in that case, the Court held on the merits that there was no

(1) (1912) 15 I.C., 328.

* Second Appeal Nos. 1451 and 1452 of 1910.

Before Abdur Rahim and Sundara Ayyar, JJ.

RAVULA VENGALA REDDI

v.

THE SECRETARY OF STATE.

In this case, judgment of the lower Appellate Court must be reversed on the question of limitation. The District Judge held that section 59 of the Revenue Recovery Act applied and not article 16 of the second Schedule of the Limitation Act.

In Second Appeals Nos. 838 and 844 of 1910 and 240 to 244 of 1911, we went into the question fully and we came to the conclusion that where there is a mere demand by the Government purporting to be made under the Revenue Recovery Act, such a demand will not make section 59 of that Act applicable as amounting to a proceeding under the Act. The judgment of the District Judge must, therefore, be reversed on this point and that of the District Munsif restored with costs in this and the lower Appellate Court.

(2) (1900) I.L.R., 23 Mad., 571. † See next page.

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case. That case was considered by the Bench in *Ravula Vengala Reddi* v. *Secretary of State*(1), and in the cases therein referred to, and distinguished. *Ravula Nagamma* v. *Secretary of State*(2), which was also referred to, does not touch this point.

In this state of authorities, sitting alone, I should have considered myself bound to follow the decision in *Ravula Vengala Reddi* v. *Secretary of State*(1) but it is open to me, sitting as I am now, to express my own views, and I agree with the decision in *Ravula Vengala Reddi* v. *Secretary of State*(1), for the reasons given in that case and in the unreported cases referred to therein, and I disagree with that part of the judgment in *Orr* v. *Secretary of State for India in Council*(3), which is to the contrary.

That being my view, it is enough to dispose of the case: but although I have not heard the matter fully argued, I think it right to say that I should find it very difficult to hold that section 29 of the Limitation Act, even if it has any application in this case, operates to

† *Before Abdur Rahim and Sundara Ayyar, JJ.*

Second Appeals Nos. 838 to 844 of 1910 and 240 to 244 of 1911.

In Second Appeal No. 838 of 1910.

1912, March 2.

PUCHALAPALLI PICHI REDDI, APPELLANT (PLAINTIFF),

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF NELLORE.

The Court delivered the following JUDGMENT:—

This Second Appeal has arisen out of a suit instituted by the appellant to establish the right of the shrotriyamdars of a certain village (plaintiff and defendants Nos. 2 to 9) to a tenth share of the water of a tank and to recover a certain sum of money which the plaintiff paid under protest to the Government as water cess levied from him.

(1) (1912) 15 I.C., 328. (2) (1913) 18 I.C., 699.
(3) (1900) I.L.R., 23 Mad., 571.

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exclude the two months' time given by section 15 of that Act, for there is nothing in section 59 of the Revenue Recovery Act to suggest that the six months limited there is to include the period which is by the general law excluded.

The appeal will be dismissed with costs, including the costs of this reference.

K.R.

Two principal questions arise in the suit. One was whether the suit was barred by limitation and the other whether the plaintiff has made out his right to the water as claimed by him. The District Munsif found both the points in favour of the plaintiff, but the District Judge reversed the judgment of the District Munsif on the question of limitation and also on the merits. As regards limitation he held that section 59 of the Madras Revenue Recovery Act applied to the suit. That section says:

"Nothing contained in this Act shall be held to prevent parties deeming themselves aggrieved by any proceedings under this Act, except as hereinbefore provided, from applying to the Civil Courts for redress; provided that Civil Courts shall not take cognizance of any suit instituted by such parties for any such cause of action, unless such suit shall be instituted within six months from the time at which the cause of action arose."

It is contended on behalf of the appellant that the proper period of limitation is that provided by article 16 of the Limitation Act and that section 59 of the Revenue Recovery Act has no application. We think that this contention must prevail. In this case there was only a demand by the Government and the appellant paid the cess demanded from him under protest. There is nothing to show that there was any proceeding as contemplated by the Revenue Recovery Act, such as attachment of any moveable or immoveable property or arrest of the person of the appellant. It is contended in support of the view of the learned District Judge that a mere demand would be a proceeding within the meaning of section 59 of the Revenue Recovery Act. We do not think that that can be the meaning. It can hardly be said that a person is aggrieved by a mere demand. The plaintiff is aggrieved in this case by the receipt by the Government of the money to which the Government was not entitled. The mere receipt of the money could not be said to be a proceeding. A proceeding must refer to such actions of the Government as are mentioned

in the various parts of the Act, for example seizure of the property or of the person. The question does not appear to have been fully discussed in any of the previous rulings. We find that, in a case reported in *Suryaprakasa Row* v. *The Secretary of State for India*(1) section 59 of the Revenue Recovery Act was applied but article 16 of the Limitation Act was not considered and further there was as a matter of fact a proceeding taken by the Government in that case by way of distraint of the plaintiff's property. The same observation applies to the case reported in *Orr* v. *Secretary of State for India in Council*(2). On the other hand in the case reported in *Mahammad Meera Mohiden* v. *The Secretary of State for India*(3) the period of one year's limitation was applied to a suit for recovery of money paid under protest. In *Sankaranpan Naicken* v. *Secretary of State*(4) a prohibitive assessment was levied and the ground on which section 59 was applied was that a proceeding had apparently been taken under the Act. If there has been no proceedings in this case within the meaning of section 59, Revenue Recovery Act, article 16 of the Limitation Act would no doubt apply in terms. It applies to suits for the recovery "of money paid under protest in satisfaction of a claim made by the revenue authorities on account of arrears of revenue or on account of demands recoverable as such arrears." Of course if section 59 of the Revenue Recovery Act applied that would exclude the application of article 16 of the Limitation Act; but as we have said there was no proceeding in this case such as is contemplated by section 59 of the Revenue Recovery Act. In that view we do not think it necessary to consider whether section 59 is not meant to be applicable only to suits for damages arising out of proceedings taken under the Act or whether that section would apply to cases where no money was at all due to the Government as revenue. The finding of the District Judge is wrong on the question of limitation and we hold that the suit is not barred. The District Judge's finding on the merits cannot be said to be satisfactory. He has not tried to deal with the various questions that arose in connexion with that point, nor has he met the various grounds on which the District Munsif found for the plaintiff. We reverse the judgment of the District Judge and remand the appeal for fresh disposal on the merits. Costs will abide the result. Second Appeal Nos. 839 to 844 of 1910 and Second Appeal Nos. 240 to 244 of 1911 will follow.

K.R.

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(1) (1903) 13 M.L.J., 380.
(2) (1900) I.L.R., 23 Mad., 571.
(3) (1903) 13 M.L.J., 269.
(4) (1910) 20 M.L.J., 977.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Krishnan and Mr. Justice Wallace.

1923, January 23.

N. V. E. NACHIAPPA CHETTIAR (PETITIONER), APPELLANT,

v.

N. A. K. SUBBIER AND THREE OTHERS (RESPONDENTS 1 TO 4), RESPONDENTS 1 TO 4.*

Civil Procedure Code (V of 1908), sec. 73—Rateable distribution —Attachment before judgment in a suit—Property sold pending suit and proceeds deposited into Court to the credit of the suit—Subsequent attachment of the amount by later decree-holders in the same Court—Decrees in subsequent suits, obtained prior to the decree in the first suit—Rateable distribution, right to—Assets held in Court, meaning of—Right of decree-holder in first suit—Right of decree-holder who first obtained a decree.

A, having instituted a suit in a District Munsif's Court, obtained an attachment before judgment of certain piece-goods belonging to the defendant; the goods were sold pending the suit and the sale-proceeds deposited in the Court to the credit of that suit on 11th April 1917. *B* subsequently instituted another suit in the same Court against the same defendant, got an attachment before judgment of the amount deposited in Court on 14th April 1917, and, having obtained his decree on 19th April 1917, applied, on 7th June 1917, in *A*'s suit, for payment of the amount in deposit in satisfaction of his decree. *C*, another creditor, obtained a decree against the same defendant on 8th June 1917 and applied for payment on the 29th of the same month. *A* obtained his decree on the 2nd July 1917 and applied on 3rd July 1917 for payment out of the whole money deposited in his suit. The District Munsif passed an order on 31st August 1917 for payment of the entire amount in Court to *A*. *B* filed a revision petition in the High Court against the order.

Held, that the amount deposited in Court became "assets held in Court" within the terms of section 73, Civil Procedure

* Letters Patent Appeal No. 10 of 1921.

Code, only when the Court passed an order on the application of *A* for payment in execution of his decree;

that *B*'s application for payment, having been wrongly made in *A*'s suit, was incompetent, as no such payment could be made without an order in *B*'s suit;

that *A*, *B* and *C* were entitled to rateable distribution under section 73 of the Code, *Viswanadhan Chetty* v. *Arunachalam Chetti* (1921) I.L.R., 44 Mad., 100 (F.B.), applied; *Umma Venkataratnam & Co.* v. *Adamji Usman & Co.* (1919) I.L.R., 42 Mad., 692, and *Bisheshar Das* v. *Ambika Prasad* (1915) I.L.R., 37 All., 575, dissented from.

APPEAL under section 15 of the Letters Patent against the judgment of SADASIVA AYYAR, J., in Letters Patent Appeal No. 53 of 1919, preferred against the judgment of BAKEWELL, J., in Civil Revision Petition No. 1309 of 1917, preferred to the High Court against the order of R. KRISHNASWAMI AYYAR, the District Munsif of Periyakulam, in Interlocutary Application No. 496 of 1917, in Original Suit No. 566 of 1917.

One Subbier, the first respondent in this Letters Patent Appeal, instituted a suit (Original Suit No. 566 of 1917) on the file of the District Munsif's Court of Periyakulam against one Kumarasami Mudaly. Subbier obtained an attachment before judgment of certain piece-goods belonging to his debtor (the defendant) in March 1917. During the pendency of the suit, the goods were sold on 11th April 1917, and the money was deposited in the Court to the credit of this suit (Original Suit No. 566 of 1917). The appellant, Nachiappa Chetty, brought his suit (Original Suit No. 678 of 1917) in the same Court against the same debtor, got an attachment before judgment of the money in deposit in the same Court on 14th April 1917, and obtained his decree on 19th April 1917. On 7th June 1917, the appellant Nachiappa Chetty, applied, not in his own suit but in Subbier's suit (Original Suit No. 566 of 1917) for payment to him of the deposit

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in satisfaction of his decree. His application was pending when Subbier got his decree in his suit on the 2nd July 1917 and applied for a cheque on 3rd July 1917 in execution of his decree. Two other creditors of the same defendant (one Rangaswamy Iyer and one Sundara Row) brought two other suits, Original Suit No. 617 of 1917 and Original Suit No. 785 of 1917 on the file of the same Court; the former obtained decree on 8th June 1917 and applied for payment on 29th June 1917 before Subbier obtained his decree, and the latter (Sundara Row) obtained his decree and applied for payment on the 20th July 1917, after Subbier got his decree. The District Munsif passed an order on the 31st August 1917, directing the payment of the entire amount in deposit in Subbier's suit towards the latter's decree in Original Suit No. 566 of 1917. The appellant Nachiappa Chetty preferred a civil revision petition to the High Court against the order of the District Munsif, impleading the other three decree-holders in the three other suits as well as the common judgment-debtor Kumarasami as respondents to the petition. The civil revision petition came on for hearing before BAKEWELL, J., who held that Nachiappa Chetty was entitled to priority against all other decree-holders and reversed the order of the District Munsif. Against this judgment, Subbier (the decree-holder in Original Suit No. 566 of 1917) preferred a Letters Patent Appeal (Letters Patent Appeal No. 53 of 1919) which was heard by SADASIVA AYYAR and COUTTS-TROTTER, JJ. The former learned Judge held that Subbier, Nachiappa and Rangasamy were entitled to rateable distribution under section 73, Civil Procedure Code, while the latter agreed with BAKEWELL, J., and held that Nachiappa was entitled to priority over the other decree-holders, as he was the first to obtain a decree. The judgment of SADASIVA AYYAR, J., as that of

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the Senior Judge, prevailed. Against the latter judgment, Nachiappa Chetty preferred this Letters Patent Appeal (Letters Patent Appeal No. 10 of 1921), impleading the three other decree-holders and the common judgment-debtor as respondents.

K. S. Jayarama Ayyar for appellant.—The appellant Nachiappa Chetty who is the plaintiff in Original Suit No. 678 of 1917 on the file of the District Munsif's Court, was the first to obtain a decree, while the first respondent (Subbier) and the other plaintiffs in the three other suits obtained decrees in their respective suits only after the appellant's decree. Although the first respondent obtained an attachment before judgment in his suit (Original Suit No. 566 of 1917), the attachment created no charge in his favour in respect of the decree that might be passed in his suit. The attachment prevents only private alienation by the defendant. Order XXXVIII, rule 9, Civil Procedure Code, enacts that attachment before judgment does not prevent sale by another decree-holder in execution of his decree. The money deposited in the Court represents the property which was originally attached before judgment by the first respondent. The appellant also effected an attachment before judgment of the money so realized and deposited in Court. Subbier has no charge or lien or priority of any sort over the money deposited in Court. The appellant has got a statutory right to execute his decree and take the money in Court in satisfaction of his own decree. There is no section or rule in the Civil Procedure Code to prohibit him from drawing the money in Court in execution of his decree; on the contrary, Order XXXVIII, rule 9 expressly permits such a course being taken by the appellant as a decree-holder. He has a right to execute his decree and the Court is bound to order execution under Order XXI, rule 17, Civil

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Procedure Code. This is a statutory right and is not affected by an attachment before judgment in another suit. The decision in *Umma Venkataratnam & Co.* v. *Adamji Usman & Co.*(1) supports the appellant's contention that the appellant, who was the first to obtain a decree among the decree-holders, and apply for execution at a time when there was no other decree-holder in the field, is solely entitled to the amount in Court. This case has not been overruled by the Full Bench decision in *Viswanadhan Chetty* v. *Arunachalam Chetti*(2); the decision in *Bisheshar Das* v. *Ambika Prasad*(3) also supports the appellant's contention. The other decree-holders are not entitled to claim rateable distribution along with the appellant. The Court is not competent to put off passing orders on the application of the appellant, who had obtained his decree and applied for execution, when there was no other rival decree-holder who could claim to be paid in execution. The Court cannot wait passing orders on an execution application with a view to enable the first respondent to obtain his decree and get paid. Such a procedure is contrary to the spirit and the express provisions of the Civil Procedure Code, such as Order XXXVIII, rule 9 and Order XXI, rules 10 and 17, Civil Procedure Code.

In any event the appellant is entitled to rateable distribution.

The respondents were not represented.

JUDGMENT.

SCHWABE, C.J.

SCHWABE, C.J.—Early in 1917, the first respondent Subbier brought a suit (Original Suit No. 566 of 1917) in the Court of the District Munsif of Periyakulam against Kumarasami Mudali In March 1917 he attached before

(1) (1919) I.L.R., 42 Mad., 692. (2) (1921) I.L.R., 44 Mad., 100. (F.B.).
(3) (1915) I.L.R., 37 All., 575.

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judgment certain piece-goods the property of the defendant. They were sold and the proceeds deposited to the credit of this suit on 11th April 1917. The present appellant Nachiappa Chettiar brought a suit in the same Court against the same defendant, Original Suit No. 678 of 1917, and on April 14, 1917, attached before judgment the money in deposit in Subbier's suit. He got a decree on April 19, 1917, and on June 7, 1917, he applied in Subbier's suit for payment out to him of the money in Court. While this application was pending Subbier got a decree on July 2, 1917, and on July 3rd applied for payment out to him, or, as it is called, applied for cheque. The present second and third respondents Rangasami Iyer and Sundara Rao, brought suits in the same Court against the same defendant, Original Suits Nos. 617 of 1917 and 785 of 1917, and obtained decrees and applied for payment out to them, one on June 29, that is, before Subbier's application, and the other on July 20th, that is after Subbier's application. Subbier first got an attachment before judgment and the money was deposited to the credit of his suit, but Nachiappa Chettiar and Rangasami Iyer got decrees and applied for payment out of the money to them before Subbier got his decree, while Sundara Rao got his decree and applied for payment out after Subbier got his decree and applied for payment.

The question for determination is which of these four plaintiffs is entitled to be paid. The question depends upon the interpretation of section 73, Civil Procedure Code, which is in the following terms :—

"Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of

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money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons."

The District Munsif held that as none of the other three had applied before the receipt of the assets into the Court in Subbier's suit, they had no right to rateable distribution under section 73 and refused their applications, and ordered that Subbier should draw the whole amount, but stated that his order did not preclude the rival decree-holders from setting up their rights, which would have to be determined in a suit. The matter then came up on Civil Revision Petition before BAKEWELL, J., and he held, following *Umma Venkataratnam & Co.* v. *Adamji Usman & Co.*(1), that Nachiappa Chettiar being the first decree-holder to apply for payment was entitled to the money. On the Letters Patent Appeal from that order SADASIVA AYYAR, J., held following *Visvanadhan Chetty* v. *Arunachalam Chetti*(2), that section 73 applied to the first three decree-holders and awarded rateable distribution amongst them. COUTTS TROTTER, J., differed and proposed to follow BAKEWELL, J., and held that the petitioner Nachiappa Chettiar ought to be given preference. Owing to this difference of opinion the matter now comes before us under clause 15 of the Letters Patent. In *Umma Venkataratnam & Co.* v. *Adamji Usman & Co.*(1), and in *Bisheshar Das* v. *Ambika Prasad*(3), it was decided in similar circumstances that the person entitled is the first decree-holder who applies to the Court in which the money is deposited, on the same principle as is applied in the case of an ordinary judgment-debtor's property in his own possession, namely the first in order of time has the preference.

(1) (1919) I.L.R., 42 Mad., 692. (2) (1921) I.L.R., 44 Mad., 100 (F.B.).
(3) (1915) I.L.R., 37 All., 575.

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The whole matter was however reconsidered in *Visvanadhan Chetty* v. *Arunachalam Chetti*(1), by a Ful Bench of this Court and the proper interpretation of section 73 was laid down. The Court was unanimous. It was held that " assets held by a Court " did not include all money lying in Court to the credit of the judgment-debtor but only the assets levied in execution or paid into Court in satisfaction of the decree under execution, and that there is no receipt of assets within the meaning of section 73 until the Court holding the money comes to the conclusion that no objection exists, and orders the money to be transferred to the credit of the first attaching creditor's suit, the decree in which it is engaged in executing. This is the effect of the judgment of WALLIS, C.J., with which AYLING and NAPIER, JJ., agreed. SADASIVA AYYAR, J., held that the words " before receipt of such assets " must be qualified by an implication of the 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." KRISHNAN, J., put it that only when the money is transferred to the credit of the suit in which attachment takes place can the attaching court be said to have received the assets and hold them within the meaning of section 73, and that the decree-holders who have attached prior to that are entitled to rateable distribution. In view of this decision, in my judgment, *Umma Venkataratnam & Co.* v. *Adamji Usman & Co.*(2), *Bisheshar Das* v. *Ambika Prasad*(3), cannot here be considered as good law. In this case the money in Court has never been levied in execution nor transferred to

(1) (1921) I.L.R., 44 Mad., 100 (F. B.) (2) (1919) I.L.R., 42 Mad., 692.
(3) (1915) I.L.R., 37 All., 575.

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the credit of any other suit than Subbier's and did not become available as assets held by the Court under section 73 until an order was made on the application by Subbier for execution of his decree. Under Order XXXVIII, rule 11, he, having attached before judgment, was excused from applying for re-attachment in execution, and there being already other applications to the Court for attachment of this money in execution of decree against the same judgment-debtor, the amount in Court should have been rateably distributed between these applicants. In this case the persons entitled to rateable distribution are Subbier, Nachiappa Chettiar and Rangasami Iyer. The fourth decree-holder Sundara Rao has not appealed, and it is not necessary to consider his claim, and he must be excluded.

That is enough to determine this appeal; but speaking for myself I desire to say that I am not at present satisfied that the position of a person attaching property before judgment as against a subsequent decree-holder against the same defendant does not require further consideration. It has apparently been accepted as concluded that because the property attached, or the proceeds thereof being in Court, is not the property of the attaching creditor it is available for any subsequent decree-holder against the same defendant. Under section 60, Civil Procedure Code, any property can be attached which belongs to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit. Under Order XXI, rule 52, Civil Procedure Code, where the property to be attached is in the custody of any Court a request must be made to that Court that the property may be held subject to the orders of the executing Court, but the Court having custody shall determine

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all questions of priority and the claim of any person having an interest in such property by virtue *inter alia* of any attachment. There is no doubt that the money in one Court is available for the decree of another Court subject to the consent of the former and to its decision as to priorities. In the case of money simply lying to the credit of the judgment-debtor no difficulty arises, as by this form of equitable execution it can be reached by a decree-holder; but there is no doubt that the judgment-debtor has no power of disposing of property attached before judgment for his own benefit, and I very much doubt whether such property can be said to belong to him within the meaning of section 60, Civil Procedure Code, or whether it can be taken in execution so long as the custody Court holds it pending the decision of the suit before it. If the prevalent view referred to above is correct, the result is that a plaintiff, who gets an order to attach before judgment because he satisfies the Court that there is a danger of the property being made away with, and that enough ought to be preserved pending his suit to satisfy any decree he may get, may find that the property he has preserved is taken away from him pending his suit by a decree-holder who is lucky enough to get a decree more quickly. Indeed it would be easy for a defendant, who wishes to take his property out of the reach of the attaching creditor, after attachment to get, or even create, a friendly creditor for an amount large enough and allow him to take judgment and get the property attached in execution, while he delayed the suit of the original attaching creditor. It seems to me that it is possible that the Court with custody of the property under attachment before judgment might properly refuse to allow it to be attached in execution until after the decision of the suit in which it was originally

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attached. In *Bisheshar Das* v. *Ambika Prasad*(1) Order XXXVIII, rule 10, Civil Procedure Code, was considered to be conclusive in favour of the decree-holder, but it is possible that the interpretation of that rule requires further consideration. I have referred to this matter here as the point was discussed before us. It may be that the solution is to be found in the exercise of discretion of the custody Court. It is, however, unnecessary to give a decision upon it in this case.

This appeal must be dismissed and the case sent back to the District Munsif directing him to make rateable distribution between the present appellant and the present respondents 1 and 2. The parties will bear their respective costs throughout except of this appeal. None of the respondents appeared in this appeal and there will be no order as to their costs.

KRISHNAN, J. KRISHNAN, J.—I agree with the learned Chief Justice in the order proposed by him. As pointed out in his judgment the present case is really governed by the recent full Bench ruling *Visvanadhan Chetty* v. *Arunachalam Chetti*(2). In that case the money attached was lying in Court to the credit of the judgment debtor, the custody Court and the attaching Court being the same Court. In the present case the attachment before judgment was no doubt in the first instance of some piece-goods belonging to the judgment-debtor; but as the price was falling in the market and delay might cause loss, the goods had been sold by order of Court under Order XXXIX, rule 6, Civil Procedure Code, and the money obtained had been paid into Court in Subbier's suit in which that attachment had been made. The conversion of the piece-goods into money by sale was not however a "realization of assets" within the

(1) (1915) I.L.R., 37 All., 575. (2) (1921) I.L.R., 44 Mad., 100 (F.B.).

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meaning of section 73, Civil Procedure Code, as the District Munsif held, for the sale was not in execution of any decree. The result of the sale proceedings was only to substitute the money paid into Court for the goods and subject it to the same attachment before judgment as was levied on the goods. We have thus here also a case of money in Court being attached by the same Court as in the Full Bench Case. According to the ruling in the Full Bench case that money became assets held by the Court and available for payment out in execution only after the District Munsif passed the order for payment. Till then it remained in Court as money under attachment, the attachment before judgment having become in effect an attachment after decree (under Order XXXVIII, rule 11) when the decree was passed. Prior to the order of the Munsif, the other decree-holders before us had obtained decrees and had applied for execution and had attached the money in question. The case seems therefore to be clearly one to which section 73, Civil Procedure Code, applies.

It is true that the appellant before us, Nachiappa Chetti, had obtained his decree before Subbier and the other creditors had obtained theirs and his attachment before judgment of the money had thus taken effect as an attachment in execution before that of any of the others. But in applying for execution by issue of a cheque to him he applied to the Court in Subbier's suit, O.S. No. 566 of 1917. So far as he was concerned, the Court acting in that suit was the custody Court, the attaching Court being the Court acting in his own suit, No. 678 of 1917. The custody Court could not pay out the money to him without an order of the attaching Court to that effect as it has to hold the money subject to

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the orders of the attaching Court under rule 52, Civil Procedure Code. If he wanted payment out he should have applied in his own suit and obtained an order from the Court as attaching Court for payment in execution before asking the custody Court to pay or he should have applied in his own suit for transferring the amount to the credit of his suit and then got that Court to pay the money to him. His application to the custody Court for payment was not a proper application and was rightly disregarded by the District Munsif. In these circumstances it is not necessary to decide the question whether, if he had made a proper application according to law to have his decree amount paid out, the fact that Subbier had a prior attachment before judgment on that money would have in any way justified his application being refused. I do not propose therefore to discuss the question raised by the learned Chief Justice in the latter part of his judgment regarding the effect of an attachment before judgment: I desire to reserve my opinion on it for the present. In my view Nachiappa Chetty got no right for the payment of the whole of his decree amount as claimed before us and as was held by BAKEWELL, J., nor did Subbier get such a right as held by the Munsif. An order for rateable distribution is, in my view, the proper order to make in the case. The fourth decree-holder Sundara Rao not having applied in revision is not entitled to the benefit of our order; he must be excluded.

WALLACE, J.

WALLACE, J.—I agree.

2. Appellant urges strongly that the attachment before judgment by Subbier in March 1917 of the funds of the common debtor in the custody of the Court cannot confer on Subbier any sort of lien or charge

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on these funds and could not be used to defeat the right of himself as first applicant for execution to have his decree satisfied in full, when he applied for cheque on 7th June 1917, at a time when no other creditor had obtained his decree or was entitled to apply in execution. It is well recognised law that an attachment confers no sort of lien or charge on the attached property and is not effective to create any sort of legal right in the attaching creditor to have the property earmarked for the satisfaction of any decree he has obtained or may obtain and it is in no sense to be regarded as the inception of execution on behalf of the attacher. Much less does it enure to create any such right for the benefit of other creditors seeking for decrees or for execution of decrees or for rateable distribution under section 73. And it then can be used for one purpose only, viz., to defeat and render void any private alienation made during its continuance. See *Annamalai Chettiar* v. *Palamalai Pillai*(1) and *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria*(2). There is in the present case no such private alienation in question, and hence, for the purposes of this case, the attachment before judgment by Subbier created or maintained for him no legal right to the fund in the custody of the Court.

3. So that, on 7th June 1917, when appellant applied for his cheque, he was in a strong position, with no legal bar to his having his decree satisfied out of this fund, provided his execution application was in order and the Court chose to grant it. But his application was not in order. It was not an application in his own suit, the only suit in which he had then any *locus standi*, to operate on a fund in another suit. That he could not do until he had the fund transferred to the credit of his

(1) (1918) I.L.R., 41 Mad., 265 (F.B.). (2) (1917) I.L.R., 44 Calc., 662 (P.C.).

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own suit. His application did not include any request to the Court to transfer to the credit of his suit the amount at credit of Subbier's suit, possibly the omission was intentional, as such a request would have at once raised in the custody Court the question of the priority of the first attaching creditor Subbier. In any case the appellant's application was thus not in form, and the Court, either for this reason or some other, did not choose to act on it then. Had it then ordered payment one might infer that it had, as custody Court, settled the question of priority, and had itself, as attaching Court, transferred the money at credit of Subbier's suit to the credit of appellant's suit. But it refrained, and the money remained where it was, held as before, money in the Court as custody Court held subject to the disposal of the Court as attaching Court, in suspense, as it were, until the attaching Court had before it a proper execution application, i.e., an execution application in the suit in which the first attachment took place, or an execution application in another suit praying for transfer to that suit of the money from the suit in which it was. When that occurred, it was then for the attaching and executing Court to decide to work out the attachment and call up the attached money for satisfying the various applicants. There was no such application until Subbier put in his application on 2nd July 1917 for cheque. In my opinion the Court ought to have then proceeded to execute Subbier's decree with due regard to the claims of persons entitled under section 73 to rateable distribution. There was no reason then for delaying matters further. However the Court still refrained from moving, and, so far as one can see, the fund remained in the custody Court in the same state as it had been from the beginning, until on 31st August 1917 the Court decided to distribute and

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determined that the whole of it should go to Subbier Only then can it be said that the attaching Court called up the fund in the custody Court for use in execution of the pending unsatisfied decrees, and only then can it be said that the assets were received within the meaning of section 73.

4. The same conclusion follows also from a strict examination of the terms "assets held" and "receipt of the assets" in section 73. In the ordinary case of assets realized by Court sale under a decree, the assets are held when the whole of the sale-proceeds in execution are paid into Court, and it is only when the assets are actually realized, that any question of the title of any one to rateable distribution will arise,—see *Kristnaswamy Mudaliar* v. *Official Assignee of Madras*(1). But when the sale-proceeds are already in Court prior to the decree it must be that they cannot become assets before (1) the debtor becomes a judgment debtor, and (2) execution is taken out against them either by a judgment creditor entitled by decree and by his position as the plaintiff in the suit to the credit of which the money lies, to put in a valid execution application; or by a judgment creditor entitled, by an order of Court transferring the fund to the credit of his suit, to put in a valid execution application. It is only then at the earliest that they can become assets held and received in execution, but it does not follow that it is then that they do become so. The point of time of the conversion is the point of time at which the Court says "I, as attaching Court, take this property of the judgment debtor lying in this Court as custody Court and make it property available for distribution in satisfaction of decree against him."

(1) (1903) I.L.R., 26 Mad., 673.

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5. In the present case there is nothing to show that the Court made this conversion earlier than the date 31st August 1917 on which it directed rateable distribution. It might have done it, as I have indicated, on 7th June 1917, when appellant applied for cheque, or on 29th June 1917, when the decree-holder in 617 of 1917 applied for cheque, or, most reasonably of all, on 3rd July 1917, when Subbier applied for cheque, or on 29th July 1917, when the decree-holder in 785 of 1917 applied. The fact that on none of these dates did it make any pay order shows that on none of these dates did it decide to effect the necessary conversion. I am not satisfied that the Court exercised its discretion judicially in withholding that conversion beyond 3rd July 1917 which has had the effect of bringing in a fourth claimant for rateable distribution, who seems, so far as we have heard, to have had no particular claims to such indulgence. But that matter is not now before us. I do not think we can hold that the Court had no power so to delay the conversion, or that this Court has power to alter the date of receipt of assets.

6. In a case like the present, then, section 73 leaves a wide discretion to the Court, which is both custody Court and attaching Court, to fix the date of "receipt of assets" within the meaning of section 73, and I am clear that we are not justified in holding that the Court exercises its discretion unjudicially when it fixes that date so as to enable the creditor who has been the first to attach the property and thus hold it, it may be, for all creditors as well as himself, to obtain his decree provided that creditor shows all due diligence in obtaining it and that the delay is due to the complexity of the suit or the dilatoriness of the trying Court or some other cause over which he has no control and it would certainly exercise its discretion wisely in so delaying the

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conversion, if the alternative was to permit a later attaching creditor, who obtained his decree earlier merely because his suit was simpler, or because the common debtor did not choose to contest the claim, from going off with the whole fund which had been secured by the diligence and foresight of another creditor. It might, no doubt, be contended that, if the debtor's property had not been attached, he might have satisfied the less diligent creditor out of Court, and that such preference is not illegal, but I do not see why, when a Court has custody of the debtor's property, it should be bound to imitate the debtor's personal preference, while it would in all cases be a matter of idle speculation whether the first holder of a valid application for execution was the one whom the common debtor, if left to himself, would have preferred to pay. On the other hand it may well be argued that the object of Order 38, rule 5, was to put it out of the power of the common debtor to give such preferential treatment and thus to prepare in advance for some equitable rateable distribution. Such delay in conversion will, no doubt, at times have the result that other belated and perhaps indifferent and inactive creditors may also be enabled to come in under section 73, when the assets are received, but even so, as a rule, I think it preferable that that should happen rather than that the most diligent creditor should be wholly deprived of a share in the assets which were secured by his forethought and promptitude.

7. This, I think, is the logical result of the principles laid down in *Visvanadhan Chetty* v. *Arunachalam Chetti*(1) as applied to a case like the present, and will deviate from those laid down in *Umma Venkataratnam and Co.* v. *Adamji Usman and Co.*(2) in allowing the Court to exercise

(1) (1921) I.L.R., 44 Mad., 100 (F.B.). (2) (1919) I.L.R., 42 Mad., 692.

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its discretion in favour of a diligent creditor who has attached before judgment the property of his debtor in the custody of the Court. The insistence in the latter case on the reward of diligence may be carried so much further forward. The Court will then exercise its discretion in favour of all diligent creditors, diligence being tested either (1) by promptitude in obtaining attachment before judgment, followed up by diligence in prosecuting the suit and when decree is obtained, in applying for execution, or (2) by promptitude in obtaining a decree and applying for execution.

8. I therefore agree in the order proposed by the learned Chief Justice.

K.R.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Phillips, Mr. Justice Devadoss, Mr. Justice Venkatasubba Rao, and Mr. Justice Wallace.

GOPAL NAIDU AND ANOTHER (ACCUSED 1 AND 2), PETITIONERS,

v.

KING-EMPEROR (RESPONDENT).*

1922, December 22.

Indian Penal Code (XLV of 1860), ss. 342, 96 to 105 and 81—Wrongful confinement—Drunken person—Arrest and confinement by police officer, without warrant—Police officer charged with offence under sec. 342, Indian Penal Code—Private defence or justification—Rules of English Common Law, whether applicable to Criminal Law of India—Effect of codification—Right of private defence or justification laid down in Indian Penal Code only, applicable—Criminal Procedure Code (V of 1898), sec. 57—Madras Police Act (XXIV of 1859), sec. 21—Duties and powers of police officers.

The purpose of a codified statute is that, on any point specifically dealt with by it, the law shall be ascertained by interpreting the language used.

The Criminal Law of India has been codified in the Indian Penal Code and the Criminal Procedure Code; the former Code deals specifically with offences and states what matters will afford an excuse or a defence to a charge of any offence, and the Court is not entitled to invoke the Common Law of England in such matters at all.

Where a village magistrate arrested a drunken person whose conduct was at the time a grave danger to the public, he is not guilty of an offence, not by virtue of the rule of English Common Law, but by reason of the provisions of section 81 or sections 96 to 105 of the Indian Penal Code.

The case in *In re Ramaswami Ayyar*, (1892) I.L.R., 44 Mad., 913, is rightly decided, not on the grounds of the

* Criminal Revision Petition No. 386 of 1922 and Criminal Revision Case No. 387 of 1922.

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English Common Law on which the decision is based, but on the provisions of the Indian Penal Code relating to private defence.

Where two police officers arrested without warrant a person who was drunk and creating disturbance in a public street, and confined him in the police station though one of them knew his name and address and it was not found to what extent he was a danger to others or their property.

Held, that the arrest having been made by the police officers without warrant, for a non-cognizable offence, their action was *primâ facie* an offence under section 342 of the Indian Penal Code, unless it was justified under the provisions of the Code relating to the right of private defence or under section 81 of the same Code.

PETITION under sections 435 and 439 of the Code (V of 1898) praying the High Court to revise the judgment of the Sessions Judge of the North Arcot Division at Vellore in Criminal Appeal No. 1 of 1922 preferred against the judgment of M. SUNDARA RAJAN, the Sub-divisional Magistrate of Tiruvannāmalai, in Calendar Case No. 62 of 1921.

The petitioners were convicted by the Sub-Divisional Magistrate of the offence of wrongful confinement under section 342 of the Indian Penal Code and sentenced to pay a fine of Rs. 51 each. The petitioners were head constables, who, along with another accused, who was a Sub-Inspector, were accused of having wrongfully arrested without warrant the complainant, and confined him in the police station for a short time until he was released on furnishing security. The lower Courts found that the two petitioners arrested the complainant on the night of 8th August 1921, as he was drunk and creating a disturbance in the Brahman street of the village, and that they took him to the police station and confined him there, although one of them knew his name and address. On appeal by the accused, the Sessions Judge confirmed their conviction under section 342, Indian

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Penal Code, but reduced the fine to rupees ten on each of the accused. It appeared that the complainant was charged with committing the offence of public nuisance under section 290, Indian Penal Code, and was convicted and fined rupees ten. It also appeared that one of the head constables knew the name and residence of the complainant before he was arrested without warrant. The learned Sessions Judge held that, the offence of public nuisance under section 290, Indian Penal Code, being a non-cognizable offence, the arrest without warrant was under the circumstances not justified under section 57, Criminal Procedure Code, that the petitioners were therefore guilty of "wrongful confinement" under section 342, Indian Penal Code; the learned Judge also held that section 21 of the Madras Police Act (XXIV of 1859) did not empower the police officers to act as they did. Against the order of the Sessions Judge, the two police officers preferred this Criminal Revision Petition. The case came on for hearing originally before OLDFIELD and RAMESAM, JJ., who made the following:

ORDER OF REFERENCE TO A FULL BENCH.

We are asked to revise the decision of the Sessions Judge of North Arcot, confirming the conviction of the two petitioners, Head Constables, of an offence punishable under section 342 and their sentences to pay a fine of Rs. 10 each. The findings of the lower Court are, we take it, that on the night of 8th August 1921 the two petitioners arrested one Nayinatha Udayan, as he was drunk and creating a disturbance in the Brahman street of the village, and that they took him to the station and confined him there, although one of them, it is found, knew his name and address. On those findings the learned Sessions Judge held that Nayinatha Udayan, having committed a non-cognizable offence, could not be arrested or taken to the station, inasmuch as there was no necessity for the Head Constables under section 57, Criminal Procedure Code, to do so in order that his name or residence might be ascertained.

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Here the petition has been argued first with reference to section 21 of the Madras Police Act XXIV of 1859, the contention being that this section removes any restriction on the power of arrest imposed by any other law, including the Criminal Procedure Code. Section 21 no doubt states that "it shall be the duty of every Police Officer to use his best endeavour and ability to prevent all crimes, offences and public nuisances, to preserve the peace, to apprehend disorderly and suspicious characters;" and then further duties are described with a similar absence of precision. This section, as we understand it, expresses only some of the pious injunctions, to which our earlier Indian draftsmen were addicted, and was not intended to enlarge the powers, with which the police were at its date or have since been invested under the substantive law, whatever that law at the time in question may have been or may be. We cannot presume an intention to limit the liberty of the subject by language so general. We therefore turn to the second argument relied on by Mr. Jayarama Ayyar on behalf of the petitioners, that in fact what they did was authorized by the substantive law, as declared by judicial authority in this Presidency.

Shortly petitioners rely on the decision in *In re Ramaswami Ayyar*(1), as justifying their action. That decision we read as founded on three propositions. First that the Common Law of England would authorize an arrest, not only by the Police or a magistrate, but by any person, in the circumstances of the present case; next, that the Common Law of England is applicable to India, except where a statute either expressly or by implication has abrogated it; and thirdly, that the Common Law has not been abrogated in any way, so far as it is applicable to the facts before us.

The first of these propositions has not been disputed here; and we observe only that the Common Law power to terminate a nuisance, such as is here in question, by the arrest of the offender, is an effective and immediate remedy adapted to the circumstances of such cases. The second rests in this Presidency on the authority of *In re Venkata Reddy*(2). The learned Public Prosecutor has drawn our attention to *Satish Chandra Chakravarti* v. *Ram Dayal De*(3), and it is possible that reconsideration

(1) (1921) I.L.R., 44 Mad., 913. (2) (1913) I.L.R., 36 Mad., 216.
(3) (1921) I.L.R., 48 Calc., 388.

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of the principle involved in the light of the latter decision may be justified. We do not however pursue this further, since we are clear that in connexion with the third of the propositions above stated a reference to a Full Bench must be made.

To the third proposition the learned Public Prosecutor has taken objection on the ground that certain provisions of statute law were not considered by the learned Judges in the previous case. The offence in question then, as now, was one punishable under section 290 or section 510, Indian Penal Code, Nayinatha Udayan having in fact been convicted of an offence punishable under the former. Which section however was really applicable does not matter, because the offence under each is one, for which the police cannot arrest without warrant; that is, it was non-cognizable. There is then the provision regarding arrest in non-cognizable offences, section 57, Criminal Procedure Code; and whatever the inconvenience involved, we cannot disregard the existence of this apparently exhaustive provision regarding the powers of the police in them. There is no mention of these provisions in *In re Ramaswami Ayyar*(1) and no consideration of the extent to which they abrogate the right of arrest under the English Common Law. In the absence of such mention we entertain doubt as to the correctness of the learned Judges' conclusion; and we accordingly refer to a Full Bench the question whether *In re Ramaswami Ayyar*(1) was correctly decided.

ON THIS REFERENCE

K. S. Jayarama Ayyar for petitioners.—The question referred to the Full Bench is whether the case of *In re Ramaswami Ayyar*(1), was rightly decided. That raises the question of the applicability of rules of English Common Law in determining the rights of a private citizen to arrest or apprehend others under circumstances in which the complainant was apprehended in the reported case. There are three questions to be answered: (1) What is the Common Law of

(1) (1921) I.L.R., 44 Mad., 913.

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England on the subject? There can be no doubt as to the English Common Law on the subject. The cases have been cited in *In re Ramaswami Ayyar*(1).

The second question is whether the English Common Law is applicable to India. The Privy Council has applied the English Common Law to India in the case of *Ramaloll Thackoorsèydos* v. *Soojunmull Dhondmull*(2) and in *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdhry*(3).

This High Court has applied the English Common Law to the Indian Criminal Law of defamation, by holding that the absolute privilege of witnesses, recognized in the Common Law of England applies also to a prosecution of a person for defamation by him in the course of a deposition as a witness. See *In re Venkata Reddy*(4) The English Common Law is applicable as a rule of equity, justice and good conscience. The first introduction of the English Common Law into India was by the Charter of Charles II in 1683.

The provisions of the Criminal Procedure Code relating to arrests with or without warrant by police officers or by private persons are not exhaustive. See sections 54 to 59. Under the Towns Nuisances Act (III of 1889) the offence of nuisance is cognizable; but the Act is not applicable to rural areas and hence the offence is non-cognizable therein. Under section 21 of the Madras Police Act, XXIV of 1859, the police officers have power to prevent crimes, preserve order and peace, etc., and in exercise of such power they are competent to apprehend persons: apprehend means arrest and confine persons. The provisions relating to arrest in the above Act (XXIV of 1859), sections 22 to 25 were repealed by Act (XVII of 1862), as they were

(1) (1921) I.L.R., 44 Mad., 913.
(2) (1848) 6 M.P.C.C., 300.
(3) (1872) 11 Beng. L.R., 321 (P.C.).
(4) (1913) I.L.R., 36 Mad., 216.

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provided for in the Criminal Procedure Code, XXV of 1861—vide preamble to the former Act. Sections 1 and 3 of the latter Code say that nothing in the Code affects powers outside the Code. Section 54 of the Criminal Procedure Code does not say that no police officer can arrest without warrant in any case, but only that he can do so in certain cases. Therefore his powers, if otherwise conferred, are not taken away by the Code.

Under section 59 of the Code of Criminal Procedure a private person can arrest any person for a non-bailable cognizable offence, etc. Under the English Common Law, felonies and misdemeanours were apprehensible by private citizens. Section 59 took in only a part of the Common Law relating to felonies, it did not affect the powers in other cases (misdemeanours) in which a private citizen could arrest under the Common Law, which exist outside the section. There is no wrongful restraint or confinement, where the Common Law allows it to be done. See section 97, Indian Penal Code.

Public Prosecutor, J. C. Adam, for the Crown.—Offences under sections 510 and 290, Indian Penal Code, are both non-cognizable offences under the schedule to the Criminal Procedure Code; the police cannot arrest without warrant in those cases under the Indian Law. The rules of English Common Law are not applicable except as rules of justice, equity and good conscience.

The Charter of 1661 was the earliest that made the English Common Law applicable in the Presidency Towns in India. In 1726, the Legislature specifically introduced Common and Statute Law only in Presidency Towns. Before the Indian Penal Code was passed, the Criminal Law in force in the mufassal was the Muhammadan Criminal Law, which was no longer in force after the Indian Penal Code. See Strachey, page 95. Before the Indian Penal Code, there was no Criminal Common Law

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in the mufassal; Muhammadan Criminal Law or any principle of justice was applied. The English Common Law was introduced into the Presidency Towns in 1726 and extended to the mufassal by 39 & 40 Geo. III. There is no record of English Common Law (Criminal) being applied in the mufassal. Blackstone makes a distinction between new Colonies and places where the Colony is in a country already under a system of established law: Blackstone's Commentaries, Vol. I, page 106; Stephen's History of Criminal Law, Vol. III, pages 289 and 292, Chapter "Native Court." It is not correct to say that the English Common Law (Criminal) was ever introduced into India.

The Indian Penal Code is a complete Code and cannot be augmented. *Satish Chandra Chakravarti* v. *Ram Dayal De*(1) and *Bank of England* v. *Vagliano Brothers*(2). The decision in *In re Venkata Reddy*(3) is erroneous. It was there held that the English Law of absolute privilege in defamation applies to a criminal charge of defamation, as it is not specifically dealt with in the Indian Penal Code. Defamation is exhaustively dealt with in section 499, Indian Penal Code. Here also the Criminal Procedure Code deals with arrest and the English Common Law does not apply. The defences open are laid down in Chapter IV (General Exceptions) of the Indian Penal Code, which is an exhaustive Code on the subject.

K. S. Jayarama Ayyar in reply.—The charter establishing Supreme Courts confined Common Law to Presidency Towns. Mufassal Courts are governed as to application of the Common Law by the previous charters. See Pollock's Expansion of Common Law,

(1) (1921) I.L.R., 48 Calc., 388. (2) [1891] A.C., 107.
(3) (1913) I.L.R., 36 Mad., 216.

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page 132. The second schedule to the Criminal Procedure Code only applies to police officers arresting persons and not to rights and powers of private citizens.

OPINION.

SCHWABE, C.J.

SCHWABE, C.J.—The question referred to the Full Bench is whether *In re Ramaswami Ayyar*(1) was correctly decided.

This is not a desirable form of reference to a Full Bench, because the facts of one case are seldom precisely the same as those of another and it is much better that the point on which the opinion of the Full Bench is desired should be formulated. In *In re Ramaswami Ayyar*(1), a Village Magistrate arrested a drunken man whose conduct was at the time a grave danger to the public. In this case two police constables arrested a man who was drunk and creating disturbance, but to what extent he was a danger to others does not appear in the order of reference. The decision in *In re Ramaswami Ayyar*(1) went on the ground that the English Common Law 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 showed that the public peace is likely to be endangered by his acts," as per Parke, B. in *Timothy* v. *Simpson*(2), applies to India and affords a good answer to any person charged for wrongful confinement under section 342 of the Indian Penal Code, if the facts of the case comply with that definition.

The first introduction of English Common Law in this country was in a Charter of Charles II in 1661 whereby it was ordained that the law of the Kingdom, which would include the Common Law, should be administered in this country. In later charters and

(1) (1921) I.L.R., 44 Mad., 913. (2) (1835) 4 L.J. Ex., 81.

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enactments it has been provided that the Hindu Law is to be applied between Hindus and the Muhammadan Law between Muhammadans, and in cases not otherwise provided for the principles of equity, justice and good conscience; and these latter words have been held to include material parts of the English Common Law. But for the purpose of this case it is not necessary to consider precisely to what extent and with what restrictions the Common Law of England is part of the Law of India.

In this country the Criminal Law has been codified in the Indian Penal Code and in the Code of Criminal Procedure and the principle has been well established, and is fully enunciated in the speech of Lord HALSBURY in the *Bank of England* v. *Vagliano Brothers*(1), that "where a statute is expressly said to codify the law, you are not at liberty to go outside the Code so created, because before the existence of that Code another law prevailed." This perhaps should be limited by the speech of Lord HERSCHELL (at page 145) to the effect that the purpose of the codified statute is that on any point specifically dealt with by it the law shall be ascertained by interpreting the language used.

Now there can be no doubt that the Code of Criminal Procedure deals with the powers of arrest with or without warrant, and the Indian Penal Code deals specifically with the question of wrongful confinement. It is, however, to be observed that the Code of Criminal Procedure is dealing rather with the arrest for crimes that had been committed than with the arrest for the prevention of crime, although there are specific instances given permitting the arrest of persons suspected of crime, and it may be correct to say that the Code of Criminal

(1) [1891] A.C., 107.

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Procedure does not specifically deal with the matter under discussion here. However this may be, the Indian Penal Code makes "wrongful confinement" an offence by section 342. What amounts to wrongful confinement must be ascertained by examining the definition contained in sections 339 and 340. If the acts complained of come within both definitions the offence has been committed unless there are other sections in the Code which provide an excuse for or a defence to what otherwise would be a crime. The Indian Penal Code defines the offence and also states what matters will afford a defence, and therefore it may be said that this Code deals specifically with the question, and it follows that the Court is not entitled to invoke the Common Law of England in the matter at all. I therefore cannot agree with the grounds of decision in *In re Ramaswami Ayyar*(1), but in my judgment, the decision was perfectly correct and can be supported on other grounds to be found on a proper interpretation of the Code itself.

By section 340 of the Indian Penal Code, whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said to wrongfully confine that person. By section 339, whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed is said wrongfully to restrain that person. So the arrest of any person when he has not been guilty of an offence for which arrest without warrant is permitted, *primâ facie* is wrongful confinement of the person; sections 96 and 97 give a right to every person to defend his own body and the body of every other person

(1) (1921) I.L.R., 44 Mad., 913.

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and the property of himself and of every other person against certain offences, and this *right of private defence* commences under sections 102 and 105, when a reasonable apprehension of danger to the person or property commences. In our judgment these provisions are quite wide enough to have afforded a complete defence in the case reported in *In re Ramaswami Ayyar*(1), and in effect provided for this country what is provided in England by the rule of common law referred to. The question in each case must be whether the person arresting or confining has a genuine and reasonable apprehension that to allow the other to remain at large will endanger the person and property of others. Some such provision is a necessity in a civilized community, for otherwise its citizens would be left the alternative of standing by until a crime has been committed or of themselves becoming criminals by taking what might be the only course to prevent the commission of a crime, namely the confinement of the person whose actions show that the persons and property of others are endangered. In my judgment the Indian Penal Code adequately provides the solution of the difficulty.

Reliance has been placed on section 21 of the Madras City Police Act XXIV of 1859, which provided that it shall be the duty of every Police Officer to use his best endeavour to prevent all crimes and offences and public nuisances, to preserve the peace, and to apprehend disorderly and suspicious characters. This was followed by many sections providing when a Police Officer could or could not arrest with or without warrant, but on the coming into force of the first Code of Criminal Procedure these sections were repealed, but section 21 was left unrepealed. This no doubt was done deliberately, and

(1) (1921) I.L.R., 44 Mad., 913.

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it states the duties of the police in the matter of prevention of crime, leaving the matter of the arrest of persons for crimes that have been committed or are suspected to have been committed to be dealt with in future under the Code of Criminal Procedure. It is not necessary to consider in this case whether this section gives to the police wider powers in cases such as the one in question than are enjoyed by all citizens; but it is to be observed that it would be remarkable if Police Officers were by statute enjoined to preserve the peace, and a genuine attempt to do so under circumstances like the present would amount to the commission of a criminal offence by the police. It is not, however, necessary to consider this point further as it has not been specifically referred to us, but it must not be taken that I am expressing my view of the correctness or otherwise of the decision of the Referring Bench on this point.

The answer to the question referred to us is that the case in *In re Ramaswami Ayyar*(1), is rightly decided on the ground stated above. It will be for the Referring Bench to consider on the facts of this case whether the accused had a genuine and reasonable apprehension that unless the prosecutor was arrested there would be damage to the person or property of others.

Having had the opportunity of reading the judgments of my learned brothers I would add that it will be also open to the Referring Bench to consider the applicability of section 81 of the Indian Penal Code.

PHILLIPS, J.

PHILLIPS, J.—I agree and would only add that in the present case and in similar cases the provision in section 81 of the Indian Penal Code, may also be considered. That section lays down that nothing is an offence merely by reason of its being done with the knowledge

(1) (1921) I.L.R., 44 Mad., 913.

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that it is likely to cause harm, if it be done without any criminal intention to cause harm and in good faith for the purpose of preventing or avoiding other harm to person or property. While I am not prepared to say that this provision is strictly applicable to the facts of the case referred, it appears to me that it and other provisions of chapter IV of the Penal Code have been framed to provide for cases like the present one, to which before the enactment of the Code, the common law would have applied.

DEVADOSS, J.

DEVADOSS, J.—The question referred to the Full Bench is whether *In re Ramaswami Ayyar*(1), was correctly decided. In that case a Village Magistrate was convicted under section 341, Indian Penal Code. AYLING and COUTTS TROTTER, JJ., held that the Common Law of England was applicable to this country and that on the facts found the petitioner had "ample justification, not as Village Magistrate, but as a private citizen to put a restraint upon the complainant who was drunk and disorderly and threatened to commit breach of the peace and was a danger to the other villagers." In the case under reference the petitioners who are police constables have been convicted under section 342, Indian Penal Code, for wrongfully confining the complainant and sentenced to pay a fine of Rs. 10 each.

Two questions arise for consideration :—

1. Whether the Common Law of England is applicable to India except where a statute either expressly or by implication has abrogated it?

2. Granting that the Common Law of England is applicable to India, whether the statute law has not abrogated it so far as it is applicable to this case?

As regards the first point Mr. Jayarama Ayyar for the petitioners contends that the Common Law of England

(1) (1921) I.L.R., 44 Mad., 913.

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is applicable to India and relies upon *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdhry*(1) and *Ramloll Thackoorseydas* v. *Soojunmull Dhondmull*(2). In the latter case an action was brought in the Supreme Court of Bombay on a wager. Lord CAMPBELL, in delivering the judgment of their Lordships of the Privy Council, observed at page 310 "The Statute, 8 and 9 Vict., Ch. 109, does not extend to India, and although both parties on the record are Hindus, no peculiar Hindu Law is alleged to exist upon the subject; therefore this case must be decided by the Common Law of England" and held that the wager in question was not illegal and could be enforced in a Court of Justice.

In *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdhry*(1) the question was whether witnesses could be sued for damages in respect of evidence given by them in a judicial proceeding. Their Lordships of the Privy Council held

"that witnesses cannot be sued in a Civil Court for damages in respect of evidence given by them upon oath in a judicial proceeding. Their Lordships hold this maxim which certainly has been recognized by all the Courts of this country to be one based upon principles of public policy. The ground of it is this that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes the fear of being harassed by suits for damages but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury."

In the former case, their Lordships assumed as a matter of course that the Common Law of England was applicable to contracts in Bombay. According to the charter of the Supreme Court the King's Judges were enjoined to administer the Common Law of England, and it was evidently on that ground the question whether

(1) (1873) 11 Ben. L.R., 321 (P.C.). (2) (1848) 6 M.P.C. C., 300.

the Common Law of England was applicable or not was not raised in argument in that case. In the latter case their Lordships rest their judgment upon principles of public policy. They do not invoke the aid of the Common Law of England for holding that a witness could not be sued for damages in respect of the evidence given by him.

In re Venkata Reddy(1), a Full Bench of the Madras High Court held that the statement of an accused person in answer to a question by the Court was absolutely privileged under the Common Law of England and could not form the subject of an indictment under section 499, Indian Penal Code, even though false and made without good faith, and that exceptions to section 499, Indian Penal Code, were not exhaustive. This decision has been dissented from by a Full Bench of the Calcutta High Court in *Satish Chandra Chakravarti* v. *Ram Doyal De*(2). With the greatest respect to the learned Judges who decided *In re Venkata Reddy*(1), I share with SPENCER, J., the apprehension entertained by him in that case that the cause of justice might suffer by the extension of the principle of absolute privilege to unscrupulous persons who in a petty case might make the most unfounded aspersions on the character of the relations of the complainant and his witnesses.

When the charter was granted to the Madras High Court it was provided by section 30 that to all persons brought for trial before the High Court of Madras either in the exercise of its original jurisdiction or as a Court of Appeal, reference or revision, charged with any offence, the law as contained in the Penal Code or amending Acts of such Code should be applied. Section 112 of the Government of India Act lays down that the High Courts

(1) (1913) I.L.R., 36 Mad., 216. (2) (1921) I.L.R., 48 Calc., 388.

of Calcutta, Madras and Bombay should, in the exercise of their original jurisdiction in the suits against the inhabitants of the three cities, apply the personal law in matters of inheritance, succession and contract where the parties are subject to a personal law. But no distinction is to be made with regard to the administration of the criminal law of the land except so far as that law is laid down in the Acts of the Legislatures. The powers of the Governor-General in Council to make the laws are embodied in section 65 of the Act. Subject to certain restrictions, which it is unnecessary to detail here, the central legislature has power to legislate on all subjects. The Common Law of England has not been made applicable to this country by any Act of Parliament or by any enactment of the Indian Legislature. Our attention has not been drawn to any statute or legislative enactment which makes the Common Law of England the law of the land. The charter of Charles II granted to the East India Company and the later charters enjoin upon the Company and its servants due obedience to the Common and Statute Law of England. It was only towards the close of the 18th century that the Supreme Courts in Madras, Calcutta and Bombay were established where the King's Judges administered the Common Law of England. Outside the jurisdiction of the Supreme Courts, the law of the land with regard to civil matters and the Muhammadan Law as regards offences were administered by the Company's Courts. The Principal Civil Court was called Suddar Adaulat, and the Principal Criminal Court was known as Fowzdari Adaulat. In Madras as well as in other provinces regulations were passed empowering the Courts to deal with Civil and Criminal matters. In Madras, Regulation 2 of 1802 was passed giving jurisdictions to Civil Courts. Then by Regulation 3, Rules of Civil Practice in the Zillah Courts

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were enacted. By Regulation V the Saddar Adaulat or Chief Court of Civil jurisdiction was established. Regulation VI laid down rules for the guidance of Magistrates. By Regulation VIII the Fouzdari Adaulat or Chief Criminal Court was established. From 1802 onwards various regulations were passed with regard to the trial of offenders and the trial of civil suits. By those regulations the Judges of the Zillah Court and the Saddar Adaulat were enjoined to apply the Hindu Law to Hindus and the Muhammadan Law to Muhammadans and "in cases for which no specific rule may exist the Court shall act according to justice, equity and good conscience"—Regulation II of 1802, section 17 and Regulation V of 1802, section 30. This provision was reproduced in the Madras Civil Courts' Act of 1873; and by section 16, clause (*c*) "in cases where no specific rule exists the Court shall act according to justice, equity and good conscience." English Judges who sat in the Company's Courts had cauzees and pandits to advise them on points of Muhammadan Law and Hindu Law. They naturally looked for guidance to the principles of the Common Law of England as they were familiar with that law. As well said by a famous Judge, the Common Law of England is the embodiment of common sense and in most cases the Common Law of England supplied the Judges with rules and precedents which were in accordance with justice, equity and good conscience. In this manner the Common Law of England came to be considered to be the law of the land.

There is no statutory law of torts in this country, and under the customary law of India, suits for damages for civil wrongs were almost unknown. British Courts in India entertain suits for damages for torts and give relief according to the rules of the Common Law of England. The same may be said as regards easements

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and specific relief before the passing of the Easements Act and the Specific Relief Act. In enjoining the Judges in India that where there is no rule of law applicable to a particular case, they should act according to justice, equity and good conscience, the legislature left it to them to invoke the aid of the common law wherever possible. By such practice of the Courts a custom has sprung up of looking to the English Common Law for guidance and precedents where there is no customary, Hindu or Muhammadan Law or statute law governing the case. It is unnecessary to pursue the interesting subject further, in view of my opinion on the second question.

The second question is, granting that the Common Law of England is applicable to India, whether the statute law has not abrogated it so far as it is applicable to this case. Section 22 of the Police Act of 1859 empowered Police Officers to arrest without a warrant. But after the passing of the Indian Penal Code in 1860 and the Criminal Procedure Code in 1861 sections 22 to 43 were repealed by Act XVII of 1862. It is contended for the petitioners that section 21 gives power to arrest without a warrant Section 21 lays down the duties of Police Officers. Among other things it shall be their duty to use their best endeavours to prevent crimes, etc., and to apprehend disorderly and suspicious characters. This section does not empower them to arrest persons without a warrant. The intention of the legislature is made quite clear by the repeal of section 22 which gave power to the police to arrest without a warrant; and the preamble to Act XVII of 1862 puts the matter beyond doubt. Therefore the contention that a Police Officer is entitled to arrest without a warrant by virtue of section 21 is untenable. Under section 44 of the Act penalties are provided for neglect of duty and that section as the Act now stands immediately follows section 21; and it

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can be safely assumed that a Police Officer is enjoined by section 21 to carry out certain duties, and his failure to do so without lawful excuse will subject him to penalties under section 44. We must therefore look for authority to arrest without a warrant elsewhere. The law as to arrest without warrant was first codified in sections 100, 101, 104 and 108 of the Code of Criminal Procedure Act XXV of 1861, and the provisions contained in those sections have been reproduced with slight amendments in sections 54 to 57 of the Criminal Procedure Code of 1898. Under section 54, a Police Officer may arrest without a warrant any person concerned in a cognizable offence, any person having in his possession without lawful excuse house-breaking implements, proclaimed offenders, persons in possession of stolen property, etc. Offences are classified as cognizable and non-cognizable by the Criminal Procedure Code. Cognizable offence is one in which a Police Officer may arrest a person charged or suspected of the offence without a warrant. Under section 55 an officer in charge of a Police Station may arrest (1) any person preparing to commit cognizable offence under certain circumstances, (2) persons without ostensible means of subsistence and (3) habitual offenders. Section 57 gives power to a Police Officer to arrest without warrant when any person in the presence of such Police Officer commits or is accused of committing non-cognizable offence and refuses on demand by a Police Officer to give his name and residence, or gives a name or residence which such officer has reason to believe to be false. Such person may be arrested without a warrant in order that his name or residence may be ascertained. The offence of being drunk and disorderly is not a cognizable offence, and a Police Officer cannot arrest the alleged offender without a warrant. He can arrest him only if he refuses

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to give his name or residence, or gives a false name or residence. If his name or residence is known to the Police Officer, the law does not empower him to arrest such person without a warrant. In no case other than those provided by sections 54, 55 and 57 can a Police Officer arrest a person without a warrant. The law being jealous of the liberty of the subject has set wholesome bounds to the power of the police to arrest without a warrant. The Criminal Procedure Code being a complete code defining the powers of the police with regard to arrest, it is not open to a Court to travel outside the code for finding powers either for the police or for private persons to interfere with the liberty of the subject. The provisions enacted in 1861 have not been altered though the Criminal Procedure Code has been amended and re-enacted in 1872, 1882 and 1898. In this connexion I may quote the well known observations of Lord HERSCHELL in *Bank of England* v. *Vagliano Brothers*(1). In that case the question was as regards the interpretation to be placed upon section 7, sub-section 3, of the Bills of Exchange Act of 1882. The Court of Appeal relied upon the law as it existed before the Bills of Exchange Act was passed in interpreting the section. Lord HERSCHELL observed:

"I cannot bring myself to think that this is the proper way to deal with such a statute as the Bills of Exchange Act, which was intended to be a code of the law relating to negotiable instruments. I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view."

(1) [1891] A.C., 107.

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Under certain special and local laws power is given to certain officers to arrest without a warrant for offences under those Acts. Under the Madras Salt Act VIII of 1899, for instance, a Salt Officer may arrest without warrant a person concerned in the manufacture, sale or keeping of such contraband salt or dealing therewith. Under the Madras City Police Act, a Police Officer may arrest without warrant in certain cases.

I may also quote the words of Lord ABINGER in *Henderson* v. *Sherborne*(1).

> "The interpretation of statutes has always, in modern times, been highly favourable to the personal liberty of the subject, and I hope will always remain so."

The liberty of the subject should not be curtailed by importing something which is not warranted by the statute law of the land. At the same time, it is not necessary to invoke the aid of the Common Law of England in order to justify the arrest of a person who is threatening to commit an offence against the person of an individual. The general exceptions contained in Chapter IV of the Indian Penal Code afford ample protection against threatened violence to person or mischief to property.

With due respect I may observe that the learned Judges who decided *In re Ramasami Ayyar*(2), need not have rested their decision on any rule of Common Law, as the village magistrate arrested the complainant to prevent harm to himself and to others, and he was protected by section 81, Indian Penal Code; if a person threatens to commit an assault he can be disarmed and if necessary put under restraint to prevent harm to persons or to property. A private person is justified in doing an act which would prevent any harm happening to himself or to another person provided he does that act, *bona fide* and without unnecessary force or violence.

(1) (1837) 2 M.W., 236; 150 E.R., 743. (2) (1921) I.L.R., 44 Mad., 913

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Both the Indian Penal Code and the Criminal Procedure Code are complete Codes of laws regulating the right of citizens to personal freedom; and such rights should not be curtailed by judicial decisions unless warranted by statutes. The Common Law of England applicable to a case of arrest without warrant does not apply to India. The case of an alleged illegal arrest or wrongful confinement has to be decided according to the law as contained in the Indian Penal Code and Criminal Procedure Code. My answer to the question referred to us, is, *In re Ramasami Ayyar*(1), was rightly decided, not because the Common Law of England was applicable, but by reason of the act complained of coming within the exceptions contained in Chapter IV of the Indian Penal Code.

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I have come to the same conclusion, and as the question raised is one of great importance, I desire to say a few words.

It has been argued that the Common Law of England may be applied to India in regard to power to arrest and that a Police Officer or a private citizen can exercise the power independent of the provisions of the Criminal Procedure Code and any special or local law which by section 1 of the said Code is expressly declared not to be affected thereby. I am totally unable to accept this argument. The Code sets out in great detail circumstances in which arrests may be made and persons who may exercise the right. Provision is made for arrests not only after the commission of an offence but also with a view to prevent offences being committed and in some instances for securing the preservation of the peace. I may instance section 54, clause (2) which empowers a Police Officer to arrest without warrant any person having in his possession without lawful excuse any implement of house-breaking. Section 55 again authorizes any officer

(1) (1921) I.L.R., 44 Mad., 913.

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in charge of a Police Station to arrest similarly, subject to certain qualifications, a person found taking precautions to conceal his presence with a view to committing an offence or any person who has no ostensible means of subsistence or any person who by repute is a habitual robber or thief. It is thus clear that the Code contains provisions in respect of arrest both for the purpose of preventing crimes and for bringing offenders to book. The subject is exhaustively dealt with, and it is impossible to hold that a power of arrest is possessed apart from and independent of the statute law. This is my view of the law as it stands, and I may add that as the question relates to interference with the liberty of the subject it is far more desirable on grounds of public policy and expediency, that the right should be precisely defined and regulated by the legislature than that it should be left to the magistracy of the country to ascertain the law, in the words of Lord HERSCHELL in *Bank of England* v. *Vagliano Brothers*(1), by roaming over a vast number of authorities, extracting the law by a minute critical examination of previous decisions and probably also, I may add, of the statements to be found in ancient text-books. It has been pointed out to us that the only case which so far has decided that a private citizen possesses a right of arrest apart from the statute law, is *In re Ramasami Ayyar*(2). Speaking for myself I am glad to find that there is so little authority in support of the position that such right exists. In that case the accused removed to the Police Station an individual who was very drunk and bit him in the foot and tore the sacred thread of one of the witnesses. The question arose whether the accused committed an offence of wrongful restraint under section 341 of the Indian Penal Code. The learned Judges, very naturally,

(1) [1891] A.C., 107. (2) (1921) I.L.R., 44 Mad., 913.

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considered that it would be unjust to punish a person for doing an act which in the interest of the orderly government of the society and the preservation of the peace should be declared lawful and they justified the act with reference to the power of arrest which every individual as an ordinary member of the general public possesses, under the Common Law of England. But with great respect, it seems to me, that if their attention had been invited to certain sections of the Indian Penal Code, they would probably have rested their judgment upon grounds other than that underlying their decision. Section 81 enacts that nothing is an offence if it be done without criminal intention and in good faith for the purpose of preventing or avoiding other harm to person or property. It was suggested that if a person who is under the influence of drink carries a revolver in his hand and runs amuck there must be the power to arrest him on the part of every citizen as otherwise disastrous results may follow. But this argument ignores that any reasonable act on the part of any citizen interfering with the freedom of the drunken person is amply protected by the aforesaid section and by other sections of the Indian Penal Code. The right of private defence conferred by that Code is quite adequate to meet all reasonable requirements. By section 97 every person is given a right to defend his own body and the body of any other person, his own property as well as the property of other persons. Under sections 100 and 104 the right of private defence may be exercised when there is a reasonable apprehension of danger to life or of grievous hurt to body or of robbery or of house-breaking or commission of other serious offences. Section 100 sets out in very clear terms that the offence which occasions the exercise of the right may be an assault as may reasonably cause the apprehension that death or

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grievous hurt will be the consequence of such assault. Assault is defined by section 351 as consisting of a gesture or preparation that is likely to cause an apprehension that criminal force will be used. Section 103 similarly provides for the exercise of the right of private defence not only when the offences specified therein are committed but also when attempts to commit them are made. In my opinion, therefore, there is no need to have resort in the circumstances such as those that existed in *In re Ramasami Ayyar*(1), to the doctrine of the Common Law that every private individual has a right to arrest. Dealing with the Sale of Goods Act 1893, 56 and 57 Vic., Ch. 71, COZENS HARDY, M.R., in *Bristol Tramways and Carriage Co.* v. *Fiat Motors, Ltd.*(2), observes:—

"I rather deprecate the citation of earlier decisions such as *Chanter* v. *Hopkins*(3) or *Shepherd* v. *Pybus*(4). The object and intent of the statute of 1893 was no doubt simply to codify the unwritten law applicable to the sale of goods: but in so far as there is an express statutory enactment that alone must be looked at and must govern the rights of the parties, even though the section may to some extent have altered the prior common law."

In an earlier case, *Bank of England* v. *Vagliano Brothers*(5), Lord HERSCHELL remarks:—

"I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a Code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated."

(1) (1921) I.L.R., 44 Mad., 913. (2) [1910] L.J., 79; K.B., 1107.
(3) (1838) 4 M. & W., 399; 150 E.R., 1484.
(4) (1842) 3 Man. & G., 868; 133 E.R., 1390. (5) [1891] A.C., 107 at p. 144.

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I think that every word in the observations of these eminent Judges applies with great force to the subject on hand.

The learned referring Judges conclude their Order of Reference with these words:

"And we accordingly refer to a Full Bench the question whether *In re Ramasami Ayyar*(1), was correctly decided."

My answer is that the grounds of the decision are wrong though the decision itself is correct.

WALLACE, J. WALLACE, J.—I agree with the judgment of the learned Chief Justice and would also, with my learned brothers, call in aid section 81 of the Indian Penal Code.

K.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Oldfield and Mr. Justice Coutts Trotter.

KELU ACHAN (FIFTEENTH DEFENDANT), APPELLANT,

v.

CHERIYA PARVATHI NETHIAR AND OTHERS (THIRD PLAINTIFF AND OTHERS), RESPONDENTS.*

1923, January, 30.

Suits Valuation Act (VII of 1887), ss. 8 and 11—Under-valuation of suit—Suit instituted in a District Munsif's Court—Real valuation more than Rs. 5,000—Appeal to District Court—Objection taken both before District Munsif's Court and District Court—Finding by latter Court that there was no undervaluation and also that there was no prejudice on the merits—Second appeal to the High Court—Mere deprivation of right of first appeal on facts, whether a prejudice—Procedure in appeal whether proper test of prejudice.

Where by reason of an undervaluation of the suit, it was instituted in a District Munsif's Court and not in a Sub-Court, though the real valuation was more than Rs. 5,000 and a party

(1) (1921) I.L.R., 44 Mad., 913.
* Second Appeal No. 286 of 1920.

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to the suit was thereby deprived of the right of first appeal on facts to the High Court to which a second appeal was preferred against the decree on appeal of the District Court in the case,

Held, by the Full Bench, that, from the mere fact that a party was deprived of the right of appeal on facts before the High Court, it cannot be deemed that the undervaluation had prejudicially affected the disposal of the suit or appeal on the merits within the terms of section 11 of the Suits Valuation Act, 1887, and that consequently the second appeal should be heard on the merits.

Raghavachariar v. *Raghavachariar*, (1910) 20 M.L.J., 726, approved; *Mohini Mohan Misser* v. *Gour Chandra Rai*, (1920) 5 Patna L.J., 397, dissented from; *Shidappa Venkatarao* v. *Rachappa Subrao*, (1912) I.L.R., 36 Bom., 628, referred to.

SECOND APPEAL against the decree of V. P. ROW, the District Judge of South Malabar, in Appeals Nos. 25 and 24 of 1918, respectively, preferred against the decree of B. VENKATA RAO, the District Munsif of Alatur in Original Suit No. 328 of 1916.

The plaintiffs sued for the removal of the first defendant from being the Karnavan of their tavazhi and for a declaration that certain alienations were not binding on the family and that certain properties were the properties of the family and other reliefs. The suit was valued by the plaintiff at less than Rs. 3,000. The defendants objected to the valuation in the first Court; the District Munsif overruled the objection and decided on the merits in favour of the plaintiffs; on appeal to the District Judge both on the preliminary point of undervaluation and on the merits, the learned Judge held that there was no undervaluation, and even if there were, it did not prejudicially affect the disposal of the suit on the merits; the learned Judge affirmed the decree on the merits. One of the defendants preferred this second appeal and contended, apart from the merits, that the undervaluation had deprived the defendants of a right of appeal on facts to

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the High Court, and that this was a prejudice in the disposal of the case under section 11 of the Suits Valuation Act, 1887. The second appeal came on for hearing before OLDFIELD and DEVADOSS, JJ., who differed in opinion on the preliminary question of jurisdiction based on undervaluation and referred the question to a Full Bench under the following Order of Reference :—

ORDER OF REFERENCE TO A FULL BENCH.

OLDFIELD, J.—*In S.A. No.* 286 *of* 1920.—The first question we have to decide is whether this suit was beyond the pecuniary jurisdiction of the District Munsif, by whom it was tried. The valuation for the purpose of jurisdiction is under section 8, Suits Valuation Act (VII of 1887), the same as the valuation for the computation of Court Fees. The reliefs asked for and to be valued are, as appear from the pleadings, which are given at unnecessary length in the District Munsif's judgment, three :—

1. Removal of first defendant from tavazhi management.

2. A declaration that a Karipanayam, dated 2nd July 1916, is not binding on any of the seventeen items in A schedule and a direction to defendants in respect of items 1 to 15, which (it is not disputed) would be equivalent to a decree for delivery thereof.

3. A declaration in respect of another Karipanayam and a decree for surrender of it and connected documents.

There is no dispute as to the valuation of the first and third of these; and the question, it is agreed, is only whether the second should be valued as plaintiffs have valued it at Rs. 500 for delivery of items 1 to 15 with reference to the revenue payable thereon under Court Fees Act, section 7 V (*b*) and Rs. 10 for the declaration asked for, regarded as one relating to all the seventeen items under Schedule II, article 17 (iii) or whether it should be valued, as defendants contend, under section 7 V (*b*) for items 1 to 15 and under section 7 IV (*c*) for the relief asked for in respect of items 16 and 17, at which the relief sought is valued in the plaint. The importance of the latter contention lies in the fact, which is not disputed, that it entails an enhancement of the total valuation of the suit beyond the District Munsif's pecuniary jurisdiction, since, as appears from the reference in plaint paragraph 11-B2, the value of the buildings on items 16 and 17 is over Rs. 3,000.

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The Lower Appellate Court decided for plaintiffs, partly on the ground that the inclusion of a prayer in respect of items 16 and 17 was, as alleged by plaintiff's vakil before it, a mistake and that no relief was asked for in respect of them. But it is sufficient that the plaint was not in fact amended consistently with any such statement and that here Mr. Madhava Nayar for plaintiffs was ready to withdraw the claim to relief in respect of these items, which is certainly made in the plaint, only in case our conclusion as to jurisdiction should be against him. On the merits the matter is concluded by the decision in *Shidappa Venkatrao* v. *Rachappa Subrao*(1), with which I respectfully concur. That decision is based on the application of section 17, Court Fees Act; and that section is applicable to the case before us, since there is, to my mind, no reason for following the opinion expressed in *Durga Prasad* v. *Furandar Singh*(2), and holding that the "distinct subjects" referred to must necessarily be distinct causes of action. It further does not seem to me that the conclusion as to valuation in the Bombay case cited is affected by the judgment of the Privy Council in Appeal, *Rachappa Subrao Jadhav Desai* v. *Shidappa Venkatrao Jadhav Desai*(3). The reference to the real value of the property in suit as undisplaced for purposes of jurisdiction by the notional value was made in connexion with the portion of the claim for which the fixed fee was payable under Schedule II; and it was in that connexion there, as it is here, that the admissibility of the real value as determining jurisdiction was material, the succeeding paragraph relating to the other par of the suit. And in fact the decision in plaintiff's favour was given not on the ground that the technical objection relied on by defendant was unsubstantial, but because owing to the failure to take it earlier a merely technical objection could not prevail.

The valuation adopted by plaintiffs in the present case being incorrect for purposes of jurisdiction and the District Munsif therefore incompetent to try the suit, the question is whether this entails the success of the Second Appeal. In *Rachappa Subrao Jadhav Desai* v. *Shidappa Venkatrao Jadhav Desai*(3), it was sufficient that objection had not been taken to the jurisdiction on this ground until the argument in the High Court and it was therefore unnecessary for the Judicial Committee to refer in its judgment to the provision of law, section 11, Suits Valuation Act, on which our decision must turn. For it is not disputed here that an objection was taken and an issue framed regarding

(1) (1912) I.L.R., 36 Bom., 628.
(2) (1905) I.L.R., 27 All., 186. (3) (1919) 46 I.A., 24; 36 M.L.J., 437.

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it before the District Munsif, although (for reasons which are not clear) he said that an adjudication was unnecessary.

Section 11, Suits Valuation Act, provides that, where objection to the jurisdiction has been taken by reason of over or undervaluation in the Court of First Instance, it shall receive effect, only if the Appellate Court is satisfied that "the over or undervaluation has prejudicially affected the disposal of the suit on its merits." That language is general and certainly it is difficult to understand what special circumstances are contemplated in it or to say whether it can be applied to a case, such as that before us, in which no prejudice to the disposal of the suit has been specified in the Memorandum of Appeal or in the argument. Yet in accordance with the ordinary canons of construction that language cannot be deprived of effect, as though the intention were that in all cases of incorrect valuation the proceedings in the Court of First Instance should be treated as invalid. The test contemplated in the language used cannot ordinarily be supposed to be the convenience or preference of the parties since they will seldom agree on those matters and it will be impossible to decide between conflicting local and personal considerations of an indefinite nature. It is then argued that, when (as in the present case) actual prejudice is not demonstrated, the Appellate Court must consider whether it can be presumed. But if prejudice based on presumption is contemplated by the section, it is still necessary to consider how any presumption can be made. None can be made, because the Court of a District Munsif is substituted for that of a Subordinate Judge or *vice versa* in consequence of the incorrect valuation, since, the powers of both to deal with litigation legitimately before them being the same, there is no substantial reason for presuming that the decision of one is more likely to be right than that of the other, this being particularly exemplified in cases, such as the present where the objection to valuation is sustained first in Second Appeal and the decision of both Courts on fact and law are the same; and this view has, in fact, been taken in *Raghavachariar* v. *Raghavachariar*(1). This failing, application may perhaps be found for the words of the section in cases, in which the incorrect valuation entails that the Small Cause, instead of the ordinary, procedure will be followed, although it is doubtful whether, both procedures being regarded by the legislature as affording a satisfactory method of trial, there can be any question of prejudice to the disposal on the merits. The last suggestion made is that

(1) (1910) 20 M.L.J., 726.

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prejudice is contemplated as arising from the difference in the course of appeal and the number of appeals, which incorrect valuation will entail; and in particular from the loss in cases of undervaluation of the right of appeal on the facts to the High Court. This possibility no doubt has not been considered in the decisions we have been shown. But first the forfeiture of a particular right of appeal, arising after the disposal of the suit, cannot be regarded as in the words of the section "prejudicially affecting the disposal of the suit on the merits." Next, this possibility is irrelevant in cases of overvaluation; and necessity for separate reference to them is on the assumption involved wanting. And thirdly this explanation is based on a presumption that adjudication on the facts must be prejudicially affected, if the hearing is by an inferior Court which is no more sustainable with reference to appellate than original proceedings. This also failing it must be supposed that the very general wording was adopted to provide *ex abundanti cautela* for any exceptional cases, in which prejudice to disposal on the merits may be demonstrable, but of which the nature cannot be more exactly defined. In the present case no such prejudice has been alleged or shown to have occurred. I would therefore proceed with hearing of the Second Appeal.

But as my learned brother differs and as the difference between us relates to a preliminary point requiring decision before we can proceed to disposal on the merits, I agree to refer to a Full Bench the question whether the Second Appeal should be heard on the merits or whether the plaint should be returned.

DEVADOSS, J.—*In S.A. No.* 286 *of* 1920.—This is an appeal by the 15th defendant against the decree of the District Judge of South Malabar, affirming the decree of the District Munsif of Alatur in O.S. No. 328 of 1916, in which the plaintiffs sued for the removal of the karnavan of their tavazhi, the 1st defendant, and for a declaration that certain alienations were not binding on the family, and that certain properties were the properties of the family of the plaintiffs and the 1st defendant. The District Munsif granted decree in favour of the plaintiffs, and the District Judge has upheld it.

In the plaint several reliefs were claimed: (1) the removal of the 1st defendant from the tavazhi management, (2) the

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appointment of the 2nd plaintiff or any other plaintiff as manager, (3) a declaration that a Karipanayam deed executed by the 1st defendant to the 2nd defendant, dated 2nd July 1916, for Rs. 4,823-8-0 was not valid and binding on the plaintiffs and for possession of items 1 to 15, (4) a declaration that the amount of the Karipanayam deed executed by defendants 11 to 13 to the 14th defendant belonged to the tavazhi of the plaintiffs, (5) a direction to the 1st defendant to deliver to the plaintiffs all documents, accounts, etc., and some other reliefs. The plaintiffs valued the first relief at Rs. 1,233-5-4, the third at Rs. 500 being five times the annual assessment, the fourth at Rs. 100 and the fifth at Rs. 5.

The defendants pleaded that the suit was undervalued, that for the purpose of declaration, the valuation was the full value of the property, and that items 16 and 17, in respect of which a mere declaration was prayed for, were worth more than Rs. 3,000-0-0.

The District Munsif valued the first relief at Rs. 2,182-12-9, but held that the other reliefs were properly valued, and that he had jurisdiction to try the suit, and took evidence and decided it on the merits.

The 15th defendant who appealed against the decree of the istrict Munsif, raised the contention that the District Munsif had no jurisdiction to try the suit and that the suit ought to have been dismissed on that ground, but the District Judge overruled the contention, holding that the undervaluation, if any, did not prejudicially affect the disposal of the suit on the merits.

It is argued before us that the District Munsif had no jurisdiction to try the suit, as the value of the reliefs claimed was over Rs. 5,000-0-0 and that the decree of the District Munsif should, therefore, be set aside.

It is admitted by the respondents that the value of all the reliefs claimed exceeded Rs. 5,000, that items 16 and 17 are worth more than Rs. 3,000-0-0, and that as a mere declaration was asked for in respect of them, the valuation for the purpose of jurisdiction should have been at their market value, and that in respect of the other items, plaintiffs claimed a consequential relief, and therefore, they were justified in valuing them at any

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figure, which they thought proper under the Court Fees Act, section 7, clause 4 (*c*).

The point for decision is whether the District Munsif's decree should be set aside on the ground that the value of the suit exceeded the pecuniary jurisdiction of the District Munsif. The appellant in support of his contention, relies upon a case reported in 36 Bom. 628. In that case, the plaintiff valued for the purpose of declaration his plaint at Rs. 135 and filed it in the Court of the First-class Subordinate Judge who passed a decree in his favour. On appeal to the District Court a preliminary objection was taken that the appeal lay to the High Court as the value of the subject matter of the suit was above Rs. 5,000. The District Judge held that there was no failure of justice consequent on the lower Court's erroneous assumption of jurisdiction and that neither party was entitled to complain of want of jurisdiction, and heard the appeal on the merits and dismissed it. The defendant preferred a Second Appeal to the High Court. CHANDAVARKAR and BATCHELOR, JJ., held that the plaintiff had not properly valued the suit, and that the valuation for the purpose of jurisdiction was Rs. 69,016-9-0, and that therefore, the appeal lay to the High Court. They set aside the decree of the District Judge and directed the appeal to be presented to the High Court, which was done. The learned Judges heard the appeal on the merits and dismissed it. Against this decree of the High Court, the defendant preferred an appeal to the Privy Council and the judgment of the Privy Council is reported in *Rachappa Subrao Jadhav Desai* v. *Shidappa Venkatrao Jadhav Desai*(1). Their Lordships of the Privy Council dismissed the appeal holding that the plaintiff's valuation was incorrect, that the proper valuation for the purpose of declaration exceeded Rs. 60,000 and that "no objection was taken to the Court's jurisdiction in the written statement or the issues and it was not even suggested in the memorandum of appeal to the District Judge or the High Court," and that it was "because the defendant did not take the objection at the proper stage that he has been able to prolong the litigation commenced so far back as 1909 by an

(1) (1919) 46 I.A., 24; 36 M.L.J., 437 (P.C.).

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appeal to this Board." "Their Lordships are of opinion that they would not be justified in assisting an objection of that type; and more than that, they hold that even the technicality on which the defendant relied could not prevail."

Under the Madras Civil Courts Act, District Munsifs have jurisdiction up to Rs. 3,000 and appeals against their decisions lie to the District Court, and Subordinate Judges have unlimited pecuniary jurisdiction, but appeals from their decisions lie to the District Court "except when the amount or value of the subject matter of the suit exceeds five thousand rupees in which case the appeal shall lie to the High Court." In this case, the valuation of the properties being admittedly over Rs. 5,000, if the suit had been brought in a Subordinate Judge's Court, the unsuccessful party would have had the right to appeal to the High Court.

The respondents' counsel relies upon section 11 of the Suits Valuation Act which is in these terms—I shall extract only portions of it:—

"(1) Notwithstanding anything in section 578 of the Code of Civil Procedure, an objection that by reason of the overvaluation or undervaluation of a suit or appeal a Court of first instance or lower appellate Court which had not jurisdiction with respect to the suit or appeal exercised jurisdiction with respect thereto shall not be entertained by an appellate Court unless (*a*) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded or in the lower appellate Court in the memorandum of appeal to that Court or (*b*) the appellate Court is satisfied for reasons to be recorded by it in writing that the suit or appeal was overvalued or undervalued and that the overvaluation or undervaluation thereof has prejudicially affected the disposal of the suit or appeal on its merits.

"(2) If the objection was taken in the manner mentioned in clause (*a*) of sub-section (1), but the appellate Court is not satisfied as to both the matters mentioned in clause (*b*) of that sub-section and has before it the materials necessary for the determination of the other grounds of appeal to itself, it shall dispose of the appeal as if there had been no defect of jurisdiction in the Court of first instance or the lower appellate Court.

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"(3) If the objection was taken in that manner and the appellate Court is satisfied as to both those matters and had not those materials before it, it shall proceed to deal with the appeal under the rules applicable to the Court with respect to the hearing of the appeal."

This section enacts that no objection on the ground of overvaluation or undervaluation shall be entertained unless (1) the objection is taken in the Court of first instance at or before the first hearing, or (2) the appellate Court is satisfied for reasons to be recorded by it in writing that the overvaluation or undervaluation has prejudicially affected the disposal of the suit or appeal on its merits and if the appellate Court is satisfied as to both these matters, then and then only it shall proceed to deal with the appeal as regards the question of jurisdiction. In the present case the objection was taken in the first Court in the written statement and before the first hearing and in the memorandum of appeal to the appellate Court also the objection to jurisdiction was raised. It cannot be said that the disposal of the suit has in any way been prejudicially affected by the undervaluation. It is not easy to conceive of a case, where the disposal of a suit or appeal would be prejudicially affected merely by reason of overvaluation or undervaluation. Mr. Madhavan Nair found it difficult to suggest any instance where the disposal on the merits could be said to be prejudicially affected by reason of overvaluation or undervaluation. He suggested that by proper valuation a suit may be brought in a sub-court which may be able to enforce the attendance of witnesses of either party. It is difficult to see how a Court of a Subordinate Judge could enforce the attendance of witnesses which a District Munsif could not do. If it is suggested that the change of venue would be more convenient to one party or the other, that would not depend upon the pecuniary jurisdiction of a Court; so that instance is no instance at all. He relied upon a case reported in *Ragahavachariar* v. *Raghavachariar*(1). In that case the facts were: the plaintiff and the defendant were executors of the will of one Krishnaswami Ayyangar. Under the will they were appointed co-trustees for

(1) (1910) 20 M.L.J., 726.

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the two widows and the minor adopted son of the deceased and also for carrying on a charity. The plaintiff sued to remove the defendant from the co-executorship and co-trusteeship on the ground of his misappropriation of the trust funds and his failure to co-operate in the execution of the will and the trust. The defendant objected to the suit being within the Court's jurisdiction both under the Trust Act of 1882 and on account of the whole of the trust property being of more than the Court's pecuniary limits. The plaint was returned for presentation to the proper Court, but the District Court reversed the order of the District Munsif and directed the Court of first instance to receive the plaint and dispose of it on the merits. The District Munsif entertained the suit and found that the defendant had failed to account for two sums of Rs. 1,306 and Rs. 115, and passed a conditional decree that, if the defendant did not pay the amount within three months, he would be removed from office. On appeal, the District Court affirmed the decree of the District Munsif. On second appeal it was contended that the subject of the trust being admittedly above Rs. 20,000 in value the District Munsif had no jurisdiction to try the suit. Sir T. MUTHUSWAMI AYYAR and HANDLEY, JJ., held that "the value of the trust property ought to have been taken as a guide to the determination of the question of jurisdiction. The objection was taken both in the Court of first instance and in the lower appellate Court. According to section 11 of the Suits Valuation Act we are precluded from entertaining the objection, unless we are satisfied that the undervaluation has prejudicially affected the disposal of the suit on the merits. The mere change of forum consequent on the undervaluation cannot of itself be treated as prejudicially affecting the disposal of the suit on the merits within the meaning of the section, for that is the very case premised and provided for by the section. Reading the section together with section 578 of the Code of Civil Procedure, we consider that the words 'prejudicially affected the disposal of the suit on the merits' must be construed in the same way as they would be construed with reference to any error, defect, or irregularity contemplated by that section. The effect of section 11 of the Suits Valuation Act is simply to place overvaluation or undervaluation of suits on the same footing

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with other irregularities contemplated by section 578 except that the objection must be taken either in the Court of first instance or in the lower appellate Court. In the present case we do not consider that the undervaluation has prejudicially affected the disposal of the suit on the merits." This case was followed by the Madras High Court in *Ammalu Ammal* v. *Krishnan Nair*(1), and *Vedaji Baskara Tirumalrao* v. *Subramania Gurukkal*(2), and in *Narayani Ammal* v. *Secretary of State*(3).

The question that presents a real difficulty is this :—Is the plaintiff justified in undervaluing a suit and bringing it in a Court which would not have jurisdiction over it, if properly valued, and thereby deprive the other party of the right to appeal on facts to the High Court? If a suit were valued at more than Rs. 5,000 it would have to be brought in the Subordinate Judge's Court and an appeal against the decree of the Subordinate Judge in such a suit would lie to the High Court on facts. But, by bringing such a suit in the District Munsif's Court, the right of appeal to the High Court is taken away ; and the appeal in fact lies to the District Court, and a Second Appeal to the High Court lies only on questions of law. The object of the Madras Civil Courts Act in limiting the jurisdiction of Civil Courts is not without an object, and the defendant should not be deprived at the whim and fancy of a plaintiff of his right to appeal to the highest Court in the land on facts. If section 11 of the Suits Valuation Act is strictly interpreted, an Appellate Court would be unable to interfere with the decree of a District Munsif, whatever might be the value of the property in suit, on the ground that the party appealing against the decree is unable to show that the disposal has been prejudicially affected by undervaluation. It is not easy to conceive of cases where the disposal could be said to be affected prejudicially on the merits merely by reason of undervaluation or overvaluation. It is strongly urged by the respondents' counsel that the legislature in enacting section 11 in those terms did not want the decrees of Courts to be interfered with merely because the subject matter exceeded the pecuniary jurisdiction of such Courts. No doubt, a literal interpretation

(1) (1921) 62 I.C., 715. (2) (1919) 52 I.C., 992.
(3) (1917) 41 I.C., 167.

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of clause (1) (*b*) of section 11 would lead to that result. But it is difficult to hold that the legislature intended to give a plaintiff the right to sue in whatever forum he might choose, and thereby to take away the right of appeal on facts to the High Court. Under the Madras Civil Courts Act, Courts of different pecuniary jurisdictions are established. The very object of having judicial officers of different cadres would be defeated if the Court of the lower pecuniary jurisdiction could be allowed to try and dispose of suits, the subject matter of which exceeds its pecuniary jurisdiction. A defendant is entitled as a matter of right to have his case heard by a Judge of a higher grade and of greater experience, if the value of the claim against him exceeds the pecuniary jurisdiction of the Court in which the suit is brought. Where there are two legislative enactments, one creating and regulating the jurisdiction of Civil Courts and the other mainly intended for fiscal purposes, the provisions of the former should not be lightly treated in dealing with questions of jurisdiction affecting rights of parties. Under section 21 of the Civil Procedure Code an objection to territorial jurisdiction should be taken at the earliest opportunity, and an appellate Court will entertain it only if there is a consequent failure of justice. In *Hamidun-nissa Bibi* v. *Gopal Chandra Malakar*(1), the learned Judges after referring to various cases before and after the passing of the Suits Valuation Act, observe thus :—"It is no doubt a sound rule that Courts should not allow parties to evade the law relating to matters of jurisdiction and that where it is found that a party is intentionally exaggerating his claim in order to bring his suit in a Court which otherwise would not have jurisdiction to try it before the merits of the claim have been gone into, the plaint should be returned to be presented to the proper Court. But this rule must be taken with qualifications, and the one important qualification is that embodied in section 11 of the Suits Valuation Act, which is this, viz., that where a suit has been tried on its merits by the first Court and the overvaluation or undervaluation of the suit is not found by the appellate Court to have prejudicially affected a suit on its merits the objection as to jurisdiction should not be

(1) (1897) I.L.R., 24 Calc., 661.

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given effect to. A plaintiff who alters the valuation of his suit for the purpose of evading jurisdiction must be punished by having no costs allowed to him; but it would not, in our opinion, conduce to promote the ends of justice, if an appellate Court were te set aside a decision, which is found to be correct, on the merits, simply because the valuation of the suit had been designedly increased or decreased to evade jurisdiction."

Considering the high authority of Sir T. MUTHUSWAMI AYYAR, who decided the case *Raghavachariar* v. *Raghavachariar*(1) and that of Mr. Justice BANNERJEE in *Hamidun-nissa Bibi* v. *Gopal Chandra Malakar*(2) one would be very reluctant to differ from their opinion. But, in none of the cases, so far as I have been able to examine them, the question of right of appeal on facts was raised. That question was specifically raised only in *Shidappa Venkatarao* v. *Rachappa Subrao*(3) where the learned Judges reversed the decree of the District Judge and directed the appeal to be presented to the High Court. This judgment of the Bombay High Court was affirmed by their Lordships of the Privy Council. If their Lordships thought that section 11 of the Suits Valuation Act was an answer to the defendant's contention, I think they would not have rested their judgment on other grounds. While their Lordships refer to section 8 of the Suits Valuation Act as regards the mode of valuation, and also to section 7 as regards the computation of fees payable for certain suits, and sections 6 and 7 of the Court Fees Act as regards the fees payable in respect of reliefs, they rest their decision upon the fact that the objection was not taken at the proper time and that a defendant who did not choose to take the objection in the Court of first instance should not be helped. But for their Lordships' decision in *Rachappa Subrao Jadhav Desai* v. *Shidappa Venkatrao Jadhav Desai*(4), I would have felt very great difficulty in not following the decision in *Raghavachariar* v. *Raghavachariar*(1) and other cases. It has not been shown by the appellant that the disposal of the suit on the merits has been prejudicially affected by the undervaluation. At the same time I feel strongly that the right of appeal to the High Court, which the defendant would have had if the suit had been

(1) (1910) 20 M.L.J., 726.
(2) (1897) I L.R., 24 Calc., 661.
(3) (1912) I.L.R., 36 Bom., 628.
(4) (1919) 36 M.L.J., 437; 46 I.A., 24.

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instituted in the Subordinate Judge's Court, had been improperly taken away by the suit being instituted in the District Munsif's Court; and no party should have the right to take away the right of his adversary to appeal to the highest Court in the land on facts. It might be said that he got the right of a second appeal, which he would not have had, if the suit had been filed in the Subordinate Judge's Court in the first instance. I do not think this argument needs serious consideration. A decision of a Bench of two Judges of the High Court on facts, I consider, would be more satisfactory than the decision of a single Judge of the District Court. On this ground, the undervaluation of the suit has prejudicially affected the defendant's right of appeal. Relying upon the decision of their Lordships of the Privy Council in *Rachappa Subrao Jadhav Desai* v. *Shidappa Venkatrao*(1), I respectfully dissent from the decision of Sir T. MUTHUSWAMI AYYAR and other learned Judges in the three Madras cases referred to above, and hold that the District Munsif had no jurisdiction to try the suit. Mr. Madhavan Nayar offered to withdraw the suit so far as items 16 and 17 are concerned. I think in the view I take he should not be allowed to cure the want of jurisdiction by withdrawing the suit in respect of a few items at this stage, depriving the defendant of the undoubted right to have his appeal on facts heard by the High Court and the suit tried by a Subordinate Judge.

The plaint should be ordered to be returned to the plaintiff for presentation to the proper Court.

ON THIS REFERENCE—

C. V. Ananthakrishna Ayyar.—The question before the Full Bench is whether there is prejudice within the meaning of section 11 of the Suits Valuation Act, 1887. There has been undervaluation of the suit, and owing to undervaluation it has been filed in the District Munsif's Court and not in the Sub-Court, the real valuation being above Rs. 5,000. The undervaluation is not denied but is now admitted by the respondents (plaintiffs). The District Munsif held that

(1) (1919) 36 M.L.J., 437; 46 I.A., 24.

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there was no undervaluation and decided on the merits in favour of the plaintiffs. On appeal, the District Judge held that there was no undervaluation, and even if there were the undervaluation did not affect the disposal of the suit on the merits. The appellant files this second appeal and contends that there was undervaluation, and it has affected the disposal of the suit and appeal on the merits. The High Court is competent to go into the question whether there was prejudice though it was a question of fact. Prejudice is a question of law and fact. Prejudice is either in the first Court or in the lower Appellate Court. In this case, if the suit was properly valued, the appeal will lie on facts and on law to the High Court, and not to the District Court and only a second appeal to the High Court on law only. The party is deprived of the advantage of a first appeal on facts to the High Court. This is a prejudice. The lower Appellate Court can decide if there was prejudice caused in the decision of the first Court, not if there was one in that of lower Appellate Court itself. While other statutes, such as the Civil Procedure Code, give a right of first appeal on evidence to the High Court, this right should not be deemed to be taken away by section 11 of the Suits Valuation Act, 1887, by one of the parties giving a wrong valuation to the suit. If a District Judge or Sub-Judge decides on facts and not two learned Judges of the High Court, it is prima facie a prejudice. See *Mamraj Agarwala* v. *Ahamad Ali Mahammad*(1), *Shidappa Venkatarao* v. *Rachappa Subrao*(2), *Mohini Mohan Misser* v. *Gour Chandra Rai*(3). The decision in *Raghavachariar* v. *Raghavachariar*(4) is against the appellant, but this point of change of venue causing prejudice, was not argued.

(1) (1918) 47 I.C., 932.
(2) (1912) I.L.R., 36 Bom., 628.
(3) (1920) 5 Patna L.J., 397.
(4) (1910) 20 M.L.J., 726.

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C. Madhavan Nair (for respondents) referred to the decisions in *Raghavachariar* v. *Raghavachariar*(1), *Narayani Ammal* v. *Secretary of State*(2), *Ammlu Ammal* v. *Krishnan Nair*(3), and *Vedaji Baskara Tirumalrao* v. *Subramania Gurukal*(4).

OPINION.

SCHWABE, C.J.

SCHWABE, C.J.—In this case the suit was commenced before the District Munsif and it appears that there was an undervaluation of the suit. If it had been properly valued, the case would not have gone to the District Munsif but would have gone to the Subordinate Judge, in the first instance, and thence on appeal to the High Court instead of to the District Court and on second appeal to the High Court, as is the case in decisions from District Munsifs. This objection to jurisdiction by reason of undervaluation was taken before the District Munsif who held that he had jurisdiction and heard the case. There was an appeal from him to the District Court, the lower appellate Court in this case. The District Judge held also that the suit was not undervalued but he also held that, if the suit were undervalued, still its valuation had not prejudicially affected the disposal of the suit on its merits. That decision on appeal comes to this Court by way of Second Appeal and, there having been a difference of opinion, it is referred to a Full Bench.

The question turns on the proper interpretation of section 11 of the Suits Valuation Act of 1887 which provides that objections to jurisdiction, by reason of overvaluation or undervaluation of a suit or appeal, are not to be entertained by an appellate Court, unless the objection is taken in the Court of first instance or in the

(1) (1910) 20 M.L.J., 726.
(2) (1917) 41 I.C., 167.
(3) (1921) 62 I.C., 715.
(4) (1919) 52 I.C., 992.

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lower appellate Court and the appellate Court is satisfied, for reasons to be recorded by it in writing, that the suit or appeal was overvalued or undervalued, and that the overvaluation or undervaluation thereof has prejudicially affected the disposal of the suit or appeal on its merits. It is contended before us that the District Judge was wrong because the mere fact of undervaluation, involving a trial before the District Munsif, must be prejudicial to the unsuccessful party, because an appeal from him lies to a District Court and then to the High Court by Second Appeal where questions of fact are not open to discussion, whereas, if the suit had been brought originally before the Subordinate Court, it would come by first appeal to this Court where questions of fact are open to discussion. In my judgment, the clause of the Suits Valuation Act, when referring to prejudicially affecting the disposal of a suit or appeal on its merits, is not considering at all the different rules of procedure that there may be on appeal from one Court to another Court. If, as has been contended before us, the mere fact of there being some different rules in the procedure on appeal must prejudicially affect the disposal of a suit on its merits, the section has really no meaning at all, because in every case from a District Munsif to a lower Appellate Court, where there had been undervaluation the appeal would have to be allowed and a new trial ordered, because the trial on its merits was prejudiced and that, in my judgment, is absurd. There is ample authority of this Court that the lower appellate Court in such a case not only has jurisdiction to hear the appeal from a District Munsif who has exceeded his jurisdiction but that it must do so unless it is satisfied, as required by section 11 of the Suits Valuation Act, first, that the point was taken, and secondly, that the decision on the merits was prejudicially affected. (See

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Raghavachariar v. *Raghavachariar*(1), *Narayani Ammal* v. *Secretary of State*(2), *Ammalu Ammal* v. *Krishnan Nair*(3). There is a decision to the contrary in *Mohini Mohan Misser* v. *Gour Chandra Rai*(4). With that decision I do not agree. The point was also discussed in *Shidappa Venkatrao* v. *Rachappa Subrao*(5), but the point at present before the Court is not decided there.

Our answer to the question, therefore, is that the second appeal must be heard on its merits. The same point arises in Second Appeal No. 287 of 1920 which is also referred to us and our answer in that case must be the same.

OLDFIELD, J. — OLDFIELD, J.—I agree.

COUTTS TROTTER, J. — COUTTS TROTTER, J.—I am of the same opinion and I should have thought that the contention put before us was absolutely unarguable were it not that it apparently has commended itself to at least one Bench of Judges in this country. I take it that the object of section 11 of the Suits Valuation Act is to provide a machinery for curing the original lack of jurisdiction in such circumstances. If it does not do that, it does nothing else: yet, it is argued before us that, if you once start a suit in one Court which decides on the merits, the section has no power to cure the original lack of jurisdiction which remains uncured to the end; that is to say, that the section gives you something with one hand and immediately takes it away with the other. Mr. Anantakrishna Ayyar did not contend otherwise than that the "Court of First Instance" referred to in sub-section 1 (*a*) of section 11 must mean not the Court in which the suit ought to have been started, but the Court in which it was, in fact, started. It seems to me to follow from that, beyond a possibility of question,

(1) (1910) 20 M.L.J., 726. (2) (1917) 41 I.C., 167.
(3) (1921) 62 I.C., 715. (4) (1920) 5 Patna L.J., 397.
(5) (1912) I.L.R., 36 Bom., 628.

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that, in sub-section 1 (*b*) when we get to talking about "Appellate Court," that means not the Court in which the appeal should have been started in the first instance but the Court to which it did, in fact, go and ought to have gone if the lack of jurisdiction were to be condoned. In this case in fact it was condoned. In my opinion. the only possible answer to this reference is the one proposed by my Lord.

K.R.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Spencer, Mr. Justice Kumaraswami Sastri and Mr. Justice Ramesam.

1923, February 21.

MUHAMMAD KUNHI (PLAINTIFF), APPELLANT IN SECOND APPEAL No. 1493 OF 1919,

v.

PACKRICHI UMMA AND ELEVEN OTHERS (DEFENDANTS), RESPONDENTS IN SECOND APPEAL No. 1493 OF 1919.*

Malabar Law—Marumakkattayam Mappillas of North Malabar—"Strisothu"—Custom of settling property on females and their female descendants to the exclusion of males, validity of.

There is no custom or usage prevailing among the Marumakkattayam Mappillas of North Malabar by which property may be settled as *strisothu* on the female members of a tarwad or tavazhi to the exclusion of the males or so as at least to authorize the female members to sell the family property otherwise than for necessary tarwad purposes without the consent of the males.

Their Lordships refrained from expressing any opinion as to the existence of tarwards in which the manager or Karnavathi is a female.

SECOND APPEALS against the decree of H. D. C. REILLY, District Judge of North Malabar, in Appeal Suit No. 656 of 1917, preferred against the decree of P. G. RAMA

* Second Appeal No. 1493 of 1919 and Second Appeal No. 506 of 1919.

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AYYAR, District Munsif of Cannanore, in Original Suit No. 312 of 1916, and against the decree of K. V. KARUNAKARA MENON, Additional Temporary Subordinate Judge of North Malabar, in Appeal Suit No. 157 of 1918, preferred against the decree of P. G. RAMA AYYAR, District Munsif of Cannanore, in Original Suit No. 362 of 1915.

The following are the facts in Second Appeal No. 1493 of 1919.

The plaintiff and defendants 5 to 12 are descendants of the fourth defendant, a Marumakkattayam Mappilla woman. Her husband Mamookoya Haji and his mother and aunt made a gift of the plaint and other properties to her and her daughters in 1018 (1873) under Exhibit B. The material portions of Exhibit B are as follow :—

"Deed of gift granted by Ponmanichintagath Mamookoya, his mother Ayissa and her sister Kunhamina to Mamookoya's wife Kunhikalandathi and his daughters Ayissa Umma and Mariyumma. We have no legal heirs. Out of our own free will we make a gift of all our properties, movable and immovable to you as soujanyam. We have put you in possession of the properties and the title-deeds. We have no further right to the properties. Hereafter you and the female santanams derived from you should hold and enjoy the properties as *strisothu*. The male santanams derived from you will have no power to sell or give away the properties."

The plaintiff is a male member and is the karnavan of the tarwad. He brought this suit to recover possession of the above properties from defendants 1 to 3 to whom they were sold in 1905 by defendants 4 to 12 on the ground that the sale was invalid and not binding on him. Defendants contended *inter alia* that under the gift deed the properties belonged only to the vendors, viz., the female members of the tarwad, that the plaintiff, a male, had no right to the same and that the plaintiff was estopped. In answer to this the plaintiff contended that a gift prescribing the line of succession to females alone

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was invalid. The District Munsif who upheld all the other contentions of the plaintiff held against him on the question of estoppel and therefore dismissed the suit. On appeal by the plaintiff the District Judge held without deciding the question of estoppel that such a gift was valid among the Mappillas of North Malabar and dismissed the appeal. The plaintiff preferred this Second Appeal.

This Second Appeal coming on for hearing on the 7th day of December 1920, their Lordships (AYLING and SPENCER, JJ.) made the following :

ORDER OF REFERENCE TO A FULL BENCH.

SPENCER, J.—In these connected Second Appeals a question of law has been taken whether a course of devolution of property among females to the exclusion of males is unknown in North Malabar and is repugnant to Marumakkattayam law as followed by Mappillas in that district. The Subordinate Judge and the District Judge who heard the first appeals have come to different conclusions on the point, and the authorities to which the District Judge refers in his judgment are neither clear nor uniform.

In *Bivi Umah* v. *Keloth Cheriyath Kutti*(1), an instrument of gift which limited the descent of property to the female line was held by COLLINS, C.J., and PARKER, J., to be valid. The learned Judges observe that the gift was of the class known as *strisothu* or *henumula* and created an estate known to Marumakkattayam usage. They quote *Kunhacha Umma* v. *Kutti Mammi Hajee*(2), a Full Bench case, which is not however an authority upon the significance and legality of *strisothu* gifts. On the other hand in *Kunhamina* v. *Kunhambi*(3), MILLER and MUNRO, JJ., refer to a similar gift to females excluding males as being an attempt

(1) (1910) M.W.N., 693. (2) (1893) I.L.R., 16 Mad., 201 (F.B.).
(3) (1909) I.L.R., 32 Mad., 315.

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"to create a perpetual succession confined to females, a course of devolution equally unknown to the Marumakkattayam and to the Muhammadan Law."

We might feel bound to follow this ruling, were there not certain observations in the judgment which indicate that the decision turned rather on a question whether the last survivor of a tenancy in common created by the gift deed had the power of disposing of the property to the exclusion of the descendants, if any, of the donees, than on the validity of the condition in the gift deed as to the exclusion of males, which the learned Judges describe as a condition of no real importance.

To a certain extent the statement that the condition in the gift deed excluding males was invalid was thus an *obiter dictum*.

The District Judge (Mr. REILLY) states in his judgment that he has come across instances in North Malabar of devolution of property being limited to females, and a case of a *strisothu* tarwad came before BAKEWELL, J., and myself in *Soopi* v. *Mariyoma*(1). Such a usage was judicially recognized by Mr. THOMPSON, the District Judge of North Malabar, in Appeal Suit Nos. 641 and 647 of 1891 on the file of that Court which came on appeal to the High Court in Second Appeals Nos. 1127 and 1128 of 1892.

In view of the divergence of opinion both in the Courts below and in this Court as to the validity of such a provision occurring in a gift, I think that the question of law as stated above should be referred to a Full Bench of this Court.

AYLING, J.—I agree to the reference proposed by my learned brother, though I should personally be content to simply follow *Kunhamina* v. *Kunhambi*(2).

(1) (1920) I.L.R., 43 Mad., 393. (2) (1909) I.L.R., 32 Mad., 315.

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On the hearing of this Reference before Sir JOHN WALLIS, C.J., SPENCER, J., and KUMARASWAMI SASTRI, J., on 15th, 16th and 24th March 1921,

K. P. M. Menon for appellant in Second Appeal No. 1493 of 1919 contended as follows:—The point referred does not arise. The gift deed in this case does not disable the males from inheriting the property; it only prevents them from selling or giving; the males have got equal rights of enjoyment. The only peculiarity of *strisothu* property is that in most cases females alone have the right of management. A gift prescribing a new mode of devolution is illegal; see *Kunhamina* v. *Kunhambi*(1). In none of the cases quoted in the Order of Reference this point arose for decision and the facts and decisions in them were different.

C. Madhavan Nayar (with *B. Pocker*).—There are two modes of succession known in Malabar, one through males and another through females; it is open to any one to choose either one or the other. This species of property is recognized as valid in *Bivi Umah* v. *Keloth Cheriyath Kutti*(2), and Second Appeal No. 1502 of 1894 (unreported) with reference to the document in question and in Second Appeals Nos. 1127 and 1128 of 1892 and *Soopi* v. *Mariyoma*(3). In *Kunhamina* v. *Kunhambi*(1), this question did not arise and the decision on this point is *obiter*. It was a case of competition only between two daughters and not one of competition between males and females. This is a special social custom which must be recognized whether it can be based on any recognized rule of law or not.

The Court (WALLIS, C.J., SPENCER, J., and KUMARASWAMI SASTRI, J.) delivered the following

(1) (1909) I.L.R., 32 Mad., 315. (2) (1910) M.W.N., 693.
(3) (1920) I.L.R., 43 Mad., 393.

MUHAMMAD KUNHI v. PACKRICHI UMMA.

JUDGMENT.

Opinions appear to be conflicting as to the validity among the Mappillas of North Malabar of a gift of property as *strisothu* or women's property which, it is said, means a gift to a female and her female descendants only, to the exclusion of her male descendants. In Second Appeal No. 1127 of 1892 Mr. ARTHUR THOMPSON, the District Judge of Tellicherry, expressed an opinion favourable to the legality of such a *strisothu* disposition but the High Court, MUTHUSWAMI AYYAR and BEST, JJ., disposed of the case on the ground that the suit of the male karanavan questioning it was barred by limitation.

COLLINS, C.J., and PARKER, J., also regarded such dispositions as valid in *Bivi Umah* v. *Keloth Cheriyath Kutti*(1), and in Second Appeal No. 1502 of 1894 with reference to the documents now in suit. A deed of this kind came before MILLER and MUNRO, JJ., in *Kunhamina* v. *Kunhambi*(2), where the question was whether a gift could be regarded as a gift to the females mentioned therein as tenants-in-common or a gift to the donee and her female descendants as a sort of tavazhi. The Court took the latter view which was sufficient for the disposal of the case. The learned Judges, however, observed incidentally that it had not been contended that the condition of enjoyment could stand so for as it excluded males altogether. For the purposes of the case, it made no difference whether males were excluded or included as the intention to create a tavazhi was clear and that was enough to invalidate a disposition by one of the female donees only. In *Soopi* v. *Mariyoma*(3), it was not disputed that a woman, described as the Karnavathi, was the manager of the Marumakkattayam tarwad in

(1) (1910) M.W.N., 693. (2) (1909) I.L.R., 32 Mad., 315.
(3) (1920) I.L.R., 43 Mad., 393.

a question which is referred to by the learned Judges as a *strisothu* tarwad, but the question whether the male members of the family were excluded from ownership as well as from management did not arise. Mr. Menon contended before us that this is the real meaning of a *strisothu* gift and that a *strisothu* tarwad in North Malabar is merely a tarwad in which the right of management is in the senior female instead of in the senior male, according to the system which prevails in the adjoining district of South Kanara with reference to Aliyasantana tarwads, and that otherwise the male members of the family have an equal interest with the females in the tarwad property. He also contended that the question had never arisen directly between the female members of a tavazhi claiming under such a gift and the male members. Coming now to the two suits, which have given rise to this reference, the District Munsif dealing with both suits purported to follow *Kunhamina* v. *Kunhambi*(1), and held that Marumakkattayam usage only knew of tarwads and tavazhis and that its conception of a tarwad or a tavazhi is that it consists of a female common ancestor and her descendants, male and female in the female line, and that a tarwad or a tavazhi consisting of females only to the exclusion of male descendants of females was a thing so far unrecognized by Marumakkattayam usage. The appeal in one suit came before the District Judge, Mr. REILLY, and the appeal in the other before the Subordinate Judge, the late Mr. K. V. KARUNAKARA MENON. The latter observed in his judgment that it had rightly been conceded before him that the gift deed did not exclude males from participating in the income of the properties, and that all that was contended for was that the right of management was in

(1) (1909) I.L.R., 32 Mad., 315.

the females. This contention he rejected observing that in *Kunhamina* v. *Kunhambi*(1), a gift like this had been held to create a tavazhi consisting of males and females and that the present gift must be taken to have been made to a tavazhi consisting of males and females. In the other appeal, the District Judge, Mr. REILLY, took a completely different view and held that Exhibit B created what was sometimes known as a *strisothu* tarwad or tavazhi consisting of a woman and her female descendants who alone have the right of management and that it was unnecessary to consider whether the male descendants would have any right of maintenance. He regarded the observations of MILLER and MUNRO, JJ., in *Kunhamina* v. *Kunhambi*(1), as the *obiter dicta* of Judges whose experience had lain in South and not in North Malabar, the usages of which vary in several respects. He further observed that instances in which the devolution of property was confined to the females of a family had come to his own knowledge among the Marumakkattayam Mappillas of North Malabar and that he understood that that course of devolution was recognized in South Kanara. Accordingly he held that the male members of the family were not entitled to question the sale by the female members under Exhibit I.

As we regard the decisions and other materials before us as inconclusive we have decided before disposing of the reference to call for a finding from the District Judge of North Malabar in Second Appeal No. 1493 of 1919, in which the question necessarily arises, as to whether according to the custom or usage prevailing among the Marumakkattayam Mappillas of North Malabar property may be settled as *strisothu* on the female members of a tarwad or tavazhi to the exclusion of the

(1) (1909) I.L.R., 32 Mad., 315.

males, or so as at least to authorize the female members to sell the family property otherwise than for necessary tarwad purposes without the consent of the males. Fresh evidence may be taken. Finding will be submitted in two months after the local vacation. Seven days will be allowed for objections.

In compliance with the order contained in the above judgment, the District Judge of North Malabar submitted a finding in the negative stating that neither side was ready with evidence to prove the usage and that he was not inclined to grant an oral application for adjournment for producing evidence.

On the 5th December 1921, the High Court, after the return of the above finding and on application of the parties to grant further time to adduce evidence made the following

ORDER :—

Seeing that both sides were not ready on 25th July and applied for an adjournment and that the time allowed for returning a finding did not expire till 18th August, we think that the District Judge might properly have granted an adjournment.

Considering the importance of the question at issue, we are not inclined to decide it on the materials on record and we direct the District Judge to give the parties another opportunity for adducing evidence.

After the examination of oral and documentary evidence produced before him the District Judge again returned a finding in the negative.

When the case came on for hearing again on 21st February 1923 the Full Bench (SPENCER, KUMARASWAMI SASTRI and RAMESAM, JJ.) gave the following

OPINION :—

In calling upon the District Judge to record evidence of a custom or usage prevailing in Malabar of males

being excluded from tarwads or tavazhies managed exclusively by females of certain Marumakkattayam Mappillas, we discussed in some detail all the decisions in which such a custom might be said to have been judicially recognized or its recognition refused, and we stated that we regarded them as inconclusive. The District Judge was therefore asked to return a finding on such evidence as might be produced before him to prove the existence of the particular custom in question. This he has done, and we agree with him in holding that it is wholly inadequate to prove the prevalence of any custom by which males are treated as having no right to be consulted in the management of the affairs of the tarwad or tavazhi and no right to participate in the income of the tarwad or tavazhi properties. It is not necessary to express any opinion as to the existence of tarwads in which the manager or Karnavathi is a female.

We therefore answer the reference made to us in the affirmative.

N.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Oldfield and Mr. Justice Coutts Trotter.

SUBRAYA SAMPIGETHAYA AND TWO OTHERS (DEFENDANTS 1, 3 AND 4), APPELLANTS,

v.

KRISHNA BAIPADITHAYA (PLAINTIFF), RESPONDENT.*

1923, March, 12.

Section 6 (d), Transfer of Property Act (IV of 1882)—Personal right of widow to future maintenance, not transferable.

Where a widow who had succeeded as heir to her husband's properties surrendered her life-interest therein to the nearest

* Second Appeal No. 498 of 1921.

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reversioner who in return agreed to her residing in the family house and sharing the meals of the family or to her receiving a certain amount of paddy annually if she chose to live away from the family house, the option being exercisable by her at her will and without her being subject to any liability to elect once and for all,

Held that the right to maintenance conferred on the widow was purely "personal" to her, within section (6)(*d*) of Transfer of Property Act and was not transferable.

SECOND APPEAL against the decree of K. GOPALAN NAYAR, Subordinate Judge of South Kanara, in Appeal Suit No. 122 of 1920, preferred against the decree of P. NARAYANA MENON, District Munsif of Karkal, in Original Suit No. 148 of 1919.

The document (Exhibit B) is given in the judgment of the learned Chief Justice and the facts are given in the Referring Order of SPENCER, J. The defendants against whom a decree was given by the lower Appellate Court preferred this Second Appeal.

This Second Appeal coming on for hearing on Thursday and Friday, the 6th and 7th days of April 1922, the Court made the following

ORDER OF REFERENCE TO A FULL BENCH.

OLDFIELD, J.—I agree to a reference to a Full Bench in the terms, which my learned brother is about to state. In doing so, I commit myself to no opinion as to whether section 6, Transfer of Property Act, is to be interpreted with reference to public policy. For it is not clear that the considerations which arise correspond with any of the heads of public policy, which authority has hitherto recognized and which it is undesirable to multiply or that the refusal of the law to treat certain things and rights, of which a widow's right to future maintenance may be one, as property susceptible of transfer, may not be a sufficient justification for interpreting the section in the manner proposed.

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SPENCER, J.—In this Second Appeal a question has arisen whether the sale of a right to maintenance which a Hindu widow executed in favour of the plaintiff was valid. The widow, who is named Lakshmi Hengsu, in 1904 surrendered by Exhibit B her husband's estate to the nearest reversioner subject to a condition by which she became entitled to food and clothing for life and a right of residence, the food to consist of 45 muras of rice of two descriptions charged on the liability of the surrendered properties; and nearly ten years later she conveyed under Exhibit A her right to collect future maintenance in the form of 45 muras of rice annually to the plaintiff in consideration of a sum of Rs. 1,000. The description of property in the document refers to another conveyance of the widow's right to collect arrears of maintenance which she executed on the same day.

Mr. Anantakrishna Ayyar who appears for the appellant concedes that the transfer of arrears of maintenance already accrued at the time of transfer is valid. But he argues that Exhibit B is invalid in so far as it purports to transfer future maintenance. In the lower Appellate Court in dealing with this point of law, the Subordinate Judge relied on an observation in *Rani Annapurni Nachiar* v. *Swaminatha Chettiar*(1) of Sir ARNOLD WHITE, Chief Justice, and MUNRO, J. They state:

"It may be that voluntary alienations of rights for future maintenance should be prohibited as well as the taking of such rights in execution. The legislature has not thought fit to prohibit them. We are not prepared to say that, at any rate, where, as here, the amount payable is subsequently fixed by agreement or by decree, a transfer of a widow's right to maintenance from her late husband's estate is inalienable."

With due deference, I feel some difficulty in accepting that dictum as a correct statement of the law on the

(1) (1911) I.L.R., 34 Mad., 7 at p. 9.

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subject. So far as it makes an agreement to pay maintenance to a widow transferable it seems to be opposed to section 6, clause(*d*) of the Transfer of Property Act which declares that an interest in property restricted in its enjoyment to the owner personally cannot be transferred by him. On this section and clause there is a note in the commentary by SHEPHARD and BROWN on the Transfer of Property Act, which is so well accepted an authority that I do not hesitate to quote it. It says :

> "The right to future maintenance cannot be attached in execution of a decree and it seems clear that such a right enjoyed by a Hindu widow cannot be made the subject of a sale or other transfer, by her since the right exists for her personal benefit only."

It may be doubted whether she could effectually transfer her interest in property allotted to her for her maintenance. As regards attachment of the right to future maintenance reference is made to *Diwali* v. *Apaji Ganesh*(1) and section 60 of the Code of Civil Procedure. In *Diwali* v. *Apaji Ganesh*(1), the decision proceeded upon the proviso against alienation contained in the deed of assignment. But section 60, clause (*n*) is quite clear. The Courts have consistently held that a right to future maintenance cannot be attached in execution. In *Nunammal* v. *The Collector of Trichinopoly*(2), the fact that the right to maintenance had ripened into a decree did not, in the opinion of ABDUR RAHIM, J., and MUNRO, J., who was also a party to *Rani Annapurni Nachiar* v. *Swaminatha Chettiar*(3), make the right to maintenance any more attachable. In *Palikandy Mammad* v. *Krishnan Nair*(4), SADASIVA AYYAR and MOORE, JJ., had no hesitation in holding that

(1) (1886) I.L.R., 10 Bom., 342.
(2) (1909) 20 M.L.J., 97.
(3) (1911) I.L.R., 34 Mad., 7.
(4) (1917) I.L.R., 40 Mad., 302.

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there could be no attachment of a right to future maintenance. As pointed out by SADASIVA AYYAR, J., in that case, the public policy of prohibiting transfers found in section 6 of the Transfer of Property Act and the prohibition against attachment under Civil Procedure Code, both rest upon the same foundation. In England it was held in *Watkins* v. *Watkins*(1), that alimony granted to a separated wife was not alienable by her. LINDLEY, L.J., indicates the reason for this. He says the Court which orders it never loses its control over it and the doctrine of inalienability is based on the old ecclesiastical law. The learned Judges, who decided *Rani Annapurni Nachiar* v. *Swaminatha Chettiar*(2) evaded the application of the Transfer of Property Act by saying that the right to future maintenance was not in their opinion "property." SESHAGIRI AYYAR, J., in *Seshappa Heggade* v. *Chandayya Heggade*(3) also expressed an opinion that a right to maintenance would not be covered by clause (*d*) of section 6 as it could not be described as an interest in property restricted in its enjoyment to the owner personally. But my learned brother, OLDFIELD, J., who sat with him pronounced an opinion only on the other question which arose as to the maintainability of the suit in a Small Cause Court. In *Annada Mohan Roy* v. *Gour Mohan Mallik*(4), MOOKERJEE, acting Chief Justice, in deciding that the chance of a Hindu reversioner succeeding to the estate of the last full owner was not alienable property under clause (*a*) of section 6, discussed a definition of "property," a definition which could cover a widow's right to maintenance. He pointed out that when non-existent property is made the subject of a contract, the party who takes

(1) [1896] Prob., 222.
(2) (1911) I.L.R., 34 Mad., 7 at p. 9.
(3) (1913) 37 M.L.J., 402.
(4) (1921) I.L.R., 48 Calc., 536.

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the agreement is in no better position when he attempts to defeat the application of the statutory provision by this means, as no Court of equity will assist him in his endeavour to accomplish his purpose which is opposed to public policy. In 12 Calc. L.J., there are two instructive cases, *Asad Ali Molla* v. *Haidar Ali*(1) and *Tara Sundari Debi* v. *Saroda Charan Banerjee*(2). MOOKERJEE, J., obeserved in the earlier case at page 133 that if a person is entitled to a monthly allowance under a deed the allowance can be attached by an execution creditor only after it has become due so that an assignee of a decree for arrears of maintenance can execute it against the judgment-debtor in the same manner as the original decree-holder and at page 154 where land has been granted in lieu of a right to maintenance the interest of the grantee is liable to be sold in execution of a personal decree. He quotes the decision in *Harris* v. *Brown*(3) by the Privy Council where a monthly allowance of Rs. 50 devised by Will for the maintenance of a daughter was transferred and the Privy Council treated the assignment as operative. In that case no question as to the illegality of the assignment by the legatee Flora Williams of this allowance was raised with reference to section 6 of the Transfer of Property Act. The two cases *Enaet Hossein* v. *Nujeeboonissa Begum*(4) and *Maharajah Dheraj Mehtab Chand Bahadoor* v. *Sreemutee Dhun Coonaree Bibee*(5), the latter relating to an annuity charged on an estate in favour of a brother which was held to be attachable in execution, are not very material to the question before us, as they were decisions prior to the passing of the Transfer of Property Act in which the provisions of the Civil Procedure Code alone were considered. In the present case the

(1) (1910) 12 C.L.J., 130. (2) (1910) 12 C.L.J., 146
(3) (1901) I.L.R., 28 Calc., 621. (4) (1869) 11 W.R., 138.
(5) (1872) 17 W.R., 254.

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provisions for residence and clothing under Exhibit B. appear to be undoubtedly interests restricted in enjoyment to the widow Lakshmi Hengsu. As the allowance of rice was intended to be for her support after she had parted with her interest in the land and as it would come to an end at her death this also appears to be an interest restricted to her personally, and a transfer of such an interest is, in my opinion, prohibited on grounds of public policy by section 6, clause (*d*). Whether after a decree has been obtained for arrears of past maintenance the decree-holder can assign the decree for execution is a matter which does not require to be decided on the facts of this case. As the decision in *Rani Annapurni Nachiar* v. *Swaminatha Chettiar*(1), appears to be at variance with section 6 of the Transfer of Property Act and the other decisions already referred to, we refer the question to a Full Bench,

"*Whether the interest of a widow who has obtained by a registered deed a right to future maintenance during her life-time even if charged upon specified immoveable property is capable of being transferred when the transfer is attempted to be effected at a time before the maintenance has become due.*"

C. V. Anantakrishna Ayyar (with *K. Srinivasa Rao*) for appellants.—Exhibit B is a valid deed of surrender of whole estate by the widow stipulating for maintenance —*Bhagwat Koer* v. *Dhanukdhari Prashad Singh*(2), *Anga-muthu Chetti* v. *Varatharajulu Chetti*(3). She has also therein stipulated that she would not create any further charge on the said properties or have any claim to their return. Her right therein is purely personal to her and it is not assignable. See section 6, clauses (*d*) and (*h*) of the Transfer of Property Act, Trevelyan's

(1) (1911) I.L.R., 34 Mad., 7. (2) (1920) I.L.R., 47 Calc., 466 (P.C.).
(3) (1919) I.L.R., 42 Mad., 854 (F.B.)

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Hindu Law, page 80, *Narbadabai* v. *Mahadeo Narayan Kashinath Narayan and Shamabai*(1), West and Buhler (1919) Edition at pages 253 and 254. The decision against me is *Rani Annapurni Nachiar* v. *Swaminatha Chettiar*(2). It is *obiter* and also wrong and it is adversely commented on in *Palikandy Mammad* v. *Krishnan Nair*(3). In English Law alimony and maintenance are not transferable. *Watkins* v. *Watkins*(4) ; 4 Halsbury, paragraph 855.

[THE CHIEF JUSTICE referred to *In re Robinson*(5).] Maintenance is not property ; it is subject to variation in amount. See definition of " property " in section 28 of the Provincial Insolvency Act. Right to future maintenance is not attachable. See section 60, clause (*n*) of Civil Procedure Code. *Tara Sundari Debi* v. *Saroda Charan Banerjee*(6).

B. Sitarama Rao for respondent.—Right to maintenance becomes property when it is settled by agreement or is charged on property. When an annuity is agreed in lieu of maintenance the annuity is property and cannot be restricted to enjoyment personally—*Rani Annapurni Nachiar* v. *Swaminatha Chettiar*(2), *Enaet Hossein* v. *Nujeeboonissa Begum*(7), *Maharajah Dheraj Mahtab Chand Bahadoor* v. *Sreemutee Dhun Coomaree Bibee*(8), *Rajat Kamini Debi* v. *Raja Satya Niranjan Chakrabarty*(9), *Seshappa Heggade* v. *Chandayya Heggade*(10) and *Asad Ali Molla* v. *Haidar Ali*(11). *Salakshi* v. *Lakshmayee*(12), *Harrison* v. *Harrison*(13). Future property is assignable in equity.—*Palaniappa* v. *Lakshmanan*(14). The fact

(1) (1881) I.L.R., 5 Bom., 99 at p. 104. (2) (1911) I.L.R., 34 Mad., 7.
(3) (1917) I.L.R., 40 Mad., 302 at p. 306. (4) [1896] Prob., 222.
(5) (1884) 27 Ch.D., 160. (6) (1910) 12 C.L.J., 146.
(7) (1869) 11 W.R., 138. (8) (1872) 17 W.R., 254.
(9) (1919) 23 C.W.N., 824. (10) (1919) 37 M.L.J., 402.
(11) (1910) 12 C.L.J., 130. (12) (1908) I.L.R., 31 Mad., 500.
(13) (1888) 13 Prob., 180. (14) (1893) I.L.R., 16 Mad., 429.

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that the alternative right is personal does not make the original right also personal; *Coleman Henry* v. *Strong*(1). The dictum in *Narbadabai* v. *Mahadeo Narayan Kashinath Narayan* and *Shamabai*(2) is *obiter*. Section 6, clause (*d*) is intended to cover cases of contract of personal service. *Tara Sundari Debi* v. *Saroda Charan Banerjee*(3) is a case of attachment for a decree.

C. V. Anantakrishna Ayyar replied.

OPINION.

SCHWABE, C.J.—The question referred to the Full Bench is : SCHWABE, C.J.

" Whether the interest of a widow who has obtained by a registered deed a right to future maintenance during her life-time even if charged upon specified immoveable property is capable of being transferred when the transfer is attempted to be effected at a time before the maintenance has become due."

I do not think that it is possible to give a general answer to this question, and I will confine myself to considering whether the assignment in this case is valid. By a document called a general power-of-attorney, the widow surrendered all her interest in her late husband's property in favour of the nearest reversioner of her husband in consideration of his agreeing to pay some debts of the husband and to maintain her during her life-time. The document then continues (according to a corrected translation) :

" Besides maintaining me by giving me food and clothing, etc. until my life-time you should also perform my obsequies, etc., after my death. Henceforward, you should also perform the sraddhas of my husband, father-in-law and mother-in-law, making the necessary expenses therefor. . . . If it is not convenient for me to live jointly with you, I should remain in the building where I now reside. In that event, except that for

(1) (1888) 39 Ch.D., 443, 451.
(2) (1881) I.L.R., 5 Bom., 99. (3) (1910) 12 C.L.J., 146.

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my food and clothing you should pay yearly 33 muras of kuchlu rice and 12 muras of beltige rice charged on the following properties. I have no right to contract any debts as a charge on the said properties or have any claim to the return of the property."

Whether the right to future maintenance, apart from a contract, or under a contract to provide clothing, board and residence in the house of the other contracting party is property at all, within the meaning of section 6 of the Transfer of Property Act, is a matter upon which there has been considerable divergence of opinion, but it is unnecessary to consider that here as in my judgment, it is a purely personal right and is clearly inalienable.

The right under a contract to a defined amount in cash or kind for future maintenance is, in my judgment, property under the enabling words of section 6 of the Transfer of Property Act of 1882. But the question remains whether it is an interest in property restricted in its enjoyment to the owner personally, such an interest under clause (*d*) of that section being inalienable. This must depend on the facts of each particular case and must be ascertained by the ordinary rules of the interpretation of the contract; the question being, whether the intention of the parties was that the right should be personal and therefore inalienable. That intention is to be ascertained from the language of the document itself and the surrounding circumstances at the time of its execution. It must be considered as a *contract* to come into operation at once, and in the light of the surrounding circumstances as they then stood. What has in fact happened since is not a relevant consideration, except perhaps as an illustration of what may possibly have been in the contemplation of the parties at the time of this contract. The widow was surrendering her life-interest in the property in exchange for the agreement for maintenance, and it seems to have been quite clearly

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in the contemplation of the parties that the reversioner should continue in possession of the property and of the family house, and the fact that he has since sold the property does not help us to arrive at the true interpretation of the contract.

Examining the contract itself, we find that the first alternative form of *maintenance* provided was by residence in the house and by sharing the meals of the family. The second alternativ was that, if she chose to live apart, she should receive definite amounts of paddy secured by a charge on the land. There is no provision for an election once and for all, and I see no reason why she should not at her will at one time live in the house, and at another live away and receive the paddy. This leads me to the conclusion that the intention of the parties to be derived from the document was that the rights under the contract should be personal and inalienable; for, she could not give to another the right of living and feeding with the reversioner's family.

I think that the view expressed above that this question must turn on the intention of the parties reconciles most, if not all, of the apparently conflicting decisions on this question.

The right to future maintenance properly so called, by which I mean the right to be maintained by the supply of clothing, board and lodging is inalienable, and so I understand the statements in the text-books, Trevelyan's Hindu Law, II Edition, page 80, West and Buhler's Hindu Law, page 253 and Shephard and Brown Transfer of Property Act, page 209, and so, I think, may be explained the decision in *Rajat Kamini Debi* v. *Raja Satya Niranjan Chakrabarty*(1), where, on facts

(1) (1919) 23 C.W.N., 824.

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somewhat similar to these, it was held that a widow who released her life-interest in return for an agreement to pay her Rs. 100 per annum and supply her with 39 maunds of rice per annum could alienate her interest under the agreement; for, in that case, it was no part of the agreement that she should be clothed, fed or housed and therefore there was nothing personal about the contract at all. This too, was, I think the view of MOOKERJEE, J., who in two cases decided in the same month held that the widow's right to maintenance under one contract could be taken in execution and under another it could not. *Asad Ali Molla* v. *Haidar Ali*(1) and *Tara Sundari Debi* v. *Saroda Charan Banerjee*(2). The right to attach is governed by the Code of Civil Procedure, but in his judgments he discussed fully the inalienability of such right. In *Tara Sundari Debi* v. *Saroda Charan Banerjee*(2), in which he held the right inalienable and, therefore, not attachable, the payments were not to be made until the donee lived separately from the family, and he distinguishes between cases where the provision of land, money or goods is taken in lieu of maintenance without any restraint upon alienation where the land, money or goods are alienable, and cases where the right is purely personal. If the latter, he considers that, even when the right is merged in a decree, it is not alienable. *Bhyrub Chunder Ghose* v. *Nubo Chunder Gosho*(3), *Enaet Hossein* v. *Nujeeboonissa Begum*(4) and *Maharajah Dheraj Mahtab Chand Bahadoor* v. *Sreemuttee Dhun Coomaree Bibee*(5), I think, may be reconciled on the same ground. *Rani Annapurni Nachiar* v. *Swaminatha Chettiar*(6) and the explanation of it in *Patikandy Mammad* v. *Kishnan Nair*(7), by

(1) (1910) 12 C.L.J., 130. (2) (1910) 12 C.L.J., 146.
(3) (1868) 5 W.R., 111. (4) (1869) 11 W.R., 138.
(5) (1872) 17 W.R., 254. (6) (1911) I.L.R., 34 Mad., 7.
(7) (1917) I.L.R., 40 Mad., 302.

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SADASIVA AYYAR, J., do not assist me in arriving at the principle to be applied. The remarks of SESHAGIRI AYYAR, J., in *Seshappa Heggade* v. *Chandayya Heggade*(1), on this point were purely *obiter* but can properly be explained by limiting their application to cases of maintenance properly so called. I do not think that any useful purpose will be served by going in further detail into any of these cases or others to which our attention was drawn.

I answer the question referred by saying that this widow's right to future maintenance was inalienable.

OLDFIELD, J.

OLDFIELD, J.—The question referred is stated in general terms, which, as the referring order of SPENCER, J., and the argument before us show, are liable to be applied to interests of different kinds and subject to different legal incidents. Some confusion has again been introduced by reliance on the exemption under section 60, Civil Procedure Code, of a right to maintenance from attachment. But that exemption is inconclusive, when, as here, a transfer by act of parties is in question and when some of the descriptions of property enumerated in the section certainly are not, and it is not to be assumed that a maintenance right is, exempted from attachment. Authorities relating to attachment are accordingly irrelevent, except in so far as they deal with the only provision of law at present material, section 6 (*d*), Transfer of Property Act, under which property cannot be transferred, if it is

> "restricted in its enjoyment personally to the owner."

And on this account *Palikandy Mammad* v. *Krishnan Nair*(2), one of the decisions of this Court regarded as conflicting in the reference, is not of assistance, the prohibition against attachment having been relied

(1) (1919) 37 M.L.J., 402. (2) (1917) I.L.R., 40 Mad., 302.

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on directly. The other *Rani Annapurni Nachiar* v. *Swaminatha Chettiar*(1), proceeds on the view that a right to future maintenance is not property within the enabling words or an interest in property contemplated by paragraph (*d*) of section 6. But, with all respect, we have not been shown that this view has been taken elsewhere ; it is inconsistent with the statutory exclusion of such a right from property liable to attachment ; and, if it were acceptable, explanation would still be necessary as to the law, by which the validity of a transfer of what is not property is recognized or can be tested at all.

Authority need not be cited to show that section 6(*d*) requires more than the termination of the interest in question with the life of its owner. But in the present case that requirement is complied with. For it is not conceivable that Exhibit B was meant to enable the widow to have some other person clothed or to introduce any stranger she might nominate to the family meals. The rights conferred on her are clearly personal ; and it is therefore unnecessary to follow MOOKERJEE, J., in his exhaustive discussion in *Tara Sundari Debi* v. *Saroda Charan Banerjee*(2), of the questions (1) whether an interest created in lieu of and in discharge of a right to maintenance is assignable and (2) whether it is material that the right is enforceable by a charge on immoveable property. For as regards the first I agree that there is no question of a discharge in Exhibit B, the widow's option to return at any time to actual maintenance instead of a periodical allowance having been preserved, and as regards the second the only substantive right under transfer is the right to future maintenance already considered and no question of an impersonal interest in

(1) (1911) I.L.R., 34 Mad., 7. (2) (1910) 12 C.L.J., 146.

land available for the enforcement of that right can arise, except incidentally and in case a default takes place.

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I concur in the opinion expressed by my Lord.

COUTTS TROTTER, J.—I am of the same opinion and have nothing to add.

COUTTS TROTTER, J.

N.R.

SPECIAL BENCH.

Before Mr. Justice Ayling, Mr. Justice Coutts Trotter and Mr. Justice Ramesam.

CHIEF COMMISSIONER OF INCOME-TAX, MADRAS, REFERRING OFFICER,

1923, March 8.

v.

DORAISWAMI AYYANGAR AND BROTHERS, ASSESSEES.*

Indian Income-tax Act (VII of 1918), sec. 2 (12-A)—Registration of some members of a joint family as a firm—Partnership of some members by a document—Liability of the joint family to super-tax.

Registration of some members of a joint family as a firm as defined in section 2 (12-A) of the Indian Income-tax Act (VII of 1918) precludes the assessment of the family as an undivided family to super-tax on the income derived from the business of the firm unless the firm so registered has been shown to carry on its business on behalf and for the benefit of the joint family. Nor does mere constitution of a partnership between some members of the family by a formal document preclude the assessment of the income of the partnership to super-tax as part of the income of the undivided family, if the partnership is conducted on behalf of and for the benefit of the joint family.

CASE stated by the Secretary to the Chief Commissioner of Income-tax, Madras, in his letter, dated 5th

* Referred Case No. 14 of 1921.

CHIEF COMMISSIONER OF INCOME-TAX v. DORAISWAMI AYYANGAR.

August 1921, S.T.A. No. 27, under section 6 of the Super-tax Act of 1920 read with section 51 of the Income-tax Act of 1918 for decision of the High Court.

In this case a joint Hindu family consisted of a father and four sons. The four sons combined and started a joint partnership business in 1907 and executed a formal deed of partnership in November 1920 and had it registered with the Collector and Commissioner of Income-tax, Madras, in January 1921. The said officer issued the Certificate of Registration and declared it to have effect from 1st April 1920. He treated the income derived from partnership business as income of the joint family and assessed the firm to super-tax. The firm objected to the assessment on the grounds that the firm's business was no business of the joint family which consisted of the father also, that the firm was a separate entity by itself, that the father was only a lender to the firm and that the income of the firm could not be added to the income of the joint family so as to enable the Income-tax Officer to assess the firm to super-tax. The firm also objected before the Income-tax Officer that being a registered firm it was not liable to super-tax. On these objections the Commissioner of Income-tax referred for decision to the High Court under section 6 of the Super-tax Act (1920) read with section 51 of the Income-tax Act of 1918 the two following questions :—

"1. Does the registration of the brothers as a firm as defined by section 2 (12) of Act VII of 1918 preclude the assessment of the family as an undivided family to super-tax on the income derived from the business of the firm ?

2. If not, does the mere constitution of a partnership between some members of the family by a formal document preclude the assessment of the income of the partnership to super-tax as part of the income of the undivided family?"

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The necessary facts not being clear the High Court required the Commissioner to give more information after taking evidence. The Commissioner then sent his report which he wound up as follows :—

"On the whole, no adequate evidence has been adduced which would enable one to record a finding as a fact whether the original capital of the firm was wholly or in part derived from joint family funds. It can only be inferred from the conduct of the assessees and all the circumstances of the case that appellants intended to trade as a joint family and did trade as such."

A. Krishnaswami Ayyar (with *M. Subraya Ayyar*) for the assessee.—The firm is not liable to super-tax for the following reasons :—The Super-tax Act exempts registered firms from super-tax. The firm is not an asset of the family. The father has no concern with the business of the firm and he is a mere lender in respect of it. It is clear from *Sudarsanam Maistri* v. *Narasimhulu Maistri*(1), that when some only of the members of a family are partners in a business or when a particular property is expressly agreed to be treated as partnership property, the incidents of joint family property do not apply to the partnership or the property. It is also clear from *Appovier* v. *Rama Subba Aiyan*(2) that in respect of a particular property the members of a family may by an agreement treat themselves as separated in status. See also *Rungun Monee Dossee* v. *Kassinath Dutt*(3). The finding given by the Commissioner is not against this view. There is no finding that the business belongs to the joint family.

Government Pleader (*C. V. Anantakrishna Ayyar*) for the Government. The question is one of fact. If the firm is really a business of the joint family it is liable to be assessed to super-tax though some members alone of the family constitute the firm and the firm is registered.

(1) (1902) I.L.R., 25 Mad., 149 at 158. (2) (1866) 11 M.I.A., 75 at page 90.
(3) (1868) 13 W.R. (F.B.), 76 (footnote).

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COUTTS TROTTER, J.

If there is no clear finding on this point a finding may be called for.

The JUDGMENT of the Court was delivered by

COUTTS TROTTER, J.—This is a case stated by the Chief Commissioner of Income-tax to the High Court under section 51 of the Income-tax Act (VII of 1918) read with section 6 of the Super-tax Act, 1920. The question for decision is whether the assessees who are the registered firm of M. Doraiswami Ayyangar and Brothers are assessable to super-tax as an undivided Hindu family and the specific questions put to us are as follows :—

"(1) Does the registration of the brothers as a firm as defined under section 2 (12) of Act VII of 1918 preclude the assessment of the family as an undivided family to super-tax on the income derived from the business of this firm ?

"2. If not, does the mere constitution of a partnership between some members of the family by a formal document preclude the assessment of the income of the partnership to super-tax as part of the income of the undivided family ?"

When this case first came before us we thought it necessary to have more information than was afforded to us by the original case stated and therefore referred the case back for a finding of fact as to whether the original capital of the firm was wholly or in part derived from joint family funds. The answer to that is to be found in the Commissioner's letter, dated the 5th of August 1922, the concluding paragraph of which runs as follows :—

"On the whole no adequate evidence has been adduced which would enable one to record a finding as a fact whether the original capital of the firm was wholly or in part derived from joint family funds."

To that is appended the following statement :—

"It can only be inferred from the conduct of the assessees and all the circumstances of the case that appellants intended to trade as a joint family and did trade as such."

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COUTTS TROTTER, J.

We desire to say with regard to this last statement that it is in no way relevant to anything that we referred back to the Commissioner, that we decline to treat it as a finding of fact by which we are bound in framing our answer to the questions referred to us. It appears to us to be a deduction of law from known circumstances rather than a finding of fact, but in any event, we disregard it as being in no way called for in connexion with the matter that has been referred. In any event it is vitiated by the laxity of reasoning which led up to and is evidenced by, the language in paragraph (3) of the same document in which it is said that "the four brothers 'practically' form the joint family." A joint family consists of certain definite persons and any given individual must either be a member of it or not. The general legal position appears to us to be beyond doubt. Members of a joint family may engage in trade in such a way as to embark on the adventure funds of the joint family and pledge its credit to their undertaking. On the other hand the members of a joint family may embark on a trade without involving the funds of the joint family in it, and in that event, their profits as traders would be self-acquisitions and the losses would not be recoverable from the joint family property. The members who actually take part in the trade may enter into a deed of partnership between themselves or between themselves and a stranger partner which of course would regulate their dealings *inter se* and with the stranger partner but need not necessarily affect the question as to whether and how far the property of the joint family is to be regarded as involved in the adventure. It is not conclusive to show that some funds of the joint family were invested in the trade ; because they might have been borrowed by the trading members as a loan of a definite sum to be repaid by the trading firm just as if it was a

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loan from strangers. In the present case the accounts appear to show that such a course has been pursued here and that the amounts advanced by Mr. M. Anantha-chariar, the father of the assessees and apparently the manager of the joint family of which they are all admittedly members, were treated as a mere loan for the purpose of the business to be repaid with interest in the ordinary way and not as an indication that the business was conducted as a joint family business. But that is a question of fact and inference which is primarily at least for the determination of the Commissioner and not of this Court. We therefore answer the questions put to us in the only way we can answer them on the materials before us.

(1) Yes, unless the firm so registered has been shown to carry on its business on behalf of and for the benefit of the joint family.

(2) The answer is in accordance with the preceding answer.

The mere constitution of a partnership between some members of the family will not preclude the assessment in cases where the partnership is conducted on behalf of and for the benefit of the joint family.

As we have been unable on the materials before us to give a final determination of the rights of the parties we make no order as to costs.

N.R.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Oldfield and Mr. Justice Ramesam.

1923, March 12.

MARAKARUTTI AND THREE OTHERS (DEFENDANTS), APPELLANTS,

v.

VEERAN KUTTI AND FIVE OTHERS (PLAINTIFFS, DEFENDANTS AND LEGAL REPRESENTATIVES OF SECOND RESPONDENT), RESPONDENTS.*

Practice—Records of Court lost in rebellion—Inherent power of Original and Appellate Courts to reconstruct records—Methods of reconstruction—Onus on appellant.

When a Court loses its records, e.g., by accident, it has inherent power to reconstruct them and a Court hearing an Appeal from the judgment of the first Court, has also inherent power to reconstruct the records lost in the first Court, or the Appellate Court can, in such a case, call for a finding from the first Court as to what the records were; the method of reconstruction being by means of affidavits, counter-affidavits, hearing of witnesses, the admission of copies, etc. *Douglass* v. *Yellop*, (1759) 2 Bur., 722; 97 E.R., 532. *McLendon* v. *Jones*, (1845) 42 Am. Dec., 640 and *Baboo Gooroo Dyal Singh* v. *Durbaree Lal Tewaree*, (1867) 7. W.R., 18, followed.

On a Reference by a District Judge as to the course of action to be taken by him in an appeal pending before him, the records wherein were destroyed by a rebellion, before they were sent to the District Court, but the judgment of the first Court was available, their Lordships ordered the District Judge to hear the Appeal and if necessary to reconstruct the records for the purposes of the Appeal and observed (1) that the judgment of the first Court was for the purpose of reconstruction good evidence as a contemporaneous statement of what took place before that Court, and (2) that in the event of the Appellate Judge being unable to reconstruct the record to his satisfaction the onus was on the Appellant to establish his grounds of Appeal and on the respondent his cross objections if any.

* Referred Case No. 17 of 1922.

MARAKARUTTI v. VEERAN KUTTI.

CASE stated under section 113 of the Code of Civil Procedure, by C. G. Austin, the District Judge of South Malabar, in Appeal Suit No. 525 of 1921, preferred against the decree of T. R. VENKATSWARA AYYAR, the District Munsif of Parappanangadi, in Original Suit No. 674 of 1920.

In this case the plaintiff obtained judgment in his favour in the District Munsif's Court of Parappanangadi and the defendants filed an Appeal in the District Court but the Munsif's Court-house and all the records of the case had been destroyed by the Mappilla rebellion, before the latter could be sent to the District Court. As there were several cases of the kind the District Judge referred to the High Court as to the course of action to be taken by him in hearing the Appeal.

K. P. Ramakrishna Ayyar for the plaintiff (respondent before the District Court). Every Court has inherent power to reconstruct its own records and an Appellate Court has similar power with reference to records lost in the Court of first instance. Of course the reconstruction must be without prejudicing the successful party ; see *Baboo Gooroo Dyal Singh* v. *Durbaree Lal Tewaree*(1), a case exactly similar to this ; *Kamakshamma* v. *Emperor*(2), *Venkatamma* v. *Manikkam Nayani Varu*(3), *Raj Gir Sahaya* v. *Iswardheri Singh*(4), *Douglass* v. *Yellop*(5), *Sanderson* v. *Walker*(6). The Appellate Court can call for a finding from the District Munsif as to what the records were.

The other side was not represented.

JUDGMENT.

SCHWABE, C.J.

SCHWABE, C.J.—This case is referred to us by the District Judge of South Malabar. It is an appeal from

(1) (1867) 7 W.R., 18.
(2) (1913) 25 M.L.J., 445.
(3) (1915) 26 I.C., 244 at 248.
(4) (1910) 11 C.L.J., 243, 247 and 248.
(5) (1759) 2 Bur., 722 ; 97 E.R., 532.
(6) (1836) 1 Myl. & Cr., 359 ; 40 E.R., 413.

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the District Munsif of Parappanangadi. Difficultly has arisen owing to the fact of the District Munsif's court having been destroyed in the Mappilla rebellion and the records in this case at the same time destroyed. We are informed that there are many cases similarly affected, and the learned District Judge asks our direction as to what is the proper course to adopt.

The respondent only has been represented before us, but his vakil, Mr. K. P. Ramakrishna Ayyar, has assisted the court very much by placing before us fully everything that he could find whether it was for him or against him in the matter. I think that one can safely start with the proposition that there is inherent power in every Court to reconstruct its own records, and I think it follows that there is inherent power in the Appellate Court to reconstruct the records of the Court from which an Appeal lies to it. This power has been recognized in England and in America, which follows the English Common Law, and also in this country. The English case that is quoted on the subject is *Douglass* v. *Yellop* (1). The matter was more fully discussed in an American case, *McLendon* v. *Jones* (2), a judgment of the Court of Alabama which quoted and followed *Douglass* v. *Yellop* (1) and a case which had been decided by the Supreme Court of New York ; and that case *McLendon* v. *Jones*(2) points out :

> "Cases must frequently have occurred in which, by accident, the records of Courts of Justice have been destroyed or lost, and it would seem strange if the Common Law had provided no adequate means by which the injuries growing out of such accident could be averted or remedied,"

and then goes on to discuss the methods by which the remedy should be provided. I call attention to it because it states the matter more fully than the other

(1) (1759) 2 Bur., 722 (97 E.R., 532)
(2) (1845) 42 Am. Dec., 640.

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reported cases. In this country the matter came before the Calcutta court in 1867 in *Baboo Gooroo Dyal Singh* v. *Durbaree Lal Tewaree* (1), a judgement of Sir BARNES PEACOCK, C.J., and JACKSON, J. In that case records had been lost in transit from the first Court to the second; the second Court acted on some documents purporting to be office copies which the High Court held were not regularly proved or admitted. The Court held that there were two alternative courses open, to direct the lower Appellate Court to receive such secondary evidence of the contents of original records as may be forthcoming or to order an entirely new trial. It decided against the second alternative for very cogent reasons with which we agree. It directed the lower Appellate Court to recieve secondary evidence of the contents of the whole record, but, if not able thus to replace the record, that the parties should be at liberty to adduce further evidence and on the record so reconstructed and supplemented, give judgment. While agreeing in the main with this, we think it desirable to state our own view of the matter.

The first thing to observe is that the appellant has, in order to get his Appeal heard at all, to satisfy the Court what the record is of the case in which he has failed. He can come to the Court and say that he has tried to get the record which has been destroyed. He can then ask the Court to be allowed to reconstruct that record. It is then for the Court, if so minded (I say that, because it is conceivable that the Court may say, on the material at hand before it or on the appellant's application, that no amount of reconstructing of the record would assist the appellant in his Appeal) to permit the appellant to get the record reconstructed.

(1) (1867) 7 W. R., 18.

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The Court has not got to have the case re-heard. The respondent is entitled to the benefit of having the judgment which he has got in his favour on the original hearing. It may be that in reconstructing the record, the Court will have to go very near to re-hearing, but the Court will always have to apply its mind to ascertain not what the rights of the parties were, but what the destroyed record of the suit was and on that record, when reconstructed, it will have to act on the ordinary principles on which it would have acted if the original record had been before it. It will be for the Judge to whom the application is made to decide how the reconstruction of the record is to be attempted; affidavits, counter-affidavits, the hearing of witnesses and the admission of copies are all methods which he can in a proper case allow. He will, of course, get the best evidence available. It will be open to him in a proper case to call for a finding of the District Munsif on what the record was. It may well be in some cases that it would be more convenient that the Court that heard the matter and made the record should do the reconstructing rather than the Appellate court and, with that in view, the Appellate Court may well in a proper case send the case to the District Munsif for the recording of evidence and a finding as to what the record consisted of, which finding, when given it will be open to the Appellate Court to accept or reject in the ordinary way. It is worth observing that in the Appellate Court, probably the best evidence of what took place in the Court below will be found in the judgment, if that has been preserved, of the District Munsif, or of the Subordinate Judge, as the case may be, who heard the case and recorded findings.

In the case at present before us, we have the District Munsif's judgment still existing, and he states on several matters the facts that were proved before him and it is

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very clear that his statement as a contemporaneous statement of what took place before him or statement made at any rate a short time after it had taken place will be as good evidence as can be obtained and in all probability better than any other. In the event of the Appellate Judge being unable to reconstruct the record to his satisfaction, it must be borne in mind that the onus is on the appellant to establish his grounds of Appeal and on the respondent his cross-objections, if any.

Therefore in this case we direct the District Judge of South Malabar to hear the Appeal and if he thinks it necessary, to reconstruct the record for the purposes of the Appeal in the manner suggested above. I do not think we can in anticipation usefully give any further instructions as to what should be done in these matters.

Costs of this reference will be costs in the Appeal.

OLDFIELD, J. OLDFIELD, J.—I agree and have nothing to add.

RAMESAM, J. RAMESAM, J.—I agree.

N.R.

ORIGINAL CIVIL—SPECIAL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Coutts Trotter and Mr. Justice Kumaraswami Sastri.

In re COURT FEES.*

1922, October 31.

Practice—Suits on Original Side, High Court—Gazette notification prescribing higher court fee for suits from date of publication in the Gazette—Publication in the evening of the day—Whether higher fee payable on plaints filed on that day.

A notification in the *Fort St. George Gazette* Extraordinary, published on the 5th of May 1922, announced an increase of court fees for suits filed on the Original Side of the High Court and stated that the amendments "do come into force *from* the date of publication in the *Fort St. George Gazette*."

The notification was received in the office of the High Court only at about 5 p.m. on the 5th of May 1922, after office hours.

Held, by the Court (KUMARASWAMI SASTRI, J., dissenting) that the increased fee was payable even on plaints filed on the 5th of May.

Per KUMARASWAMI SASTRI, J.—The day of the notification should be excluded and the lower court fee was leviable on plaints filed on that day.

CASE referred for the opinion of the Court as to the court-fee leviable.

Facts are given in the judgment of KUMARASWAMI SASTRI, J.

Advocate-General (*C. P. Ramaswami Ayyar*) for the Crown.—The law does not take notice of fractions of a day. The notification comes into effect from the beginning of the 5th May on which date it was published. The rule is framed by virtue of the power given to the High Court by the Government of India Acts, 5 & 6 Geo. V, Cap. 61, 6 & 7 Geo. V, Cap. 37 and 9 & 10 Geo. V, Cap. 101; hence the interpretation of

* Original Suit No. 513 of 1922 and others (Court Fee Reference).

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the rule must be only in accordance with the rule laid down in section 36 of the Interpretation Act (1889) 52 & 53 Vict., Cap. 63, and not according to the Indian General Clauses Act X of 1897 or the Madras General Clauses Act I of 1891. When a rule is enacted to be operative "from" a certain day it includes that day unless a period having an outer limit is also fixed during which it is announced to be operative, in which case alone the first day is excluded. He referred to *Wright* v. *Mills*(1), *Subbaya* v. *Yellamma*(2), *Goldsmiths' Company* v. *The West Metropolitan Railway*(3), *Sheffield Corporation* v. *Sheffield Electric Light Company*(4), *South Staffordshire Tramways Company* v. *Sickness and Accident Assurance Association*(5). Cases under the Common Law on the point are *Tomlinson* v. *Bullock*(6), *Pugh* v. *Duke of Leeds*(7), *Isaacs* v. *Royal Insurance Co.*(8), *In re Railway Sleepers Supply Company*(9), *Castle* v. *Burditt*(10), and *In re North, Ex parte Hasluck*(11). For the meaning of the word "from" see Murray's Dictionary; and Bouvier's Law Dictionary.

V. V. Srinivasa Ayyangar for the party.—The words of the notification are not "on" or "on and from" but "from." When "from" is used the day intended is excluded unless the contrary is necessarily implied from the context. Section 36 of the English Interpretation Act uses only "on" and not "from." He referred to Maxwell's Interpretation of Statutes, pages 605 and 606; Stroud's Judicial Dictionary and Wharton's Law Lexicon for the meaning of the word "from." There

(1) (1859) 28 L J., Ex., 223.
(2) (1886) I.L.R., 9 Mad., 130.
(3) [1904] 1 K.B., 1.
(4) [1898] 1 Ch., 203.
(5) [1891] 1 Q.B., 402.
(6) (1879) 4 Q.B.D., 230.
(7) (1777) 2 Cowp., 714; 98 E.R., 1323.
(8) (1870) L.R., 5 Ex., 296, 299.
(9) (1885) 29 Ch.D., 204.
(10) (1790) 3 Term. Rep., 623; 100 E.R., 768.
(11) [1895] 2 Q.B., 264 at 274.

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is no fixed rule in England as is seen from the cases quoted. We are to be guided by the rule of justice, equity and good conscience, mentioned in the Civil Courts Act. Fictions of English law need not be imported in India. In cases of doubt a fiscal rule must be interpreted in favour of the subject.

[KUMARASWAMI SASTRI, J., referred to *Lester* v. *Garland*(1).]

[CHIEF JUSTICE referred to *Sidebotham* v. *Holland*(2).]

SCHWABE, C.J.

SCHWABE, C.J.—The question to be decided in this case is whether on a proper interpretation of the notification contained in the *Fort St. George Gazette* of May 5th, 1922, the rules imposing increased institution fees on suits on the Original Side of this Court apply the new scale to suits instituted on that day or not. The words of the notification are "that the amendments do come into force *from* the date of publication in the *Fort St. George Gazette*," and the whole question is whether those words mean on and after that date, including May the 5th or after that date excluding May the 5th.

The matter has been most fairly and clearly argued by the Advocate-General for the Crown and Mr. V. V. Srinivasa Ayyangar for the litigants, and I have also had the opportunity of studying and considering the judgments of my brothers, who take different views on this matter. I approach this matter conscious of the salutary rule that, in all statutes imposing taxation, any real ambiguity must be decided in favour of the subject and against the Crown. I consider that the hour of the day at which the Gazette was actually published is a wholly irrelevant consideration, because on neither view

(1) (1808) 15 Ves., 248, 257; 33 E.R., 742.
(2) [1895] 1 Q.B., 378.

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does it make any difference. If the Gazette had been published early in the morning, according to the view of KUMARASWAMI SASTRI, J., the tax will come into operation only the next day. If it had been published late at night, according to the view of COUTTS TROTTER, J., the tax would still be operative from the time the office opened for the receipt of plaints on that day. I agree that we have nothing to do with the English Common Law except in so far as it may afford some guide as to the proper meaning to be attached to words in the English language. I think this may be deduced from a study of all the English authorities, namely, that in every case the word "from" preceding a date may have one of two meanings, namely, on and after, that is, including the named date, or merely after, that is excluding the named date, and that it is necessary to look at the context and the circumstances of each case to arrive at the true construction. But I think further that, unless there are valid reasons to the contrary, certain rules may be deduced and they may be stated thus: (1) that, if the named date is the beginning of a defined limited period, that is, where there is a terminus *ad quem* as well as a terminus *a quo*, then *prima facie* the first day is excluded; (2) that, if the named date is the beginning of an indefinite period then *prima facie* the *first day* is included. I say *prima facie* because in my view there must be exceptions, for example, if I announced that I should sit on the Original Side from Monday next, I should interpret that to mean including Monday, and that whether I had announced that I should do so for a month only or whether I had left the terminus *ad quem* indefinite. In my view these rules have been recognized by the framers of the two Indian Statutes, the Indian General Clauses Act X of 1897, section 3, sub-section (12), and the Madras General

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Clauses Act I of 1891, section 9, following the English Interpretation Act of 1889, 52 & 53 Vic., Cap. 63. I do not think it necessary to decide whether any of these Interpretation Acts applies, though I incline to the view that the English Act applies, as none of them deal specifically with this point.

Applying the general rules stated above to this case, the named date must be included unless there is some valid reason why it should not be, and I can find none. It is true that it may have the effect of making persons pay more than they understood they had to pay when they filed their suits; but this seems to me to be a ground for criticising the method of imposing this tax rather than a ground for interpreting the notice in any particular way; and I think that this argument is more than counterbalanced by the fact that this was a sudden imposition of a tax which in many cases could be avoided if notice was given of it in time for suits to be filed between the time of the publication and of its actually coming into operation. What has greatest weight with me is that I am of opinion that in ordinary plain English, unless there is anything indicating the contrary intention in the context, "from a named date" means "on and after that day."

I do not discuss the authorities in detail because I think the whole matter is summarized in the words of A. L. SMITH, L.J., in *In re North, Ex parte Hasluck*(1),

> "In the reckoning of time each case must depend on its own circumstances and subject matter,"

and giving the best consideration that I can to this case and the circumstances and the subject matter of this notification, in my judgment, the plaints filed on May

(1) [1895] 2 Q.B., 264 at p. 272.

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5th are subject to the amended rules, and it must be declared accordingly.

COUTTS TROTTER, J.

COUTTS TROTTER, J.—The short point for our decision is whether the new scale of fees applies to the plaint filed in this Court on the 5th May, the date of its publication in the *Fort St. George Gazette*. The High Courts of India are enabled to make rules for regulating the practice and proceedings of such Courts and to settle a table of fees to be allowed to officers of Court under section 107 of the Government of India Act, 5 and 6 Geo. V, Cap. 61, 6 and 7 Geo. V, Cap. 37 and 9 and 10 Geo. V, Cap. 101, all of course being statutes passed by the Imperial Parliament. The Advocate-General therefore contends that it follows that section 36 of the Interpretation Act of 1889, 52 and 53 Vict., Cap. 63 alone applies and that we are not concerned with the Indian Statutes. Section 36, sub-section 2 of the Interpretation Act is as follows:—

"Where an Act passed after the commencement of this Act, or any order in Council, order, warrant, scheme, letters patent, rules, regulations, or bye-laws made, granted or issued, under a power conferred by any such Act, is expressed to come into operation on a particular day, the same shall be construed as coming into operation immediately on the expiration of the previous day."

If this contention be not correct, the orders made by the High Courts under the authority of the Government of India Act must be governed by the Indian General Clauses Act X of 1897 and the relevant sections of that Act are section 3, sub-section 12, and section 9. Section 3, sub-section 12 is as follows:—

"Commencement used with reference to an Actor Regulation shall mean the day on which the Act or Regulation comes *into force*."

Section 9 enacts that in any Act, it shall be sufficient, for the purpose of excluding the first in a series of days

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or any other period of time, to use the word "from," and for the purpose of including the last in a series of days or any other period of time, to use the word "to." In my opinion this case is not really affected by the consideration of whether the English Interpretation Act or the Indian General Clauses Act is to be looked to for the guiding rule in this case. The whole argument of Mr. V. V. Srinivasa Ayyangar is based on the use of the preposition "from" in the notification instead of the more obvious "on." To my mind no useful purpose is served by drawing distinctions between particular prepositions such as "on," "from," "from and after" and so forth and for that I have the authority of *Doe* v. *Spence*(1) and LINDLEY, L.J., in *Sidebotham* v. *Holland*(2). It appears to me that while it is true that no one general rule exists as to the computation of time [See Sir WILLIAM GRANT in *Lester* v. *Garland*(3) and *In re North, Ex parte Husluck*(4)] the English Common Law has evolved two perfectly clear principles and they are the principles which I conceive that the draftsman of the Indian General Clauses Act intended to embody in the sections which I have quoted. What I conceive to emerge from the decided cases is this: that as the law in general neglects fractions of a day you must either exclude or include the whole of the day with which a given statute or rule or regulation deals. And the exclusion or inclusion, I think, is clearly provided in two other rules. If you are fixing the point of time at which a certain state of things is to be called into existence, that state of things comes into existence at midnight of the day preceding the day at which or on which or from which or from and after which the new state of things begins. In such cases the statute or rule is only

(1) (1805) 6 East, 120; 102 E.R., 1232.
(2) [1895] 1 Q.B., 378 at 384.
(3) (1808) 15 Ves., 248; 33 E.R., 748.
(4) [1895] 2 Q.B., 264.

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concerned in fixing the terminus *a quo* of a new state of law which is enacted to continue indefinitely, in other words, until repealed by a new enactment of the legislature where, in short, you have a terminus *a quo* but no terminus *ad quem*. This principle is well illustrated by the case of *Tomlinson* v. *Bullock*(1). It is one of obvious convenience for it would be an intolerable burden upon the litigant public to require it to ascertain at which precise hour of the day a particular statute is passed or a particular rule or regulation is promulgated. The other rule is this. When you have a period delimited by statute or rule which has both a beginning and an end, the word "from" excludes the opening day and any words fixing the closing day include that day. As was pointed out by DAY, J., any other canon of construction would lead to an absurdity. For instance a policy of insurance to be good for one day from the 1st January might be valid only for a few hours or even for a few minutes or conceivably not at all, unless you exclude the 1st January from the computation. Illustrations of the application of this principle are to be found in *Isaacs* v. *Royal Insurance Co.*(2), *In re Railway Sleepers Supply Company*(3), *South Staffordshire Tramways Company* v. *Sickness and Accident Assurance Association*(4), *Sheffield Corporation* v. *Sheffield Electric Light Company*(5), and *Goldsmiths' Company* v. *The West Metropolitan Railway*(6). This distinction appears to me to be vital and reconciles all the cases referred to in the argument. I think the rule that emerges is this: Where a statute fixes only the terminus *a quo* of a state of things which is envisaged as to last indefinitely, the common law rule obtains that you ought to neglect

(1) (1879) 4 Q.B.D., 230.
(2) (1870) L.R., 5 Ex., 296.
(3) (1885) 29 Ch.D., 204.
(4) [1891] 1 Q.B., 402.
(5) [1898] 1 Ch., 203.
(6) [1904] 1 K.B., 1.

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fractions of a day and the statute or regulation or order takes effect from the first moment of the day on which it is enacted or passed, that is to say, from midnight of the day preceding the day on which it is promulgated; where, on the other hand, a statute delimits a period marked both by a terminus *a quo* and a terminus *ad quem*, the former is to be excluded and the latter to be included in the reckoning. This notification clearly falls within the former class and must be taken to have come into force on the first second of the 5th May, that is to say, from midnight of the 4th May. It follows that the plaints filed on the 5th May are liable to the enhanced fees laid down by the Regulation.

A very large part of the argument addressed to us on behalf of those who filed plaints on the 5th May was based on what was called a hardship suffered by them if our decision should be favourable to the Crown. Increased taxation is always in a sense a hardship to the subject but I cannot see any special hardship imposed upon these particular litigants. If the suits which they filed are not in their opinion worth the expenditure entailed by the increased rate of institution fees, they would doubtless be permitted to withdraw them—a suit evaluated at that rate by the person who institutes it is not likely to be based on a very solid cause of action. In any event a line has to be drawn one side or the other more or less arbitrarily and it does not seem to me that considerations of supposed hardship can possibly affect the determination. In my opinion the Crown succeeds, whether this matter is regulated directly by the Common Law of England and the English Interpretation Act of 1889 or by the Indian General Clauses Act which, in my opinion, should be construed in the light of the numerous decisions of the English Courts. I do not think too much importance should be attached to the

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terminological significance of the words "period" and "series" which are the expressions used in the Indian Act. But it is clear that such considerations, if invoked, tend to support the contention of the Crown. In the case of the word "period" it is incontestably so, for the word obviously imports from its Greek origin the completion of a circuit, that is to say, something which has both a terminus *a quo* and a terminus *ad quem* to begin and end the circuit.

KUMARASWAMI SASTRI, J.

KUMARASWAMI SASTRI, J.—By a notification in the *Fort St. George Gazette* Extraordinary, published on Friday, the 5th of May 1922, the Table of Fees which, under Appendix II of the old rules on the Original Side, were levied in respect of the institution of suits was amended and instead of a fixed fee of Rs. 30 levied under serial No. 1, it was provided that Rs. 150 was to be levied in all suits where the value of the subject matter did not exceed Rs. 10,000 and that, in respect of suits of higher value, Rs. 20 was to be levied for every Rs. 5,000 or part thereof in excess of Rs. 10,000. In respect of serial Nos. 2 and 2 (*a*) it was provided that, in the case of suits cognizable by the City Civil Court or the Court of Small Causes, the same fee was to be levied as would be leviable were the suits instituted in those Courts, with a proviso that the fee shall, in no case, be less than Rs. 150. This notification states that the amendments

"do come into force from the date of publication in the *Fort St. George Gazette*."

A Gazette Extraordinary was issued on the 5th of May 1922 containing the notification and it reached the High Court at about 5 p.m. that day and several plaints had been filed before that hour. As the office hours are 11 a.m. to 5 p.m. the notification reached the Court at the close of the office hours. The question raised is

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whether the plaints instituted that day are to be charged with a fee of Rs. 30 as under the old rules or with the fee provided for by the amended rules and this question turns on whether the notification is to take effect from the 5th of May the date of publication or whether that day is to be excluded in determining the question as to from what date the amended rules have operation. The wording of the notification being that it is to take effect "from the date of publication" it is argued by the Advocate-General who appears for the Government that the word "from," in construing the notification, must be taken as inclusive of the date of publication and that the notification should apply to plaints presented on that date before the publication as the law does not take notice of fractions of a day. Mr. Srinivasa Ayyangar who appears on the other side contends that the date of publication should be excluded and that the use of the word "from" does not necessarily connote the inclusion of the first day. Reference has been made by the Advocate-General in the course of his arguments to the General Clauses Act X of 1897 and the Madras General Clauses Act I of 1891, but these Acts do not afford much help as Act X of 1897 only applies to the construction of the Acts of Governor-General in Council and the Regulations made pursuant to those Acts and is not made applicable to any rules that may be framed. The legislature has refrained from making the provision of this Act applicable to rules framed under statutory power. The Madras General Clauses Act I of 1891 similarly has no application to the question involved in this case. Section 36 of the Interpretation Act of 1889 (52 and 53 Vict., Cap. 63) is also of no help even assuming that the Act applies to rules made under the powers conferred by section 107 of the Government of India Act (a point on which I express no opinion) as the section

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refers to rules being expressed to come into operation "on" a particular day and not "from" a particular day. We have therefore to fall back on the general principles which govern cases like the present.

There has been a great diversity of opinion as regards the legal effect of the use of the word "from" with reference to the computation of time and as to whether it must be treated as inclusive or exclusive of a terminus *a quo*. Hard and fast rules were attempted to be laid down in the earlier English cases. For example in *Castle* v. *Burditt*(1), it was held, relying on the rule laid down in *R.* v. *Adderley*(2), that where the computation of time is to be made from an act done the day on which the act is done is to be included. Distinctions were attempted to be drawn between the use of the words "from the date" and "from the day of the date." It was, however, recognized even in the earlier cases that no hard and fast rules could be laid down. Lord MANSFIELD in *Pugh* v. *Duke of Leeds*(3), where a lease was to run from the day of the date of the indenture for 21 years and the question was whether the date of the lease must be included or excluded, observed as follows:

"In grammatical strictness and in the nicest propriety of speech that the English language admits of, the sense of the word "from" must always depend on the context and subject matter whether it shall be construed inclusive or exclusive of the terminus *a quo*."

All the earlier authorities were referred to and discussed by Sir WILLIAM GRANT, M.R., in *Lester* v. *Garland*(4), which has been followed in subsequent cases. On a consideration of the authorities on the question as to whether in computing time from an act or event,

(1) (1790) 3 T.R., 623; 100 E.R., 768. (2) (1780) 2 Doug., 463; 99 E.R., 295.
(3) (1777) 2 Cowp., 714; 98 E.R., 1323. (4) (1808) 15 Ves. 248; 33 E.R., 748.

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that day is to be included or excluded, he observed as follows:—

"It is not necessary to lay down any general rule upon this subject; but upon technical reasoning I rather think it would be more easy to maintain that the day of an act done or an event happening ought in all cases to be excluded than that it should in all cases be included. Our law rejects fractions of a day more generally than the civil law does. The effect is to render it a sort of indivisible point so that any act done in the compass of it is no more referrable to any one, than to any other, portion of it; but the act and the day are co-extensive; and therefore the act cannot properly be said to be passed until the day is passed. But it is not necessary to lay down any general rule; whichever way it should be laid down, cases would occur, the reason of which would require exceptions to be made."

The Master of the Rolls referred with approval to the argument of Sergeant Palmer that in all the previous cases except one the act done, from which the computation is made inclusive of the day, is an act to which the party against whom the time runs is privy; and, as he has unquestionably the benefit of some portion of the day, there is the less hardship in constructively reckoning the whole of it as a part of the time allowed him; whereas in the case under consideration the event was one totally foreign to the party, whose time for deliberation was to begin to run from that event. Maxwell in the "Interpretation of Statutes" (Sixth Edition, p. 605) observes as follows:—

"In the computation of time, distinctions have been made by the Courts which were founded chiefly on considerations of convenience and justice. The general rule, anciently, seems to have been that both terms or endings of the period given for doing or suffering something were included; but when a penalty or forfeiture was involved in non-compliance with a condition within the given time, the time was reckoned by including one and excluding the other of the terminal days. A distinction

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was afterwards made depending on whether the point from which the computation was to be made was an act to which the person against whom the time ran, was privy or not. Thus, if the time ran "from" when he was arrested or received a notice of action, it might justly be computed as including the day of that event; but not so, if it ran from the death of another person; a fact of which he would not, as in the previous cases, necessarily be cognizant, or, in other words, in such and cognate cases the exact meaning is signified by the phrase 'from and after'."

In *In re North, Ex parte Hasluck*(1), the point for consideration was whether the day of seizure by a Sheriff should be included or excluded in computing the period of 21 days referred to in section 1 of the Bankruptcy Act of 1890. VAUGHAN WILLIAMS, J., observed as follows:

"There seems no doubt that by the common law when an act is complete on a particular day, and it becomes necessary to calculate from that day, the day on which the act was so completed must be reckoned in the computation. This is the principle established in *R.* v. *Adderley*(2) and it was upon this basis that it was held in *Glassington* v. *Rawlins*(3), with regard to the act of bankruptcy grounded upon lying in prison for two months after arrest that the day of the arrest must be included in the computation of time."

After referring to the section in the old and new Bankruptcy Acts the learned Judge observed as follows:

"I do not feel disposed, however, to revert to the common law principle unless the law clearly compels me to do so, because it is much more convenient to have one rule of computation of time in bankruptcy, and it is not readily to be assumed that the legislature intended to establish two rules."

Lord ESHER, M.R., on appeal observed as follows:—

"No general rule exists for the computation of time either under the Bankruptcy Act or any other statute, or, indeed,

(1) [1895] 2 Q.B., 264. (2) (1780) 2 Doug., 463; 99 E.R., 295.
(3) (1803) 3 East, 407; 102 E.R., 653.

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where time is mentioned in a contract and the rational mode of computation is to have regard in each case to the purpose for which the computation is to be made. Notwithstanding the elaborate array of authorities which have been cited to us they seem on being sifted to contain no binding rule to the effect that time must be computed according to a hard and fast rule; that seems clear from the judgment in *Lester* v. *Garland*(1) in which Sir WILLIAM GRANT after a learned examination of the whole subject laid down what I conceive to be the wholesome view that no general rule exists. A great deal of difficulty has been caused in the administration of the law and particularly of the common law by decisions in which technical rules have been formulated which were not true—that is, were not in accordance with the facts of the case. To say that by the common law a part of a day is the whole of a day is to say something which is contrary to the truth; it is a technical rule which was imposed upon the law with the result of bringing the law into disrepute. It is immaterial whether those older decisions were right in the particular cases; if they, or any of them, laid down any general rule as to the mode of computing time, that rule has been departed from in recent times and no longer exists."

A. L. SMITH, L.J., observed:

"It is contended that the old authorities show that formerly when time had to be computed from the doing of an act, the first day—that is, the day on which the act was done—was included and that the rule is applicable to the present case. But it has been shown from subsequent cases that there is no such universal rule and that in the reckoning of time each case must depend on its own circumstances and subject matter and for this I need only refer to the judgment of Sir WILLIAM GRANT in *Lester* v. *Garland*(1), to that of KELLY, C.B., in *Isaacs* v *Royal Insurance Company*(2), and of CHITTY, J., in *In re Railway Sleepers Supply Company*(3).

RIGBY, L.J., observed as follows:

"It is said that the law takes no account of fractions of a day; but that is not a correct statement, for it means that the

(1) (1808) 15 Ves., 248; 33 E.R., 748. (2) (1870) L.R., 5 Ex., 296.
(3) (1885) 29 Ch.D., 204.

law will never enquire at what time a particular event took place; for instance, a difference of five minutes in the registration of two deeds in the Meddlesex Registry would be sufficient to determine a question of priorities, and the time of their respective registration will, as a matter of course, be looked at. If the doctrine is cut down to the proposition that in the computation of time the law takes no account of fractions of a day, then it means one of two things; either that the fraction of a day is to be taken as a whole day or that it is to be excluded altogether from the calculation; it does not help us to determine in any particular case whether the part is to be left out or kept in. It was contended before us and it seems at one time to have been thought to be law that where a fact or event was mentioned from which a given period of time was to be reckoned the Court was bound to reckon the portion of the day on which the act was done as though it were a whole day and to reckon it as the first day of the period. That doctrine underwent a thorough examination in *Lester* v. *Garland*(1), at the hands of Sir WILLIAM GRANT who considered the cases in which the first day had been included or excluded and came to the conclusion (which I think was inevitable) that there was no general rule on the subject. His own view was that if there were to be a general rule it ought to be one of exclusion as being more reasonable than one to the opposite effect. His classification of the cases shows that where the calculation is in favour of a person, the construction should be adopted which is more favourable to him . . . . In my opinion although Sir WILLIAM GRANT did not put the proposition in so many words, his judgment leads us to the conclusion that 'the question whether the day on which the act is done is to be included or excluded must depend on whether it is to the benefit or disadvantage of the person primarily interested."

The law is thus stated in Halsbury's Laws of England, Vol. 27, page 446:

"Expressions such as 'from such a day' or 'until such a day' are equivocal since they do not make it clear whether the inclusion or exclusion of the named day be intended. As a

(1) (1808) 15 Ves., 248; 33 E.R., 748.

general rule however the effect of defining a period in such a manner is to exclude the first day and include the last day."

I may also refer to Stroud's Judicial Dictionary where it is stated "from" is much akin to "after" and when used with reference to computation of time, for example, from a stated day, *prima facie* excludes "the day of the date." In Wharton's Law Lexicon it is stated that the word "from" ordinarily excludes the day from which the time is to be reckoned but is construed inclusive of that day if the context requires it. *Sidebotham* v. *Holland*(1), was referred to by the Advocate-General as showing that the words "at," "on," "from" and "on and from" have the same meaning. That case turned upon the date of commencement of a tenancy and all that LINDLEY, L.J., held in that case was that the words "at," "on," "from" and "on and from" were, for the purpose of considering the validity of a notice, equivalent expressions and the learned Judge observed that any distinction between them *for such a purpose as that* was far too subtle for practical use. I do not think that it is authority for holding that wherever these words are used they have the same meaning. *Tomlinson* v. *Bullock*(2), referred to turned on the construction of section 3 of the Bastardy Act 35 and 36, Vic., Ch. 65, which runs as follows:

"Any single woman who may be delivered of a bastard child after the passing of this Act", etc.

It was held that the Act came into immediate operation and that order on application may be made in respect of a child born at any time of the day on the 10th August 1872, when the Act received the Royal assent. LUSH, J., was of opinion that the Act was not intended to deprive the mother of a child born on the

(1) [1895] 1 Q.B., 378.

(2) (1879) 4 Q.B.D., 230.

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day on which it was passed of all remedy against the putative father, that it intended to substitute another remedy for that which it took away, and that if that intent can be effectuated without violence to its language it is the duty of the Court to so construe the Act as to carry out that intention. The case proceeded on considerations as to the intention of the legislature and of the hardships that would be caused to the mother and bastard. I do not think it is authority for the proposition that the use of the word "from" invariably includes the first day. The law as laid down by the more recent decisions being that there is no universal rule and that in the reckoning of time each case must depend upon its own circumstances and subject matter, there is no reason to hold that the exclusion of the first day where the word "from" is used is only to be in cases where there are two termini, as contended for by the Advocate-General. His main argument was that the rule of the common law being that "from" is to be included for the computation of time, that the law would not take notice of fractions of a day, and that the authorities only made an exception where there were both termini, the common law rule ought to be applied in this country so as to include the first day whenever the word "from" is used. The common law rule, if there was any such hard and fast rule, as contended for by the Advocate-General, has not been applied in a series of recent decisions, the test laid down being whether the inclusion or exclusion would be just or equitable or would be in accordance with the intentions of the parties having regard to the circumstances and subject matter of each case. I do not think that the rules of English Common Law based as many of them are on a system of jurisprudence and on considerations so different should be applied to this Court unless necessary for the ends of justice. It has

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not been held in any case that the English Common Law applies to this country. The rules of equity and good conscience are by the Civil Courts Act to govern cases not covered by Hindu and Muhammadan Laws. The rule that the law will not take notice of fractions of a day has been used for the purpose of excluding the first day in cases where the inclusion would work hardship and I do not think there is any reason for including the day where an act is said to be done from a day and excluding the day where an act is said to be done from a day to another day. A number of days beginning with a fixed date is still a series of days and they do not cease to be a series simply because they are to go on indefinitely. It is argued that the exclusion is necessary when there are two termini because if one day is given for the doing of an act the law would be reduced to an absurdity. But it has always been recognized even in the older decisions that the word "from" would exclude the first day, if otherwise it would lead to an absurdity and that though the law does not in general take notice of fractions of a day, yet it admits it if necessary. This was recognized as early as *Combe* v. *Pitt*(1). If the rule is that "from" includes or excludes the first day according to the context and the intention of the parties, it would necessarily exclude the first day when there are two termini and one day given and there is no necessity for having two rules of construction according as there are one or two termini.

Applying the law as laid down in the previous cases to the facts of the present case, we have to see whether the 5th of May 1922 is to be included or excluded. I might, in this connexion, state that I do not think that the principles which govern, or the devices which are

(1) (1763) 3 Burr, 1423; 97 E.R., 907.

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resorted to, by the executive for the purpose of raising money by taxation ought to have any weight with us in determining whether the date of publication is to be included or excluded. I do not think the High Court is part of the tax-gathering machinery of the Government or has any concern with the consequences to the Government of their decision on the construction of the rule. The rule, I take it, was passed by the Judges of the High Court in the exercise of the powers entrusted to them to control the administration of justice and the fees were raised because in the opinion of the Judges it was just and proper that litigants ought to pay more for the benefits which they derive by resorting to the jurisdiction of the High Court. The notification expressly states that it is to have effect from the date of publication, the object of the publication being that the public ought to have notice that the fees were being raised so that they might know exactly what they were in for when they resorted to the High Court for justice. The notification, as I have already said, was (as appears from a note of the Deputy Registrar) received in the High Court at 5 p.m., the office closing at 5 p.m. It seems to me that the litigants who filed plaints before they or even the office had knowledge of the publication of the rule did what was perfectly valid under the old rules and they presented the plaints with Rs. 30 stamp irrespective of the value of their claim. A person who files a plaint which is properly stamped and which is in order at the time of presentation is entitled to have his plaint admitted on presentation though as a matter of convenience the office receives the plaints and admits them at the end of the day or later on. There seems to me to be very little justice or equity in directing that persons who have done what was perfectly a legal and valid act at the time should pay a court-fee which is much

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higher simply because a notification was received at the close of the day making the higher fees chargeable from the date of the notification. It may well be that if those persons had notice that instead of Rs. 30 they had to pay at least Rs. 150 and a maximum that would range according to the value of their claim, they might rather have compromised with the other side or might have had resort to other proceedings like arbitration for settling their claims. I can find nothing to justify charging people, who filed their plaints on that day without knowledge of the notification which only reached the High Court at 5 p.m. with the higher fees in respect of plaints filed during the course of the day.

Having regard to all the facts and circumstances of the present case, I think that, if the law is that there is no hard and fast rule in deciding whether the word "from" is inclusive or exclusive of the date of notification and that each case must depend upon its own circumstances and subject matter, justice and equity demand that the date of the notification ought to be excluded. I would therefore direct that all the plaints received on the 5th of May 1922 be stamped with Rs. 30.

N.R.

APPELLATE CIVIL—SPECIAL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Oldfield and Mr. Justice Coutts Trotter.

1923, January 29.

THE SECRETARY, BOARD OF REVENUE, INCOME-TAX, MADRAS, REFERRING OFFICER,

v.

RIPON PRESS AND SUGAR MILLS COMPANY, LIMITED, ASSESSEE.*

Indian Income-tax Act (VII of 1918), sec. 3 (1)—Company located in British India controlling business situated outside India—Accrual of income outside India—Liability of Company to income-tax.

A Company whose Directors and head office were in Bellary wherefrom the business of the Company was controlled had a factory in Raichur (i.e., in the Nizam's Dominions), earned all its income only in Raichur by pressing cotton for its customers and usually paid its dividends according to its agreement only at that place.

Held, notwithstanding the fact that some money was received in Bellary from Raichur for office expenses and for convenient payment in Bellary of dividends to some shareholders, the Company cannot be assessed to income-tax in British India as no portion of its income "accrued, arose or was received" in British India within section 3 (1) of the Indian Income-tax Act (VII of 1918).

Money remitted to the Company at Bellary is only part of the money already "accrued" to the Company at Raichur and is not income newly "received" by the Company; *In re Aurangabad Mills Limited*, (1921) I.L.R., 45 Bom., 1286, *Board of Revenue, Madras* v. *Ramanadhan Chetty*, (1920) I.L.R., 43 Mad., 75, and *Sundar Das* v. *Collector of Gujarat*, (1922) I.L.R., 3 Lah., 349 (F.B.), followed.

CASE stated under section 51, Act VII of 1918 by the Secretary, Board of Revenue (Income-tax), Madras, in I.T.A. No. 28 of 1920-21.

* Referred Case No. 2 of 1922.

The facts are given in the Judgment of the CHIEF JUSTICE.

C. Sambasiva Rao (with *P. Chenchayya*) for assessee.—The Company is not liable to be taxed. Its business is entirely in Raichur, i.e., in the Nizam's Dominions. There alone all its income accrues and no portion of its income accrues in British India. The fact that some portion of the income already earned in Raichur is sent to Bellary for office expenses and for payment of dividend to some of its shareholders does not make the receipt of that money by the Company a new receipt or a new income. According to the rules dividend was payable only at Raichur. I rely on *In re Aurangabad Mills, Limited*(1), an exactly similar case; *Gresham Life Assurance Society* v. *Bishop*(2) and *Sundar Das* v. *Collector of Gujrat*(3). The fact that the place wherefrom the business is controlled is in British India is immaterial; *Board of Revenue, Madras* v. *Ramanadhan Chetty*(4).

[CHIEF JUSTICE referred to *Greenwood* v. *F. L. Smidth & Co.*(5).]

Government Pleader (*C. Madhavan Nair*) for the Government.—Some profits were received in Bellary for distribution as dividend. That is sufficient to satisfy section 3 (1) of the Act.

[CHIEF JUSTICE.—It was not received in Bellary as income. Even if it was income, how can you assess the whole income?]

Whatever was sent to Bellary must be treated as income remitted to British India, and hence taxable. Moreover the business was controlled from Bellary. I rely on the observations in *Board of Revenue, Madras*

(1) (1921) I.L.R., 45 Bom., 1286. (2) [1902] A.C., 287.
(3) (1922) I.L.R., 3 Lah., 349 (F.B.). (4) (1920) I.L.R., 43 Mad., 75.
(5) [1922] A.C., 417.

BOARD OF REVENUE v. RIPON PRESS. — SCHWABE, C.J.

v. *Ramanadhan Chetty*(1). *In re Aurangabad Mills, Limited*(2) is wrong.

SCHWABE, C.J.—In this case the facts contained in the original reference and the further report, which is by no means clearly expressed, amount to this: The Company carries on a factory at Raichur in the territory of the Nizam of Hyderabad. At that factory material is pressed. Against persons who bring the material to the factory, a charge is made, and the charge is received wholly in Hyderabad. The Company's head office is in Bellary in this Presidency. There are Directors there and they control the business carried on at Raichur by directing its policy, fixing the rates to be charged for the work done there, examining its accounts and issuing dividend warrants in respect of the profits earned. The only other thing that, it would appear, is done in British India is the receipt of some money for the purpose of the office expenditure at Bellary and possibly, though it is not clear on the statement, the receipt, of some money which is occasionally used for the payment of dividend warrants at Bellary though, by the terms of the dividend warrants, they are payable only at the office of the treasury at Raichur.

The question referred to us is whether the Company can be assessed to income-tax on the whole of its profits for the year, it being claimed that Bellary is the place where the total amount of the profits is paid by the Company to its shareholders by the issue of dividend warrants. The question turns on the interpretation of section 3 (1) of the Income-tax Act VII of 1918 which runs thus:—

"This Act shall apply to all income from whatever source it is derived if it accrues or arises or is received in British India,

(1) (1920) I.L.R., 43 Mad., 75. (2) (1921) I.L.R., 45 Bom., 1286.

BOARD OF REVENUE v. RIPON PRESS. — SCHWABE, C.J.

or is, under the provisions of this Act, deemed to accrue or arise, or to be received in British India."

Except for the small amount received as the Company's money by the Company in Bellary, in my judgment, there is no income which accrues or arises or is received in British India and there is nothing in the Act to show that such profits earned outside British India are to be deemed to accrue or to arise or to be received in British India.

There is a direct authority on the point in *In re Aurangabad Mills, Limited*(1). In that case the facts were precisely the same as in this case except that the Bombay Directors of the business, which had its factory in Aurangabad, seemed to have controlled the business in Aurangabad more than the Bellary Directors did in this case, and except for the fact that it was admitted in that case, though it is not clear in this case, that money was received in Bombay for the express purpose of paying some of the Bombay shareholders their dividends; and it was held in that case that the general profits of the Company were not liable to income-tax. I agree with that decision, which governs this case, and I have nothing to add to the reasons given by MACLEOD, C.J., in that case. I think that this case really is also covered by the ruling of this Court in *Board of Revenue, Madras v. Ramanadhan Chetty*(2). There is a recent case *Sundar Das.* v. *Collector of Gujrat*(3) where it was held that where a man carried on business outside the part of India to which the Income-tax Act applies, earned his profits there, and then had them remitted to him in India where he resided, that money was not received in India. It was pointed out that it had been received outside and had remained in the possession, actual or

(1) (1921) I.L.R., 45 Bom., 1286.
(2) (1920) I.L.R., 43 Mad., 75. (3) (1922) I.L.R., 3 Lah., 349 (F.B.).

BOARD OF REVENUE v. RIPON PRESS. — SCHWABE, C.J.

constructive, of the trader throughout and that it could not be considered to be received again when it was brought into British India, whether brought by him or sent from abroad to him in British India. I point out this because that is a point which may be involved in the event of the question being referred to this Court whether small amounts, received by the Company as stated by me above in Bellary are themselves liable to taxation or not.

I, therefore, answer the question referred to us in the negative. The costs to be assessed by the Registrar are payable to the assessee.

OLDFIELD, J.

OLDFIELD, J.:—I agree and I only wish to point out that, although the argument as to the receipt by some of the shareholders of dividends in Bombay was available to the Crown in *In re Aurungabad Mills, Limited*(1) it was not thought worth while to make any distinct reference to it in the judgment. I supplement what has been said by my Lord regarding it because it is as well to point out that the terms of the reference of the Board indicate a fundamental misconception on one important point. Mention is made in that reference of the fact that "the majority of the shareholders (who after all form the company) received their dividends in British India." The identity between the shareholders and the Company is not material for the present purpose, since the assessment is not of the income as the income of the individual shareholders, but as the income of the Company; and we have nothing to do with the shareholders in their individual capacity. So far as the Company is concerned, the only material matter is the receipt of the income and that income was received at Raichur. If some of it came to Bellary and was actually used to pay dividends, that is no reason

(1) (1921) I.L.R., 45 Bom., 1286.

BOARD OF REVENUE v. RIPON PRESS. — OLDFIELD, J.

why we should assume that what was done in Bellary was anything more than the distribution of what was already the Company's income and was payable as of right in accordance with the arrangement made by the Company to the shareholders only at Raichur outside British territory. It is not necessary for us, and it is not possible on the facts before us, to say whether payment in the cases referred to in the reference was made at Bellary by the officers of the Company to the payees, who took their money there instead of presenting their dividend warrants at Raichur, after the receipt of the money by those officers at the latter place as the payees' agents, or to attempt an exact definition of the legal position. It is sufficient that such payments have nothing to do with the accrual of income to or its receipt by the Company, as such. With these observations. I agree in the negative answer proposed.

COUTTS TROTTER, J.

COUTTS TROTTER, J.—I agree. Where you have dividend warrants issued to shareholders expressed to be payable at the office of the treasury at Raichur, it is very strong evidence that the income regarded as the Company's income has been received and has accumulated in Raichur. I entirely agree with the decision cited to us in *Sundar Das* v. *Collector of Gujrat*(1) that you cannot receive the same sum of money *qua* income twice over, once outside British India and once inside it. *In re Aurangabad Mills, Limited*(2) covers the point raised in argument, and I respectfully agree with that decision.

N.R.

(1) (1922) I.L.R., 3 Lah., 349 (F.B.). (2) (1921) I.L.R., 45 Bom., 1286.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, K.C., Chief Justice, Mr. Justice Oldfield and Mr. Justice Coutts Trotter.

1922, March 13.

CHOKKALINGAM CHETTIAR (PLAINTIFF), APPELLANT,

v.

PALANI AMBALAM (DEFENDANT) RESPONDENT. *

Madras Estates Land Act (I of 1908), ss. 13 (3) and 187 (1)—Improvements made by tenant at his own expense—Contract for higher rent made before the passing of the Act—Improvements made by tenant after the Act—Right of landholder to higher rent under the contract, whether taken away by the Act.

A landholder is not entitled to recover from his tenant rent at wet rates for land which the latter has been able to cultivate wet in consequence of improvements made at his own expense on the strength of a contract made before the Estates Land Act was passed, the improvements however having been made after the passing of the Act.

Section 13 (3) of the Act, read with section 187 (1) is applicable to contracts made before as well as after the passing of the Act.

Dictum in *Venkata Perumal Raja* v. *Ramudu* (1916) I.L.R., 39 Mad., 84, distinguished.

LETTERS PATENT APPEAL against the judgment of KRISHNAN, J., in Second Appeal No. 999 of 1920.

This appeal under the Letters Patent arises out of a difference of opinion between KRISHNAN and ODGERS, JJ., who heard the second appeal (Second Appeal No. 999 of 1920) from the decision of the District Judge on appeal in a suit for rent instituted by the landholder against his tenant in the Court of the Special Deputy Collector of Ramnad. The plaintiff claimed rent at wet rate for paddy grown on punja or dry lands which were converted into nanja (wet) lands by improvements

* Letters Patent Appeal No. 25 of 1921.

effected by the tenant at his sole expense in 1912-13. The plaintiff claimed wet rate of rent on such lands on account of improvements made by the tenants subsequent to the passing of the Act, on the strength of a contract made with the tenant in 1885, which provided for higher rent in case wet crops were raised on punja lands, and did not except cases where improvements were made at the tenants' own expense. The learned District Judge held that the plaintiff was not entitled to wet rate of rent on account of the improvements as they had been effected at the tenant's own expense. The plaintiff preferred a second appeal, which was heard, as already stated, by KRISHNAN and ODGERS, JJ., who differed. The former learned Judge held, *inter alia*, that section 13 (3) applied to contracts made before as well as after the passing of the Estates Land Act, especially when the improvements were made at the sole expense of the tenant after the passing of the Act; the latter held that the Act did not apply to contracts made before the Act. The judgment of the former Judge prevailed and the Second Appeal was dismissed in accordance therewith. The plaintiff preferred this appeal under the Letters Patent.

C. V. Anantakrishna Ayyar for appellant.

S. T. Srinivasagopala Chari for respondent.

JUDGMENT.

SCHWABE, C.J.

SCHWABE, C.J.—The question is whether the plaintiff, landholder, is entitled to recover rent at wet rates from his tenant, the defendant, for land which the latter has been able to cultivate wet in consequence of improvements made at his own expense. The plaintiff claims that he is entitled to wet rates on the strength of a contract contained in Exhibit D of the year 1885, before the Estates Land Act was passed. The improvements

CHOKKALINGAM CHETTIAR v. PALANI AMBALAM. — SCHWABE, C.J.

were made after it was passed. KRISHNAN, J., has held that, in these circumstances, the plaintiff is not entitled to rely on his contract with reference to section 13 (3) of the Estates land Act.

It is no doubt true that as the plaintiff contends, such a contract would have been enforceable under the previous law, section 11 of Act VIII of 1865. The only authority relied on by the plaintiff is a dictum of KUMARASWAMI SASTRI, J., in *Venkata Perumal Raja* v. *Ramudu*(1), a case in which both the contract and the improvements were made before the passing of the present Act. The dictum was, therefore, unnecessary for the learned Judge's decision. The considerations which weigh with us are that (1) the wording of section 13 (3) exempts the ryot from liability to pay a higher rate of rent in consequence of improvements made at his sole expense, notwithstanding any usage or contract to the contrary and that wording is absolutely general; (2) that, as KRISHNAN, J., has observed, the connected reference to usage renders it unlikely in the extreme that the legislature intended to except contracts made before the Act, but not enforceable before it from this provision; (3) that the ryot is referred to in section 13 (3) as becoming liable to pay a higher rate of rent, inconsistently with the view that he had already become liable under a previous contract; lastly section 187 (1) must be read with section 13 and in the former the reference is to contracts made "before or after the passing of this Act." This indicates clearly that the intention of the legislature was to refuse to contracts made before, equally with contracts made after, the passing of the Act, any effect on the relation between the ryot and the landholder.

Taking this view, we dismiss the appeal with costs.

K.R.

(1) (1916) I.L.R., 39 Mad., 84.

APPELLATE CRIMINAL.

Before Mr. Justice Oldfield and Mr. Justice Ramesam.

KING-EMPEROR (APPELLANT),

v.

VIRAMMAL AND TWO OTHERS (FIRST, THIRD AND FOURTH ACCUSED).*

1922, August 22.

Finger-prints—Expert's evidence—Conviction based on, whether legal—Court's duty to verify expert's evidence.

A Court cannot refuse to convict a person on the evidence of a finger-print expert, merely on the ground that it is unsafe to base a conviction upon such evidence. If the finger-prints are clear enough, the Court must verify the evidence of the expert by examining them with a magnifying glass if necessary, and applying its own mind to the similarities and dissimilarities afforded by the finger-prints, before coming to a conclusion one way or the other; *Emperor* v. *Abdul Hamid* (1905) I.L.R., 32 Calc., 759, *Bazari Hajam* v. *King-Emperor*, (1922) I.L.R., 1 Pat., 242, not followed. *In re Singri Bhima* (1915) 27 I.C., 900, considered.

APPEAL under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the accused by K. S. VENKATACHALA AYYAR, the Assistant Sessions Judge of Tanjore in Sessions Case No. 27 of 1921.

The facts are given in the Judgment.

Public Prosecutor for the appellant.

B. Satyanarayana for first, third and fourth accused.

OLDFIELD, J.—In this case we are asked to revise the order of acquittal of the first accused of an offence punishable under section 82 (*c*) of the Indian Registration Act, false personation and admission in an assumed character of the execution of a document, and the third and fourth accused of abetment thereof. It is

OLDFIELD, J.

* Criminal Appeal No. 785 of 1921.

KING-EMPEROR v. VIRAMMAL. — OLDFIELD, J.

unnecessary to go further into the facts, than to say that the learned Public Prosecutor has based his argument before us exclusively on certain finger-prints. A number of finger-prints were taken at the various stages of the proceedings before and during the trial. We are now asked to set aside the acquittal solely with reference to Exhibit B and Exhibit N.

We could in fact deal with the case very shortly, if the lower Court had not taken up an attitude and entered on general considerations, which we think are unsound and which it is necessary to correct. The attitude of the lower Court was in effect a refusal to exercise its own judgment on the finger-prints at all and an attempt to discredit the evidence of the third prosecution witness, the finger-print expert, on general grounds That attitude and refusal may have been due to its reluctance to enter into what is generally described as the "Science" of finger-prints or to come to close quarters with the evidence of a person described as "an expert." But in fact there is nothing in the so-called science of finger-prints or the qualifications of an expert in it, which need have deterred the lower Court from applying its own magnifying glass or its own eyes and its own mind to the evidence and verifying the results submitted to it by the witness. For the argument in finger-print cases rests on a simple deduction from a number of observations of the similarities and differences between the finger-prints in question the probabilities approaching more or less closely to certainty as those similarities or differences are many or few. It is of course a different question to be answered according to the circumstances of the particular case and the clearness of the finger-prints available whether such similarities or differences are established; and to that we shall apply ourselves in the sequel.

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The lower Court has first justified its attitude by reference to *Emperor* v. *Abdul Hamid*(1). But the Judgments in that case show that the learned Judges there entered on an inspection of the finger-prints before them and were unable to base any argument on them, only because they were too indistinct to support the expert's conclusion. There is then the observation of HENDERSON, J., to the effect that a conviction based on finger-prints alone would be unsafe; and similarly that of the learned Judge in *Bazari Hajam* v. *King-Emperor*(2). With all respect we cannot take that view. For if the finger-prints are clear enough to sustain an argument, there is no reason why an argument by way of deduction should not be as sure a foundation for a conclusion and it may be a better one than any based on direct evidence. The portion first referred to in *Emperor* v. *Abdul Hamid*(1) was relied on by SESHAGIRI AYYAR, J., in *In re Singri Bhima*(3). But I am unable with all deference to follow the learned Judge's mathematical demonstration based on a quotation apparently from Sir E. R. Henry's work on Finger-Prints, page 61, and think that he must have been misreported.

Turning now to the evidence in the present case and to the finger-prints, Exhibits N and B, with which alone the learned Public Prosecutor asks us to deal, we have examined them to the best of our ability and are unable to reach any affirmative conclusion with reference to them. There is no doubt a general similarity between the two finger-prints. But Exhibit N is so blurred that no verification by counting the lines in it for comparison with the number in the same position in Exhibit B is possible. This may be due to the fact that the first accused had injured her thumb, voluntarily or not, before Exhibit N was taken. However this may be, in

(1) (1905) I.L.R., 32 Calc., 759. (2) (1922) I.L.R., 1 Pat., 242.
(3) (1915) 27 I.C., 900.

KING-EMPEROR v. VIRAMMAL.

OLDFIELD, J.

RAMESAM, J.

the absence of anything on which an argument strong enough to exclude reasonable doubt can be based, we cannot intefere with the lower Court's conclusion. The appeal is dismissed.

RAMESAM, J.—I agree and I wish to add a few words with reference to the quotation in SESHAGIRI AYYAR, J.'s judgment in *In re Singri Bhima*(1). What Edward Henry states at page 50 of his book is, that the chance of finding one particular distinguishing mark is one in four. It follows from this that the chance of finding the combination of distinguishing marks is one in 4^6 or 4,096. I think this is what the learned Judge intended to state and what appears as 46 is a mistake for 4^6. When the learned Judge states that "Two out of four persons will have one distinguishing mark in common" what was meant was corresponding to *a person* having a certain distinguishing mark, we are likely to find *another* in a group of four chosen at random having the mark in common with him. Similar remarks apply to the later statements of the learned Judge. When he says "There will be 2 persons from out of 4^6 men who will have all the six marks in common," what was meant was: if we have a person with six marks, we are likely to find another who has all the six marks in common with him, out of a group of 4^6 persons chosen at random. A similar correction should be applied to the statement "out of 4,096 persons, two persons would possess the marks spoken to by the expert." In each case, the learned Judge adds to the person compared, the one person that may, as a matter of probability, be found in a group and makes it two. This is not strictly accurate.

N.R.

(1) (1915) 27 I.C., 900.

APPELLATE CRIMINAL.

Before Mr. Justice Oldfield and Mr. Justice Ramesam.

RAMANATHAN CHETTIAR (SECOND ACCUSED), PETITIONER,

1922, August 15.

v.

KING-EMPEROR, RESPONDENT.*

Section 350 (1) (*a*)—*Warrant case—Proceedings before framing charge, only enquiry and not trial—No right for accused for a* de novo *examination of witnesses.*

In warrant cases all proceedings before the charge is framed are only "enquiry" and not "trial" and hence if there is a change of Magistrates before a charge is framed in such cases, the accused is not entitled to a fresh examination of witnesses as provided by section 350 (1) (*a*), Criminal Procedure Code. *Narayanaswamy Naidu* v. *Emperor*, (1909) I.L.R., 32 Mad., 220 (F.B.), *Sriramulu* v. *Veerasalingam*, (1915) I.L.R., 38 Mad., 585, and *Venkatachinnayya* v. *King-Emperor*, (1920) I.L.R., 43 Mad., 511 (F.B.), followed.

PETITION under sections 435 and 439 of the Code of Criminal Procedure (1898), praying the High Court to revise the Order of M. A. QADIR BADSHA, Subdivisional First-class Magistrate of Madura Division, in Calendar Case No. 56 of 1921.

This was a complaint against ten persons charging them with offences under sections 147, 341, 353 and 323, Indian Penal Code. After the examination-in-chief of all the prosecution witnesses and before any charge was framed the presiding Magistrate was transferred and was succeeded by another. At that stage the accused applied to the new Magistrate to recall the witnesses

* Criminal Revision Case No. 115 of 1922.

AMANATHAN CHETTIAR v. KING-EMPEROR.

and to examine them afresh. The Magistrate declined to grant the application. Against the said order the accused preferred this Revision Petition to the High Court under section 439 of Criminal Procedure Code.

A. Narasimha Ayyar (with *Dr. Swaminathan*) for petitioner.

Public Prosecutor (*J. C. Adam*) for Crown.

ORDER.

The question before us is in effect whether section 350 (1) (*a*), Criminal Procedure Code, can be applied to proceedings in a warrant case, before charge has been framed. That is in effect whether at that stage the proceeding is not a trial, but merely an enquiry. The authorities, *Narayanaswamy Naidu* v. *Emperor*(1), *Sriramulu* v. *Veerasalingam*(2) and *Venkatachinnayya* v. *King-Emperor*(3), are in favour of the view that such a proceeding is merely an enquiry, and we see no reason for departure from this series of considered decisions, two of them given by a Full Bench. There is therefore no legal objection to the Magistrate's order and the revision petition must be dismissed.

N.R.

(1) (1909) I.L.R., 32 Mad., 220 (F.B.). (2) (1915) I.L.R., 38 Mad., 585.
(3) (1920) I.L.R., 43 Mad., 511 (F.B.).

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Odgers.

MADDU VENKAYYA (PETITIONER), PETITIONER, 1923, March 12.

v.

KAMIREDDI PADAMMA AND ANOTHER (COUNTER-PETITIONERS), COUNTER-PETITIONERS.*

Criminal Procedure Code (*V of* 1898), *sec.* 488—*Order of Magistrate awarding maintenance to an illegitimate child—Subsequent decree of Civil Court declaring that the child was not illegitimate—Application not to give effect to Magistrate's order.*

On obtaining a decree of a Civil Court that a child is not his illegitimate child, a person is entitled to ask the Magistrate not to give effect to his previous order awarding maintenance to the child. *Mahomed Abid Ali Kumar Kadar* v. *Ludden Sahiba*, (1887) I.L.R., 14 Calc., 276, and *Illath Narayanan Moosad* v. *Kathil Ittieherry Amma*, (1917) 33 M.L.J., 449, followed.

CASE referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate, Vizagapatam, in R.C. No. 4052 of 1922-C-2, dated 6th November 1922.

THE facts are given in the Judgment.

P. R. Srinivasa Ayyangar for petitioner.

V. L. Ethiraj for the Public Prosecutor.

The JUDGMENT of the Court was delivered by

AYLING, J.—The petitioner in this case was directed by the Subdivisional Magistrate of Narasapatam under section 488 of the Criminal Procedure Code to pay maintenance at the rate of Rs. 3 a month for his illegitimate child. He subsequently brought a suit in the District Munsif's Court of Yellamanchili and succeeded in securing a final decision on appeal to the Subordinate Judge of AYLING, J.

* Criminal Revision Case No. 91 of 1923.

VENKAYYA v. PADAMMA. — AYLING, J.

Vizagapatam to the effect that the child was not his. On this he applied to the Subdivisional Magistrate drawing his attention to the decision of the Subordinate Judge and making the following prayer :—

"Your petitioner, therefore, prays your honourable Court to abstain from giving further effect to the order, dated 21st May 1918, the order awarding maintenance, in view of the decree and judgment of the Additional Subordinate Judge declaring that the second counter-petitioner was not born to the petitioner and that the petitioner is not bound to maintain her."

This petition has been returned with the following endorsement :—

"The petitioner is free to seek whatever remedy he likes against the order of this Court which cannot be reconsidered."

The order of the Subdivisional Magistrate is obviously based on a misconception. There is no question of reconsidering the order of maintenance for which no provision is made in the Code, but, where the relationship on which the maintenance order is based has been declared by the final decree of a competent Civil Court not to exist, it is open to the person adversely affected thereby to ask the Magistrate to abstain from giving any further effect to his order of maintenance. This has been laid down in *Mahomed Abid Ali Kumar Kadar* v. *Ludden Sahiba*(1), and it is in accordance with the view of the law taken by a Bench of this Court in *Illath Narayanan Moosad* v. *Kathil Ittichery Amma* (2), although in that case the learned Judges were dealing with a maintenance order passed after the decision of the Civil Court.

The order of the Subdivisional Magistrate is therefore set aside and he is directed to restore the petition to file and dispose of it in the light of the above remarks.

N.R.

(1) (1887) I.L.R., 14 Calc., 276. (2) (1917) 33 M.L.J., 449.

APPELLATE CRIMINAL.

Before Mr. Justice Ayling and Mr. Justice Odgers.

1923, March 13.

RAMAMMA (COMPLAINANT), PETITIONER,

v.

GURUNATHAM (ACCUSED), RESPONDENT.*

Proceedings under section 1, *Workmen's Breach of Contract Act* (*XIII of* 1859), *not criminal proceedings—Absence of complainant—Dismissal of complaint—Power of Magistrate to review his order.*

A Magistrate's proceedings under section 1 of the Workmen's Breach of Contract Act up to the stage of his passing an order for repayment or performance under section 2 of the Act are not proceedings under the Criminal Procedure Code and hence if owing to the absence of the petitioner on any occasion before the passing of an order under section 2, the Magistrate dismisses the complaint, it is not an acquittal under section 247, Criminal Procedure Code, but is merely a dismissal of the complaint which the Magistrate can review. *Hussaina Beari* v. *King-Emperor*, (1920) I.L.R., 43 Mad., 443 and *Averam Das Mochi* v. *Abdul Rahim*, (1900) I.L.R., 27 Calc., 131, followed *Girish Chandra Das* v. *Bhusan Das*, (1919) I.L.R., 46 Calc., 867, not followed.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure of 1898, and section 107 of the Government of India Act praying the High Court to revise the order of the Court of the Stationary Sub-Magistrate of Kovur, Nellore district, dated 29th day of October 1921, in Calendar Case No. 329 of 1921.

The facts are given in the Judgment.

S. Ranganadha Ayyar for petitioner.

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

* Criminal Revision Case No. 333 of 1922 and Criminal Revision Petition No. 290 of 1922.

RAMAMMA v. GURUNATHAM. — AYLING, J.

The Judgment of the Court was delivered by AYLING, J.—The petitioner in this case has filed a complaint under section 1 of the Workmen's Breach of Contract Act against the respondent before the Stationary Sub-Magistrate, Kovur, and that officer proceeded to hear and determine the case as provided in the Act. On one of the dates of hearing, the petitioner was absent and the Magistrate thereupon passed an order purporting to acquit the respondent under section 247 of the Criminal Procedure Code. The petitioner subsequently applied to the Magistrate to review the order of acquittal and to proceed with the trial from the stage at which the case was thrown out. The Magistrate held that he had no power under the Criminal Procedure Code to review an order of acquittal under section 247 and accordingly dismissed the petition. Against that dismissal the present revision is preferred.

In our opinion the Magistrate's view was wrong. It has been held by this Court in *Hussaina Beari* v. *King Emperor*(1), that the Magistrate's proceedings under the Workmen's Breach of Contract Act up to the stage of the passage of an order by the Magistrate for repayment or performance under section (2) are not criminal proceedings at all, and this is also the view taken in *Emperor* v. *Dhondu*(2). If the proceedings are not criminal proceedings, it is difficult to see how the procedure can be regulated by Chapter XX of the Criminal Procedure Code or how section 247 of the Code can be held to apply. Mr. Ethiraj, who argued the case for the Public Prosecutor, suggested that the definition of "summons case" in the Code as "a case relating to an offence and not being a warrant case" would cover proceedings leading up to an offence (i.e., disobedience to a Magistrate's order), which has not been committed at the time when the proceedings were initiated; but it seems to us that that would be an unwarrantable stretch of the definition. The ruling in *Hussaina Beari* v. *King-Emperor*(1) is to the effect that no offence is committed until the workman disobeys the Magistrate's order. In the second place Mr. Ethiraj asks, under what provision of law the enquiry contemplated by the Act can be conducted at all, if not under the Criminal Procedure Code? We think the answer to it is contained in the closing words of section 1 of the Act, which empowers the Magistrate to "hear and determine the case." This view is in accordance with the judgment of the Calcutta High Court in *Averam Das Mochi* v. *Abdul Rahim*(2), in which the learned Judges have in fact held that the Criminal Procedure Code does not apply to the enquiry contemplated by section 1 of the Workmen's Breach of Contract Act. They say,

> "the learned pleader, who appears for the petitioner, urges (1) that the evidence has not been properly recorded; and (2) that the Magistrate has written no judgment. He, however, has not been able to show us any section of Act XIII of 1859 or of the Criminal Procedure Code, prescribing how evidence in a case of this nature should be recorded or requiring a judgment to be written."

These words imply that Chapter XX of the Criminal Procedure Code does not govern the case. We have been referred to a Calcutta case, *Girish Chandra Das* v. *Bhusan Das*(3), similar to the present case, in which the learned Judges apparently assumed that section 247 would apply, but the question of the applicability does not appear to have been raised in that case at all, nor was their attention drawn to the difficulty.

(1) (1920) I.L.R., 43 Mad., 443. (2) (1909) I.L.R., 33 Bom., 22.

(1) (1920) I.L.R., 43 Mad., 443.
(2) (1900) I.L.R., 27 Calc., 131. (3) (1919) I.L.R., 46 Calc., 867.

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In our opinion, the enquiry directed by section 1 of the Workmen's Breach of Contract Act cannot be held to be one under Chapter XX of the Criminal Procedure Code and the Magistrate's order of acquittal was in effect not passed under that Chapter of the Code but was merely a dismissal of the complaint. Viewed in this light, there is nothing to prevent him from reviewing that order if he sees cause to do so. We must therefore set aside his dismissal of the petitioner's review petition, dated 23 February 1922, and direct him to restore the petition to file and dispose of it according to law.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Venkatasubba Rao.

1923, February 9.

MAHARAJAH OF JEYPORE (PETITIONER), PETITIONER,

v.

SRI RAJAH GANGARAJU BAHADUR AND EIGHT OTHERS (RESPONDENTS), RESPONDENTS.*

Ganjam and Vizagapatam Agency Courts Act (XXIV of 1839)—Rules XIV and II (3) under—Cases pending before such Agency Courts—Power of High Court to transfer them to its file.

Under Rule XIV of the rules of 1920 framed under the Ganjām and Vizagapatam Agency Courts Act (XXIV of 1839) and under section 107 of the Government of India Act the High Court has power to transfer to its file cases pending before the Agency Commissioner. The High Court cannot transfer such cases to a District Court. *Maharajah of Jeypore* v. *Papayyamma*, (1900) I.L.R., 23 Mad., 329, decided under the old rules of 1840 is no longer law.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased

* Civil Miscellaneous Petition No. 2076 of 1922.

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to issue an order directing transfer of Civil Miscellaneous Appeal No. 2 of 1922 on the file of the District Court of Vizagapatam to the High Court to be tried along with Civil Revision Petition No. 751 of 1921 on its file preferred against the order of the Court of the Judicial Assistant Commissioner of Waltair in Interlocutory Application in Original Suit No. 5 of 1921.

Rule XIV of the new Agency Rules framed in 1920 is as follows:—

"From all decrees upon original suits passed by the Agency Commissioner an appeal shall lie to the High Court . ."

Rule II (3) of the new Agency Rules framed in 1920 is as follows:—

"Civil suits of a value exceeding Rs. 5,000 or for revenue-paying lands of which the value of the annual produce exceeds Rs. 500 shall be instituted in the Court of the Agency Commissioner. Provided, however, that claims of succession to, or of any interest in the estates of any chief shall not be entertained in any Civil Court, but that, in all such cases, the Agency Commissioner shall submit the result of his inquiries for the orders of Government."

Rule XXI of the old rules was as follows:—

"From all decrees upon original suits passed by the Agent (with the single exception specified in the next following rule) an appeal shall lie to the Sadr Court to be disposed of as provided in section 6, Act XXIV of 1839; provided such appeal is preferred either to the Agent or the Sadr Court within three months after the Agent's decision; or after that period if sufficient cause can be assigned to the Sadr Court for any delay which may have occurred by petition on the prescribed stamp, and subject to the other rules required in other appeals to the Sadr Court, as provided in the Madras Code and Acts applicable to that Presidency."

Rule XXII of the old Rules was as follows:—

"From decrees of the Agent in suits wherein the landed possession of a Zamindar, bissoye or other feudal hill chief may have formed the subject of litigation, an appeal will lie to the Governor in Council alone, who may refer any such appeal for

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the decision of the Sadr Court, provided that the decree of the latter Court shall not be carried into execution without the permission of the Governor in Council."

The facts are given in the Judgment.

P. Somasundram for petitioner.—Under Rule XIV of the present rules relating to these Agency tracts and under section 107 of the Government of India Act, the High Court has power to transfer any case from the file of the Agency Courts to its own file. The present Rule XIV confers upon the High Court appellate jurisdiction over all decrees in original suits passed by the Agency Commissioner. Hence the High Court is a superior Court to the other Court. Section 107 is thus satisfied. He referred to the old Rules XXI and XXII and the present Rules II (3) and XIV. Whatever differences of opinion on this point might have existed under the old rules as disclosed by *Maharajah of Jeypore* v. *Papayyamma*(1) (see especially BENSON, J.'s, judgment) the present rules clearly give the power to transfer. *Maharajah of Jeypore* v. *Papayyamma*(1) is not now good law.

Y. Suryanarayana for respondents.—There is no power of transfer under section 107. Rule XIV has given only a power of appeal and has not given to the High Court all the powers mentioned in all the sub-sections of section 107, when alone that section can be applied. The High Court is not a Court superior to an Agency Court within section 107 (*b*). All the considerations mentioned in *Maharaja of Jeypore* v. *Papayyamma*(1) are still applicable. There is no material difference between the old and the new rules as regards appealability from decrees of Agency tracts, as suits formerly excepted by the old Rule XXII have now been altogether taken out of the cognizance of Civil Courts by the present Rule II(3).

(1) (1900) I.L.R., 23 Mad., 329.

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ORDER.

In Original Suit No. 5 of 1921 on his file the Judicial Assistant Commissioner of the Agency Division dismissed an application for the appointment of a receiver; and the petitioner before us appealed against that order of dismissal to the Agency Commissioner. The Commissioner, on the ground that one of the parties to the proceedings was his ward, obtained an order from this Court, transferring the appeal to the District Court, Vizagapatam. We are now asked to transfer it from that Court to the High Court.

The transfer to the District Court was made by us administratively and without notice to the petitioner, no dispute as to the correctness or sufficiency of the ground on which it was proposed being possible; and there is accordingly no reason why it should not be reconsidered at his instance. He urges that it should be, because this Court had no power to make it or to transfer a case from the file of the Commissioner to that of any Court except the High Court. This contention no doubt involves that our order of transfer to the District Court was ultra vires and ineffective and therefore the relief required is a transfer from the file of the Commissioner, from which the appeal has never been removed in any legal way, to the file of this Court, although that is not what is actually asked for in the petition before us. But it is not suggested by respondents that there is any substance in the difference. We therefore turn to the law to ascertain our powers in the matter, observing only that neither side disputes the necessity for a transfer to some Court other than that of the Agent with reference to his position as guardian of a party.

The general power of the High Court to transfer from the file of a Court, such as that of the Agency Commissioner, which is not subject to the Code of Civil

Procedure, is conferred by section 107, Government of India Act (5 & 6 Geo. V.C. 61) and is exerciseable thereunder subject to fulfilment of two conditions that (1) the Court from which the transfer is made is subject to the High Court's appellate jurisdiction, (2) the transfer is to another Court of equal or superior jurisdiction. The first of these conditions is in our opinion complied with, because under Rule XIV of the Agency rules at present in force an appeal lies to the High Court from

"all decrees passed by the Agency Commissioner upon original suits"

and the conclusion founded directly on this comprehensive wording cannot be affected by the fact, relied on by respondents as inconsistent with the application of section 107 (*a*) and therefore of the section as a whole, that Rule XIX provides for the submission to the High Court of returns, since that provision may have been made simply for convenience and completeness or with reference to section 107 proviso.

The respondents have then referred to the decision in *Maharajah of Jeypore* v. *Papayyamma*(1) as negativing this Court's power to transfer, not only to the District Court (consistently with petitioner's contention), but also to its own file. It is not material that this decision was given under section 15, Indian High Courts' Act (24 & 25 Vict., C. 104), because that section has been re-enacted in almost identical terms in the section of the Government of India Act above referred to; but it is material to both the points above stated that a different set of Agency Rules was promulgated on 9th November 1920 in the *Fort St. George Gazette*, Part I, page 1425 and governs the present case. For as regards the point at present under consideration, the appellate jurisdiction of

(1) (1900) I.L.R., 23 Mad., 329.

this Court was sustained in the judgment of WHITE, C.J., with reference to Rule XXI and was negatived by BENSON, J., mainly with reference to the exclusion from that jurisdiction of the class of suits referred to in Rule XXII of the rules then in force, transfer of a suit of that class being (it may be added) in fact in question. Whilst, however, the former Rule XXI is reproduced without substantial difference in the present Rule XIV, the proviso to the present Rule II (3) which deals with cases of the nature of those dealt with in the former Rule XXII, those in which the succession to or an interest in the estate of a chief is in dispute, differs from it materially, because it entirely excludes such cases from the jurisdiction of the Courts and from trial as suits, whilst under the former rule their character as suits was maintained, but, the fact on which BENSON, J., to some extent relied, the appeal was to the Governor in Council, and, if it was (as the rule provided) referred to the Sadr or High Court for decision, the decree could be carried into execution only with his permission. No such derogation from the High Court's appellate jurisdiction is recognized in the present rules; and accordingly we have not to take into consideration the main ground on which BENSON J.'s conclusion was founded. It may be true that the suit in connexion with which in the present case the appeal to the Commissioner was filed, is (as respondents contend) of the description referred to in the former Rule XXII and in the present Rule II (3). But, if so, that is merely possible ground for objection to the Court's jurisdiction at the trial; it cannot be urged on the present application and is not material to the disposal of the general question of construction at present under discussion. On that question we must hold that the High Court has appellate jurisdiction over the Court of the Agency Commissioner.

The learned Judges in *Maharajah of Jeypore* v. *Papayyamma*(1) were agreed in holding on the second question stated above that a District Court was not of "equal or superior jurisdiction" to that of the Agent (corresponding with the Agency Commissioner in the present rules), WHITE, C.J., referring apparently in this connexion only to an argument based on the policy of the legislature, on which BENSON, J., had relied generally, and also expressing an opinion against the general power of the High Court to transfer suits from an Agency Court to itself. Regarding the merits of this argument, which has also been pressed on us, that the policy of the legislature is indicated as being against any power of transfer by its provision of special statutes and statutory rules adapted to the backward condition of the Agency tracts, to which the developed procedure of the ordinary Courts would be unsuited, it would with all respect be sufficient that the true inference from the existence of such provision is in favour of discrimination in the use of the power of transfer, not of its absence and of the absence of any means of protecting an Agency litigant against a disqualified judge. But we need not pursue this consideration further, because, whatever its weight, when (as those learned Judges thought) the language of the rules they were construing admitted of doubt or a secondary interpretation it is inadmissible to control the clearer language, with which we are concerned.

The conclusion already reached with reference to the comprehensive wording of Rule XIV, that the High Court has appellate jurisdiction over the Court of the Agency Commissioner, in fact precludes all doubt that the one is superior to the other, the exercise of appellate

(1) (1900) I.L.R., 23 Mad., 329.

jurisdiction being the clearest test of superiority; and only the position of the District Court remains for consideration. In favour of equality (superiority is not alleged) between it and the Court of the Agency Commissioner there is, so far as we have been shown, only the fact that the original pecuniary jurisdiction of both is unlimited. On the other hand, the powers which each can use in disposing of cases differ widely, as the learned Judges have shown in *Maharajah of Jeypore* v. *Papayyamma*(1) and those differences remain under the rules now in force. There can be no comparison and no question of equality between Courts so differently constituted. The conclusion must accordingly be that the High Court, being superior to the Court of the Agency Commissioner, can transfer a case therefrom to its own file but not to the file of the District Court, which is not equal or superior.

This being so, we hold that the appeal numbered as C.M.A. No. 2 of 1922 on the file of the District Court of Vizagapatam has never been legally transferred from the file of the Agency Commissioner and transfer it to the file of this Court for disposal.

N.R.

(1) (1900) I.L.R., 23 Mad., 329.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Devadoss.

1923, March 6.

SANKARAN NAIR (DECREE-HOLDER), PLAINTIFF.

v.

ATCHUTHAN AND ANOTHER (JUDGMENT-DEBTORS), DEFENDANTS.*

Village Munsif's Court Act, Madras (I of 1889), ss. 48, 66 and 67—Execution of decree—Jurisdiction of District Munsif to withdraw execution from Village Munsif's Court and transfer it for execution to another District Munsif—Applicability of sec. 39, Civil Procedure Code.

A District Munsif receiving by transfer a decree of a Village Munsif's Court under section 66 of the Madras Village Munsif's Court Act (I of 1889) or withdrawing execution of a decree to his own file under section 67 of the Act has no jurisdiction to transfer it for execution to another District Munsif under section 39, Civil Procedure Code. His power of transfer is limited to sending it for execution to another village Court in which the defendant is represented to have movable property. The Village Munsif's Court Act is a complete Code of procedure by itself and the provisions of Civil Procedure Code cannot be imported into it, except to the extent provided by the Amending Act II of 1920.

CASE stated under section 113 of Civil Procedure Code, 1908, by B. VENKATA RAO, the Additional District Munsif of Tellicherry in Small Cause Execution Petition No. 364 of 1922 in Suit No. 278 of 1921 on the file of the Court of the Village Panchayat of Tiruvangad, Kottayam taluk, Malabar.

The facts are given in the Judgment.

JUDGMENT.

The question referred to us is whether a District Munsif, receiving by transfer a decree of a village Court under section 66 of the Madras Act I of 1889 or withdrawing execution of a decree to his own file under

* Referred Case No. 24 of 1922.

section 67, has or has not jurisdiction to transfer it for execution to another District Munsif's Court under section 39, Civil Procedure Code.

The learned District Munsif in referring this question has pointed out the great practical inconvenience of a negative answer to it; and we fully appreciate the considerations he has referred to. It is, however, our duty to deal with the matter with reference to the law as it stands. Under section 48

"the decree shall be executed by the Village Court, which passed it, or by a Village Court or District Munsif, to whom it is sent for execution under the provisions hereinafter contained."

Under section 66

"any decree passed by a Village Court may, on the application of the decree-holder, be transmitted for execution to the District Munsif"

(who is defined earlier in the Act as the District Munsif within whose jurisdiction the Court is situate)

"who may execute the same, as if it were a decree passed by himself or may transmit it for execution to the Court of any other village, in which the defendant is represented to have moveable property;"

and section 67 authorizes the District Munsif to take on his own motion the action authorized by section 66. The result of these sections is not, in our opinion, to authorize the District Munsif to send a decree, which has been withdrawn to his own file, for execution to another District Munsif for that purpose. There is first no explicit reference to such transmission. There is next the explicit reference to a particular kind of transmission as open to the District Munsif, a transmission to the Court of any other village in which the defendant is represented to have moveable property. In accordance with the ordinary canons of construction reference to

SANKARAN NAIR, v. ATCHUTHAN.

this one kind of transmission is against an intention to authorize any other kind of transmission. The Act, as we understand it, is intended to supply a complete Code of procedure for Village Courts; and there is, therefore, no reason for importing into that procedure the provisions of another statute, the Civil Procedure Code, the less so as the reference to transmission in section 66 is in our opinion against such importation.

We may add with reference to the applicability of the provisions of the Civil Procedure Code that in the Amending Act II of 1920, when it was desired to make one of those provisions, section 60, applicable to the execution of Village Court's decree, it was so made applicable by a special provision, section 23.

We must answer the reference in the negative. No one has appeared on either side on this reference. Therefore no order as to costs is necessary.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Devadoss.

1923, arch 15.

GANAMMA AND ANOTHER (PETITIONERS), APPELLANTS,

v.

KETIREDDI AND FIVE OTHERS (COUNTER-PETITIONERS), RESPONDENTS.*

Execution sale of shrotriyam village—Dismissal of application of judgment-debtor to postpone sale for want of due publication—Subsequent petition under O. XXI, r. 90, Civil Procedure Code, whether barred by res judicata—Quit-rent payable by shrotriyam village whether "revenue" for O. XXI, r. 54, Civil Procedure Code.

A judgment-debtor, whose shrotriyam village was proclaimed for sale in execution of a decree, applied for the postponement of the sale alleging want of due publication of the proclamation and the absence of publication in the Collector's office. The Judge after taking evidence dismissed the application holding (1) that the proclamation was duly published in the village, (2) that publication in the Collector's office was required only in the case of ryotwari villages. After the sale, the judgment-debtor applied under Order XXI, rule 90, Civil Procedure Code, to set aside the sale on the same grounds and the Judge rejected the application without taking evidence, holding that the matter was *res judicata* by reason of his previous order.

Held (1) that the matter was not *res judicata*, (2) that evidence should have been taken and (3) that publication in the Collector's office was necessary in the case of shrotriyam villages also, as the quit-rent payable by them was "revenue" within Order XXI, rule 54, Civil Procedure Code.

*Civil Miscellaneous Appeal No. 149 of 1922.

GANAMMA v. KETIREDDI.

Appeal against the order of V. Venugopal Chetti, the District Judge of Nellore, in E.A. No. 123 of 192. (in O.S. No. 58 of 1917, Sub-Court, Nellore) (E.P. No. 12 of 1920).

The facts appear from the Judgment of DEVADOSS, J.

The judgment-debtors preferred this Appeal.

M. Patanjali Sastri with *A. Sundaram Ayyar* for appellants.

A. Krishnaswami Ayyar with *B. Somayya* for respondents.

JUDGMENT.

OLDFIELD, J. OLDFIELD, J.—This is an appeal by the petitioners judgment-debtors, against an order dismissing their petition under Order XXI, rule 90, Civil Procedure Code. The majority of the grounds on which the publication and conduct of the sale were impugned were rightly held unsustainable by the lower Court, because they either had been or might have been taken in the proceedings for framing proclamation, of which the petitioners had notice, and so far as they were taken, were either not established or were not material. We

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therefore can confine ourselves to two points, (1) the lower Court's failure to enquire into the allegation that the sale was not proclaimed in the village, (2) its conclusion, adopted from a previous order, that no publication at the Collector's office was required, because the property was not ryotwari land.

That previous order is, in fact, material on both points, because as regards publication in the villages also the conclusion in it was adopted, no further enquiry being held. It was passed on a previous petition by the present petitioners, Execution Application No. 71, dated 2nd April 1921, in which publication in two newspapers was asked for and also a postponement of the sale until 9th July 1921, apparently after the vacation. The sale had been fixed for 4th April 1921 and the petitioners' object to gain time was sufficiently clear. In spite, however, of the decree-holder's opposition, referred to in the diary in the record, to a postponement and his presumable readiness to support the sale in case of proceedings under Order XXI, rule 90, the lower Court took the exceptional course of allowing the sale to continue, but at the same time holding an enquiry into the validity of the proclamation, concluding the sale only when that enquiry had ended in the decree-holder's favour. That enquiry included the taking of evidence as to the publication in the village, which had been denied in the affidavit accompanying the petition; and the decision that the proclamation was duly published has been adopted in the order before us.

One ground, on which this adoption has been supported, is that the lower Court merely utilized the evidence already taken, as though the previous proceeding during the sale had not been completed, and based its present finding on it. But that does not correspond with the facts, that the previous proceeding was completed by

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the refusal to adjourn the sale and that the lower Court does not now profess to have applied its mind to the evidence or to have done more than adopt the previous decision.

It is then necessary to consider whether, as is further argued, that previous decision concludes the parties as *res judicata*. Certainly the evidence for and against publication was taken fully and the order of 7th May 1921, refusing adjournment or postponement, discussed fully; and certainly the judgment-debtor had invited the Court to decide and the decree-holders acquiesced in its deciding the question, the latter producing their evidence. It may moreover be said that, if there had been no proper publication, the sale would clearly have been ineffective, since on application, it would have had to be set aside. But those considerations do not entail that the Court had jurisdiction to reach or the judgment-debtors the right to ask it to reach a conclusion on the point at that stage or that in doing so it acted otherwise than officiously. The Code does not provide for any enquiry into the validity of the publication of proclamation, until after the sale has been held. If the Court holds one, it must be regarded as doing so for its own statisfaction. Whether, in case it is not satisfied that there has been proper publication, it would be entitled to refuse to proceed and to call on the decree-holder to pay for a fresh publication, in spite of his readiness to take the risk of failure in proceedings under Order XXI, rule 90, need not, in the present case be considered. What is material is that, when the enquiry is not prescribed by law, but is, as here, undertaken only to decide on the necessity for a postponement, there can be no security for the Court's application of the standard of proof appropriate to a judicial proceeding or shortly for its having acted judicially and for its decision being

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a judgment. There is naturally no authority applicable to an exceptional incident of this description. But it is material that in *Sivagami Achi* v. *Subrahmania Ayyar*(1) the policy of this part of the law was regarded as being to avoid the difficulties and delays, which even now occur in obtaining the execution of decrees and to postpone consideration of objections to the publication and conduct of sales, until after they have been held, when the essential issue whether loss has been caused can also be tried. In the circumstances it is not possible to hold that the proper publication of the sale proclamation was *res judicata* or that the lower Court was justified in refusing to take evidence and adjudicate on it.

The lower Court further did not take evidence as to the publication at the Collector's office, because it adopted the previous conclusion that such publication was requisite under Order XXI, rule 67 read with 54 (2) only in the case of ryotwari land and not in the case of enfranchised shrotriyam villages, such as are in question according to petitioners' affidavit, dated 2nd April 1921, and the sale proclamation and admission made before us. For this construction of rule 54 (2) we have been shown no authority and in ordinary parlance the quit-rent payable to Government would be as clearly revenue as any other money payable to it for use in the ordinary course of administration. Revenue, however, has not been, so far as we have been shown, defined, except in section 1, Madras Act VI of 1867. True, according to that provision, "revenue" means "assessment, quit-rent, ground rent or other charge upon the land payable to Government"; and in the Revenue Recovery Act (II of 1864) the machinery for the collection of revenue is by sections 1 and 3 explicitly applied to shrotriyamdars. The

(1) (1904) I.L.R., 27 Mad., 259 (F.B.).

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argument on the other side is however that a distinction is recognized in other statutes, for instance, by the reference to "Lakhiraj lands and all other lands paying favourable quit-rents" in section 4, Reg. XXV of 1802 and in the reference to "land charged with any fixed payment in lieu of revenue" in section 7 (5) (*a*) of the Court Fees Act (VII of 1870) between revenue and such payments as a shrotriyamdar has to make and that this distinction should be applied before the shrotriyam villages in the proclamation before us are treated as land paying revenue to Government. But as regards the Regulation it is material that "lands paying favourable quit-rents" are one of a number of "articles of revenue" enumerated in the section and that it is not clear, the result for the purpose of court-fee being the same, whether shrotriyam lands would not fall under the description in section 7 (5) (*e*) of the Court Fees Act, as "land partially exempt from the payment of revenue." In any case the foregoing reference to the two Madras Acts shows that no decisive result can be reached by recourse to other statutes. The real answer to the decree-holder moreover is that recourse to other statutes is not legitimate when, like those here relied on, they are not in *pari materia* with the statute under interpretation and that it is unnecessary, when, as in this case, the *prima facie* interpretation of the word used is consistent with the circumstances and the object of the provision. For it is easy to understand the division of land in private ownership under two heads, that for which directly or indirectly payments are made to Government and that for which there are none, land available for cultivation falling under the first and land not so available, for instance, house-sites, backyards and other urban or village sites, under the other; and it is easy to understand the necessity for advertisement of the sale

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of the former at the public office concerned with two important incidents of ownership, the liability and the right to recognition of liability for public dues. The lower Court's conclusion that publication at the Collector's office was unnecessary cannot in these circumstances be sustained.

The result is that the appeal must be allowed, the lower Court's decision being set aside and the petition remanded for re-hearing after inquiry on the issues (1) whether the proclamation was published in the village, (2) whether it was affixed in the Collector's office, (3) whether, if the finding on either or both of these points is in the nagative, the applicant in consequence sustained substantial loss. Costs to date here and in the lower Court will be costs in the cause and be provided for in the order to be passed.

DEVADOSS, J.

DEVADOSS, J.—This appeal is against the order of the District Judge of Nellore declining to set aside an auction sale held on 7th May 1921. The petitioners are the second and third defendants, and respondents 1 to 4 are the plaintiffs, in Original Suit No. 58 of 1917. The sixth respondent is the auction purchaser. The plaintiffs obtained a mortgage decree against the first defendant (the husband of the second defendant) and the third defendant, her son. The properties were brought to sale and were purchased for a sum, which the petitioners allege to be considerably below the value of the properties. They applied to have the sale set aside on the ground of irregularity and fraud on the part of the plaintiffs and the auction purchaser. The learned District Judge declined to take evidence as regards the irregularities complained of, as, in his opinion, they had already been found against the petitioners in a previous inquiry, and held that there were no grounds for setting aside the sale.

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In this appeal several contentions are put forward. The first is that the amount of the income derived from the properties was not mentioned in the sale proclamation and that no particulars were given for ascertaining the value of the properties. The petitioners were served with notices to be present at the time when the sale proclamation was settled and they did not choose to be present. They cannot, therefore, reasonably complain that a certain piece of information, which, according to them, would has given data to the purchaser as regards the value, have been omitted. There is nothing therefore in this contention.

It is next urged that the properties were grossly undervalued in the sale proclamation. It is in evidence that the two properties were valued at Rs. 7,000 each and there is no reliable evidence to show that the value of the properties was anything more than that mentioned in the sale proclamation. As a matter of fact, we find that the upset price had to be reduced as there were no bidders to bid up to the amount mentioned in the sale proclamation. This objection also fails.

The contention that there was a combination among the bidders and that they conspired not to raise the bid is not seriously pressed. It is not illegal for a number of intending bidders to arrange among themselves not to bid above a certain figure. The other allegations in the petition are not seriously pressed.

The contention that needs consideration is, was the learned Judge justified in refusing to take evidence as regards the allegations made in the petition? In his judgment, in paragraph 5 he says:

"Paragraph 4 refers to four circumstances in connexion with the publication of the proclamation; 1, 2 and 3 were dealt with in the order of the Court on the previous petition and were found against the petitioners."

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And in paragraph 8, he observes:

"For the foregoing reasons I am of opinion that it is unnecessary to take evidence for disposing of the petition."

The inquiry referred to was held by the District Judge on a petition presented by the present petitioners on 2nd April 1921 in which they prayed for orders:

"(1) for publishing the proclamation in this case duly in 'the Andra Patrika' and 'the Hindu' papers, (2) for stopping the sale in this case till 9th July 1921, and (3) with such other reliefs as the Court may deem fit according to circumstances."

The sale was advertised to be held on 4th April 1921. The petition was opposed by the plaintiffs and the learned Judge passed the following order on 16th April 1921.

"The sale will continue from day to day till 30th April. Petitioner to pay batta. His witnesses must be ready that day. Adjourned to 30th April for evidence."

The petitioners stated in paragraph 9 of the affidavit filed in support of the petition that

"The proclamation was not published by tom-tom beat of the drum even in the two villages. Therefore the proclamation is not proper and maintainable."

Evidence was taken on both sides and the Judge passed an order on the 7th May 1921 that

"there are no grounds therefore to suppose that there was no proper proclamation."

With regard to the allegation that notice was not affixed in the Collector's office, he remarked,

"The properties being shrotriyam lands, it was not necessary to affix a copy of the notice of sale in the Collector's office."

And he concluded his order by saying,

"I see no grounds to hold that there has been no proper publication of the sale, I therefore dismiss the petition with costs."

It is contended on behalf of the respondent that that order is binding on the parties and that it was not therefore necessary for the Judge to inquire again into that matter after the sale had been held. This application is

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made under Order XXI, rule 90. That rule can only apply to cases where there has been a sale and where the petitioners seek to set aside the sale. No doubt the executing Court has power to satisfy itself whether a proclamation of sale was duly published or not, when an allegation is made by a party that it was not duly published. It is argued that, inasmuch as the petitioners invited the learned Judge to hold an inquiry they are bound by the result of that inquiry, whether the learned Judge has power or not to hold such an inquiry. The question is whether the parties are bound by the result of an inquiry which could not be held before the sale. The mere fact that the petitioners adduced evidence or consented to the inquiry and even asked the Judge to hold an inquiry would not be a sufficient compliance with the provisions of Rule 90 of Order XXI, whereby a party has got a right to go before the executing Court and ask that Court to hold an inquiry and set aside a sale on the grounds of material irregularity or fraud in publishing or conducting it. No authority is shown for the contention that the finding of the learned Judge is either *res judicata* between the parties or that that decision is a sufficient answer to an application under rule 90. In this case, the petition was mainly intended to get a sale adjourned and to have the proclamation of sale published in some of the well-known papers so that well-to-do people or people who wanted to invest on land might bid at the sale. There is no prayer in the petition of 2nd April 1921 for an inquiry as regards the irregularity or the absence of publication by beat of tom-tom in the village. It cannot be contended that, by making an application for adjournment of a sale and by consenting to have evidence adduced as regards one of the allegations in the petition the petitioners either abandoned their right to have the sale set

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aside under rule 90 of Order XXI, Civil Procedure Code, or under any other provision of law open to them. The object with which the learned Judge held the inquiry on the petition of April 1921 was only for the purpose of satisfying himself as regards the truth or otherwise of the allegations made in that petition in order to consider whether the sale should be adjourned or not. In these circumstances the lower Court erred in not taking evidence and disposing of this petition on the merits.

In this connexion it is necessary to notice the contention that it is not necessary to affix the notice of sale in the Collector's office. It is difficult to say what material the learned Judge had for saying in his order of the 7th May 1921, that the properties being shrotriyam lands, it was not necessary to affix a copy of the notice of sale in the Collector's office. Under Order XXI, rule 54

> "A copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court house and also, where the property is a land paying revenue to Government, in the office of the Collector of the district in which the land is situate."

It is argued for the respondent that, inasmuch as the property brought to sale are shortriyam villages, it was not necessary to affix the notice in the office of the Collector of the district, for shrotriyam villages pay only quit-rent or jodi and what is paid is not revenue and therefore Order XXI, rule 54, clause (2) does not apply to them. Mr. Krishnaswami Ayyar, in support of his argument, refers to the Court Fees Act, section 7, clause V (*c*) and contends that "revenue" there means revenue which is collected from ryotwari lands or from permanently settled estates and where a certain amount is paid as quit-rent it is not revenue but it is in lieu of it, and therefore rule 54 does not apply to a case like this. It

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has to be remembered that the Civil Procedure Code is an enactment of the Imperial Legislature and we have to see whether the legislature intended to use the expression, "land paying revenue to Government," in the sense in which it is ordinarily understood or in any particular sense.

From the earliest days of the East India Company the revenue administration of the territory ceded to it formed an important portion of its activities. The word "Revenue" meant the share of the produce of the land which the Government, either the East India Company or its predecessor, took from the ryot or the cultivator. There is no definition of the word "revenue" in the Civil Procedure Code or in the General Clauses Act, but in the Madras Revenue Recovery Act of 1864 "public revenue" is said to include for the purpose of the Act cesses or other dues payable to Government on account of water supplied for irrigation. It is admitted that shrotriyam villages are liable to pay road cess. The short answer to the respondent's contention is that shrotriyam villages pay road cess and therefore they are lands paying revenue to Government; but the discussion need not end here as the word "revenue" in the Madras Regulations as well as in Bengal and Bombay Regulations always meant the assessment which the Government levied from the occupier for the occupation of the land. In the Madras Regulation XXV of 1802 known as the Permanent Settlement Regulation, the words "land revenue" are used to denote the amount payable by the Zamindars to the Government. It is therefore clear that what a Zamindar pays to Government is revenue. Whether land held on inam or on other favourable tenures could be said to be land paying revenue to Government is a question which is not free from difficulty.

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In *Piziruddin* v. *Madhusudan Pal Chowdhry*(1) the question was whether a Zamindar could grant a piece of land rent free out of his Zamindari. In the course of the judgment, Mr. Justice SHAMBOONATH PANDIT, one of the Judges who formed the Full Bench, observes:

"In India that portion of the produce of lands which goes to the ruling power as its share is called revenue; and the produce in money or kind received from the cultivators by persons entitled to collect as well as the collection made in kind or money by other intermediate holders of different grades, from those who are above those persons that collect from tenants of the lowest grade up to those who pay the revenue directly to Government, is also called rent."

In another case *Mahomed Akil* v. *Asadunnissa Bebee*(2), Sir BARNES PEACOCK, C.J., observes at page 831:

"If the construction which I put upon the words of section 10 is correct, the word 'revenue' will be read in its ordinary and natural sense. The provisions of the section are natural and consistent with justice, and force and effect will be given to every word of the section."

The word "revenue" therefore means ordinarily the share which the Government gets from the occupier as its claim upon what the Indian Raja and Governments got from the tillers of the soil. Considerable light is thrown upon this in the Fifth Report on the East India Affairs. At page 31 of the Second volume of this report, there is this passage:

"To form a correct judgment of the weight of the assessment upon the country generally, we ought to possess the following data. First a knowledge of the rents actually paid by the ryots compared with the produce of their labour. Secondly, accurate accounts of what the Zamindars and farmers collect and their payments to Government. Thirdly, detailed accounts of the alienated lands showing the quantity of them, the person to

(1) (1865) B.L.R., Suppl. vol. (F.B. Rul.) 75 at 87.
(2) (1867) B.L.R., Suppl. vol. (F.B. Rul.) 774.

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whom they were granted, the dates of the grants and those by whom they are now held."

As I have said above, from the earliest days of the East India Company a good portion of its administration was directed towards the revenue settlement of the territory ceded to it by the Native Princes or acquired by it under treaties or otherwise, and, in all the correspondence and the earliest documents and papers, the word "revenue" is used to denote what the East India Company or the Government expected to get from the lands as its share of the produce. In the third volume of the Fifth Report at page 252 there is an extract from the proceedings of the Board of Revenue at Fort St. George of the 8th September 1806. It is addressed to the Subordinate Collector of Tanjore. It begins thus:

"You will be pleased to commence in the settlement of the revenues on your respective divisions without delay and on the following grounds. Paragraph 1. Nanja. You first take the produce of each village in Fasli 1210,1211 and 1212 and ascertain therefrom the average produce per veli. This average you will consider as the medium standard produce of the village."

And various directions are given as to how the Government's share was to be ascertained.

It is contended that certain cesses are not revenue; no doubt they are not land revenue but anything which is made payable by reason of possession of land or that which is levied upon land may be taken to be revenue. In other words whatever is payable to Government either by way of cess or by way of dues by a holder of land as such would be revenue.

The Policy of Order XXI, rule 54 is patent. It is for the purpose of informing the Collector of the district as to the change of ownership of land so that he may proceed, in case of default of payment of revenue, against the person who is the owner of the land. Though land is primarily responsible for the payment of the revenue

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yet it is necessary for the revenue department to know who is the owner so that it may have its remedies against him. That being so it is not possible to accept the contention that a shrotriyam village is not land paying revenue to Government simply because it does not pay the revenue which an ordinary ryotwari holding pays or which a Zamindari pays. The learned Judge has erred in thinking that the shrotriyam in question is not land paying revenue to Government and that therefore notice of sale need not be affixed to the Collector's office.

The appeal is allowed and the learned Judge is asked to take evidence and dispose of the petition as directed by my learned brother.

N.R.

PRIVY COUNCIL.*

SUBBAIYA PANDARAM (PLAINTIFF), APPELLANT,

v.

MAHAMMAD MUSTAPHA MARCAYAR, SINCE DECEASED AND OTHERS (DEFENDANTS), RESPONDENTS.

1923, June 26.

[On Appeal from the High Court of Judicature at Madras.]

Limitation—Adverse possession—Hindu charitable endowment—Decree declaring trust—Possession continuing after decree—Recovery of trust property—Indian Limitation Act (IX of 1908), s. 10, sch. I, arts. 134 and 144.

The appellant was trustee under a registered deed executed by his grandfather in 1890 endowing a chatram with immoveable property. In 1898 the first respondent purchased part of the property at a sale in execution of a decree against the appellant's father, the then trustee, for debts incurred by him; the purchaser and the other respondents, who claimed under him, had been in possession since that date. In 1904, in a suit in which the first respondent was a defendant, the appellant obtained a decree declaring the validity of the trust. In 1913 the appellant sued the respondents for possession of the purchased property.

Held that the decree of 1904 did not operate as *res judicata* so as to preclude the respondents from asserting that the property was now theirs, and that the suit was barred under either article 134 or article 144 of the Indian Limitation Act, 1908, Schedule I; the decree merely emphasized the fact that the purchaser's possession was adverse. Further, the exception in section 10 of that Act shows that a claim to recover trust property from an assignee for valuable consideration with notice can be defeated by adverse possession.

* Present: Lord BUCKMASTER, Lord DUNEDIN, Lord CARSON, Sir JOHN EDGE and Lord SALVESEN.

Ishwar Shyam Chand Jiu v. *Ram Kanai Ghose* (1911) I.L.R., 38 Calc., 526 (P.C.) *and Vidya Varuthi* v. *Balusami Ayyar* (1921) I.L.R., 44 Mad., 831 (P.C.), distinguished.

Judgment of the High Court affirmed.

APPEAL (No. 84 of 1920) from a judgment and a decree of the High Court (31st August 1916) affirming a decree of the temporary Subordinate Judge of Tanjore.

The suit was brought by the appellant in 1913 against the respondents for possession of immoveable property which had been dedicated to the endowment of a food chatram and other charitable objects by deeds of trust executed in 1890 by the appellant's grandfather. The first respondent had purchased in 1898 at a sale in execution of a decree against the appellant's father; the purchaser and the other respondents who claimed under him had since been in possession. In 1904, in a suit to which the first respondent had been joined as a party at his own request, a decree had been made declaring the validity of the trust, but no steps had been taken under that decree prior to the present suit. The facts are more fully stated in the judgment.

The temporary Subordinate Judge of Tanjore dismissed the suit on the ground that it was barred by limitation, and that decision was affirmed, on appeal to the High Court, by AYLING and SRINIVASA AYYANGAR, JJ.

Kenworthy Brown for the appellant.—The purchaser was a party to the suit in which the decree of 1904 was obtained by the appellant and cannot deny the existence of the trust as affecting the property; the respondents consequently cannot allege that they subsequently held adversely to the appellant trustee *Nasrat Ullah* v. *Mujib Ullah*(1). Further the statutory period only ran against the appellant from the time when he became entitled to possession as trustee, and

(1) (1891) I.L.R., 13 All., 309, 315.

that was within 12 years of the suit: *Vidya Varuthi* v. *Balusami Ayyar*(1), *Ishwar Shyam Chand Jiu* v. *Ram Kanai Ghose*(2).

De Gruyther, K.C., and *Dube* for the respondent.—The decree of 1904 did not prevent the purchaser's possession from continuing to be adverse; *Singaravelu Mudaliar* v. *Chokka Mudaliar*(3). The time limited for executing that decree has long since passed. The period of limitation for the present suit ran against the successive trustees: *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*(4), *Trimbak Bawa* v. *Narayan Bawa*(5). The decisions of the Board referred to by the appellant on this point are distinguishable; they related to mukarari leases which were valid for the lifetime of the grantor. If section 10 of the Limitation Act applies the purchaser was an assignee for valuable consideration and the ordinary rules of limitation apply: *Chintamoni Mahapatro* v. *Sarup Se*(6). The suit was barred by article 134 and by article 144; it was also barred by article 11, having regard to sections 280, 283 of the Code of Civil Procedure, 1882.

Kenworthy Brown in reply.—In *Singaravelu Mudaliar* v. *Chokka Mudaliyar*(3), there had not been, as in this case, a decree declaring that the property was subject to a trust. In *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*(4), the claim was not contrary to the trust, but an adverse claim to the trustee. Both cases are therefore distinguishable.

The JUDGMENT of their Lordships was delivered by

(1) (1921) I.L.R., 44 Mad., 831 (P.C.); L.R., 48 I.A., 302, 318.
(2) (1911) I.L.R., 38 Calc., 526 (P.C.); L.R., 38 I.A., 76.
(3) (1922) 43 M., L.J., 737.
(4) (1900) I.L.R., 23 Mad., 271 (P.C.); L.R., 27 I.A., 69, 76.
(5) (1883) I.L.R., 7 Bom., 188. (6) (1888) I.L.R., 15 Calc., 703.

SUBBAIYA PANDARAM v. MAHAMMAD MUSTAPHA MARCAYAR. — Lord BUCKMASTER.

Lord BUCKMASTER.—The real question in this appeal is whether the suit is barred by the operation of the Indian Limitation Act.

It was instituted by the Appellant to recover, as against a purchaser under an execution sale and those who claimed under him, certain property which had by two deeds dated the 21st February 1890 and the 13th December 1894 been devoted to charitable purposes. The first of these two documents declared that the heirs of the settlor in the order of primogeniture should be trustees and conduct the said charities. The settlor died in 1895, leaving him surviving his widow and Arunachellam, his only son. Arunachellam is the father of the present appellant. He was trustee of the charity and having become involved in debt, one of his creditors sued him and obtained a decree in execution of which the endowments of the charity were attached. The settlor's widow, on behalf of the appellant who was then an infant, filed an objection to the attachment, but it was dismissed on the ground that during the lifetime of the appellant's father he had no *locus standi*. In the same year another suit was instituted by the minor acting through the same next friend seeking to establish the validity of both the deeds, and while this suit was pending, the property was brought to sale under the decree against Arunachellam on the 22nd March 1898. It was purchased by Maracayar who is since deceased, and whose legal personal representatives are the respondents Nos. 4 to 8 of this appeal; the sale was confirmed on the 11th August 1898, and delivery of possession was made to the purchaser, the settlor's widow being removed from possession. From that day until the institution of these proceedings, the purchaser and those claiming under him have been in uninterrupted possession of the property.

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On the 31st December 1900, it was declared in the second suit of 1897 (1) that the properties, including those seized under the execution sale, formed a trust estate for the purpose specified in the deed. On the 9th November 1911, the appellant, who had come of age on the 6th August 1910, petitioned the District Court asking for leave to bring a suit to remove Arunachellam from the office of trustee, and such leave was granted; the suit for removal was accordingly instituted and on the 21st July 1913, a decree was obtained removing Arunachellam, and the appellant succeeded as trustee. The present suit was then brought on the 23rd July 1913, to recover the property. Both the learned Judge, before whom the matter first came, and the learned Judges of the High Court have decided against the appellant but on different grounds: the result of the decisions was, however, in their Lordships' opinion, correct.

There is no doubt that whatever period of limitation be assigned, the full period had run before these proceedings were instituted, unless it could be alleged that by virtue of the proceedings to which reference has been made, there was some interruption in the period.

Now the real argument in favour of the appellant was that in the presence of the purchaser it was declared that the trust had been validly created and that the property was, in fact, trust property, and it is suggested that this effects *res judicata* as against the respondents and prevents them from now asserting that the property is their own. Their Lordships do not think that the decree had that effect. At the moment when it was passed the possession of the purchaser was adverse, and the declaration that the property had been properly made subject to a trust disposition, and therefore ought

(1) The respondent Maracayar, after his purchase, was joined as a defendant to that suit on his own application.

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not to have been seized, did not disturb or affect the quality of his possession; it merely emphasised the fact that it was adverse. No further step was taken in consequence of that declaration until the present proceedings were instituted, when it was too late.

A further argument has been put forward to the effect that the Statute of Limitation begins to run afresh as each new trustee succeeds to the office, and in support of that view reliance is placed on the case of *Ishwar Shyam Chand Jiu* v. *Ram Kanai Ghose*(1), and on the case of *Vidya Varuthi* v. *Balusami Ayyar*(2), but these authorities do not assist the appellant. In each case they relate to the effect of an attempt on the part of a trustee to dispose of the property by a permanent mukarari lease. This he has no power to do, though he is at liberty to dispose of it during the period of his life and a grant made for a longer period is good, but good only to the extent of his own life interest. It follows, therefore, that possession during his life is not adverse, and that upon his death the succeeding trustee would be at liberty to institute proceedings to recover the estate, and the statute would only run against him as from the time when he assumed the office. Such an argument has no relation to the case where, as here, property has been acquired under an execution sale and possession retained throughout. Their Lordships are, therefore, of opinion that this suit is barred either under article 134 or 144 of the first schedule to the Limitation Act. The former fixes the period as 12 years where the suit is to recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration; and the latter assigns the same

(1) (1911) I.L.R., 38 Calc., 526 (P.C.); L.R., 38 I.A., 76.
(2) (1921) I.L.R., 44 Mad., 831 (P.C.); L.R., 48 I.A., 302.

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period where the claim is for possession of immoveable property or any interest therein not thereby otherwise specially provided for.

This is not, in fact, a transfer by the trustee himself for a valuable consideration, though there is little difference in principle between a transfer under an adverse execution and a sale by the trustee himself, but disregarding that article, article 144 covers the exact case. Further, section 10 of the Limitation Act appears also to contemplate the exact position: it is in these terms:—

"10. 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."

and it shows that, where it is sought to follow trust property, as in the present case, on the ground that the person in possession knew that it was trust estate, the claim is not barred, excepting in a case of assigns for valuable consideration, and the exception shows that in that event the claim may be defeated by adverse possession. The purchaser in the present case is clearly within the terms of the exception, and consequently he is not prevented, by reason of the fact that the property was to his knowledge trust property after the date of the decree, from relying on the provisions of the statute which limit the time within which suits must be brought for recovery.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitor for appellant: *Douglas Grant.*

Solicitor for respondents: *T. L. Wilson & Co.*

A.M.T.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Oldfield, Mr. Justice Ramesam, Mr. Justice Devadoss and Mr. Justice Coleridge.

1923, April 23.

PONNUSAMY ODAYAR AND THREE OTHERS (ACCUSED), PETITIONERS,

v.

RAMASAMY THATHAN (COMPLAINANT), RESPONDENT.*

Criminal Procedure Code (Act V of 1898), ss. 342, 242, 256, 289 and 451—Summons cases—Trial—Duty of Court to question accused generally on the case—Provision, whether applicable to summons cases—Calling on the accused for his defence—Entering on his defence—Hearing the accused—Calling on the accused for his defence, found in sections 256 and 289, but not in Chapter XX—Effect of.

The mandatory provisions of section 342 of the Criminal Procedure Code (Act V of 1898), which require the Court to question the accused generally on the case after the examination of the prosecution witnesses, do not apply to trials in summons cases.

The use of the expression "before the accused is called on for his defence," in section 342 itself, as well as in section 256 relating to trials in warrant cases and in section 289 relating to trials in sessions cases, and the absence of such an expression in the sections relating to trials in summons cases under Chapter XX of the Code, show that the provisions of section 342 in question are not intended to apply to summons cases.

PETITION under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of Khan Sahib B. MUHI-UD-DIN KHAN LODI SAHIB BAHADUR, the Subdivisional First-class Magistrate,

* Criminal Revision Case No. 641 of 1922.

Māyavaram, in Criminal Appeal No. 21 of 1922, preferred against the conviction and sentence of T. K. VENKASWAMI RAO, the Stationary Second-class Magistrate, Māyavaram, in Calendar Case No. 275 of 1921.

The petitioners with seven others were charged with rioting under section 143 of the Indian Penal Code, and convicted by the Stationary Second-class Magistrate of Māyavaram and fined Rs. 10 each. The petitioners appealed against their conviction and sentence, but the appellate Magistrate confirmed the same. The petitioners contended, before the Appellate Court, *inter alia*, that their conviction was bad in law on the ground that the trial Court did not question the accused generally on the case after the examination of the witnesses for the prosecution, as required by section 342 of the Criminal Procedure Code, though the trial before him was in a summons case under Chapter XX of the Code. The Appellate Magistrate observed that this was a trial in a summons case, that the trial Magistrate had examined the accused under section 242 at the commencement, that the accused had engaged a pleader throughout the trial and that, as soon as the prosecution witnesses were examined and before proceeding further, the trial Court had "called on the pleader to have his say against the evidence and the pleader had argued upon it," and that it was only thereafter that the accused (appellants) had entered upon their defence. He also found that there was no prejudice to the accused caused by the procedure followed. He therefore declined to quash the conviction on this legal ground and confirmed the conviction and sentence. Against this decision, the accused preferred a Criminal Revision Petition to the High Court. The case came on for hearing before ODGERS, J., who referred the case to a Bench for disposal as the case involved an

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important point of law; the case was subsequently ordered by the CHIEF JUSTICE and ODGERS, J., to be posted before a Full Bench.

ON THIS REFERENCE :—

K. Bashyam Ayyangar for petitioners.—Chapter XX, Criminal Procedure Code, deals with procedure in the trial of summons cases, Chapter XXI deals with warrant cases, Chapter XXII with summary trials, Chapter XXIII with sessions trials, and Chapter XXIV with general provisions which are prima facie applicable to all trials. Section 342 is applicable to summons cases, as well as to warrant cases. The very same considerations that apply to warrant cases apply to summons cases, the general provisions of section 342 must be applied if it is not inconsistent with the procedure in summons cases. In summons cases, the accused enters on his defence only when witnesses for defence are called, not when he pleads guilty or not guilty under section 242 of the Code. Pleading is not entering on defence either in summons cases or warrant cases. There is nothing in section 242 and other sections in Chapter XX to prevent the application of section 342. The hearing of the accused provided in section 242 in summons cases is not *exclusive* of the questioning prescribed in section 342 but cumulative. The expression "If he thinks fit" in section 245 only applies to cases of acquittal and does not exclude section 342. Reference was made to *Emperor* v. *Fernandez*(1), *Emperor* v. *Gulabjan*(2), *Gulam Rasul* v. *The King Emperor*(3), *Raghu Bhumij* v. *The King Emperor*(4), *Muhammad Bakhsh* v. *Emperor*(5), *Parmeshwar Lal Mitter* v. *Emperor*(6), *Criminal Revision Petition* No. 492 of 1922 (*per*

(1) (1921) I.L.R., 45 Bom., 672. (2) (1922) I L.R., 46 Bom., 441.
(3) (1921) 6 Pat. L.J., 174. (4) (1920) 5 Pat. L.J., 430.
(5) (1922) 65 I.C., 618. (6) (1922) 67 I.C., 616.

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WALLACE, J.) *Criminal Revision Petition* No. 738 of 1922 (*per* AYLING, J.)

Hearing the accused under section 242 is not the same thing as questioning the accused on the case. The object of the legislature is that the Court should have a direct communication with the accused on the case, apart from any argument.

Public Prosecutor (*J. C. Adam*).—There are two points. Firstly section 342 was not intended to apply to summons cases; secondly, if section 342 does apply, it should be made to apply in a workable way. (1) The applicability of section 342 depends upon "the accused being called on for his defence or to enter upon his defence." Section 342 refers to "accused being called on for his defence." Similar language is used in section 289 (sessions trials) and in section 256 (trial in warrant cases). That the Code makes a distinction between the two procedures "hearing the accused" and "entering on defence" is shown by section 451 which draws the contrast between them. Section 451, clauses (1) and (2) shows that section 342 is not applicable to summons cases, where there is no calling upon the accused for, or to enter on, his defence.

Assuming section 342 applied to summons cases, it must be applied in a modified and workable way as may be necessary, i.e., defence should be deemed to begin when the accused is asked to show cause under section 242. In this case the accused was asked what he had to say.

JUDGMENT.

SCHWABE, C.J.

SCHWABE, C.J.—This Criminal Revision Case has been referred to the Full Bench on the question whether in summons cases the provisions of section 342 of the Code of Criminal Procedure are to be applied,

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that is, is the Court bound, for the purpose of enabling the accused to explain the circumstances appearing in the evidence against him, to question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. The inconvenience of this course is manifest in view of the provisions of section 364 of the Code of Criminal Procedure which require the taking down of any such question in full in the language in which the accused is examined, or, where that is not practicable, in the language of the Court or in English, and that the record shall be shown or read to him and, if necessary, interpreted. The great majority of summons cases are of a petty nature and a strict application of the section must necessarily involve a consumption of a large amount of judicial time. We are reliably informed that it would involve a considerable increase in the Magistracy and that, in fact, the section has in practice in this Presidency not been treated as applying to summons cases. In Madras there is no authority on the point except that in two recent cases single judges have felt themselves bound to hold that the section does apply by reason of the decisions of the Benches of other Courts referred to below. In other Courts there is considerable weight of judicial authority in favour of the application of the section. In *Emperor* v. *Fernandez*(1), SHAH and CRUMP, JJ., gave a direct decision on the point and it was followed in *Emperor* v. *Gulabjan*(2), by MACLEOD, C.J., and SHAH, J., the former pointing out the inconvenience and suggesting legislation as a remedy. In *Raghu Bhumij* v. *The King Emperor*(3), in which the point was unnecessary for decision as it was a sessions case, SULTAN AHMED, J.,

(1) (1921) I.L.R., 45 Bom., 672. (2) (1922) I.L.R., 46 Bom., 441.
(3) (1920) 5 Pat. L.J., 433.

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held that the application of section 342 was obligatory in sessions cases and expressed the opinion that it did not apply to summons cases for reasons which I will refer to later. MULLICK, J., holding that the section was not obligatory in sessions cases stated that he failed to see any difference between warrant and summons cases. On this case being referred to JWALA PRASAD, J., he held that it was obligatory in sessions cases and was clearly of opinion that it applied to summons cases. In *Gulam Rasul* v. *The King Emperor*(1), ADAMI and BUCKNILL, JJ., held that the section applied to summons cases. *Emperor* v. *Fernandez*(2), had been reported in the meantime and the Court simply followed that decision. This case has also been followed by single judges in Lahore in *Muhammad Bakhsh* v. *Emperor*(3), and in Patna in *Parmeshwar Lall Mitter* v. *Emperor*(4). It is open to this Bench to take a different view and we have to consider the matter for ourselves, of course, giving due weight to the authorities quoted above. Section 342 is one of the general provisions as to inquiries and trials, contained in Chapter XXIV, and, being a general provision, it must be applied to all cases, unless the special sections dealing with particular cases indicate that it is not intended to apply to them, or unless the words of the section itself give such indication. In my judgment, both these grounds of exception are to be found in respect of summons cases. Looking at section 342 it is a condition that the questioning directed is to take place before the accused is called on for his defence. The calling on the accused for his defence has a definite meaning both in sessions and warrant cases under sections 289 and 256, but when examining Chapter XX containing the provisions

(1) (1921) 6 Pat. L.J., 174. (2) (1921) I.L.R., 45 Bom., 672.
(3) (1922) 65 I.C., 618. (4) (1922) 67 I.C., 616.

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applying to summons cases, the expression is not used. The prisoner in these cases does not "enter on his defence" but the Magistrate is bound "to hear the accused." That this distinction in phraseology is deliberate is clear from an examination of section 451 relating to the trials of European British subjects which refers, in summons cases, to a time before he is heard in his defence under section 244 and, in warrant cases, to a time before he enters on his defence under section 256. [See on this point the judgment of SULTAN AHMED, J., in *Raghu Bhumij* v. *The King Emperor*(1).] In my judgment, the proper interpretation to be put upon section 342 by reason of these words is that it is to apply only to those cases where under other sections of the Code the prisoner is to be called on for his defence. Again Chapter XX provides a complete procedure for the hearing of summons cases. Under section 242 the accused is asked if he has any cause to show why he should not be convicted; but there is no sort of preliminary inquiry before framing a charge, as is the case in warrant cases, and before a case is committed to Sessions. Then under section 244 the Magistrate must hear the complainant and take all such evidence as may be produced in support of the prosecution and also hear the accused and take all such evidence as he produces in his defence. Under section 245 after taking this evidence and such further evidence (if any) as he may cause to be produced, and (if he thinks fit) examining the accused he must give his decision. It is difficult to see where in these sections a formal examination under section 342 is to come in. It would have to be read in somewhere in section 244 and it would be remarkable that, if section 342 was intended to be

(1) (1920) 5 Pat. L.J., 430.

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applied to summons cases, the Legislature should not have said at what stage in the application of sections 242, 244 and 245 this further formal examination is to take place. I do not feel bound to read the provisions of section 342 as intervening in the middle of the operation of these sections, and in my judgment, it has no application to summons cases. It is perhaps worth observing that in summons cases there is no objection to a Magistrate questioning the accused generally for the purpose of enabling him to explain the circumstances appearing in the evidence against him, and in complicated cases especially where the accused is not represented by Counsel, it is a desirable course notwithstanding that it is not obligatory.

As to the other points raised, this Criminal Revision Case with this direction will be referred to the Referring Bench for disposal.

OLDFIELD, J.

OLDFIELD, J.—I agree. The authorities referred to in the judgment just delivered seem to me to proceed, implicitly or explicitly, on two assumptions, which, with all respect, I cannot follow:—that the entry by the accused on his defence, referred to in section 342 of the Code of Criminal Procedure, is identifiable with the hearing of the accused, referred to in Chapter XX, and that the language used in the section is applicable at all to summons case procedure. With all deference to my Lord, I am not sure that the separate references in section 451 to accused being heard in summons cases and entering on his defence in warrant cases assist the argument. For it is not clear that they correspond with more than the draftsman's adherence in 1884, when that part of the Code was amended, to the wording of the other portions now under construction. It is, however, in my opinion, sufficient that the distinction to be inferred from the different wording used in each of

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those portions can easily be drawn, the hearing of the accused under section 244 referring to the general hearing, to which he or his vakil on his behalf is entitled in the course of the trial. His entry on his defence under summons case procedure takes place earlier, when under section 242, after the particulars of the offence have been stated to him, he is asked if he has any cause to show why he should not be convicted. But, as the witnesses for the prosecution have not then been examined, there can be no question then or later of the requirements of section 342 having been fulfilled.

OLDFIELD, J.

RAMESAM, J. RAMESAM, J.—I agree with the judgment of the learned Chief Justice.

DEVADOSS, J. DEVADOSS, J.—I agree with the judgment of the learned Chief Justice.

COLERIDGE, J. COLERIDGE, J.—I agree.

K.R.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Oldfield, Mr. Justice Ramesam, Mr. Justice Devadoss and Mr. Justice Coleridge.

1923, April 24.

DHARMA SINGH (ACCUSED), PETITIONER,

v.

KING-EMPEROR (COMPLAINANT), RESPONDENT.*

Criminal Procedure Code (V of 1898), Chap. XXII—Summary trials of summons cases—Sec. 342, Applicability of, to summary trials of summons cases.

The provisions of section 342, Criminal Procedure Code, requiring the Court to examine the accused generally on the case after the examination of the prosecution witnesses, are as

* Criminal Revision Case No. 894 of 1922.

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inapplicable to summary trials of summons cases under Chapter XXII of the Code, as to ordinary trials of such cases.

PETITION under sections 435 and 439, Criminal Procedure Code, praying the High Court to revise the order of the Bench of Magistrates, First Class, Coimbatore, in Summary Case No. 182 of 1922.

The petitioner was charged with the offence of escaping from the lawful custody of a process-server, punishable under section 225 (*b*) of the Indian Penal Code. The accused was tried under the summary procedure laid down in Chapter XXII of the Criminal Procedure Code before the Court of the Bench of Magistrates (First Class), Coimbatore, and was convicted and sentenced to simple imprisonment for 15 days. Against the conviction and sentence, the accused preferred a Criminal Revision Petition to the High Court, and contended, *inter alia*, that the trial was vitiated by the non-compliance with the provisions of section 342, Criminal Procedure Code.

V. L. Ethiraj for petitioner.—Section 342 applies to summary trials. The question is when the accused is called on for his defence in a Summons Case in a summary trial. It is between the time when the prosecution evidence is closed and defence evidence begins. Plea is not the stage of entering on his defence. Section 262 makes section 342 applicable to summary trials. See *Mahomed Hossain* v. *Emperor*(1), *Parmeshwar Lall Mitter* v. *Emperor*(2).

The Public Prosecutor (*J. C. Adam*), for the Crown.—There is no difference between summary trials of Summons Cases, and ordinary trials of such cases, any more than there is between summary and ordinary trials of warrant cases.

(1) (1914) I.L.R., 41 Calc., 743. (2) (1922) 67 I.C., 816.

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SCHWABE, C.J.

The JUDGMENT of the Court was delivered by

SCHWABE, C.J.—This case raises the same point as Criminal Revision Case No. 691(1), the only difference being that it was tried summarily under Chapter XXII. In our judgment, there is no difference between summary trials of summons cases and the ordinary trials of summons cases. This petition must be dismissed. The sentence is light, but in the circumstances as he has already been released and only has few more days to serve we reduce the sentence to 11 days.

K.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., K. C., Chief Justice, Mr. Justice Oldfield and Mr. Justice Ramesam.

1923, April 6.

V. C. T. N. CHIDAMBARAM CHETTI (PLAINTIFF—RESPONDENT), APPELLANT,

v.

THEIVANAI AMMAL (LEGAL REPRESENTATIVE OF 3RD DEFENDANT—APPELLANT), *Respondent.**

Decree—Execution—Legal representative of judgment-debtor—Application for execution against legal representative, ordered without notice—Property attached—Application by decree-holder for settlement of terms of sale proclamation—Notice—Service by affixture—Ex parte order settling terms of sale proclamation—Subsequent application by legal representative for release of property from attachment as not liable to execution—Bar of res judicata.

The legal representative of a judgment-debtor was brought on record for the purpose of execution and immoveable property was attached but without notice to him, such notice not being required under Order XXI, rule 22, Civil Procedure Code. The decree-holder then filed an application for settlement of the terms of the sale proclamation; the notice thereon merely intimated the date of the hearing of the application, and was

(1) *Supra* 758.

* Appeal against Appellate order No. 106 of 1921.

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served by affixture, the legal representative was declared ex parte and the terms of the sale proclamation were settled in his absence. The latter then applied to the Court for release of the property attached on the ground that it was not liable to attachment. The decree-holder pleaded the bar of *res judicata*.

Held, that mere non-attendance at the hearing of an application to settle the terms of a sale proclamation did not estop the legal representative on the principle of *res judicata* from disputing thereafter the liability of the property to attachment.

APPEAL against the decree of V. S. KRISHNA AYYAR, the Subordinate Judge of Dindigul, in Appeal Suit No. 8 of 1921, preferred against the order of S. P. SUBRAMANYA AYYAR, the District Munsif of Palni, in Execution Application No. 171 of 1920 in Execution Petition No. 9 of 1920 in Original Suit No. 840 of 1918.

The appellant obtained a decree for money against the orginal defendant, one Kathaperumal, who died after decree; and the brother of the judgment-debtor (Kandaswami) was brought on the record as his legal representative for purposes of execution. A prior application for execution had been filed for attachment and sale of the moveables belonging to the original defendant, but the petition was dismissed for default of prosecution. Within a year of those proceedings, a subsequent application for execution by attachment and sale of immoveable property was made, but no notice was given to the legal representative, as it was not required under the provisions of Order XXI, rule 22, Civil Procedure Code, and the property was attached by an order, dated 8th June 1920. The decree-holder then applied for the sale of the property, and a notice for settling the sale proclamation in Form E of the Code was issued; the notice stated that the decree-holder had applied for sale of the property, and that the judgment-debter was thereby informed that the 14th day of August 1920 had been fixed for the purpose of settling the terms of the proclamation of sale. This notice

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was served by affixing it on the last known residence of the legal representative. The latter was declared *ex parte*, and the terms of the sale proclamation were settled by the Court in his absence. Subsequently the legal representative filed an execution application (E.A. No. 171 of 1920), for release of the property from attachment on the ground that the property was not liable to attachment and sale in execution of the decree. The District Munsif dismissed this petition. On appeal the Subordinate Judge reversed the order and remanded the petition for enquiry as to whether the property belonged to the judgment-debtor, holding that the notice of the petition for settlement of sale proclamation was not properly served on the legal representative. The decree-holder preferred this Civil Miscellaneous Second Appeal to the High Court against the latter order. The decree-holder contended, *inter alia*, that a separate application to set aside the *ex parte* order should have been filed and that the liability of the property to attachment in execution of the decree was *res judicata* by reason of the order on the application for settlement of the terms of the sale proclamation. The case came on for hearing originally before OLDFIELD and VENKATASUBBA RAO, JJ., who referred to the Full Bench the question as to the applicability of Order IX, rule 13, Civil Procedure Code, to proceedings in execution under the following order of Reference:—

Plaintiff, the present Appellant, obtained a decree against Kathaperumal Goundan, who afterwards died and was subsequently represented by Kandasami, his brother. Kandasami claimed the property attached by plaintiff as his own and not that of Kathaperumal in his hands and his claim was rejected by the District Munsif. He, however, appealed successfully and this second appeal is against the order allowing his claim. It is opposed by his legal representative, to be referred to as respondent.

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One ground, on which she opposes the appeal, that she is not and Kandasami was not a party to the proceedings and that therefore no second appeal lies, can be dealt with shortly. Kandasami's own appeal to the lower Appellate Court involved the admission that he was or represented a party and the applicability of section 47, Civil Procedure Code, and his representative cannot allege the contrary.

The substantial question for decision then is whether Kandasami's claim is concluded by his failure to advance it in the proceedings taken by plaintiff to bring the property now claimed to sale. That he advanced it only in his claim petition, Execution Application No. 171 of 1920, on 12th August 1920, and not in the proceedings which resulted in the District Munsif's order of 8th June 1920, is not disputed. It is urged only that (1) the order of 8th June 1920 can in no circumstances be regarded as an adjudication, actual or constructive, against his right to the property, and (2) even if that order is such an adjudication, it was not passed after any valid notice to him and he can now show that it was not, in spite of his failure to take proceedings in respect of it under Order IX, rule 13.

On the question whether the order of 8th June 1920 was in effect an adjudication against Kandasami's claim and in favour of the liability of the property to sale in his hands we have not before us the petition, which initiated the proceedings. But there is no reason for doubting, what has throughout been assumed and not disputed, that it was for attachment and sale of the property; and the text of the order of 8th June 1920, 'Proclaim and sell on 14th August 1920. Upset price Rs. 1,000' shows what would ordinarily be the case, that the proceedings were to obtain an order for sale and to fix the terms of the sale proclamation and the date, on which the sale would be held; and, so far as plaintiff asked for an order for sale, the contention that the property was not liable under the decree, on which Kandasami based his subsequent claim, would have been open to him and would, if established, have resulted in the dismissal of the petition. His failure to adopt this ground of defence would accordingly, if section 11, explanation 4, is applicable, debar him from adopting it later. Against this it is first urged

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generally that neither section 11, explanation 4, nor the principle of constructive *res judicata* applies to execution proceedings. But, whether the explanation or any broader principle is applicable, this is unsustainable, at least, when, as was here the case, those proceedings are between parties to the suit or their representatives and result in an adjudication on a question in issue between them. This has been established since *Ram Kirpal Shukul* v. *Mussumat Rup Kuari*(1) and maintained in the very recent decision in *Raja of Ramnad* v. *Velusami Tevar*(2) and others, the latter case dealing directly with the consequence of failure, such as plaintiff before us relies on, to adopt a ground of defence. It is then necessary only to make sure that the ground in question was open to Kandasami; and respondent in fact urges that it was not, because he was a party to the proceedings, not in their wider scope above referred to, when the plaintiff's right to sell the property was in issue, but only for the settlement of the sale proclamation, and decisions at that stage are administrative and not judicial. This also, however, is unsustainable. It is true that, as this Court held in *Sivayami Achi* v. *Subrahmania Ayyar*(3) proceedings for the settlement of a sale proclamation under section 287 of the former Code, corresponding with the present Order XXI, rule 66, are of that character and therefore not appealable. But the reference there to such proceedings as excluded from the purview of the then section 244, now section 47, shows that they were not regarded as concluding the enquiry, if any is necessary, into the decree-holder's right to bring the property to sale. Such enquiry can be, and is held, if an issue entailing it is raised, in the disposal of the application for sale, the settlement of proclamation being a distinct stage therein, which in case of the making of a valid objection would never be reached; and the fact that orders passed in the course of that settlement are not appealable or binding in other proceedings cannot affect the character of those passed in the decision of the substantive question whether the sale shall be held at all. No doubt, and this is the tenor of the decision in *Subramania Ayyar* v. *Raja Rajeswara Dorai*(4)

(1) (1883) 11 I.A., 37.
(2) (1921) 40 M.L.J., 197 (P.C.).
(3) (1904) I.L.R., 27 Mad., 259 (F.B.).
(4) (1917) I.L.R., 40 Mad., 1016.

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caution is necessary before orders of the latter class are treated as conclusive and the Court must be satisfied that the matter, in respect of which they are relied on, was in issue and that the party to be affected had clear notice that it would be so. But, although the notice alleged to have been given to Kandasami in the present case is not before us, it is not alleged and there is no reason for supposing that it was not in general terms and, even if it referred specifically only to the settlement of the proclamation, it would still have been notice that a sale had been asked for, to which, until the passing of the order "Proclaim and sell" of 8th June 1920, he could and should have made his objection.

There remains the contention that all this is immaterial, because that notice in fact was not served. The service relied on was by affixture: and the Lower Appellate Court has now found, differing from the Court of First Instance, that as a matter of fact it was insufficient. If it is open to us to act on that finding, one which we should ordinarily accept, the order of 8th June 1920 and Kandasami's failure to advance his claim before it will not stand in the way of his advancing it now. But we have to deal with plaintiff's contention that we cannot act on such a finding or disregard that order, because it has not been set aside in the only way authorized by law, proceedings under Order IX, rule 13. This contention is substantial and cannot be met by treating, as we are asked to do, the subsequent claim petition as an application under that provision. For it does not contain the appropriate prayer or averments or anything to show how it was presented within the prescribed period of limitation, the contrary being *prima facie* the case.

The question is then whether Order IX, rule 13, applies to and affords the only remedy open to a party, against whom an order has been made in his absence in execution proceedings. In accordance with *Subbiah Naicker* v. *Ramanathan Chettiar*(1), this should be answered in the affirmative; and in fact such answer would exclude the anomaly involved in allowing the validity of an order passed *ex parte* to be disputed, perhaps after long delay, whenever it is necessary to dispute it in

(1) (1914) I.L.R., 37 Mad., 462 at 475.

subsequent proceedings, after the period allowed by Article 164, Schedule I, Limitation Act has elapsed. On the other hand it is said that Order IX, rule 13, does not in terms apply to proceedings other than suits and that there is authority irreconcilable with *Subbiah Naicker* v. *Ramanathan Chettiar*(1).

The first of these contentions was rejected in the case last mentioned on the ground that, although Order IX refers only to decrees not orders, such orders as that then and now in question are decrees with reference to the definition in section 2 of the Code; and it is now pointed out with some force that, although this may justify the application of Article 164 above referred to, it is no answer to the consideration that the whole order including Rule 13 is applicable in terms only to suits and therefore, it is to be inferred, to the description of decrees passed in them. And next reference has been made to the argument from the history of those provisions based by JENKINS, C.J., in *Hari Charan Ghose* v. *Manmatha Nath Sen*(2), on the decision of the Privy Council in *Thakur Pershad* v. *Fakirullah*(3), in which what (with great respect) is the real and better justification for the conclusion in *Subbiah Naicker* v. *Ramanathan Chettiar*(4), the present section 141 corresponding with the former section 647, is referred to. With all due deference, that argument is not convincing, because first it is based on a conjecture as to the intention of the legislature, which is inconsistent with the plain and unrestricted terms of section 141, is unnecessary in order to explain them and would nullify the action of the legislature in deliberately omitting, when the Code was re-enacted in 1908, the explanation inserted in 1892. Next the case before the learned Chief Justice was na ordinary claim by a third party, to which section 47 was inapplicable, the further remedy being by a suit, in which the previous order would not be conclusive. Last, *Thakur Prasad* v. *Fakirullah*(3), the foundation of the judgments, to adopt the only view reconcilable with *Ram Kirpal Shukul* v. *Mussumat Rup Kuari*(5), and *Raja of Ramnad* v. *Velusami Tevar*(6) decided

(1) (1914) I.L.R., 37 Mad., 462 at 475.
(2) (1914) I.L.R., 41 Calc., 1. (3) (1894 22 I.A., 44; I.L.R., 17 All., 106 (P.C.).
(4) (1914) I.L.R., 37 Mad., 462. (5) (1883) 11 I.A., 37.
(6) (1921) 40 M.L.J., 197 (P.C.).

only that the dismissal of an execution application not prosecuted by the decree-holder did not debar him from applying again, not that an order passed after notice to the judgment-debtor was not binding on him and did not require to be set aside, before the adjudication on any substantive question involved in it could be disregarded.

This failing, reliance is placed on the course of authority against the application of Order IX, rule 13, and the correctness of the decision of this Court already referred to. But, although it is true that *Subbiah Naicker* v. *Ramanathan Chettiar*(1) was dissented from on this point in *Bhubaneswar Prasad Singh* v. *Tilukdhari Lal*(2), and is irreconcilable with other cases cited therein and with *Babui Ritu Kuer* v. *Alakhdeo Narain Singh*(3), that would not be material, if the conclusions reached after full consideration in our own Court were clear. It is true that the only one of those other cases which was decided in Madras, *Balasubramania Chetti* v. *Swarnammal*(4), would seem either irreconcilable with *Raja of Ramnad* v. *Velusami Tevar*(5) and others above referred to are distinguishable on the ground that no previous adjudication in the particular matter in issue was in question. But the difficulty arises from the *dictum* in it that section 141 is intended to apply to proceedings in Civil Courts, such as probate, etc., and not to execution, anticipating the reasoning of JENKINS, C.J., above referred to in *Hari Charan Ghose* v. *Manmatha Nath Sen*(6), and negativing the foundation, on which it has been suggested that the conclusion in *Subbiah Naicker* v. *Ramanathan Chettiar*(1) might more properly have been based. *Balasubramania Chetti* v. *Swarnammal*(4), although reported after, was decided before, but is not referred to in, *Subbiah Naicker* v. *Ramanathan Chettiar*(1), and it is doubtful whether the two decisions can be reconciled.

The question, whether they can be and, if not, which is correct is one for a Full Bench; and there is nothing to add except that the matter has since been considered in Madras, so far as we have been shown, in two cases only, to both of which

(1) (1914) I.L.R., 37 Mad., 462 at 475.
(2) (1919) 4 Pat. L.J., 330.
(3) (1919) 4 Pat. L.J., 135.
(4) (1915) I.L.R., 38 Mad., 199.
(5) (1921) 40 M.L.J., 197 (P.C.).
(6) (1914) I.L.R., 41 Calc., 1.

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SADASIVA AYYAR, J., was a party; his decision in *Periakaruppan Chetty* v. *Chidambara Tambiran*(1), and *Kali Shetthi* v. *Shama Rao*(2), being the one consistent and the other inconsistent with his previous conclusion in *Subbiah Naicker* v. *Ramanathan Chettiar*(3). In the second of these two cases, however, there was no reference to that or any recent authority.

The matter standing thus, we refer for the decision of a Full Bench the question:—

Whether Order IX is applicable to proceedings in execution between parties to the decree or their representatives?

ON THIS REFERENCE:—

K. S. Ganapathy Ayyar for appellant.—The decree-holder is the appellant. The legal representative of the judgment-debtor was brought on the record of execution proceedings and attachment of some moveables belonging to the original defendant was ordered; but no further steps were taken, as batta was not paid. Next an application was filed against the same legal representative for attachment and sale of immoveables. No notice was given as none was required under Order XXI, rule 22, Civil Procedure Code. No fresh notice was necessary; and the order of attachment as well as attachment was made without notice. Next the decree-holder filed an application for settlement of the terms of the sale proclamation. Notice of this application was issued and served by affixture to the house of the legal representative. Though it is true that there was no notice prior to the order for attachment of immoveables, there was notice duly served on the application for settlement of terms of sale proclamation. The order on the latter is binding as *res judicata* as to the liability of the property for attachment and sale in execution. The rule of constructive *res judicata* is applicable to execution proceedings. See *Subbiah Naicker* v. *Ramanathan Chettiar*(1), *Mungul Pershad Dighit* v. *Grija Khant Lahiri*(2). See form 28 in Appendix E, Civil Procedure Code, for form of notice for settlement of sale proclamation. There is no necessity to provide in the notice issued as to what would happen if the defendant was absent. See *Subbiah Naicker* v. *Ramanathan Chettiar*(1), *Periakaruppan Chetty* v. *Chidambara Tambiran*(3). The form of proclamation (Form 29, Appendix E) contains the words "Property of the judgment-debtor above named"—which shows—that the property attached is sold as his property liable in execution. Further the *ex parte* order ought to have been set aside under Order IX, rule 13; See *Subbiah Naicker* v. *Ramanathan Chettiar*(1).

T. S. Ramaswami Ayyar for the respondent.—Orders for settlement of sale proclamation are not judicial orders. See *Sivagami Achi* v. *Subrahmania Ayyar*(4). In any event, the order on the application for settlement of sale proclamation is not *res judicata*, as the petition did not raise the question of liability of the property for attachment but only concerned itself with the details of the terms of sale proclamation. It assumed the liability for sale under a previous order for which there was admittedly no notice.

(1) (1916) 33 I.C., 443.
(2) (1917) 21 M.L.J., 297.
(3) (1914) I.L.R., 37 Mad., 462 at 475.

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JUDGMENT.

SCHWABE, C.J.

SCHWABE, C.J.—The present appellant is the decree-holder. The respondent is the legal personal representative of a brother of the judgment-debtor who had been brought upon the record for the purpose of execution. An application had been made for attachment of the moveable property of the original defendant, the judgment-

(1) (1914) I.L.R., 37 Mad., 462 at 475.
(2) (1882) I.L.R., 8 Calc., 51 (P.C.).
(3) (1916) 33 I.C., 443.
(4) (1904) I.L.R., 27 Mad., 259 (F.B.).

debtor. Those proceedings had come to nothing by reason of the fact that the present appellant failed to find the necessary expenses. Within a year of those proceedings, application was made for attachment of the immoveable property. By reason of the operation of Order XXI, rule 22, no notice of those proceedings was required to be given to the representative of the judgment-debtor and no notice was given. An application was then made for the sale of the property and in due course a notice for settling the sale proclamation, in form No. 21 of appendix E of the Code of Civil Procedure, was issued. That notice stated that the decree-holder had applied for a sale of the property and continued, "You are hereby informed that the 14th day of August 1920 has been fixed for the purpose of settling the terms of the proclamation of sale." That notice was served by affixing it to some place alleged to be the residence of the respondent. The respondent, who alleges that he never received the notice, did not attend on the date fixed for settling the terms of the proclamation. He was declared *ex parte* and the terms of the proclamation were settled in his absence. He then applied to the District Munsif for the release of the property on the ground that it was not liable to be attached. The District Munsif dismissed that application, and on appeal to the Subordinate Judge, the Subordinate Judge remanded it to the District Munsif to enquire into the facts as to whether or not the property was the property of the judgment-debtor, holding that the notice of the proceedings in which he had been declared *ex parte* was not properly served upon him. That raises an interesting point as to whether or not it was open on these proceedings to the District Munsif or the Subordinate Judge to discuss the question whether or not notice had been properly served or whether it was necessary for

the respondent to take some different form of proceedings to challenge that notice, but, in the view we take of another point in this case, it is unnecessary for us to express any opinion on that point.

The appellant contended that the question of the ownership of this property was *res judicata* and that it had been decided, or must be taken to have been decided, on the hearing of the application for settling the terms of the proclamation of sale. Under section 11 of the Civil Procedure Code "no Court is to try any issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit." Several cases have decided that a matter must be taken to have been substantially in issue in a former suit or proceeding if the point was open and could have been raised in the former proceedings. In this case the Respondent had no notice at all that the matter of the ownership of the property would or could come up for decision on the hearing of the application for settlement of the terms of the proclamation of sale. He did not even get a draft of the proposed terms. All that he was told was that a certain date had been fixed for settling those terms, and it would be a very remarkable thing if, on receipt of such notice, it were to follow that, if he did not attend on that occasion, he must be taken to have attended and raised the question whether or not the property was the property of the judgment-debtor. Our attention has been called to no authority in support of that contention and it seems to me to be quite wrong, because that was not the time for discussing the question of the ownership of that property, although it is possible that the Court would on an application then made have listened to some argument on the point; nor did the terms of the notice that he got suggest that it was. Our attention has been called to the case of *Subbiah Naicker* v. *Ramanathan*

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Chettiar(1). But I think, on this point, the whole of that decision turns on these words; "Now the order of August 1909 was no doubt an *ex parte* order but it was passed after notice was issued to the 2nd defendant to show cause why such an order should not be passed and after the Court had satisfied itself on the affidavit and the return of the process-server that the notice had been duly served." If in this case the respondent had been asked to show cause why the property should not be sold the reasoning of that decision would apply, but in this case by the formal notice that he got he was not asked to show cause as to anything and he had no intimation at all that the matter would be open to him to raise or that it would be discussed. Under those circumstances I cannot see that it is possible to hold that his non-appearance on that occasion amounts to a decision against him that the property was the property of the judgment-debtor.

Our attention has also been called to the decision of the Full Bench of this Court in *Sivagami Achi* v. *Subrahmania Ayyar*(2) that what takes place on the hearing of the application to settle the terms of the proclamation of sale is more of an administrative character than judicial, and that therefore no appeal lies against the decision of a Court on that occasion as to what that proclamation is to contain. That being the decision of the Full Bench, unless it is possible to say that part of what takes place on that occasion is judicial and part administrative, it would be a strong ground for contending that the matter cannot be *res judicata* by reason of the non-attendance at a sitting of the Court, such sitting being held for administrative and not judicial purposes.

I desire to say that our decision in this case must be taken to be confined to the particular facts of this case,

(1) (1914) I.L.R., 37 Mad., 462 at 475. (2) (1904) I.L.R., 27 Mad., 259 (F.B.).

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that is to say, that where you have nothing more than the non-attendance at the hearing of an application to settle the terms of a sale proclamation, the respondent cannot be taken to be estopped by reason of that non-attendance on the principle of *res judicata* from thereafter denying the liability of the property to execution.

On these grounds I think the Subordinate Judge was right in remanding this case to the District Munsif. The result will be that this case must go back to the Referring Bench with that direction.

OLDFIELD, J.—I agree. As one of the Referring Judges, I add that, speaking for myself, I am now clear that in stating the effect of the obligation imposed by the notice to Kandasami, we had not sufficient regard to the fact that it was given in proceedings which originated without notice to him of the attachment. OLDFIELD, J.

RAMESAM, J.—I agree: but I wish to add a few words. The leading decision on the application of the principle of *res judicata* to execution proceedings is the decision of the Privy Council in *Mungul Pershad Dighit* v. *Grija Khant Lahiri*(1). It was held in that case that, if after notice, a decision was passed on an execution petition, it would not be open to parties to object to that decision when a subsequent application is presented. In applying that case a Bench of this Court in *Subramania Ayyar* v. *Raja Rajeswara Dorai*(2) at p. 1026 say, "One principle seems to be clear, and that is, that the party who is sought to be affected by the bar of *res judicata* should have notice of the point which is likely to be decided against him and should have an opportunity of putting forward his contentions against such a decision. In the present case no notice went to the respondents to show cause why they should not be brought on the record as the legal representatives of the deceased judgment-debtor for the RAMESAM, J.

(1) (1882) I.L.R., 8 Calc., 51 (P.C.). (2) (1917) I.L.R., 40 Mad., 1016.

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purpose of execution. They had no notice that any particular property was going to be attached. We must therefore overrule this plea." I entirely agree with the principle underlying these remarks. Another example of the application of this principle is the decision in *Sheik Budan* v. *Ramachandra Bujangaya*(1). Notice to the judgment-debtor to be present at the settlement of the terms of the proclamation cannot be regarded as raising the question of the liability of the property to be attached and therefore it cannot be said that the judgment-debtor was invited to object to that attachment. That being so, the order that followed cannot be regarded as an implied adjudication that the property was correctly attached. I agree with the order proposed.

K.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Oldfield and Mr. Justice Ramesam.

1923, April 10.

RAJAGOPALA NAIDU, FIRST PLAINTIFF (PETITIONER),

v.

RAMASUBRAMANIA AYYAR AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Court Fees Act (VII of 1870), sec. 7 (V) (e)—Temple—Suit for possession of—Value of temple for purpose of Court Fees Act—Temple, whether a house—Market-value, meaning of—Temple, whether has a market-value—Valuation, based on value of materials used for the building, whether proper.

A temple, which is devoted absolutely and in perpetuity to religious purposes, even if it is to be regarded as a house, has no market-value within the terms of section 7, clause V (*e*) of the Court Fees Act; hence a suit for recovery of possession of it by a person claiming as trustee against another also claiming as trustee falls under Schedule II, article 17 (VI) of the same Act.

The principle for determining the market-value of property under the Court Fees Act, as under the Land Acquisition Act, is that the things have to be taken as they stand at the time, and as there can be no market for a temple as such, there can be no market-value for it, and the principle of valuation based on the value of the materials composing it is erroneous. *Manmatha Nath Mitter* v. *The Secretary of State for India in Council*, (1898) I.L.R., 25 Calc., 194 (P.C.), followed.

(1) (1887) I.L.R., 11 Bom., 537.

* Civil Revision Petition No. 288 of 1922.

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CIVIL Revision Petition to the High Court to revise the order of T. K. SUBBA AYYAR, the Additional Subordinate Judge of East Tanjore at Māyavaram, in Original Suit No. 7 of 1921.

This is a suit instituted by the plaintiffs to establish their exclusive right to manage the suit temple and to appoint and remove the trustee of these temples as occasion arises. They pray for a declaration accordingly and for delivery of possession of the temples and their properties and for payment of certain amounts that may be found due on taking accounts. The defendants took objection to the valuation of the subject-matter of the suit. The plaintiffs valued certain lands attached to the temples as well as the temples under section 7, clause (IV) (*c*) of the Court Fees Act. They valued the temples at Rs. 800 under the above provision. On objection to valuation being taken by the defendants, the lower Court appointed a Commissioner who made a report that the temples and their properties are worth more than two lakhs. The Commissioner valued the temples at the value of the materials used in their construction and the value of the site. The Sub-Judge accepted his valuation and directed the plaintiff to pay the deficient court fees within two weeks. Against this order, the plaintiffs preferred this Civil Revision Petition

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to the High Court. The case came on for hearing before SPENCER and VENKATASUBBA RAO, JJ., who made the following Order of Reference to a Full Bench :—

ORDER OF REFERENCE TO A FULL BENCH.

SPENCER, J.—The plaintiffs in this representative suit claim to have an exclusive right to manage certain devastanams mentioned in the plaint and to appoint and remove a dharmakartha for those temples whenever occasion arises. They pray for a declaration accordingly and ask for delivery of possession by defendants 1 and 2 of all the properties of the suit temples and for payment of certain amounts that may be found due on examination of accounts of the income and expenditure.

The question in this Civil Revision Petition is how such a suit should be valued. The Subordinate Judge has valued it according to the estimate made by a Commissioner of the value of the temples and all the properties attached to them which amounts to more than Rs. 2,00,000. The first plaintiff as petitioner contends that he is not liable to pay court-fees upon the valuation of the temple properties according to their market value. He maintains that he can value the relief under section 7, clause 4 (c) of the Court-Fees Act as he pleases, as the only right in issue in the suit is the right pertaining to trustees of managing the suit properties. In Civil Revision Petition No. 862 of 1917, a similar question came before a Bench consisting of Mr. Justice SADASIVA AYYAR and myself, the question then being whether a plaintiff who sued for joint possession along with other trustees was bound to pay court-fees *ad valorem* as in a suit for possession falling under section 7, clause 5, upon the market value of the temple and its properties. We made a reference to a Full Bench, upon the point. When the reference came before the Full Bench, the Civil Revision Petition was withdrawn. The question which was a very important one, upon which SADASIVA AYYAR, J., and I differed, thus remained undecided. Most of the authorities were collected in the reference made by my learned brother and myself, and after full consideration I expressed an opinion that the plaintiff's valuation was conclusive and should be accepted under section 7, clause 4 (*c*) and (*d*) and article 17, clause (vi) of schedule 2 of the Court Fees Act. I

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pointed out in that case that the plaintiff was only asking for such possession as he was entitled to on the footing of a trustee without having any personal interest in the trust property and for such possession as the holder of the office was capable of, the ownership of the temple properties being vested in the idol. If a plaintiff sets up any proprietory right over temple properties I was willing to concede that he must pay court-fees valuing his relief of possession upon the value of the temple properties. I then held that the cases in *Sonachala* v. *Manika*(1), and Appeal No. 10 of 1911 were distinguishable and I quoted *Mohendra* v. *Dinabandhu*(2), and certain other authorities for the proposition that if a plaintiff claims no higher right than that of administering endowed properties he should not be made to pay court-fees on the same footing as a plaintiff who sues for possession claiming rights as proprietor. The question is an important one, and I am not satisfied that Appeal No. 10 of 1911 and Second Appeal No. 1410 of 1917, in which it was held that the temple and its properties must be valued, were correctly decided. It is advisable also that in a matter where no party is more concerned than Government who are interested in the payment of the full court-fees, the Advocate-General should have notice and should be heard in the matter.

I therefore refer to a Full Bench the question what are the court-fees legally payable on the plaint in this suit, Original Suit No. 28 of 1920 in the Court of the Subordinate Judge of Mayavaram ?

VENKATASUBBA RAO, J.—I am also of the opinion that the question should be referred to the Full Bench. The matter was fully discussed and the authorities in support of the rival contentions were set forth in the referring judgments of my learned brother and SADASIVA AYYAR, J., in Civil Revision Petition No. 862 of 1917, and I therefore refrain from covering the same ground again. But, there is one point to which I would like to advert. It has been stated that, in the present case, court-fee was paid on the value of the subject matter so far as it consists of "lands" under section 7 (5) (*c*) of the Court Fees Act. The plaintiff, however, has not paid the fee payable on the market value of the temple in question. The Commissioner appointed

(1) (1885) I.L.R., 8 Mad., 516. (2) (1914) 19 C.L. J., 15

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valued the temple at Rs. 2,22,000 odd. The estimate was based, *inter alia*, upon the cost of the materials used, on the ground that by that process the "market value" of the structure could be ascertained.

Whatever may be held to be the correct view in regard to the more general question discussed in the Judgment in Civil Revision Petition No. 862 of 1917, it seems to me that there is considerable force in the argument of the learned vakil for the appellant, that the structures constituting a temple, which are the abodes of the idols, are not "houses" under section 7 (5) (*c*) on which "a market value" can be placed under sub-clause (*e*). A "house" according to Murray's Dictionary, no doubt, includes "a place of worship, a temple, or a church." I do not think we shall be justified in turning to English decisions for interpreting the word "house" as they deal with particular statutes where the word occurs. As Stroud, in his Judicial Dictionary, points out, a church consecrated according to the rites of the established church was held not to be "a house" under section 105, Metropolitan Management Act, 1885, whereas a dissenting chapel was held to be such a "house." Again, a consecrated church, though held not to be a "house" within the section just cited, was neverthless held to be a "house" *qua* a building line which a local authority has a right to prescribe. I do not think we can derive much assistance from the definitions or interpretations given above in construing the word "house" in the section of the Court Fees Act.

I am of opinion that under the Court Fees Act a temple which is mainly the abode of the deity cannot be said to be a "house," the "market value" of which is capable of being ascertained. A temple being *extra commercium* is ex *hypothesi* incapable of having a market value. It is well known that, to construct structures similar to numerous temples in India, sums amounting to lakhs or tens of lakhs of rupees would be required, and I do not think that the Legislature intended that a court-fee should be levied on what is described before us as the "market value" of the temples. I am therefore inclined to hold that it is not possible to estimate at a money value, a temple and the idols in it and that, in any event, so far as the subject matter comprises the aforesaid, the case falls within Article 17 (*b*) of Schedule II of the Court-Fees Act V of 1922.

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K. S. Sankara Ayyar for petitioner.—Plaintiff sues to recover certain temples and their properties from the defendants who are alleged to be not trustees. They have valued all the lands and moveable properties except the temple and idols. They claim that temples are not "houses", have no market-value, and consequently fall under Schedule II, article 17 (6) of the Court Fees Act. The plaintiffs have paid court fees to the extent of Rs. 750. As regards temples and idols they are incapable of valuation. There is no market for them and so they have no market-value. They are extra commercium. Temples cannot be sold. There is a legal prohibition. "Temple" is not a "house" within section 7, clause (*e*) of the Court Fees Act. It is only by a figure of speech, called "a house of God." Either section 7, clause IV (*c*) and (*d*) or Schedule II, article 17 (6) will apply and not section 7, clause V (*e*). Under the English Law a church is neither a house nor land: *Angell* v. *Paddington Vestry*(1) and *Wright* v. *Ingle* (2). Under the Common Law of England, a church is not a habitation for man; a house must under that law be a habitation for man. In *Durga Singh* v. *Bisheshar Dayal* (3) an indigo factory was held to be a house. That decision does not help this case. The "house" referred to in section 7, clause 5 (*c*) should be one that can have a market-value: a temple is not such a thing. In Stroud's Judicial Dictionary, "Market-value" is defined as what it would fetch under the condition in which it exists. The materials composing it should not be valued piece-meal and the aggregate taken to be the value of the temple. It should be valued as a temple, and the estimated value of the materials should not be taken. A temple is not alienable under the Hindu Law, and

(1) (1868) 3 Q.B., 714. (2) (1886) 16 Q.B.D., 379 at 399.
(3) (1902) I.L.R., 24 All., 218.

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it is saved by section 2, clause 6 of the Transfer of Property Act.

Government Pleader (*C. V. Ananthakrishna Ayyar*).—Temples have no market-value. Reference was made to two decisions of the Privy Council, viz., *The Secretary of State for India in Council* v. *Shanmugaraya Mudaliar*(1), *Kidar Nath* v *Mathu Mal*(2). Some portions of what is loosely called temple are leased out by trustees, and may be so far marketable. *Manmatha Nath Mitter* v. *The Secretary of State for India in Council*(3) shows that market-value should be of a thing as such in its actual condition; valuation should not be made of its materials by breaking it up and using the materials.

K. S. Venkataramani for respondent.—By comparing section 7, clauses 3 and 4 with section 7, clause 5, it is clear that the Legislature assumes all immoveables to have some market-value. Some market-value must be found out in some reasonable way. The method of valuing by estimating the materials is proper.

JUDGMENT.

SCHWABE, C.J.

SCHWABE, C.J.—This is a reference to a Full Bench on the question of the court-fee payable on a suit by the plaintiff claiming to be a trustee of a temple against the defendant, who is in possession of the temple, also claiming to be a trustee. The property in question has been valued by the plaintiff for purposes of court-fee at a certain amount, but the Commissioner has reported that the amount is too small, solely on the ground that the temple buildings ought to be valued at their cost of construction *less*, presumably, something for depreciation. It is contended by the plaintiff that the temple

(1) (1893) I.L.R., 16 Mad., 369 (P.C.).
(2) (1913) I.L.R., 40 Calc., 555 (P.C.) at 564.
(3) (1898) 25 Calc., 194 (P.C.) at 202.

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buildings as such are not assessable at all for purposes of court-fee. The section of the Court-Fees Act alleged to be applicable is section 7 (V) (*c*) which provides that, where the subject-matter is a house or garden, it has to be valued "according to the market-value of the house or garden." It is first argued, and with considerable force, that the temple is not a house at all. I do not think it necessary to go into the question of what is and what is not a "house" or whether any part of this temple could be properly included within the proper definition of the word "house." I think it better to leave that question over until it arises definitely for decision, for we have not in this case the full facts as to the exact nature of the buildings in question and the use to which they are or can be put. But it is further argued that this temple, even if it can be considered as a house, has no market-value. "Market-value" has been defined in England as meaning what it would fetch in the market under the state of things existing at the time, and that definition is to be found repeated with great clearness in *Manmatha Nath Mitter* v. *The Secretary of State for India in Council*(1). That was a case under the Land Acquisition Act, and what was acquired was a road and compensation was claimed in respect of that road based on the value of the land on which the road stood when it ceased to be a road for agricultural or building purposes or the like; and their Lordships of the Privy Council made it quite clear that, apart from the fact that the Land Acquisition Act itself in terms prohibited such considerations, the principle of compensation based on the "market-value," which is the wording in that Act as well as in the Court-Fees Act, is that things have to be taken as they stand at the time of acquisition.

(1) (1898) I.L.R., 25 Calc., 194 (P.C.).

Now, this temple is an ancient temple and its history dates at least thousand years back, and there seems to be no doubt that the temple is devoted absolutely and in perpetuity to religious purposes. On those facts one has to enquire whether there is a market for such a thing. In my judgment, such enquiry results in the conclusion that there is no market, and that it can have no market-value at all. The principle applied by the Commissioner, when he has taken as the market-value what may be called the hypothetical construction value, is, in my judgment, entirely wrong. He has got to find the market-value of the thing as a temple at the time. It is not suggested before us on behalf of the respondent or on behalf of the Crown, who attended as *amicus curiæ*, that in fact there is any market for such things. I think also that it would be conclusive against such a contention, that the property is inalienable and was devoted in perpetuity to religious purposes.

On these grounds, I come to the conclusion, that there is no market value at all for this temple as such. That being so, it does not come under that section of the Act, and has to be dealt with as a matter "not otherwise provided for"—under schedule II (17). Apparently there is in this case some market-value for some part of the property claimed, and in respect of that the plaintiff has put on a valuation. There is no appeal in respect of that valuation by him, and therefore that valuation stands and must be taken as correct.

Taking this view of the case it is unnecessary to consider the question specifically referred to us by the referring Bench, namely, whether, on a claim by a trustee for possession of trust properties for the purpose of proper administration of that trust, he will have to pay court-fee on the value of the trust property, or whether in that case he is only bound to pay the nominal

amount of Rs. 10 or Rs. 15. This question had been referred on a former occasion to a Full Bench of this Court, but it was not decided then, and, owing to the facts of this case, it shares the same fate now.

The answer to the question referred to the Court is, the court-fees legally payable are the fees already paid.

OLDFIELD, J.—I entirely agree. OLDFIELD, J.

RAMESAM, J.—I agree. RAMESAM, J.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Devadoss.

KONDAL RAYAL REDDIAR (PLAINTIFF), APPELLANT, 1923, March 2.

v.

RANGANAYAKI AMMAL ALIAS AMIRTHAMMAL (DEFENDANT), RESPONDENT.*

Suit for restitution of conjugal rights by husband against his wife—Defence of cruelty—Cruelty, meaning of—Physical violence—Conduct of husband—His persistent conduct, such as to undermine health of wife—English decisions, how far applicable—Canon law—Common law of England—Rule of justice, equity and good conscience—Jurisdiction of Indian Courts to entertain suits for restitution of conjugal rights—Civil Procedure Code, O XXI, r. 32.

Courts in India have jurisdiction to entertain suits for restitution of conjugal rights and to grant relief when the parties are Hindus or Muhammadans.

Surjyamoni Dasi v. *Kali Kanta Das*, (1901) I.L.R., 28 Calc., 37, followed.

Under the Indian Law, cruelty in the legal sense need not necessarily be physical violence. A course of conduct which, if persisted in, would undermine the health of the wife, is a sufficient justification for refusing to the husband a decree for restitution of conjugal rights.

* Appeal No. 353 of 1920.

Thompson v. *Thompson*, (1912) I.L.R., 39 Calc., 395; *Armour* v. *Armour*, (1904) 1 All. L.J. 318; *Kelly* v. *Kelly*, (1870) L.R., 2 P & D 59 and *Bethune* v. *Bethune*, [1891] P. 205, relied on.

The matrimonial law of England is the canon law of the Church, and the matrimonial causes were formerly heard and determined by the Ecclesiastical Courts and it is only under the Matrimonial Causes Act (21 & 22 Vic., ch. 85) that the King's Courts were given jurisdiction to entertain matrimonial causes and by section 22 they were directed to determine them as far as possible on the principles of the Ecclesiastical Law and the precedents of the Ecclesiastical Courts. The decisions of the English Courts, being based on the Canon law and not on the Common law of England, are not necessarily applicable to India as containing rules of justice, equity and good conscience. Hence, even if a course of conduct does not amount to legal cruelty under the prevailing decision of the House of Lords in *Russel* v. *Russel*, [1897] A.C., 395, the Indian Courts need not follow that decision but may follow the view of the minority in that case and the dicta in later English cases.

APPEAL against the decree of J. C. STODART, in Original Suit No. 25 of 1919, on the file of the District Court of South Arcot.

The material facts appear from the Judgment.

T. M. Krishnaswami Ayyar with *T. M. Ramaswami Ayyar* for appellant.

Dr. S. Swaminadhan for respondent.

JUDGMENT.

DEVADOSS, J. DEVADOSS, J.—This is an appeal by the husband against the decree of the District Judge of South Arcot, dismissing his suit for restitution of conjugal rights against the first defendant, his wife, on the ground that he was guilty of legal cruelty. The plaintiff's case is that he married the first defendant about 18 years ago, that they lived together as husband and wife till she left him, that he had to marry a second wife as the first defendant had no issue, that the first defendant left him about 19 months before he filed his plaint at the instigation of

the second defendant, her father, and the other defendants have induced her to stay away from the husband and that he was entitled to restitution of conjugal rights against the first defendant. The first defendant pleaded that the husband was guilty of cruelty, that she was ill-treated by him, that he falsely charged her with an attempt to poison him and that when she went to the husband's house at the request of her father, he pushed her out by the neck and threatened to slipper her if she ever crossed his threshold. The learned District Judge has believed the evidence of the defendants and their witnesses and refused the plaintiff any relief.

Mr. T. M. Krishnaswami Ayyar who appears for the appellant contests the findings of fact and argues that on the facts found no legal cruelty has been established. The admitted facts are that the first defendant was married to the plaintiff when she was quite young, that they lived together as man and wife for about ten years, that as she had no issue the plaintiff married a second wife about 1913, that the first defendant continued in her husband's house for about five years after the second marriage and has left the husband's protection. She filed a petition for maintenance on 14th November 1918 before the Subdivisional Magistrate of Tindivanam and he passed an order in her favour on 22nd February 1919 and the revision petition by the plaintiff against that order was dismissed by the High Court on 28th July 1919. He filed this suit on 7th April 1919.

The plaintiff as his first witness swears that he and the first defendant lived as man and wife till she left him without any ostensible reason. His suggestion for her leaving him is that her father applied to him for a loan of Rs. 1,000 for the purpose of prosecuting a case against one Kamalatchi Ammal and he refused to lend him money whereupon the father took the daughter

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away and refused to send her back. He denies the allegation that he suspected his wife of an attempt to poison him and denies the acts of cruelty. The plaintiff is a man in well-to-do circumstances and seems to be very influential in his own village. His evidence is supported by plaintiff's witness 3, his paternal aunt, a widow living in his family. The other witnesses on his side do not throw any light on the matters in dispute. On the other hand, the first defendant has been examined as defendant's first witness and she says that there were no marital relations between her and the plaintiff after he married his second wife, that he would not even speak to her, that he took away her jewels on some pretext, that she was made to do household work like a servant, that he abused her when she took some buttermilk to him to be taken with his food, that he did not drink the buttermilk but got up from his unfinished meal and said he would not drink from her hand even in the next birth, that he would not allow her to touch the child of the second wife, though the child was attached to her, that when he suffered from a slight ailment, he charged her with having put poison in his coffee, that he used very violent language to her, that he and his mother gave directions that she should not enter the kitchen which was the only room she had entered up to that time after the second marriage, and that she, unable to bear the cruel treatment, left the house, and went to Korkady to live with her father and mother and that the father after sometime brought her to her husband's house and when she entered the house he came from inside and necked her out. Her evidence is supported by that of her father as regards her being pushed out by the neck when he took her to the husband's house. Defendant's witness 4, the village munsif of the place against whom no serious motive has

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been alleged, says that he was sent for on one occasion by the plaintiff, that when he went to his house his mother and paternal aunt showed him a Karandagam (a small metallic box) and asked him to open it and he did so and it emitted a bad smell. He was told that the first defendant was keeping that medicine for poisoning her husband. He asked that the first defendant should be sent for and as she was unable to go to him she sent word that it was kept by her for stomach-ache and he was afterwards told that she proved the innocuousness of the medicine by taking it herself. The other witnesses support the evidence of the first defendant that the husband considered her to be a disgusting woman and said that he would have no relations with her.

The learned Judge after carefully examining all the evidence has come to the conclusion that her version of the case is entitled to better weight than that of the plaintiff. I have no hesitation in agreeing with him inasmuch as no arguments have been put forward on the side of the plaintiff which could in any way induce me to consider that the learned Judge has not correctly appreciated the evidence in the case.

The next question pressed by the appellant is that the acts of cruelty found are not sufficient to establish a good defence to the plaintiff's suit for restitution of conjugal rights. It is now settled that Courts in India have jurisdiction to entertain suits for restitution of conjugal rights and to grant relief when the parties are Hindus or Muhammadans; vide *Surjyamoni Dasi* v. *Kali Kanta Das*(1). But the difficult question is under what circumstances would a Court be justified in refusing to grant the relief asked for in such a case. In this case

(1) (1901) I.L.R., 28 Calc., 37.

the parties are Hindus. Mr. Mayne in his book on Hindu Law sums up the law thus :

"When the marriage is once completed, if either party refuses to live with the other, the case is no longer one for specific performance of contract but for restitution of conjugal rights." (Section 96.) "Nothing will justify her in leaving her home except such violence as renders it unsafe for her to continue there or such continued ill-usage as would be termed cruelty in any English matrimonial court." (Section 456).

Mr. Krishnaswami Ayyar strongly pressed on our attention the case of *Russell* v. *Russell*(1), and contended that a mere allegation of the commission of an offence would not amount to cruelty and that though his client hastily thought that the first defendent was capable of poisoning him, he repented of it and that inasmuch as he was anxious to live with her he entertained no fear of her poisoning him and therefore she was not entitled to live away from him. He also contended that the only act of actual cruelty in the popular sense was her being shoved out when she went to his house after leaving him for a time. In this connection, it must be remembered that the plaintiff does not admit having made an unfounded charge but denies having made it. He does not plead that he has forgiven his wife or that he was misled into thinking that she was capable of committing a heinous offence but totally denies having made any such charge. Therefore, there can be no repentence on his part and the way in which this case has been pressed shows that he is anxious to have a decree in his favour without any regard to the future welfare of his wife. In *Russell* v. *Russell*(1) the House of Lords held that "a false charge of having committed an unnatural criminal offence brought by a wife against her husband, although

(1) [1897] A.C., 395.

published to the world and persisted in after she did not believe in its truth, is not sufficient legal cruelty to entitle the husband to judicial separation." The case was decided by a majority of 5 Lords against 4. Before considering the English authorities it is to be borne in mind that the Matrimonial Law of England is the canon law of the church and matrimonial causes were heard and determined by Ecclesiastical Courts. According to the Canon Law strict monogamy is the rule. The Roman Church even now does not recognize divorce. The Anglican Church though it allows divorce is still leaning towards strict monogamy. It was only under the Matrimonial Causes Act, 20 and 21 Vict. Chap. 85, that the King's Courts were given jurisdiction to entertain matrimonial causes and by section 22 they were directed to determine them as far as possible on the principles of the Ecclesiastical Law. That jurisdiction is now exercised by the Probate Division of the High Court of Justice. The legislature did not alter the Canon Law except in a few matters and the Judges who administer the law are bound by the precedents which were established in the Ecclesiastical Courts. To import the Ecclesiastical Law of England wholesale into India is as injudicious as it is inequitable. In the Christian countries monogamy is the rule. No man or woman can marry a second time when the first marriage is subsisting. In England therefore if a wife or husband refuses to cohabit or to render to each other marital duties, the other party cannot have any relief except such as is granted by the Courts and that is the reason why Courts were strict in enforcing the marital duties and were jealous of the rights of the parties to the marriage and would not allow any violation of the marital tie, and compelled the recalcitrant party to submit to the embraces of the other, and forced them

to live as man and wife. In India the Hindu Law permits a man to have more than one wife at the same time, but among the higher castes, a woman can marry only once. When a man marries more than one wife and ill-treats one of his wives in such a way as to make it impossible for her to live with him not merely with any degree of comfort but without danger to her health the question for consideration is should the Court enforce the strict rule of English Ecclesiastical Law or should it consider whether the circumstances of each case would justify its using its power to compel the wife to live with her husband who hates and loathes her, and when by such residence her health is likely to be seriously impaired. The Courts in India are enjoined to decide according to justice, equity and good conscience in cases where no specific rule exists and they naturally look to the English decisions for guidance. The Common Law of England furnishes precedents which are in conformity with equity, justice and good conscience. But the Ecclesiastical Law of England is not the Common Law of England, and the former is applicable to a state of things which does not obtain in India and therefore great care should be exercised in importing wholesale into India the strict principles of the Ecclesiastical Law of England which are embodied in the decisions of the English Courts. Even in England the tendency of the later cases is to relax the extreme stringency of the rules of Ecclesiastical Law as regards marital rights and duties in order to give relief where a Court of Equity would consider such relief to be proper.

With these preliminary remarks I will examine the cases relied upon by the appellant. In *Russell* v. *Russell*(1), the wife brought a suit for restitution of

(1) [1897] A. C., 395.

conjugal rights and the husband resisted it on the ground of cruelty by the wife. The cruelty proved was "that from that time, after the trial, although she had heard the verdict in favour of her husband at the close of the trial, that she thenceforth wrote letters, made statements, pursued her husband, practically insisted on the same charge not by one single act or by any single letter but by a continuance and persistence in conduct of that sort."

The charge was that he was guilty of an unnatural offence. The case was tried before POLLOCK, B with a jury. He pronounced a decree for judicial separation. The Court of Appeal held that the husband was not entitled to a decree for judicial separation. Two of the learned Lords Justices, LOPES and LINDLEY, define cruelty thus:

"There must be danger to life, limb or health bodily or mental, or reasonable apprehension of it."

The leading judgment in that case was delivered by Lord HERSCHELL who held that the wife's persistence in making a false charge against her husband knowing the charge to be false, however culpable such conduct was, did not amount to legal cruelty. He followed the dictum of Lord STOWELL in *Evans* v. *Evans*(1), and held that the plaintiff's act did not amount to legal cruelty. Lord STOWELL in the course of the judgment in *Evans and Evans*(1), observes:

"I take it the rule cited by Dr. Bever from Clarke and the other books of practice, is a good general outline of the Canon Law, the Law of this Country, upon this subject. In the older cases of this sort which I have had an opportunity of looking into, I have observed that the danger of life, limb or health is usually inserted as the ground upon which the Court has proceeded to a separation. This doctrine has been repeatedly applied by the Court in the cases that have been cited. The

(1) (1790) 1. Hagg. Cons., 35 at 40.

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Court has never been driven off this ground. It has been always jealous of the inconvenience of departing from it and I have heard no one case cited in which the Court granted a divorce without proof given of a reasonable apprehension of bodily hurt."

After an examination of a number of cases Lord HERSCHELL observes at page 455 :

"I think the law of restitution of conjugal rights as administered in the courts did sometimes lead to results which I can only call barbarous. I need seek no better illustration of this than the case of *Holmes* v. *Holmes*(1) decided in 1755 which is relied on for the proposition that the Courts can only refuse restitution on grounds which would justify a divorce. Conduct of a most revolting character on the part of the husband was held to afford no answer to his claim for restitution of conjugal rights. Indeed, if the broadest definition of cruelty which has been contended for in this case were accepted, it would still be to my mind unsatisfactory that a husband who, though stopping short of cruelty in that sense, had by insult and outrage driven his wife to leave him, should, without repentence for the past or any assurance of amendment for the future, be able to invoke the assistance of the Court and call for the strong arm of the law to force his wife under pain of imprisonment to resume cohabitation. One would think that the Court may well refuse to afford its assistance to one who acted thus. And notwithstanding the decision to which I have referred there are not wanting dicta of eminent Judges, and notably, of Lord STOWELL, that something short of legal cruelty might bar a suit for restitution. However that may be, the matter is of less importance than it formerly was, as the legislature has interposed ; and even if the Court is still bound to make a decree for restitution, it is no longer bound to enforce it as before."

Lord DAVEY who agreed with Lord HERSCHELL was obliged to confess :

"My only duty is to say whether the appellant's contention is conformable to the principles on which the Ecclesiastical Courts formerly acted and gave relief. I am constrained to say that in my opinion it is not."

Considering the rigour of the Ecclesiastical Law the legislature interposed and made it optional with the

(1) (1755) 2 Lee, 113.

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Court to enforce the decree for restituation of conjugal rights by imprisonment. Order XXI, rule 32 of the Civil Procedure Code, prescribes the mode in which a party could be compelled to obey a decree for restitution of conjugal rights; but I am not aware that the Court could refuse the execution of a decree unless it be that the health of the party against whom the decree is sought to be executed, would suffer by such restitution. The latitude given to the English Courts has only been recently given to the Indian Courts by Order 21, rule 33, Civil Procedure Code, as regards the execution of decrees in such cases. Lord HALSBURY who differed from the majority says at page 420.

"In the view the Ecclesiastical Courts took of the sanctity and perpetual obligation of the rights between spouses, it is intelligible enough that they should have sternly enforced the duty of continued cohabitation except in such cases as, to use the phrase continually recurring, when the facts show an absolute impossibility that the duties of married life can be discharged."

With regard to the conduct of the plaintiff, he observes :

"For my own part I believe an accusation of this kind is an incurable injury to the person against whom it is directed."

Lord HOBHOUSE who was also in the minority in considering what would be "cruelty" observes as follows :

"That violence and bodily danger are far the most common forms of cruelty accounts for the frequent repetition of the formulæ relating to such cases. But we find not only judicial recognition that there may be other forms of cruelty but judicial dicta and decisions taking a wider range and quite irreconcilable with the rigid line by which it is now sought to confine the jurisdiction of the court."

And after an examination of the cases on the point he says :

"The conclusion I draw from the authorities is that there is no rigid rule to exclude from the consideration of Judge or jury a case where acts cruel in their nature are so grave as to

destroy the foundations of conjugal life. I do not think that any rule can be laid down less wide than that of Lord STOWELL, "that the causes must be grave and weighty and such as to show an absolute impossibility (meaning of course a moral impossibility) that the duties of married life can be discharged." The fact that violence and personal danger are far the most common ground alleged for separation has led to repeated statements of the doctrine of danger in terms applicable and appropriate to those cases. But they are only one class of the broader category indicated by Lord STOWELL."

In *Bray* v. *Bray*(1), Sir JOHN NICHOLL observes with regard to the conduct of the husband who accused his wife of the most abominable intercourse that can possibly be conceived, no less than incest with one of her nearest relations,

"It is not, I think, possible to conceive cruelty of a more grievous character (except perhaps great personal violence) than the accusation made by this husband against his wife."

Cruelty in the legal sense need not necessarily be physical cruelty. A course of conduct which, if persisted in, would undermine the health of the wife, is a sufficient justification for refusing to the husband a decree for restitution of conjugal rights. In *Kelly* v. *Kelly* (2) it was held

"if force, whether physical or moral is systematically exerted to compel the submission of a wife to such a degree and during such a length of time as to injure her health and render a serious malady imminent, although there be no actual physical violence such as would justify a decree it is legal cruelty and entitles her to a judicial separation."

In that case, the husband adopted a deliberate system of conduct towards his wife with the view of bending her to his authority. No physical violence was found against the husband but only a course of conduct which was a kind of tyranny to the wife. CHANNEL, B., in the course of the judgment observes:

"It would be difficult to frame a definition of legal cruelty which should be applicable to all the cases which may arise.

(1) (1828) 1 Hagg. Eccl. cases, 163. (2) (1870) L.R., 2 P. and D., 59.

The object of the matrimonial court in exercising its jurisdiction in decreeing judicial separation for cruelty is to free the injured consort from a cohabitation which has been rendered, or there is imminent reason to believe will be rendered, unsafe by the ill-usage of the party complained of. It is obvious that the modes by which one of two married persons may make the life or health of the other insecure are infinitely various, but as often as perverse ingenuity may invent a new manner of producing the result, the Court must supply the remedy by separating the parties."

In *Bethune* v. *Bethune*(1) the President of the Probate Division, Sir JAMES HANNEN, gave a decree for divorce on the ground of adultery coupled with cruelty, the cruelty consisting of a long course of systematic neglect and insult. The law is summed up in Halsbury's Laws of England, Volume 16, section 976:

"A course of conduct calculated to break the spirit of the sufferer (more usually the wife) continued till health breaks down or is likely to break down under the strain, sometimes termed 'constructive cruelty', is also a ground for relief."

And reliance is placed for the proposition upon a number of cases. In India there are cases in which it was held that it was not necessary to prove physical violence in order to deny the husband a decree for restitution of conjugal rights, vide *Thompson* v. *Thompson*(2) and *Armour* v. *Armour*(3).

The facts proved in this case are sufficient in my opinion to deny the plaintiff the relief claimed by him. When a husband, who is guilty of a course of conduct which would be regarded as cruel to the wife, comes before a Court seeking its aid to compel the wife to submit to his embraces, it is the duty of the Court to see whether the health of the wife is likely to suffer by forcing her against her will to live with him. The observations of Lord BROUGHAM in *Paterson* v. *Paterson* (4) seem to be peculiarly applicable to the present case.

(1) [1891] P. 205. (2) (1912) I.L.R., 39 Calc., 395.
(3) (1904) 1 All. L.J., 318. (4) (1850) 3 H.L.C., 308 at p. 328.

"If the husband, without any violence or threat of violence to the wife—without any maltreatment endangering life or health, or leading to an apprehension of danger to life or health—were to exercise mere tyranny, to utter constant insults, vituperation, scornful language, charges of gross offences (utterly groundless) charges of this kind made before her family, her children, her relations, her friends, her servants, insulting her in the face of the world, and of her own domestics, calling upon these servants to join in those insults, and to treat her with contumely and with scorn—if such a case were to be made out or even short of such a case, viz., injurious treatment which would make the married state impossible to be endured, rendering life itself almost unbearable, then I think the probability is very high that the consistory Courts of this country would so far relax the rigour of the negative rule, at present somewhat vague, as to extend the remedy by a divorce *mensa et thoro* to a case such as I have put."

This observation was made before the Matrimonial Causes Act gave a statutory relief in hard cases. The facts found in this case are—

1. The husband charged the wife with the attempted murder of her husband by poison.

2. He insulted her on more than one occasion and called her by the most vile epithet.

3. He treated her with loathing and disgust and abused her when she took some buttermilk to him, and he expressed his disgust by getting up from his unfinished meal.

4. He sent word through a servant that if she went back to him she would be dragged out by a Pariah and slippered.

5. He threatened her with violence by saying that he would dash her to pieces with a knife and allowed the second wife to abuse her and to say that she (meaning the first defendant) deserved to be made to stand in the road and be spat on by passers-by, that it was enough that she had not wrung its (child's) neck and thrown it into the well and that if she touched the child again she would be beaten with broom-stick.

6. He used personal violence by pushing her by the neck. The mother-in-law and the paternal aunt who treated her with kindness turned against her after the charge of an attempted murder was ventilated by the husband. I think these circumstances are sufficient to make out cruelty under the English Law. But in India where the conditions are different it is not necesssary to implicitly follow the precedents of the Ecclesiastical courts in considering what is equitable in the circumstances. The Indian courts are courts of justice, equity and good conscience and though a decision of the House of Lords is to be regarded with the utmost respect, yet it is not binding upon the Indian courts and where the decision rests not upon the principles of the common law but upon the peculiar principles of the Ecclesiastical Law of England, the Courts in India are not bound to follow the decision; for the simple reason that the Ecclesiastical Law of England is not the law of this country and monogamy, so far as the husband is concerned, is not the rule of Hindu Law. The Hindu Law does not recognize any divorce. It permits a husband to have as many wives as he likes. The husband in this case had no marital relations with his wife — the first defendant — for a period of more than 7 or 8 years and it would be cruel now to force the wife to go back to the husband against her will.

Mr. Krishnaswami Ayyar urged that the plaintiff was anxious to have his wife back, that he had repented of his past conduct and that he is willing to treat her as a wife should be. He also urged that in country places personal violence towards the wife by the husband is excusable and that we should not apply to the parties the principles which would govern a case where the parties are educated and enlightened. I am not prepared to believe that domestic relations in the mufassal

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and the country places are as described by Mr. Krishnaswami Ayyar. No doubt, sometimes, the Hindu society overlooks personal violence to the wife by the, husband but when a Court's intervention is asked for, the Court should not be guided by the public opinion in a country village, but by what is just and equitable in the circumstances In this case the plaintiff is a man of influence in his own village. There is no public opinion at all in that place. Is there safety or security for the wife, if the husband chooses to charge her again with an attempt to poison him and hands her over to the police on his becoming slightly ill for which illness he could not find any reason ? There is no guarantee that the suspicion which he once entertained will not be revived again if he or his second wife or his second wife's child should fall ill. If he was really anxious to have his wife back, he could very well have gone to her and offered to treat her properly. When the maintenance proceedings were before the subdivisional Magistrate, he suggested that the parties should settle the matter out of Court and the plaintiff in order to make out that he was willing to settle the matter sent his bandyman to fetch his wife and she rightly refused to go with him as she thought that the plaintiff was attempting to dupe her. If he was in earnest he could have sent his paternal aunt or any of his female relations to fetch her. I am not prepared to put any faith in the protestations of Mr. Krishnaswami Ayyar on behalf of his client. A Hindu wife looks upon her husband as her lord and master and she has no happiness outside her husband's house. Knowing the conditions in India as we do, I am not prepared to believe that a Hindu wife would stay away at the instance of her father or other relations when there was no sufficient reason for her conduct, for she considers her husband's home as her proper place and she would not leave it

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without the gravest reason as she has nothing to look forward to here or hereafter. There is a civil suit pending in which the wife seeks to recover her jewels from the husband. I am satisfied that the plaintiff has brought this suit only to satisfy his vanity and to defeat the order made in favour of the wife for maintenance and this suit is not a bona fide attempt to get back his wife to continue the marital relations. I consider that the facts establish sufficient cruelty on the part of the husband which would justify the Court in refusing the plaintiff the relief he seeks. The case might perhaps be different if the Court is asked to dissolve the marriage; but in a case of restitution of conjugal rights, the courts need not consider what would be sufficient to grant a divorce according to the Matrimonial Law of England. On the other hand before passing a decree in favour of the husband the Court should be satisfied that by giving its aid to him it does not thereby endanger the life, limb, liberty or the health of the wife. If there is danger to any of these, the Court would be amply justified in refusing to give a decree for restitution of conjugal rights.

The learned judge has decreed separate residence to the wife. There is no counter-claim by the defendant to the plaintiff's suit and I do not see how the court could grant a decree for separate residence when there is no proper claim for it. That portion of the decree of the lower Court should be expunged.

In the result the appeal fails and is dismissed with costs.

PHILLIPS, J.—I agree.

PHILLIPS, J.

K.R.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, and Mr. Justice Odgers.

1923, March, 15.

THE PRESIDENT OF THE DISTRICT BOARD, SOUTH KANARA (DEFENDANT), APPELLANT IN SECOND APPEAL AND PETITIONER IN CIVIL REVISION PETITION,

v.

GOPALAKRISHNA BHATTA (PLAINTIFF), RESPONDENT IN BOTH.*

Provincial Small Cause Courts Act (IX of 1887), Sch. II, cls. 13 and 19—Suit for compensation by toll-gate contractor against a District Board President, suit of a Small Cause nature—Section 6 of Tolls Act (XXI of 1901).

A suit for damages by a toll-gate contractor against the President of a District Board for the latter's illegal obstruction to the collection of tolls is a suit of a Small Cause nature and the President is not an officer of the Government within clauses 1 and 3 of schudule II of the Provincial Small Cause Court Act (IX of 1887). Nor is the jurisdiction of the Small Cause Court to try such a suit ousted either by clause 19 of that schedule or by section 6 of the Tolls Act (XXI of 1901).

SECOND APPEAL against the decree of A. NARAYANAN NAMBIYAR, District Judge of South Kanara, in Appeal Suit No. 50 of 1920, preferred against the decree of K. RARU NAYAR, District Munsif of Kasaragod, South Kanara, in Original Suit No. 652 of 1918 and petition under section 115 of Act V of 1908 praying the High Court to revise the decree of the District Court of South Kanara in Appeal Suit No. 50 of 1920 preferred against the decree of the Court of the District Munsif of Kasaragod, in Original Suit No. 652 of 1918.

The facts are given in the judgment.

Advocate-General (C. Madhavan Nayar) for appellant.

* Second Appeal No. 1 of 1921 and Civil Revision Petition No. 2 of 1921.

B. Sitarama Rao (with *R. Kesava Ayyangar* and *K. P. Sarvothama Rao*) for respondents.

JUDGMENT.—Second Appeal No. 1 of 1921.

SCHWABE, C.J.—A preliminary point is taken in this second appeal under section 102 of the Civil Procedure Code on the ground that this was a suit which could be brought in the Provincial Small Cause Court being for an amount under Rs. 500. The suit was rather a curious one. It was an action by a person who had bought the right to collect tolls on certain roads from the District Board. He had to comply according to his contract with the orders given by the President of the District Board. A large quantity of fodder being required for army purposes in this district, the Forest officers hired carts and sent them along the road on which the toll bar in question was. The respondent tried to collect tolls on these carts and he received an order from the appellant, President of the District Board, forbidding him to collect tolls, he basing his prohibition on his interpretation of the Army Act, under which he decided that no toll was payable in respect of carts carrying supplies for the Army. The respondent complied with the order which the appellant had issued and in due course brought a suit for damages claiming that this order forbidding him to collect these tolls was illegal and alleging that he had suffered damages by reason of that order.

The District Munsif and on appeal the Subordinate Judge, so found, and awarded him damages for Rs. 214. No second appeal lies against that decision, the amount being under Rs. 500 unless this is one of the suits set out in the second schedule to the Provincial Small Cause Courts Act IX of 1887. The article of that schedule relied upon is article 19

"A suit for declaratory decree, not being a suit instituted under section 283 of the Code of Civil Procedure."

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SCHWABE, C.J.

I agree that if the case is really a case for declaration the Court would be entitled to hold that the Small Cause Court's jurisdiction was excluded. If the case is really a case for damages as in our judgment this was, the Small Cause Court would have jurisdiction though in arriving at its decision, it would have to come to a conclusion as to whether this prohibition was rightly or wrongly imposed. The other articles relied upon are articles 1 and 3 which except from the cognisance of a Small Cause Court, suits concerning acts or orders purporting to be done by the Governor-General in Council or by a local Government or by a member of the Council and suits concerning acts or orders purporting to be done by any other officer of the Government in his official capacity. If the President of the District Board is an officer of the Government within the meaning of these articles, this suit would be excepted. But in our judgment he is not. Local Boards and Corporations are what may be called quasi-governing bodies, but by the very scheme of the Acts under which they are created they are not servants of the Government. Their representatives in some cases are nominated but generally elected by the people and they have their official capacity as such and not as officials of the Government. It is true that they are under Government in the sense that under the statute they have to account to the Government, and are under certain disciplinary powers of the Government. The Government has a duty cast upon it to see that these ministerial bodies carry out their functions lawfully. But in our judgment none of the officials of these municipalities and District Boards are officers of the Government coming within articles 1 and 3.

It follows that this preliminary point succeeds and that this Second Appeal does not lie and must be dismissed with costs.

C.R.P. No. 2 of 1921.

PRESIDENT OF THE DISTRICT BOARD, SOUTH KANARA v. GOPALA KRISHNA BHATTA.

SCHWABE, C.J.

SCHWABE, C.J.—This Civil Revision is on the same matter just disposed of (Second Appeal No. 1 of 1921). It is suggested that the Court that heard the case had no jurisdiction by reason of section 6 of the Tolls Act XXI of 1901. By that section provisions are made for compensation to certain persons who sustain loss by reason of that Act. It is argued that loss had been sustained by the present respondent by reason of that Act. It is not at all so. Even if it were so, that section does not in my judgment exclude the jurisdiction of the Small Cause Court to hear cases such as this.

It is further suggested that this action did not lie because it was against the President and not against the District Board itself. That is not a question, as I understand it, going to the jurisdiction, and I see no ground for interfering in this case on revision.

This Civil Revision Petition will be dismissed. There will be no costs.

ODGERS, J.—I agree.

ODGERS, J.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Odgers.

DHARMARAJA (2ND DEFENDANT), APPELLANT,

v.

PETHU RAJA AND THREE OTHERS (PLAINTIFF AND DEFENDANTS 1, 6 AND 7), RESPONDENTS.*

1923 March 16

Practice—Appeal—Withdrawal of suit in appellate Court as against appellant alone—Withdrawal in appeal discretionary with Court—O. XXIII, r. 1, Civil Procedure Code.

There is no provision of law allowing a respondent in an appeal to withdraw as of right his suit as against the appellant.

* Second Appeal No. 553 of 1921.

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It is discretionary with the appellate court to allow such a withdrawal and a Court of Appeal cannot allow a respondent to withdraw his suit as against the appellant alone when the result of such allowance will be to prejudice the appellant and other respondents who have not appealed; the proper course in such a case is to hear the appeal on the merits.

SECOND APPEAL against the decree of P. S. SITARAMA AYYAR, Additional Subordinate Judge of Rāmnād at Madura in Appeal Suit No. 29 of 1919 preferred against the decree of A. SESHAGIRI RAO, Additional District Munsif of Srivilliputtur, in Original Suit No. 257 of 1917.

The facts are given in the judgment.

T.R. Venkatarama Sastri (with *A. Swaminatha Ayyar*) for appellant.

Government Pleader (*C. V. Ananthakrishna Ayyar*) (with *A. S. Visvanatha Ayyar*) for respondents.

The JUDGMENT of the Court was delivered by

AYLING, J.

AYLING, J.—This dispute which has given rise to the present litigation is in connexion with a channel which is claimed by the appellants to be a poramboke channel feeding the Karisalkulam tank which irrigates their lands, but which the respondents, who were plaintiffs in the first Court, claim to be a portion of their patta lands and to have no connexion at all with Karisalkulam tank. The suits were brought to establish the rights of the plaintiffs in the channel and to prevent interference by Government, who are impleaded under the designation of the Secretary of State as the first defendant as well as by the other defendants, who are pattadars holding lands irrigated by the Karisalkulam tank. In the first Court, the plaintiffs were successful and were granted the reliefs prayed for by them. Government did not appeal, holding, as is now explained by the learned Government Pleader, that their interests were not sufficiently involved in the matter to make it worth their while to

contest the decrees of the first Court in appeal. The defendants however did appeal. When the appeals came on for hearing, the plaintiffs-respondents claimed that they were entitled as of right to withdraw their suits as against the present defendants-appellants, and to content themselves with the decrees against Government, who have not appealed. The learned Subordinate Judge accepted this plea and allowed the suits to be withdrawn and dismissed as against the present defendants-appellants and the decrees against the Secretary of State were confirmed.

DHARMARAJA v. PETHU RAJA.

AYLING, J.

It is now contended on behalf of the appellants that the Subordinate Judge was wrong and that the plaintiffs could not claim as of right to be allowed to withdraw their suits at the stage which the litigation had reached, that they were prejudiced by the decrees of the first Court, even supposing the latter to be confined to a decree against Government, and that their appeals should have been heard and decided on their merits. We think these contentions are justified. The provision of law relied on by the plaintiffs-respondents is Order XXIII, rule (1) of the Code of Civil Procedure, which provides for the withdrawal of a suit by a plaintiff and abandonment of part of his claim. This the rule gives as a matter of right and it is not disputed that a similar privilege is inherent in an appellant as regards his appeal; but we have not been referred to any ruling or provision of law which would extend this privilege to a plaintiff-respondent, nor can we see any reason why when the litigation has reached the stage of an appeal the respondent should be allowed the right to defeat the appeal and prevent its being heard by the simple process of withdrawing his suit as against the appellant. It may of course be argued that, although this is not a right of the appellant, nevertheless it is in the discretion

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of the Court to allow him to do so, but that will depend on considerations which, we think, have not been appreciated by the Lower Appellate Court. The Lower Appellate Court has held that the appellants in these cases have no right of appeal because they are not prejudicially affected by the decrees in so far as they are decrees against Government. We do not think this is so. The defendants represented themselves as holders of lands under a Government tank and the irrigation of their lands as depending on the supply of water allowed to them by Government. The effect of the decrees is to declare that a certain channel claimed by them as a supply channel to the Government tank is not such a supply channel and to prevent Government from using it as such and exercising its paramount right of distributing the water-supply therefrom. We think that they clearly are materially prejudiced by the decrees against Government and that they should have a right of appeal against them. This is in accordance with the decision in *Sivasailam Iyer* v. *Ramakrishna Iyer*(1). It has been argued on behalf of the respondents that this is not so, because the appellant's rights have been negatived by the decision of this Court in another litigation terminating in Second Appeal No. 1198 of 1913. To what extent the decision in that appeal is conclusive of the rights of the parties in the present cases is a matter for argument: but, it is a question which must be decided in the course of the hearing of these appeals. We are most anxious to express no opinion on a point which would have to be determined by the Lower Appellate Court, but it is argued on behalf of the appellants that the points for decision in that case are not identical with those which may arise for consideration in these cases and in effect that the

(1) (1914) M.W.N., 788.

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rights claimed by the plaintiffs in that case were more extensive than those which are prejudicially affected by the decrees in these cases. This is a point which we must leave to the Lower Appellate Court to determine.

The decrees of the Lower Appellate Court must therefore be set aside and the appeals remanded to the Lower Appellate Court for rehearing and disposal on their merits. The plaintiffs—respondents will pay the defendants—appellants their costs in this Court. The costs of Government in this Court will be provided for in the final decrees. The Court-fee paid on the present appeals will be refunded to the appellants.

N. R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Venkatasubba Rao.

1923, March 21.

RAMASAMI AIYAR AND OTHERS (DEFENDANTS), APPELLANTS,

v.

A. S. VENKATARAMA AYYAR (PLAINTIFF), RESPONDENT.*

Hindu Law—Coparcener—Alienation of an item of joint family property without necessity—Suit by surviving coparcener against alienee—Right of alienee to enforce partition in such suit—Whether a separate suit by alienee necessary—Property sold less in value than share of alienor in all the family property—Right of alienee to be allotted such item from his alienor's share—Equity—Right of other members.

Where a member of a joint Hindu family sued to recover a certain item of family property alienated by another member on the ground that the alienation was not binding on him, and it appeared that the plaintiff was the only surviving coparcener and that the value of the property alienated was less than that

* Appeal Suit No. 14 of 1922.

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of the alienor's share in the entire family properties at the time of the alienation.

Held, that the alienee need not be directed to institute a separate suit to work out his rights by a partition, but was entitled in the coparcener's suit as a defendant to get a decree for partition, and claim to be allotted the item purchased by him in respect of his vendor's share, if that was consistent with the rights of the other coparceners; and that, if the value of the item did not exceed the value of the alienor's share in the entire family property at the time of the alienation, the alienee was entitled to retain the entire property sold to him.

Ramkishore Kedarnath v. *Jainarayan Ramrachhpal* (1913) I.L.R., 40 Calc., 966 (P.C.) relied on.

APPEAL against the decree of K. S. GOPALARATNAM AYYAR, the Additional Subordinate Judge of Tanjore, in Original Suit No. 11 of 1920 in the file of the said Court (Original Suit No. 47 of 1918 on the file of the Sub-Court of Kumbakōnam).

The plaintiff was the son of one Sambasiva Ayyar who died in May 1901 in the lifetime of his adoptive father Sivarama Ayyar who died in February 1903. The plaintiff sued to set aside a sale-deed executed by his paternal grandfather in favour of the first defendant on 29th June 1901; he impeached the sale on the ground that it was not binding on the family as it was not supported by necessity, and prayed for recovery of the entire property, or, if the sale was held to be valid to the extent of the alienor's share, for partition and recovery of his half share in the property sold to the first defendant. It appeared that the plaintiff's father had died at the time of the alienation, but that the plaintiff had been born in 1898 before the alienation. The first defendant and the other defendants who were his sons, contended, inter alia, that the sale was binding on the plaintiff, and that the property alienated represented in value less than the half share in the entire family property to which the alienor was entitled and

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that consequently the plaintiff's suit should be dismissed. The Subordinate Judge held that the sale was valid to the extent of the alienor's share, that the suit for partial partition at the instance of a coparcener was maintainable, and that the plaintiff was entitled to a decree for partition and delivery of his half share in the property sold with mesne profits from the date of sale, and he accordingly passed a preliminary decree for partition. Against this decree the defendants preferred this appeal.

A. Krishnaswami Ayyar for the appellants.

K. Bashyam Ayyangar for respondents.

JUDGMENT.

PHILLIPS, J. PHILLIPS, J.—In this case the plaintiff is the son of one Sambasiva Ayyar, the adopted son of one Sivarama Ayyar, and he sues to recover possession of certain properties, sold by his grandfather Sivarama Ayyar on the 29th of June 1901 to the first defendant who is the father of defendants 2 to 4 on the ground that the sale was not effected for any necessity and is not binding on him. The plaintiff's father and grandfather are now both dead and, therefore the plaintiff claims to recover the whole of the suit properties.

The Subordinate Judge has found that there was no necessity for the sale and that it is, therefore, not binding on the plaintiff's share and he has given a decree to the plaintiff for a division of the property into two parts and for recovery of possession by the plaintiff of one half with mesne profits from the date of sale. The defendants now appeal and state that the decree is wrong and that the plaintiff's suit should have been dismissed on the ground that the first defendant acquired a right by the sale in his alienor's share of the family property and that he is in equity entitled to recover property not greater in value than his alienor's

share, and that he is also entitled to ask for partition of the family property, and to have the specific item assigned to his alienor's share, if that is consistent with the rights of other coparceners.

It is not disputed that an alienee from an undivided coparcener has a right to sue for partition of the family property and to recover his alienor's share, in the case of a sale of an undivided share that share itself, and in the case of sale of a specific item of property an equitable right to have that property assigned, if possible, to his alienor's share. This principle was laid down in *Aiyyagari Venkata Ramayya* v *Aiyyagari Ramayya*(1) and was followed in *Chinnu Pillai* v. *Kalimuthu Chetti*(2) where it was further held that the share of the alienor which passes to the alienee is the share to which the former was entitled at the date of the alienation. This latter ruling disposes of the respondent's contention that the first defendant has lost all right to the property on the death of Sivarama Ayyar. It is thus quite clear on all the authorities that the first defendant is entitled to a partition of the family property and to have the plaint property assigned to Sivarama Ayyar's share if that can equitably be done, and can bring a suit for that purpose.

It is then argued for the respondent that relief cannot be given to the defendants in this suit and that they must be left to work out their rights in a subsequent suit, and reliance is placed on several cases cited beginning with *Deendyal Lal* v. *Jugdeep Narain Singh*(3). In that case it was held by the Privy Council that the purchaser of the right, title and interest of one co-sharer in joint ancestral estate at a sale in execution acquired merely the right to compel a partition as against the other co-sharers which the judgment-debtor possessed.

(1) (1902) I.L.R., 25 Mad., 610 (F.B.). (2) (1912) I.L.R., 35 Mad., 47 (F.B.).
(3) (1878) I.L.R., 3 Calc., 198 (P.C.).

In a subsequent case, *Hardi Narain Sahu* v. *Ruder Perkash Misser*(1), the same proposition was enunciated, but the Privy Council refused to interfere with the decree of the High Court ordering a partition and allotting a share to the purchaser, but observed that the decree ought to have been for the recovery of the whole property by the other coparcener with a declaration of the rights of the purchaser. In neither of these cases was the equity of the purchaser to stand in his vendor's shoes with which we are now concerned fully discussed. There have also been observations in several Madras cases that the right of the purchaser is only a right to obtain, by a suit for partition, the share to which his alienor was entitled, vide *Kota Balabadra Patro* v. *Khetra Doss*(2) to which one of us was a party; *Manjaya* v. *Shanmuga*(3) and *Maharaja of Bobbili* v. *Venkataramanjulu Naidu*(4) and also a very recent case *Subba Goundan* v. *Krishnamachari*(5). It is only in the last case, however, that the question really arose as to whether the purchaser was to be driven to a suit for partition or whether relief could be given to him when defending a suit by another coparcener. In this case the Privy Council ruling in *Ramkishore Kedarnath* v. *Jainarayan Ramrachhpal*(6) was interpreted as meaning that the Privy Council, while raising the point, expressed themselves unwilling to decide it. In *Ramkishore Kedarnath* v. *Jainarayan Ramrachhpal*(6) the suit was instituted by members of a Hindu joint family to set aside an alienation in favour of the first respondent who claimed to be adopted into the family and it was held that as between the father Kedarnath and the alienee Jainarayan

(1) (1884) I.L.R., 10 Calc., 626 (P.C.). (2) (1916) 31 M.L.J., 275.
(3) (1915) I.L.R., 38 Mad., 684. (4) (1916) I.L.R., 39 Mad., 265.
(5) (1922) I.L.R., 45 Mad., 449. (6) (1913) I.L.R., 40 Calc., 966 (P.C.).

"the latter may be entitled to insist that he stands in the shoes of the former as to the share which would come to the former upon a partition; and that the Court, if that position were established would itself at Jainarayan's instance, decree a partition as between the plaintiffs on the one hand and Kedarnath on the other. Their Lordships think that on the present pleadings it is open to Jainarayan to set up such a case, but express no opinion as to its validity either in law or fact."

That this pronouncement does relate to the competency of a Court to give a decree for partition in such a suit is, I think, clear from the succeeding passage, according to which the suit is remanded for trial,

"with a declaration that it is competent for the Court, in the event of the respondent Jainarayan failing in his other defences, to make the whole or any part of the relief granted to the plaintiffs conditional on their assenting to a partition so far as regards Kedarnath's interests in the estate, so as to give effect to any right to which the respondent may be entitled claiming through Kedarnath."

This latter statement seems to me to lay down quite clearly that the Court to which the suit was remanded was competent to order partition and to give decree accordingly and that the statement in the previous paragraph that their Lordships "express no opinion as to its validity either in law or fact" refers merely to the question of how much of his case Jaiyanarayan would be able to establish when it formed the subject-matter of inquiry, and this is the view taken by the learned Chief Justice in *Beevi Ammal* v. *Radhakrishna Aiyar*(1). In this latter case the suit was by a member of a family for general partition, and it was held that the alienee from one of the coparceners was entitled, if otherwise equitable, to retain property alienated to him as the share of his alienor. No doubt in many cases it would not be easy to enforce the alienee's equitable right in a

(1) (1923) 44 M.L.J., 309.

suit brought by one of the coparceners to recover the property, because it would be necessary to add all the coparceners to the suit and ascertain the amount of family property available for division, etc., and consequently it would often be simpler to refer the alienee to a separate suit, but that is not to say that, when the circumstances are favourable, the alienee must, of necessity, be driven to another suit. The principle originally laid down in *Deendyal Lal* v. *Jugdeep Narain Singh*(1) is that the purchaser has the right to compel partition and it was held that he was entitled to take proceedings to have his alienor's share ascertained by partition. This being the principle, where such share can be ascertained without driving the parties to a separate suit, it should be done in order to avoid multiplicity of litigation. The observations referred to above that the alienee has only a right to sue must be read with reference to the facts of the cases concerned, for, if an equity exists in the alienee and it can be enforced without a separate suit, there seems to me to be no reason for restricting that equity to a mere right to sue, a limitation which cannot be supported on equitable principles. As I read *Ramkishore Kedarnath* v. *Jainarayan Ramrachhpal*(2) that case is authority for the proposition that, in a suit by a coparcener for recovery of the property or for partition, the alienee is entitled to claim partition if it can conveniently be done. In the present case the plaintiff is the only surviving member of his family and at the time of the alienation to the first defendant the plaintiff's grandfather was entitled to one half share in the family property, he having only one son. The family property at that time was a great deal more than double the amount sold to the first defendant, for by that sale about

(1) (1878) I.L.R., 3 Calc., 198 (P.C.). (2) (1913) I.L.R., 40 Calc., 966 (P.C.).

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two velis were sold at a time when the family properties amounted to something like 13 velis of land. There is no necessity in the present case to implead any other coparceners for they do not exist, and the partition, so far as the plaint property is concerned can be effected without any trouble at all. Sivarama Ayyar was entitled to property at least equal in value to the property alienated and there is no reason why it should not be allotted to his share, and consequently to the first defendant.

The plaintiff has also claimed mesne profits but he would not be entitled to such except from the date of the plaint. The sale was by a manager of the family and, as such is not *prima facie*, void, but only voidable at the instance of other members of the family. Vide *Hanuman Kamat* v. *Hanuman Mandur*(1) also *Subba Goundan* v. *Krishnamachari*(2). The plaintiff is therefore not entitled to any mesne profits until the date of plaint and, as it has been held that the defendants are entitled to retain possession of the property it follows that he is not entitled to any mesne profits. The appeal is allowed and plaintiff's suit dismissed with costs throughout. The memorandum of objections is also dismissed.

VENKATA-SUBBA RAO, J.

VENKATASUBBA RAO, J.—I agree.

K.R.

(1) (1892) I.L.R., 19 Calc., 123 (P.C.). (2) (1922) I.L.R., 45 Mad., 449.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Venkatasubba Rao.

PARTHASARATHI AIYANGAR AND TWO OTHERS (PLAINTIFFS),

1922, November, 15.

v.

DORAISAWMI NAICKER AND ANOTHER (DEFENDANTS).*

Madras City Tenants Protection Act (III of 1922), sec. 9—Tenant in possession of temple lands—No right under the Act to compel trustee to sell the land to him.

A tenant in occupation of land belonging to a temple or mosque cannot enforce a compulsory sale of the land under section 9 of Madras City Tenants Protection Act and require the temple or mosque to deliver the land to him on a valuation to be made by the Court.

CASE stated under section 113 and Order XLVI, rule 1 of the Code of Civil Procedure, by C. V. VISWANATHA SASTRIYAR, City Civil Judge of Madras, in letter D. No. 405, dated the 20th March 1922, in Original Suits Nos. 75 and 76 of 1921, on his file for the opinion of the High Court.

This was a suit brought by the trustees of Parthasarathiswami temple at Triplicane in Madras to eject the defendants from certain temple lands which the defendants were occupying as tenants under the trustees. The defendants claimed *inter alia* under section 9 of Madras City Tenants Protection Act that the trustees should sell to them the lands in their occupation at a valuation to be fixed by the Court. Thereupon the Judge referred to the High Court the question whether the tenants had such right under the Act. The question referred is fully stated in the judgments of the High Court.

* Referred Case No. 6 of 1922.

PARTHA-SARATHI AIYANGAR v. DORAISAWMI NAICKER.

N. Srinivasa Achariyar for plaintiffs.—Trust lands do not come under section 9 of the Act. Section 9 does not give the defendants the right claimed by them; for trustees of temple lands have not in law any "power" to sell temple lands. They are not owners and their only rights are to manage temple lands and to represent the temple in litigations respecting the same. See *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannadhi*(1), *Jagadindra Nath Roy* v. *Hemanta Kumari Debi*(2) and *Bishen Chand Basawat* v. *Nadir Hossein*(3); compare section 60 of Civil Procedure Code. If the opposite contention were allowed all temple lands will be easily converted into money and there will be great risk to the temples. There is no provision in this Act corresponding to the one in Land Acquisition Act under which temple lands can be acquired. See *Shiva Rao* v. *Nagappa*(4), *Kamini Debi* v. *Pramatha Nath Mookerjee*(5). Proprietary rights not expressly taken away by a statute cannot by implication be presumed to have been taken away. See Maxwell on Interpretation of Statutes, pages 149 and 160.

C. Ayyaswami Sastri for defendants.—"Any power" in section 9 includes all conceivable power like that of trustees who can sell temple lands under certain circumstances. The Act has excepted by section 12 only some classes of lands and temple lands do not come under those classes. The inability to sell temple lands referred to in decisions quoted by the plaintiffs pertains only to voluntary alienations and it does not apply to cases where special Acts confer special rights in derogation of ordinary rights. The Act is not *ultra vires*, see section 80 (A) of the Government of India Act.

Plaintiffs' vakil was not called upon to reply.

(1) (1917) I L.R., 40 Mad., 709 (P.C.) at 718.
(2) (1905) I.L.R., 32 Calc., 129 (P.C.)
(3) (1888) I.L.R., 15 Calc., 329 (P.C.).
(4) (1906) I.L.R., 29 Mad., 117.
(5) (1912) I.L.R., 39 Calc., 33 at 37.

PARTHA-SARATHI AIYANGAR v. DORAISAWMI NAICKER. — SPENCER, J.

JUDGMENT.

SPENCER, J.—The question referred to us is—

"Whether a tenant in occupation of trust lands belonging to a temple or mosque can enforce a compulsory sale under section 9 of the Madras City Tenants Protection Act and require the temple or mosque to deliver the land to him on a valuation to be made by the Court."

There is no difficulty to my mind in including the trustees of temples, mosques and other religious endowments, within the definition of "landlord" in section 2 of Madras Act III of 1922, as they certainly are persons entitled to collect the rent of the land on behalf of another person. A greater difficulty arises when we come to consider section 9. This section provides for the compulsory sale by a landlord of land in the possession of a tenant in the City of Madras from which the tenant is sought to be ejected in a suit instituted under the Presidency Small Cause Courts Act. The explanation to this section defines "land" as—

"The interest of the landlord in the land and all other interests which he can convey under any power."

What are the interests which he can convey under any power? If they signify easements and other subsidiary interests, it would have been easy for the Act to so describe them. If the title to the land is intended to be included, has a trustee power to convey it? In *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannadhi*(1) the Judicial Committee quoting the words of Lord Justice KNIGHT BRUCE in *Hanoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*(2) observe—

"The power of the manager for an infant heir to charge an estate not his own is under the Hindu Law a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate."

(1) (1917) I.L.R., 40 Mad., 709 (P.C.) at 715.
(2) (1856) 6 M.I.A., 393.

PARTHA-SARATHI AIYANGAR v. DORAISAWMI NAICKER. — SPENCER, J.

And at page 716 quoting Sir MONTAGUE E. SMITH'S words [from *Prosunno Kumari Debya* v. *Golab Chand Baboo*(1)] they say:

"There is no doubt that, as a general rule of Hindu Law, property given for the maintenance of a religious worship and of charities connected with it, is inalienable."

They then proceed to consider what kind of benefit will justify an absolute alienation of temple property. Among benefits to an estate they include the preservation of the estate from extinction, the defence against hostile litigation affecting it, the protection of it from injury or deterioration. These and such like things, they say, would obviously be benefits. In *Bawa Magniram Sitaram* v. *Kasturbhai Manibhai*(2), there is an observation:

"The disability of a shebait to make a permanent grant is not absolute."

A trustee then, like the guardian of an infant, has power to convey portions of the corpus of trust property under circumstances of necessity or where the conveyance will be for the benefit of the estate. As the Act which we are considering creates a statutory necessity for landlords to sell portions of their land where the conditions fulfil the terms of the Act, it may be argued that even trustee landlords are under the necessity of selling land to their tenants as provided in section 9. A similar statutory necessity arises when land is acquired by Government under the Land Acquisition Act. Section 31 of that Act speaks of persons "having a limited interest" in land and provides for cases where there is no person competent to alienate the land." Section 32 also speaks of certain persons as having "no power to alienate" lands acquired under the Act. In *Kamini Debi* v. *Pramatha Nath Mookerjee*(3), MOOKERJEE,

(1) (1875) 2 I.A., 145 at 150. (2) (1922) I.L.R., 46 Bom., 481 at 487 (P.C.).
(3) (1912) I.L.R., 39 Calc., 33 at 38.

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J., observes that trustees will come under the category of persons who have "no power to alienate" land dedicated to an idol or to religious charitable purposes. In this Presidency also it is the practice to apply these sections whenever land belonging to temples and mosques is acquired for a public purpose. But section 32 provides a safeguard for the preservation of the money awarded as compensation by directing that it shall be invested in the purchase of other lands and meanwhile deposited or invested in some approved securities. Madras Act III of 1922 does not contain any such safeguard. The presumption, therefore, is that the legislature did not intend to so endanger the preservation of trust properties as to include them under the definition of "land" which can be conveyed under "any power." I am, therefore, of opinion, that the question referred to us should be answered in the negative.

VENKATASUBBA RAO, J. — VENKATA-SUBBA RAO, J.

VENKATASUBBA RAO, J.—I entirely agree. The question to be determined in this reference is whether a tenant can compel a trustee of a temple under section 9 of the Madras City Tenants Protection Act, Madras Act III of 1922, to sell him the land on which the tenant has constructed a building. The point has been referred for the opinion of the High Court by the Judge of the City Civil Court, Madras, who states that more than a hundred ejectment suits are now pending disposal in respect of land belonging to a temple or a mosque or other charitable or religious trust and that he entertains considerable doubt regarding the interpretation of the word "land" in section 9 of the said Act.

The object of the Act is stated to be to give protection to tenants, who, in many parts of the City of Madras, have constructed buildings on others' lands in

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the hope that they will not be evicted so long as they pay a fair rent for the land.

Section 3 provides that every tenant shall on ejectment be entitled to be paid as compensation the value of any building erected upon the land.

Section 4 enacts that, in a suit for ejectment in which the landlord succeeds, the Court shall ascertain the amount of compensation payable under section 3, and direct that, on payment by the landlord of the amount so found due, the tenant shall put the landlord into possession of the land with the building thereon.

It will be seen that the effect of sections 3 and 4 is that the landlord becomes on payment of a price the owner of the tenant's building.

Section 9 provides for cases where tenants are not anxious to obtain compensation for the buildings, but on the contrary are desirous of obtaining the land on which the buildings stand. It enacts that any tenant, who is entitled to compensation under section 3 and against whom a suit in ejectment has been instituted, may apply to the Court for an order that the landlord shall be directed to sell the land for a price to be fixed by the Court. The Court shall then fix the price and shall order that the tenant shall pay into Court the price so fixed. On payment of the price the Court shall pass a final order directing the conveyance of the land by the landlord to the tenant. Under section 9, therefore, the tenant, instead of parting with his building, becomes the owner of the land on which the building has been constructed.

The term "landlord" is defined by clause (3) of section 2. "Landlord" means any person owning any land, and includes every person entitled to collect the rent, whether on his own account or on behalf of another person, or by virtue of any transfer from the owner, or

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of any order of a competent Court, or of any provision of law.

The definition is comprehensive enough to include trustee of a charitable endowment. I may state that a farmer of rents, a usufructuary mortgagee, a receiver appointed by Court, a committee of a lunatic or a guardian of a minor would undoubtedly come within the definition. But the difficulty is created by the explanation to section 9. It runs thus: "land" means:

> "the interest of the landlord in the land and all other interests which he can convey under any power."

A person absolutely owning the land can convey it, but what is the interest that can be conveyed in the case of a person who is entitled to an interest short of absolute ownership? If a lease is granted by a usufructuary mortgagee or by a lessee for a term of years, if either of them files a suit against a tenant who has erected a building, it cannot possibly be contended that by a conveyance under section 9 a higher right can pass to the tenant than is possessed by the mortgagee or the lessee, the plaintiff in the suit. But there is a class of landlords who occupy a position very different from that occupied either by absolute owners or persons with admittedly a very limited right in the property such as lessees for a term of years or usufructuary mortgagees. To take only a few cases, managers of joint undivided Hindu families, Hindu widows, trustees of temples or other religious endowments and guardians of minors would fall in this category. There are no words in the Act which indicate the intention of the legislature in regard to these various classes of landlords. It is indeed strange that an Act, whose assumed object is to afford protection to tenants, should be silent on matters so vital as this. On behalf of the tenants it has been argued before us that we must presume that the

legislature intended to protect tenants irrespective of considerations that have reference to the extent of interest possessed by the landlords in the land leased. I do not think we would be justified in presuming anything of the kind. We must gather the intention of the Act, if possible, from the words used.

What is the meaning of the words "under any power" used in section 9? The word "power" occurs both in Indian Acts and decisions of the Judicial Committee of the Privy Council and of various Courts in India. Confining my observations to the case of trustees, I may first refer to *Prosunno Kumari Debya* v. *Golab Chand Baboo*(1), where Sir MONTAGUE E. SMITH, in delivering the judgment of their Lordships, observes:

"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 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."

Regarding the power of the manager for an infant heir, the observations of Lord Justice KNIGHT BRUCE in *Hanoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*(2), are quoted:

"The power of the manager for an infant heir to charge an estate not his own is, under the Hindu Law, a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate."

In *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannadhi*(3), the power of a trustee to grant a permanent lease of temple lands was considered. Their

(1) (1875) 2 I.A., 145 at 151. (2) (1856) 6 M.I.A., 393.
(3) (1917) I.L.R., 40 Mad., 709 (P.C.).

Lordships of the Judicial Committee held that, unless a trustee is constrained thereto by unavoidable necessity or any benefit accrued to the charity, he cannot grant a lease in perpetuity of debottar lands at a fixed rent. They observe that it is impossible to give a precise definition of "benefit to the estate" but they indicate that the preservation of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation would be benefits.

Referring to *Hanoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*(1), their Lordships observe at page 716—

"In that particular case in reference to which this language was used, the 'necessity' for the loan would appear to have been plain and imperative, the benefit to the estate, the preservation of its existence, obvious."

This and similar passages in the judgment will make it clear that the word "benefit" is used in this context in a special sense.

In the course of the judgment their Lordships further observe that it is a breach of duty on the part of a shebait in the absence of necessity or benefit to grant a lease in perpetuity at a fixed rent.

An argument was advanced before the Judicial Committee that the charity will be benefited by a transaction which put at the shebait's disposal a sum of money capable of being profitably used. Their Lordships say that no authority has been cited giving any countenance to the notion that a shebait is entitled to sell debottar lands solely for the purpose of investing the price so as to bring in an income larger than that derived from the probably safer and certainly more stable property, the land itself.

(1) (1856) 6 M.I.A., 393.

These principles have not in the slightest degree been departed from in *Bawa Magniram Sitaram* v. *Kasturbhai Manibhai*(1), where it was held that the disability of a shebait to make a permanent grant is not absolute and that although the manager for the time being has no power to make a permanent alienation in the absence of proved necessity, yet the existence of justification may be presumed from the long lapse of time between the alienation and the challenge of its validity. In that particular case there was an interval of a hundred years between the date of the alienation and the date of the challenge of its validity.

It is not necessary to refer to further decisions on this subject and it may be taken to be settled law that the power of a trustee of temple property is limited and that an alienation by him in the absence of necessity or benefit will not be upheld.

This being the state of the law, what do the words under "any power" in section 9 connote? Can it be said that the trustee can convey the interest which he can convey only when necessity exists or when the alienation is for the benefit of the estate?

In other words, if the construction urged on behalf of the tenants is adopted, the explanation to section 9 will be equivalent to this; "Land" means the full interest which a trustee can convey under the power possessed by him to convey trust property when necessity exists or the alienation is for the benefit of the estate.

I do not think that this construction can be adopted. It has been argued that there is a statutory liability imposed in virtue of the Act itself upon trustees to convey the land and that this constitutes sufficient

(1) (1922) I.L.R., 46 Bom., 481 (P.C.).

necessity to justify an alienation. This argument begs the question because the point to be decided by us is "Does the Act impose such a statutory liability?"

The decisions bearing upon the interpretation of the word "power" used in various Acts such as the Civil Procedure Code and the Insolvency Act give us very little assistance in understanding the expression "under any power" in section 9. I may refer to *Fakirchand Motichand* v. *Motichand Hurruckchand*(1), which deals with the power vested in the Official Assignee to dispose of the insolvent's son's interest in ancestral property for the payment of his debts and two other similar cases: *Rangayya Chetti* v. *Thanikachalla Mudali*(2) and *Nunna Setti* v. *Chidaraboyina*(3). I may also refer to *Jagabhai Lalubhai* v. *Bhukandas Jagjivandas*(4), which refers to the expression in section 266 of the Civil Procedure Code (Act XIV of 1882) "has a disposing power which he may exercise for his own benefit."

The provisions of the Land Acquisition Act I of 1894 seem to me to furnish a guide in regard to the determination of the question at issue. In that Act are to be found three expressions:

(1) persons "interested in the land";
(2) persons "entitled to act";
(3) persons "competent to alienate the land" or "having power to alienate the same."

Section 3 (*g*) mentions trustees among persons "entitled to act." The clause runs thus: "The following persons shall be deemed persons entitled to act as and to the extent hereinafter provided, that is to say, trustees for other persons beneficially interested shall be

(1) (1883) I.L.R., 7 Bom., 438 at 441.
(2) (1896) I.L.R., 19 Mad., 74.
(3) (1903) I.L.R., 26 Mad., 214.
(4) (1887) I.L.R., 11 Bom., 87.

deemed the persons entitled to act with reference to any such case and that to the same extent as the persons beneficially interested could have acted if free from disability."

If there are no persons competent to alienate the land the Act prescribes that the compensation shall be deposited in Court and the Court shall order the money to be invested in the purchase of other lands. In *Kamini Debi* v. *Pramatha Nath Mookerjee*(1), and *Ramprasanna Nandi Chowdhuri* v. *Secretary of State for India*(2), it was held that a shebait is a person incompetent to alienate for the purposes of sections 31 and 32 of the Land Acquisition Act (I of 1894).

Section 10 contemplates the various interests possessed by co-proprietors, sub-proprietors, mortgagees and tenants.

Sections 29 and 30 deal with the apportionment of the compensation.

In great detail provision is made in the Land Acquisition Act to safeguard the interests possessed by various persons in the land acquired. No such provisions are to be found in the Act under consideration. Are we to assume that the legislature intended that the trustee should be compelled to sell the land and that he should in lieu of it receive money which should be thenceforward at his absolute disposal? If the lands in possession of trustees were intended to be included, certainly we should expect to find some provision in the Act dealing with the investment of the funds. To adopt the construction suggested on behalf of the tenants would be in effect to hold that the legislature intended the conversion of trust lands into money without providing for the protection of the money so obtained.

(1) (1912) I.L.R., 39 Calc., 33. (2) (1918) I.L.R., 40 Calc., 895.

We cannot assume that breaches of trust were intended to be facilitated by the Act.

These observations may apply to the case of all limited owners, but we have nothing to do with the consequences that may follow from our interpretation of the sections of the Act. If the legislature deems it necessary or desirable to extend further protection to tenants, the Act may be amended but we have nothing to do with it.

It is said that this interpretation will cause hardship to the tenants. Under section 9 the tenant may apply for an order directing the landlord to sell the land. There is nothing in the section to compel the tenant to do so. On his applying for a direction the Court is required to pass an order directing the conveyance of such interest as the landlord can pass. If the landlord cannot pass any interest the tenant cannot acquire it.

The contrast between section 9 of the Act and section 16 of the Land Acquisition Act is very marked. Under the latter, when the Collector has made an award the land "vests absolutely in the Government, free from all encumbrances." The absence of these words in section 9 indicates conclusively that the sale to the tenant does not vest in him the land absolutely.

For these reasons I would answer the question referred to us in the negative.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Venkatasubba Rao.

1922, November 20.

LATIFA BI AND ANOTHER (PETITIONERS 1 AND 2), APPELLANTS,

v.

MOTTAI AMMAL AND 2 OTHERS (RESPONDENTS 1 TO 3), RESPONDENTS.*

Madras City Tenants Protection Act (III of 1922), ss. 9 and 10 —Decree before Act for ejecting tenant—No right to apply under section 9—No retrospective operation for section 9.

Where a decree had been passed before the Madras City Tenants Protection Act (III of 1922) came into force for the ejectment of a tenant, he cannot thereafter apply to the Court under section 9 of the Act for an order directing the landlord to sell the land to him. Section 9 has no retrospective operation.

APPEAL against the Order of PAUL APPASWAMI, City Civil Court Judge, Madras, in Civil Miscellaneous Petition No. 302 of 1922 in Original Suit No. 278 of 1919 (City Civil Court Appeal No. 32 of 1920 on the file of the High Court).

The facts are given in the Judgment of VENKATASUBBA RAO, J.

S. Krishnama Achariyar for appellant.

C. Viraraghava Ayyar for respondent.

JUDGMENT.

SPENCER, J. SPENCER, J.—The City Civil Judge's order so far as he referred the petitioners to separate proceedings for a declaration that they were entitled to whatever rights their mother possessed at the time of her death from her

* Civil Miscellaneous Appeal No. 182 of 1922.

status as tenant cannot be supported. They were entitled to have the question whether the interest of their mother had devolved on them, decided by the Court to which they made their application. Another obstacle to appellants' success however exists. The application was one under section 9 by persons claiming to be tenants under Madras Act III of 1922. Section 9 speaks only of tenants "against whom a suit in ejectment has been instituted."

In this case a decree was passed against petitioners' mother in the City Civil Court on 13th August 1920 and was confirmed on appeal in this Court on 7th February 1922, that is, before the Act came into force.

The general frame of the Act, including section 10, makes it clear that section 9 was not intended to enable tenants to apply for sale of the land to them under this section after the ejectment suit, to which they were parties, had been decreed.

Section 10 permits sections 4, 5, 6 and 8 to be applied to suits in which decrees had been passed for ejecting tenants before the Act came into force but not executed. Section 5 provides the manner in which the amount of compensation to be paid to tenants is to be determined and subsequently modified. Section 6 provides for the determination of a reasonable rent when the landlord cannot or will not pay compensation. Section 4 deals with the effect of suits for ejectment being dismissed, and section 8 with the effect of rents being determined.

There is a noticeable omission of section 9 from mention in section 10. It is suggested that this may be due to section 9 having been inserted in the Act after the other sections had been incorporated, and that but for an oversight section 9 would have found mention in section 10.

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Whatever may be the explanation, the Act, as it has been enacted, gives no retrospective effect to section 9. Consequently where a decree has been passed before the Act came into force for the ejectment of a tenant, it is too late for the tenant to apply to the Court that passed the decree for an order directing the landlord to sell the land to him. On this ground the application must fail and the appeal is therefore dismissed with costs.

VENKATA-SUBBA RAO, J.

VENKATASUBBA RAO, J.—I am also of the opinion that the appeal should be dismissed with costs.

The suit was in ejectment and the City Civil Court passed a decree on the 13th August 1920 and it was confirmed in appeal by the High Court on the 7th February 1922. The Madras City Tenants Protection Act (III of 1922) came into operation on a subsequent date; see section 81 of the Government of India Act, 1915. The defendant was a Muhammadan woman. Her daughters applied to the City Civil Court on the 27th February 1922, sometime after the Act came into force, for an order under section 9 to direct the plaintiff to sell the land on which the superstructure stands for a price to be fixed by the Court. The learned City Civil Judge dismissed the application on the ground that the petitioners should get their title declared to succeed to their mother, apparently being of the opinion that he could not decide in the proceedings before him, the question as regards their title to represent the deceased defendant. In this he was obviously wrong. It was his duty to have adjudicated on their title if there was any contest regarding it. The defendant was either a tenant liable to pay rent or a person who continued in possession after the termination of the tenancy (see section 2, clause 4). The legal representatives of the defendant would be entitled to the same rights as herself.

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But the appeal may be disposed of on another ground which is fatal to the appellants. Section 9 refers to a tenant against whom a suit in ejectment has been instituted. The words "has been" are material. I do not think a tenant, against whom a decree for ejectment was passed prior to the coming into force of the Act, can apply under section 9. Section 10 places the matter beyond doubt. It refers to suits "which are pending" or "in which decrees for ejectment have been passed but have not been executed before the coming into force of this Act." A distinction is made between suits which are merely pending and those in which decrees in ejectment have been passed. Section 10, while stating that sections 4, 5, 6 and 8 shall apply to suits which are pending or in which decrees for ejectment have been passed, makes no reference to section 9.

I therefore hold that the appellants are not entitled to make an application under section 9.

N.R.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Oldfield and Mr. Justice Ramesam.

PAKKIAM (PLAINTIFF),

1923, April 6.

v.

CHELLIAH PILLAI (DEFENDANT).*

Indian Divorce Act (IV of 1869), sec. 2—"Professes Christian faith", meaning of—Conversion to Christianity of one of a Hindu couple, effect of, on marriage—Dissolution of Native Converts' Marriages Act (XXI of 1866)—Means of obtaining dissolution of marriage, under.

A person who was born a Christian and who was baptized a Christian and who professes some form of Christian faith does

* Referred Case No. 14 of 1922.

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not cease to "profess the Christian religion" within section 2 of the Indian Divorce Act (IV of 1869), because the particular church to which she belonged disapproving of her conduct excommunicated her.

Under the Dissolution of Native Converts' Marriages Act (XXI of 1866), conversion to Christianity of one of two married Hindu spouses does not by itself dissolve the marriage. The dissolution is effected under the Act only after a year's refusal to comply with an order for restitution of conjugal rights.

CASE referred by H. R. BARDSWELL, District Judge of Madura, in his letter, dated 9th September 1922, No. 5130, for confirmation by the High Court under section 17 of the Indian Divorce Act (IV of 1869) of the decree *nisi* passed in Original Suit No. 5 of 1921 on the file of the District Court of Madura.

This was a suit for a declaration of nullity of marriage under the following circumstances and the following facts are taken from the judgment of the District Court:—

1. "The petitioner, a Christian, was married to the respondent in the Registrar's office at Palamcottah on 2nd November 1919; she thereafter lived with the defendant, chiefly at Madura till 16th January 1921 when she learned that the respondent had a wife alive to whom he was already married at the time of his marriage to the plaintiff. She also represents that she was induced to marry the respondent, because of false representations as to his status.

2. "The respondent admits that he married the petitioner when he was already married to a woman under Hindu rites, but he says that this woman voluntarily separated from him and that he afterwards became a Christian and married the petitioner who knew all about his previous marriage. He also says that the petitioner, who was a member of the Swedish Lutheran Mission Church of Madura, was excommunicated on 27th December 1921 on account of immorality, that she is not now in touch with any church, does not profess the Christian religion and has become practically a Hindu, being kept by one Chinnia Nayudu (a Hindu)."

The District Judge found that the petitioner was once admitted a member of the Church and that she professed the Christian religion at the time of her

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petition, i.e., on 24th September 1921, in spite of the fact that her church excommunicated her for living with a Hindu, inasmuch as she never renounced Christianity and adopted Hinduism. He also held that the respondent's marriage with a Hindu wife was not dissolved in law as soon as he became a Christian inasmuch as the procedure prescribed by the Dissolution of Native Converts' Marriages Act (XXI of 1866) for dissolving that marriage was never availed of by the respondent. Hence he passed a decree for the nullity of the petitioner's marriage.

On reference to the High Court for confirmation of the decree—

T. M. Ramaswami Ayyar for petitioner.—The decree declaring the marriage to be a nullity has to be confirmed. The petitioner must be held to "profess the Christian religion" in spite of the fact that her church excommunicated her. Profession of a religion is a matter of one's own volition and not of any outside authority. By reason of the conversion to Christianity of one of two married Hindu spouses there is automatically no dissolution of the Hindu marriage. Under sections 4 to 18 of the Dissolution of Native Converts' Marriages Act (XXI of 1866) an elaborate procedure is prescribed for the dissolution of the Hindu marriage in such cases. In this case such a procedure was not availed of. Hence the previous marriage subsists.

No one appeared for the respondent.

JUDGMENT.

SCHWABE, C.J.

SCHWABE, C.J.—This is a suit for nullity of a marriage under the following circumstances. The respondent, when a Hindu, was married to a Hindu. The respondent changed his religion, being converted to Christianity. No steps were taken by him to dissolve

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his marriage, but he then went through a form of marriage with the petitioner, also a Christian. The petitioner now brings this suit on the ground of bigamy of her husband, he having a wife alive at the time he went through the form of marriage with her.

The first defence raised is that the petitioner has no rights under the Indian Divorce Act, because it is alleged that she does not profess the Christian religion. This is based on a resolution of the particular sect to which she belongs, in effect excommunicating her. In my judgment although she may be excommunicated by the sect or the church to which she belongs, she does not thereby cease to profess Christianity. The question of profession of Christianity is a question of her own action and not of the action of her church. It is to be observed that the petitioner was the daughter of a Christian and no doubt was baptized as a Christian. I cannot see how it can be said that she ceases to profess the Christian religion, because her church disapproving of her conduct has excommunicated her.

The second defence raised is that at the time of this marriage there was no existing marriage of the respondent, it being alleged that by reason of his conversion his then existing marriage became dissolved. That is not the law. It is quite clear from the Dissolution of Native Converts' Marriages Act (XXI of 1866) that the conversion to Christianity of one of two married Hindus does not dissolve the marriage. That Act provides for means to obtain dissolution of the marriage by application to the Court first of all for restitution of conjugal rights and then after the lapse of a year for dissolution of the marriage if conjugal rights are refused. Otherwise the conversion to Christianity of one of two spouses has no effect on the existing marriage.

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It follows that the decree that it is a nullity is correct and must be confirmed with costs.

OLDFIELD, J. — OLDFIELD, J.

I have felt some doubt with regard to the first question raised by this petition, whether the petitioner can be said to have been professing the Christian religion at the time she presented it, within the meaning of section 2 of the Indian Divorce Act. My hesitation arises from the facts, evidenced by the resolution of excommunication referred to by my Lord that she had repudiated the authority of the governing body of the Christian denomination to which she belonged and that she was by the resolution deprived of the spiritual privileges of the Christian faith in the only form in which, so far as appears, she has ever possessed them. The reply suggested is that, notwithstanding her withdrawal or expulsion from a particular denomination, she can still be heard to say that she professes an unsectarian Christianity. These words of the Act have always been difficult of interpretation; and it is with some hesitation that I accept the suggestion made on her behalf. It is some justification for doing so that there is nothing before us as to her admission or readmission to Hinduism, which presumably was originally her faith or that of her parents and nothing to show whether such readmission or admission is possible; and there is further the fact that the policy of the law appears to require the application of the words of section 2 to what may be a substantial class of persons in this country, those who have abandoned a particular sect but who still remain unattached to any religion other than Christianity.

In these circumstances I do not feel justified in dissenting from the judgment just delivered.

RAMESAM, J. — RAMESAM, J.

I agree with the judgment of the learned Chief Justice. In my opinion the religion of a

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person is what the person professes and does not require recognition by the other persons belonging to that religion. A Hindu who professes to be a Hindu, though he may be excommunicated by all the existing Hindu castes, is still a Hindu, though probably he is subject to great social inconvenience. In this respect I do not think that there is anything peculiar to Christianity. If a person says that he is a Christian, though he does not belong to the existing Christian churches, he is still a Christian. Probably his creed is different from the existing creeds and he is subject to social inconvenience in respect of the performance of marriages and burials. Still he would be a Christian.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Devadoss.

1923, April 11.

PAKKIRI KANNI (PLAINTIFF), APPELLANT,

v.

HAJI MAHAMMAD MANJOOR SAHIB (DEFENDANT), RESPONDENT.*

Suit for partition of common properties—Exclusion of some common properties from suit—Maintainability of suit.

A suit for partition of common properties, and not joint properties, is not liable to be dismissed on the ground that the suit did not include all the common properties available for partition.

APPEAL against the order of K. S. GOPALARATNAM AYYAR, Additional Subordinate Judge of Tanjore, in Appeal Suit No. 59 of 1921 (A.S. No. 332 of 1920 on the file of the District Court, Tanjore), preferred against the decree of K. PARTHASARATHI AYYANGAR, District Munsif of

*Civil Miscellaneous Appeal No 60 of 1922.

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Tirutturaippundi, in Original Suit No. 382 of 1919 (O.S. No. 5 of 1919, on the file of the District Munsif's Court, Negapatam).

The facts are given in the Judgment.

R. Kuppuswami Ayyar for appellant.

C. V. Anantakrishna Ayyar for respondent.

JUDGMENT.

Objection has first been taken to the lower Appellate Court's findings that two items of common property are available for partition but are not referred to in the plaint. Those findings are findings of fact; and we have not been shown any ground on which we can interfere with them in Second Appeal.

The Second Appeal is then argued against the lower Appellate Court's order remanding the suit with a direction to the District Munsif to give the plaintiff an opportunity to amend his plaint by including a prayer for relief in respect of the properties just referred to and other properties, if any, left by the deceased, and in case he does not so amend, to dismiss the suit. We have not been shown any direct authority that a suit for partition of common property, not joint property, is liable to dismissal on the ground that all the common property, in respect of which it might have been brought, has not been included. Shortly we have not been shown that the objection founded on what is usually described as the plea of partial partition is available when a suit for division of common property, not joint property, is in question.

It is true that in *Mahomed Fuzlur Rahman Chowdhury* v. *Mahomed Fayzur Rahman Choudry*(1), *Moideensa Rowthen* v. *Mahammad Kasim Rowthen*(2) and *Moidin Kutti* v. *Mariam Umma*(3) an opinion was expressed

(1) (1911) 15 C.W.N., 677. (2) (1915) 28 I.C., 895.
(3) (1921) 14 L.W., 502.

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against the expediency of suits for partition of common property, in which the whole of the property available for partition was not included. But we have not been shown any decision that such suits are actually unsustainable and we are not prepared to hold that they are so. It is, we may point out, always open to the defendant in such a case as the present, if he thinks himself prejudiced by the exclusion of any property, himself to bring a suit in respect of it and have it tried with the suit already pending. Taking this view we must allow the appeal to the extent that we set aside the lower Appellate Court's order and direct it to dispose of the appeal in the light of the foregoing and with reference to the District Munsif's findings on the issues. Costs in this Court will be costs in the cause and will be provided for by the lower Appellate Court in the decree to be passed.

This case coming on for hearing again on the 11th April 1923, on being posted to be spoken to, the Court delivered the following

ORDER :—

It is pointed out to us that the Additional Sub-Court of Tanjore, from which this appeal came has been abolished in consequence of the bifurcation of the district into Tanjore East and Tanjore West for judicial purposes and that therefore our order of remand to the lower Appellate Court requires explanation. So far as we can ascertain, the District Court of Tanjore East now exercises appellate jurisdiction over Tirutturaipundi District Munsif's Court to which this case belongs. The remand must therefore be to the District Court of Tanjore East and our order must be read accordingly.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Devadoss.

D. K. KANNISA (DEFENDANT), PETITIONER,

v.

DEVICHAND (PLAINTIFF), RESPONDENT.*

1913. April 23.

Presidency Small Cause Courts Act (XV of 1882), O. XXXVII, rr. 1 and 2—Summons form 13, Appendix I—Ultra vires.

Rules framed under statutory powers must be just and reasonable; otherwise they are *ultra vires*. By rules framed under the Presidency Small Causes Courts Act, the form of summons in a summary suit on a negotiable instrument required every defendant to apply for leave to defend three clear days before the day of hearing. But there were no rules prescribing any penalty for not so applying or compelling the service of the summons sufficiently early so as to enable a defendant to apply in time. Nor was there any power in the Court to extend the time in cases requiring extension.

In the particular case the summons was not served sufficiently early and the defendant's application for leave to defend, filed only two clear days before the hearing, was dismissed by the Judge as out of time.

Held that the dismissal was illegal and that the direction in the summons was *ultra vires*.

PETITION under section 115 of Act V of 1908, praying the High Court to revise the order of C. R. TIRUVENKATA ACHARIYAR, Chief Judge of Small Cause Court at Madras, in U.C.S. No. 22 of 1922.

The facts are given in the judgment.

S. Venkatarama Ayyar for petitioner

P. C. Sundaram Ayyangar (*amicus curiae*) *for* respondent.

JUDGMENT.

This is an application under section 115 of the Code of Civil Procedure to revise the decree of the Court of Small Causes, Madras, in U.C.S. No. 22 of 1922.

* Civil Revision Petition No. 397 of 1922.

KANNISA v. DEVICHAND.

The facts are these.—The plaintiff brought a suit on a promissory note executed by the defendant. Summons in Form No. 13 was served upon the defendant on 3rd May 1922. He applied for leave to defend on 5th May 1922. The hearing of the case was fixed for the 8th May 1922. The learned Chief Judge rejected the application for leave to defend on 8th May as not having been filed three clear days before the date of hearing and decreed the plaintiff's suit. The defendant has preferred the civil revision petition.

The plaintiff does not appear to oppose the petition. It is contended that the direction contained in the summons is *ultra vires* and the decision, therefore, of the learned Judge is without jurisdiction. The direction in the summons is :

"Leave to appear may be obtained on application to the Court supported by affidavit showing that there is a defence to the suit on the merits or that it is reasonable that he should be allowed to appear in the suit. The day——— of ——— 19 . . . is fixed for your appearance before . . . . . Judge of this Court and the said application and affidavit must be filed in the office of the Registrar and copies thereof must be served on the plaintiff or his pleader not later than three clear days before the said date."

Order XXXVII, rule 1 (1) of the rules of the Court of Small Causes, Madras, reads thus :

"All suits upon bills of exchange, hundis or promissory notes, may, in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed. The summons shall be in Form No. 13 in Appendix 1 and it shall not be necessary to serve a copy of the plaint on the defendant."

Rule 2 (1) is

"The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application."

The question now is whether the direction in the summons that an application for leave to defend must be

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filed in the office of the Registrar and copies thereof must be served on the plaintiff or his pleader not later than three clear days before the said day is valid or not. In the first place, there is no provision that summons should be served upon the defendant sufficiently early to enable him to apply three clear days before the date of hearing. If the summons be served on the morning of the day of hearing giving no opportunity to the defendant to comply with the direction contained in the summons, could his right to apply for leave to defend be taken away? There is nothing in the rules which prescribes the penalty for not applying within the time fixed. In the case of an application coming under article 159 of the Limitation Act, the period is ten days, and the time begins to run from the date of the service of summons. But in this case the rule makes no reference to the date or to the time of the service of the summons, but insists upon an application for leave to defend being filed three clear days before the date of hearing. There is no remedy open to the defendant if he is not served so as to give him sufficient time to apply three clear days before the date of hearing. Though Form No. 13 is sanctioned by Order XXXVII, rule 1, yet one has to see whether a direction given in the summons or a time fixed for doing an act by the Court is reasonable or unreasonable. If the rules provide for an extension of time for proper reasons, the direction would not be unreasonable ; but where it gives no option to the Court to give relief in cases of real hardship where the defendant is not to blame, it cannot be held to be reasonable. No doubt, in the case of small causes expedition and saving of time are aimed at in framing the rules : but the rules should not be such as to make it impossible of compliance in some cases however honest and *bona fide* may be the attempt on the part of the defendant to comply with the rule. As the

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plaintiff did not appear, I asked Mr. Sundaram Ayyangar to argue the case as *amicus curiae* for the respondent, and he did his work very satisfactorily. He has drawn my attention to the cases reported in *Stiles* v. *Galinski*, *Nokes* v. *Islington Corporation* (*No.* 2)(1), *Arlidge* v. *Islington Corporation*(2), *Johnson* v. *The Mayor of Croydon*(3). Those are the cases in which the Court held that Rules and Bye-laws made by statutory bodies should be reasonable; otherwise they would be *ultra vires* and void. In the case of rules framed for the guidance of Courts of Justice one should look for a greater degree of reasonableness and fairness. He drew my attention to *Quazie Mahmudar Rohman* v. *Sarat Chandra Dutt*(4) in which STANELY, J., sitting as a single Judge, held that he had no power to extend the time prescribed for filing an application for leave to defend a suit under chapter XXXIX of the Civil Procedure Code of 1882. The learned Judge quoted section 4 of the old Limitation Act and held that he had no power to extend the time. He distinguished a case decided by PONTIFEX, J., in which that learned Judge extended the time for filing an application for leave to defend on the ground that, as the defendant lived at Peshawar, the time within which the defendant might obtain liberty to appear and defend should have been 28 days instead of 10 days, the time contained in the Form described in the 4th schedule to the Code. In *The British India Steam Navigation Co.* v. *Sharafally*(5) a Bench of this Court held that, as the Small Cause Court was open on certain days during the vacation for the receipt of plaints, petitions and other papers, the Court could not be treated as closed and an application for appeal to the Full Bench which could have been filed on the days

(1) [1904] 1 K.B., 615.
(2) [1909] 2 K.B., 127.
(3) (1886) 16 Q.B.D., 708.
(4) (1900) 5 C.W.N., 259.
(5) (1923) 44 M.L.J., 100.

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the Court was open, could not be filed after the close of the vacation. Though section 148 of the Code of Civil Procedure, which is a new section giving power to a Court to extend any period of time fixed or granted by the Court for doing any act prescribed or allowed by the Code has been extended to the Small Cause Court, yet, the learned Judge had no jurisdiction to extend the time fixed in the summons by the Court for filing an application for leave to defend by reason of the definition of the word "code" in Order I (*a*), rule 4 (2). Though form B is according to rule 1 of Order XXXVII, it cannot be said to form part of the rules. If the direction as regards the filing of an application for leave to defend is intended to be made part of Order XXXVII, rule 1, it should have been made clear and a provision should have been made to meet cases where the defendant could not possibly have three clear days owing to the service on him within three days of hearing. Taking all the circumstances into consideration I hold that the direction in the summons is unreasonable and therefore *ultra vires* and the Court by complying with an illegal rule has acted without jurisdiction.

I, therefore, set aside the order of the learned Chief Judge and direct him to restore the case to his file and to receive the application for leave to defend and to dispose of it according to law.

The costs of this application will be borne by the plaintiff.

N.R.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Oldfield and Mr. Justice Ramesam.

1923, April 23.

SINNAN CHETTY AND ANOTHER (DEFENDANTS NOS. 5 AND 6), APPELLANTS,

v.

G. S. ALAGIRI AIYER AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS 1 TO 4), RESPONDENTS.*

Torts—Conversion—Action in detinue, trover or conversion—Judgment in action of detinue or conversion, whether passes property to the tortfeasor—Satisfaction, necessary to pass property—Partial satisfaction or receipt of dividend in bankruptcy, whether effective to pass property—Election by creditor after Judgment, whether passes property—Set-off by creditor of unliquidated claim against tortfeasor against debt due to latter—Petition by creditor after set-off, to adjudicate the latter an insolvent—Maintainability of petition in Insolvency—Election by Set-off—subsequent suit by creditor to recover jewel or value from tortfeasor or his bona fide *pledgee, whether maintainable—Provincial Insolvency Act (III of 1907), ss. 2, 6, 24, 26 and 30.*

A Judgment in an action in conversion does not pass the property to the defendant unless and until it is satisfied; in this respect there is no difference between a Judgment in an action in detinue and one in trover or conversion.

Brinsmead v. *Harrison* (1871) L.R., 6 C.P., 584; and *In re Gunsbourg* (1920) 2 K.B., 426, followed.

Mere proof in bankruptcy does not amount to satisfaction so as to pass the property, nor would part satisfaction by execution or by receipt of dividend in bankruptcy have that effect; but a plaintiff can, after Judgment, elect to look only to his chance of obtaining satisfaction by execution or by proof in bankruptcy, and give up his claim to the property. See *Ex parte Drake, In re Ware* (1877) 5 Ch. D., 866.

The plaintiff owed Rs. 2,500 to the defendant who owed him Rs. 2,072, but the former had lent a ring valued by

* Letters Patent Appeal No. 13 of 1922.

him at Rs. 1,000 to the defendant, who refused to return it on demand; the plaintiff applied to adjudicate the latter an insolvent by filing a petition in which he set-off the amount due by him against the amount due by the defendant on both the items and used the balance as a liquidated amount to support his insolvency petition as a petitioning creditor; an order of adjudication was passed and the plaintiff proved his debt for the balance and was included in the schedule of creditors; it further appeared that the defendant had, subsequent to the petition and before the order of adjudication, pledged the ring to the second defendant who was a *bona fide* transferee for value; on a suit being filed for recovery of the jewel or its value against the pledgor, the pledgee and the Official Receiver,

Held, that the conduct of the plaintiff amounted to a definite election to abandon all rights to the ring in favour of the insolvent, and that the suit to recover the ring or its value was not maintainable against the debtor or his pledgee.

Even if the pledgor had no title at the date of the pledge, he got one on the date of the adjudication, and it enured to the *bona fide* pledgee for value, on the principle of "feeding the title" or "forwarding the title."

See Whitehorn Brothers v *Davison* [1911] 1 K.B., 463, and *In re a debtor*, Ex parte *Petitioning Creditor* [1907] 97 L.T., 140.

APPEAL under the Letters Patent against the Judgment of Mr. Justice KRISHNAN in A.A.O. No. 419 of 1921, preferred against the order of the District Court of Salem, in Appeal Suit No. 172 of 1918, preferred against the decree of the Principal District Munsif of Salem, in Original Suit No. 713 of 1916.

The plaintiff was the owner of an emerald ring worth Rs. 1,000, which he lent to the first defendant for use on the occasion of a marriage; the latter refused to return the jewel on demand by the plaintiff. The plaintiff owed to first defendant a sum of Rs. 2,500 on a promissory note, while the latter owed the plaintiff a sum of Rs. 2,072-8-0 on a certain account. The plaintiff instituted criminal proceedings against the first defendant for criminal misappropriation in respect of the ring, which was dismissed on the ground that the matter

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was of a civil nature; but in the course of the criminal proceedings, the jewel was taken possession of by the Magistrate and remained in the custody of his Court at the date of the suit. The plaintiff had filed a petition in insolvency to adjudicate the first defendant an insolvent. In his petition as a petitioning creditor, the plaintiff had set-off his debt of Rs. 2,500 against the amounts of Rs. 2,072–8–0 and Rs. 1,000, which were the plaintiff's estimated value of the ring lent by him to the first defendant, and thus claimed to be a creditor of the first defendant to the extent of Rs. 572–8–0, so as to qualify him as a petitioning creditor under section 24 of the Provincial Insolvency Act III of 1907. An order of adjudication was made, and the plaintiff proved his debt for Rs. 572–8–0 and was included in the Schedule of creditors in the insolvency proceedings but did not receive any dividend. Three days after the filing of the insolvency petition, the first defendant pledged the ring with the second defendant who was found to be a *bona fide* pledgee for value. The plaintiff, subsequent to the insolvency proceedings, instituted the present suit for recovery of the ring or its value from the first and second defendants; and the Official Receiver in insolvency and the transferees from the second defendant were subsequently impleaded as defendants 3, 4, 5 and 6 respectively. The defendants pleaded, *inter alia*, that the plaintiff was barred from recovering the ring as he had lost his property in it which had become vested in the first defendant or the Official Receiver or in the second defendant as a bona fide pledgee for value, by reason of the petition, the order of adjudication, and proof of the plaintiff's claim, after set-off, in the insolvency proceedings. The District Munsif held that the suit was not maintainable and dismissed it. On appeal the learned District Judge held that the suit was

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maintainable and reversed the decree and remanded the suit for trial on all the other issues in the case. Fifth and sixth defendants preferred a civil miscellaneous appeal against the order of remand of the District Judge. The case came on for hearing before KRISHNAN and VENKATASUBBA RAO, JJ., who differed in opinion; the former learned Judge holding that the plaintiff was entitled to institute a suit for recovery of the jewel or its value; and the latter the contrary and the judgment of KRISHNAN, J., prevailed under section 98, Civil Procedure Code. Against this judgment, defendants 5 and 6 preferred this Letters Patent Appeal.

T. M. Krishnaswami Ayyar for appellants.—The plaintiff filed a petition on 7th March 1913 to adjudicate the first defendant an insolvent; the order of adjudication was made on 2nd December 1915, and the plaintiff proved his debt as a creditor, and his debt was included in the Schedule of creditors on 7th March 1916 for the balance due to him after setting-off this pro-note debt by him to the first defendant against the cash due from the latter, Rs. 2,072 and the value of the ring, viz., 1,000 Rs. The first defendant pledged the ring to the second defendant in September 1912 and the latter is a *bona fide* pledgee. It is only on the basis that property in the ring passed to the insolvent, that the plaintiff became entitled to set-off his debt and claim to be a petitioning creditor. He also obtained an order in adjudication, and proved for his debt in respect of the balance of the value of the ring on the basis of the property having vested in the insolvent. There has been much more than merely obtaining a judgment in conversion. Though mere proof in bankruptcy may not amount to an election, still if he moves the Insolvency Court to adjudicate the debtor an insolvent, that amounts

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to an election. See *In re a Debtor, Ex parte Petitioning Creditor*(1) and *Bradley and Cohen, Limited*, v. *Ramsay & Co.*(2). The last case limits the operation of *Brinsmead* v. *Harrison*(3) to the facts of that case and says it does not apply to a case where there is a partial satisfaction. Entry in the schedule of creditors is equivalent to payment, and a solicitor loses his lien by proof in bankruptcy, which amounts to abandonment of security, *Tholasiram* v. *Duraji*(4). The case of *Ex parte Drake, In re Ware*(5) was considered in *In re a Debtor, Ex parte Petitioning Creditor*(1) and distinguished as a case in which the proof was rejected.

S. Panchapagesa Sastri for respondent (plaintiff).—There are two points in this case, viz., (1) Estoppel or Election, and (2) Transfer of title from the plaintiff to the first defendant.

There is nothing more here than entering the plaintiff as a creditor in the schedule of creditors. Under sections 24 and 25 of the Provincial Insolvency Act the entry is not final. Under section 26 of the Act, the schedule can be altered. No dividend was paid. Even if any dividend had been paid, that would amount only to partial satisfaction. Unless there is complete satisfaction, the rule in *Brinsmead* v. *Harrison*(3) will apply. Unless the decree is fully satisfied, there is no bar to the owner taking or recovering the property. See *In re a Debtor, Ex parte Petitioning Creditor*(1) and *Ex parte Drake, In re Ware*(5). Even after dividend was received, the creditor was allowed to change his election: See *Ex parte Adamson, In re Collie*(6).

It is not necessary for the plaintiff to have a set-off before he can claim to be a petitioning creditor.

(1) (1907) 97 L.T., 140.
(2) (1912) 106 L.T., 771.
(3) (1871) L.R., 6 C.P., 584 at 587.
(4) (1905) 15 M.L.J., 375.
(5) (1877) 5 Ch.D., 866.
(6) (1878) 8 Ch. Div., 807.

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The Provincial Insolvency Act III of 1907, section 2, clause (*b*) defines "a creditor" and the plaintiff was entitled as a creditor in respect of Rs. 2,072, without set-off to apply under section, 6 clause (4) as a petitioning creditor. The set-off comes at a later stage under section 30. Though the English Act mentions set-off before a person can be a petitioning creditor, the Indian Act (III of 1907) does not mention set-off in section 6, which is not affected by section 30. The English Act distinctly recognizes set-off as an answer to a Bankruptcy petition, while no set-off is mentioned in section 6 of the Indian Act (III of 1907).

T. M. Krishnaswami Ayyar in reply.—Plaintiff must be deemed to have elected to abandon his right to the jewel by (1) petitioning in bankruptcy, (2) by his set-off, (3) by his proving in insolvency for the balance of the value of the ring, (4) by his being entered in the schedule of creditors. Apart from the rule in *Brinsmead* v. *Harrison*(1) the conduct of the plaintiff amounts to an election. The rule in that case should not be extended to this country. The rule in *Brinsmead* v. *Harrison*(1) should not be extended beyond the facts of that case in the light of later English cases. See Williams on Bankruptcy Practice, page 226 (notes).

JUDGMENT.

SCHWABE, C.J.

SCHWABE, C.J.—This suit having been dismissed on the ground that on the facts stated by the plaintiff there was no cause of action, we must assume for the purpose of this appeal that those facts are correct. On this assumption the plaintiff was the owner of a ring of the value of Rs. 1,000 and lent it to the first defendant. The plaintiff was liable to the first defendant on a

(1) (1871) L.R., 6 C.P., 584 at 587.

promissory note for Rs. 2,500 and the first defendant was liable to the plaintiff for Rs. 2,072-8-0 being the first defendant's contribution in respect of a joint bond which the plaintiff had discharged. The first defendant assigned the promissory note to one Mikka Pillai who brought an action on it, Original Suit No. 21 of 1915 in the Salem District Court against the plaintiff. On the 7th of March 1913 the plaintiff presented an insolvency petition against the first defendant. In that petition he alleged that the first defendant was indebted to him for Rs. 3,072-8-0 made up of the Rs. 2,072-8-0 and Rs. 1,000, the value of the ring which he alleged the first defendant refused to return. He alleged that there was no consideration for the assignment of the promissory note to Mikka Pillai and that it was a fraud on the creditors and he proposed to set it off against his claim, which would thereby be reduced to Rs. 572-8-0. Three days after the presentation of the petition the first defendant pledged the ring with the second defendant, who is now represented by the fifth and sixth defendants, it is said, for Rs. 725. The second defendant took it without notice of any claim to it by the plaintiff. In Original Suit No. 21 of 1915 the plaintiff set up against Mikka Pillai's claim on the promissory note the Rs. 2,072 due by the first defendant and also Rs. 1,000 the value of the ring, no doubt on the basis that Mikka Pillai was not a holder in due course of the note.

The insolvency petition was heard, the first defendant not appearing; and he was on the 2nd of December 1915 adjudicated insolvent, the District Judge holding that the assignment of the promissory note to Mikka Pillai was fraudulent and also holding, though he gave no reasons, that the plaintiff was entitled to Rs. 1,000 in respect of his ring with the result that he became a creditor of the insolvent for Rs. 572-8-0 instead of

being his debtor in Rs. 427-8-0, the difference against him in respect of the two other cross claims for Rs. 2,500 and Rs. 2,072-8-0.

In due course the plaintiff put in his proof for Rs. 572-8-0 and it has been admitted. Subsequently he alleges that he discovered that the ring was in possession of the second defendant and brings this suit for its recovery. Owing to certain criminal proceedings the ring is in fact in the custody of the Magistrate's Court at Attur, but for the purpose of this suit it must be treated as still in the possession of the pledgee, the second defendant. The second defendant contends that the plaintiff has definitely elected to treat the ring as the property of the first defendant—first by his petition in insolvency and subsequent proof whereby he has treated the value of it as a debt due to him and used part of it as a set off against the balance of the insolvent's claim against him, and on the other part has filed his insolvency petition, and that the Court by allowing the petition and subsequently admitting the proof has accepted his contention, and that this involves a decision that the property in the ring has passed to the first defendant from which it follows that the plaintiff has no longer any claim to it. Secondly reliance was placed on the plaintiff having in the suit by Mikka Pillai used the Rs. 1,000 or part of it as a debt due from the first defendant and therefore available for him as an answer to Mikka Pillai's claim on the promissory note. I think there is nothing in the latter contention. Apparently Mikka Pillai had no claim at all and no such set off has, in fact, been allowed against him, it being unnecessary to consider the question in view of the fact that the negotiation to Mikka Pillai has been held to be fraudulent. We have not got the full facts as to this before us. But I assume this to be the position from the fact that the plaintiff has only

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been allowed to prove on the basis that he is indebted on the promissory note to the first defendant and not to Mikka Pillai. But the use that the plaintiff has made of his right against the first defendant in respect of the ring in the insolvency petition stands on a different footing and gives rise to a difficult question in respect of which there is little authority.

The District Munsif has held that the plaintiff has lost his title to the ring and the District Judge has held to the contrary and on appeal KRISHNAN, J., agreed with the District Judge and VENKATASUBBA RAO, J., with the District Munsif.

The matter is not rendered more easy by the fact that in my judgment the first defendant ought not to have been adjudicated on this petition. I know of no principle on which a debtor can turn himself into a creditor for the purpose of presenting an insolvency petition by setting off the value of property unlawfully detained or converted by another against a liquidated claim by that other against him, and so leave a balance due to him in respect of the dealings between them. For it must be remembered that it is only in respect of liquidated demands that insolvency petitions can be presented. But he has been allowed to do so in this case and we must deal with it accordingly. The plaintiff cannot by this apparently irregular order of adjudication be in a better position than he would have been if he had recovered judgment for Rs. 1,000 damages for conversion of the ring and, in my judgment, we must look upon the adjudication as equivalent to such a judgment for the conversion of his ring by failure to deliver it up on demand and we must look upon that judgment as satisfied to the extent of Rs. 427-8-0 by being used to that extent to extinguish the balance which would otherwise be due from the plaintiff to the

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first defendant. For the balance of this claim for Rs. 1,000 the plaintiff has attempted to obtain satisfaction by proof in the insolvency but so far has received nothing by way of dividend in respect thereof.

The question then arises whether a judgment in conversion passes the property to the defendant unless and until it is satisfied. I think not. The leading case on the subject is *Brinsmead* v. *Harrison*(1). In that case there had been an action for conversion and detention of a piano which resulted in a money judgment for an amount presumably the value of the piano, and the judgment being unsatisfied a second suit was brought in detinue to recover the piano from another person in whose possession it was. The defendant set up that by the judgment in the former suit the property in the piano passed to the defendant in that suit and that therefore the plaintiff could not sue. But the Court of Common Pleas held that the property did not pass under such a judgment without satisfaction, the judgment being treated as an assessment of the value and the satisfaction of the judgment as the payment of the price. This case has always been treated as good law. It is worth calling attention to the fact that there are two distinct forms of action which could be brought against a defendant who has or should have moveable property of the plaintiff in his possession. They are known as detinue and conversion, the latter being in the old law also called trover. In the former the suit is primarily for the return of the chattel to which is usually added a claim for its value in default of its return. The decree in such an action takes two alternative forms with the same effect. One is for the return to the plaintiff within a limited time of the chattel or its value

(1) (1871) L.R., 6 C.P., 584.

together with damages, if any, for its detention, and the other is for a sum being the value plus the damages for its detention, to be reduced to the damages only if the chattel is returned in a certain time. In either case the option to return or to pay is in the defendant, but the Court may, in proper cases, order the specific delivery of the chattel which the defendant must comply with on pain of contempt, or it may order the issue of a writ of delivery to the sheriff directing him to seize the chattel. The action for conversion or trover is for damages only and is as a rule for the value of the chattel and is based on an allegation that the defendant has converted the chattel to his own use by some wrongful dealing with it, one instance of which is the refusal to deliver up on demand, and on a decree of this kind the defendant has no option to deliver up the chattel nor has the plaintiff a right to demand it.

I have called attention to this distinction because it has been suggested that the rule in *Brinsmead* v. *Harrison*(1) applies only to actions in detinue and not to actions in conversion. I confess that to me the suggestion is attractive, but in my judgment the weight of authority is against it. *Brinsmead* v. *Harrison*(1) itself is a clear authority to the contrary. *In re Gunsbourg*(2), STERNDALE, M.R., says,

"The order he has obtained amounts to nothing more than judgment in detinue or trover for the value of the goods and it has not been satisfied. It has been clear law since the case of *Brinsmead* v. *Harrison*(1) that such a judgment unsatisfied does not operate to transfer the property to the person against whom judgment was obtained or prevent the true owner from suing a third person not the original wrongdoer for the return of the plaintiff's goods which that third person continues to detain from him. That was the exact point determined upon the new assignment in *Brinsmead* v. *Harrison*(1) and that decision is conclusive against the appellants on this point."

(1) (1871) L.R., 6 C.P., 584. (2) [1920] 2 K.B., 426 at p. 436.

It is true that WARRINGTON, L.J., at page 447 says "I think it is settled that a judgment for the recovery of goods or their value, or for the value of the goods to be reduced if the goods are delivered, does not of itself transfer the property to the defendant, but only if and when it is satisfied by actual payment of the value (*Brinsmead* v. *Harrison*(1))"; thus confining his judgment to cases of detinue. In *Ex parte Drake, In re Ware*(2), which is not unlike the present case, in which *Brinsmead* v. *Harrison*(1) was followed, it was unnecessary to discuss this point as the previous action had been in detinue.

Some doubt, however, is thrown on the matter by *Bradley and Cohen, Limited*, v. *Ramsay & Co.*(3). In that case PHILLIMORE, J., held that the principle of *Brinsmead* v. *Harrison*(1) applied only to cases of detinue and in the Court of Appeal KENNEDY, L.J., with whose judgment COZENS HARDY, M.R., agreed, says that he agrees with PHILLIMORE, J., on this point. But he adds that the earlier judgment obtained was for the price of the goods in question and that therefore the judgment obtained was different from the judgment in *Brinsmead* v. *Harrison*(1) and prevented the plaintiff suing again. But BUCKLEY, L.J., points out that the judgment in that case was not a judgment for damages but for the price of the goods as on a sale, and he so explains the judgment of PHILLIMORE, J. The defendant in the earlier case had at one time at any rate had the property from the plaintiff on sale or return and I think that the decision in that case can be explained without in any way cutting down the effect of the judgment in *Brinsmead* v. *Harrison*(1), on the ground that the earlier judgment was based on the election by the plaintiff to treat a contract of sale or return of the goods, which had

(1) (1871) L.R., 6 C.P., 584. (2) (1877) 5 Ch. D., 866.
(3) (1912) 106 L.T., 771.

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in fact been determined as still alive and resulting in a sale, for the judgment was for the price and not for damages, as is quite clear from the fact that the value as opposed to the price which would be the measure of damages for conversion was not considered. It may be that if this point ever comes before the highest tribunal the operation of the principle of *Brinsmead* v. *Harrison*(1) will be confined to the judgment in detinue. But in the present state of authorities I do not think we can so limit it.

Mere proof in Bankruptcy does not amount to satisfaction so as to pass the property. See *Ex parte Drake, In re Ware*(2). Nor does it seem that part satisfaction by execution or by receipt of dividend in bankruptcy would have that effect.

It is, however, clear from *Ex parte Drake, In re Ware*(2) that the plaintiff can after judgment elect to look only to his chance of obtaining satisfaction by execution or by proof and give up his claim to the property: *In re a Debtor, Ex parte Petitioning Creditor*(3) the plaintiff obtained a judgment for the return of a cup forthwith or for payment of £50 its value and for £5-5-0 for damages and for costs. The cup not being returned he signed judgment for the full amount and issued a bankruptcy notice for non-compliance with that judgment. After that date the debtor sent the cup to the plaintiff and on the hearing of the petition claimed that there was no longer a good petitioning creditor's debt as it ought to be treated as reduced by the value of the cup. The Court ordered adjudication and BIGHAM, J., said,

"It has been contended that the property in the cup is still in the petitioning creditor. I think, however, that by issuing the

(1) (1871) L.R., 6 C.P., 584. (2) (1877) 5 Ch.D., 866.
(3) (1907) 97 L.T., 140.

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bankruptcy notice and presenting the bankruptcy petition the creditor finally elected to abandon the property in the cup to the debtor and that it now vests in him and will form part of the estate in Bankruptcy."

This was not necessary for the decision of the case because the debtor failed to exercise the option that was given of returning the cup forthwith, with the result that the judgment became a money judgment only and he having lost his option was liable for the full amount of the judgment and could properly be adjudicated for non-compliance, and I am not satisfied that if the plaintiff had subsequently found the cup in the hands of a third party, he could not on the principle of *Brinsmead* v. *Harrison*(1) have sued that person for it. But, however that may be, I think there is much more here. The plaintiff when he petitioned in insolvency had no judgment at all nor any thing equivalent to one. But what he did was to allege that the first defendant owed him Rupees 1,000 as a liquidated amount and set off about half of that amount against a debt due from him to the insolvent and then used the balance as a liquidated amount to support his insolvency petition, and in my judgment that amounts to a definite election to abandon all right to the ring in favour of the first defendant, and to look only to the advantage of getting rid of the balance of his own debt to the first defendant, and the hope, by the pressure of insolvency proceedings, of getting payment of the balance from the first defendant. It follows that, at the date of the pledge to the second defendant, the first defendant had a good title to the ring and the plaintiff had none, that at least on the date of the adjudication the plaintiff gave up all further interest in the ring, and that if the first defendant had no title at the date of the pledge he got one on the date of adjudication on the principle of

(1) (1871) L.R., 6 C.P., 584.

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feeding the title as it is called in *Whitehorn Brothers* v. *Davison*(1), or forwarding the title as it is called by PHILLIMORE, J., in *In re a Debtor, Ex parte Petitioning Creditor*(2), the principle being that if there is a sale or pledge to a bona fide purchaser or pledgee for value by one who has no title, if that person subsequently obtains a title it enures to the benefit of the purchaser or pledgee.

On these grounds I think that the judgments of the District Munsif and VENKATASUBBA RAO, J., are correct and the appeal must be allowed with costs throughout.

OLDFIELD, J.

OLDFIELD, J.—I agree.

RAMESAM, J.

RAMESAM, J.—I agree.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Odgers.

1923, April 23.

THE TALUK BOARD, DINDIGUL, THROUGH ITS PRESIDENT (FIRST DEFENDANT), APPELLANT,

v.

VENKATRAMIER AND FOUR OTHERS—(PLAINTIFFS), RESPONDENTS.*

Customary right—Long use by villagers of village site—Grant by Government of the site for building a school—Legality of.

In the absence of evidence of open and continuous enjoyment as of right, of village sites, by the villagers, establishing in their favour any definite customary right or right by prescription, the Government can assign village sites to any one who applies for them for building purposes. *Collector of Gōdāvari District* v. *Pedda Rengayya* (1908) 4 M.L.T., 440, followed.

SECOND Appeal against the decree of U. GOVINDAN NAYAR, Additional Subordinate Judge of Madura, in

(1) [1911] 1 K.B., 463. (2) (1907) 97 L.T., 140.

* Second Appeal No. 289 of 1921.

THE TALUK BOARD, DINDIGUL, v. VENKATRAMIER.

Appeal Suit No. 49 of 1920 preferred against the decree of S. NARAYANASWAMI AYYAR, District Munsif of Tirumangalam, in Original Suit No. 417 of 1918.

The facts are given in the judgment.

T. Narasimha Ayyangar with *T. Nallasivam Pillai* for appellant.

K. Bashyam Ayyangar for respondents.

JUDGMENT.

AYLING, J.

AYLING, J.—This appeal relates to a plot of land, 14 cents in extent, forming part of S. No. 261-2 F-4 in Solaikurichi village, Madura taluk, which measures 19·28 acres and is registered as nattam (building site) poramboke. Most of the survey number has already been built over, but 2·92 acres are still vacant and of this, Government has granted the suit plot to the Dindigul Taluk Board (first defendant) to build a girls' school upon. The plaintiffs are villagers, who claim that they have a right to use the whole of the vacant land (including the suit site) for various agricultural purposes and plead that the grant to the taluk board is consequently illegal.

The sole question is as to the legality of the grant and on this the two lower Courts have come to opposite conclusions, the Subordinate Judge in first appeal deciding in favour of plaintiffs.

It is not disputed that nattam poramboke may properly be granted for the purpose specified; but plaintiffs claim a right vested in the villagers whom they represent, incompatible with such a grant.

They say in paragraph 5 of the plaint "from time immemorial this kalam poramboke has been in the undisturbed enjoyment of the ryots of the said village and they have been using it as of right for communal purposes as detailed hereunder. That the said site

from time out of mind has been used and is now being used as a threshing floor for about 500 acres in times of harvest (kodai and kalam), for storing manure and green leaves, for stocking hay-stacks immediately after the harvest, for drying paddy before it is taken to the granaries of the ryots, for allowing their cattle, buffaloes, etc., amounting to 1,000 and more, to stray and remain there before they are taken for grazing, and for other incidental innumerable purposes connected with agricultural operations."

The lower Appellate Court finds as a fact that the villagers have been using the land for purposes mentioned in the plaint and proceeds "The question is whether such enjoyment has given them the right asserted by them in the plaint or whether it was only as a matter of grace that the villagers were permitted such acts of enjoyment." He decides in favour of plaintiffs.

It seems to me that whether the right claimed by the plaintiffs is based on custom or prescription, the enjoyment alleged is of too fugitive and patently permissive a kind to afford support to it. There is probably, no village in the Presidency in which the unoccupied village-site is not used for the purposes indicated. Such user does no harm to any one and is unobjectionable until the land is wanted for its legitimate purpose. I do not propose to labour this point as it is sufficient to quote from the judgment of a Bench of this Court (BENSON and BHASHYAM AYYANGAR, JJ.) dealing with an absolutely similar case, *Collector of Gōdāvari District* v. *Pedda Rengayya*(1). "According to the common law of the country the control of Grama nattam vests in the Revenue authorities and they are at liberty to grant portions of it at their discretion to persons who apply for it for building purposes."

(1) (1908) 4 M.L.T., 440.

It is suggested as a ground of distinction that the use of the land as a threshing floor, which is not specifically referred to by the learned Judges in that case, though probably included, is a ground of distinction. It seems to me to differ in no way from the other uses set out in the plaint. Any flat hard piece of ground can be utilized as a threshing floor and such user is of just the same character as the others.

Apart from the evidence of user, the only other evidence in plaintiffs' favour to which we are referred is Exhibit A, copy of an order of the Madura Tahsildar in 1902. It appears from this that about that time another portion of the same unoccupied nattam poramboke had been set apart for building police lines and that on the ryots petitioning that this would be "an obstruction to the public use" it was ordered that another locality should be selected and that the place originally chosen should be kept as threshing floor poramboke, etc., for the public use."

I am not prepared to attach much weight to this as evidence of recognition by Government of the rights claimed by plaintiffs; and still less as evidence of a fresh grant for communal purposes other than building site. Exhibit A is merely the order of the Tashildar communicating to the ryots the fact that the Board of Revenue had acceded to their request, and given up the scheme of building police lines on that spot. Neither the petition of the royts nor the orders or reports of the Deputy Collector and Collector nor the Proceedings of the Board (all specifically referred to in Exhibit A) are in evidence and I find it impossible to say from Exhibit A that Government either recognized plaintiffs' rights or made a fresh grant of the land. We do not know the extent of the land required for the police lines or, except by conjecture, the nature of the petitioners' objections, or the

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extent to which the existence of an equally suitable alternative site may have influenced the Board's decision. I cannot agree with the lower Appellate Court that Exhibit A evidenced any acknowledgment of plaintiffs' rights, or was more than a concession to their pleas (or those of their predecessors) on the ground of comparative convenience as estimated at the time.

I would set aside the decree of the lower Appellate Court and restore that of the District Munsif dismissing the suit with costs throughout.

ODGERS, J.

ODGERS, J.—My learned brother has set out the facts and it is unnecessary for me to repeat them. The question is "have the plaintiffs acquired any and what rights in the suit land?". The question falls under two heads (1) have they acquired such rights, if at all, by long enjoyment, (2) or by grant. The land is admittedly building site poramboke and any rights acquired by long enjoyment must have been acquired against Government. The lower Appellate Court has apparently found a customary right in favour of plaintiffs founded on long enjoyment from28—70 years as spoken to by the witnesses. The nature of the enjoyment is very varied—the user most prominently put forward is kalam (threshing floor) but other alleged user includes "storing manure and green leaves, stocking hay-stacks, drying paddy, allowing cattle, buffaloes, etc., to stray and remain there before they are taken for grazing and for other incidental innumerable purposes connected with agricultural operations. (See plaint paragraph 5.) In the first place it seems clear that no easement in the ordinary sense of the term as defined by section 4 of the Easement Act has been acquired. The right is not set up in respect of a dominant tenement to which the easement is appurtenant over a

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servient tenement subject to it; *Ashraf Ali* v. *Jagan Nath*(1). It is true that section 18, Easement Act, recognizes that easements may be acquired by virtue of a local custom and the illustration (*a*) to the section appears to illustrate a customary right rather than an easement though it may be justified by the fact that every cultivator as the owner or possessor of cultivated land has the right to graze his cattle on the common waste. In my opinion the right claimed here must be established if at all as a custom recognized in section 2 (*b*), Easement Acts. The distinction between a customary right and customary easement is seen in *Palaniandi Tevan* v. *Puthirangonda Nadan*(2). No fixed period is laid down by law as necessary to establish the former. In the Madras case quoted above the law as laid down in *Kuar Sen* v. *Mamman*(3) was approved. The learned Judges there held paragraph (2), page 92—

"In our opinion a Court should not decide that a local custom such as that set up in this case, exists, unless the Court is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or by force, and that it had been openly enjoyed for such a length of time as suggests that originally by agreement or otherwise, the usage had become a customary law of the place in respect of the persons and things which it concerned."

Apart from reasonableness, I do not think it can be said in the present case, that the alleged custom is certain as to extent or application. The waste land in question was obviously used for any and all purposes or for several purposes at one or different times. Each user was fugitive or intermittent so much so that as shown by the plaint itself it is extremely difficult if not impossible to say what the customary user sought to be established was. Indiscriminate miscellaneous user of

(1) (1884) I.L.R., 6 All., 407. (2) (1897) I.L.R., 20 Mad., 389
(3) (1895) I.L.R., 17 All., 87

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village waste land cannot, in my opinion, establish the fact that such user "had become a customary law of the place in respect of the persons and things which it concerned." The user here is much too indefinite to do anything of the kind; I do not think the attempt to establish the primary user of the land as kalam can be supported.

In *Collector of Gōdāvari District* v. *Pedda Rengayya*(1) a precisely similar case arose as to the village building site. The learned Judges held that no customary right was established. They said until it (the land) is appropriated in this way to the use of some definite person it is usual for the villagers to make use of it in any way that suits them best.

> "They throw rubbish on it, graze their cattle on it, use it as a latrine, and the like, and they are rarely interfered with. But it is always understood that this use is permissive on the part of Government and that Government has the right at any time to appropriate it for any special public purpose or grant it to an individual for building purposes."

There is therefore no sufficient evidence from which I can say that a custom has been established.

There is no direct evidence of any grant, but the lower Appellate Court relies on Exhibit A as an acknowledgment of the rights of the plaintiffs in the suit land. The villagers protested some years ago when it was proposed to erect police lines on the site in question. The Collector's order, Proceedings of the Board of Revenue and Deputy Collector's disposal, though referred to in Exhibit A, are not before us, and Exhibit A is an endorsement signed by the Tahsildar on the petitions of the villagers. The endorsement says "the place shall be kept as threshing floor, poramboke, etc., for the public use." It may be that no undertaking is intended

(1) (1908) 4 M.L.T., 440.

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or implied in this that the place shall be so kept for ever; in any case I think it impossible to hold that Government by this endorsement of the Tahsildar either intended or must be held in law to recognize the alleged customary rights of the villagers in the waste. If this were so, it would be reasonable to suppose that this would much more clearly appear from the Proceedings of the Collector or the Board which the respondents have not laid before us. Under the circumstances, I am not prepared to say that Exhibit A is an acknowledgment of these rights of the villagers. Differing from the lower Appellate Court, I therefore hold that the appellants must succeed and that no customary right has been established by the respondents.

N R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Devadoss.

1923 April 24.

KONTHALATHAMMAL (PETITIONER), APPELLANT,

v.

THANGASAMY AND THREE OTHERS (PETITIONERS NOS. 1 TO 3 AND FIRST RESPONDENT), RESPONDENTS.*

Guardians and Wards Act (VIII of 1890) sec. 47—Order refusing to remove testamentary guardian—Appeal against order, maintainability of—Hindu Law—Power of a Hindu father to appoint by will guardian for the person and separate property of his minor children.

A Hindu died leaving a will by which he bequeathed his property to his minor daughter and appointed a guardian for such property and for the person of the minor. On the refusal by the Court of an application to remove such guardian, under section 39 of Guardians and Wards Act,

Held, (1) that no appeal lay to the High Court under the Act from an order refusing to remove the guardian and (2) that

* Civil Miscellaneous Appeal No. 66 of 1923 and Civil Revision Petitions Nos. 289 and 359 of 1923.

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under the Hindu Law the father was competent to appoint by will a guardian of the person of his minor children and of their property, not being joint family property. *Soobah Doorgah Lal Jha* v. *Rajah Neelanund Singh*, (1867) 7 W.R., 74, followed. *Chidambara Pillai* v *Rangasami Naicker*, (1918) I.L.R., 41 Mad., 561 (F.B.), considered.

APPEAL against, and Civil Revision Petitions under section 115 of Act V of 1908 and section 107 of the Government of India Act to revise the order of J. C. STODART, District Judge of South Arcot, in O. P. No. 13 of 1923.

The facts are given in the Judgment.

A. Krishnaswami Ayyar (with *K. Aravamudu Ayyangar*) for appellants.

E. L. R. Thornton, T. R. Ramachandra Ayyar, V. Narayana Ayyar and *T. S. Krishnaswami* for respondents.

JUDGMENT.

OLDFIELD, J.

OLDFIELD, J.—The first and important of the two orders before us was passed by the District Judge of South Arcot on a petition for the removal of first respondent from her position as testamentary guardian of the person and property of a minor Thirugnanavalli Ammal, for the appointment of the petitioner or any other fit person in her stead and for connected reliefs. Against that order there is an appeal by the petitioner and also a revision petition.

I deal first with the respondent's preliminary objection to the appeal, that this order, consisting in a refusal to remove a guardian is not appealable under section 47, Guardians and Wards Act (VII of 1890) and is final under section 48. The order, as it stands, is certainly of that character, its conclusion being that the Court is not prepared to remove the guardian on any of the grounds stated in the petition and that the petition is dismissed; and the objection is supported by

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authority which I am prepared to follow, *Mohima Chunder Biswas* v. *Tarini Sunker Ghose*(1), *Pakhwanti Dai* v. *Indra Narain Singh*(2), *In re Bai Harkha* (3) and *Imtiaz-un-nissa* v. *Anwar-ul-lah*(4). But the objection has been met by the arguments, (1) that the order is really one declaring a testamentary guardian under section 7 (1) (*b*), and, as such, appealable under section 47 (*a*) and (2) that as the right of a Hindu to appoint a testamentary guardian is not recognized by the law and first respondent's appointment was a nullity, there was no necessity for the Court to remove or to refuse to remove her and its order must be regarded simply as one refusing to appoint petitioner, which is appealable under section 47 (*a*).

The first of these arguments can be dealt with shortly. It rests solely on the facts that the lower Court in its order has referred to first respondent as the testamentary guardian, has affirmed her fitness for the appointment and found against the conduct alleged as disqualifying her for it. But all that was relevant to the prayer for her removal and did not amount to the making of a declaration, which was not made in terms, which neither party has asked for, which the lower Court was not conscious that it was considering and in regard to which the procedure enjoined in the Civil Rules of Practice, Chapter XI, was not employed.

The second argument calls for fuller discussion notwithstanding that, as I shall hold, there is ground in any event for interference with the order before us in revision, because a conclusion against the legality of first respondent's appointment as guardian will be relevant, not only to the question whether that order is appealable, but also to the merits in the further enquiry to be held,

(1) (1892) I.L.R., 19 Calc., 487.
(2) (1896) I.L.R., 23 Calc., 201.
(3) (1896) I.L.R., 20 Bom., 667.
(4) (1898) I.L.R., 20 All., 488.

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since, if she has not been legally appointed, the question will not be of her right to retain the appointment, but only of her eligibility for it in competition with the petitioner or any other candidates. It is not disputed that by a will, dated 6th July 1915, the father of the minor left her his separate property, worth (it is said) several lakhs of rupees and purported to appoint first respondent guardian of her person and property. But it is argued that the terms of a decision of a Full Bench of this Court in *Chidambara Pillai* v. *Rangasami Naicker*(1) require us to hold generally against the right of a Hindu to appoint a guardian of a person or property of his child by will, not only when the property is, as it was in that case, ancestral but also when it is, as in this case, separate. It is not disputed that this is the only authority, by which the argument can be supported, and we must therefore scrutinize its terms to see whether they entail the acceptance of any principle applicable to the present case. Such scrutiny is the more clearly required, when, as appears from the fuller report of the arguments in the Madras Law Journal of *Chidambara Pillai* v. *Subbayya Pillai* (2) the experienced vakil for the petitioner, who attacked the appointment, conceded that it would have been valid, if the property in question had been separate. It is further to be observed that the decision does not deal with guardianship of the person, except in the statement of COUTTS TROTTER, J., that the appointment of such a guardian may be a natural right vested in the father.

What is urged, however, is that each of the judgments refers generally to the absence of any recognition in Hindu Law of the father's right to appoint a posthumous guardian for his children and that section 6 of the

(1) (1918) I.L.R., 41 Mad., 561 (F.B.). (2) (1918) 34 M.L.J., 381 (F.B.).

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Guardians and Wards Act authorizes only such appointments as are valid by the law to which the minor is subject. If that were indeed the effect of the judgments, the arguments under consideration would no doubt be established. But to take them in order—that of AYLING, J., refers to the necessity for careful consideration, if the existence of such a power is to be recognized on the sole grounds that its exercise is not forbidden and is expedient, and then decides against its existence on the ground, irrelevant in the case before us, that it would run counter to the conception of a Hindu joint family. SESHAGIRI AYYAR, J., no doubt refers first to the absence of any foundation for the existence of the power in Hindu Law or as a common law right recognized by other systems of jurisprudence. But he then enters on a survey of the case law, to which I return, observing for the present only that many of the authorities cited dealt with the joint family property, with which he was directly concerned, that he distinguished one case on the ground that the property in question was self-acquired and that he explained the recognition of a testamentary power of appointment in certain statutes on the ground that they

> "referred to cases, in which such power is permissible under the law, for example cases of self-acquired property in Madras."

It may in the circumstances be doubted whether these learned Judges intended to negative the existence of a testamentary power generally or otherwise than in connexion with joint family property. COUTTS TROTTER, J., alone, if I understand him correctly, adhered to the argument that absence of a statutory basis for the power or of any basis for it except natural right was conclusive against its existence generally and in connexion with separate as well as family property. We are not in my opinion debarred by *Chidambara Pillai* v. *Rangasami*

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Naicker(1) from scrutinizing petitioner's argument on its merits.

In doing so I make no attempt to follow the demonstration that testamentary guardianship in other systems of law has had no origin independently of statute. That demonstration before the Full Bench did not, it may be observed, include any reference to the mention of testamentary guardianship in the Twelve Tables (Mackeldey's Roman Law, Ed. Dropsie Sec. 621 note) or to the former practice of the Ecclesiastical Courts in England in respect of personal property (vide Simpson on Infants, 3rd Edition, page 203) and the complication of the matter in respect of real property by the existence of feudal rights, which 12 Charles II, chapter 24, was passed to determine; and it is therefore doubtful whether the argument, so far as the Roman and English systems were concerned, was exhaustive. We are, however, on firmer ground in confining attention to India. It may be said at once that it is useless to look for this or any other testamentary power in Hindu texts, which recognise no power to make a will or execute an instrument to take effect after executant's death at all. It may in fact be suggested that the powers to appoint a testamentary guardian and to make a will were, as regards any demonstrable or legitimate origin and until the Hindu Wills Act in 1870, on the same footing. The real justification for the one, as for the other, is that it has been exercised from the earliest times after the reception of English Law without objection and with the countenance of the legislature and the Courts. It is urged that this is inconclusive, when the will-making power can be explained in terms of legal conceptions always current in India, whilst the appointment by will

(1) (1918) I.L.R., 41 Mad., 561 (F.B.).

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of a guardian cannot; and we have been referred to the suggestion in the *Tagore Case* (1) of a connexion between wills and gifts *inter vivos*. But this suggestion, like others considered by Mr. Mayne at page 366, Hindu Law, 9th Edition, is at best conjectural; and, if conjecture as to the origin of the power in dispute is necessary when the argument in its favour is based primarily on its exercise and recognition, it is easy in a country where the distinction between legal and beneficial ownership has always been neglected, to explain the testamentary appointment of a guardian of property in terms of the execution of a trust, the similar appointment of a guardian of the person following by mistaken analogy or on the ground of mere convenience.

The reply to the contention that such appointments have been continuously recognized by the legislature has been that such recognition is always subject, as it is under Act VIII of 1890, to their validity under the personal law of those concerned; but it is difficult to suppose that any such reservation was contemplated in sections 18 and 19, Madras Regulation V of 1804 in connexion with permanently settled estates, the owners of which have in almost all instances been Hindus; and none is conceivable in connexion with section 3, Hindu Widows Re-marriage Act (XV of 1856). It is true that the Hindu Wills Act (XX of 1870) did not apply section 47 of Indian Succession Act (XV of 1856) to Hindu wills; but that section, evidently based on the statute of Charles II, was framed with reference to the wills, which the Succession Act controlled and the result of the failure to apply it to Hindu wills was only to limit the privilege of testamentary appointments to adult

(1) (1872) I. A., Sup. Vol. 47, at 68.

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testators and the authority of the commentators follows the evident intention of the legislature. In a case of 1807 referred to in Strange's Hindu Law, Volume II, page 72, the Pandit recognised, apparently as a matter of course, that the father's testamentary nomination of his brother as guardian should prevail against the claim of the natural guardian, the widow; and, if the Court's compliance with this view was, as Mr. Colebrooke suggests, in the exercise of its discretion, that was natural where the testamentary power itself was still in controversy. Later, Trevelyan on Minors, 3rd Edition, page 62 and the successive editions of Mayne's Hindu Law and Usage are clear, *Chidambara Pillai* v. *Rangasami Naicker*(1) being referred to in the last edition of the latter as relating only to guardianship of family property.

The conclusion in favour of the right of testamentary appointment is supported indirectly by the fact that except in *Budhilal* v. *Morarji*(2), where the point was taken but not decided, we have not been shown that unless perhaps in two cases any general objection to such an appointment was ever suggested before the decision of Madras Full Bench, although in several cases, for instance *Venkayya Garu* v. *Venkatanarasimhulu*(3), *Sami Row* v. *Eliavatha Row*(4), and *In the matter of Srish Chunder Singh*(5), such an objection, if sustainable, would have been conclusive. Of those two cases, *Alagappa Ayyangar* v. *Mangathai Ammangar*(6) related to guardianship of the person and *Soobah Doorgah Lal Jha* v. *Rajah Neelanund Singh*(7) to guardianship of the property. There

(1) (1918) I.L.R., 41 Mad., 561 (F.B.)
(2) (1907) I.L.R., 31 Bom., 413.
(3) (1898) I.L.R., 21 Mad., 401.
(4) (1906) 16 M.L.J., 357.
(5) (1894) I.L.R., 21 Calc., 206.
(6) (1917) I.L.R., 40 Mad., 672.
(7) (1867) 7 W.R., 74.

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seems to me no reason, in view of the considerations already referred to, why the former decision should not be followed, although it appears to have been based entirely on *Albrecht* v. *Bathee Jellamma*(1), in which the validity of the appointment was, so far as appears, not disputed. The second authority calls for closer consideration, because SADASIVA AYYAR, J., in *Alagappa Ayyangar* v. *Mangathai Ammangar*(2) understood it apparently as contemplating an appointment in respect of family property whilst COUTTS TROTTER, J., in *Chidambara Pillai* v. *Rangasami Naicker*(3) thought that it referred only to a possibility and contained no definite decision. The answer to SADASIVA AYYAR, J., is however given in the judgment of SESHAGIRI AYYAR, J., in the case last mentioned that self-acquired as well as family property was in question; and his further comment is significant.

> "In respect to such property it can hardly be disputed that it is open to the testator to appoint a guardian to manage it."

The recognition of that right in *Soobah Doorgah Lal Jha* v. *Rajah Neelanund Singh*(4) seems to me, with all respect for COUTTS TROTTER, J., clear. No doubt the learned Judges there, as they avoided finding on the genuineness of the will relied on, were compelled to adjudicate so far as the family property was concerned with reference to representation and, so far as the separate property was concerned, with reference to estoppel and they conceded that the will in respect of the family property was in any event inoperative. But their treatment of both pleas depended on their conclusion that if the will was genuine, it conferred a definite legal character and that the Courts dealing with the

(1) (1912) 22 M.L.J., 247.
(2) (1917) I.L.R., 40 Mad., 672.
(3) (1918) I.L.R., 41 Mad., 561 (F.B.).
(4) (1867) 7 W.R., 74.

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earlier litigations and the then respondent in connexion with a foreclosure were justified in assuming that it did so. No doubt the learned Judges in referring to the will as operative as regards the guardianship, said that it was not so as regards the family property. But it should be remembered that in the previous litigation relating to that property, the suit of 27th July 1848, the guardianship was in dispute only between the alleged testamentary and the natural guardian, for both of whom the separate character of the property was common ground. This decision given in 1867 has not, so far as is shown, been subjected to adverse comment until now and it, in my opinion, corroborates strongly the inference based on the materials already considered. I hold that a Hindu can appoint a guardian of the person and property of his child by will, that the appointment of first respondent is not a nullity and that therefore the present appeal does not lie and must be dismissed. No order as to costs.

We are, however, asked by a separate petition to interfere with the lower Court's order in revision on the ground that it has failed to exercise its jurisdiction in respect of its omission first to consider certain allegations that first respondent has alienated the minor's estate without justification. The facts are that in paragraph 17 (*a*) (*b*) (*c*) and (*e*) there are allegations of misappropriation by first respondent for the benefit of or at the instance of second respondent, who under the will is associated with her in the management of the minor's property and that the lower Court dismissed them on the sole ground that under the will first respondent is not to be required to account in respect of her management. Whether evidence to prove these allegations was offered is not clear; but it would have been useless to offer any, when a different ground of decision had commended itself.

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It is not, however, possible for us to accept that ground. For, apart from the question whether the intention of the testator was that gross negligence or dishonesty by first respondent should be condoned, the allegations in paragraph 17 (*e*) and (*f*) are not, as they are stated, matters of account, the contention that those in paragraph 17 (*a*) and (*b*) are so, because they relate to the disposal of the collections of the estate, cannot be accepted, when the suggestion is that the investment of those collections as corpus has been made with the object of benefiting second respondent. In this respect the lower Court failed to exercise its jurisdiction. We must therefore set aside its order and remand the petition for further enquiry. As the effect of charges, such as those in question, must be cumulative, all the allegations in the petition will be open to further consideration, before orders are passed. Costs of the Civil Revision Petition in this Court will be costs in the case and be provided for in the lower Court's order.

This result reached, it is unnecessary for us to consider the other failure to exercise the jurisdiction relied on in the Civil Revision Petition, the lower Court's omission to ascertain from the minor in person her wishes as to her guardianship and the proposal for her marriage, on account of which the removal of first respondent was principally asked for. It is sufficient that neither the Guardians and Wards Act nor any authority makes such ascertainment obligatory and that the lower Court may very well have refrained from seeing and questioning the minor in the exercise of its discretion, an exercise which in view of her tender age was very likely sound and with which therefore we cannot interfere. In this connexion, however, we think it advisable to direct the attention of the lower Court to certain allegations as to the efforts by both sides to

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interfere with the custody of the minor's person and to prevent her from coming from Chidambaram to appear at the hearing. Some of these allegations were made in this Court by affidavit in connexion with an application for temporary injunction and it is not disputed that some of them were also made orally on the last day of the hearing in the lower Court. It will be for the lower Court to consider after obtaining any definite statement which either party may wish to make regarding the facts whether anything has been done which would constitute a disqualification for the custody and guardianship of the minor and whether the appointment of an impartial third person as guardian of either the person or the property is not advisable.

In this connexion reference must be made to Civil Revision Petition No. 289 in which we are asked to revise an order by the lower Court granting an injunction restraining four persons specified, here petitioners, from taking steps towards the minor's marriage against 1st respondent's wishes. This order was passed on the day on which the guardianship petition was dismissed, on the oral application of 1st respondent's counsel. Whether such an oral application should have been listened to it is unnecessary to decide, but it may be observed that no special reasons appear for the deviation from ordinary practice involved. There are however other fundamental objections to what was done. For there was no proceeding before the Court initiated by the 1st respondent, in which even an interim injunction could have been granted, much less a permanent one, such as that before us. No notice was given to the persons, against whom the order was made; and they are not alleged to have been in fact present. There was no evidence by affidavit or otherwise adduced for the Court to act on and the statement in the order that the facts were not disputed is

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futile, when the persons concerned to dispute them, those against whom the order was asked for, never had an opportunity to do so. It is difficult to understand how any one concerned can have thought that a permanent injunction granted in such a way could be legal. The Civil Revision Petition must be allowed with costs against 1st respondent, the injunction being dissolved.

DEVADOSS, J.

DEVADOSS, J.—I entirely agree with the order passed by my learned brother and the reasons therefor, and I wish to add a few words of my own on the question of a Hindu father's right to appoint a guardian by will for his minor children, as it is a question the decision of which, one way or other, will affect millions of His Majesty's subjects in this Presidency.

Mr. A. Krishnaswami Ayyar who appears for the appellant contends that under the Hindu Law a father has no right to appoint a guardian by will for his minor son, and relies for his contention on the Full Bench ruling in *Chidambara Pillai* v. *Rangasami Naicker*(1). His argument is that "it is settled law that a father cannot also appoint a guardian for his minor son by will when there is a joint family property, and that he cannot appoint a guardian for him if he bequeaths to him his separate or self-acquired property, for that would mean the existence of two guardians, one in respect of joint family property and one in respect of his separate property. Even if the Hindu father is the sole surviving member of a joint family, he cannot appoint a testamentary guardian for his son, who by birth acquires an equal right with the father in ancestral property. The right to appoint a guardian does not go with the right to make bequests. For a testator cannot appoint by his will a guardian to a minor legatee, who is not his

(1) (1918) I.L.R., 41 Mad., 561 (F.B.).

child, and a Hindu who is not empowered by Hindu Law to appoint a guardian for his son cannot claim the right by virtue of his being able to leave his son some of his own property, and it is illogical to say that he can appoint a guardian in respect of his separate property when he cannot do so in respect of joint family property. Wills and testaments were unknown to Hindu Law and therefore a Hindu father has not, by his personal law, a right to appoint a testmentary guardian for his minor children. The right to appoint a guardian by will or testament is a creation of statute in England, and there is no statute law in India empowering a Hindu father to appoint a guardian by will."

The real question for consideration is:—Has a Hindu father the right to appoint by will a guardian for his minor son? It is considered as settled law that he cannot appoint a guardian to manage the joint family property, as the manager of the family is the guardian of all minor members. The last surviving member of a joint family cannot appoint by will a guardian for his son to manage the family property, as it is said to be inconsistent with the theory of survivorship. If the father has not the right to appoint a guardian by will for his minor son by virtue of his power of disposition of his separate or self-acquired property, for it is a well-known principle of law that a testator cannot appoint a guardian for a minor legatee only by reason of the disposition in his favour, a testator can appoint trustees to hold property for a legatee and that does not depend upon the legatee being a minor. So the right to appoint a guardian for a minor son is to be sought for elsewhere than in the power to bequeath the property to him. A father as well as a mother have obligations as well as rights in respect of their children during minority. The penal law perscribes a penalty for abandoning a child

and punishes any one who kidnaps a child under a certain age from the rightful guardianship. The father has the right to the custody of the children against all the world till a court of law sees fit to take away the guardianship from him. Under the Hindu Law a father can give away a boy in adoption. The mother can give a boy in adoption only with the express permission of the father. Even where a father is a junior member of a joint Hindu family he alone has the right to give the boy in adoption. The managing member of a joint family has not the right to give in adoption any junior member who is not his own son. The Hindu Law recognises the right of the father as paramount in this respect to that of the managing member of the family. The Hindu Law permitted the father to sell his son. If such is the right of the father why could he not appoint by will some one to look after the minor son during his minority? The answer is that the Hindu Law does not permit it. On a close examination it will be found that it does not prohibit or discountenance such an appointment. Wills being unknown to Hindu Law no provision is found in the authorities as to the power of a father to appoint a testamentary guardian for his minor son. The text on which reliance is placed is *placitum* 27, in Chapter 8 of Manu;

"The property of a student and of an infant, whether by descent or otherwise, let the king hold in his custody, until the owner shall have ended his studentship, or until his infancy shall have ceased in his sixteenth year."

The chapter is headed "on judicature; and on law, private and criminal." From the said heading, the text appears to be a direction to the King's Judges to do what is proper in the case of an infant when his property has to be protected. There is nothing to show that in the case of infants the father could not exercise his right of

guardianship. No doubt the king's power was paramount. But that is no ground for saying that the father did not exercise or could not exercise his right as guardian of his own minor son, for if he had had no power over his son how did it allow a father to give away his son in adoption thereby cutting off the son from all the benefits that would accrue to him in his natural family. Nor does the text in any way infringe or take away the right of the manager of a joint family to have the guardianship of the minor members. I take it, though not without some hesitation, that the direction is only to the Judges to decide causes that might come up before them. Whatever may be the meaning of the text, I think there is nothing in the Hindu Law to prevent a Hindu father appointing a guardian for the person of his minor son.

The argument urged against this view is that there can only be one guardian for a minor and that there cannot be one guardian for the person and another for the property. No doubt there cannot be two guardians for one and the same property of a minor. But there is nothing in law or reason or equity to prevent there being two guardians, one for the person and one for the property. The Guardians and Wards Act expressly permits the appointment of more guardians than one—vide section 15, clauses (4) and (5). Where it is not permissible to appoint a guardian for the property of a minor, a guardian for the person alone can be appointed by testament. The case in *Virupakshappa* v. *Nilgangava*(1) decided by a Full Bench of the Bombay High Court is sufficient authority for this position. It is sheer pedantry to seek for texts or authority in ancient law books for giving relief suitable to the conditions now

(1) (1895) I.L.R., 19 Bom., 309.

prevailing. The Code of Manu was intended for a primitive society which has long since ceased to exist. Now would it be possible to enforce the law contained, for instance, in the following texts in Chapter VIII?

270. "A once-born man, who insults the twice-born with gross invectives ought to have his tongue slit; for he sprang from the lowest part of Brahman".

271. "If he mention their names and castes with contumely, as if he say "Oh Devadatta, thou refuse of Brahmans", an iron style, ten fingers long, shall be thrust red hot into his mouth".

380. "Never shall the king slay a Brahman, though convicted of all possible crimes: let him banish the offender from his realm, but with all his property secure, and his body unhurt".

371. "Should a wife, proud of her family and the great qualities of her kinsmen, actually violate the duty which she owes to her lord, let the king condemn her to be devoured by dogs in a place much frequented".

81 in Chapter IX: "A barren wife may be superseded by another in the eighth year. She whose children are all dead, in the tenth; she who brings forth only daughters, in the eleventh, she who speaks unkindly, without delay."

It is unnecessary to quote further examples from Manu to show the utter unsuitability of applying wholesale the directions or laws contained therein to the present society. It would be as absurd to apply the Code of Manu in its entirety to the present society as to apply the levitical law to modern Europe. When the family or clan lived in a small village it was deemed prudent to live jointly, to have one manager and to prevent alienation. But to-day a member of a joint family may live in England or America while the other members live in this Presidency. If it is said that a father cannot appoint by will a guardian for his minor son because there is some joint family property, what is to happen to a minor whose father dies in California or South Africa? If the boy happens to be a minor at the

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date of his death no one can take charge of him or look after the property till an undivided cousin or a distant relative in India takes steps to protect him. If a successful member of the bar or a member of the Viceroy's council who is a Hindu sends his son for education to Eton or Harrow and dies before his son attains his age, should the boy be left to the tender mercies of an ignorant coparcener by reason of the misfortune that the family owned an ancestral hut in a small village in the Presidency? The Court has to take into account the modern conditions in giving effect to ancient texts or law that was considered valid and binding once but which has been departed from for generations. The Hindu Law as now obtains has departed in many vital respects from the law that was codified if such an expression could be used with regard to the Code of Manu, perhaps 2,000 years ago.

The Law of Wills has grown up quite within recent times and judicial decisions have recognized the validity of Hindu wills, and the Hindu Wills Act has put the matter on a satisfactory basis. The following passage from West and Buhler, 4th Edition, page 618, note, illustrates the opposition to the recognition of wills by courts. "Mr. Ellis thought that a Hindu could not make a will at all. Strange's Hindu Law, 419. It is obviously opposed to the Brahminical family system and to the interest of the ancestral manes in the estate out of which sacrifices to them are to be provided. A general opinion unfavourable to the testamentary power was expressed by native judicial officers consulted in Bombay in 1864. But the principle obtained early recognition, though but a qualified one, that what could be given away during life could be bequeathed by will." Whether the law of wills has grown out of the power to make gifts *inter*

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vivos or not, it is unnecessary to enquire. It is sufficient for the present purpose to say that wills had come to be recognized as valid by a long course of decisions before the Hindu Wills Act was passed. The power of a father to appoint a guardian for his minor son by will was recognized in *Soobah Doorgah Lal Jha* v. *Rajah Neelanund Singh*(1). All writers on Hindu Law without exception have recognized the right. Writers like Mayne, Trevelyan and Gour have accepted the father's right to appoint a testamentary guardian as unchallenged. It was the consciousness of the people in this Presidency that a father could appoint a testamentary guardian for his son. Till the decision in *Chidambara Pillai* v. *Rangasami Naicker*(2) was given, no one seriously disputed the right of the father to appoint a guardian for his minor son. With due respect I must observe that the decision in *Chidambara Pillai* v. *Rangasami Naicker*(2) is not only against the consciousness of the people but is opposed to their notion of the law on the subject. The point that was referred to the Full Bench in *Chidambara Pillai* v. *Rangasami Naicker* (2) was "Whether it is competent to the only adult coparcener of a Mitakshara family consisting of himself and his minor coparceners to appoint a testamentary guardian to the coparcenery properties of the minor coparceners"? And the answer given was in the negative. SESHAGIRI AYYAR, J., tries to explain *Soobah Doorgah Lal Jha* v. *Rajah Neelanund Singh*(1) on the ground that the property dealt with was the self-acquired property of the testator. If the father had no power to appoint a testamentary guardian he could not acquire the right merely because he had self-acquired property. There are remarks in the judgment to the effect that

(1) (1867) 7 W.R., 74.

(2) (1918) I.L.R., 41 Mad., 561 (F.B.).

there is nothing in the Roman Law or English Common law which empowers a father to appoint a guardian for his minor children. Mr. Moyle in his book on Roman Law at page 13 with regard to the twelve tables makes this observation, "Nor did they include the *leges regiæ*, law and religion having now been differentiated. Much again relating to the effects of legal acts and dispositions which was the matter of common knowledge and formed no subject of dispute remained, as we might say, 'Common Law' the familiar possession of every citizen. Leage in his book on Roman Law describes the various kinds of tutela. Tutela testamentaria was appointed by will. The duties of tutela are set out at page 101 of his book. Pollock and Maitland in their History of the English Law at page 312 trace the origin of wills to very early times.

"We may believe that even in the first days of Christianity the Church was teaching that the dying man was in duty bound to make such atonement as possible for the wrongs that he had done and to devote to the relief of the poor and other pious works a portion of the wealth that he was leaving behind him. . . . From the middle of the ninth centuary we begin to get documents which are spoken of as the Anglo-Saxon Wills and Testaments." Vol. 2, page 312.

With regard to guardianship the learned authors make this observation at page 443 of the same volume:

"This part of our law will seem strange to those who know anything of its next of kin. Here in England old family arrangements have been shattered by seignorial claims, and the King's court has felt itself so strong that it has had no need to reconstruct a comprehensive law of wardship. That the king should protect all who have no other protector, that he is the guardian above all guardians is an idea which has become exceptionally prominent in this much governed country. The king's justices see no great reason why every infant should have a permanent guardian because they believe that they can do full justice to infants."

The testamentary power was hotly opposed by the king and his officers while it was sedulously supported

by the Church and its dignitaries. Finally the Church triumphed. Until recently the Ecclesiastical Courts dealt with all testamentary matters and granted probate. So it was necessary in the time of Charles II to have a statute empowering a father to appoint a testamentary guardian. This does not mean that under the Common Law the father had not the right of guardianship but under the peculiar tenures obtaining in England and the law of primogeniture the power of the father to appoint a guardian for his heir was resisted till the legislature had to intervene. There is nothing in the law of tenures in this country to militate against the right to guardianship of a father, and therefore it cannot be contended that that right was denied in ancient times. The decision in *Chidambara Pillai* v. *Rangasami Naicker* (1) can only govern cases where a testamentary guardian is sought to be imposed upon the coparceners of a joint Hindu family. It cannot be extended so as to take away the right of a father to appoint a guardian for the person of his minor son.

The source of law is custom, judicial decisions and statutes. The custom as now prevalent recognizes the father's right as shown by the numerous wills in which a guardian is appointed for the minor children by fathers; and the judicial decisions have recognized the right at least from the times of *Soobah Doorgah Lal Jha* v. *Rajah Neelanund Singh*(2) and the fact that the correctness of that decision has not been questioned for a long number of years can only be attributed to the consciousness of the people that it was in accordance with the custom prevailing among the people. I am led to make these observations in the hope that the decision in *Chidambara Pillai* v. *Rangasami Naicker*(1) will come up for reconsideration before long.

(1) (1918) I.L.R., 41 Mad., 561 (F.B.). (2) (1867) 7 W.R., 74.

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In the present case the minor is a girl. She can have no community of interest in property with her father. The question of joint family status cannot come in. I hold that it is the inherent right of a father to have the custody of his minor children and that right is transmissible by will or testament, and there is nothing in the Hindu Law to prevent such transmission.

There is a further argument which I need only mention for it has not been pressed before us, that is, the applicability of the Code of Manu to the Dravidians of this Presidency. The English Judges who administered justice in the days of the East India Company took their law from the Pandits who always looked up the ancient texts for guidance. The more ancient the text the greater was its sanctity, and *ergo* its binding character. This view was sedulously propogated by the Pandits and the Judges who were ignorant of the customs of the people, naturally adopted the view of the Pandits. This question need not be pursued further. But it should be remembered when it is sought to apply wholesale what is foreign to the Dravidians, to the conditions now prevailing. The Courts in India are enjoined to decide cases according to justice, equity, and good conscience where no specific rule exists. There being no specific rule against the appointment of a testamentary guardian by a father for his minor children either in Hindu Law or in any valid custom, I hold that a father has power to appoint by will a guardian for the person of his minor children whether there be joint family property or not; and that right does not depend upon the father being able to devise by will any property to his children for whom he appoints a guardian.

N.R.

PRIVY COUNCIL.*

1923, June 29.

BOMMADEVARA NAGANNA NAIDU AND ANOTHER, (APPELLANTS),

v.

RAVI VENKATAPPAYYA AND OTHERS (RESPONDENTS).

(On Appeal from the High Court at Madras.)

Cause of action—Money recovered under decree—Subsequent decision of Privy Council between same parties—Absence of reversal or supersession of former decree—Zamindar and tenant—Decrees as to proper patta.

Money recovered under a decree cannot be recovered back in a fresh suit while the decree under which it was recovered remains in force; if the decree has been reversed or superseded the money paid is recoverable.

Suits by a Zamindar against tenants for the acceptance of pattas at *asara* or *varam* rates for wet lands were dismissed by the Revenue Court and, on appeal, by the District Judge, it being found that certain cash rate had previously been agreed. On second appeals, the High Court in 1908 reversed those decrees and held that the pattas tendered were proper. In 1914 the Privy Council reversed the decree of the High Court on the ground that the decision was one of fact and, therefore, could not be reversed upon a Second Appeal. After 1908 the Zamindar in subsequent suits had recovered under decrees rent at the rate held applicable by the High Court. In the present suits the tenants sought to recover the amount by which the rent so paid exceeded that finally decreed in the earlier suits.

Held that the decision of the Privy Council had not superseded the decrees under which the rent had been paid, and that the tenants were not entitled to recover.

Shama Purshad Roy Chowdery v. ***Hurro Purshad Roy Chowdery*** (1865) 10 M.I.A., 203, followed. *Jogesh Chunder Dutt* v. *Kali Churn Dutt* (1878) I.L.R., 3 Calc., 30 (F.B.), disapproved.

CONSOLIDATED APPEAL (No. 105 of 1921) from a judgment and several decrees of the High Court (March 7, 1919) reversing decrees of the District Judge of Kistna.

The Consolidated Appeal arose out of two sets of suits.

* PRESENT :—Lord BUCKMASTER, Lord DUNEDIN, Lord CARSON, Sir JOHN EDGE and Lord SALVESEN.

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One set consisted of suits brought by the respondents (tenants) in 1916 against the appellants (landlords) to recover the excess amount of rent which had been recovered from them in respect of faslis 1316 to 1322 under decrees in suits under section 77 of Madras Act I of 1908. The decrees had been made on the assumption that a decree of the High Court, dated October 13, 1908, was right. The plaintiffs relied on a decision of the Privy Council in *Ravi Veeraraghavulu* v. *Venkata Narasimha Naidu Bahadur*(1) reversing the decree of 1908. The second set consisted of suits brought by the appellants in October 1914 to recover rent due for fasli 1323.

The facts appear more fully from the judgment of the Judicial Committee.

The first set of suits was tried by the Subordinate Judge of Bezwada, the second by the Deputy Collector. In all the suits appeals were taken by the landlords (the present appellants) to the District Judge of Kistna, who held that the judgment of the Privy Council operated as res judicata, with regard to the rent for years subsequent to 1315 fasli. Further appeals by the landlords to the High Court were heard together by the Chief Justice (Sir JOHN WALLIS) and KUMARASWAMI SASTRI, J. The learned Judges held that the District Judge was right in holding that, in the circumstances of the suits, the tenants were entitled to recover the excess rent for which they sued; they adopted the view of the majority of the Court in *Jogesh Chunder Dutt* v. *Kali Churn Dutt*(2) as to the effect of the judgment of the Privy Council in *Shama Purshad Roy Chowdery* v. *Hurro Purshad Roy Chowdery*(3). They considered, however, that the District Judge was wrong in assuming that the

(1) (1914) I.L.R., 37 Mad., 443 (P.C.): 41 I.A., 258.
(2) (1878) I.L.R., 3 Calc., 30 (F.B.). (3) (1865) 10 M. I.A., 203.

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rate which the Revenue Court had fixed for fasli 1315 governed later faslis. The decrees in all the suits accordingly were reversed and the suits remanded for trial.

Dunne, *K.C.*, and *Narasimham* for the appellants.—Reference was made to the two decisions mentioned above, also to *Marriot* v. *Hampton*(1).

The respondents did not appear.

The judgment of their Lordships was delivered by

LORD CARSON.

Lord CARSON.—The appellants are the Zamindars of North Vallur Estate in Kistna district, and the respondents are the occupancy tenants of certain villages in the said estate.

In 1904 the Zamindar, father of the appellants, brought before the Court of the Head Assistant Collector of the Bezwada Division, Kistna district, forty-nine summary suits under section 9 of the Madras Rent Recovery Act, 1865, against the respondent raiyats to enforce the acceptance by them of pattas or leases for faslis 1314 and 1315 (1904 and 1905) which had been tendered to them. The Zamindar demanded *asara* or *varam* rates for wet lands. The tenants on the other hand denied the claim of the Zamindar, pleading that certain rates had been fixed in fasli 1292 (1882), which were alone recoverable and not the *asara* or *varam* rates (produce sharing system) demanded by the Zamindar. The suits were dismissed by the Head Assistant Collector, Bezwada Division, finding as a fact that the conversion of the *asara* rates into cash payment in 1283 fasli, which was confirmed in 1292 fasli, and had been acted upon ever since, was a permanent arrangement, and that the plaintiff (the said Zamindar) was not therefore entitled to impose on the tenants pattas on the *asara* basis. On

(1) (1797) 7 Term. Rep., 269; 2 Sm. L.C. (12th Edn.), 408.

appeal by the Zamindar, the District Judge affirmed the decrees of the Collector in respect of the finding of fact relative to the character of the arrangement of 1283 fasli, and upheld the orders dismissing the suits. On further appeal to the High Court of Madras, the High Court set aside the orders of the lower Courts, holding that

> "the pattas tendered by the plaintiff were proper pattas, and that the defendants must accept them."

The tenants, thereupon, appealed from the judgment of the High Court to His Majesty in Council, and on the 18th June 1914, the Lords of the Judicial Committee of the Privy Council set aside the judgments and decrees of the High Court on the ground that as there were concurrent findings of fact in the Courts below, an appeal to the High Court was precluded by the Code of Civil Procedure, sections 584 and 585. Their Lordships, however, ordered that the cases should be sent back to be remitted to the Court of the Collector for the drawing up of proper decrees and dealing with any other questions that might be outstanding in these actions between the parties. The case before this Board is reported in *Ravi Veeraraghavulu* v. *Venkata Narasimha Naidu Bahadur*(1) where the facts outlined above are more fully stated. Meanwhile during the pendency of the said appeal to His Majesty in Council the Zamindar instituted similar suits for arrears of rent in respect of 1316 fasli to 1322 fasli under section 77 of Madras Act I of 1908, and decrees were made against the tenants, all of which, except those of 1322 fasli, were realized in execution. No application was made for stay of trial of any of the suits pending the disposal of the appeal to this Board. The matters for

(1) (1914) I.L.R., 37 Mad., 443 (P.C.); L.R., 41 I.A., 258.

determination in the present consolidated decrees raise questions as to the effect, if any, of the decision of this Board of the 18th June 1914, on the subsequent judgment and execution thereunder.

On the one hand, on the 2nd October 1914, the appellants brought the present suits against the respondents, claiming dry cash cist (rent) for dry lands and claiming *ambaram* (rent in kind, or its equivalent in money) for wet lands, whilst the tenants (respondents) contended that the Zamindar was only entitled to dry cash rate on all the lands, and that the order of the Privy Council had so decided.

On the other hand, the tenants (respondents) instituted the present suits against the father of the appellants, who now represent him, for a refund of amounts paid by them in excess of dry rates for the rents of 1314, 1316—1321 fasli, claiming that the said decision of the Privy Council in suits for 1315 fasli was to the effect that the Zamindar was entitled only to dry rates as fixed in 1292 fasli, and that not only the decisions of the High Court but also those of the Collector and the District Judge, which were given subsequently on the strength of that decision, were void and *ultra vires*.

In the Zamindar's suits the Deputy Collector of Bezwada decreed the suits, fixing the rent at the rate of Rs. 6 per acre for wet lands and rates varying from Rs. 3 to Rs. 2-8-6 for dry lands. On appeal, however, the District Judge of Kistna held that the Privy Council judgment operated as *res judicata* with regard to the claim for rent for future years, and he decreed a uniform rent of Rs. 2-12-0 odd per acre.

In the tenants' (respondents') actions for recovery of the excess of rent paid during the pendency of the appeal the Subordinate Judge of Bezwada on the 29th September 1916 found in favour of the respondents (tenants).

The decisions in both sets of cases were challenged, and appeals taken to the Hight Court of Madras, and both sets of appeals were heard together.

On the 7th March 1919 the High Court gave judgment. With regard to the suits instituted by the respondents for the refund of rent in consequence of the decision of the Judicial Committee, the Court held "that the tenants (respondents), on reversal of the decree of the High Court by the Privy Council, became entitled to recover the rent which they had overpaid in the intermediate suits by reason of this decision," and remanded the suits for disposal according to law.

The learned Judges of the High Court based their decision mainly, if not altogether, on the authority of a case decided by this Board, viz., *Shama Purshad Roy Chowdery* v. *Hurro Purshad Roy Chowdery*(1), as interpreted by the majority of the Full Bench in *Jogesh Chunder Dutt* v. *Kali Churn Dutt*(2) to be referred to later.

Their Lordships cannot agree with this view, nor do they consider that the case cited in evidence is an authority for the conclusions come to. It is clear and settled law, as stated in the former case at page 211 of the report that "money recovered under a decree of judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered remains in force; but this rule of law rests as their Lordships apprehend upon this ground, that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding. If it has been reversed or superseded, the money recovered under it ought certainly to be refunded, and, as their Lordships

(1) (1865) 10 M.I.A., 203. (2) (1878) I.L.R., 3 Calc., 30 (F.B.).

conceive, is recoverable either by summary process or by a new suit or action. The true question, therefore, in such cases is, whether the decree or judgment under which the money was originally recovered has been reversed or superseded?"

Their Lordships entirely agree with this statement of the law, and, applying the test indicated, their Lordships can find no reason for holding that the decrees or judgments executed against the respondents were either reversed or superseded by the judgment of this Board of the 18th June 1914. By that judgment their Lordships did not propose to deal with anything but the actual subject matter of the cases before them. In fact the only point decided was that the High Court, under the circumstances, had no power to reverse the decisions of the subordinate Courts. The facts in the case of *Shama Purshad Roy Chowdery* v. *Hurro Purshad Roy Chowdery*(1), were, in their Lordships' opinion, entirely different. In that case the Judicial Committee, in applying the test already quoted, viz., "whether the decree or judgment under which the money was originally recovered had been reversed or superseded," were of opinion that it was plainly intended by the Order in Council in that case that all the rights and liabilities of the parties should be dealt with under it, and that it would be in contravention of the order to permit the decrees obtained pending the appeal on which it was made to interfere with this purpose. It was also pointed out that the plaint in which the original decree was recovered, described the interest recovered by the decrees under appeal as part of the same cause of suit, holding therefore, that such decrees were mere subordinate and dependent decrees, which could no longer be held to have remained in force when the decree on

(1) (1865) 10 M.I.A., 203.

NAGANNA v. VENKATAPPAYYA. — LORD CARSON.

which they were dependent had been reversed. It is no doubt true, as stated in the judgment of the High Court, that in the case of *Jogesh Chunder Dutt* v. *Kali Churn Dutt*(1) the decision in *Shama Purshad Roy Chowdery* v. *Hurro Purshad Roy Chowdery*(2) was extended by a majority to apply to a case like the present, where it sought to recover the difference between the enhanced rent recovered and the fixed rent which the tenant was bound to pay. But for the reasons already stated their Lordships cannot agree with the interpretation of the case in 10 M.I.A. applied by the majority of the Court, and prefer the reasoning and conclusions set forth in the judgment of GARTH, C.J., which were concurred in by JACKSON, J.

Their Lordships are therefore of opinion that in the tenants' (respondents') actions for the recovery of the excess of rent the appeal should be allowed and the actions should be dismissed. In the suits by the appellants for the rent of a fasli subsequent to the decision of the Privy Council their Lordships see no necessity for referring the case back to the Court of the Honorary Suits Deputy Collector of Bezwada, as has been ordered by the High Court. That Court, by decrees of the 3rd December 1915, found that a suitable rate is Rs. 6 per acre, and the appellants have not before the Board questioned the amount of such decrees. Their Lordships therefore think these decrees should be affirmed.

Their Lordships will, therefore, humbly advise His Majesty that these appeals should be allowed but without costs, either in the Courts before whom the suits were litigated or before this Board.

Solicitor for appellants: Edward Dalgado.

(1) (1878) I.L.R., 3 Calc., 80 (F.B.). (2) (1865) 10 M.I.A., 203.

SPECIAL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Coutts Trotter and Mr. Justice Krishnan.

In re AN ADVOCATE.

1923, August 20.

Article 10, Letters Patent—Barrister—Advocate—Misconduct—Conviction in England for perjury—Disbarring in England—Motion in High Court four years after, to disbar—Matters for consideration.

A Barrister who was enrolled as an Advocate of the Madras High Court in 1913 was convicted of perjury in England by the London Central Criminal Court and sentenced in 1918 to imprisonment for six months, which conviction and sentence were confirmed on appeal. The Benchers of his Inn thereupon disbarred him and expelled him from the Inn in 1919. On a motion under Article 10 of the Letters Patent, made in 1923 to disbar the Advocate;

Held (1) that the loss of the privilege of being a Barrister in England, though it was his only qualification for admission here as an Advocate, did not necessarily entail his disbarment in the High Court, (2) that the conviction pronounced after a fair and full trial, though by an English Court, should be recognized as valid by the High Court and (3) that though in these proceedings it was not open to question the propriety of the conviction the Court can, with a view to fix the *quantum* of punishment, look into the circumstances of the case and ascertain the degree of moral turpitude and extenuating circumstances, if any.

Held further that though, if the motion had been made soon after the conviction, the Court would have disbarred him, yet as it was made four years later, it was open to the High Court to take into consideration such matters as would be relevant on an application to reinstate a practitioner who has been disbarred.

An order of disbarment is not necessarily final or conclusive for all time; it is open to the Court to readmit a practitioner after a lapse of time, if satisfied that he has in the interval conducted himself honourably and that the sentence of exclusion has had the salutory effect of awakening in the delinquent a higher sense of honour and duty so that he might be safely entrusted with the affairs of his clients and admitted to an honourable profession without its suffering any degradation.

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Looking into all the circumstances of the case their Lordships suspended the Advocate from practice for a year.

It having come to the notice of the High Court, that Mr. *A*, an Advocate of the Court, and a member of Lincoln's Inn, had been convicted of perjury and sentenced (in 1918) to undergo six months' imprisonment by the Central Criminal Court, London, and that the said conviction and sentence were upheld by the Court of Criminal Appeal, that the said Advocate had been expelled and disbarred by the Benchers of the Lincoln's Inn (in 1919) and that their action had been upheld by a tribunal presided over by the Lord CHANCELLOR, the High Court, directed (in 1923) that the said Advocate be called upon to show cause why his name should not be removed from its rolls.

Further facts are given in the judgment.

Advocate-General (*C. Madhavan Nayar*) for the Crown.—Having been deprived in England of his position as a Barrister, the Advocate should be disbarred here also, as his only qualification for enrolment and practice here as an Advocate has been taken away. The propriety of the conviction cannot be questioned; *In the matter of Rajendro Nath Mukerji*(1). Perjury involves moral turpitude. A person who belongs to this honourable profession should be above suspicion; *Re Hill*(2), *In re Weare*; *In re the Solicitors Act* 1888(3).

The Advocate in person.—The conviction being by a foreign Court is not binding on this Court. The conviction is wrong. I was really innocent. I did not commit perjury. Even if I cannot question the propriety of the conviction the Court can look into the circumstances of the case to see the extent of the

(1) (1900) I.L.R., 22 All., 49 (P.C.).
(2) (1868) 3 Q.B.D., 543 at 548. (3) [1893] 2 Q.B., 439, 445, 446.

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gravity of the offence and the circumstances under which it was committed. [For this purpose the Advocate then read the relevant evidence in the criminal case.] Conviction need not entail disbarment. Even a person once disbarred can be reinstated on account of subsequent good conduct. *In re Abiruddin Ahmed*(1), *In re Hara Kumar Chatterjee*(2). More than four years have elapsed since the conviction and on the certificates of good conduct given to me, I should not be disbarred.

F. S. Vaz for the Bar Association.

JUDGMENT.

SCHWABE, C.J.

SCHWABE, C.J.—*A* was called to the Bar by the Honourable Society of Lincoln's Inn in January 1913. He was admitted as an Advocate of this Court under the rule which includes among qualifications for such admission a call to the Bar in England. After his call to the Bar he remained in England for some time and practised there.

Unfortunately he became involved in matrimonial disputes arising out of his relations with two English ladies, one of whom he married and with the other of whom he went through a form of marriage. According to him it was valid under the Muhammadan Law, but it was clearly invalid according to the Law of England. It was alleged by the first of these ladies that he ill-treated and deserted her, and she in some way having got into communication with the editor of a newspaper, one Horatio Bottomley, the latter published a series of articles reflecting seriously on the character of *A*. He brought and himself conducted an action for libel based on these publications. At the hearing of that suit he

(1) (1910) 12 C.L.J., 625. (2) (1911) 14 C.L.J., 113.

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gave evidence and was cross-examined by Horatio Bottomley, a very skilled cross-examiner, who also conducted his case in person. The evidence given did not commend itself to the jury and *A* lost his case. He was subsequently prosecuted for perjury, in respect of the answers alleged to have been given under that cross-examination. He was convicted and sentenced to six months' imprisonment and on appeal the conviction was upheld. The matter came before the Benchers of his Inn, and after a full enquiry, it was decided by reason of that conviction he had been proved unfit to remain a member of that Honourable Society and he was disbarred and expelled therefrom. He appealed to his Majesty's Judges and his appeal was dismissed. The Lord Chancellor stated that it was impossible to allow a man who had been convicted of perjury to remain a member of the Bar, and although he hoped that the appellant having learnt his lesson and received his punishment might be able to lead an honest and successful life in the future, the tribunal could not interfere with the Benchers' decision. No steps were taken at the time to remove *A's* name from the roll of Advocates of this Court, and after a lapse of some years he commenced practice as an Advocate in Madras. The attention of the High Court having been called to these facts, he was called upon to show cause why his name should not be removed from the roll and he now appears to show cause.

In such cases the Court will not allow the propriety of the conviction and sentence to be questioned, but can and will enquire into the facts to ascertain the degree of moral turpitude involved and to form an opinion whether the legal practitioner in question should be removed or suspended or be otherwise dealt with. It has been argued before us that the rule as to not allowing

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the propriety of the conviction and sentence to be questioned does not apply where the conviction took place in England and the application to the Court is in this country. I do not consider it necessary to consider how far this rule is applicable to cases of convictions in another country, though I concede that it is possible that, where the Criminal Law of the two countries differs in respect of the matters charged or in a case where it is alleged that there had not been a fair trial in some foreign country, the rule might be held not to be applicable. But, in this case, the law of the two countries is the same, and it is quite clear that *A* received a full and fair trial at the hands of the English Judge and Jury. Indeed, his own submission to the contrary is based on the admission of certain shorthand-notes of his cross-examination as evidence of answers given in respect of which the charge of perjury was brought. He suggested that such shorthand-notes were inaccurate and that the inaccuracy was intentional and due to corruption of the shorthand writers by Horatio Bottomley. It is a matter for regret that, in the stress of argument, he should have chosen to make such allegations which are entirely unsupported by evidence and which I am quite clear are unfounded. I am satisfied that he was rightly convicted, and it is therefore immaterial to consider whether or not we are bound, without enquiry, to accept the conviction as correct. If it is a matter upon which it is open to me to express an opinion, I must also say that I am quite satisfied as to the propriety of the decesion of his Benchers and of His Majesty's Judges. If an application had been made soon afterwards, in my judgment, on the facts of this case, no other order could have been properly made than that his name should be struck off from the roll of Advocates. I wish to guard myself from saying that this Court is

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bound to follow the decision of the Benchers of the Inns of Courts. I think it has, by the Letters Patent, a discretion vested in it, and it must in every case exercise that discretion itself, giving of course due weight to the views of the Benchers of a man's Inn in England.

But this case has not come before us immediately, but after the lapse of some years, and, in my judgment, it is open to this Court to consider the matter as it now stands, and to take into consideration such matters as would be relevant on an application to reinstate a man who has been disbarred. The law, I think, is quite clear that an order of disbarment is not necessarily final or conclusive for all time and that it is open to a Court to readmit a practitioner after a lapse of time, if it is satisfied that the practitioner has in the interval conducted himself honourably and that the sentence of exclusion has had the salutary effect of awakening in the delinquent a higher sense of honour and duty, so that he might be safely entrusted with the affairs of his clients and admitted to an honourable profession without its suffering degradation, and in such a case it is open to the proper tribunal to restore a man to the rolls whether he be a Barrister, Advocate or Attorney; *See Ex parte Pyke*(1) and the judgment of MOOKERJEE, J., in *In re Abiruddin Ahmed*(2). In this case we might strike off the name from the rolls and leave it to the practitioner to qualify himself again for admission by applying to his Inn for reinstatement. But *A* is here and not in England; he desires to practise here and not there and I do not think it would be right for us to avoid the responsibility of considering the matter ourselves by leaving the burden of the decision to the Benchers of his Inn. We have before us a considerable body of testimony that *A*

(1) (1865) 6 B. & S., 703; 122 E.R., 1354.
(2) (1910) 12 C.L.J., 625.

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has led an honourable and reputable life since his return to this country. I think too we may take into consideration the fact that, although this crime of perjury did involve moral turpitude as a practitioner, at the time he was young and that he swore falsely under the stress of severe cross-examination and that it is a case where he was in fact defending himself from a very serious attack upon his character, and that he probably became somewhat unbalanced by reason of his matrimonial affairs in a foreign country, and his being involved in a mass of personal litigation resulting therefrom.

On the whole the justice of the case will be met by ordering that *A* shall be suspended from practice as Advocate for a period of 12 months, such time to run from the 26th February 1923, the date when he first appeared before this Court to show cause. The order will not be retrospective in effect and his suspension will be from now until February 26th, 1924.

COUTTS TROTTER, J.

COUTTS TROTTER, J.—My Lord the Chief Justice has set out the facts in relation to this gentleman, and I need not repeat them. But I think it is right that I should state in my own words my reasons for concurring in the course he has proposed, and I fully realize the serious responsibility which is cast upon us in this matter. It was at one time suggested that we were relieved of that responsibility on the ground that one of the qualifications necessary for the enrolment of an Advocate in this Court was that the applicant should be a member of the English bar, and that, as it is not suggested that Mr. *A* has or had any other qualification on ceasing to be a member of the English bar, he must *ipso facto* be removed from the roll of Advocates of this Court as being without qualification. I do not think that we are entitled so to evade the responsibility of determining for ourselves whether reasonable grounds exist for taking the step

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that we are invited to take by the Advocate-General in the name of the Bar, and I think that we are invested with a discretion which, however reluctantly, we must exercise for ourselves.

I agree that the actual conviction of Mr. *A* for perjury is a thing which we cannot allow him to go behind, and we must take it that he committed the crime for which he was tried and convicted. But I think we are entitled, indeed, are bound to look into the facts in order to form an opinion as to the degree of moral turpitude involved in a conviction on those facts. In doing so I am not called upon to express any opinion as to his relations with the two women in whose lives he involved himself. With regard to the first there seems reason to believe that he infected her with gonorrhœa soon after their marriage. There also seems reason to think that at the time of the marriage he quite honestly believed himself to be free from taint. With regard to Miss Ling, I confess myself unable to see that she had any legitimate cause of complaint against him. On her own admission she seems to have known all the facts relating to him and all the risks she ran in going through a form of marriage with him at the time when she commenced her association with him. But there can be no possibility of doubt that when cross-examined in the libel action which he brought against Mr. Bottomley he committed deliberate perjury by swearing that he was not the father of Miss Ling's child. He was foolish enough in this Court to suggest that the shorthand writers who recorded those answers were tools in the employment of Mr. Bottomley and that he never gave the answers they swore to from their notes. Such a suggestion cannot be entertained for a moment and I think it is quite clear that he did what is sometimes spoken of as "swearing by the card." I entirely and respectfully agree with

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AVORY, J., that the sooner that "swearing by the card" is recognized and punished as perjury the better, and indeed there is a very old instance in the books where it was so punished.

At the same time I think that we are entitled to look at this man's position and see what he actually did. He was being persecuted by a ruffian who conducted a blackmailing journal whose activities are the more revolting because they were conducted in the hypocritical guise of a *censor morum*. Mr. *A* was practically a ruined man unless he could vindicate his character in an action for libel against that journal or its editor or both. He throughout maintained and maintains now that he regarded Miss Ling as being, according to the law of his own people and by every moral law, his wife. These are the circumstances in which he took the foolish and wrong step of swearing that he was not the father of Miss Ling's child. It was because, as he said, he regarded her not as Miss Ling but as Mrs. *A*. There is this to be said in extenuation for his doing so, namely that he was goaded and harassed by a relentless persecutor and that so far as I can see it was perjury committed not deliberately in furtherance of any fraudulent aim or to cause any injury to anybody else, but solely in self defence. No doubt its tendency was to pervert justice; and it even might have tended to put damages in his pocket to which his character did not entitle him; but I do not think that this consideration actuated him or was present to his mind. It was also I think inspired by the desire of trying to make by a verbal quibble a score off his opponent. I think his conduct is not inaptly described in the document which is signed by an Indian gentleman of position who has written on his behalf as "conceit and legal lunacy." Perjury is an offence the gravity of

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which I do not seek to minimise, especially when committed by a member of the bar who knows its full import. At the same time it has many degrees of gravity, and I think there is much to be said in extenuation of the offence committed by Mr. *A*. I am the more inclined to take this view as in the latter part of his address to us Mr. *A* practically abandoned the foolish attempt to argue against the propriety of his conviction and in effect threw himself upon the clemency of the Court.

The much greater difficulty which has pressed upon me throughout and presses upon me still is the gravity of the position of our appearing to act contrary to the action of the Benchers of Lincoln's Inn who disbarred him, and the very eminent judges who confirmed that sentence. In view of certain arguments that were addressed to us by Mr. *A*, arguments to my mind both injudicious and pernicious, I wish to make my attitude on one point as clear as I can make it. I utterly dissent from the view that any different standard of conduct or character is required from a barrister of Indian race to a barrister of English race. I equally strongly dissent from the view that a different standard of honour should be held to exist for a practitioner at the English bar of whatever race and the practitioners of this Court, whether barristers or vakils. I am jealous of the honour of the bar which practises before me, as I am proud of what I believe to be its high standard of professional conduct, and I resent as keenly, as I feel convinced that that bar would resent, any suggestion that the standard of honour that it strives to maintain and which it would wish this Court to uphold is in any respect lower than the standard demanded from practitioners at the English bar. So far from thinking that any prejudice was imported into any of the proceedings in England by reason of Mr. *A*'s race, I think

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that all those who investigated the case were clearly actuated by an insistent desire to make such allowance both for his race and his religion as probably told considerably in his favour.

My reasons for taking the undoubtedly strong course we are taking of allowing this gentleman to continue to practise in these Courts are the following. In the first place I think that he has been very severely punished already for what he did. I think it is to his credit that for a number of years he has acquiesced in that punishment and has only recently sought once more to seek his livelihood in what he tells us—I see no reason to question his statement—is the only vocation in which by his training and associations he is able to earn a living. In the next place it does weigh with me very greatly that Viscount Cave, a lawyer of the greatest eminence and now Lord Chancellor, when Home Secretary, thought fit to order his release immediately on the rejection of his appeal against his conviction. It also weighs with me greatly that a very large number of documents have been put before us, including a memorial signed by a large number of well-known practitioners of this Court, men mostly of a different race and creed to his own, who all concur in the view that he has sufficiently purged his conduct, that this episode is a blot on a previously honourable career, that he is fit to be associated with them in their profession, and that therefore they recommend him to the favourable consideration of this Court. Finally I do not conceal my view that it is much extenuation of his most reprehensible conduct that it was committed under the goad of a relentless persecution for the mere purpose of public notoriety by one of the foulest pests that has ever infected English society. Perhaps I may make my position clear by putting it in this way. If this Court

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were invested with jurisdiction to re-admit him as a member of the English bar, which it is not, I should consider that he had purged his offence and was fit to resume the privileges which he justly lost. As that is my opinion, it logically follows that I must say as I do that he is entitled under the conditions which my Lord has laid down to be permitted once more to practise as an advocate of this Court.

KRISHNAN, J.

KRISHNAN, J.—In this case the learned Advocate-General has applied to us to exercise our disciplinary powers under the Letters Patent and to remove the name of Mr. *A*, an advocate of this Court, from the roll of advocates for the reason that he was convicted of perjury by the Central Criminal Court in London, a conviction which was confirmed on appeal, and he was disbarred subsequently by the Benchers of his Inn (Lincoln's Inn) by reason of that conviction, their order being confirmed by His Majesty's judges on appeal.

Mr. *A* was called upon to show cause why this application should not be granted. He did not deny the facts stated by the Advocate-General but he raised certain contentions in answer which I shall consider. The first point he tried to make was that he was wrongly convicted and that we should examine the facts of the perjury case against him and decide for ourselves whether his conviction was right or wrong. Now it is laid down by the Privy Council in *In the matter of Rajendro Nath Mukerji*(1) that in an inquiry into the conduct of a practitioner under the Letters Patent the propriety of a conviction and sentence could not be questioned though the facts of the case might be considered to see whether the culpability of the individual concerned was such as to disqualify him for his

(1) (1900) I.L.R., 22 All., 49 (P.C.).

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profession. Sir RICHARD COUCH who delivered their Lordships' judgment in that case quotes and follows the following observations of Lord MANSFIELD in *Ex parte Brounsall*(1).

> "This application is not in the nature of a second trial or a new punishment. But the question is whether after the conduct of this man it is proper that he should continue a member of a profession which should stand free from all suspicion and it is on this principle that he is an unfit person to practice as an attorney. It is not by way of punishment, but the Courts in such cases exercise their discretion whether a man whom they have formerly admitted, is a proper person to be continued on the roll or not."

The Court would not as a matter of course strike a man off the rolls because he has been convicted, but will examine the case to see in what manner its discretion should be used. It will not however examine the propriety of the conviction on the merits.

It was argued in answer by Mr. *A* that these principles could not be applied to his case as he was convicted not by a Court in India but by an English Court which according to him is in the position of a foreign tribunal. I am unable to accept this argument. No authorities have been cited in support of it. In a matter of disciplinary jurisdiction which we are now exercising the English Court cannot, in my opinion, be put on the same footing as a foreign Court. It is because Mr. *A* was a Barrister of England that he was admitted as an advocate here. The question whether he should be continued as an advocate here stands on much the same footing as the question whether he should be allowed to continue as a Barrister in England and if, for the purpose of deciding the latter question, the principles stated in *In the matter of Rajendro Nath Mukerji*(2)

(1) (1778) 2 Cowp., 830; 98 E.R., 1385. (2) (1900) I.L.R., 22 All., 49 (P.C.).

apply to judgments of English Courts, as they clearly do, there is no reason not to apply them for the purpose of deciding the former question. The question whether these principles will apply when the judgment relied on is really that of a foreign tribunal and, if so, subject to what conditions they will apply is a difficult one on which I express no opinion, as it has not been properly argued before us.

Even assuming that we should go into the facts and decide if Mr. *A*'s conviction for perjury was right, there can be no doubt that it was. The only substantial argument addressed to us on the point to suggest that his conviction was wrong was that he did not utter the words regarding which he was charged with perjury but that what he swore to, was somewhat different in effect. If there was any substance in this suggestion it would have been put forward as the main ground of defence in the perjury trial. On the other hand the shorthand writers who were called as witnesses to prove what Mr. *A* had sworn to in the libel action and who proved the words used by him were not cross-examined at all. The suggestion now made, therefore, appears clearly to be an after-thought and cannot in my opinion be accepted for a moment.

Finding that Mr. *A* did commit perjury what action should we take against him? The learned Advocate-General in the course of his argument suggested that as Mr. *A* was admitted as an advocate here solely on the ground of his being a Barrister in England, his disbarment in England should, as a matter of course, lead to his being removed from the list of advocates. He contended that the continuance of his qualification as a barrister was necessary for the continuance of his status as an advocate, he not having any other qualification for it.

The point is an important one but was not properly argued by either side. No authorities or precedents were cited. Giving it the best consideration I can, I have come to the conclusion that the Advocate-General's argument is not sound. No doubt it is true that it was the fact that he was a barrister that enabled Mr. *A* to get enrolled as an advocate here and that if he were now to apply to be enrolled he could not be admitted as he is not a barrister now. But on being enrolled here in 1913 we must hold that he obtained the status of an advocate here. And under the Letters Patent we can interfere with that status by removing or suspending him only for sufficient cause shown. We have to exercise our judgment in each case on the facts placed before us and decide whether sufficient reason has been made out to take action and, if so, what action we should take. To adopt the Advocate-General's suggestion would be to allow the Benchers in England effectively to control our discretion in the matter though indirectly. That does not seem to me to be right. We are not bound by the action of the Benchers any more than they are bound by ours. Though in most cases we should and would follow the action taken by the Benchers, I cannot accede to the argument that we should do so in every case.

In the present case we have to consider not merely the facts which existed when the Benchers took action four years ago but also all that has transpired since. As pointed out by the learned Chief Justice the position now is very much the same as if Mr. *A* had made an application for reinstatement as a barrister. It is settled that such applications are competent even if a man has been altogether struck off the rolls. See *Ex parte Pyke*(1), *In re Abiruddin Ahmed*(2) and *In re*

(1) (1865) 6 B. & S., 703; 122 E.R., 1354. (2) (1910) 12 C.L.J., 625.

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Hara Kumar Chatterjee(1). In that view we must see how the matter stands. Perjury is a serious offence and undoubtedly involves great moral turpitude; it is all the greater in the case of practitioners as it is their duty whether Englishmen or Indians to maintain the purity of the administration of the law. There can be no difference in this matter between the English and the Indian practitioner or between England and India. The standard of conduct expected from the practitioner is of course the same in both the countries, be he an advocate, a barrister or a member of any other branch of the profession. I therefore agree with the learned Chief Justice in thinking that if the facts of this case had been brought to our notice at the time when the Benchers took action, our proper order would have been to strike off Mr. *A*'s name from the roll of advocates. But as I have already observed the position is not the same now and we have to consider whether it is necessary now to adopt the extreme measure of striking him off the roll or whether a more lenient order will not meet the ends of justice and the exigencies of the situation.

More than four years have passed since Mr. *A* was disbarred in England. During all these years there is reason to suppose that he has led an honourable life. He has been able to obtain and place before us numerous certificates from eminent persons both here and in England testifying to his good conduct. He has also produced a memorial signed by a large number of his brother practitioners saying that he is a fit person to continue at the bar and asking that he may be so continued. At the end of the argument he acknowledged his error and threw himself on the mercy of the

(1) (1911) 14 C.L.J., 113.

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Court and it may be reasonably inferred that he can be trusted to behave honourably hereafter. In spite of all this I should have hesitated to take too lenient a view of the case as the offence is such a serious one. But the learned Chief Justice has taken a lenient view of the case and in a matter like this of the exercise of our disciplinary jurisdiction I do not feel called upon to differ from his Lordship and to insist on more drastic action being taken. I therefore concur in the order proposed by my Lord the Chief Justice.

N.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Coutts Trotter and Mr. Justice Krishnan.

VIZAGAPATAM SUGAR DEVELOPMENT COMPANY, LTD., AND ANOTHER (APPELLANTS), DEFENDANTS,

1923, August 2.

v.

MUTHURAMAREDDI AND TWO OTHERS (RESPONDENTS), PLAINTIFF AND ADDITIONAL RESPONDENTS.*

Part-performance—Contract to sell land worth more than Rs. 100 *—Payment of consideration and delivery of possession—Suit by vendor to eject purchaser for want of conveyance—Part-performance and right to specific performance, good defences—Section 54, Transfer of Property Act (IV of* 1882*) —'Sale' and 'Price,' meaning of.*

A agreeing to sell his lands worth more than Rs. 100, to *B*, received the consideration and put *B* in possession but did not execute a conveyance. In a suit by *A* to eject *B* from the lands, based on the want of a conveyance;

* Appeal No. 106 of 1921.

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Held by the Full Bench, that part-performance by way of delivery of possession and an enforceable right on *B*'s part to specific performance are each good defences to the action; *Venkayyamma Rao* v. *Appa Rao* (1916) I.L.R., 39 Mad., 509 (P.C.), *Mahomed Musa* v. *Aghore Kumar Ganguli* (1915) I.L.R., 42 Calc., 801 (P.C.), followed. *Ramanathan* v. *Ranganatha* (1917) I.L.R., 40 Mad., 1134 and *Kurri Veerareddi* v. *Kurri Bapireddi* (1906) I.L.R., 29 Mad., 336 (F.B.), overruled.

Held, by the Division Bench (PHILLIPS AND DEVADOSS, JJ.), (*a*), that the plea of part-performance is not limited to cases where the right to sue for specific performance is not barred on the date of the subsequent suit; *Meher Alikhan* v. *Arutunnessa Bibi* (1919) 25 C.W.N., 905, followed.

APPEAL against the decree of P. NARAYANA RAO NAYUDU Garu, Subordinate Judge of Vizagapatam, in Original Suit No. 19 of 1919.

The facts are given in the Order of Reference.

Defendants against whom a decree was given by the Subordinate Judge preferred this appeal.

This Appeal coming on for hearing on Tuesday, the 1st day of March 1923, the Court (PHILLIPS and DEVADOSS, JJ.), made the following

ORDER OF REFERENCE TO A FULL BENCH.

In this case one Basivi Reddi, of whose property plaintiff is the receiver, agreed to take 200 shares in first defendant's company, and in lieu of paying cash put them in possession of certain lands and godowns. The plaintiff now sues to recover this property on the ground that title had not passed to first defendant as no registered document was executed by Basivi Reddi, and the lower Court has decreed the suit and has given a personal decree against second defendant, the Secretary of the Company. This personal decree is clearly wrong and must be set aside.

Defendants appeal and raise various contentions, the chief of which is that the case is governed by the

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doctrine of part-performance, as laid down by the Privy Council in *Mahomed Musa* v. *Aghore Kumar Ganguli*(1) and *Venkayyamma Rao* v. *Appa Rao*(2). Before dealing with this, some preliminary objections may be considered. In the first place, we agree with the Subordinate Judge on the question of limitation. It is then contended that the document relating to the purchase of the shares and the sale of the lands and godowns does not require registration by reason of section 17, 2 (ii) of the Indian Registration Act, XVI of 1908. We, however, agree with the learned Subordinate Judge that this contention is not valid. No doubt in so far as the document relates to the purchase of shares it does not require registration, but it also contains a contract for sale of immoveable property worth over Rs. 100 and as such must be registered.

It is next argued that the transaction does not come within the definition of sale in section 54, Transfer of Property Act IV of 1882, as the immoveable property was to be transferred in consideration of the allotment of shares and consequently it was not a transfer for a price. The correspondence, especially second defendant's letter of 7th June 1907 (Exhibit XVII), shows that the price of the property was fixed at Rs. 10,000, whereas the cost of the shares was Rs. 10,200, of which the Rs. 200 was paid in cash. The fact that the defendants accepted the immoveable property in lieu of Rs. 10,000 cash does not prevent the transaction being one of sale, for the price of the latter was clearly fixed at Rs. 10,000. The transaction was therefore one to which the provisions of the Transfer of Property Act apply. If, then, we apply the Full Bench ruling in *Kurri Veerareddi* v. *Kurri Bapireddi*(3), followed in *Ramanathan*

(1) (1915) I.L.R., 42 Calc., 801 (P.C.). (2) (1916) I.L.R., 39 Mad., 509 (P.C.)
(3) (1906) I.L.R., 29 Mad., 336 (F.B.).

v. *Ranganathan*(1), it is clear that plaintiff is entitled to succeed and that the doctrine of part-performance cannot be relied on by defendants. The Full Bench ruling in *Kurri Veerareddi* v. *Kurri Bapireddi*(2), was delivered before the pronouncements of the Privy Council in *Mahomed Musa* v. *Aghore Kumar Ganguli*(3) and *Venkayyamma Rao* v. *Appa Rao*(4) and it is contended that the latter have overruled the former. This contention was found against in *Ramanathan* v. *Ranganathan*(1), where the decision was that of a majority of three Judges in a Letters Patent Appeal, when two Judges had already differred. This case was followed in *Subramania Iyer* v. *Kalyanasundaram Iyer*(5). Since then the question has been considered by the other High Courts in India, and Calcutta, Allahabad, Bombay and Patna have all held the view opposed to the decision in *Ramanathan* v. *Ranganathan*(1)—(vide *Khagendra Nath Chatteerjee* v. *Sonatan Guha*(6), *Syamkisor* v. *Dines Chandra*(7), *Shafikul Huq Chowdhury* v. *Krishna Gobinda Dutt*(8), *Meher Ali Khan* v. *Arutunnessa Bibi*(9), *Salamat-uz-zamin Begam* v. *Masha Alla Khan*(10), *Bapu Apaji* v. *Kashinath Sadoba*(11), *Hiralal Ramnarayan* v. *Shankar Hirachand*(12) and *Deb Lal Jha* v. *Baldeo Jha*(13).

In view of the fact that the decision of this Court is only that of three Judges out of five, in view also of the unanimity of the other Courts, and as we also feel some doubt as to the correctness of the Madras decision, we refer the following question for decision by a Full Bench :—

(1) (1917) I.L.R.. 40 Mad., 1134.
(2) 1906) I.L.R , 29 Mad., 336 (F.B.).
(3) (1915) I.L.R., 42 Calc., 801 (P.C.).
(4) (1916) I.L.R., 39 Mad., 509 (P.C.).
(5) (1919) 53 I.C., 283.
(6) (1915) 20 C.W.N., 149.
(7) (1920) 31 C.L.J.,75.
(8) (1918) 23 C.W.N., 284.
(9) (1919) 25 C.W.N., 905.
(10) (1918) I.L.R., 40 All., 187.
(11) (1917) I.L.R., 41 Bom., 438 (F.B.)
(12) (1921) I.L.R., 45 Bom., 1170.
(13) (1920) 56 I.C., 277.

"Do the provisions of the Transfer of Property Act or of the Registration Act preclude the application of the doctrine of part-performance laid down by the Privy Council in *Mahomed Musa* v. *Aghore Kumar Ganguli*(1) and *Venkayyamma Rao* v. *Appa Rao*(2) ?"

ON THIS REFERENCE

A. Krishnaswami Ayyar (with *K. Aravamudu Ayyangar* and *P. V. Rangaram*) for appellants (defendants).—The suit must fail on either of my two following defences; (*a*) my subsisting right to enforce specific performance of the contract to sell and (*b*) even if on account of bar by limitation I am not entitled to specific performance, on the doctrine of part-performance. Defendant can get a registered sale-deed if his right to specific performance is not barred by time and his defence can be viewed as a suit for specific performance.

Bapu Apaji v. *Kashinath Sadoba*(3), *Shyam Kishore Dey* v. *Umesh Chandra Bhuttacharjee*(4), *Davud Beevi Ammal* v. *Radhakrishna Aiyar*(5), *Ramkishore Kedarnath* v. *Jainarayan Ramrachhpal*(6), *Salamat-uz-zamin Begam* v. *Masha Allah Khan*(7), *Khagendra Nath Chatterjee* v. *Sonatan Guha*(8), and *Immudipattam Thirugnana Kondama Naik* v. *Periya Dorasami*(9). *Kurri Veerareddi* v. *Kurri Bapireddi*(10), is wrong as being opposed to this last decision of the Privy Council.

Part-performance by itself is a good defence; *Mahomed Musa* v. *Aghore Kumar Ganguli*(1) and *Venkayyamma Rao* v. *Appa Rao*(2). The judgment of the majority in *Ramanathan* v. *Ranganathan*(11), is wrong; he relied also on *Khagendra Nath Chatterjee* v. *Sonatan Guha*(8),

(1) (1915) I.L.R., 42 Calc., 801 (P.C.).
(2) (1916) I.L.R., 39 Mad., 509 (P.C.).
(3) (1917) I.L.R., 41 Bom., 433 (F.B.).
(4) (1919) 24 C.W.N., 463.
(5) (1923) 44 M.L.J., 309 at 312.
(6) (1913) I.L.R., 40 Calc., 966 (P.C.).
(7) (1918) I.L.R., 40 All., 187.
(8) (1915) 20 C.W.N., 149.
(9) (1901) I.L.R., 24 Mad., 377 (P.C.).
(10) (1906) I.L.R., 29 Mad., 366 (F.B.).
(11) (1917) I.L.R., 40 Mad., 1134.

Meher Ali Khan v. *Arutunnessa Bibi*(1), *Deb Lal Jha* v. *Baldeo Jha*(2), *Hiralal Ramnarayan* v. *Shankar Hirachand*(3) and *Shafikul Huq Chowdhury* v. *Krishna Gobinda Dutt*(4).

P. Narayanamurti (with *D. Appa Rao* and *B. Satyanarayana*) for respondents (plaintiffs).—Only one question, viz., the propriety of the defence on the ground of part-performance has been referred to the Full Bench and the other defence is not referred. Part-performance is no good defence; mere possession does not confer a title to the lands under the law. It is no better than a mere right to specific performance. The policy of the law is that title to lands worth Rs. 100 and more should be acquired only by registered conveyances; see *Ramanathan* v. *Ranganathan*(5) and *Kurri Veerareddi* v. *Kurri Bapireddi*(6). As the Division Bench has not given its findings on the question whether there is now a right to specific performance, it must be left open.

JUDGMENT.

The facts relevant to the answer of the question propounded to us in this case can be very briefly stated. The predecessor-in-title of the plaintiff, in return for the allotment to him of a number of shares in the Vizagapatam Sugar Development Company, Limited, handed over certain lands, theretofore his property, to the company for the purposes of their business in the year 1907. No registered sale-deed was ever executed embodying the transaction, but the company has been in possession of the lands ever since that date. It is now sought to recover these lands on

(1) (1919) 25 C.W.N., 905.
(2) (1920) 56 I.C., 277.
(3) (1921) I.L.R., 45 Bom., 1170.
(4) (1918) 23 C.W.N., 284.
(5) (1917) I.L.R., 40 Mad., 1134.
(6) (1906) I.L.R., 29 Mad., 336 (F.B.).

the ground that no title passed to the company in the absence of a registered document. Two main answers were made; first, that as the defendant company had a valid contract enforceable by specific performance, they could rely upon that by way of defence to the suit; secondly, that they could rely on their possession as such part-performance of the contract as would take it out of the operation of the statute. There can be no doubt that the latter question has been directly referred to us; as to the former, it is more doubtful, though the reference of the learned Judges to *Kurri Veerareddi* v. *Kurri Bapireddi*(1), would seem to suggest that it was in their minds.

On the question of part-performance, there can be no doubt that there is an express authority of this Court in *Ramanathan* v. *Ranganathan*(2), to the effect that section 54 of the Transfer of Property Act (IV of 1882) by implication excludes any right to set up an equity, such as possession in pursuance of a subsisting and enforceable contract of sale, against a registered title, even as between the parties to such contract.

With respect, we think that such a construction involves a confusion of thought between two essentially different conceptions. What the statute enacts is that a document of title to land—a conveyance in short—can only acquire validity, can only in fact be provable, on registration. So far from forbidding unregistered contracts for the sale of land, it expressly recognizes their existence, denying to them only the creation of an interest in or charge upon the land itself—and therefore leaving their contractual effect as between the parties to the contract unimpaired. Were there no other guide to us we should be prepared on principle to

(1) (1906) I.L.R., 29 Mad., 336 (F.B.).
(2) (1917) I.L.R., 40 Mad., 1134.

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hold that the decision of the majority of the learned Judges in *Ramanathan* v. *Ranganathan*(1) was erroneous. In fact our opinion is fortified by two other considerations. In the first place without saying that the decision under review is definitely and necessarily in conflict with the two rulings of the Privy Council that have been cited to us (*Mahomed Musa* v. *Aghore Kumar Ganguli*(2), and *Venkayyamma Rao* v. *Appa Rao*(3), it is clearly contrary to the indicated trend of their Lordships' opinion. In the next place, every other Court in India has taken the opposite view and we cannot but attach great weight to that fact.

It is unnecessary to set out the cases, which are all cited in the Order of Reference. Our answer to the question propounded to us is therefore in the negative, and it is so because we are satisfied that *Ramanathan* v. *Ranganathan*(1), was wrongly decided.

We have already intimated that we do not feel clear whether the question has been definitely referred to us as to whether the possession of a proved right to specific performance would afford a good defence to a suit such as the present. Here again, there is an express ruling of a Full Bench of this Court in *Kurri Veerareddi* v. *Kurri Bapireddi*(4), to the effect that it cannot. Notwithstanding our view that the two defences, though sometimes they may coincide, are in essence logically distinct, and that only one has been categorically referred for our opinion, it falls to be observed that the learned Judges who referred this case to us conceived *Kurri Veerareddi* v. *Kurri Bapireddi*(4), to be an authority on the question referred, unless it was to be supposed to be overruled by the subsequent pronouncements of the Privy Council. Moreover, the learned

(1) (1917) I.L.R., 40 Mad., 1134. (2) (1915) I.L.R., 42 Calc., 801 (P.C.).
(3) (1916) I.L.R., 39 Mad., 509 (P.C.). (4) (1906) I.L.R., 29 Mad., 336 (F.B.).

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Judges who gave the prevailing opinions in *Ramanathan* v. *Ranganathan*(1), expressed themselves as following the Full Bench decision and treated it as a relevant authority. We, therefore, think it right to say that the learned Judges who decided the earlier case laboured under the same misconception as those whose opinion prevailed in the later one. They treated a prohibition of unregistered conveyances as being a prohibition of unregistered contracts, and neglected a very clear expression of opinion to the contrary in the Privy Council in the case of *Immudipattam Thirugnana Kondama Naik* v. *Periya Dorasami*(2), as being an *obiter dictum*. Strictly speaking, that may be so; it is sufficient for us to say that we respectfully agree with it, and consider that the case in *Kurri Veerareddi* v. *Kurri Bapireddi*(3) was wrongly decided. We desire to add that if the learned referring Judges are to be taken as having impliedly referred this point to us, we are not clear whether they have determined that the facts exist which would make good that plea, or whether they are only inviting an expression of our opinion as to whether if substantiated by the facts such plea would in law be a good answer to the suit. If the latter course was intended to be adopted, we deprecate the practice of submitting a hypothetical question of law to a Full Bench before the Divisional Bench has satisfied itself that the facts really exist which would necessarily raise that question. That would no doubt entitle us to refuse to consider this matter without a direct finding that on the facts the plea, if valid in law, is established. However, the inconvenience caused to the parties by a fresh reference back is very great, and Mr. Narayanamurti was content to argue the point before us, provided

(1) (1917) I.L.R., 40 Mad., 1134. (2) (1901) I.L.R., 24 Mad., 377 (P.C.).
(3) (1906) I.L.R., 29 Mad., 336 (F.B.).

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it was left open to him to contend before the Divisional Bench that the facts do not show that the Appellant Company now possess an enforceable equity to specific performance. On this understanding we have no hesitation in saying that in our opinion the decision in *Kurri Veerareddi* v. *Kurri Bapireddi*(1) is contrary both to principle and authority and should no longer be followed in this Court.

This Appeal coming on for hearing after the expression of the Opinion of the Full Bench, the Court (PHILLIPS and DEVADOSS, JJ.) delivered on the twelfth day of September 1923 the following Judgment:—

It is now contended by Mr. Narayanamurthi that the applicability of the doctrine of part-performance is limited to cases where the right to sue for specific performance is not barred on the date of the subsequent suit and he relies on *Gajendra Nath Dey* v. *Moulvi Ashraf Hossain*(2) and *Syamkisor* v. *Dines Chandra*(3).

In neither case was this proposition specifically considered, whereas in *Meher Ali Khan* v. *Arutunnessa Bibi*(4), there is a decision of a single Judge to the contrary. We can find no such limitation in any of the judgments of the Privy Council cited, and to impose such a limitation would, in effect, confine the equity to cases in which the party had a subsisting legal right which he could enforce, and consequently be a denial of justice in other cases. This is hardly consistent with the doctrines of equity and we are not prepared to accept this plea.

In the result this appeal is allowed and plaintiff's suit dismissed with costs throughout.

N.R.

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(1) (1906) I.L.R., 29 Mad., 386 (F.B.).
(2) (1922) 27 C.W.N., 159.
(3) (1920) 31 C.L.J., 75.
(4) (1919) 25 C.W.N., 905.

ORIGINAL CIVIL.

Before Mr. Justice Coutts Trotter.

JAYAMMAL, PLAINTIFF,

v.

1923, April 20.

THE MADRAS AND SOUTHERN MAHRATTA RAILWAY COMPANY, LTD. (DEFENDANT).*

Railway Company—Licence to the public to cross the line—Child injured by locomotive, while crossing the line—Damages—Contributory negligence in children—Negligence of the guardian in allowing a child to go into a danger zone, whether contributory negligence—Trap—What amounts to, in case of children.

The plaintiff, a girl aged 7 years, while attempting to cross the Railway line at a point where to the knowledge of the Railway officials people habitually crossed the lines as licensees, was injured by a locomotive. The engine driver and the fireman neglected to keep a proper look out at the point where they knew there was special danger to be apprehended as people, both adults and children, crossed the line there. In a suit for damages, held:

That the Railway Company was liable, and that it was no answer to the claim that if the child had taken the care that would be expected of an adult the accident would not have occurred.

If a Railway Company allows children to stray over its lines it has to take all the precautions which would be unnecessary in the case of an adult but which are required to protect children against their own thoughtlessness.

Whereas in the case of a licensee who is an adult the owner of premises will be liable only if he has a "trap" on the premises, in the case of children he will be liable not merely if he maintains a trap but if he is guilty of ordinary negligence.

The negligence of the guardian or parent of a child in allowing it to go unaccompanied by an adult into a danger zone cannot be imputed to the child as in the nature of contributory negligence.

Nugent Grant, *T. S. Ramaswami Aiyar* and *V. Sundaram Aiyar*, for plaintiff.

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* Civil Suit No. 465 of 1922.

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it was left open to him to contend before the Divisional Bench that the facts do not show that the Appellant Company now possess an enforceable equity to specific performance. On this understanding we have no hesitation in saying that in our opinion the decision in *Kurri Veerareddi* v. *Kurri Bapireddi*(1) is contrary both to principle and authority and should no longer be followed in this Court.

This Appeal coming on for hearing after the expression of the Opinion of the Full Bench, the Court (PHILLIPS and DEVADOSS, JJ.) delivered on the twelfth day of September 1923 the following Judgment :—

It is now contended by Mr. Narayanamurthi that the applicability of the doctrine of part-performance is limited to cases where the right to sue for specific performance is not barred on the date of the subsequent suit and he relies on *Gajendra Nath Dey* v. *Moulvi Ashraf Hossain*(2) and *Syamkisor* v. *Dines Chandra*(3).

In neither case was this proposition specifically considered, whereas in *Meher Ali Khan* v. *Arutunnessa Bibi*(4), there is a decision of a single Judge to the contrary. We can find no such limitation in any of the judgments of the Privy Council cited, and to impose such a limitation would, in effect, confine the equity to cases in which the party had a subsisting legal right which he could enforce, and consequently be a denial of justice in other cases. This is hardly consistent with the doctrines of equity and we are not prepared to accept this plea.

In the result this appeal is allowed and plaintiff's suit dismissed with costs throughout.

N.R.

(1) (1906) I.L.R., 29 Mad., 336 (F.B.).
(2) (1920) 31 C.L.J., 75.
(2) (1922) 27 C.W.N., 159.
(4) (1919) 25 C.W.N., 905.

ORIGINAL CIVIL.

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Railway Company—Licence to the public to cross the line—Child injured by locomotive, while crossing the line—Damages—Contributory negligence in children—Negligence of the guardian in allowing a child to go into a danger zone, whether contributory negligence—Trap—What amounts to, in case of children.

The plaintiff, a girl aged 7 years, while attempting to cross the Railway line at a point where to the knowledge of the Railway officials people habitually crossed the lines as licensees, was injured by a locomotive. The engine driver and the fireman neglected to keep a proper look out at the point where they knew there was special danger to be apprehended as people, both adults and children, crossed the line there. In a suit for damages, held :

That the Railway Company was liable, and that it was no answer to the claim that if the child had taken the care that would be expected of an adult the accident would not have occurred.

If a Railway Company allows children to stray over its lines it has to take all the precautions which would be unnecessary in the case of an adult but which are required to protect children against their own thoughtlessness.

Whereas in the case of a licensee who is an adult the owner of premises will be liable only if he has a "trap" on the premises, in the case of children he will be liable not merely if he maintains a trap but if he is guilty of ordinary negligence.

The negligence of the guardian or parent of a child in allowing it to go unaccompanied by an adult into a danger zone cannot be imputed to the child as in the nature of contributory negligence.

Nugent Grant, *T. S. Ramaswami Aiyar* and *V. Sundaram Aiyar*, for plaintiff.

* Civil Suit No. 465 of 1922.

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Vere Mockett, for defendant.

The facts of the case are fully set out in the

JUDGMENT.

This is a suit brought by a little girl aged 7, called Jayammal, for damages for personal injuries against the Madras and Southern Mahratta Railway Company, Limited. I confess that I have felt little difficulty about the facts which I may briefly summarize as follows:— The village of Amoor lies on both sides of the defendant's railway lines and the Wallajah Road Railway Station is in the middle of the village. To the north of the line lie most of the inhabited houses which make up the village, and in one of those the plaintiff lived with her father, a toddy contractor named Jayamuni Nayudu. The Post Office and certain shops lie to the south of the line. On the 15th June 1921, the plaintiff went on an errand from the northern to the southern part of the village, and for that purpose she would have to cross the line. There are two recognized level crossings with gates where Railway servants are stationed to look after the public, one considerably to the east and the other considerably to the west of the station platform; but the evidence is that it is the habit of the people who go from one part of the village to the other to cross the lines at the point where the accident happened. It happened when the child was on her return journey, and the route which she took is quite clear from the plan. There is a wicket-gate close by the Assistant Station Master's house on the extreme south side of the line. It is said that it is only meant to be used by the Assistant Station Master as a means of reaching his house, but it is clear that no attempt was made to keep it locked with a key for his exclusive use. The plaintiff went through this gate and walked westwards along

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the side of the line until she got opposite to the platform which she desired to reach in order to cross the bridge and so go home. She then turned sharply to the right and stepped on to the track and was immediately knocked down by a locomotive of the defendant company. The locomotive had brought in the train from Ranipet (from the west) and the evidence is that as soon as the train comes into the station the engine is uncoupled and runs eastward down the line, until it comes to some points; then it changes its direction and is brought back along the loop-line (the southernmost of all the lines of rails) on which the child stepped when she was hit, to reach an engine-shed to the west of the station for the purpose of watering.

The evidence is that as soon as the engine was uncoupled the whistle was sounded. That would obviously not have helped the little girl, because, if the whistle had attracted her attention and caused her to turn her head, she would have seen the engine going away from her and not approaching her. It is further said, though this is disputed, that the engine whistle was sounded again after it got on to the loop-line at the southernmost end of the two sets of rails and when it was 70 yards away from the scene of the accident. I am not convinced that the witnesses who speak to this were speaking with a definite recollection of the particular incident on this day rather than of the general practice which might have been omitted on any particular occasion. When the engine returned and came along the loop-line the driver was on the right-hand side of the foot-plate. I have no doubt that those of the plaintiff's witnesses who suggest that he stayed on the platform and left the engine to be reversed and taken to the shed by the firemen, are giving evidence which is either untrue or mistaken. I am quite satisfied that he was in

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charge of the engine; but I am equally satisfied that, standing on the right-hand side of the foot-plate, he could not have seen this little girl walking along the side loop-line as soon as the engine got at all near to her; for the intervening body of the engine would obviously have obstructed his view. The two firemen were also in the cab, and I think it is quite clear that they kept no sort of look out on the left side of the engine, for one of them, Manikkam, the first fireman, saw nothing, and Doraiswami, the second fireman, only saw the child when she was 4 or 5 feet away from the engine.

I have no difficulty in holding on the evidence before me that the practice of the villagers was to take the short-cut across the line which the little girl was taking when she met with her injuries, and that no serious steps were taken by the Railway officials to prevent either adults or children from going that way. The Station Master no doubt has tried to say that when he saw people doing it he prohibited them, but I do not believe him, and Johnson, the engine driver, frankly admitted that he tried to keep a special look out when he neared the wicket-gate, because he knew that people did take this short-cut habitually. I entertain no manner of doubt that if a proper look out had been kept on the left-hand side of the foot-plate, that on the side of the wicket-gate, this accident could almost certainly have been avoided. A second whistle might have been given to warn the child if she had been seen, and, if it were observed to be unheeded, the engine could have been stopped as soon as it got into dangerous proximity to the child. I take it that Johnson, the engine driver, who admits that he knew that the villagers used this short-cut habitually so as to put him on his guard to be careful at the spot, must be taken to have known, if he had seen the child, that she would be morally certain to attempt

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to cross the line at exactly the point where she did cross it, and that it was incumbent upon him, if he had seen her, to take measures to avoid an accident. The result seems to be (1) that the Railway officials connived at the practice of the villagers in crossing the line at this point and (2) that the engine driver and firemen were negligent in not keeping a proper look out on the left side of the engine at a point where they knew that there was special danger to be apprehended from people crossing the line, both adults and children.

Such being my findings of fact, I have to apply the law to it as enshrined in numerous reported decisions. My findings amount to this, that the plaintiff was not a trespasser but at least a licensee, and that the company through their servants were guilty of negligence. The question is whether that negligence gives a remedy to the plaintiff in law. After a long and instructive argument, in the course of which almost every reported case which could conceivably have any bearing on this matter was cited to me, I am still in considerable doubt as to what is the real legal position. I do not think it can be reasonably expected that a Judge of first instance in this country should go through in review all the cases which were cited to him, but rather that he should summarise the conclusions which he reaches as the result of his perusal of those cases and leave it to a court of appeal to put him right if he is wrong. Two considerations appear to me to be capable of being dealt with at the outset. I make no question but that if this had been a case of an adult, the Railway Company would have been entitled to rely upon a plea of contributory negligence. And there is an expression of opinion by FRY, L.J., in the case of *Stiefsohn* v. *Brook Bond, and Company*(1) that contributory negligence can be imputed

(1) (1889) 5 T.L.R., 684.

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to a child. It is urged upon me that in the case of a little girl of 7 years in this country, where children are called upon at a very early age to take a share in such out-door duties of a village household as tending cattle and the like, I might reasonably find that this child was of an age and understanding to have contributory negligence imputed to her directly. My own opinion is that the later decisions of the English Courts have left no room for such a doctrine, and I would especially refer in this connexion to the words of Lord ATKINSON in Cooke's case at page 238 of the Report(1). He says: "The duty the owner of the premises owes to the person to whom he gives permission to enter upon them must, it would appear to me, be measured by his knowledge, actual or imported, of the habits, capacities, and propensities of those persons." For the purpose of this case I translate that to mean that if the owners of premises like a railway line allow children to take short-cuts across the line, they must be taken to know that a child of seven is likely to cross the rails heedlessly without looking to see whether there is a dangerous object such as a train or an engine approaching. Two other phrases which occur in the cases also, I do not think I am called upon to consider here. The one is "allurement" and the other is "trap." The doctrine of "allurement" as I understand it, is really equivalent to justifying the presence of the injured plaintiff not merely on the landowner's premises in general but on the particular portion of it at which he received the injury complained of. *Lynch* v. *Nurdin*(2) is a familiar instance, and the doctrine is further illustrated by Cooke's case itself and by the case of the *Glasgow Corporation* v. *Taylor*(3).

(1) [1909] A.C., 229.

(2) (1841) 1 Q.B., 29.

(3) [1922] 1 A.C., 44.

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The only thing that could possibly be described as an allurement here is the mere invitation to take the short-cut by leaving the wicket-gate unlocked which gave access to the company's premises. A short cut is in a sense an allurement to every one: but I doubt if it is so in the sense in which that phrase is used in the cases. The other doctrine that figures prominently in the English cases is expressed in the familiar term "a trap," which has been frequently defined as a danger which is known or ought to be known to the owner of the premises and is not known or could not reasonably have been known to the licensee. Once more, if this had not been the case of a child, it would be impossible to say that this was a trap. A Railway Company which invites persons of ordinary intelligence to cross its lines of rails cannot, I think, be supposed to have invited or licensed them not to look and see whether there was an approaching engine or train before they step on to the track. The difficulty arises in this case because the licensee was a child of tender years; and the way in which the case is put to me is this, that, if a Railway Company impliedly licenses children of tender years to cross their lines, they must exercise a degree of care sufficient to counteract the necessary heedlessness of such children. After much hesitation, I have come to the conclusion that that argument is sound and that I must accept the proposition that if a Railway Company allows children to stray over its line, it has to take all the precautions which would be unnecessary in dealing with an adult but which are required to protect children against their own thoughtlessness. That, I think, amounts to this and I do not shrink from it, that, whereas, in the case of a licensee who is an adult, the owner of the premises will only be liable if he has on those premises what the cases call "a trap," in the

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case of children he will be liable not merely if he maintains a trap but if he is guilty of ordinary negligence. Or perhaps one may say that what in the case of an adult would be merely negligence, in the case of children may be regarded as a trap. If I am to put it in words, I would endeavour to phrase it thus:—to invite children to cross lines of railway over which trains run is to expose them to the danger of being run over by a passing train or engine, a danger which must be apparent to the railway authorities and is not apparent to a child, and the scale appears to me to be turned when you have this added factor which to my mind is clearly revealed by the facts of this case, that the conduct of those in charge of the engine on this occasion was palpably negligent.

One last point was taken by the railway authorities which I think I can deal with very shortly. It was suggested that if there was an invitation to children to cross the line, it could only be taken to be an invitation to them to do so when accompanied by an adult capable of looking after them, and for this proposition reliance was placed on the case of *Burchell* v. *Hickisson*(1). That was a case of a defective stair-case and I think it is obvious that totally different considerations will apply on the question of licence or invitation to a thing like a stair-case and a thing like a short-cut across a set of railway lines. The case has been invoked to establish a sort of dilemma that there is either no invitation at all to a child or at most an invitation to a child accompanied by a guardian capable of looking after it. That would seem to afford a complete dilemma, but I think the later cases negative the soundness of such a view. I also think, and I gather the same view is taken

(1) (1881) 50 L.J.C.P., 101.

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by Sir Frederick Pollock in the later editions of his standard work on the Law of Torts, that the view that any negligence of the parent or guardian in allowing a child to get into what I may call the danger zone can be imputed to the child as something in the nature of contributory negligence, is exploded by the decision of the House of Lords in Cooke's case.

On the whole, I come to the conclusion that the Railway Company is liable in damages to the plaintiff for the reasons which I have given.

It only remains for me in this case to fix the amount of damages. With the consent of the parties I have discussed the matter with my learned brother RAMESAM whose knowledge of the conditions of life of such people is so much greater than my own, and with his help and the best consideration I can give to it myself, I fix the damages at Rs. 3,500. That sum will be paid to the Official Trustee and the capital will be retained by him, pending the result of any appeal or pending the attainment of majority by the child. The funds will be invested at the discretion of the Official Trustee and the income will be paid by him to the child's father during the child's minority. The plaintiff will have her costs.

Brightwell and Moresby—Attorneys for the defendants.

D.A.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Venkatasubba Rao.

1922, Nov. 23.

THE BRITISH INDIA STEAM NAVIGATION COMPANY, LTD. (DEFENDANT), PETITIONER,

v.

SHARAFALLY (PLAINTIFF), RESPONDENT.*

Presidency Small Cause Courts (Act XV of 1882), sections 38 and 92—Long vacation—Notification for conduct of urgent work and receipt of papers during long vacation, validity of—Decree passed long before vacation—Application for new trial on reopening of Court after long vacation—Limitation—Revision under section 115, Civil Procedure Code.

A notification issued under section 92 of the Presidency Small Cause Courts Act stated that during the long vacation of that Court "plaints, execution applications, and other papers will be received only on the days on which the Vacation Judge sits," viz., Wednesdays and Thursdays.

Held, that the notification was not *ultra vires* of section 92 of the Act and that an application for a new trial under section 38 of the Act which should be presented within eight days under section 38 came under the words "other papers" in the notification and was barred by limitation when after several weeks it was presented on the day the Court reopened after the long vacation. *Nachiyappa* v. *Ayyasami*, (1882) I.L.R., 5 Mad., 189 (F.B.), applied.

Held, further that where a lower Court declines to exercise jurisdiction by refusing to entertain an appeal on account of a wrong decision on a question of limitation as to when the appeal should have been filed, the High Court has power to revise the order under section 115, Civil Procedure Code. *Sundaram* v *Mausa Mavuthar*, (1921) I.L.R., 44 Mad., 554 (F.B.), followed. *Kuppusawmi Iyengar* v. *Narayana Iyengar*, (1916) 19 M.L.T., 24, distinguished.

PETITION under section 115 of Act (V of 1908), praying the High Court to revise the order of the Full Bench of

* Civil Revision Petition No. 799 of 1921.

Rao Bahadur C. R. TIRUVENGADA ACHARIYAR, Chief Judge, and Doctor K. KRISHNAN PANDALAI, Judge, of the Court of Small Causes, Madras, in Application No. 138 of 1921 in Small Causes Suit No. 13102 of 1920.

The facts and the notification are given in the Judgment of VENKATASUBBA RAO, J.

Sidney Smith for petitioner.—The application was not barred by limitation. Section 92 of the Presidency Small Cause Courts Act prescribes a vacation for the Court which means a continuous number of holidays; hence the notification which cuts the vacation into parts and provides for work being done on certain days during the vacation is *ultra vires* of section 92. Even if the notification is legal and valid it contains only an enabling provision and it prescribes only for the presentation of "urgent applications," which the vacation Judge could dispose of. Applications for new trial cannot come under the description of "other papers" mentioned in the notification. "Other papers" therein is *ejusdem generis* with urgent applications. Applications for new trial could not be disposed of by a single Judge. The Court is closed during the vacation. Section 10 of the General Clauses Act applies.

A. Venkatarayaliah for respondent.—There is no question of jurisdiction involved in the decision of the lower Court. If anything, there is only a wrong decision on a question of limitation; hence no revision lies to the High Court. *Amir Hassan Khan* v. *Sheo Baksh Singh*(1), *Kuppuswami Iyengar* v. *Narayana Iyengar*(2), on appeal from *Kuppusawmi Iyengar* v. *Narayana Iyengar*(3). The application was barred by limitation. The Presidency Small Cause Courts Act is a self-contained Act as regards limitation. Notification under section 92

(1) (1885) I.L.R., 11 Calc., 6 (P.C.). (2) (1916) 19 M.L.T., 24.
(3) (1914) 16 M.L.T., 438.

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prescribing working days during the vacation is valid. The Court is open on those days. Applications for new trial come under words "other papers." The reasoning in *Nachiyappa* v. *Ayyasami*(1) applies to this case also.

Sidney Smith in reply.—The High Court can revise when the lower Court declines jurisdiction on a wrong construction of law. See *Sundaram* v. *Mausa Mavuthar*(2). In *Nachiyappa* v. *Ayyasami*(1), it was not held that "appeals" came within the category of "other papers," but it was held that "appeals" came within the description of "petitions."

JUDGMENT.

SPENCER, J.

SPENCER, J.—This is a petition under section 115, Civil Procedure Code, to revise the order of two Judges of the Presidency Small Cause Court rejecting as being out of time an application for retrial of a small cause suit tried by a single Judge of that Court.

A preliminary objection is raised that the High Court has no power of revision over an erroneous decision of a Small Cause Court on a question of limitation. It was held by a single Judge of this Court in *Kuppuswamy Iyengar* v. *Narayana Iyengar*(3), that an alleged erroneous decision of a Small Cause Court on a question of limitation was not liable to be revised under section 115, Civil Procedure Code, and in Letters Patent Appeal *Kuppusawmi Iyengar* v. *Narayana Iyengar*(4), this view was upheld. In the present case, however, the result of the two Judges' decision on the question of limitation has been that if they were wrong in so deciding, there was a failure on their part to exercise a jurisdiction vested in them, and this will be within the scope of section 115.

(1) (1882) I.L.R., 5 Mad., 189 (F.B.).
(2) (1921) I.L.R., 44 Mad., 554 (F.B.).
(3) (1914) 16 M.L.T., 438.
(4) (1916) 19 M.L.T., 24.

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In *Sundaram* v. *Mausa Mavuther*(1), it appears from the judgments of the learned Chief Justice and Kumaraswami Sastri, JJ., that if the erroneous decision of a Subordinate Court involves a refusal to deal with a petition made to it, its action amounts to a failure to exercise a jurisdiction vested in it by law. This distinguishes the present case from cases where no question of jurisdiction is involved by the decision on a point of limitation. The objection therefore fails.

The judgment in the Small Cause Court which occasioned the application for retrial was pronounced on 10th May 1921. The application under section 38 of the Presidency Small Cause Courts Act was made on 15th July. That section provides eight days within which to make an application for a new trial or for reversal of the decree or order of a Judge who has disposed of a contested suit. The Presidency Small Cause Court was closed for the vacation from 16th May to 16th July inclusive. Section 10 of the General Clauses Act provides that if a Court is closed on a day upon which an act is allowed to be done the action shall be considered as done in due time if it is done on the next day afterwards on which the Court is open. It is clear then that, if the applicant was entitled to exclude the whole vacation of the Small Cause Court, his application made on the 15th of July was in time, but not otherwise. Under section 92 of Act XV of 1882, the Small Cause Court is bound to draw up a list of holidays and vacations and to obtain the approval of the Local Government to it. The notification for the midsummer vacation of 1921 provides that

"Plaints, execution applications and other papers will be received only on the days on which the Judge sits."

(1) (1921) I.L.R., 44 Mad., 554 (F.B.).

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Those are the words of paragraph 5 of the notification. Paragraph 2 deals with the sitting of the vacation Judge on Wednesdays and Thursdays for the disposal of emergent work; paragraph 3 deals with cases which require immediate attention for which the party concerned has to give 24 hours' notice to the Registrar. Paragraph 4 deals with the receipt of monies and urgent applications referred to in paragraph 3. It is conceded that the present application was not an urgent application. Urgent applications may include applications for attachment before judgment, applications for injunctions, stay of execution and such like matters; but the fact that a plaint or petition is about to become time-barred will not of itself make the presentation of it an urgent matter, provided that it will be in time, if presented on some later date owing to the exclusion of days when the Court is closed. If the present application was capable of being received on the next day on which the Vacation Judge sat after the expiration of eight days from the date of the order sought to be set aside, then the Court cannot be regarded as closed upon that date when the application might have been made. When a Court is adjourned for the vacation but the notification states that the Court will be open on certain days for the reception of plaints, petitions and other papers, the Court cannot be treated as closed on those days when it was open for the above purpose. This is the effect of the Full Bench decision in *Nachiyappa* v. *Ayyasami*(1) in which four out of five Judges concurred. This principle was followed in another Full Bench of this Court in *Receiver of the Nidadavole* and *Medur Estates* v. *Suraparazu*(2). In *Parvatheesam* v. *Bapanna*(3) it is implied that a Court cannot be regarded as closed on dates when arrangements

(1) (1882) I.L.R., 5 Mad., 189 (F.B.). (2) (1915) I.L.R., 38 Mad., 295 (F.B.).
(3) (1890) I.L.R., 13 Mad., 447 at 451.

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were made and notified for the reception of plaints. The note in Mr. Rustomji's Law of Limitation under section 4 of the Limitation Act suggests that a different view has prevailed in the Calcutta, Bombay and Punjab Courts on the question whether a Court is closed when the office is open for the reception of plaints and petitions. I have referred to the cases in *Rani Venkata Ramania* v. *Kherode Mull*(1) and *Maharaja Rajaneswar Prasad Singh* v. *Baij Nath Ram Goenka*(2) and *Ranchordas* v. *Pestonji*(3). These cases turn upon the terms of the notification for the closure of the Court and the practice prevailing in those Courts. They do not diminish the authority of the Full Bench decision of our Court by which we are bound. As a matter of practice, it is well understood that plaints, which are not presented in the Presidency Small Cause Court on the days when the office is open for receiving them during the vacation, become time-barred after the expiration of the period of limitation appropriate to such suits and the plaintiffs cannot claim to exclude the whole of the Small Cause Court's vacation.

It is however argued that applications under section 38 of the Act are applications of a special nature and are not "plaints, execution applications or other papers," within the meaning of paragraph 5 of the notification and secondly that the notification is not in conformity with section 92 of the Act which requires the list of holidays and vacations to be notified. It is contended that a vacation means a continuous holiday which cannot be whittled down by an announcement that the Court will be open for the receipt of plaints and other papers. On the first point I am of opinion that the words "other papers" are very wide and must include applications of this nature, unless there is

(1) (1909) 10 C.L.J., 118. (2) (1909) 10 C.L.J., 120.
(3) (1907) 9 Bom. L. R., 1329.

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anything to indicate the contrary. Secondly in the Full Bench decision in *Nachiyappa* v. *Ayyasami* (1) it was not considered illegal or irregular that the District Judge should have appointed certain days for the presentation of plaints and petitions to the ministerial officer in charge during his absence. Order 41, rule 1, of the rules of the Small Cause Court 1912 in force in the Presidency Small Cause Court provides for applications under section 38 being presented to the Registrar or such other officer as the Chief Judge appoints. There is nothing to show that during the days on which the Vacation Judge sat there was nobody authorized to receive plaints and applications presented on those days. I am therefore not prepared to hold that the notification was illegal or contravened the provisions of section 92 of the Act, although I consider that future notifications should be more precisely worded so as to leave no doubt as to when applications under section 38 will be received. The order against which this petition is preferred thus appears to be right and does not need to be revised by us.

The petition is therefore dismissed with costs.

VENKATA-SUBBA RAO, J.

VENKATASUBBA RAO, J.—I agree.

The decree of the Small Cause Court is dated the 10th May 1921. On the 16th May, the Small Cause Court adjourned for the long vacation. The defendant filed an application for new trial under section 38 of the Presidency Small Cause Courts Act, Act XV of 1882, on the day when the Court reopened after the annual recess. The Full Bench of the Court of Small Causes rejected the application as being out of time. Under section 38 the application for new trial should be presented within eight days from the date of the decree.

(1) (1882) I.L.R., 5 Mad., 189 (F.B.).

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It has been argued before us that as the Court was closed from the 16th May to the 16th July, the application should be held to have been filed in time as it was filed on the reopening day.

The question turns on the construction of the notification published under section 92 of the Act, which enacts that the Small Cause Court shall draw up a list of holidays and vacations to be observed in the Court and shall submit it for the approval of the Local Government, and that such list, when it has received such approval, shall be published in the local official gazette. The wording of the notification has led to this difficulty and though it must be said that it is somewhat obscure, there can be no reasonable doubt in regard to its interpretation. The notification runs as follows:—

"Except as hereunder mentioned, the Madras Court of Small Causes will be closed for the midsummer vacation from Monday the 16th May to Saturday the 16th July 1921, both days inclusive.

2. His Honour the Third Judge, Mir Zyn-ud-din, Esq., Bar.-at-law, will sit as Vacation Judge on Wednesdays and Thursdays for the disposal of emergent work.

3. In any case which requires immediate attention, the party concerned or his vakil may give 24 hours' notice of the same to the Registrar, when the papers will be sent to the Vacation Judge for disposal, after hearing the party, if necessary.

4. The office of the Registrar will be open from Wednesday to Friday in each week from 12 noon to 4 p.m. for the receipt of moneys and of urgent applications referred to in paragraph 3 supra.

5. Plaints, execution applications and other papers will be received only on the days on which the Judge sits."

It will be observed that the very first clause, while stating that the Court will be closed for the midsummer vacation, mentions the qualification, except as hereunder mentioned. The material clause is clause 5. It means that the Court will be open on Wednesdays

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and Thursdays for the reception of plaints, execution applications and other papers; pleadings or proceedings referred to in clause 5 are not intended to be disposed of by the Vacation Judge. It is therefore curious that, instead of providing that plaints, etc., will be received only on Wednesdays and Thursdays, the clause refers to "the days on which the Judge sits." Those days are Wednesdays and Thursdays, as clause 2 shows; but there was no reason to refer to them in the manner in which they have been referred to in clause 5. It has been argued by Mr. Sidney Smith on behalf of the defendant that clause 5 must be regarded as referring to "urgent applications" mentioned in clause 4. I do not think that on a careful reading of this notification, this contention can be accepted.

Clauses 2, 3 and 4 deal with "emergent work" or "urgent applications" but clause 5 deals with quite a different subject. This clause is of the first importance and one would naturally expect that the matter contained in it would be clearly expressed in the forefront of the notification, whereas its actual position and wording are apt to mislead.

The fourth clause says that "the office of the Registrar will be open." This implies that it is otherwise closed, but there are no words to indicate that the office of the Registrar will remain closed except as provided for by clause 4. What is really meant is that the Small Cause Court and the office of the Registrar will be closed during the recess, except as provided for in the notification.

Mr. Sidney Smith has next argued that the notification is *ultra vires*, because the word "vacation" used in section 92 is different from "holidays" and that the Court was not justified in making rules providing for work to be done during the vacation. It is not necessary

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to deal with this matter at great length because the point is concluded by authority. In *Nachiyappa* v. *Ayyasami*(1), a Full Bench of this Court had to consider a similar notification and the publication of such rules was treated as a matter having the sanction of general usage. In the judgment it was observed that the judicial sittings of the Court may be adjourned but the office of the Court may still remain open for the presentation of the pleadings. *Parvateesam* v. *Bapanna* (2), also recognizes this practice. There the Court was closed for the annual recess from the 23rd April and the plaint was presented on the 26th April. Arrangements had been made and duly notified for the reception of plaints on every Monday and Thursday during the recess. The 23rd April happened to be a Monday. It was contended that the suit was barred and the plaintiffs' answer was that the 23rd April was a "local holiday" and that he was therefore entitled to present the plaint on Thursday the 26th. The learned Judges remanded the case for ascertaining whether the 23rd was a "local holiday" and whether the Court was closed on that day. This of course implies that, if the 23rd was not a "local holiday," the suit would have been barred notwithstanding the fact that the 23rd fell during the recess. *Nachiyappa* v. *Ayyasami* (1), was referred to by a Bench of this Court with approval in *Komuru Appalaswami* v. *Palli Narayanaswamy* (3).

Even if in any other province a different view had been taken we would be bound by the authority of the decisions mentioned above, but I do not think that a different rule has been enunciated in any case decided by any other Court. In *Ranchordas* v. *Pestonji*(4), the

(1) (1882) I.L.R., 5 Mad., 189 (F.B.).
(2) (1890) I.L.R., 13 Mad., 447.
(3) (1919), 49 I.C., 626.
(4) (1907) 9 Bom. L.R., 1329.

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notification seems to have provided only for "urgent" work during the vacation and it was held that the filing of a plaint or the filing of an appeal could not be considered as work of an urgent nature.

Rani Venkata Ramania v. *Kherode Mull*(1) and *Maharaja Ravaneswar Prasad Singh* v. *Baij Nath Ram Goenka* (2), afford us no assistance whatsoever, because the terms of the notification have not been set out in the reports of the cases.

There remains another objection to be dealt with. It has been argued that applications for new trial are not explicitly mentioned in clause 5. But the words "other papers" are comprehensive enough, although a more apt expression might have been used. It is not denied that clause 5 was always treated as applicable also to applications for new trial. I am of the opinion that this contention also must fail.

N.R.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, and Mr. Justice Ramesam.

1923, April, 23.

SURJIMULL MURLIDHAR CHANDICK (PLAINTIFF) APPELLANT,

v.

ANANTA LAL DAMANI AND ANOTHER (DEFENDANT), RESPONDENTS.*

Stamp Act (II of 1899), sch. I, art. 1—Acknowledgment, meaning of—Statement of account—Dominant intent to supply evidence of debt—Necessity for stamp—Creditor calling for account from debtor—Statement of account by debtor—Credit and debit entries, with a balance item signed by debtor—Document sent by debtor to creditor, whether an acknowledgment—Document, unstamped, whether admissible in evidence—Construction of document—Evidence of surrounding circumstances.

(1) (1909) 10 C.L.J., 118. (2) (1909) 10 C.L.J., 120.

* Original Side Appeal No. 53 of 1922.

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A document is not an acknowledgment within the terms of article 1, schedule I of the Stamp Act, unless it is given with the dominant intent to supply evidence of the debt.

The Court has to apply its mind to the question—looking at the document and the surrounding circumstances—what was the intention with which it was given.

Where a document contains entries from which it is right to deduce that the intention was to arrive at a *statement of account* or put on record payments on either side of the account, it cannot be inferred from the sending of the document by the debtor to the creditor, although it contains a balancing item at the end and is signed by the debtor, that the intention was to supply evidence of the debt to the creditor; such a document, though unstamped, is admissible in evidence.

Brojender Coomar v. *Bromomoye Chowdhrani* (1879) I.L.R., 4 Calc., 885; *Brojo Gobind Shaha* v. *Goluck Chunder Shaha* (1883) I.L.R., 9 Calc., 127; *Nund Kumar Shaha* v. *Shurnomoyi* (1888) I.L.R., 15 Calc., 162; and *Ambica Dat Vyas* v. *Nityanund Singh* (1903) I.L.R., 30 Calc., 687, followed; *Sitaram* v. *Ramprosad* (1914) 19 C.L.J., 87; and *Mulji Lala* v. *Lingu Makaji* (1897) I.L.R., 21 Bom., 201 (F.B.), distinguished; *Ramaswami Aiyar* v. *Gnanamani Nachiar* (1916) 31 M.L.J., 851, dissented from.

APPEAL from the judgment of Mr. Justice PHILLIPS passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 824 of 1920.

The plaintiff sued to recover a sum of money due to him from the defendants on dealings between the first defendant and the plaintiff since 1911 and prior thereto between him and his alleged adoptive father and mother. The plaint referred to a roka or varthamanam letter, written by the first defendant and dated 15th November 1917 to save limitation for the suit which was instituted

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on the 8th November 1920. Paragraph 6 of the plaint referred to the roka in the following terms :—

"By a Marwadi Roka or Vartamanam, letter, written and acknowledged by the first defendant herein, dated 15th November 1917, there is due to the plaintiff a sum of Rs. 4,397-12-3, only by the first defendant for principal carrying compound interest at 12 per cent per annum, in respect of dealings which the first defendant had with the plaintiff herein."

The 1st defendant pleaded, inter alia, that the suit was barred by limitation, and denied his signature to the roka, but at the time of the hearing in the trial Court admitted his signature and stated that the document was inadmissible in evidence, as it was not stamped under schedule I, article 1 of the Stamp Act.

By a letter written by the first defendant to the plaintiff, it appeared that the latter had sent for account from the former, who wrote the following letter (Exhibit B) :—

". . . You sent for accounts—That is all right. We have taken down a statement of account and already given the same to Ammaji. You may have received the same. Again after our coming to Sri Madras we would prepare a statement of account with particulars and give to you. Please to know of it . . ."

The roka was sent to the plaintiff by the 1st defendant in pursuance of that letter. The learned Trial Judge held that the roka referred to in the plaint was an acknowledgment, that it was inadmissible in evidence as it was not stamped, and that the suit was in consequence barred by limitation, and dismissed the suit. The plaintiff preferred this appeal.

T. R. Ramachandra Ayyar and *K. V. Sesha Ayyangar* for appellant.

T. R. Venkatarama Sastri, *K. Jagannadha Ayyar* and *R. Purushothama Ayyangar* for second respondent.

R. N. Ainger for first respondent.

CHANDICK v. ANANTA LAL DAMANI.

SCHWABE, C.J.

The JUDGMENT of the Court was delivered by

SCHWABE, C.J.—This is an appeal from a decision of PHILLIPS, J., deciding a case on the ground that a document acknowledging a debt was not admissible in evidence. The document is called a *roka*. It shows credit entries and the balance due at the last account and interest thereon up to date, and debit entries of the amount paid off and a balancing item of Rs. 4,397–12–3 and then the words "balance payable up to Kartik sudh first of samvat 1974 (that is, 15th November 1917) Rs. 4,397–12–3" and the signature of the defendant. The circumstances under which that document came into existence are clear from the correspondence, and I do not think that any evidence could be adduced which would give the Court any further assistance than is obtained from the correspondence. A letter, Exhibit B, was produced from the defendant stating that he had taken down the statement of account which had been sent for and given it to Ammajee, the plaintiff's mother, and promising on coming to Madras that he would prepare a fresh statement of account and give it to the plaintiff. When he came to Madras, in pursuance of that promise the roka was sent. The question is whether or not that is an acknowledgment within the definition of "acknowledgment" in the Stamp Act, for if it is, it has to be stamped, and if not stamped, it cannot be admitted in evidence, and in such a case the legislature has thought fit to impose what to my mind is an appalling penalty of the plaintiff losing his claim altogether ; because there is no penalty provided, by the payment of which to Government, the document can be admitted. Perhaps in view of the seriousness of this provision, the draftsman of the schedule has so worded it that it has left many loopholes, and has given rise to a conflict of judicial opinion when it comes to interpretation. The words are

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"Acknowledgment of a debt exceeding Rs. 20 in amount or value, written or signed by or on behalf of a debtor in order to supply evidence of such debt."

The first question that arises is whether any particular document is given to supply evidence of the debt. It is quite clear to my mind on the authorities that the question is whether it is given with the dominant intent to supply evidence of the debt and it has been held that where the document contains other entries from which it is right to deduce that the intention is to arrive at a statement of account or to put on record payments on either side, the intention to be inferred from the sending of the document, although it contains a balancing item at the end, is not to supply evidence to the creditor. *Brojender Coomar* v. *Bromomoye Chowdhrani*(1), *Brojo Gobind Shaha* v. *Goluck Chander Shaha*(2), *Nund Kumar Shaha* v. *Shurnomoyi*(3), and *Ambica Dat Vyas* v. *Nityanund Singh*(4) are all instances of this. Cases quoted to the contrary are *Sitaram* v. *Ramprosad*(5) and *Mulji Lala* v. *Lingu Makaji*(6). In those two cases there was something quite different from the other cases and from this case. There, there was nothing but an acknowledgment of debt. In both those cases the words amounted to giving the figure and the statement was that account having been taken the balance due was so much, and I can understand the view in those cases that there was merely sending an acknowledgment of the debt for giving the other party an acknowledgment for use in evidence. The matter also came before this Court in *Ramaswami Aiyar* v. *Gnanamani Nachiar*(7). There, there was a somewhat complicated document containing a statement of the balance

(1) (1879) I.L.R., 4 Calc., 885. (2) (1883) I.L.R., 9 Calc., 127.
(3) (1888) I.L.R., 15 Calc., 162 (4) (1903) I.L.R., 30 Calc., 687.
(5) (1914) 19 C. L.J., 87. (6) (1897) I.L.R., 21 Bom., 201 (F.B.).
(7) (1916) 31 M.L.J., 851.

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due by a zamindar to his agent and an acknowledgment by the zamindar that he had examined the account and found it correct, and releasing the agent from all claims against him. It was held by ABDUR RAHIM, Offg. C.J., first that that was an acknowledgment within the meaning of the Stamp Act and secondly that it was a release, and being a release, it could not be looked upon as a document which was inadmissible, though looked upon as an acknowledgment it would be inadmissible. With that part of the judgment PHILLIPS, J., did not agree, because he did not think that it amounted to a release. He did, however, think that it amounted to an acknowledgment, but said that it did not matter in that case, because whether the document was admitted or not it did not affect the merits of the case. It follows that this point in that case was not necessary for the decision. It seems to be in direct conflict with some of the cases in Calcutta quoted above, and speaking for myself, so far as it relates to acknowledgment I do not agree with it. That being the state of the authorities, the Court has to apply its mind to the question—looking at the document and the surrounding circumstances—what was the intention with which that document was given; was that meant to be a bare acknowledgment and a promise to pay to be used in evidence against the sender, or was it sent for some other dominant purpose? In my judgment, the answer must be that it was given with the intention that it was to be a statement of account as between the parties containing entries of payments by the defendant as well as a statement of debits due from him, and also a statement of the calculation of interest, and the rate of interest which the defendant admitted that he was under a liability to pay. In these circumstances, in my judgment, the document is not an acknowledgment and ought to have been admitted.

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The question is also raised whether or not it comes within the other exceptions in the article in that it contains a promise to pay the debt and stipulation to pay interest. These two questions seem to be difficult and interesting; but in the view I take of the first point it is not necessary to consider them. In my opinion this judgment is wrong and must be set aside.

It is suggested that we should direct a new trial on this issue of limitation. If I were satisfied that there would be anything to gain by such a course, I should order a new trial. But in this case I am not so satisfied, and I am clear that any evidence of intention given at this stage could not be of the least assistance to the Court. I think one has in the letter referred to and in the document itself so much to show that it is not a mere acknowledgment given with the intention of supplying evidence of the debt to the other side, that any amount of verbal evidence adduced would not affect the proper interpretation of the document.

This appeal must be allowed and the case must go back to the Original Side for disposal on issues 2, 4 and 5 and the additional issues if the Court thinks it necessary.

The costs of this appeal must be paid by the respondents and the costs of the first trial save in so far as the first defendant has been deprived of them will abide the result of the second. The court-fee paid on the appeal memorandum will be refunded to the appellant on application. The memorandum of objection is dismissed.

Grant & Greatorex, Solicitors for first respondent.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Venkatasubba Rao.

MURARI RAO AND OTHERS (DEFENDANTS), APPELLANTS,

v.

BALAVANTH DIKSHIT AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1923, July, 9.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1—Review of judgment—Error of law apparent on the face of the record—sufficient ground for review—competency of judge to grant review on ground of error of law—Error whether includes one of law as well as of fact under rule 1 (c) of O. XLVII.

'Error', under rule 1, Order XLVII, Civil Procedure Code, is not limited to one of fact and an error of law committed by a Judge and apparent on a perusal of the record is a ground for granting a review.

Where a Judge dismissed a suit on the ground that, as between the plaintiffs who were the nearest agnates and the defendants who were the sister's sons of the last male owner, the latter were the preferential heirs under the Mitakshara Law prevailing in the Madras Presidency, *Held* that this was an error of law apparent on the face of the record and that the Judge was competent to grant a review.

APPEAL against the revised decree of H. R. BARDSWELL, the District Judge of Bellary, in Original Suit No. 33 of 1917, on the file of the District Court of Bellary.

The material facts appear from the judgment.

B. Satyanarayana, for appellants.

V. S. Narasimha Achariyar, for respondents.

The Court delivered the following

JUDGMENT:

This suit is a dispute regarding the properties of one Gundu Bhat, who died leaving a minor daughter

*Appeal Suit No. 294 of 1920.

who survived him only a few days. Plaintiffs claim to be the nearest agnates of Gundu Bhat, while defendants are admittedly his sister's sons. The District Judge found plaintiffs' case to be true, but held that the sisters' sons were the preferential heirs. Plaintiff applied for review of judgment on the ground that it has been held in *Kamala* v. *Bhagirathi*(1) that the agnates are to be preferred to the sister's sons. This ruling had not been brought to the Judge's notice at the original trial and he accordingly revised his original order and gave a decree to plaintiffs. Defendants appeal both on the merits, and on the ground that it was incompetent for the District Judge to grant a review as none of the grounds mentioned in Order 47, rule 1, Civil Procedure Code, is present in this case.

On the merits we entirely agree with the District Judge's conclusion that plaintiffs have satisfactorily proved their relationship. Pedigrees filed by Gundu Bhat's father, Giri Bhat (Exhibits L and V) in 1860 at the time of the inam inquiry show that plaintiffs' grandfather and Giri Bhat were descended from a common ancestor Venkana Bhat. There are one or two discrepancies in the intervening links of the geneological trees, but they clearly show the relationship between the families, and there is a remark in Exhibit L-1, showing that plaintiff's grandfather held an inam in Dombala (Bombay Presidency). This explains their house name of Dombala, the house name of the other branch being Ittigi. There is also the oral evidence of three witnesses (P. Ws. 2, 3 and 9) who are the executors of Gundu Bhat's Will, that Gundu Bhat admitted the relationship and even entertained the idea of adopting one of the plaintiffs. These three men were persons enjoying

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

Gundu Bhat's confidence and no reason has been shown for disbelieving their evidence.

Defendants content themselves with a denial of the relationship but have no particular case of their own, nor can they point to any specific defect in plaintiffs' claim to relationship. We find that plaintiffs are Gundu Bhat's agnates and are entitled to succeed in preference to defendants.

It next remains to consider the validity of the District Judge's order granting a review. Appellants rely on *Chhajju Ram* v. *Neki*(1). The actual facts of that case are not very clear, but it is evident from the judgment that the case is not one in which the first two grounds for review mentioned in Order 47, rule 1, Civil Procedure Code, were considered at all, the decision being that when a review is granted for any other sufficient reason "that reason must be analogous to the preceding reasons contained in that rule." In the present case the District Judge was guilty of an error of law, but an error so patent that we think it can be said to be "apparent on the face of the record." It has undoubtedly been held in many cases such as *Hazra Sardar* v. *Kunja Behari Nag Choudhury* (2), and *Ellem* v. *Basheer* (3) that a mistake in law is not sufficient ground for granting a review but there are other cases in which a different view is taken. We are of opinion that each case must be judged by itself and that where the error of law is such that it is clearly apparent on a perusal of the record, there is ground for granting a review. To hold otherwise would be to multiply litigation, for naturally the aggrieved party would appeal and the error would have to be corrected by the Appellate Court rather than in the court of first instance. Here the question of law

(1) (1922) I.L.R., 3 Lah. 127; 49 I.A., 144. (2) (1918) 44 I.C., 161.
(3) (1876) I.L.R., 1 Calc., 184.

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involved is the question of priority of heirs under the Mitakshara Law applicable to this presidency and it is a question which can admit of no doubt, when it has been definitely laid down by this Court as the law of the land. In the present case, therefore, we think that the error was one apparent on the face of the record and that therefore the District Judge had power to grant a review under the provisions of Order XLVII. We are not prepared to accept appellants' contention that the word 'error' must necessarily be limited to errors of fact, but consider that there are cases in which an error of law can also come within the meaning of the rule.

The appeal accordingly fails and is dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Wallace.

1923, August, 1.

SRI RAJA BOMMADEVARA SATYANARAYANA VARAPRASADA RAO BAHADUR (PETITIONER),

v.

SRI RAJA BOMMADEVARA VENKATA BHASHYA-KARLA RAO BAHADUR (RESPONDENT).*

Civil Procedure Code (Act V of 1908) sec. 111—Leave to appeal to His Majesty in Council—Order of a single judge of the High Court in Revision—Order, final—No appeal before two judges of the High Court under Letters Patent, as amended—Application for leave to appeal to Privy Council, whether competent—Letters Patent (Madras), clauses 39 and 44—Act of Indian legislature whether competent to abrogate provisions of Letters Patent—Sec. 111, Civil Procedure Code, whether abrogates clause 39 of Letters Patent.

* Civil Miscellaneous Petition No. 1594 of 1923.

SATYA-NARAYANA VARAPRASADA v. VENKATA BHASHYA-KARLA.

The High Court has no power to grant leave to appeal to His Majesty in Council against an order of a single judge of the High Court passed in the exercise of its Revisional Jurisdiction. The Letters Patent are, under clause 44, subject to modification by an Act of the Indian Legislature, and the latter has, by section 111 of the Civil Procedure Code, abrogated the right of appeal to His Majesty in Council against orders passed by a single judge of the High Court.

PETITION under clause 39 of the Letters Patent praying that the High Court will be pleased to grant a certificate of leave to appeal to His Majesty in Council against the order of KRISHNAN, J., in Civil Revision Petition No. 361 of 1922 filed against the order of the Court of the Subordinate Judge of Masulipatam in Execution Application No. 348 of 1922 in Original Suit No. 18 of 1920 on the file of the District Court of Kistna.

The plaintiff herein instituted this suit against his father for partition of the South Vallur estate and other family properties and for delivery to him of his share. A compromise was entered into and a decree was passed in the suit in accordance with the compromise. The compromise provided, *inter alia*, that the father was to be in management of the minor's share also, but if he alienated or incurred debts so as to affect the minor's interest without the consent of his mother, who acted as his guardian, the plaintiff was to be entitled to apply in execution for partition and separate possession of his share. Alleging that the father had acted contrary to the terms of the compromise, the plaintiff filed a petition in the Court which passed the decree, for the passing of the final decree in the suit, and for division and delivery of possession of his share in the properties. The defendant objected, but the Subordinate Judge allowed the petition and directed partition to be made. Against this Order, the defendant preferred a Civil Revision Petition to the High Court. The petition was heard by

KRISHNAN, J., who dismissed it. The defendant then preferred this Civil Miscellaneous Petition for leave to appeal to His Majesty in Council.

C. V. Anantakrishna Ayyar and *M. Ramachandra Rao* for petitioners.

V. Ramadoss and *V. Krishna Mohan* for respondent, took a preliminary objection, that the petition for leave is incompetent under section 111, Civil Procedure Code, though the order of a single judge is final. Under clause 44 of Letters Patent the right of appeal, if any, is subject to the Act of the Indian Legislature. Reference was made to *In re James Currie*(1), *In re Nataraja Aiyar*(2), *Brij Indar Singh* v. *Kanshi Ram*(3).

C. V. Anantakrishna Ayyar for petitioner. Clause 39 of the Letters Patent gives a right of appeal in such cases.

JUDGMENT :—

This is an application for leave to appeal to the Privy Council against an order passed by one of us sitting as a single judge, under section 115 of the Civil Procedure Code and section 107 of the Government of India Act. That order confirmed the order of the lower Court and dismissed the Civil Revision Petition filed in this Court. The present petitioner, who was the petitioner in the Revision Petition has applied to us to grant him leave to appeal to the Privy Council.

A preliminary objection is taken to this application on the ground that section 111, Civil Procedure Code, bars any such application. Section 111 says notwithstanding anything contained in section 109, no appeal shall lie to His Majesty in Council among other things (*a*) from the decree or order of one judge of a High

(1) (1897) I.L.R., 21 Bom., 405. (2) (1913) 25 M.L.J., 565.
(3) (1917) 42 I.C., 43 (P.C.).

Court established under the Indian High Courts Act, 1861. This is manifestly an application for an appeal from such an order. It is difficult to see how the petitioner can escape the obstacle placed in his way by this section. His learned vakil says, however, that under clause 39 of the Letters Patent a right of appeal is given in all cases of final orders or decrees of this High Court to the Privy Council and since the amendment of the Letters Patent whereby the right of appeal to two judges from the judgment of a single judge sitting in revision has been taken away, this order which was passed in such proceedings has become final and therefore he contends that he is entitled to ask for leave. Clause 44 of the Letters Patent expressly provides that any provision in the Letters Patent can be altered or controlled by the legislation of the Governor-General in Legislative Council ; and such an enactment is the Civil Procedure Code, and when there is express provision in that Code, we must hold that that provision must be given effect to even if it is possible to bring the case under the general wording of clause 39 of the Letters Patent. In these circumstances we have no other alternative but to dismiss the application with costs.

K.R.