



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

Editor

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JUDGES OF THE HIGH COURT.



1925.

1st JANUARY TO 31st DECEMBER.

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(Continues as temporary Judge.)

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(Continues as temporary Judge.)

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from 13th July to 9th November.)

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from 13th July to 31st October.)

The Honourable Mr. H. D. C. REILLY, I.C.S. (Officiated from
13th July to 7th August, and from 31st August to 30th
September.)

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 SEC. 18 (7)—*Intestate succession to personal property—Claim by more than one person—Duty of Judge to refer claimants to a suit—No jurisdiction to decide under Regulation.* | If on a person dying intestate, leaving personal property, more than one person claim the same, under Madras (Administration of Estates) Regulation III of 1802, the duty of the Judge under section 18 (7) of the Regulation is to refer the parties to a regular suit; and he has no jurisdiction in such a case to decide the claim under the Regulation.

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———— Maintainability of—Order of remand not under O. XLI, r. 23, Civil Procedure Code, but under inherent powers.} Where after an original Court had disposed of a suit by trying all the issues before it, the Appellate Court allows an amendment of the plaint, and hence remands the suit for trial on the amended plaint, the order of remand is one passed under the inherent powers of the Court and not one under Order XLI, rule 23, Civil Procedure Code. Hence an appeal to the High Court from the order of remand is incompetent. *Athappa Chetty v. Ramanatham Chetty*, (1919) 10 L.W., 359, and *Mahmud Shah v. Talab Hussain Shah*, (1923) 73 I.C., 915, followed.

Rudhakrishna Rao v. Venkata Rao (1925) I.L.R., 48 Mad., 713

ASSIGNMENT—Money advanced for conduct of suit—Compromise of suit—Charge on money paid under compromise—Repudiation of contract—Election to treat contract as existing.} Money, up to two lakhs of rupees, was agreed to be advanced for the purpose of the conduct of a suit claiming a zamindari estate. The agreement provided (*inter alia*) that upon the suit being compromised the borrowers, "out of the movable and immovable properties" thereby obtained, would first repay the money advanced with interest. After a large sum had been advanced the borrowers refused to comply with certain terms of the agreement as to accounting and vouching, and the lender consequently declined to make any further advances. The borrowers subsequently compromised the suit for a large sum in cash. The lender's widow claimed that the advance and interest thereon were a charge on the money paid under the compromise: Held, that she was entitled to the charge claimed. The agreement was an assignment of part of the fruits of the litigation, and even if they were to be regarded as non-existing property at the date of the agreement, the agreement attached upon the money being paid; the agreement was still in force, as the lender had elected not to accept the borrowers' repudiation. *Glegg v. Bromley*, [1912] 3 K.B., 474, approved and applied.

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BENAMI TRANSACTION—Purchase in name of wife—Alleged ante-nuptial agreement—Alleged oral agreement—Absence of corroborating evidence in writing.} When it is alleged that a purchase of property in India by an Indian, out of his own money but in the name of his wife, was made in pursuance of an ante-nuptial agreement, and that consequently it is not to be regarded as a benami transaction by which the beneficial interest vested in the husband, the alleged ante-nuptial agreement, if oral, must be proved by the clearest and most satisfactory evidence of credible witnesses; it would be unwise to act upon oral evidence unless there was contemporaneous written evidence to corroborate it.

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CHANGE—Lease in consideration of a rent and premium—Promissory note so executed for the premium—Lessor not entitled to a charge on the lease hold:—
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— Money paid under a compromise—Fruits of litigation—Property non-existing at the date of agreement—See under "ASSIGNMENT" ... 230

CHARTER PARTY—Advance freight—Ship stranded before loading cargo—Whether advance could be recovered by shipper?—See under "CONTRACT" ... 459

CHIT FUND for co-operation, thrift, and prudence among subscribers, legality of.] A chit fund, the object of which is the promotion of co-operation, prudence and thrift among its subscribers, whose number is determined beforehand and in which every subscriber is entitled by its rules to get from the promoters of the fund the whole of the capital subscribed for by him before or at the closing of the fund at a fixed time, is a legal transaction and is not a "lottery" or a gambling venture, even though some of the subscribers become by the rules entitled to get much more than they paid and such persons are determined by the drawing of lots. *Iyyanar Kona v. Vidomada Cone*, (1858) Sud. Dec., 58, *Kamakshi Achari v. Apparai Pillai*, (1863) 1 M.H.C.R., 448, *Varudevan Nambudri v. Mammoed*, (1894) I.L.R., 22 Mad., 212, *Wallingford v. Mutual Society*, (18-0) 5 App. Cas., 685, followed. *Sykes v. Bradon*, (1874) 11 Ch. D., 170, *Sankunni v. Ikkora Kirtti*, (1912) M.W.N., 570, and *Nagappa Pillai v. Arunachalam Chetty*, (1924) 47 M.L.J., 876, not followed.

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CIVIL PROCEDURE CODE (ACT V OF 1908), s. 10—No jurisdiction for Insolvency Court to stay mortgage suit against the insolvent:—See under "MORTGAGE" ... 750

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SEC. 48—Decree for money—*Decree to recover money from A in the first instance and in case of failure, to recover from B—Limitation—Application for execution against B after twelve years after decree.] Held, by PHILLIPS, J. (on a reference under section 98, Civil Procedure Code, owing to a difference of opinion between DEVADOSS and WALLACE, JJ. that where a decree directs that money be recoverable from a party only on failure to recover from another party, execution of the decree becomes barred against the former after twelve years from the date of the decree, as provided by section 48, Civil Procedure Code. Khulna Loan Company v. Jnanendra Nath Bose, (19-7) 22 O.W.N., 145 (P.O.) followed. Aiyasamier v. Venkatachela Mudali, (1917) I.L.R., 40 Mad., 989 (F.B.), not followed.*

Nawab Shuja-ul-Mulk Bahadur v. Umir-ul-Umra Bahadur ... (1925) I.L.R., 48 Mad., 846

SEC. 92—Suit for removal of defendant from office of Pandara Sannadhi and for a scheme. *Allegations in the plaint as to misconduct of and breach of trust by defendant—Death of defendant before trial of suit—No allegations of any separate ground for a scheme. Suit for scheme, whether abates on death of the defendant.] In a suit instituted under section 92, Civil Procedure Code, for the removal of the defendant from the office of Pandara Sannadhi and for the framing of a scheme in relation to the Mutt, the defendant sought to be removed died pending the suit. It appeared that the main allegations in the plaint related to breaches of trust by the deceased defendant and no separate allegations had been made in the plaint in support of the prayer for a scheme. The succeeding Pandara Sannadhi, who was brought on record as legal representative of the defendant, contended that the suit had abated. Held, that the suit regarding the scheme did not abate on the death of the defendant but that the cause of action for a scheme survived and the suit could be prosecuted. Raja Anand Rao v. Ramadas Daduram, (1921) I.L.R., 48 Cal., 493 (P.C.) Sivagnana Desika Gnanasambandha Pandarasannadhi v. Advocate General of Madras, (1916) 28 M.L.J., 174, followed.*

Arumuga Thambiran v. Namasivaya Pandara Sannadhi ... (1925) I.L.R., 48 Mad., 688

O. II, r. 2—Mortgage bond—Independent covenant to pay interest—Provision for payment of principal and interest on demand—Suit on independent covenant for payment of interest only—Petition by Official Assignee of mortgagor against mortgagee in

Insolvency Court to declare mortgage defunct by reason of previous suit—Bar by O. II, r. 2, whether applicable in insolvency proceedings—Demand for interest—Notice, whether a demand for principal or only a warning.] Where a mortgage bond contained an independent personal covenant to pay interest every month besides providing for payment of principal with interest on demand, a suit based on the covenant to recover interest personally from the mortgagor does not bar a subsequent suit by the mortgagee for the principal and interest due on the bond, under Order II, rule 2 of the Civil Procedure Code. Kishen Narain v. Pala Mal, (1928) I.L.R., 4 Lah., 82; 50 I.A., 115; Muhammad Hoffs v. Muhammad Zakariya, (1922) I.L.R., 44 All., 121 (P.C.), referred to. Where the mortgagee in his notice demanding payment of interest stated that if interest was not paid he would instruct vakil to sue for principal and interest, the notice did not amount to a demand for principal but only a warning that principal would be demanded if interest was not paid. The provisions of Order II, rule 2, Civil Procedure Code, do not apply to proceedings by way of a petition filed by Official Assignee against the mortgagee so as to bar the right of the mortgagee under the bond by reason of a previous suit instituted by him for interest.

Sawmy Rao v. Official Assignee of Madras ... (1925) I.L.R., 48 Mad., 708

CIVIL PROCEDURE CODE (ACT V OF 1908), O. III, r. 4—Rule 277 of Civil Rules of Practice, construction of—*Right of legal practitioner to appear for his former client's opponent—Sec. 115, Civil Procedure Code.] If a legal practitioner has been deprived by a Subordinate Court of his right to appear for a party by a wrong interpretation of rule 277 of the Civil Rules of Practice, the order is one liable to be revised by the High Court under section 115, Civil Procedure Code. Rule 277 is enacted not only in the interests of clients who might find themselves aggrieved by practitioners wrongly allowing themselves to be engaged by their former client's opponent but also in the interests of practitioners who might be unjustly deprived of engagements by unscrupulous litigants. The prohibition on a practitioner contained in rule 277 ordinarily applies only to cases of further proceedings arising from one and the same suit or matter. It cannot be applied to a subsequent suit arising out of a prior suit unless the right or title and the causes of action and reliefs claimed in both are the same. Order III, rule 4, Civil Procedure Code, does not give an absolute right to any practitioner to appear in any Court in any matter he chooses. It is subject to the rules governing the admission of different classes of practitioners in different Courts and to rules framed by the High Court, such as rule 277 which invests Courts with power to regulate the conduct of practitioners.*

Veerappa Chettiar v. Sundaresa Sastrigal ... (1925) I.L.R., 48 Mad., 676

O. XVI, ss. 10, 11, 12—*Imposition of fine on refractory witness without previous proclamation or attachment of his property, validity of.] Neither the issue of a proclamation nor an order for attachment of property under Rules 10 and 11 of Order XVI of the Code of Civil Procedure is a condition precedent to the imposition of a fine on a refractory witness under Rule 12. Asutosh Mullik v. Secretary of State for India, (1920) 57 I.C., 302 and Ram Gopal v. Secretary of State for India, (1920) 55 I.C., 425, dissented from.*

Nagayya, In re. ... (1925) I.L.R., 48 Mad., 941

O. XXI, r. 16—*Decree—Execution—Transfer of decree—Assignment in writing—Transfer to a particular person in his own name—Transferee being benamidar—Application for execution by real owner—Application, whether competent—Construction of Statute, Order XXI, Rule 16.] Where a decree has been transferred to a particular person under an instrument in writing, no other person, claiming that he was the real owner under the transfer and that the transferee named therein was a mere benamidar for him, can apply for execution of the decree, under the terms of Order XXI, Rule 16, Civil Procedure Code. Manikam v. Tetayya, (1896) I.L.R., 21 Mad., 388, and Abdul Kaseem v. Chukkan, (1879) 5 O.L.R., 258 dissented from.*

Palaniappa Chettiar v. Subramania Chettiar ... (1925) I.L.R., 48 Mad., 552

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CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXIII, R. 3—Application to sue in forma pauperis—Presentation to Sarishtadar of Court, proper presentation—Rule 14 of Civil Rules of Practice, not ultra vires.] Presentation of an application to sue in forma pauperis to the chief ministerial officer of the Court, e.g., Sarishtadar, is a proper presentation. It need not be to the Judge himself. Rule 14 of the Civil Rules of Practice is not ultra vires.	
<i>Chidambaram Chettiar v. Kadar Mohideen Rowther</i> , (1925) I.L.R., 48 Mad.,	785
O. XXXVII, R. 5—Attachment before judgment—Small Causes Court—Jurisdiction:—See under "PROVINCIAL SMALL CAUSES COURTS ACT"	489
O. XLI, R. 22—Memorandum of objection in an original side appeal of the High Court:—See under "STAMP ACT (II OF 1899), SEC. 35"	681
O. XLV, R. 7, PROVISOS 1 AND 2—Order to furnish security other than cash or Government bonds, when to be made—"Grant of certificate" in rule 7, meaning of.] An order to furnish security for the costs of the respondent in an appeal to the Privy Council, in a form other than cash or Government Bonds can be made only at the time of granting the certificate and not afterwards. "Grant of certificate" in rule 7 of Order XLV, Civil Procedure Code, means the judicial order for the issue of a certificate and not the formal issue of the certificate.	
<i>Arunachala Naidu v. Bulakrishna & Co.</i> ... (1925) I.L.R., 48 Mad.,	559
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R. 277—Legal practitioner appearing against his former client—Order of Court prohibiting the practitioner from appearing—Revision:—See under "CIVIL PROCEDURE CODE, O. III, R. 4"	678
COMPANIES ACT, INDIAN (VII OF 1913), SEC. 162—Company, winding up of—Petition by a mortgagee of the company on the Original Side of the High Court—Claim disputed by the company—Petition for winding-up, when an abuse of process of the Court—Preliminary and final order on the petition—Appeal against final order by creditor—Memorandum of objections by respondent against validity of preliminary order, whether maintainable.] A petition for the winding-up of a company, filed by a creditor with the view of enforcing payment of a disputed debt, is an abuse of the process of the Court and should be dismissed. In <i>re London and Paris Banking Corporation</i>, (1874) 19 Eq., 445; and <i>Tulsidas Lallubai v. The Bharat Khand Cotton Mill Company, Limited</i>, (1915) I.L.R., 39 Bom., 47, followed. Held also, that with respect to all Courts, more especially Courts of Record such as the Original Side of the High Court, the order of Court is the order that comes to be embodied in the formal order drawn up and issued by the Court, and when the first order of the Court is in the nature of a preliminary order, an appeal against the final order would undoubtedly be held to include any principles decided for the purpose of the preliminary order.	
<i>Satyarasu v. Guntur Mills</i> ... (1925) I.L.R., 48 Mad.,	267
SEC. 162 (6)—Company—Winding up—Application to Court—Sufficiency of grounds—Just and equitable grounds under section 162 (6), meaning of—Whether ejusdem generis with clauses (1) to (5) of section—Lack of confidence in Managing Director, whether sufficient ground.] On an application to the Court for the winding up of a Company under the Indian Companies Act, VII of 1913, the reasons for a Court considering it to be just and equitable that a Company should be wound up under clause (6) of section 162 of the Act need not be ejusdem generis with those contained under clauses 1 to 5 of the section. <i>Loch v. John Blackwood Co., Ltd.</i>, [1924] A.C., 783 followed. Held, on the facts	

proved in the case, that there were sufficient grounds to call upon the Director for an explanation with a view to deciding on the winding up of the Company.

Sabapathy Rao v. Sabapathy Press Co., Ltd. ... I.L.R., 48 Mad., 418

CONTRACT—Charterparty—Advance freight—Meaning of—Advance, made by charterer—Ship stranded before loading of cargo—Voyage not begun by ship—Advance, whether recoverable by shipper—English rule as to advance freight, whether and when applicable.] On a contract of charterparty the charterer advanced a sum of money on the date of the contract, which was to be taken in part payment of freight on loading, the balance being payable at the port of destination. The ship, however, did not start on its voyage, as it stranded before reaching the port fixed for loading. On the charterer suing for return of the money advanced by him, the owner contended that the amount was not recoverable as being advance freight; Held, that advance freight does not arise until the voyage has actually begun, or at any rate until the goods for which freight is payable have been loaded on the ship or accepted by bills of lading; that the advance in this case did not amount to advance freight, and that consequently the plaintiff was entitled to recover from the defendants the amount paid by him. *Allison v. Bristol Marine Insurance Co.*, [1875] 1 A.C., 209; *Smith Hill & Co. v. Pyman, Bell & Co.*, [1891], 1 Q.B., 742 followed; *A. Coker & Co., Ltd. v. Limerick Steamship Co.*, (1918) 118 L.T., 726, distinguished.

Sivanandam Chettiar v. Surayya ... (1925) I.L.R., 48 Mad., 459

Joint promisees—Mere undertaking to pay one of the joint promisees and no actual payment—Effect of, on the debt.] In order that one of several joint promisees could give a valid discharge of a debt so as to bind all the promisees, the promisor must make an actual payment to him of the debt; a mere undertaking to pay him the amount at some future date cannot deprive the other promisees of their right to sue for the debt. *Barber Maran v. Ramana Goundan*, (1897) I.L.R., 20 Mad., 461, and *Annapurnamma v. Akkayya*, (1913) I.L.R., 36 Mad., 544 (F.B.), applied. *Shrinivasadas Bavri v. Meherbai*, (1917) I.L.R., 41 Bom., 300 (P.C.), explained.

Ramasami v. Kotayya ... (1925) I.L.R., 48 Mad., 693

For sale of goods—Description of goods as of three labels and designs—Rejection by buyer on the ground that invoice did not specify the description of goods as agreed—Rejection on that ground unjustifiable—Goods proved to be of one design and label—Re-sale by vendor under terms of contract—Suit by vendor for damages for loss on resale under the contract—Suit, not for difference between market price and contract price—Delay in resale, effect of—Plea of defendant that goods were not of the kind agreed, if permissible—Rule in *Braithwaite's case*, scope and applicability of.] The plaintiffs agreed to purchase from foreign merchants in Europe and sell to defendants 80 cases of fireworks, in 3 lots of 10 cases each, each lot under one label, in all 3 designs; the contract provided that the defendants should accept and pay bills drawn on them for the amount of the invoices, and that on failure to accept and pay for the bills on maturity, the plaintiffs were authorized to sell the goods on defendant's account. The invoices did not contain the specification of goods as comprised of three labels of 10 cases each. The defendants refused to accept the goods on that ground. It was proved that the goods were all in one label and of the same design. The plaintiffs sold the goods ten months later and sued the defendants for the difference between the contract price and actual sale price. The latter pleaded non-liability; Held, that, before the plaintiff could substantiate a claim for damages on resale of goods under the contract, they must show that the goods which they purported to sell were the goods which the defendant would have been obliged to accept under the contract but failed to do so; that the plea that the goods were not those agreed to be sold could be taken by the defendants, even though their ground of rejection based on the contents of the invoices was unjustifiable; and that the rule in *Braithwaite's case*, [1905] 2 K.B., 543, was not applicable to this case, as the

suit here was not for difference between the market price and the contract price, but was for a wider remedy under the terms of the contract; *Held* further, that the delay of the plaintiffs in selling the goods was unreasonable and disentitled them to any damages. Scope of the rule in *Braithwaite's case* [1905] 2 K.B., 543 explained.

Parthasarathy Chetty v. Gujapathy Naidu ... (1926) I.L.R., 48 Mad., 787

CONTRACT—Sale of goods—Shortage in delivery—Suit by vendee for damages—
Plea that defendant had fully paid his vendor who had become insolvent before plaintiff made his claim for shortage—Plea, whether sustainable—Bar of limitation—Limitation Act (IX of 1908) art. 62 or 96—Mistake—Knowledge of plaintiff as to shortage—Money had and received. The defendants, who had purchased eight bales of grey shirtings from a person, sold them to the plaintiff in August 1918, representing that each bale contained sixty pieces. The latter sold the bales to others who found that each bale contained only fifty pieces; the plaintiff became aware of the shortage in April 1919, and, after sending a notice of demand to the defendants, sued them in February 1922 for damages for short delivery. The defendants pleaded non-liability on the ground that they had paid full price to their vendor who had become insolvent before the plaintiff made his claim on him, and also pleaded that the suit was barred by limitation under article 62 of the Limitation Act; *Held*, that the plea of the defendants on the merits was not sustainable in law; that article 96 of the Limitation Act which was a specific article for suits for relief on the ground of mistake, applied to the facts of this case; that article 62 which was a general article did not apply; and that the suit, instituted within three years from the date on which the mistake became known to the plaintiff, was not barred by limitation.

Ramiah & Co. v. Sadasiva Mudaliar ... (1925) I.L.R., 48 Mad. 925

-----To lend money—Repudiation by borrower—Lender electing to treat contract as existing:—See under "ASSIGNMENT" ... 230

CONTRACT ACT (IX OF 1872), SEC. 56—Sale of goods—Consignment by ship from Coromandel ports to Marseilles—Commandeering of ship for war purposes—Impossibility of performance—Inability to get other tonnage—"Force majeure" clause—Non-performance—Liability—Exoneration The respondent, a merchant in Madras, agreed on 10th November 1916 with the appellants, a firm in Marseilles to ship groundnuts, H.B. Brand, to Marseilles from certain ports on the Coromandel Coast in the December-January (1916-17) season on a c.i.f. contract, and booked the necessary tonnage on a steamer called "Sea-pool;" but on 14th November 1916, the ship was commandeered for war purposes and the respondent was unable to get tonnage on any other steamer leaving the above ports within the agreed time, notwithstanding his best endeavours to do so. The contract contained a "force majeure" clause enumerating war, revolution, strikes, epidemics, etc., as exonerating from performance of the contract. On a suit by the appellants for damages for non-performance of the contract, *Held*, that "force majeure" would discharge the defendant from the performance of the contract; that inability to obtain tonnage was force majeure; that the commandeering of the "Sea-pool," coupled with the total lack of any other ship with available accommodation not already booked by other consignors amounted to force majeure exonerating the defendant from liability for non-performance, of his contract; *Matsoukis v. Priestman & Co.*, [1915] 1 K.B., 681; that the respondent was not bound to break his contracts already made with others with a view to perform his contract with the appellants, *Tennants (Lancashire), Ltd. v. O. S. Wilson & Co., Ltd.*, [1917] A.C., 495; and that the respondent was not bound to purchase groundnuts in Marseilles or other places and tender the same in performance, as the appellants would not be legally bound to accept such tender, because the contract was a c.i.f. contract by which the defendant

was bound to tender bills of lading in respect of groundnuts of a particular brand shipped in a steamer from particular ports to Marseilles. *Hansson v. Humel and Horley, Ltd.* 1922, 2 A.C., 86.

Bendit v. Prudhomme ... (1925) I.L.R., 48 Mad., 538

CONTRIBUTORY NEGLIGENCE—If imputable to children:—See under "TORT." 417

COSTS—Criminal revision case—High Court's power to award costs:—See under "CRIMINAL PROCEDURE CODE, SEC. 148" ... 262

COURT FEES ACT (VII OF 1870), SEC. 7 (5)—Suit to set aside father's alienation Decree for land on payment of certain sum—Appeal by defendant to exempt land—Court-fee on appeal. In a suit by a Hindu to recover his share of the family lands alienated by his father a decree was made in favour of the plaintiff for the recovery of his share on his paying a portion of the consideration to the alienee. In appeal by the defendant to dismiss the suit *in toto*, *Held* that the subject-matter in dispute in appeal was the plaintiff's share itself and not the share minus the part of the consideration ordered to be refunded and that the court-fee on appeal was to be calculated on the market value of the share of the ali nated lands as provided by section 7 (5) of the Court Fees Act; *Rup Narain v. Bishwa Nath Singh*, (1922) I.L.R., 44 All., 629, followed.

Seethayamma, In re ... (1925) I.L.R., 48 Mad., 652

COURT SALE—Purchase not by decree-holder but by a party to the suit—Subsequent reversal of decree, effect of, on Court sale. It is only bona fide purchases made in Court auction by persons who are not parties either to the suit or to the decree that are saved on a subsequent reversal of the decree under which the sale was held. A purchase made in Court auction by one who though not the decree-holder is yet a party to the suit or decree is liable to be set aside if the decree under which the sale was held is eventually reversed on appeal. *Narandra Chandra v. Jogendra Narain*, (1914) 20 C.L.J., 469, followed; *Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan*, (1888) I.L.R., 10 All., 166 (P.C.), explained.

Official Receiver, Madura v. Chettiappa Chetty ... (1925) I.L.R., 48 Mad., 767

CREDITOR—Consenting party to deed of arrangement by debtor—Petition for adjudication by consenting creditor—Estoppel:—See under "PROVINCIAL INSOLVENCY ACT, SEC. 9" ... 294

CRIMINAL APPEAL—Disposal of—Criminal Procedure Code, sec. 421—Posting of appeals, practice—Practitioner not prepared to argue the appeal when presenting it—Whether guilty of professional misconduct. A criminal appeal should not be heard at the time of presenting the papers, even for the purpose of dismissal under section 421 of the Code of Criminal Procedure (Act V of 1898). There must be a special posting of the appeal after a reasonable time, for the purpose of hearing under section 421. An appeal raising questions of fact ought not to be disposed of under section 421 without the original records being called for from the lower Court. A pleader who has drafted the grounds of appeal, but is not prepared to argue it at the time of presenting the appeal, is not guilty of professional misconduct.

Hussain Sahib, In re ... (1925) I.L.R., 48 Mad., 855

CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 148, 423 (1) (d), 435, 439 AND 561-A—Order of Magistrate under Chapter XII—Revision by High Court—Costs—Power of High Court to award costs of revision proceedings—Inherent powers—Incidental or consequential orders. The High Court, when exercising its powers of Criminal Revision from an order passed by a Magistrate in proceedings under Chapter XII of the Criminal Procedure Code, has no inherent power to award to the successful party the costs incurred in the revision proceedings; *Sankaralinga Mudaliar v. Narayana Mudaliar*, (1922) I.L.R., 45 Mad., 913 (F.B.), applied; nor can the award of costs be regarded as incidental or consequential to the disposal of the revision petition within the meaning of section 423 (1) (d) of the Code, for

it does not necessarily follow from an order passed in revision. *See Mehi Singh v. Mangal Khandu*, (1912) I.L.R., 39 Cal., 157 (F.B.). Costs referred to in section 143 of the Code are those incurred in the magisterial proceedings under Chapter XII; but the High Court, sitting in revision, is not exercising the powers of a Magistrate under this chapter, and therefore the costs in the revision proceedings cannot be included under this head.

Veerappa Naidu v. Avudayammal ... (1925) I.L.R., 48 Mad. (F.B.), 262

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 162—Admissibility of oral statements made to the police—Scope of sec. 162 as amended—Indian Evidence Act (Act I of 1872), sec. 157—Corroboration—Statements made in the course of police investigation, if part of *res gestæ* of the offence of false complaint—*See* 6 and 7.] The accused was convicted by the Sessions Judge, under section 211 of the Indian Penal Code for preferring a false complaint of dacoity. The conviction was based upon the testimony of police officers to the effect that the three persons mentioned as eye-witnesses in the complaint of dacoity had made oral statements in the course of police investigation denying the occurrence. Two of these persons, when subsequently examined at the trial of the accused, denied ever having made the statements attributed to them and the third was not examined. *Held*, that the provisions of section 162 of the Code of Criminal Procedure, either as amended or as it stood before the amendment, were not an absolute bar to the use of such oral statements at the trial for any purpose admissible under the Indian Evidence Act. *Held* further, that the statements were not admissible under section 157 of the Indian Evidence Act as they did not corroborate any evidence already given at the trial, nor under sections 6 and 7 as they did not form part of the *res gestæ*, and that the conviction should therefore be set aside.

Venkatasubbiah v. King-Emperor ... (1925) I.L.R., 43 Mad., 640

SEC. 195—Sanction—False charge of dacoity—Sanction granted by Sub-Magistrate—Prosecution in pursuance of sanction instituted before amendment of the Code as to sanction, came into force—Application to District Magistrate to revoke sanction—Jurisdiction of District Magistrate to revoke sanction after amendment came into force—Right to apply to revoke sanction, whether mere matter of procedure or substantive right—Amendment of Code, effect of—General Clauses Act (X of 1887), sec. 6.] Where a Sub-Magistrate granted sanction under section 195, Criminal Procedure Code (V of 1898), for prosecuting a person under section 211, Indian Penal Code, for preferring a false charge of dacoity against another, and in pursuance of the sanction a prosecution had been instituted before the amendment of the Code repealing section 195 came into force, the District Magistrate had jurisdiction under section 195 (b) of the Code to revoke the sanction, notwithstanding that the amendment had come into force before the date of the petition before him to revoke the sanction. The right of a person to apply to higher authorities to revoke a sanction against him is not a matter of mere procedure, but is a substantive right vested in the party to invoke the aid of a higher tribunal, and it is not affected by a later amending statute in the absence of express words to that effect. *Colonial Sugar Refining Company v. Irving*, [1905] A.C., 389, applied; *The Attorney-General v. Sillen and others*, (1884) 10 H.L.C., 704, referred to. The same principle is involved and carried out by section 6 of the General Clauses Act (X of 1887).

Ramakrishna Iyer v. Sithai Ammal ... (1925) I.L.R., 48 Mad. (F.B.), 620

SEC. 196—Order under—Nature of inquiry and contents of the order:—See under "CRIMINAL PROCEDURE CODE, SEC. 476" ... 395

"CRIMINAL APPEAL" ... **SEC. 431:—See under** ... 385

SEC. 238 (2-A)—Conviction for attempting to commit an offence—Charge only for the substantial offence—Conviction valid:—See under "PENAL CODE, SEC. 507" ... 774

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 436—Revision against order of discharge—Some of the accused not made parties to the revision petition—District Magistrate setting aside order of discharge and committing all the accused to the Sessions—Legality—Grounds for committing to the Sessions—Sec. 209 (1).] Where, upon a revision petition, filed by the complainant under section 436 of the Code of Criminal Procedure, against an order of discharge, making only some of the accused respondents, the District Magistrate set aside the order of discharge and committed to the Sessions all the accused including even those who were not parties to the revision petition and had no notice of it, *Held*, that the order so far as it related to the accused who were not parties to the revision petition was irregular and should be set aside. *Held* further, that whenever the evidence is of such a nature that the guilt of the accused can be held to be proved or disproved only as the result of the valuing and weighing it by him, the Magistrate must commit the accused to the Sessions; but if the evidence be of such a nature that no reasonable person would ever on that evidence hold the accused guilty he must be discharged under section 209 (1).

Manikka Padayachi v. King-Emperor ... (1925) I.L.R., 48 Mad., 874

SEC. 488—Maintenance claim—Counter-petitioner's plea of insanity—Procedure.] When maintenance under section 488 of the Code of Criminal Procedure (Act V of 1898) is claimed and the plea of insanity is set up on behalf of the counter-petitioner, the Magistrate must hold a judicial enquiry into his sanity and put him, if necessary, under medical observation. If he is found insane and incapable of understanding questions put to him, the Magistrate must postpone further proceedings until he is satisfied that the counter-petitioner can understand the same. The proceedings under section 488 are wholly governed by the provisions of the Criminal Procedure Code.

Appichi Goundan v. Kuttiammal ... (1925) I.L.R., 48 Mad., 388

SEC. 488—Maintenance order in favour of a girl—Girl subsequently married—No proof of ability to maintain herself—Whether maintenance order could be cancelled—Sec. 489—Magistrate's powers to cancel his order.] An order, under section 488 of the Code of Criminal Procedure, for the maintenance of a girl cannot be cancelled on her marriage without proof that she has thereby become able to maintain herself and ceased to depend upon the maintenance ordered. Section 489 empowers a Magistrate to altogether cancel his order awarding maintenance and does not restrict him to merely reducing the amount.

Meenatchiammal v. Muttuswami Pillai ... (1925) I.L.R., 48 Mad., 508

SEC. 491—Habeas corpus—Application by guardian—Considerations for the Court—Wishes of the infant—Welfare—Practice in England, how far applicable to India.] In dealing with an application for a writ of habeas corpus by a guardian to recover custody of an infant, the main consideration for the Court is the infant's welfare in its widest sense, moral, religious and physical. Due regard must be had to the ties of affection. The rules that guide the Court of Chancery in such matters are applicable to the Courts in this country also. If the infant is capable of forming intelligent opinions, the Court must take them into consideration. There is no hard and fast rule obtaining in England that the Court has no option but to give effect to the wishes of an infant of over 14 if a boy, and over 16 if a girl, without reference to its mental capacity. Even if such a rule prevails in England, it is inapplicable to India.

Saraswathi Ammal v. Dhanakoti Ammal ... (1925) I.L.R., 48 Mad., 290

CRIMINAL PROCEDURE CODE (V OF 1898 AND XVIII OF 1923), SS. 476 AND 195—Order under sec. 476, Criminal Procedure Code, by a Judge of the Presidency Small Cause Court, Madras, to prosecute for offences under sections 193 and 196, Indian Penal Code—Appeal against the order to the Appellate Side of the High Court, maintainability of.] An appeal against an order of a Judge of the Presidency Small Cause Court, Madras, directing under

section 476, Criminal Procedure Code, the prosecution of a person for offences under sections 193 and 196, Indian Penal Code, lies only to the Appellate Side of the High Court and not to the Full Bench of the Small Cause Court under section 38 of the Presidency Small Cause Courts Act (XV of 1882) or to the Original Side of the High Court. *In re Shivulal Padma*, (1910) I.L.R. 34 Bom., 316, followed; *Munisamy Mudahar v. Rajaratnam Pillai*, (1922) I.L.R., 45 Mad., 928 (F.B.), explained. As an order under section 476, Criminal Procedure Code, directing a prosecution for offences under sections 193 and 196, Indian Penal Code, amounts to a complaint under section 200, Criminal Procedure Code; the Court before making the order must hold an inquiry and must itself specify by its order (1) the witnesses to prove the complaint, (2) the false evidence complained against and (3) whether the person complained against knew that the evidence which he was using as genuine was false. An order which does not itself specify these matters but leaves them to be fished out by the trying Magistrate is liable to be set aside as illegal.

Kalyanji v. Ram Deen Lal ... (1925) I.L.R., 48 Mad., 395

DANCING WOMAN, Descendants of—*Succession*:—See under "HINDU LAW" ... 945

DECREE—*Transfer in favour of a benamidar—Application by real owner for execution, whether competent.* See under "CIVIL PROCEDURE CODE, O. XXI, R. 16" ... 355

to recover money from A in the first instance and on failure from B—*Limitation*:—See under "CIVIL PROCEDURE CODE, SEC. 48" ... 846

DISTRICT MUNICIPALITIES ACT (V OF 1920), SEC. 49, CL. 2 (3)—*Rule 12 of Election Rules—Election of Councillor—Candidate obtaining majority of votes unseated on ground of disqualification—Interest in contract with municipality—Right of candidate having next largest number of votes to be declared elected—Knowledge of voters as to the disqualification, how affects procedure—Fresh election, when ordered—Election Rules, rule 12, construction of.* Where a candidate in a municipal election, who obtained the majority of votes, was unseated on the ground that he was interested in a contract with the municipality and so disqualified from being a Councillor, the candidate, who got the next highest number of votes is not entitled as a matter of course to be declared elected under rule 12 of the Election Rules framed under the Madras District Municipalities Act (V of 1920). It is only if the voters were aware of the disqualification of the candidate and still voted for him and there were enough of such votes to destroy the majority obtained by him, that the candidate next in order of votes is entitled to be declared elected; but if the voters were ignorant of the disqualification, a fresh election should be ordered. Where there is no allegation in the petition by the second candidate that the voters were aware of the disqualification, no enquiry should be ordered as to the knowledge of the voters, with a view to declare the petitioner as elected. *Hobbs v. Morey*, [1904] 1 K.B., 74, followed.

Gopala Ayyangar v. Ebrahim Rowther ... (1925) I.L.R., 48 Mad., 509

SEC. 95—"Reside," meaning of.] A person who neither himself personally resides nor maintains a residence for himself or his family within the limits of a municipality but merely maintains an office for collection of rent accruing outside such limits does not "reside" within the municipality within the meaning of section 95 of the Madras District Municipalities Act (V of 1920), and is therefore not liable to be assessed to tax under that section.

Veerappa Chettiar v. Municipal Council, Palni ... (1925) I.L.R., 48 Mad., 476

ELECTION OF COUNCILLOR—*See under "MADRAS DISTRICT MUNICIPALITIES ACT (V OF 1920)"* ... 509

EQUITABLE MORTGAGE—*Deposit of Patta of Ryotwari lands:—See under "TRANSFER OF PROPERTY ACT"* ... 454

ESTATES LAND ACT (MADRAS ACT I OF 1908), SEC. 77 (ii)—*Distraint of cattle—Rescuing them, if an offence under sec. 212 (b).]* A person who rescues cattle distrained under section 77 (ii) of the Madras Estates Land Act is not guilty of any offence under section 212 (b) of the Act. The term "produce" in section 212 (b) means "produce of the land or trees in the defaulter's holding."

Narayana Reddi v. Dyvadeenachar ... (1925) I.L.R., Mad., 505

ESTOPPEL—*Creditor applying for adjudication after consenting to deed of arrangement by a debtor:—See under "PROVINCIAL INSOLVENCY ACT"* ... 294

EVIDENCE ACT (I OF 1872), SS. 6 AND 7—*Statements made to police, if part of res gesta the offence of false complaint:—See under "CRIMINAL PROCEDURE CODE"* ... 640

SEC. 92, PROVISIO (5)—*Proof of mercantile usage—Admissibility of evidence aliunde—"Thavanas" meaning of.] Held, that according to the usage proved to be prevailing amongst the piece-goods merchants in Godown Street, Madras Town, sales of piece-goods with a stipulation to charge interest at $\frac{1}{2}$ per cent per mensem after sixty days "thavanas" are sales on credit given for the period stipulated, and not cash sales and that accordingly limitation to sue for the price begins to run from the expiry of the period. Held further (a) that evidence aliunde can be given under section 92, proviso (5) of the Evidence Act as to the meaning of technical terms in a contract and as to incidents of the usage of the trade not expressly mentioned.*

K.M.P.R.N.M. Firm v. Somasundram Chetty ... (1925) I.L.R., 48 Mad., ... 275

SEC. 132—*Admissibility of oral statements made to the police:—See under "CRIMINAL PROCEDURE CODE, SEC. 162"* ... 640

EXECUTION OF DECREE—*Power of Court to stay execution—Decisions not reported in authorized series, whether binding on Court.] The Court has power, on an application by the judgment-debtor or his surety, to stay execution of the decree against his person for a reasonable time to enable him to satisfy the decree. Held also that the observations of SCHWABE, C.J., to the contrary in *Syed Aga Jan v. Abdul Majid*, O.S.A. No. 18 of 1923 are not binding on the Court, the case not being reported in the authorized reports.*

Suryapracasam v. Munisamy Chetty ... (1925) I.L.R., 48 Mad., 494

DAMAGES—*Child knocked down by a passing engine:—See under "TORTS"* ... 417

FORMA PAUPERIS—*Application to sue in—Admission by Government Solicitor as regards applicant's pauperism—Defendant entitled to disprove pauperism* ... 785

GENERAL CLAUSES ACT (X OF 1877), SEC. 6—*Effect of repeal:—See under "CRIMINAL PROCEDURE CODE, SEC. 195"* ... 620

GRANT—*Construction of:—See under "TANJORE RAJ."*

HABEAS CORPUS—*Application by guardian—Considerations for Court:—See under "CRIMINAL PROCEDURE CODE, SEC. 491"* ... 299

HEREDITARY VILLAGE OFFICES ACT (MADRAS ACT III OF 1895), SS. 13 AND 21—*Blacksmith's inam—Lessee of inam lands from holder of the inam—Obstruction to enjoyment of lease by defendants—Suit by lessee for damages against obstructors—Suit instituted in a Civil Court—Jurisdiction of Civil or Revenue Court to entertain suit by holder of inam or his alienee.] A lessee from the holder of a blacksmith's unenfranchised inam sued in a Civil Court to recover damages for unlawful obstruction to his enjoyment of the lands during the period of his lease, caused by the defendants; the latter*

denied the title of the lessor and contended that the Civil Court had no jurisdiction to entertain the suit: *Held*, that the Civil Court had jurisdiction to entertain the suit. In spite of the generality of the language of section 21 of Madras Act III of 1895, the jurisdiction of Civil Courts is taken away only in those cases in which it is conferred on the Revenue Court by section 13 of the Act; *Muvvula Seetham Naidu v. Doddai Rami Naidu*, (1910) I.L.R., 33 Mad., 208, relied on; and section 13 of the Act is confined to persons suing in their own right as holders, to whom the Revenue Court is provided as the forum, while for other persons, including alienees from the holders, the forum is the ordinary Civil Court.

Sahadeva Reddi v. Lingappa Asari ... (1925) I.L.R., 48 Mad., 781

HIGH COURTS ACT, 1861:—See under "INSOLVENCY COURT AT MADRAS." 331

HINDU LAW—Adoption—Mayukha Law—Right of widow to adopt without husband's or sapinda's authority:—See under "TANJORE RAJ."

Adoption of a Sudra after his marriage, whether valid—*Dattaka Chandrika*, authority of—Reasoning on which rule is based, whether sound—Rule, acted upon for more than a century—Rule ought to be followed, though based on slender foundations.] Adoption of a Sudra, after his marriage, is invalid under the Hindu Law. *Vythilinga v. Vijayathammal*, (1883) I.L.R., 6 Mad., 43; *Pichuvayyan v. Subbayyan*, (1890) I.L.R., 13 Mad., 128; *Janakiram Pillay v. Venkiah Chetty*, (1911) 10 M.L.T., 21 and other earlier cases, followed. This rule is based on the opinion of the *Dattaka Chandrika*, which is recognized as an authority in all the provinces except Bombay which follows the *Mayukha*, see *Arumilli Perroau v. Subbarayadu*, (1921) I.L.R., 44 Mad., 656 (P.C.); 42 I.A., 280; and although this conclusion of the *Dattaka Chandrika* may rest on slender foundations, still the work is recognized as an authority in all the provinces outside Bombay, and the rule has been acted upon for more than a century and it is too late to question it.

Lingayya Chetty v. Chennyalammal ... (1925) I.L.R., 48 Mad., 407

Adoption—Suit for possession:—See under "LIMITATION" ... 889

Legitimate descendants of a Hindu dancing woman—Right of succession inter se.] The legitimate descendants of two sons of a Hindu dancing woman are under the Hindu Law entitled to succeed to each other. *Mayna Bai v. Uttaram*, (1864) 2 M.H.C.R., 196, applied.

Viswanatha Mudali v. Doraiswami Mudali ... (1925) I.L.R., 48 Mad., 945

Maintenance—Concubine—Right to maintenance—Text of Hindu Law relating thereto—Conditions and limitations as to the right—"Avaruddha Stri," meaning of.] Under the Hindu Law, a permanently-kept concubine is entitled to maintenance out of the estate of her deceased paramour, in the hands of his heirs or their representatives. The expression "Avaruddha Stri" found in *Mitakhara*, Chap. II, section I, placita 27 and 28, includes a permanently-kept concubine. The decisions of Court have from time to time laid down the conditions and limitations subject to which a concubine is entitled to maintenance, namely, (1) that she must have been permanently and exclusively kept by her paramour, (2) that she must be the mother of illegitimate children by him, and (3) that she should be chaste and keep undefiled the bed of her lord and master. *Panchapagesa Odayar v. Kanaka Ammal*, (1917) 33 M.L.J., 455; *Bai Monghibai v. Bai Nagubai*, (1923) I.L.R., 47 Bom., 401, *Anandilal Bhagchand v. Chandrabai*, (1924) I.L.R., 48 Bom., 208, followed.

Rama Raja Thevar v. Papammal ... (1925) I.L.R., 48 Mad., 806

Partition—Severance of joint status—Plaint claiming partition—Withdrawal of plaint—Agreement to remain joint after severance of one member—Family business—Inference.] The filing of a plaint claiming partition by a member of a joint Hindu family, if the plaint has been withdrawn

before trial, does not result in the family being separate at a later date, although it is evidence that an intention to separate had been entertained by the plaintiff, *Kedar Nath v. Ratan Singh*, (1910) I.L.R., 32 All., 415; 37 I.A., 161, followed. When a member of a joint family has separated, an agreement by the remaining members to continue undivided may be inferred from the way in which their business is carried on after the separation. In a suit for partition which proceeds to a decree, it is the decree which shows whether the separation was only a separation of the plaintiff from his coparceners or was a separation of all the members from each other.

Palani Ammal v. Muttuvengkatachala Moniagar ... (1925) I.L.R., 48 Mad., 254 (P.C.)

HINDU LAW—Partition—Suit by minor son against his father—Birth of another son, conceived after date of plaint but born before preliminary decree—Quantum of share of plaintiff, whether affected by birth of the son—Division of status, from what date.] Where a Hindu minor, represented by a next friend, sued his father for partition, and another son of the father, conceived after the date of the plaint, was born before the preliminary decree was passed in the suit, the share to which the minor plaintiff was entitled at the date of the plaint was not diminished by the subsequent birth of the son. A suit by a minor for partition, if it ends in a decree for partition, has the effect of creating a division of status from the date of the plaint. *Chelimi Chetty v. Subbamma*, (1918) I.L.R., 41 Mad., 442, distinguished.

Krishnaswami Thevan v. Pulukaruppa Thevan ... I.L.R., 48 Mad., 465

Right of legitimate agnates from common ancestor to inherit estate of an illegitimate descendant:—See under "TANJORE RAJ." 1

Shares of legitimate and illegitimate sons:—See under "TANJORE RAJ." 1

Succession—Maternal uncle's son, preferable heir to maternal aunt's son.] Under the Hindu Law, a maternal uncle's son is a preferable heir to a maternal aunt's son; *Ram Charan Lal v. Rahim Baksh*, (1916) I.L.R., 38 All., 416, followed. *Appandai Vathiyar v. Bagubai Mudaliyar*, (1910) I.L.R., 33 Mad., 439, not followed. *Vedabhaia Mudaliyar v. Subramania Mudaliyar*, (1921) I.L.R., 44 Mad., 753 (P.C.), applied.

Bami Reddi v. Gangi Reddi ... (1925) I.L.R., 48 Mad., 722

Surrender—Daughter's estate—Inheritance by two daughters—Partition by daughters extinguish so as to right of survivorship inter se—Death of one of them after alienating portions of her share—Surrender by the surviving daughter to nearest reversioner—Right of surrenderee to question alienations before surrenderer died—Analogy of adopted son's right to question, immediately on adoption, alienations of adoptive mother, whether applicable.] Where the two daughters of a deceased Hindu succeeded as heirs to his estate and partitioned it between themselves so as to extinguish their rights of survivorship to each other, and after the death of one of them who alienated most of her properties, the survivor purported to surrender the entire estate to the nearest reversioner, the latter is not entitled to question the alienations made by the deceased daughter until the surrenderer dies. *Subbamma v. Subramanyam*, (1916) I.L.R., 39 Mad., 1035, followed; the authority of the decision in the above case has not been shaken by the ruling of the Full Bench in *Vaidyanatha Sastri v. Savithri Ammal*, (1918) I.L.R., 41 Mad., 75 (F.B.), affirming the right of an adopted son to question the alienations of his adoptive mother immediately on his adoption and before her death, but the former decision has been followed in cases later than the Full Bench decision: *Singaram Chettiar v. Kalyanasundaram Pillai*, (1914) M.W.N., 735; and *Sri Raja Suryarao Bahadur Garu v. Sri Raja Suryanarayana Jagapathi Bahadur Garu*, (1921) 41 M.L.J., 208, referred to. In recognizing the right of surrender, the Courts are justified in imposing conditions on her power based on considerations of justice,

equity and good conscience, and where the surrender is effected for the purpose of defeating alienees for consideration, the rule that till surrenderer dies her alienations cannot be questioned is a just and equitable rule—*Vaidyanatha Sastri v. Savithri Ammal*, (1918) I.L.R., 41 Mad., 75 (F.B.), referred to.

Sundarasiva Rao v. Viyyamma, (1925) I.L.R., 48 Mad. ... 933

HINDU LAW—"Sword Marriage" among Sudras, validity of:—See under "TANJORE RAJ."

—Widow—Suit to recover possession of her husband's property—Defendant claiming to be illatom son-in-law—Defendant mixing up his own funds with those of the propositus—Burden of proof as to property belonging to the plaintiff's husband or to defendant—Rule as Trustee mixing up trust funds with private funds.] Where a trustee, or a person who puts himself in the same position of accountability as a trustee, such as an executor *de son tort* by virtue of his intermeddling with the estate of another, is proved to have amalgamated monies of the testator with his own, and especially if he can be reasonably suspected of having destroyed the evidence which would otherwise be available to separate the two estates, on a suit being instituted by the beneficiary to recover the property from the intermeddler alleging that the property formed part of the estate, the burden of proof is on the intermeddler to show that the property did not belong to the plaintiff's estate but to himself. *Lupton v. White*, (1808) 15 Ves. 432, applied; *Magaluri Gurudiah v. Narayana Rangiah*, (1881) I.L.R., 3 Mad., 859, referred to. This principle applied to a case where a Hindu widow sued to recover properties alleged to belong to her husband's estate from his son-in-law, who had intermeddled in the management of the properties after her husband's death.

Tulasamma v. Venkatasubbayya ... (1925) I.L.R., 48 Mad., 597

—Will—Charity—Trusts—Will by father, creating a charity and appointing his undivided sons hereditary trustees—Trustees, whether joint tenants or tenants-in-common—Subsequent partition—Non-division of trusteeship—Right of widow of one of the sons of testator to joint management of charity with surviving son.] Where a Hindu father founded a charity under his will, endowed it with his self-acquired properties, and directed under the will that his two sons, who were members of an undivided family, should "enjoy them hereditarily and conduct the charities," without alienating or partitioning such properties, and subsequently the latter effected a partition of their estate but in respect of the charity the partition deed provided that they "should act in common as stated in the will," after the death of one of the sons leaving a minor son who also died leaving his mother, latter claimed the right to manage the charity jointly with the surviving son of the testator. Held, that under the will the testator's sons were in respect of the trusteeship joint tenants and not tenants-in-common; and that, consequently, the widow of the deceased son of the testator was not entitled to claim joint management of the charity along with the surviving son of the testator.

Salakshi Ammal v. Doraimanikka Nadan ... (1925) I.L.R., 48 Mad., 827

INCOME-TAX ACT (XI OF 1922)—Trade gain or loss in each year—Method of calculation.] If the market value of certain goods brought by a trader in the beginning of a certain year gradually becomes lower than the cost price during the course of the year and the trader therefore submits an income-tax return that the trade had a loss during that year and gets exemption from tax for that year from the authorities who accept the market values as put by him, the value that the trader should put for the opening balance of his remaining stock in trade at the beginning of the next year is not their original cost price but the lower market value accepted by the authorities as ruling at the end of the previous year. If on the basis of such lower valuation there is a profit at the end of second year, the trader must pay income-tax on such profit, though taking both

the years together there might be a net loss in trade at the end of the second year. Income-tax for a particular year is calculated upon a proper estimate of profit and loss only of that particular year.

Commissioner of Income-Tax v. Chengalwaraya Chetti, (1925) I.L.R., 48 Mad., (S.B.), 836

INCOME-TAX ACT (XI OF 1922), ss. 23 (2) AND 63 (2)—Unregistered firm—Service of notice under the Act on one member of the firm, sufficient service on the firm.] By virtue of section 63 (2) of the Income-tax Act (XI of 1922) an unregistered firm is validly served with notice mentioned in section 23 (2) of that Act, if it is served on any member of that firm.

The Commissioner of Income-tax v. Chidambaram Nadar ... (1925) I.L.R., 48 Mad., (S.B.), 602

INSOLVENCY ACT, 1848:—See under "INSOLVENCY COURT AT MADRAS" ... 731

INSOLVENCY COURT AT MADRAS—Vakils—Right of audience of vakils—Insolvency Court, whether separate or subordinate Court or branch of High Court—History of Insolvency Courts—Statutes—9 Geo. IV, ch. 78—Indian Insolvency Act, 1848, 11 and 12 Vict., ch. 21, sec. 3—Indian High Court Act, 1861 (24 and 25 Vict., ch. 104)—Indian Legal Practitioners' Act of 1879, sec. 4—Presidency Towns Insolvency Act (III of 1909), sec. 121—Effect of—Conflict of Acts—Rule of construction—Sec. 3 of Indian Insolvency Act, 1848, whether repealed by sec. 4 of Legal Practitioners' Act.] Vakils have no right of audience in the Insolvency Court at the Presidency Town of Madras. Historically, the Insolvency Court, which was first established in India in 1828 under 9 Geo. IV ch. 78, and was re-constituted in 1848 under the Indian Insolvency Act, 11 and 12 Vict., ch. 21, was a separate Court and was not a part or branch of the Supreme Court or of the High Court, until the Presidency Towns Insolvency Act (III of 1909) was passed, although a Judge of the Supreme or of the High Court presided over the Insolvency Court. Under the Indian Insolvency Act, 1848, only advocates and attorneys of the Supreme Court, and no other persons whatsoever, were allowed to practise in the Insolvency Court, and after High Courts were established under the Indian High Courts Act, 1861 (24 and 25 Vict., ch. 104), the provisions of the former Act referring to the Supreme Court and Judges thereof became applicable to the High Court and its Judges under section 11 of the later Act, with the result that only advocates and attorneys became entitled to practise before the Insolvency Court, presided over by a Judge of the High Court. Although, under section 4 of the Legal Practitioners' Act (XVIII of 1879), advocates and vakils, as such, are allowed to practise in any Court subordinate to the High Court and in any Court in British India other than a High Court, still this general provision of this later Act cannot be deemed to have impliedly repealed the special provisions of section 3 of the earlier Indian Insolvency Act, 1848, which expressly prohibited any persons other than advocates or attorneys from practising in the Insolvency Court. Even though insolvency jurisdiction was transferred to the High Court under the Presidency Towns Insolvency Act (III of 1909), and the Insolvency Court became by reason of that Act merged in the High Court, still the effect of section 121 of the Act is that, if vakils had the right of audience in the Insolvency Court before 1909, it was not taken away, but, if they had not such right previously, it was not conferred on them by the Act.

Krishnaswami Ayyar v. Swaminatha Ayyar ... (1925) I.L.R., 48 Mad., 831

INSOLVENCY PROCEEDINGS—Adjudication of a firm—Receiver appointed previously in a suit between partners of the firm:—See under "PRESIDENCY TOWN INSOLVENCY ACT, SEC. 11 (d)" ... 795

INTESTATE SUCCESSION TO PERSONAL PROPERTY—More than one claimants—Madras Regulation III of 1802, section 16 (7)—Judge must refer claimants to a suit:—See under "ADMINISTRATION OF ESTATES REGULATION III OF 1802." ... 716

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	LESSOR AND LESSEE —Lease of land for coffee cultivation for 91 years—Subsequent lease to same lessee of a portion for goldwashing for 86 years—Effect of later lease—Surrender of prior lease—Suit in ejectment of lessee from lands included in later lease—Suit after expiry of subsequent lease but before expiry of prior lease—Implied surrender—Compatibility of later lease with prior lease—Machinery erected by lessee—Right of lessee to remove same—Right of lessor for its value.] Where during the currency of a lease for a long period of a large extent of land for coffee cultivation, the lessee accepted a second lease of a portion of the land for a shorter period for goldwashing mining purposes and, on the expiry of the latter lease and before the expiry of the first, the lessor sued to eject the lessee from the lands comprised in the second lease and for recovery of the value of the goldmining plant removed by him. Held, that the rule of English Law that the acceptance of a second lease by the lessee operates as an implied surrender of the prior lease does not apply to cases where the subsequent lease is not incompatible with the prior lease; that the second lease in this case was not incompatible with the first, as the second lease was of a different kind from the first, as it was made to the same lessee, and as the later lease provided that the rent under the earlier lease should not be reduced by reason of the later lease; and that consequently the lessee was not liable to eviction. Per RAMESAM, J.—The rule of English Law as to implied surrender of an earlier lease by acceptance of a later lease is based on the view that a lessor must give possession to the lessee, that he cannot deliver possession unless the prior lease had been surrendered, and that the lessee is estopped from disputing the landlord's title to grant the lease. But under the Indian Law, delivery of possession is not necessary for the validity of a lease. The English rule of implied surrender need not therefore be extended to India. Held also, that the lessee is entitled to remove the goldwashing machinery planted by him, and the landlord is not entitled to their value, whether the lessee had removed it or not from the land. <i>Manavandan v. Perry & Co.</i> (1925) I.L.R., 48 Mad., 815	
	LETTERS PATENT, CL. 15 —Judgment—Application to sue in forma pauperis. Order of a single Judge of High Court permitting petitioner to sue as pauper—Order, whether judgment—Appeal—Statement by Government Solicitor admitting petitioner to be a pauper, whether conclusive—Right of defendant to disprove pauperism notwithstanding such admission.] The final order of a Judge of the High Court sitting on the original side, allowing or refusing to allow a plaintiff to sue as a pauper is a judgment under clause 15 of the Letters Patent and is appealable. Such an order is neither interlocutory nor made in the exercise of a discretionary power. <i>Appasami Pillai v. Somasundara Mudaliar</i> , (1908) I.L.R., 26 Mad., 487, doubted; <i>Tuljaram Row v. Alagappa Chettiar</i> , (1912) I.L.R., 35 Mad., 1 (F.B.) referred to. Where the learned Judge allowed a person to sue as a pauper upon the Government Solicitor stating that he had received a	
	report that the plaintiff was a pauper, but the defendant had not been given an opportunity to prove the statements in his counter-affidavit which has not contradicted by the plaintiff by any reply affidavit: Held, that the order should be set aside and evidence should be allowed to be adduced on both sides and a fresh order should be passed. <i>Baba Sah v. Purushothama Sah</i> (1925) I.L.R., 48 Mad., 700	700
	LIMITATION —No extinction of right before accrual of right:—See under "TANJORE RAJ."	
	—Sale of piece-goods—Stipulation to charge interest or price after certain period—Suit for price—Limitation, starting point:—See under "EVIDENCE ACT"	275
	—Suit for possession—Displacing apparent adoption—Indian Limitation Act (IX of 1871), Sch. II, art. 129—Hindu Law—Widow's estate—Res judicata—Decree against widow.] In 1905, the reversionary heirs of a Hindu, who died in 1849 leaving a widow who survived until 1902, sued for possession of his estate. The widow had made an adoption in 1862 by virtue of which the defendants were in possession. In adoption in 1887 by a plaintiff who claimed the a suit brought against the widow in 1887 by a plaintiff who claimed the property under the adoption, a final decree was made in 1892 on findings that the adoption was invalid but that the then plaintiff had obtained a title by adverse possession. Held that, whether the invalidity of the adoption was <i>res judicata</i> or not, the present suit was barred by the Indian Limitation Act, 1871, Schedule II, article 129, since the claim depended upon displacing the apparent adoption and the suit had not been brought within 12 years of its being made; article 141 of the Act of 1877 did not apply as that Act did not come into operation until after the suit was barred under article 129. <i>Ry. Chaudhray Jagadamba Chaudhrani v. Dakhina Mohun Roy Choudhary</i> (1886) I.L.R., 13 Cal., 308 (P.O.); 13 I.A., 84, followed. <i>Sembla</i> that the suit also failed since the decree of 1892 as to adverse possession was binding upon the estate. Review of the authorities showing that the Judicial Committee has invariably applied the rule laid down in the <i>Shivagunga</i> case (1863) 9 M.I.A., 589, namely, that, in the absence of fraud or collusion, a decree against a Hindu widow with regard to the estate of her deceased husband is binding upon his reversionary heirs. <i>Runchordas v. Parvatibai</i> , (1899) I.L.R., 23 Bom., 725 (P.O.); 26 I.A., 71, explained. <i>Vaithalinga Mudaliar v. Srirangath Anni</i> ... (1925) I.L.R., 48 Mad. (P.C.), 883	
	LIMITATION ACT (IX OF 1908), ARTS. 62 AND 96 —Relief on the ground of mistake:—See under "CONTRACT"	925
	—Period for a suit on judgment—Art. 122:—See under "SUIT"	482
	SCH. I, ART. 123—Suit for legacy—Time from which limitation runs—"Payable"—Construction of will—Implied intention to postpone payment.] In 1916 suits were instituted to recover legacies bequeathed by a testatrix who had died in 1899. The will provided that the legacies were to be paid out of a fund in Court; the fund would have come under the control of the testatrix only if and when a suit which she had brought to recover an estate was successful. The suit, which was pending at the death of the testatrix, was continued by her representatives; it failed in both Courts in India but succeeded in 1913 upon appeal to the Privy Council. It was not until after the decision of 1913 that any one had possession or control of the fund out of which the legacies were directed to be paid. By the Indian Limitation Act, 1908, Schedule I, article 123, a suit for a legacy must be brought within twelve years of the time when the legacy "becomes payable or deliverable." Held, that the suits were not barred by limitation, since a legacy does not become "payable" within the meaning of article 123 until the executor, or other person liable to pay	

it, has in his hands money with which it could be paid; also, because it was to be inferred from the terms of the will, and the circumstances in which it was made, that the intention of the testatrix was that the legacies were not to be paid until the suit had been finally determined.	PAGE
Venkatadri Appa Rao v. Parthasarathi Appa Rao ... (1925) I.L.R., 48 Mad. (P.O.), 312	
LIMITATION ACT (IX OF 1908), SEC. 12 (3)—Leave to appeal to Privy Council:—See under "PRIVY COUNCIL" ...	939
LOCAL BOARDS ACT (XIV OF 1920), SEC. 55 (2) (IV)—Mere resignation of office by an Honorary Magistrate—Disqualification for election or appointment as member of Local Board until acceptance of resignation.] An Honorary Magistrate ceases to hold his office not on his mere resignation but only when his resignation is accepted. Hence until his resignation is accepted by the Government he is disqualified under section 55 (2) (iv) of the Madras Local Boards Act to be elected or appointed as a member of the Local Board within whose local area he is an Honorary Magistrate; <i>Sudarsana Rao v. Christian Pillai</i> , (1923) 45 M.L.J., 798, followed.	
President, Taluk Board, Hospet v. Chandrappa... (1925) I.L.R., 48 Mad., 309	309
SEC. 55—Nomination of a member of village panchayat for election as member of a Local Board, validity of.] A member of a village panchayat exercising magisterial functions under the Madras Village Courts Act (I of 1889) is not an "Honorary Magistrate" within the meaning of section 55 of the Madras Local Boards Act (XIV of 1920); hence such member is not disqualified for nomination for election as a member of the Local Board. "Magistrate" in the Madras Local Boards Act means, according to section 3, clause (18) of the Madras General Clause Act (I of 1891), one who exercises the powers of a magistrate under the Code of Criminal Procedure and a member of a village panchayat who derives his magisterial powers only from the Madras Village Courts Act and not from the Criminal Procedure Code is not such a magistrate.	
Krishna Kone v. Kulasekhara Mudaliar ... (1925) I.L.R., 48 Mad., 392	392
ss. 159 AND 207—Encroachment—Notice to remove—Non-compliance—Limitation for prosecution—Non-compliance with fresh requisition, whether constitutes a fresh offence—Plea of previous acquittal.] A prosecution under section 159, read with section 207 of the Local Boards Act (Madras Act XIV of 1920), for non-compliance with a requisition of the local authority to remove an obstruction must be instituted within three months of such non-compliance as provided by section 223 and this period cannot be extended by making fresh requisition upon the defaulting party. A fresh offence is not committed in respect of the same subject-matter every time the local authority repeats the requisition and the accused fails to comply with it, and therefore the accused can set up the plea that he had been previously prosecuted and acquitted in respect of the same offence, as a bar to the prosecution.	
Ramanuja Charier v. Kailasam Iyer ... (1925) I.L.R., 48 Mad., 870	870
LOTTERY—Chit fund—Not illegal:—See under "CHIT FUND" ...	861
MADRAS REGULATION (X OF 1831), SEC. 2—Sale of minor's property for arrears of revenue—Minor taking property by survivorship, whether protected by the Regulation—"Regular course of inheritance," construction of—Minor owner, not registered, whether protected by the Regulation—Madras Revenue Recovery Act (II of 1864), sec. 63—Saving of Regulation X of 1831, under sec. 63 of the Act, whether applicable to minor owners, not registered as landholders.] Section 2 of Madras Regulation X of 1831, prohibiting the sale of property of minors for arrears of revenue, applies to cases of minors who take the property by survivorship. The provisions of section	

63 of Madras Revenue Recovery Act (II of 1864), saving the operation of Regulation X of 1831, apply to all minor owners of property, whether they are registered as landholders or not. <i>Svaminatha Aiyar v. Govindasami Padayachi</i> , (1918) I.L.R., 41 Mad., 733 (F.B.), referred to.	PAGE
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"MAGISTRATE"—Member of a village panchayat, not a magistrate within the meaning of Madras Local Boards Act:—See under "MADRAS LOCAL BOARDS ACT" ...	392
MAINTENANCE—Concubine:—See under "HINDU LAW" ...	805
MAINTENANCE CLAIM:—See under "CRIMINAL PROCEDURE CODE, SEC. 488".	388
MAINTENANCE ORDER—Cancellation of—Magistrate's powers:—See under "CRIMINAL PROCEDURE CODE, SEC. 488" ...	503
MORTGAGE—Rights of mortgages unaffected by Provincial Insolvency Act (V of 1920)—Suit on mortgage—Adjudication of mortgagor as insolvent—Sec. 10, Civil Procedure Code (V of 1908)—No jurisdiction for Insolvency Court to stay mortgage suit under sec. 10 of Civil Procedure Code—Application by Official Receiver under sec. 53 of the Act to set aside mortgage as void, not operative to stay suit.] The right of secured creditors to realize their security is not affected by the Provincial Insolvency Act. Hence the adjudication of the mortgagor as an insolvent does not operate as a stay of further proceedings of a suit instituted against him to realize the mortgage amount. The Court which adjudicated the mortgagor an insolvent, even if it happens to be a superior Court, has no jurisdiction to stay the mortgage suit pending in another Court on an application under section 10 of the Civil Procedure Code. Nor does an application by the Official Receiver under section 53 of the Act to the Insolvency Court to set aside the mortgage as void against the creditors operate as a stay of the suit or enable him to have the mortgage suit stayed pending the decision of his application under section 53. <i>Semble</i> —If the application under section 53 to which the mortgagee would be a party eventually succeeds, his mortgage decree will <i>ipso facto</i> become unenforceable.	
Official Receiver, The, Coimbatore v. Palaniswami Chetty (1925) I.L.R., 48 Mad., 750	750
MORTGAGE BOND—Covenant to pay interest monthly and principal and interest on demand—Prior suit for interest alone does not bar subsequent suit for principal and interest:—See under "CIVIL PROCEDURE CODE, O. II, R. 2"	708
MORTGAGE, EQUITABLE—Deposit of title-deeds:—See under "TRANSFER OF PROPERTY ACT, SEC. 59" ...	454
NEGLIGENCE—Child crossing railway line—Knocked down by a passing engine:—See under "TORT" ...	417
PARTITION ACT (IV OF 1893), SS. 2 AND 3—Party by whom an application for sale at a valuation can be made—Time when an application under sec. 3 can be made—Order for sale by consent of both parties passed—Competency of an application under sec. 3 by either party—Sale under sec. 2, nature of.] In a partition suit, a consent decree was passed embodying a direction by consent of parties that the Official Referee should divide the property by metes and bounds and that, if it could not be so divided, he should sell the property under the Partition Act (IV of 1893); on the Official Referee deciding to sell the property, the plaintiff applied under section 3 of the Act for leave to purchase it at a valuation to be fixed by the Referee; the defendants also applied later on to buy at the valuation or else that the house should be sold to the shareholder who offered the highest price above the valuation: <i>Held</i> , that, under the Partition Act (IV of 1893), an application under section 3 for a sale at a valuation to be fixed by the Court	

can be made only by a shareholder other than the shareholder who had applied for sale under section 2; that the proper time to apply under section 3 is after the request had been made by one of the parties that the property should be sold under section 2 and before the court makes an order under that section; that, in this case, as the court had already ordered the sale, by consent of both parties, an application under section 3 could not be made; that only the shareholder, who applied to buy at a valuation and at whose instance the valuation was made by the Court, is the person who is entitled to buy at the valuation; that the original order for sale in this case, by consent of parties, should be deemed to be one under section 2, and as that order was not set aside, the sale should be held by public auction in which the parties as well as the public could bid.

Angamuthu Mudaliar v. Ratna Mudaliar ... (1925) I.L.R., 48 Mad., 920

PARTITION—Separation of one member—Other members continuing business—
Agreement to remain joint—Inference:—See under "HINDU LAW" ... 254

— Suit by son against father—Another son conceived after the filing of
plaint but born before passing of decree—Quantum of Plaintiff's share:—See
under "HINDU LAW" ... 465

PARTITION SUIT—Plaint withdrawn—Joint status, severance of:—See under
"HINDU LAW" ... 254

PATTA OF RYOTWARI LANDS—Whether a document of title:—See under
"TRANSFER OF PROPERTY ACT" ... 454

PENAL CODE (ACT XLV OF 1860), SEC. 353—Public Works Department
lascar, if a public servant. A Public Works Department lascar is a public
servant within the meaning of section 353 of the Indian Penal Code and
persons guilty of assaulting him, while engaged in distributing water from
an irrigation channel, are liable to be convicted under this section.

Public Prosecutor v. Annan Nayudu ... (1925) I.L.R., 48 Mad., 867

—, SEC. 385—Extortion—Injury contemplated must be capable of
being carried out by accused:—See under "PENAL CODE, SEC. 507" ... 774

—, SEC. 507—Criminal intimidation—Ability to carry out the
threat offered, essential—Threat of divine punishment, not criminal
intimidation—Sections 285 and 508, application of—Acquittal on a
charge of cheating under sec. 420—No separate charge of attempting to
cheat—Conviction under ss. 420 and 511—Criminal Procedure Code (Act V
of 1898), sec. 238 (2-A). For a conviction under section 507 of the Indian
Penal Code (Act XLV of 1860) it must be shown that the accused
committed criminal intimidation by using threats of injury which he was
in a position to put into execution. The injury need not be one to be
inflicted by the accused himself personally, but it is enough if he can
cause it to be inflicted by another. Hence a person who extorts money
by sending anonymous letters as if from God, conveying threats of divine
punishment if a specified sum of money be not paid to a certain person
identifiable by the description given in the letters, cannot be convicted
under section 507 as it does not lie in his power either to inflict the
threatened punishment, or cause it to be inflicted. Nor can he be
convicted under section 385 of the Indian Penal Code for extortion as
the section requires that the injury contemplated must be one which the
accused himself can inflict or cause to be inflicted, and threat of divine
punishment is not such. For the application of section 508, it is necessary
that there should be some act contemplated to be done in future by the
offender. The words "by some act of the offender" should be read along
with the expressions "will become" and "will be rendered" in the section.
The Queen v. Sankara, (1883) I.L.R., 8 Mad., 881, followed. Held that the
accused was guilty of attempting to cheat and that his conviction by the
lower Court under sections 385 and 508 should be converted into one

under sections 420 and 511 of the Indian Penal Code and that the absence
at the trial of a separate charge under section 511 was no bar to such a
course as the provisions of section 238 (2-A) of the Code of Criminal
Procedure, as amended, allow an accused charged with a substantial
offence to be convicted of an attempt to commit the offence without a
separate charge and trial.

Doraswamy Ayyar v. King-Emperor ... (1925) I.L.R., 48 Mad., 774

PENAL CODE, SEC. 508—Offender must contemplate to do something in future:—
See under "PENAL CODE, SEC. 507" ... 774

PRACTICE—Posting of criminal appeals:—See under "CRIMINAL APPEAL" ... 385

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), ss. 11 (d), AND 92
—Petition for adjudication of a firm as insolvent—"Carrying on business,"
under sec. 11 (d), meaning of—So long as its business debts are undis-
charged, firm carries on business—Receiver appointed in a suit between
members of a firm, whether a bar to Court ordering adjudication—Adjudica-
tion of a firm as insolvent, whether prohibited by rule 47 of Insolvency Rules
—Rule 47, whether ultra vires. A firm should be deemed to be carrying
on business within the meaning of section 11 (d) of the Act, so long as its
business debts remain undischarged. In *re Clark, Ex parte Pope & Owles*,
[1914] 3 K.B. 105; In *re Dagnall, Ex parte Sorn and Morley*, [1896] 2
Q.B. 407; Insolvency Petition 150 of 1916 (unreported), followed. Under
the Act, a firm, as well as its partners individually, can be adjudicated
insolvent. Rule 47 of the Insolvency Rules does not prevent the Court
from making an order adjudicating the firm insolvent, but if the rule has
that meaning, it is at variance with section 99 of the Act and is ultra vires.
An order adjudicating a firm as insolvent can be made, although a
Receiver had been appointed in a suit for partition instituted by one
member of the firm against the others. In *re Wenham, Ex parte Battams*,
[1900] 2 Q.B. 698, referred to.

Govardhandoss v. Parry & Co. ... (1925) I.L.R., 48 Mad., 795

—, ss. 17, 21, 23, 30, 45
—Adjudication—Annulment—Secured creditor—Debts provable in insol-
vency—Composition, agreed to by majority of creditors—Order of annulment,
effect of—Insolvent, whether discharged or released on annulment—Right of
secured creditor, who had not proved for balance uncovered by security—
Personal liability of insolvent after annulment—Right of suit—Remedy by
application to Insolvency Court—Common law right of action, whether taken
away by sec. 80—Composition and rate therein, whether binding on creditors,
not parties to composition. An adjudication in insolvency was annulled by
the Court on account of a composition effected between the insolvent and
the statutory majority of his creditors under section 30 of the Presidency
Towns Insolvency Act (III of 1909); no regular scheme of composition was
laid before the Court, but the insolvent filed an affidavit to the effect that
the creditors had agreed to a composition of eight annas in the rupee and
that all the creditors had been paid at that rate. A secured creditor, who
had been included in the insolvent's schedule, had not realized his security
or proved for his balance before the annulment was made, and no notice
was given to him of the proceedings for annulment. Subsequent to the
annulment, the secured creditor instituted a suit on the original side of the
High Court for sale of the securities through Court and for recovery of the
balance of his debt after crediting the sale-proceeds of his security from
the insolvent personally. The latter contended that the suit was not
maintainable against him personally. Held, that the annulment of an
adjudication under section 30 of the Act did not amount to a discharge or
release of the insolvent in respect of the debts provable in insolvency; that
the secured creditor's claim for the balance, not covered by the security, was
a debt provable in insolvency, though it was not actually proved before the
annulment; that though he was not a party to the composition, he was
entitled to, and bound by, the composition in respect of the unsecured
balance of his debt; that the secured creditor was entitled to institute a suit

in respect of his provable debt on the basis of the composition and at the rate agreed to in the composition; that he was not restricted to a remedy by an application in the Insolvency Court, as the provisions of section 30, clause (2) of the Act were only enabling provisions, and did not take away the common law right of action on the basis of the composition; that, further in this case, an application to the Insolvency Court was futile, as no proceedings were pending therein, no property of the insolvent continued vested in the Official Assignee, and no trustee was appointed to carry out any scheme of composition, and that, consequently, the secured creditor was entitled to recover in this suit half the balance of the debt undischarged by the sale-proceeds of the security, from the insolvent personally. *In re Bestwick, Ex parte Bestwick*, (1876) 2 Ch. D., 485; *In re Hardy*. *Hardy v. Farmer*, [1896] 1 Ch., 904, followed; *Flint v. Barnard*, (1889) 22 Q.B.D., 90, and *Seaton v. Lord Deerpur*, [1895] 1 Q.B., 853, distinguished.

Govindas Chaturbhujadas v. Ramadon ... (1925) I.L.R., 48 Mad., 521

► **PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), sec. 97—Firm—**

One of the partners adjudicated insolvent in the High Court exercising insolvency jurisdiction—Insolvency proceedings pending before the High Court—Subsequent petition for adjudication of another partner filed in a District Court—Application to High Court to transfer latter petition to High Court—Power and duty of Judge of the High Court exercising insolvency jurisdiction to transfer. Where an order of adjudication as an insolvent has been made by the High Court, under the Presidency Towns Insolvency Act (III of 1909), against a partner of a firm, a Judge of the High Court exercising insolvency jurisdiction has, under section 97 of the Act, not only the power but is bound to transfer to the High Court any subsequent insolvency petition presented under the Provincial Insolvency Act to a District Court against another partner of the firm. *Srinivasa Ayyangar v. The Official Assignee of Madras*, (1915) I.L.R., 38 Mad., 472, distinguished; *Maneckchand, In re*, (1923) I.L.R., 47 Bom., 275, referred to.

V. A. V. S. Firm v. Muruganathan Chetty ... (1925) I.L.R., 48 Mad., 514

of—See under "INSOLVENCY COURT AT MADRAS" ... **SEC. 121—Effect** ... 391

PRIVY COUNCIL—Leave to appeal, sec. 12 (3), Limitation Act (IX of 1908)—Whether time requisite for obtaining copy of judgment can be deducted. In the case of an application for leave to appeal to the Privy Council the time requisite for obtaining a copy of the judgment appealed against, can, under section 12 (3) of the Limitation Act, be excluded in calculating limitation. *Mahabir Prasad Tewari v. Jamuna Singh*, (1922) I.L.R., 1 Pat., 429, followed.

Secretary of State for India, In re ... (1925) I.L.R., 48 Mad., 399

PRIVY COUNCIL APPEAL—Security for costs—Order to furnish otherwise than in the shape of cash or Government bonds, when to be made—See under "CIVIL PROCEDURE CODE, O. XLV, R. 7" ... 559

PROFESSIONAL MISCONDUCT—Practitioner not ready to argue appeal when presenting it—See under "CRIMINAL APPEAL" ... 385

PROVINCIAL INSOLVENCY ACT (V OF 1920), sec. 9—Creditor, consenting party to a deed of arrangement by debtor, estopped from presenting petition for adjudication of debtor. A creditor who is a consenting party to a deed of arrangement by a debtor is estopped from filing a petition for adjudicating the debtor as an insolvent, alleging the execution of the very deed as an act of insolvency. Provincial Insolvency Act (V of 1920) has not effected any change in this respect. *Kheta Mal v. Chuni Lal*, (1879) I.L.R., 2 All., 173 at 180, followed.

Rukmani Ammal v. Rajayopala Aiyar ... (1925) I.L.R., 48 Mad., 294

realized in execution by sale before date of admission of petition"—Meaning of.] The words "before the date of admission of the petition" in section

51 (1) of the Provincial Insolvency Act (V of 1920) qualify the words "assets realized" and not the word "sale" occurring in that section. "Assets" are "realized" within the meaning of that section not when the initial deposit of 25 per cent is made, but only when the balance, viz., 75 per cent, of the auction amount is received. *Arimuthu Chetty v. Vyapuri Pandaram*, (1912) I.L.R., 35 Mad., 588, followed. Hence though an execution sale of a judgment-debtor's properties may have been held and 25 per cent of the same amount be deposited in Court before the date of the admission of the petition for adjudicating him an insolvent, yet if the remaining 75 per cent is deposited only after the admission of the petition for insolvency, the whole of the sale-proceeds, including the initial deposit of 25 per cent, vests only in the Official Receiver and no portion goes to the credit of the attaching decree-holder.

Ramanathan Chettiar v. Subramania Chettiar ... (1925) I.L.R., 48 Mad., 656

PROVINCIAL INSOLVENCY ACT (V OF 1920), sec. 53—Application to set aside a mortgage, does not operate as stay of a suit on the mortgage:—See under "MORTGAGE." ... 750

PROVINCIAL SMALL CAUSES COURTS ACT (IX OF 1887)—Jurisdiction to attach before judgment, immovable property—O. XXXVIII, r. 5, Civil Procedure Code (V of 1908). Under the present Civil Procedure Code (V of 1908), O. XXXVIII, r. 5, a Court of Small Causes has power to attach immovable property before judgment. *Kedaranath Paramanik v. Hemnath Karamkar*, (1922) I.L.R., 49 Calc., 994, followed. *Marthamma v. Kittu Sheregara*, (1871) 8 M.H.C.R., 91, explained.

Kothandarama Chettiar v. Annamalai Pillai ... (1925) I.L.R., 48 Mad., 488

PUBLIC SERVANT—Public Works Department Lascar if a public servant:—See under "PENAL CODE, SEC. 353" ... 867

REGISTRATION ACT (III OF 1877), ss. 17, 40, 41—Registration—Authority to adopt—Authority conferred by invalid will—Registration as will—Absence of registration as authority. A Hindu, who had not attained his majority so as to be competent to make a will, executed a document purporting to dispose of his property; it also conferred authority to adopt, which he was of an age to do validly. The document was registered as a will, but it was not presented for registration by any person who was entitled under section 40 of the Indian Registration Act, 1877, to present an authority to adopt. Section 17 of that Act requires an authority to adopt, not conferred by a will, to be registered. Held that the document having no legal effect as a will, the authority to adopt could not be treated as one conferred by a will, and that it was ineffectual since it was not duly registered as an authority to adopt.

Vijayaratnam v. Sudarasana Rao ... (1925) I.L.R., 48 Mad. (P.C.), 614

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RESIGNATION OF OFFICE BY HONORARY MAGISTRATE—Effective from date of acceptance:—See under "MADRAS LOCAL BOARDS ACT, SEC. 55 (2)." ... 309

REVENUE RECOVERY ACT (II OF 1864), sec. 58—Ryotwari land settled and assessed as dry for thirty years—Resettlement during that period as wet and demand of increased assessment—Suit for declaration of illegality of demand, maintainability of.] When once ryotwari lands are classed as dry under a settlement for a period, say, thirty years, they cannot during that period be reclassified as wet and a demand by the Government of increased assessment on that footing is illegal and ultra vires, and a suit to declare such assessment illegal and ultra vires and for the recovery of the increased amount levied is not barred by section 58 of the Revenue Recovery Act. *Prasad Row v. Secretary of State for India*, (1917) I.L.R., 40 Mad., 886 (P.C.), followed.

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SERVICE INAM, Enfranchisement of—Effect of, on title of grantees as against strangers—Adverse possession by strangers as against Government for sixty years.] An enfranchisement by Government of a service inam as distinguished from a personal inam confers a new title on the grantees indefeasible not only by the members of his own family but also by strangers even if the latter had held the office and the inam land before them. But it is open to the latter to prove that the land was not inam at all or that they had before the enfranchisement acquired the land by adverse possession for 60 years as against the Government and thus deprived it of the power to enfranchise it in favour of any one. Case law on the subject discussed; <i>Lakshminarasimham v. Venkataratnayamma</i> , (1922) 30 M.L.T., 324, dissented from.	
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STAMP ACT (II OF 1819 AND VI OF 1922), ART. 4 (C) OR ART. 80 OF SCH. I—A—Lease—Licence—Distinction between—Test—Sole and exclusive possession, whether granted—Transfer of interest—Agreement executed to a consignee of coal to stack coal on a plot of ground in station yard, whether a lease or licence—Construction of document.] The test for determining whether a transaction is a lease or a licence is to see whether sole and exclusive occupation is given to the grantee, so as to amount to a transfer of an interest in immovable property to the grantee. <i>Frank Warr & Co., Limited v. London County Council</i> , [1904] 1 K.B., 713; and <i>Sweetmeat Automatic Delivery Company v. Commissioners of Inland Revenue</i> , [1895] 1 Q.B., 484, referred to; <i>Seeni Chettiar v. Santhanathan Chettiar</i> , (1897) I.L.R., 20 Mad., 58 (F.B.) and <i>Mammikkutti v. Puzhukkuz Edom</i> , (1908) I.L.R., 29 Mad., 353, followed. Where a Railway Company granted permission to certain consignees of coal to stack coal on certain plots of	

ground in the station yard prior to its removal by them, and it appeared that the former had no power to grant a lease without sanction of the Secretary of State for India, and in the document evidencing the agreement, it was expressly stated that nothing therein contained should be construed to create a tenancy, but there were some clauses in it imposing conditions which would be ordinarily implied in a licence, <i>Held</i> , on a proper construction of the document, that it was a licence and not a lease; that the special provisions, though unnecessary in a licence, had been put in <i>ex abundante cautela</i> , and did not operate to make it a lease and that the document fell under Article 4 (c) and not Article 30 of Schedule I (a) of the Indian Stamp Act.	
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STAMP ACT (II OF 1899), SEC. 35, PROVISIO—Unstamped documents—Admissibility in evidence—Document, damaged—Stamp duty, not ascertainable by Court owing to damaged condition—Duty of Court to admit—"Subject to all just exceptions" in proviso to sec. 35, meaning of—Original side appeal—Memorandum of objections, whether competent in an original side appeal—Civil Procedure Code (V of 1908), O. XLI, r. 22—Applicability of, to original side appeals—Letters Patent, clause 15.] Where an unstamped document, admissible in evidence on payment of stamp duty and penalty, was tendered in evidence with an offer by the party to pay the stamp duty and penalty on the Court determining the same, the Court cannot, under section 35 of the Stamp Act (II of 1899), reject the document on the ground that it cannot determine the amount of stamp duty owing to the damaged condition of the document. The terms of the proviso to section 35 are mandatory and the Judge is bound to admit the document, unless it is rendered inadmissible by the provisions of any other statute for the time being in force, and the words "subject to all just exceptions" in the proviso to the section do not permit a Court to reject a document on the ground of its inability to determine the proper stamp duty thereon. A memorandum of cross-objections cannot be filed by a respondent in an appeal preferred under clause 15 of the Letters Patent. The provisions of Order XLI, rule 22, Civil Procedure Code, do not apply to such appeals.	
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<i>Ramasami v. Muthayya Chetti</i> (1925) I.L.R., 48 Mad., 492	
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TANJORE RAJ, EXTINCTION OF, IN 1855—Grant by Crown in 1862 in favour of Raja's descendants in a certain order, validity of—Construction of grant—Rights of grantees under the grant—Hindu Law—Sudra origin of Tanjore Rajas—“Sword marriage” among Sudras, validity of—Illegitimacy of sons by sword wives—Right of legitimate branch to inherit to estate of illegitimate branch—Shares of legitimate and illegitimate sons—Law of migrating families—Right of widow under Mayukha law to adopt without husband's or sapinda's authority and in spite of escheat of husband's estate—Limitation—No extinction of one's right by limitation before accrual of right.] After the death of Sivaji, the Raja of Tanjore, in 1855, the East India Company declared in 1856 the dignity of the Raja of Tanjore to be extinct and the Raja to have lapsed to the British Government on the ground that the Raja died “without leaving a son by birth or adoption,” and with the aid of military forces took possession of the Fort of Tanjore and the lands held by the late Raja, an act which was eventually held by the Privy Council to be an Act of State over which Municipal Courts had no jurisdiction (see *The Secretary of State in Council of India v. Kamakshes Boye Sahaba* (1859) 7 M.I.A., 532]. In spite of this opinion of the Privy Council, the Court of Directors treated the case as one of lapse by escheat and instructed the Government of Madras to that effect. Then the Government proceeded to work out a scale of pensions for the late Raja's dependants. On an appeal thereafter by the widows of the Raja to Parliament for restoration of the estate the Government without restoring the dignity of Raj, relinquished on 21st August 1862 the private lands of the late Raja by the following Order:—“The estate will therefore be made over to the senior widow who will have the management and control of the property, and it will be her duty to provide in a suitable manner for the participative enjoyment of the estate in question, by the other widows—her co-heirs. On the death of the last surviving widow, the daughter of the late Raja, or failing her, the next heirs of the late Raja, if any, will inherit the property.” The lands were accordingly made over to Kamakshi Bai, the senior widow. She adopted on 1st July 1863 one Rajaram Ingle *alias* Serfoji, the late Raja's sister's grandson, in spite of the protests of the other widows and of the late Raja's daughter, alleging that the late Raja took him from his parents with a view to adopt and that the Raja had authorized at the time of his death his widows to adopt him. Then on 1st January 1864 she handed over the lands to him. In 1866 two of the junior Ranis filed a suit against Kamakshi Bai and the adopted son for recovery of their share of the lands and for the appointment of a Receiver, alleging that the adoption was invalid and that Kamakshi Bai was unfit to manage. The High Court of Madras without deciding upon the validity of the adoption, held on 14th February 1868 [See *Jijoyamba Bai's Saiba v. Kamakshi Bai's Saiba* (1868) 8 M.H.C.R., 424, that under the grant by the Government he was not entitled to the lands, even if he had been validly adopted, that the widows were jointly entitled to them during their lives with rights of survivorship and that the appointment of a Receiver made by the Original Court should be confirmed. The Receiver had taken possession of the lands from the adopted son on 25th November 1866. On the date of the grant, there were the following relations of the late Raja:—(1) Mother, (2) Daughter, (3) Twelve widows, married according to Hindu rituals. (4) Some ladies styled as “sword wives” of the Raja or Mangala Vilas ladies. (5) Several children by the sword wives, of whom six were males. Of these, the mother died in 1864. The daughter died in 1865 after having adopted one Sambu Singh in 1864. The twelve widows of the Raja died one after the other, the last of them dying on 3rd May 1912. Rajaram Ingle *alias* Serfoji, the adopted son, died in 1904 leaving two sons, the first and second defendants, the adopted son, died in 1891 leaving the third defendant alleged to have been adopted by him. After the death of the last Rani in May 1912, the Receiver instituted this inter-pleader suit making all the descendants of the late Raja and the distant agnates and cognates, defendants to the suit. The first two defendants claimed the lands as the sons of the adopted son, Rajaram Ingle. The third defendant claimed as the son of the daughter's adopted son. The fourth and fifth defendants claimed as the sons of two of the “sword wives” of the Raja. The sixth to eleventh defendants claimed as grandsons by four sons of four other sword wives of the Raja. Amongst the other defendants, the Maharaja of Kolhapur and others claimed as

agnates, some others as cognates (i.e., grandsons by sisters and step-sister) and the rest as widows of agnates, who would be heirs under the Mayukha law. *Held*, on a construction of the grant of 1862, (a) that it was a new and valid grant by the Crown to the persons intended to be benefited by it, in the order therein specified, (b) that it conferred a joint estate upon all the widows with rights of survivorship, that the daughter had only a contingent life interest to succeed upon her surviving all the widows, that the grant conferred no estate in favour of the daughter's descendants, (c) that the heirship to the lands upon the death of the last of the widows was to be determined according to who was the nearest heir to the Raja on such death and not according to who was the heir next after the daughter in order of succession according to Hindu Law, (d) that the grant did not intend to and did not exclude the Raja's subsequently adopted son or the illegitimate sons from inheriting the estate on the death of the last widow. *Held*, further, that the late Raja was not a Kahatriya but a Sudra, that the father of the first and second defendants was validly adopted by his senior widow, that "sword marriage" was not a legally recognized marriage among Sudras, that the "sword wives" were only permanently-kept concubines whose sons were illegitimate in the eye of the law and that accordingly the two sons of the adopted son and the two illegitimate sons and the sons of four other illegitimate sons, who died prior to May 1922, were entitled to inherit the lands in preference to various other claimants, who were only distant agnates and cognates. *Held*, further, that as Sivaji, the last ruler of Tanjore, was a descendant of an illegitimate descendant of the brother of Sivaji the Great, the founder of the Mahratta Empire, the distant agnates who claimed heirship through legitimate descendants of the brother of Sivaji the Great, were not entitled to inherit. *Held*, further, that as between the one adopted son and six illegitimate sons the former was entitled to four-sevenths and the latter were entitled to three-sevenths of the estate. *Kamulammal v. Viswanathaswami Naicker* (1923) I.L.R., 46 Mad., 167 (P.C.), explained and applied. *Held* also, that the Rajas of Tanjore and their kinsmen who had migrated from the Mahratta country in 1674 did not give up their personal law, viz., the Mayukha law, that accordingly the adoption by Kamakshi Bai, even supposing that there was no express authority from her husband for the adoption, was valid in law, that her right to adopt was not lost either by coheir or by the death of one of the co-widows before the adoption and that the existence of illegitimate sons or the protest of other widows was no bar to the exercise of the right to adopt. *Held*, further, that the right of the adopted son did not arise under the terms of the grant till after the death of the last Rani in May 1912, that he was not entitled or bound to file a suit for declaration or possession before May 1912, and that his rights which were recognized by his adoptive mother who put him in possession in 1864 were not lost either by adverse possession or in any other manner under the provisions of the Limitation Acts of 1871 or 1877.

Maharaja of Kolhapur v. Sundaram Ayyar ... (1925) 1.L.R., 48 Mad., 1

TORT—Negligence—Suit for damages against Railway Company—Personal injuries caused to plaintiff—Plaintiff, a girl aged seven years, knocked down by a locomotive engine of defendant Railway Company, while crossing railway line at an unauthorised point after passing through a wicket-gate—Short-cut, habitually used by people in the neighbourhood, whether on allurements—Plaintiff, whether trespasser, licensee or invitee—Child, whether capable of negligence in law—Contributory negligence whether imputable to children—Defendant, whether negligent—Special care—Duty of Railway Company—Proximate or effective cause—Trap, allurements or invitation, nature of.] The plaintiff, a little girl of seven years of age, was knocked down by an engine of the defendant Railway Company while she was crossing the railway line, and sustained severe injuries. Starting from one side of the line to go to a place on its other side, she passed through a wicket gate and stepped on the loop-line on which the engine was running on its way to the engine shed, when the accident happened. It appeared that there were other level-crossings with gates duly protected at some distance, but the people in the neighbourhood were in the habit of passing through the wicket-gate and crossing the line at a point near it as a short-cut. There

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was no proof that any special look-out was kept by the driver or other servants while the engine was passing near the wicket-gate. The plaintiff, by her father as next friend, sued the Company for damages for the injuries sustained by her. <i>Held</i> , that the proximate or effective cause of the accident was the negligence of the plaintiff in not looking out for any passing engine when she was crossing the line; that the plaintiff, though a child of seven years, was capable of appreciating danger and was old enough to have a sense of discrimination, so as to be guilty of negligence in not taking ordinary care; that the plaintiff, if not a trespasser, was at any rate a licensee, and when a licensee was concerned, an owner of the premises was not liable for injuries caused to the licensee, provided the owner did not place any trap in the way, and there was no allurement or invitation to the person injured; that the existence of a short-cut could not be treated as an allurement within the meaning of the English decisions, and there was no trap or invitation in the case; <i>Cooke v. Midland Great Western Railway of Ireland</i> , [1909] A.C., 22; <i>Glasgow Corporation v. Taylor</i> , [1922] 1 A.C., 14; that the negligence of the plaintiff being the proximate cause of the accident, the defendant Company was not liable in law to pay damages to the plaintiff for her injuries; <i>Davey v. London and South-Western Railway Co.</i> (1884) 12 Q.B.D., 70, referred to. <i>Held</i> by SPENCER, Offg. C.J., that the defendant Railway Company and their officials were not guilty of any negligence at any stage of the case. <i>Held</i> by SRINIVASA AYYANGAR, J., that the defendant Company was guilty of negligence in not keeping a special look-out when the engine was passing near the wicket-gate, that children, capable of discrimination and perceiving danger, can be guilty of contributory negligence in law, that, as the plaintiff was guilty of contributory negligence in not having exercised ordinary care and circumspection by looking out for an engine or train, when she was about to step on the line, she was not entitled in law to claim damages from the defendant.	
<i>M. & S.M. Railway Co., Ltd. v. Jayammal</i> ... (1925) I.L.R., 41 Mad.,	417
TRANSFER —One partner of a firm adjudicated insolvent by High Court—Petition in a District Court to adjudicate another partner—Application to High Court to transfer latter petition:—See under "PRESIDENCY TOWNS INSOLVENCY ACT" ...	514
TRANSFER OF PROPERTY ACT (IV OF 1882) , ss. 54, 55 AND 105—Owner of both varams—Grant of kudivaram—Lease in perpetuity—Lease in consideration of a rent and premium—Promissory note, executed for the premium—Lessor, whether entitled to a charge on leasehold interest for the premium—Grant, whether a sale or lease—Charge, whether created under the Transfer of Property Act or under the general common law of India—Rule of English Common Law, whether applicable to India.] Where the owner of both the varams in certain lands, granted the kudivaram therein to a certain person on a perpetual lease in consideration of rent as well as a premium, and in respect of the premium the lessee executed a promissory note to the lessor, and the latter sued on the note and claimed to recover the amount as a charge on the leasehold interest in the hands of transferees from the lessee. <i>Held</i> , that the grant was only a lease falling under section 105, and not a sale under section 54, of the Transfer of Property Act; that the lessor was not entitled to a charge for the premium payable under the lease, either under the Transfer of Property Act or under the Common Law of India; that the rule of the English Common Law, laid down in <i>Shepherd v. Beetham</i> , (1877) 6 Ch. D., 597, should not be followed in India, as the matter is entirely regulated by the Transfer of Property Act, which provides under section 55 for a charge only in the case of sales under section 54; that, consequently the plaintiff was entitled only to a personal decree against the lessee.	
<i>Venkatacharyulu v. Venkatasubba Rao</i> ... (1925) I.L.R., 48 Mad.,	821
SEC. 59—Mortgage—Equitable mortgage by deposit of documents of title—Patta of ryotwari lands in the mufassal—Deposit of such patta alone, whether sufficient to create an equitable mortgage—Patta, whether a document of title.] A ryotwari patta in respect of lands in the mufassal of this Presidency is a document of title, by	

the deposit of which in the City of Madras an equitable mortgage on the property can be validly created.	
<i>Official Assignee of Madras v. Badrinarayan Doss</i> ... (1925) I.L.R., 48 Mad.	454
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Will of a Hindu—Perpetuity—Time at which test to be applied—Invalid gift over—Construction—Absence of previous absolute gift—Indian Succession Act (X of 1865), secs. 101, 102, 128.] A Hindu died in 1904 being survived by his three daughters: the first daughter had four children, three born before and one after 1904, the third daughter had six children, all born after 1904, the second daughter had one child, a son T. born after 1904, and as a guardian of property was appointed in 1910 he did not attain his majority under section 3 of the Indian Majority Act, 1875, until he was 21 years of age instead of at 18. The deceased by his will directed the trustees thereby appointed to "apportion" his residuary trust fund into as many equal shares as there were daughters who should survive him or had predeceased him leaving issue, to pay the income from each of such shares to the daughters for life, respectively, and after the death of each daughter to hold the share "so appropriated to such daughter as aforesaid upon trust for the children of such daughter who shall attain the age of 21 years." <i>Held</i> (1) that the bequests to the children of daughters were invalid under section 101 of the Indian Succession Act, 1865. The test of perpetuity laid down by section 101 was to be applied at the testator's death, and at that date it was not certain whether the gift to some of the children would vest within the lifetime of persons then existing and the minority, ending at 18; it was not material that T. did not attain his majority until he was 21. The bequests being to a class and being invalid as to some members failed also as to the children born before the death of the testator under section 102. (2) That the will read as a whole did not show an intention that the daughters should take an absolute estate in the shares, and that consequently section 128 of the Act did not apply. (3) That therefore there was an intestacy as to the residuary trust fund, subject to the life interest of the daughters. Having regard to Act VIII of 1921 it was not necessary to consider whether Madras Act I of 1914 was ultra vires of the Provincial Legislature.	
<i>Soundara Rajan v. Natarajan</i> ... (1925) I.L.R. 48 Mad. (P.C.).	906
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THE
INDIAN LAW REPORTS
(MADRAS SERIES)

APPELLATE CIVIL.

*Before Mr. Charles Gordon Spencer, Officiating Chief
Justice, and Mr. Justice Kumaraswami Sastri.*

MAHARAJA OF KOLHAPUR (FIFTEENTH DEFENDANT AND
HIS LEGAL REPRESENTATIVE), APPELLANT,

1924,
January

v.

S. SUNDARAM AYYAR AND 15 OTHERS (PLAINTIFF AND
DEFENDANTS 1, 2, 4 TO 11, 24 AND LEGAL REPRESENTATIVES OF
THE 7TH AND 5TH DEFENDANTS), RESPONDENTS.*

*Tanjore Raj, extinction of, in 1855—Grant by Crown in 1862 in
favour of Raja's descendants in a certain order, validity of—
Construction of grant—Rights of grantees under the grant—
Hindu Law—Sudra origin of Tanjore Rajas—"Sword
marriage" among Sudras, validity of—Illegitimacy of sons
by sword wives—Right of legitimate branch to inherit to
estate of illegitimate branch—Shares of legitimate and
illegitimate sons—Law of migrating families—Right of
widow under Mayukha law to adopt without husband's or
sapinda's authority and in spite of escheat of husband's estate
—Limitation—No extinction of one's right by limitation
before accrual of right.*

After the death of Sivaji, the Raja of Tanjore, in 1855, the
East India Company declared in 1856 the dignity of the Raja
of Tanjore to be extinct and the Raj to have lapsed to the
British Government on the ground that the Raja died "without
leaving a son by birth or adoption," and with the aid of military
forces took possession of the Fort of Tanjore and the lands held

* Appeals Nos. 199 to 201, 248, 323 and 334 of 1919.

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by the late Raja, an act which was eventually held by the Privy Council to be an Act of State over which Municipal Courts had no jurisdiction [see *The Secretary of State in Council of India v. Kamakshee Boye Sahaba* (1859) 7 M.I.A., 582]. In spite of this opinion of the Privy Council, the Court of Directors treated the case as one of lapse by escheat and instructed the Government of Madras to that effect. Then the Government proceeded to work out a scale of pensions for the late Raja's dependants. On an appeal thereafter by the widows of the Raja to Parliament for restoration of the estate, the Government without restoring the dignity of Raj, relinquished on 21st August 1862 the private lands of the late Raja by the following Order :—

"The estate will therefore be made over to the senior widow who will have the management and control of the property, and it will be her duty to provide in a suitable manner for the participative enjoyment of the estate in question, by the other widows—her co-heirs. On the death of the last surviving widow, the daughter of the late Raja, or failing her, the next heirs of the late Raja, if any, will inherit the property."

The lands were accordingly made over to Kamakshi Bai, the senior widow. She adopted on 1st July 1863 one Rajaram Ingle alias Serfoji, the late Raja's sister's grandson, in spite of the protests of the other widows and of the late Raja's daughter, alleging that the late Raja took him from his parents with a view to adopt and that the Raja had authorized at the time of his death his widows to adopt him. Then on 1st January 1864 she handed over the lands to him. In 1866 two of the junior Ranis filed a suit against Kamakshi Bai and the adopted son for recovery of their share of the lands and for the appointment of a Receiver, alleging that the adoption was invalid and that Kamakshi Bai was unfit to manage. The High Court of Madras without deciding upon the validity of the adoption, held on 14th February 1868 [see *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba* (1868) 3 M.H.C.R., 424] that under the grant by the Government he was not entitled to the lands, even if he had been validly adopted, that the widows were jointly entitled to them during their lives with rights of survivorship and that the appointment of a Receiver made by the Original Court should be confirmed. The Receiver had taken possession of the lands from the adopted son on 25th November 1866.

On the date of the grant, there were the following relations of the late Raja :—

1. Mother.
2. Daughter.

3. Twelve widows, married according to Hindu rituals.

4. Some ladies styled as "sword wives" of the Raja or Mangala Vilas ladies.

5. Several children by the sword wives, of whom six were males.

Of these, the mother died in 1864. The daughter died in 1885 after having adopted one Sambu Singh in 1884. The twelve widows of the Raja died one after the other, the last of them dying on 3rd May 1912. Rajaram Ingle alias Serfoji, the adopted son, died in 1904 leaving two sons, the first and second defendants. Sambu Singh died in 1891 leaving the third defendant alleged to have been adopted by him.

After the death of the last Rani in May 1912, the Receiver instituted this inter-pleader suit making all the descendants of the late Raja and the distant agnates and cognates, defendants to the suit. The first two defendants claimed the lands as the sons of the adopted son, Rajaram Ingle. The third defendant claimed as the son of the daughter's adopted son. The fourth and fifth defendants claimed as the sons of two of the "sword wives" of the Raja. The sixth to eleventh defendants claimed as grandsons by four sons of four other sword wives of the Raja. Amongst the other defendants, the Maharaja of Kolhapur and others claimed as agnates, some others as cognates (i.e., grandsons by sisters and step-sister) and the rest as widows of agnates, who would be heirs under the Mayukha law.

Held on a construction of the grant of 1862,

(a) that it was a new and valid grant by the Crown to the persons intended to be benefited by it, in the order therein specified,

(b) that it conferred a joint estate upon all the widows with rights of survivorship, that the daughter had only a contingent life interest to succeed upon her surviving all the widows, that the grant conferred no estate in favour of the daughter's descendants,

(c) that the heirship to the lands upon the death of the last of the widows was to be determined according to who was the nearest heir to the Raja on such death and not according to who was the heir next after the daughter in order of succession according to Hindu Law,

(d) that the grant did not intend to and did not exclude the Raja's subsequently adopted son or the illegitimate sons from inheriting the estate on the death of the last widow.

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Held further, that the late Raja was not a Kshatriya but a Sudra, that the father of the first and second defendants was validly adopted by his senior widow, that "sword marriage" was not a legally recognized marriage among Sudras, that the "sword wives" were only permanently kept concubines whose sons were illegitimate in the eye of the law and that accordingly the two sons of the adopted son and the two illegitimate sons and the sons of four other illegitimate sons, who died prior to May 1912, were entitled to inherit the lands in preference to various other claimants, who were only distant agnates and cognates.

Held further, that as Sivaji, the last ruler of Tanjore, was a descendant of an illegitimate descendant of the brother of Sivaji the Great, the founder of the Mahratta Empire, the distant agnates who claimed heirship through legitimate descendants of the brother of Sivaji the Great, were not entitled to inherit.

Held further, that as between the one adopted son and six illegitimate sons the former was entitled to four-sevenths and the latter were entitled to three-sevenths of the estate; *Kamulammal v. Visvanathaswami Naicker* (1923) I.L.R., 46 Mad., 167 (P.C.), explained and applied.

Held also, that the Rajas of Tanjore and their kinsmen who had migrated from the Mahratta country in 1674 did not give up their personal law, viz., the Mayukha law, that accordingly the adoption by Kamakshi Bai, even supposing that there was no express authority from her husband for the adoption, was valid in law, that her right to adopt was not lost either by escheat or by the death of one of the co-widows before the adoption and that the existence of illegitimate sons or the protest of other widows was no bar to the exercise of the right to adopt.

Held further, that the right of the adopted son did not arise under the terms of the grant till after the death of the last Rani in May 1912, that he was not entitled or bound to file a suit for declaration or possession before May 1912, and that his rights which were recognized by his adoptive mother who put him in possession in 1864 were not lost either by adverse possession or in any other manner under the provisions of the Limitation Acts of 1871 or 1877.

APPEALS from the decree of S. RANGANATHA MUDALIYAR, Subordinate Judge of Tanjore, in Original Suit No. 26 of 1912, by the fifteenth defendant, by the third defendant, by the fourteenth defendant, by the twenty-fourth defendant, by the first defendant, and by the fourth,

sixth and eighth to eleventh defendants and the legal representatives of the seventh and fifth defendants, respectively. The facts are given in the judgments.

Nugent Grant (with *S. Varada Acharya* and *K. S. Champakesa Ayyangar*) for appellant in Appeal No. 199 of 1919 (the Maharaja of Kolhapur).

Nugent Grant.—The grant must be construed in the light of the then events. The adoption, as a fact, of the first defendant's father was even before the grant put forward before the Government, who expressly refused to recognize the adoption according to the policy then prevailing. The grant expressly stated that the Raja died without a natural or adopted son; hence it must be taken that the Government wanted to benefit the other heirs of the Raja and that they definitely intended to exclude for ever the adopted and illegitimate sons of the Raja. There is only one gift under the grant, that is, the grant to all the widows jointly of what is known in Hindu Law as a widow's estate with all its legal incidents. The grant of such an estate is legal; *Ram Bahadur v. Jager Nath Prasad*(1), *Vengamma v. Chelamayya*(2) and *Mahomed Shumsool v. Shewukram*(3). The rest of the grant is a mere statement of the course of inheritance in the order recognized by Hindu Law, according to which if the daughter survived all the widows she would get a *spes successionis* and would inherit for her life. After the daughter, the heirs of the Raja, next in order to the daughter according to Hindu Law, would "inherit." "Next" in "next heirs of the Raja" in the grant does not mean nearest to the Raja but next to the daughter in the order of inheritance: *Eastwood v. Lockwood*(4). The word used is "inherit" and not "take"; hence the usual course of inheritance alone is intended. An adopted son never inherits after the daughter; hence it must be taken that even if one were to be adopted after the grant he was intended to be excluded by the grant. Similarly the illegitimate sons. If we exclude the adopted son and the illegitimate sons, the only heirs according to Hindu Law who were living on the death of the last Rani, when alone the heirs are to be ascertained according to the grant, are the agnates.

K. Rajah Ayyar (with *A. Duraiswami Ayyar* and *Nanabhai Davey*) for third defendant.—What is given to the widows is not a widow's estate but only a life estate. "Inherit" means

(1) (1918) 3 Pat. L.J., 199 (F.B.).
(3) (1874) 2 I.A., 7.

(2) (1913) I.L.R., 36 Mad., 484.
(4) (1867) L.R., 3 Eq. Cas., 487.

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only "take"; *Bhagabati Barmanya v. Kalicharn Singh*(1), *Watkins v. Frederick*(2). There is also a gift to the daughter, made by the grant which is not a contingent one but an absolute vested interest in remainder capable of being transmitted to her heirs. Under the Mayukha Law which governs these parties even female donees take an absolute estate; *Navalram Atmaram v. Nandkishor Shiv Narayan*(3), *Gulappa v. Tayawa*(4), Mayne's Hindu Law, page 893, paragraph 611. Recent decisions have established that even female donees take absolute estates unless restricted by grant; *Ramasami v. Papayya*(5), *Ramchandra Rao v. Ramachandra Rao*(6), *Mahim Chandra Sarkar v. Hara Kumari Dasee*(7), *Sambasiva Ayyar v. Venkataswara Ayyar*(8), *Kanakam-mal v. Baktavatsulu Naidu*(9), *Ramaswami v. Lakshmidevi*(10), *Ramanuja Aiyangar v. Satagopachariar*(11), *Kumud Krishna Mandal v. Jogendra Nath Sarkar*(12). The use of the word "absolute" in a grant or gift is not necessary to make the gift an absolute one; *McCormick v. Simpson*(13). If what was given to the widows was not a life estate as is expressly stated in the grant but is a widow's estate, it would be divested on adoption; see *Jijiyamba Bayi Saiba v. Kamakshi Bayi Saiba*(14). No stranger can make a grant of an estate to a woman giving her a widow's estate therein. This point is not decided but is left open in *Vengamma v. Chelamayya*(15). Nor can he prescribe a different course of succession from that prescribed by law; *Tagore Case*(16). The persons mentioned in the grant take as *personae designatae*. The terms of the grant alone govern the rights of parties; *Baboo Beerpertab Sahee v. Maharaja Rajender Pertap Sahee*(17), *Nawab Malka Jahan Sahiba v. The Deputy Commissioner of Lucknow*(18) and *Venkata Jagannadha v. Veerabhadrayya*(19). A widow's estate has three special incidents; (a) an adoption divests the widow of her estate, (b) the widow has power of alienation for certain purposes and (c) the line of succession thereafter cannot be changed. If any one of these incidents is absent in any given grant, it confers upon a widow only a life estate. No power of alienation is given to the widows by this

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| (1) (1911) I.L.R., 38 Cal., 468 (P.O.). | (2) (1865) 11 H.L.O., 358. |
| (3) (1865) 1 Bom. H.C.R., 200. | (4) (1907) I.L.R., 31 Bom., 453. |
| (5) (1898) I.L.R., 18 Mad., 466. | (6) (1919) I.L.R., 42 Mad., 283. |
| (7) (1915) I.L.R., 42 Cal., 561 (P.O.). | (8) (1908) I.L.R., 31 Mad., 179. |
| (9) (1922) 16 L.W., 970. | (10) (1919) 10 L.W., 269. |
| (11) (1907) 27 M.L.J., 329. | (12) (1917) 21 O.W.N., 854. |
| (13) (1907) A.O., 494. | (14) (1868) 8 M.H.O.R., 424. |
| (15) (1918) I.L.R., 36 Mad., 434. | (16) (1872) I.A. Sup., Vol. 47. |
| (17) (1868) 9 W.R., 15 (P.O.). | (18) (1879) 6 I.A., 63. |
| (19) (1921) I.L.R., 44 Mad., 643. | |

grant. Moreover the grant gives the daughters an estate to take effect after the death of the widows. *Bhupendra Krishna Ghose v. Amarandra Nath Dey*(1), *Gooroo Das Mustafi v. Sarat Chunder Mustafi*(2), *Mussamat Bhagbutti Dase v. Chowdry Bholanath Thakoor*(3), *Bepin Behari Bundopadhyaya v. Brojo Nath Mookhopadhyaya*(4). "Failing her" in the grant means "failing her and her heirs." Words necessary can be supplied in construing a grant; see Jarman on Wills, 6th Edn., Vol. I, page 581. The words "failing her" do not make the estate given to the daughter any the less a vested remainder; *Rewun Persad v. Mussumat Radha Beeby*(5). Section 19, Transfer of Property Act, sections 83, 106, illustrations (c) and (d) to section 107 and section 108 of the Indian Succession Act; compare Jarman on Wills, 6th Edn., Vol. II, page 1312, on alternative gifts. Death, by itself, is no contingency in law; *Lallu v. Jagmohan*(6), *Rama Bai Ammani v. Hajah Sahib*(7) and *Finch v. Lane*(8). "Next heirs" means heirs next to the daughter according to law, i.e., the daughter's son; *Eastwood v. Lockwood*(9).

A. Krishnaswami Ayyar (with M. Patanjali Sastri, K. Balasubrahmanya Ayyar, P. S. Chandrasekhara Ayyar and V. Govindaraja Acharya, and K. Krishnaswami Ayyangar), for defendants Nos. 4 and 6 to 11.—The grant must be construed according to the law prevailing at that time; *Abdul Aziz Khan v. Appayasami Naicker*(10). According to the then law, an illegitimate son inherited after the widow and the daughter; see Exhibit D-240, *Datti Parisi Nayudu v. Datti Bangaru Nayudu*(11) and *Parvathi v. Thirumalai*(12). That these decisions misunderstood the text of Yagnavalkya is pointed out in *Meenakshi Anni v. Appakutti*(13), which has established the present law that the widow and the illegitimate son share together; hence the grant cannot be presumed to have negatived the rights of illegitimate sons. Under the grant the widows took a life estate; *Gooroo Das Mustafi v. Sarat Chunder Mustafi*(2), *Bhagabati Barmanya v. Kalicharn Singh*(14); and the daughter was given a contingent life interest upon her surviving

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| (1) (1916) I.L.R., 43 Cal., 432 (P.O.). | (3) (1875) 2 I.A., 256. |
| (2) (1902) I.L.R., 29 Cal., 699. | (5) (1846) 4 M.I.A., 187. |
| (4) (1892) I.L.R., 8 Cal., 357. | (7) (1920) 12 L.W., 171. |
| (6) (1898) I.L.R., 22 Bom., 409. | (9) (1867) L.R., 3 Eq., Cas., 487. |
| (8) (1870) L.R., 10 Eq. Cas., 501. | (11) (1869) 4 M.H.O.R., 304. |
| (10) (1904) I.L.R., 27 Mad., 131 (P.O.). | (13) (1910) I.L.R., 38 Mad., 226. |
| (12) (1887) I.L.R., 10 Mad., 334. | (14) (1911) I.L.R., 38 Cal., 468 (P.O.). |

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the widows. Even if it was a vested one it was defeasible on her death before the widows. Even a vested interest may be made defeasible. It is clear from the grant and from *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*(1), that the grant gave two life estates and a remainder. Even if what was given to the widows was practically a widow's estate, remainders can be given thereafter; *Mahomed Shumsool v. Shewukram*(2), *Mussamat Bhagbutti Dasee v. Chowdry Bholanath Thakoor*(3), *Radha Prasad Mullick v. Rane Mani Dasse*(4), *Radha Prasad Mullick v. Rane Mani Dasse*(5) and *Ram Bahadur v. Jager Nath Prasad*(6). The words "next heirs" might exclude the adopted son. They mean the heirs nearest to the Raja and not next to the daughter in order of succession, whether as on the date of the grant or as on the death of the last Rani. In the former case the adopted son does not take as there was then no adoption; in the latter he and the illegitimate sons take together; *Chidambara Gounden v. Sellappa*(7) and *Rajani Kant Mandal v. Kanti Chandra Mandal*(8). Heirs of "A" can be the direct objects of bounty by "B" and such gifts are gifts to *personae designatae*: see sections 80 and 83, Indian Succession Act; Norton on Deeds, Second edition, page 317, Theobald on Wills, Seventh edition, pages 330, 333, Hawkins on Construction of Wills, Second edition, page 123. If "next heirs" really means heirs next to the daughter, an agnate cannot come in before the illegitimate son. "Next heir" means "true heir" on the death of the life tenant and not next in order; *Benode Behari Bose v. Nistarini Dassi*(9), *Doe v. Chaffey*(10), *Hutchinson v. National Refuges for Homeless and Destitute Children*(11), *Owen v. Gibbons*(12), Hawkins on Construction of Wills, page 132, *Lucas Tooth v. Lucas Tooth*(13), *Maher v. Toppin*(14), *Stockdale v. Nicholson*(15), *Boys v. Bradley*(16), *Watkins, In Re, Mayberry v. Lightfoot*(17). If an heir is not given any legacy by a will he cannot be excluded from inheriting in case of intestacy unless there is a valid bequest to another of all the residual estate. *Kanjamani Dasi v. Nikunja Behari Das*(18).

(1) (1868) 3 M.H.C.R., 424.

(3) (1875) 2 I.A., 258.

(5) (1908) I.L.R., 35 Cal., 896 (P.C.).

(7) (1919) 10 L.W., 620.

(9) (1906) I.L.R., 33 Cal., 180 (P.C.).

(11) (1920) A.C., 794.

(13) (1921) 1 A.O., 594.

(15) (1867) 36 L.J. Ch., 793.

(17) (1912) 2 Ch., 430.

(2) (1874) 2 I.A., 7.

(4) (1906) I.L.R., 33 Cal., 947.

(6) (1918) 3 Pat. L.J., 199 (F.B.).

(8) (1921) 84 I.C., 237.

(10) (1847) 16 M. & W., 656.

(12) (1902) 1 Ch., 636.

(14) (1909) 1 Ir. Rep., 70.

(16) (1858) 22 L.J., Ch., 617.

(18) (1915) 22 O.L.J., 404.

T. L. Venkatarama Ayyar for fifth defendant.—"Next heirs" means nearest amongst the heirs. The rule is that amongst them the nearer excludes the more remote. Hence such of the Mangala Vilas people as are sons exclude the grandsons by the adopted son as well as the grandsons by the Mangala Vilas sons; *Watkins, In Re, Mayberry v. Lightfoot*(1), *Marsh v. Marsh*(2), *Jarman on Wills*, Sixth Edn., Vol. II, page 1632.

K. S. Venkataramani for fourteenth defendant, contended that "next heir" in the sense of the nearest heir to the Raja was already ascertained by the Government at the time of the grant in 1862 and therefore the use of "next heir" in the grant itself is not as a term of art but it means only next to the daughter in the order of succession. Hence the nearest agnate succeeds.

T. R. Ramachandra Ayyar (with *C. Krishnaswami Rao, A. V. Viswanatha Sastri* and *A. Raghunatha Rao*) for first defendant.—The prevailing policy of the British Government up to 1856 was not to recognize any adoption by a native ruler but to annex his State on failure of natural sons. It was to prevent any such annexation that the Raja married 17 wives in 1852 in the hope of getting a son by any one of them. This policy was changed in 1856. There was no adoption before the date of the grant in 1862; hence we cannot presume any intention on the part of the grantor either to exclude the later adopted son from inheritance or to prevent a future adoption. "Next heirs" in the grant means "heirs" of the Raja at the time the succession opens, i.e., at the time of the death of the last Rani; see section 80, Indian Succession Act, and *Doe v. Chaffey*(3). Even if we are to take the date of the grant as the crucial date, the adoption relates back to the date of Raja's death and an adopted son is exactly like a natural son for purposes of inheritance; *Pratapsingh Shirsingh v. Agarsinghji Rajasangji*(4). Even if excluded under a prior clause in a will a person may take under a later clause. "Failing her" means "if she should die before the last surviving widow." Section 111, Indian Succession Act and illustration (e) and section 23, Transfer of Property Act, show that a donee, like this daughter, with a contingent interest must be alive when the succession opens; otherwise next heirs step in. Hence the daughter who died before the last Rani actually got nothing by the grant; much less her son, as the gift to her was only for her life. The Mangala Vilas people

(1) (1912) 2 Ch., 430.

(3) (1847) 16 M. & W., 656.

(2) (1783) 1 Brown Ch., Ca. 293.

(4) (1919) I.L.R., 43 Bom., 778(P.C.).

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were never recognized as heirs by the Government. Hence the adopted son alone benefits by the grant.

N. Grant replied.

C. Krishnaswami Rao for first defendant.—The parties are Kshatriyas. Sword marriage is not one of the forms of marriage recognized by Hindu law for any caste. It is like gandharva marriage which is now obsolete and it is in fact nothing more than concubinage. He explained *Ramasami Kamaya Naik v. Sundaralingasami Kamaya Naik*(1) as a case of regular marriage with all rites. The instances of sword marriages testified to in this case are not reliable and do not prove anything like a valid custom.

K. Rajah Ayyar.—Pratapa Singh was not the legitimate son of his father. He referred to historical treatises and other documentary evidence on this point. Hence claimants like the Maharaja of Kolhapur who are the legitimate descendants of Shahji, the common ancestor, cannot legally be the heirs to the last Raja of Tanjore who was an illegitimate descendant of Shahji.

S. Varada Achariyar.—Sword marriages are good according to law and custom. The children by such marriages are legitimate. Pratapa Singh was the legitimate son of his father and he was treated as such by every one at the time. In the absence of evidence to the contrary, especially after a long number of years, the presumption is that a couple living as man and wife are regularly married and that their children are legitimate. *Inderun Valungypooly Taver v. Ramasawmy Pandia Talaver*(2), *Mouji Lal v. Chandrabati Kumari*(3), *Sastru Velaidar Aronegary v. Sembeecutty Vaigalie*(4). Mangala Vilas children are not the offspring of sword marriages. The parties are Kshatriyas. He referred to the historical, documentary and oral evidence on this point.

A. Krishnaswami Ayyar.—These are Sudras. Evidence on this point was then referred to. Sword marriage is a customary form of marriage prevailing at least in this family. Mangala Vilas ladies were regularly married in the sword form and were treated as wives. Even if there was no legal marriage, the ladies were permanently kept concubines and their children are illegitimate children entitled to inherit as the parties are Sudras.

S. Varada Achariyar.—Even under Mayukha law the husband's consent was necessary for a widow to adopt. *The Collector of Madura v. Mootoo Ramalinga Sathupathy*(5), *Ramji v.*

(1) (1894) I.L.R., 17 Mad., 422.

(3) (1869) 13 M.I.A., 141.

(5) (1868) 12 M.I.A., 397.

(8) (1911) I.L.R., 38 Cal., 700 (P.C.).

(4) (1881) 6 A.O., 364.

Ghamau(1), *Bhagirthibai v. Kahnajirav*(2). In this case there was no consent given by the Raja before his death for the adoption of the first defendant's father.

T. L. Venkatarama Ayyar.—It is the Mitakshara that governed these parties when they migrated and not the Mayukha which was of later origin. In the absence of any evidence as to when exactly the parties migrated or adopted Mayukha law the presumption is that the general law, viz., the Mitakshara governs people of the Deccan. He explained *Huro Pershad Roy Chowdhry v. Shibo Shunkurao Chowdrani*(3), *Murle Dos v. Manicka Chetti*(4). Even otherwise, the parties who settled in Tanjore must be deemed to have given up Mayukha on the evidence in the case.

R. Ganapati Ayyar for *K. Rajah Ayyar*.—Even if any authority had been given by the Raja before his death for the adoption, it became extinct as soon as his estate was taken by the Government by escheat. The advent of a superior heir before actual exercise of the power to adopt puts an end to the power. See *Mussumat Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhry*(5) and the cases following it. The existence of Mangala Vilas sons is a bar to adoption.

K. Raiah Ayyar.—Supposing the adoption to be valid, the adopted son's rights became barred, as his rights were denied even in 1866 and he did not sue to establish his rights within six years from that date. *Jogadamba Chaothrani v. Dakhina Mohun R. y Chaothrani*(6), *Mohesh Narain Munshi v. Taruck Nath Moitra*(7), *Harnabh Pershad v. Mandil Dass*(8), *Ratnamasari v. Akilandammal*(9), *Venkoba Row v. Nataraja Chettiar*(10), *Somasundaram Chettiar v. Vaithilinga Mudaliar*(11).

T. R. Ramachandra Ayyar.—The personal law of the parties, i.e., the Mayukha law governed those migrating to Tanjore; *Balwant Rao v. Baji Rao*(12). Under that law, express authority to adopt is not necessary; *Chandramala v. Muktamala*(13), *Venkota v. Subhadra*(14), *Subbaroyer v. Subbammal*(15). Even if the Mitakshara governs the parties, the adoption is valid as there was the consent of the Raja given before his death. If that was

(1) (1882) I.L.R., 6 Bom., 498 (F.B.).

(2) (1887) I.L.R., 11 Bom., 285 (F.B.). (3) (1870) 13 W.R., 27.

(4) (1887) 5 M.L.T., 181.

(5) (1865) 10 M.I.A., 279.

(6) (1886) I.L.R., 13 Cal., 808 (P.C.).

(7) (1893) I.L.R., 20 Cal., 487 (P.C.).

(8) (1900) I.L.R., 27 Cal., 879.

(9) (1908) I.L.R., 26 Mad., 291.

(10) (1914) M.W.N., 908.

(11) (1917) I.L.R., 40 Mad., 846.

(12) (1921) I.L.R., 48 Cal., 30 (P.C.).

(13) (1888) I.L.R., 6 Mad., 20.

(14) (1884) I.L.R., 7 Mad., 548.

(15) (1896) I.L.R., 21 Mad., 497.

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not a fact, the Raja's mother authorized the adoption and that was sufficient in law; *The Collector of Madura v. Mootoo Ramalinga Sathupathy*(1). Adoption is a religious act made for perpetuation of the lineage and for the salvation of the soul of the departed. Hence the existence of illegitimate sons who cannot confer spiritual benefit is no bar to adoption. Adoption has no connexion with the existence or otherwise of any estate. An adopted son stands exactly like a natural son and if there is any estate which he can take after his adoption he takes it. This is a case of seizure and regrant of an estate by the Government. Hence cases like *Mussumat Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhry*(2), which deal with the vesting of the estate in a superior heir before adoption, are distinguishable. The adopted son was expressly held by the Courts in all litigation till now, concerning this estate, not to have any interest till after the death of the last Rani which was in 1912; and hence he need not have sued even if there was any denial of his rights before. No suit for a declaration could have been successfully brought when he had no rights *in esse*; *Kathama Natchiar v. Dorasinga Tevar*(3), *Bright v. Tyndall*(4). Hence possession by others at that time was also not adverse to him. It is only if his right to possession was denied he should sue within 12 years. *Tirbhuvan Bahadur Singh v. Rameshar Bakhsh Singh*(5), *Muhammad Umar Khan v. Muhammad Niaz-ud-Din Khan*(6), *Doddawa v. Yellawa*(7).

K. S. Venkataramani, S. Varada Achariyar and T. S. Rayhunatha Rao each argued that his client alone was the nearest heir as a fact amongst the agnates.

O. S. Venkata Achariyar and V. Rajagopala Ayyar appeared for second defendant.

K. V. Krishnaswami Ayyar appeared for plaintiff (Receiver). T. V. Muthukrishna Ayyar for twenty-third defendant argued that third defendant's adoption was not true and that his client was the nearest heir.

K. Rajah Ayyar argued that third defendant's adoption was true and that he was the nearest heir.

A. Krishnaswami Ayyar (with T. L. Venkatarama Ayyar) argued that according to the recent Privy Council decision in *Kamulammal v. Visvanathaswami Naicker*(8) the share of an illegitimate son would be half of what he would get had he been

legitimate. If the Mangala Vilas claimants were legitimate, the adopted son can inherit no share in the estate, for there can be no adoption when there is a legitimate son. Hence the Mangala Vilas sons being illegitimate get half the estate.

T. R. Ramachandra Ayyar.—The recent decision in *Kamulammal v. Visvanathaswami Naicker*(1) has held only that for calculating the shares which an illegitimate son will get in competition with a legitimate son he will be treated as a legitimate son along with the legitimate or adopted son and that he would get half of what he would get on that calculation. It did not lay down any new law that an adoption could not be made if there be an illegitimate son, or that a prior adopted son will be deemed to be disinherited for purpose of calculation. On this decision the adopted son must now get four-sevenths of the estate and not one-fourth of the whole estate as was decided by the lower Court in accordance with the previous decisions of this Court or half the estate as contended for by the other side.

JUDGMENT :—

SPENCER, OFFG. C.J.—In A.D. 1674 during the reign of the great Moghul Emperor Aurangzeb, Ekoji *alias* Venkaji took Tanjore from its Nayak Rulers without firing a shot. This Mahratta General was the son of Shahji who had attained military distinction under the independent Muhamadan States of Ahmednugger and Bijapur and in the course of one of his military expeditions had levied a contribution from the Nayak Chiefs of Tanjore and Madura in the South Carnatic country.

Ekoji's grandfather was Malloji, a Mahratta of the Bhonsle family, who distinguished himself under Jadava or Jadow Rao, a Mahratta Chief in the service of the Ahmednugger Government, and won the hand of his daughter Jiji Bai for his elder son Shahji. Shahji by his first wife Jiji Bai was the father of the famous Sivaji who founded the Mahratta Empire in the Deccan in the 17th century, and by his second wife Tukka Bai, daughter of Mahratta parents with the surname of Mohitai, was the father of Ekoji, the founder of the

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(1) (1868) 12 M.I.A., 397.

(3) (1875) 2 I.A., 169.

(5) (1906) I.L.R., 28 All., 727.

(7) (1922) I.L.R., 46 Bqm., 776 (F.B.).

(2) (1865) 10 M.I.A., 279.

(4) (1876) 4 Ch.D., 189.

(C) (1912) I.L.R., 39 Cal., 418 (P.C.).

(8) (1923) I.L.R., 46 Mad., 167 (P.C.).

(1) (1923) I.L.R., 46 Mad., 167 (P.C.)

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Mahratta dynasty in Tanjore. When Shahji died from a fall in the hunting field, Ekoji performed his funeral rites and was confirmed by the Bijapur Government in the enjoyment of the fiefs of Bangalore and Tanjore. In 1677 the forces of Ekoji and those of his half brother Sivaji came into conflict but by a compromise the former was allowed to retain Tanjore. In 1680 Sivaji got Tanjore and other territories ceded to him by the Bijapur Government, but in the same year Sivaji died and Ekoji retained his hold on Tanjore.

Ekoji died in 1686 or 1687 leaving 3 sons, Shahji II, Sarabhoji, and Tukkoji who each in turn succeeded to the Raj. During the reign of the first named, there were two invasions led by generals of the Moghul Emperor and considerable sums were levied from Tanjore as indemnity coupled with a promise to pay annual tribute to Delhi. After Tukkoji died in 1735, his legitimate son Baba reigned for about a year, and then was succeeded by his widow Sujana Bai whose regency only lasted for a short period. Two years of revolution followed. A pretender known as Savai Shahji or Katturaja, which signifies in Tamil "Jungle King," usurped the throne with the aid of a Muhamadan commander of the Fort named Said. The usurper was assassinated, and the principal men in the State assisted by Said "the King maker" first put Saiyaji, the second legitimate son of Tukkoji on the musnud and secondly Pratapa Singh, the son of Tukkoji by his sword wife Annapurni. Pratapa Singh's first act was to have Said put to death. He ruled for 24 years and during his reign his forces came into conflict with the army of Mahomed Ali, the Nawab of Arcot, and with the troops of the East India Company sent to aid the deposed Saiyaji, and with the French under Lally. In 1762 by the intervention of the British a treaty was concluded

under which the Raja of Tanjore agreed to pay tribute to the Nawab at the rate of four lakhs of rupees annually. Pratapa Singh died in 1763 and was succeeded by his son Tulsaji. In 1771 and 1773 Tanjore territory was twice invaded by the British from Trichinopoly. On the second occasion the Fort was taken and the Raja and his family were made prisoners, but in 1776 under the orders of the Court of Directors he was restored to all his territories and became an ally of the British under a treaty by which he had to pay an annual subsidy of 14 lakhs of rupees and his State became a Protected State under the Company's Government. On Tulsaji's death without issue in 1787 his half brother Amar Singh, son of Pratapa Singh by a sword wife, succeeded and concluded two treaties with the British in 1787 and 1792, but he was deposed in 1798 in favour of Serfoji, an adopted son of Tulsaji, whose tutor and guardian Mr. Swartz of the Danish Mission was able to satisfy the Court of Directors through a memorial * presented to the Governor-General Lord Cornwallis that the verdict of the Pandits which had previously been pronounced against the adoption was erroneous in law and had been obtained by corrupt means.

* Exhibits A-455 and 456.

In 1799 Serfoji resigned the government of the country into the hands of the Company, and Tanjore then became a British District with the exception of the Fort of Tanjore and some villages and lands which constituted his Mokhasa or private property and are the subject of the present litigation. In addition to these he agreed to receive $3\frac{1}{2}$ lakhs of rupees and $\frac{1}{4}$ th of the net revenues of the country while the Company took the other $\frac{3}{4}$ ths. In 1832 Serfoji died and was succeeded by his only son Sivaji, the last Raja of Tanjore. Sivaji married 3 daughters of his sisters. Two of these wives

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predeceased him. To the elder Rani Sydamba Bai were born two daughters Rajes Bai and Muktaba Bai who both in turn were married to the same man—Sakharam Saheb. The Raja's second wife Kamakshi Bai survived him and died in 1892. In 1852 in his desperate anxiety to get an heir, he married 17 women in two batches of 9 and 8 on one day (July 18th, 1852). When His Highness Maharaja Sivaji died on October 29th, 1855, he left 16 Ranis, two legitimate daughters, a mother, 60 women living in a seraglio called the Mangala Vilas, of whom 40 aspired to be called sword wives in distinction to the dancing girls who were ordinary concubines, and 17 natural children begotten by the Raja through sword wives, six of these children being males. There were also the remnants of Serfoji's seraglio called the Kalyana Mahal. Upon the Resident, Mr. Forbes, reporting the death of the Raja and putting forward the claim of his younger daughter to be his successor and upon the Government expressing a decided and unanimous opinion that there being no male heir there was no legitimate claimant to the Raj, the Court of Directors in a despatch of April 16th, 1856,* agreeing with the opinions of the Government of Madras and the Government of India, declared the dignity of Raja of Tanjore to be extinct and the Raj to have lapsed to the British Government, as the Raja died "without leaving a son by birth or adoption" and his father Serfoji was only an adopted son. On October 18th of the same year Mr. Forbes, in his new capacity of Commissioner, took possession of the Fort of Tanjore and the lands held by the late Raja or upon demise from him.

Thereafter Kamakshi Bai as senior surviving Rani filed a Bill on the Equity side of this Court against the East India Company and succeeded in obtaining a decree

declaring her to be entitled to the estate of her deceased husband and declaring the Company to be trustees of the property taken possession of by their servants and directing an account to be furnished. The case went on appeal to the Privy Council (the Secretary of State in Council of India taking the place of the East India Company) and the Judicial Committee in *The Secretary of State in Council of India v. Kamachee Boye Sahaba*(1) reversed the above decision on the ground that the seizure of the property was an exercise of sovereign power effected at the arbitrary discretion of the Company by the aid of military force and that the act so done with its consequences was an act of State over which the Supreme Court of Madras had no jurisdiction. On the Plaintiff's Bill being thus dismissed, Sir Charles Trevelyan, President of the Council, in spite of the opinion of the Judicial Committee to the contrary [vide *The Secretary of State in Council of India v. Kamachee Boye Sahaba*(2)], decided to treat the case as one of lapse by escheat, and to instruct the Madras Government to that effect. The Madras Government accordingly regarded the Raj as merged in the Government which had become the Raja's residuary heir discharging his obligations, and proceeded to work out a scale of pensions for the maintenance of

the late Raja's dependants.* The widows, backed by a large amount of public sympathy, did not sit quiet under this disposition of their fortunes. They enlisted the services of Mr. John Bruce Norton, then Government Pleader of the Supreme Court on leave, who drafted for them what is termed in *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*(3) a "forcible memorial" and himself proceeded to England in 1860 in order to rouse the British public

(1) (1859) 7 M.I.A., 476.

(2) (1859) 7 M.I.A., 476 at 532, 541.

(3) (1868) 8 M.H.O.R., 424 at p. 444.

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to an appreciation of the injustice done by the act of confiscating the property of an independent Prince who had always been faithful to the British, and to induce Parliament to interfere in their favour and get the estate restored to the family. Mr. Norton's appeal evoked a remarkable response and on June 23rd, 1862, Colonel Durand, Secretary to the Government of India, announced Lord Canning's sanction to the relinquishment of the whole of the lands in favour of the heirs of the late Raja,

"since the plea in equity and policy for treating them as the private property of the Raja was so strong that it commanded the unanimous support of the members of the Madras Government."*

On 21st August 1862, an order of the Governor in Council was issued by the Madras Government declaring the manner in which this relinquishment was to be effected. By this time Rajes Bai, the elder daughter of Sivaji, had died on December 26th, 1856, and her husband Sakharam had married his deceased wife's sister Muktaba Bai, the Raja's second daughter, in February 1860. This all important order† sets out that the Government having consulted

the opinion of the two Pundits of the Sudder Court in order to ascertain what were the respective rights of the Raja's widows and of his daughter according to Hindu Law, concurred with the opinion of the Junior Pundit, which was in accordance with the principles of Hindu Law as expounded by the Sudder Court and the Privy Council, namely, that the senior widow was entitled to manage the property during her lifetime being at the same time responsible for the maintenance of the other widows. The G.O. then proceeds to declare:—

"The Estate will therefore be made over to the senior widow who will have the management and control of the property, and it will be her duty to provide in a suitable manner for the participative enjoyment of the Estate in question, by the

other widows—her co-heirs. On the death of the last surviving widow, the daughter of the late Raja, or failing her, the next heirs of the late Raja, if any, will inherit the property."

This order was duly carried out by the officers of Government and the private personal property of the Raja was made over to the senior widow, Kamakshi Bai, but there was no restoration of the dignity of the Raj.

On July 1st, 1863, acting on the advice of Mr. Norton and in spite of the protests of other widows and of the Princess Muktaba Bai, Kamakshi Bai adopted Rajaram Ingle *alias* Serfoji, the late Raja's sister's grandson, whom the Raja was said to have designated for adoption when he found himself without a son by any of his Ranis and who performed the Raja's obsequies and the obsequies of the Ranis. The Government of Madras, as advised by the Government Agent, when informed of the fact, took no official notice of it but directed the Government Agent to impress on Kamakshi Bai as senior widow her responsibility to the other widows and to the late Raja's daughter "who would inherit the whole property in the event of her surviving the widows." Kamakshi Bai, besides adopting Rajaram, transferred to him all the properties which she had got through the grant of August 21st, 1862, and enjoined the estate servants to take orders from him, styling him

Serfoji Maharaja.* When, however, she and Rajaram memorialized the Governor of Madras and the Secretary of State to recognize the adoption,† the former declared his intention of declining to hold any communication with any one but Kamakshi Bai on the subject of the estate and the family of the late Raja,‡ and the latter, while approving of the course adopted, observed "The validity of the alleged adoption by her

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* Exhibits A-81, A-82, A-115.

† Exhibits A-134 and A-135.

‡ Exhibits B-133 and E-59.

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* Exhibit A-136.

† Exhibit E-60.

as regards private property is a matter for the Civil Courts."* The Government of India also declined to interfere with the orders passed by the Madras Government.†

The next thing that happened was that two of the junior Ranis filed a suit (Original Suit No. 16 of 1866) in the Civil Court of Tanjore against Kamakshi Bai and the adopted son for their shares of the movable property of their late husband and of the proceeds of the immovable property on the strength of a private agreement and for a declaration that the adoption was invalid and for the appointment of a permanent Receiver to manage the property during Kamakshi Bai's lifetime. The Civil Judge (Mr. DAVIDSON) refused the relief by way of a division of property but made an order for the appointment of a Receiver, while holding that the validity of the adoption of the fourteenth defendant had not been established and that the first defendant Kamakshi Bai was totally unfit to be entrusted with the management of the estate. He had previously in an order in Miscellaneous Proceedings held that the transfer of property from first to fourteenth defendant was *ultra vires* and not *bona fide*. From this decision the plaintiffs appealed, and Kamakshi Bai and Rajaram preferred a cross-appeal which was dismissed for non-payment of the court fees.

The appeal was heard by SCOTLAND, C.J., and ELLIS, J., and is reported as *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*(1). Those very learned Judges decided that Rajaram could not maintain any claim by reason of his adoption, even if it was valid, as owing to the break between the Raja's death and the re-grant to the widows the property did not devolve upon him

(1) (1868) 3 M.H.C.R., 424.

directly from his adoptive father, that the transfer from his adoptive mother was invalid and that the plaintiffs could not enforce a partition, seeing that all the widows were possessed of a joint estate for their respective lives with rights of survivorship, that the first defendant was not fit to be entrusted with the management of the Estate and that a Receiver and Manager (preferably the Collector) should be appointed to manage it during the lives of the widows or until the Civil Court considered the appointment to be no longer necessary. These directions were carried out. The Collector managed the Estate for a time until a Court Receiver under the superintendence of the District Judge was appointed. It is to-day in the management of the Court Receiver, though there have been changes from time to time in the personnel of the office. Rajaram *alias* Serfoji after the decision in *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*(1) never during his lifetime filed a suit for a declaration that his adoption was valid, but in a petition for a succession certificate to collect the debts of one of the junior widows who died on March 29th, 1881, his adoption was put in issue and it was held by the District

Judge (Mr. PARKER) in 1883 that there had been no valid adoption.* His

appeal to the High Court was also dismissed [vide *Surfoji v. Kamakshiamba*(2)]. His sons are the first and second defendants in this suit. The Raja's second daughter Muktaba Bai died of smallpox on January 31st, 1885, when she was 38 or 39. She had one son and two daughters who predeceased her. In 1884 her husband adopted a son named Sambu Singh who died in 1891, and the third defendant claims to be the adopted son of that adopted son. Avu Saheba, the mother of the Raja, died

(1) (1868) 3 M.H.C.R., 424.

(2) (1884) I.L.R., 7 Mad., 452.

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on June 21st, 1864. The widows of the Raja died off one by one and the last Rani Jijamba Bai died on May 3rd, 1912, having outlived her husband by 56½ years. Thereupon the Receiver on July 8th, 1912, instituted this interpleader suit to decide who was entitled to take the estate, making the adopted son's sons, the daughter's adopted grandchild, the sons and grandsons of the Raja by his sword wives, distant agnates including the Maharaja of Kolhapur, the descendants of the last ruler of Satara and of the Patel of Jinti, and remote bandhus, in fact all possible claimants, parties to the suit. The trial commenced on July 2nd, 1917, before the Subordinate Judge, Tanjore, and judgment was pronounced on July 1st, 1918, after voluminous evidence had been recorded and innumerable exhibits admitted. At the hearing of these appeals against the Subordinate Judge's decree, out of 73 issues the following are the principal questions which have come to be decided:—

(1) On the death of the last surviving widow which of the defendants are "the next heirs of the late Raja" specified in the Government grant of 1862?

(2) On the true construction of the grant, are the sons of the subsequently adopted son, the grandchild by adoption of the Raja's daughter, and the children and grandchildren of the Raja by sword wives excluded from inheritance?

(3) What is the status of the Raja's offspring by sword wife mothers in this family? Are they legitimate or illegitimate? Are sword wives a species of inferior wives or a kind of superconcubines?

(4) Are the Kolhapur and Satara branches of the family liable to be excluded from inheritance by reason of the bar sinister caused by the late Tanjore Raja's great-grandfather Pratapa Singh having been begotten by his father Tukkoji through a sword wife Annapurni?

(5) Is the family, to which the late Raja of Tanjore belonged, a family of Kshatriyas or Sudras?

(6) Was the adoption of the father of defendants 1 and 2 by the senior Rani Kamakshi Bai valid as having been made with the authority of her deceased husband, or with the consent of kindred, or by her own act without any authority according to the personal law of the Mahratta family to which she and he belonged?

(7) What is the law of adoption applicable to this family?

(8) Is the adoption of the father of defendants 1 and 2 invalid by reason either (1) of the senior widow's power to adopt having been exhausted by the act of State in annexing the Raj or (2) by the adopted son's failure to establish his adoption in a Court of Law within twelve years of the act of adoption?

(9) Has the fourteenth defendant established his collateral relationship through Ramraja in the branch of the family which sprang from Sivaji the Great?

(10) What shares are the Mangala Vilas defendants (i.e., the sons of sword wives and their sons) entitled to take in the personal property of the late Raja?

(11) Of the daughter's adopted son's adopted son (third defendant) and the late Raja's sister's grandson which is the nearest bandhu?

(12) Is the third defendant the validly adopted son of Sambu, and is Sambu the validly adopted son of the Princess Muktamba Bai and her consort Sakharam?

(13) Has the twenty-fourth defendant proved his connexion through Sambaji, half-brother of Ekoji, to the family of the Tanjore Rajas?

When the Government decided that "the whole of the lands were to be relinquished in favour of the heirs

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of the late Raja" they proceeded on the assumption, which appears in the minute of Sir Charles Trevelyan printed in 7 Moore's Indian Appeals at page 540, that the Raja had died leaving no legitimate or adopted son. They had to decide between the conflicting claims of the Raja's daughter, which Mr. Forbes, the Resident, put prominently forward in his letters of November

* The Tanjore Mah-ratta Principality by William Hickey, Appendix J, page XXXIX, paragraphs 2 to 20.
† Exhibit D-35.

6th, 1855,* and September 9th, 1856,† and those of the widows jointly and severally, whom Mr. Norton represented, and they consulted the opinion of the Pundits in order that the distribution of the property might conform with the principles of Hindu Law, so far as they might be compatible with "their own notions of what was just and reasonable" [vide *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*(1)]. They do not appear to have given a thought to the case of the sword wives' children. No one came forward to plead their cause. The law that the widow and the illegitimate son of a Sudra share together in the deceased's estate had not been expounded

† Exhibit D-240, 4 M.H.C.R., 204, 10 Mad., 334, 33 Mad., 226.

§ Exhibit A-11, March 16th, 1846.

‡ Exhibit A-475.

at that date.‡ There had been a strong tendency to refuse to recognize adoptions when the estate would otherwise fall in as an escheat§ and a subsequent reaction against that doctrine.|| In the end, after due deliberation and consideration of the advice of the Pundits and the decisions of the Suddar Adawlat and the Supreme Court, the Government designated the widows as co-heirs in whom the property would vest for their lives, and the Raja's daughter as the person who would inherit the property on the death of the last

(1) (1868) 3 M.H.C.R., 431 and 432.

surviving widow. Failing her, the next heirs of the late Raja were to inherit. As the Government made a re-grant to the heirs of the late owner, the title which they got must depend entirely on the terms of the re-grant [vide *Nawab Malka Jahan Sahiba v. Deputy Commissioner of Lucknow*(1)]. At that time, although the late Raja had presented Rajaram Ingle to Lord Harris, the Governor of Madras, as the boy whom he

* Exhibits A-134, paragraph 8, A-7, page 168, A-229, page 838.

† Exhibit B-91.

intended to adopt,* no actual adoption had taken place. Mr. Forbes in his report of February 18th, 1856† states that no adoption had been made to his knowledge and Kamakshi Bai in paragraph

‡ Exhibit D-159.

(1) of her plaint‡ used words to the same effect and showed by her conduct in adopting Rajaram Ingle in 1863 that his adoption had not already been performed. It was held in *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*(2) that the adoption which took place in 1863 did not have the effect of divesting the widows' estate, the nature of

§ Exhibit B-179.

which is described in the decree§ as being "a joint estate for their respective lives with rights of survivorship." In the first paragraph of their order Government speak of the grant as a relinquishment of the whole of the lands in favour of the heirs of the late Raja. I am therefore unable to follow the learned Judges in their conclusion that what the Government purported to do was rather a grant of grace and favour than a restoration of property to those entitled to it by right of succession or an abandonment of all claims arising from the act of seizure [compare *Baboo Beerpertab Sahee v. Maharajah Rajender Pertab Sahee*(3)]. That a surrender would amount to a

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(1) (1879) 6 I.A. 63.

(2) (1868) 3 M.H.C.R., 424.

(3) (1868) 9 W.R., 15 at 22 (P.C.).

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confession of wrong doing, itself improbable in the face of Government's firm insistence on their sovereign rights being upheld, seems to me to be a *non sequitur*. It is more important to determine what was granted than to discuss in what light the officers of Government regarded the grant. The document sets out to determine what are the respective rights of the Raja's widows and of his daughter. It goes on to find that according to Hindu Law the property should not be divided but that "it vests first in the widows and after their deaths is to be inherited by the daughter." The Senior Pundit who was consulted declared that the widows' rights were limited to the use of the property during their lifetime, that they could not alienate it, and that on the death of the widows it went to the next heir of the husband. His statement that they had no power of alienation must be read in the light of his detailed answer attached to the grant, which indicates that he meant to qualify it by the words "except for most indispensable purposes." The difference of opinion that existed between the Senior and Junior Pundit related to the rights of the widows *inter se* and not to the general principles regulating the order of succession of widows and daughters under the Hindu Law. It would have been easy for the Government to have provided in the grant against the divestment of the estate by a subsequent adoption or against an adopted son succeeding at any future point of time, and Mr. Norton was astute enough to perceive that if the widows made an adoption before the estate was restored, it might occur to the Government to so word the grant that the adopted son would be effectually and finally cut out, and he advised them accordingly.* As it happened there was no express exclusion of an heir by adoption. The

* Exhibit A-50,
Exhibit A-289,
Exhibit A-286
at page 982.

learned counsel who represents the Maharaja of Kolhapur argues that what was granted to the widows was a widow's estate of inheritance, with the necessary consequence that on their deaths it goes to the next heir of the propositus with all the incidents attaching to such an estate under the Hindu Law except that they had no power of alienation during their lives and that they were not liable to have their estate divested by an adopted son. The expression used in speaking of heirs in the grant is "inherit." In the ordinary line of inheritance by Hindu Law an adopted son never takes after a widow and daughter. Therefore he contends the adopted son was not merely postponed but entirely excluded. This theory is based upon implication; but is it a necessary implication? Assuming that the Government intended to exclude the adopted son and the sword wives' sons during the widows' and the daughter's lives, it does not follow that they meant to exclude them for ever for the mere reason that in an ordinary case of inheritance they would take in preference to females.

No doubt it is possible to create a widow's estate by will or by grant (vide *Ram Bahadur v. Jager Nath Prasad*(1), *Vengamma v. Chelamayya*(2) and *Mahomed Shumsool v. Shewukram*(3), and it may even be acquired by prescription (vide *In re Pattipati Seshayya* (4), but did the Government create such an estate in this case is the question.

SCOTLAND, C.J., and ELLIS, J., expressed an opinion in *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*(5) that

"the order in question was intended to pass and did pass the property to the widows to be held and enjoyed with the same rights as the law of succession gives widows on the devolution of property by inheritance."

(1) (1918) 3 Pat. L.J., 199.

(2) (1913) I.L.R., 36 Mad., 484.

(3) (1874) 2 I.A., 7.

(4) (1912) M.W.N., 515.

(5) (1908) 3 M.H.C.R., 424.

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They held that the interval during which the estate was in the ownership and possession of Government before the grant was made to the widows was fatal to the fourteenth defendant's claims by right of adoption to the Raja. There was another interval between the death of the Raja and the annexation, so that if the Government meant to restore the estate as it was on the date of their taking it over, there would have been no obstacle to any one who was in existence on the Raja's death and entitled as a male to preference over widows being deemed to succeed directly as lineal heir of the Raja. With due deference to those learned Judges, I consider that they would have been on safer ground if they had disposed of the claim of the adopted son to dispossess the widows during their lifetime by reference to the fact that the grant distinctly designates the widows during their lives and the daughter as persons whom the grant indicated as having a preferential right over all other heirs. I am totally unable to accept Mr. Grant's contention that the daughter is here mentioned merely as an illustration of the course of succession after the death of the last surviving widow. In earlier and later orders* Government speak of the Princess's reversionary rights. She evidently was given what may either be described as a vested interest defeasible in the event of her predeceasing the last widow or a contingent interest on her surviving all the widows. Her death at some future date was a certainty but whether she would outlive them all was an uncertain contingency (see illustrations *c* and *d* to section 107 of the Indian Succession Act). The succession opened when the last widow died in 1912. As the daughter was not alive on that date, the words "failing her" make it necessary for us to look elsewhere for "the

* Exhibit A-129/4-7-85.
Exhibit D-181/31-12-86.

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next heirs" of the Raja. I may at once dispose of the plea advanced on behalf of her adopted grandson that "failing her" means "failing her and her heirs," as that involves reading into the grant words that are not there. As the daughter's heirs were not expressly mentioned in the grant and as the interest of third defendant's grandmother was contingent or liable to be divested by her death before the succession fell in, the estate never vested in them. The daughter, who by the terms of the grant herself got nothing if she predeceased the widows, could not transmit a full estate to her heirs before the succession opened [*vide Finch v. Lane*(1)].

There is no occasion for the Court to determine at this time whether what was intended to be given to the Princess was a life estate or an absolute estate, seeing that, whatever it was, she did not live to take it. In *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*(2) mention is made of her "proprietary rights" and "all the legal rights of heirship," whatever that may mean, but she was not a party to that suit and the decree is silent on the subject of her rights at the date when it was decided. When a grant has been made to a woman who ordinarily takes only a limited life interest, whether there was an intention on the part of the grantor to convey an absolute estate, is not a question which falls to be decided in the present case. It is sufficient to say that the designation of the daughter as a person to be preferred to other heirs mark her out as having got something more than a mere *spes successionis*.

As for the adopted son, in a despatch* issued four years later, the Secretary of State for India, while approving of the

* Exhibit A-136.

(1) (1870) L.R., 10 Eq. Cas., 501. (2) (1868) 3 M.H.C.R., 445 and 447.

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proceedings of the Madras Government, left the validity of his adoption to be decided by the Civil Courts. The grant itself, after designating the widows and the daughter as the persons who should first take the estate, left the next heirs unascertained.

In 1862 when the grant was made, it was not possible to predicate which of the late Raja's relations would be alive at the expiry of eighteen (including the daughter's) lives, much less the order of their succession and the amount of their shares. From certain expressions in the Government proceedings it appears probable that Government did not want the daughter to be cut out by an adoption being made by the widows after their husband's death. But when once the daughter was dead and gone, Government was indifferent as to which heir of the Raja got the property. The authorities steadfastly refused to restore the dignity of the Raj, but they did not reserve to themselves any right to resume the Raja's private property if an adoption was put forward. Their dominant idea seems to have been to provide for the widows and the daughter having the first enjoyment of the estate and that object being secured by the terms of their grant, they left the further determination of the line of succession to its natural course which could only be traced in the light of future events. The result of the grant being worded in favour of the widows' and daughter's priority as heirs was to prevent immediate divestment occurring through an adoption made after the grant and before the death of the last widow. The words "on the death of the last surviving widow" clearly indicate that the time when the next heirs were to be ascertained was the date of the last Rani's death. An argument has been based on the use of the words "next heirs" that as an adopted son is never postponed to a widow or a daughter, the

words must mean "next after the daughter" in the line of succession of heirs in Hindu Law. In paragraph 4 of the order, the words "next heir of the husband" are used in the sense of "nearest heir of the husband." In paragraph 5 the context implies that when the Government were speaking of "next heirs" they were thinking of those who would take next after the daughter, as the widows and daughter are placed first in a certain relative order. If several objects are placed in a certain order, and mention is made of one and then of the next, the word "next" ordinarily signifies the next in that order [vide *Eastwood v. Lockwood*(1)]. But here owing to the death of the daughter, the words "next heir" have lost the significance that they would have had if she had lived. Now that all the widows and the daughter have gone, the original intention of Government to see that the widows and the daughter were not dispossessed so long as they lived becomes unimportant, and therefore these words need not affect our examination of the problem of finding out who was the next heir to the Raja at the death of the last widow. It cannot be maintained that in the terms of the grant there is any conscious or express exclusion of one who would have even better claims than a daughter at the date when the succession opened. Again there is no reason to assume an intention on the part of the donor to exclude sons by adoption, if what was given was not a widow's estate, but a life estate. The opinion of SCOTLAND, C.J., and ELLIS, J., in *Jijoyamba Bayi Saiba v. Kamakshi Bayi Saiba*(2) has already been quoted. They considered that the property was passed to the widows "to be held and enjoyed with the same rights as the law of succession gives widows on

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(1) (1867) L.R., 3 Eq. Cas., 487.

(2) (1868) 3 M.H.C.R., 424.

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the devolution of property by inheritance." The terms of this grant came up again for consideration in *Kaliana Sundaram Ayyar v. Umamba Bayi Saheba*(1), where Mr. Justice SHEPHARD observed that

"the inference was irresistible that the intention was to grant a widow's estate, that is, to put Kamakshi Bayi in the position which she would have enjoyed had there been no confiscation on the death of her husband, the Raja."

Now there is no physical or legal impossibility in such a grant being made by will or by deed of gift or contract [vide *Mahomed Shumsool v. Shewukram*(2), *Ram Bahadur v. Jager Nath Prasad*(3) and *Vengamma v. Chelamayya*(4); but after giving the fullest consideration to the opinions of those learned Judges of this Court who have had the terms of this grant before them, I think that the more correct view is that the widows of Sivaji Raja got the gift of a life estate very much resembling the ordinary estate of a Hindu widow and with all the incidents of a widow's estate except the liability to be divested, but nevertheless a life estate rather than an estate of inheritance, and that this view is in consonance with the decisions of the Privy Council in the *Tagore case*(5), *Mahamed Shumsool v. Shewukram*(2), *Mussamat Bhagbutti Dase v. Chowdry Bholanath Thakoor*(6), *Bhagabati Barmanya v. Kalicharan Singh*(7) and *Bhupendra Krishna Ghose v. Amarendra Nath Dey*(8) and with the judgment of the Calcutta High Court in *Gooreo Das Mustafi v. Sarat Ohunder Mustafi*(9).

I am impelled to this view by a consideration of the fact that there is in the grant a clear gift over in the alternative to the daughter or to other heirs of her father,

(1) (1897) I.L.R., 20 Mad., 421.

(3) (1918) 3 Pat. L.J., 199 (F.B.)

(5) (1872) I.A., Sup., Vol. 47 at 75.

(7) (1911) I.L.R., 38 Cal., 468.

(9) (1902) I.L.R., 29 Cal., 699 at 706.

(2) (1874) 2 I.A., 7.

(4) (1918) I.L.R., 36 Mad., 484.

(6) (1875) 2 I.A., 256.

(8) (1918) I.L.R., 43 Cal., 422 at 429.

a fact which seems to have escaped the notice of the Bench which decided *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*(1), in that the nature of the estate given to the daughter was not defined in their preliminary judgment, though in the final judgment * and the

* Exhibit D-61.

† Exhibit B-179.

decree † there are observations as to Kamakshi Bai's proprietary right for life which are consistent with the

grant to her and her co-widows being that of a life estate. At a later date the Government seem to have approached the widows and daughter with a request to transfer a certain building and grounds for a college as if they

had a disposing power as reversioners of the Raja's estate. ‡ If Kamakshi

Bai had taken the estate as a Hindu widow, she would have completely represented the estate for the time being, and could have disposed of it for a necessary purpose without consulting the daughter (vide *Mussamat Bhagbutti Dase v. Chowdry Bholanath Thakoor*(2)).

For these reasons I find that the right of the after-adopted son and his descendants to succeed after the death of the widows and daughter was not negatived by the grant. The daughter was never made a stock of descent and her adoption of a son confers no title on him, seeing that the conditions on which she was to succeed were not fulfilled. As for the Mangala Vilas people, I reserve what I have to say till I deal with their special case under other heads, but for the present it may be noticed, first that the terms of the grant are not such as to exclude them from the category of next heirs of the Raja, he being the stock of descent to whom relationship has to be traced, and secondly the fact that they and the daughter were given annuities under

(1) (1868) 3 M.H.C.R., 424.

(2) (1875) 2 I.A., 256 at 261.

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another Government Order will not stand in the way of their coming in as heirs if they can prove a right of inheritance apart from a right to maintenance.

The first mention of sword marriage that occurs in the records of this case is in Exhibit B-140, which is a Mahratti inscription which has been ascertained to date from the beginning of the 19th century and to have been written round the walls of the Tanjore temple in the reign of Serfoji Raja. This inscription states that Tukkoji had five married wives. It proceeds—"Besides these, he had six concubines, of whom only one belonged to Mahratta caste; the other five belonged to Nayudu race. The one who belonged to Mahratta caste was married to the sword." (The Mahratta words are "Tulwarlagna kalai") . . . "In 1641 this kept woman Annapurna Bai gave birth to Raja Pratapa Singh." The mother of Pratapa Singh is again referred to a little further on as a kept woman (Rakya) as distinguished from a lawfully wedded wife (Lagna). Mention later is made of Mukta Bai, who was Serfoji's mistress before his regular marriage, a woman of Kavarai caste in whose honour he erected a chattram, but the document does not state that she was his sword wife. Pratapa Singh had a sword wife named Radha Bai. This Pratapa Singh was the son of Raja Pratapa Singh's second son Amar Singh who was himself deposed partly on account of his being only a sword wife's son.

In Sir John Malcolm's Memoir of Central India published in 1832, Volume 2, page 158, mention is made of a kind of sword marriage which is described thus:

"The sword of the Mahratta ruler, with his handkerchief bound round it, represented the Prince, and to that the female was united; she married the wearer of the sword, not the shepherd."

The incident therein referred to was that of a marriage between Holkar who was a Sudra with a woman of

Khettree blood, and the sword marriage marked the difference between the caste of the bride and the bridegroom. In this respect, there is a distinction between that marriage and the one referred to in the inscription. Annapurna Bai (it is stated) being of the same caste as the Raja was married to the sword, whereas the other concubines were not so married.

In Mr. Enthoven's Tribes and Castes of Bombay, Volume III, page 280, there is another description of of sword marriage among Rajputs,

"The bridegroom puts a sword and a coconut in charge of a maid servant who takes his place in a litter and is taken in procession to the bride's house where the maid servant sits holding the sword and represents the bridegroom even in the ceremony of joining hands with the bride."

The Resident of Tanjore in reporting* in 1849 on the dependants of Raja Pratapa Singh informed the Government that persons in the situation of Radha Bai "the concubine of the late Rajestry" were "not considered in the light of a common mistress or prostitute but rather that of an inferior wife." He adds:

"She is recognized and associated with by the lawful wife. She cannot be put away destitute, and if put away is entitled to maintenance."

He compared the right to consideration of a woman who has gone through the ceremony of sword marriage to the rights of a "Nikka" wife among Muhamadans.

Mr. Forbes, another Resident of Tanjore, in reporting † in 1856 on the state of the Tanjore Palace after the Raja's death, mentions the case of ten dancing girls whom the Raja was said to have promised to make sword wives. He proceeds to describe the nature of sword marriage; but he does not mention the sources of his information

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* Exhibit D-24.

† Exhibit D-35.

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or say that he himself had ever witnessed a sword marriage. He says:

"There are two kinds of marriages among the Mahrattas—one in which the tali is tied round the neck of the bride by the bridegroom whose full wife she then becomes, the other in which the tali is tied to a sword, a ceremony which constitutes the woman a permanent concubine of the man."

Sonabhadra Bai who was one of Serfoji's twenty-six sword wives examined as a witness in a suit of 1865

describes the ceremony.* She said that the Raja with his own hand tied

a tali round her neck and he then had a sword in his hand. Bhavani Bai, another sword wife who was a

witness in the same case, gave a similar description.† In the present

case, the last surviving sword wife of the late Raja by name Dharmavalli Bai was examined as a witness and she stated that a sword was placed and *homam* was performed and she came round the *homam* while the men chanted mantrams. After she had prostrated herself before the Maharaja, he tied the tali. She adds that seven or eight women were married at the same time and all were married in the same fashion with the placing of the sword. It is significant that there is no mention of the giving of the bride to the bridegroom, an essential feature of every valid marriage. A case of sword marriage once came before this Court and was reported in *Ramasami Kamaya Naik v. Sundaralingasami Kamaya Naik*(1). In that case there was a dagger employed instead of a sword. The Zamindar of Saptur who was the bridegroom was of Kumbbla caste, while the bride was of Vellala caste. Both these are subdivisions of the same Sudra caste and the learned Judges (MUTTUSWAMI AYYAR and DAVIES, JJ.) explained

the presence of the dagger at the marriage as being due to the inferiority of the bride's status. There the *tali* or *bottu* was tied in the presence of the dagger, the dagger being placed to represent the zamindar who did not attend in person. But there was a performance of the customary rites of the Kumbbla caste in addition to the use of the dagger (page 425). It was held that the woman was the wife of the zamindar, but inferior in status to that of a *patni* wife. The dagger marriage was held to be analogous to an *anuloma* marriage, that is, a marriage between a man of a higher caste and a woman of a lower caste (page 436). We have it on the authority of the tutor of the Mangala Vilas children (defendants' witness No. 32) that the sword wives of the late Raja Sivaji were drawn from several castes different from the Raja's caste and that there were Mahrattas, Sudras, Ayyangars and Christians among them. We know from a mortgage deed* that one of them was a Brahman

woman. There are other judicial decisions which have not found place in the law reports, but are exhibited in this case. In Original Suit No. 5 of 1899, a suit brought by a reversioner in Amar Singh's branch, which settled at Tiruvadamarudur in the Tanjore district, the Subordinate Judge of Kumbakonam found that there was no such form of marriage as sword marriage recognized in Hindu Law and that Radha Bai was not the lawfully wedded wife of Pratapa Singh but only his concubine and her daughter's son was not a reversioner but the child of an illegitimate mother. Two witnesses examined at the trial stated† that the bride held the tip of the sword while the bridegroom held the handle and in that state they went round the sacred fire in the

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* Exhibit A-266.

† Exhibits D-217 and D-218.

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Palace, and that tying of tali, taking seven steps, *homam* and other ceremonies were performed simultaneously. The Pundit declared that sword marriage was a Gandharva form of marriage peculiar to Kshatriyas, the distinctive feature of Gandharva marriage being that there is no giving away of the bride. In another case

* Exhibit E-69. Mr. KNOX, the District Judge, upon a petition* for a succession certificate presented by one of the Mangala Vilas children, the father of the present eleventh defendant, observed:

"These women called sword wives are concubines and their children are illegitimate children of the late Raja. No authority exists for treating them otherwise than according to the ordinary laws of the Hindus."

The certificate of heirship to the estate of another sword wife was consequently refused.

The accounts of sword marriage thus differ in details, but they agree on one point, the presence of a sword or dagger which is the token of Kshatriyaship, the weapon of the warrior class.

In Mr. Ganapathi Ayyar's Hindu Law, Volume I, page 491, the author refers to *Ramasami Kamaya Naik v. Sundaralingasami Kamaya Naik*(1), and he states,

"Among the Kshatriya castes, there is a form of marriage known as the sword or dagger marriage (*kadga vivaha*) and this prevails even now among some Zamindar families."

He refers to the *Jyotirvidabharanam* by Kalidasa, the date of which is unknown, in which there is a description of sword marriage. That commentator says:

"Wise men should perform Brahma and other marriages in which the lotus hand (of the bride) is received (by the bridegroom) at the time stated before, and the Gandharva, Paishachi, Rakshasa and Asura (forms of marriage) at any time."

Then he observes:

"Among all Varnas in all ages the first four forms of marriage are praiseworthy, according to the above maxim, but other forms (Gandharva, etc.) are performed in the Kali age."

Again

"In the Kali age a king should perform the auspicious sword marriage ceremony in the summer solstice when the star is auspicious for marriage in the evening."

This is an authority for the theory that a sword marriage is an institution peculiar to Kshatriyas and is not common to persons of other castes. If this is so, the legitimacy of the children of sword wives of the late Raja of Tanjore will depend on the question to be considered later, namely, whether he was a Kshatriya or Sudra by caste. Mr. Ganapathi Ayyar gives it as his opinion that the use of the dagger is in lieu of the seizure of the hand (*Karagraha* or *Panigraha*) which is observed in the ordinary forms of marriage. The *Mahratta* chieftains (he says) used to resort to this form of marriage. Now a sword or a dagger (*tulwar* or *kadga*) is essentially an emblem of the warrior or Kshatriya whose profession is that of arms. It is noticeable that in Exhibit B-140 the *tharwar* (or *tulwar*) is mentioned in speaking of the sword marriage of Annapurna Bai to Tukkoji Raja, and that the word *Panigraha* is used when speaking of the wives who were married according to the ordinary forms of marriage in which the wives became united to the Raja in lawful wedlock as distinguished from kept women (*Rakkiya*).

In order to constitute a lawful marriage among Hindus, it is essential that certain nuptial rites should be performed; otherwise the marriage is only a Gandharva marriage, or, as it is described in *Brindavana v Radhamani*(1) "a marriage importing an amorous connection founded on reciprocal desire," in fact, a marriage in a

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(1) (1894) I.L.B., 17 Mad., 422.

(1) (1889) I.L.B., 12 Mad., 72 at p. 75.

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form which has become obsolete. See MAYNE's Hindu Law, paragraph 83 and *Visvanathaswamy Naicker v. Kamu Ammal*(1).

The Subordinate Judge finds that the sword wives of the late Raja were legitimate but inferior wives. Somewhat inconsistently he has given their offspring the shares which illegitimate children are entitled to under the Hindu Law. It appears to me that there can be no half way house between legitimacy and illegitimacy. It is necessary to find either that the sword wives were regularly married or that they were concubines whose offspring are illegitimate. Lists of the sword wives in the Tanjore Mangala Vilas Establishment* have been filed. The first list divides the sword

* Exhibits D-37, D. 19-A, and D-88.

wives into Ammamars and Baimars and Ranganayaki, etc. The second distinguishes between the Ammamars of Ayyan Mahal and the Baimars of Huzur Mahal, but this document is unsigned and proof of its authenticity is wanting. There is clear evidence, which no one disputes, that all the sword wives lived in one institution called Mangala Vilas. There was a similar institution for sword wives of Serfoji which was called the Kalyana Mahal. The inmates of these institutions were kept behind the purdah and were not allowed to mingle with the outside world after their introduction into the Palace.† They had prefixed to their names the honorific title of Sowbhagyavathy (literally "a woman having good fortune") or Sumangali (one who has a husband or protector) which are terms ordinarily associated with married women. After the Raja died this was altered to Mathusris (widows). Their children

† Exhibit D-85, paragraph 12, Exhibit A-7, p. 188.

prefixed the title of Vijaya to their names to indicate their royal descent, Vijeswara being the Raja's favourite deity. Much may be gathered from the treatment accorded to them by the Raja, so far as the records are available of such treatment* and from the way in which they speak of themselves in official documents and petitions and legal proceedings in which they were parties. Evidence of this kind is conduct admissible under section 50 of the Evidence Act (see illustration b), as it shows the repute in which sword marriage was held in this family. In a manuscript obtained from the Oriental Library in Madras† the reflections

* Exhibit D-82 (Raja provided four villages for their maintenance and Government confirmed the gift).

of Tulsaji on his death-bed are recorded, and it is there stated that before making the adoption, he regretted the stigma attached to his father Pratapa Singh owing to his father having been born to a mother whom Tukkoji had not married. It is unnatural that the Raja should have voluntarily cast a stain on his ancestor's legitimacy unless there was some truth in the fact. In those days sword marriage was evidently not considered as conferring a status equal to that of a lawful wife. The last Raja Sivaji thought of adopting a son at a time when he had six natural sons. If they were fit to be his heirs there was no need for an adoption to be made. There is no evidence that any invitations to relations and officials were issued when the sword marriages of the Raja to the Mangala Vilas women were performed. The 5th Defendant, who is the son of a sword wife, admitted that he and other sword wives' sons took no part in the Raja's funeral ceremonies. The adopted son (Rajaram) performed the Raja's obsequies. The sword wives seem to have all worn Mangalasuthrams or talis and to have removed their talis at the Raja's death

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when they were given addigais * instead. The children of different sword wives have not been treating each other as brothers and sisters as would be the case with consanguine children of co-widows of legitimate descent. The children of Mangala Vilas ladies in some cases have married pure-blooded persons of the Mahratta community, but some social stigma seems to be attached to such marriages as the witnesses—D.Ws. 83, 84, 31, 16, 87—who have spoken to their existence admit.† The attitude of the children and grandchildren born of sword wives in this family as to their legitimacy has been inconsistent. When it has suited their purpose to be illegitimate sons, for instance, when they want to obtain the share of the illegitimate son of a Sudra, they style themselves illegitimate. When they want to recover the Raj or to cut out the adopted son, they pose as legitimate offspring. The 4th Defendant in his written statement alleged that he was legitimate, but asserted that Pratapa Singh was an illegitimate son of Tukkoji. Defendants 5 and 7 to 11 alleged that sword marriage conferred on them the status of royal children born in wedlock and that they had a right to exclude an adopted son from succession. But in the alternative they pleaded their right as illegitimate children of a Sudra to take the shares appropriate to such illegitimate children. In his letter of November 4th, 1880, to the Governor of Madras, ‡ 7th Defendant claimed as sword wife's son of a Raja to be the rightful heir to the Raj. In legal proceedings to which they have been parties from time to time§ these sword wives' sons have described themselves as illegitimate and they have been consistently described

* Exhibits D-12 and D-34, D-238, p. 522, A-7, p. 188.

† Exhibits D-215, 217, E-100, p. 87.

‡ Exhibit C-28.

§ Exhibits A-464, G-209, A-198, C-16.

* Exhibits D-60, D-62, D-65, D-85.

† Exhibits A-184, paragraph 60, A-187, paragraph 2.

‡ Exhibit A-464.

§ Exhibit D-86.

|| Exhibit G-209.

¶ Exhibit A-148.

** Exhibit C-46.

†† Exhibit C-59.

describes himself as a "natural" son of His Highness the Sivaji Maharaja, "natural" being used in the sense of not born in lawful wedlock—vide Brewer's and Webster's dictionaries. In a letter addressed to the Governor of Madras in 1880 ‡‡ he compares his status as sword wife's

as illegitimate or natural children by Government officers * and by the legitimate wives and relations†; and the establishment in which they lived has been described as a "Seraglio". For instance in the plaint‡ in O.S. No. 39 of 1908 in which the father of the 11th Defendant was Plaintiff, he coupled Dharmavalli Bai, a sword wife with a pension of Rs. 150 and Hira Amma, a dancing girl with a pension of Rs. 70 § and described them as "members of the congregation of women known as Mangala Vilasam attached to the Tanjore Palace." In the plaint || in O.S. No. 30 of 1911 on the file of the Sub-Court, Kumbakonam, in which the 5th and 7th Defendants in the present suit were Plaintiffs and 4th Defendant was a Defendant, it is stated that the Raja left behind him "6 illegitimate sons born to him by Mangala Vilas ladies." 7th Defendant in his evidence says they instituted the suit as illegitimate sons acting under the advice of their legal advisers. In a mortgage deed ¶ executed by the 5th Defendant he describes himself as the son of Mathusri Meena Bai "attached to the Mangala Vilasam." In a petition ** sent to the Viceroy of India in 1880 and in a letter to the Chattram Tahsildar †† the 4th Defendant describes himself as a "natural" son of His Highness the Sivaji Maharaja, "natural" being used in the sense of not born in lawful wedlock—vide Brewer's and Webster's dictionaries. In a letter addressed to the Governor of Madras in 1880 ‡‡ he compares his status as sword wife's

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son to that of Amar Singh, son of Pratapa Singh, who was not regarded as a legitimate son.

On behalf of the Maharaja of Kolhapur it is contended that the marriages of the mothers of the 4th and 5th Defendants and the grandmothers of Defendants 6 to 11 have not been proved in fact to be legitimate marriages, but as regards Pratapa Singh, through whom this defendant traces his connexion with the Tanjore line, it is argued that Annapurni was married to Tukkoji according to the records available and that there is nothing to show that the marriage in fact was not a marriage in law. Reference has been made to *Inderun Valungypooly Taver v. Ramasawmy Pandia Talaver*(1) as to the presumption in favour of a marriage in fact being a marriage in law, and to *Mouji Lal v. Chandrabati Kumari*(2) in which a strong presumption in favour of the validity of a marriage and the legitimacy of the offspring was held to arise when a couple were regarded as man and wife, and evidence was only wanting as to the mental capacity of one of the parties and as to the performance of the forms and ceremonies necessary to constitute the marriage a valid one.

In the district of Ceylon, whence the case came which went to the Privy Council in *Sastry Velaidar Aronegary v. Sembecutty Vaigalie*(3) there was evidence that wives were treated differently from concubines and that the parties went through some form of marriage, and that the woman was treated by the man as his wife and yet their Lordships drew a presumption of legitimacy, though there was no evidence that the form in which the marriage was celebrated was a legal one. At Tanjore a distinction was made in the treatment of sword wives

(1) (1869) 13 M.L.A., 141 at 158.

(2) (1911) I.L.R., 38 Cal., 709. (P.O.).

(3) (1881) 6 A.C., 364.

and dancing girls, at any rate after the Raja's death. So it is a legitimate inference that sword wives were regarded as superior to dancing girls in the Tanjore Palace, the latter having no permanent status. But when the status of sword wives is compared to that of Ranis, the presumption arising from mere co-habitation is weakened by the undeniable fact that there were a number of women in an institution of their own kept apart from the Ranis or recognized wives, and there were also dancing girls, or professional concubines dedicated to some temple, in the keeping of the same

* Exhibit D-56.

husband. One of the sword wives of Serfoji* admitted that the patta wives wore gold jewels on their legs and sat equally on the throne with the Maharaja; whereas the sword wives wore silver jewels and were not accorded the dignity of sitting with the Maharaja. When sword wives died, their corpses were carried through a different gate from

† D.W. 26, p. 312 A-7,
p. 200-6.

‡ Exhibits D-80, A-13
and A-14.

that used for the funerals of Ranis.† The full period of pollution was not observed at their deaths, as the Raja married 17 wives on July 18th, 1852, though a sword wife Maya Bai died on July 13th, 1852.‡ The maintenance and clothing of sword wives is consistent with their being in the permanent keeping of the Raja. The treatment of the children was such as would naturally be accorded to illegitimate children. In social and ceremonial matters they appear to have associated with the Ranis or lawfully wedded wives. Much oral evidence has been let in as to the performance of ceremonies such as *sunmuk* (introduction of mother-in-law to daughter-in-law), *badan* (uncovering leaf by bridegroom's sister), *mathrupuja* (worship of mother), *boubiz* (exchange of presents), feet washing, *barsa* (or tonsure) and

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vidyabhyasa (initiation into studies) and as to the repetition of *sraddhs* by children of sword wives to their paternal ancestors, which would be impossible for children of common prostitutes, and as to the interchange of *ahairs* (small pieces of cloth). These sword wives seem to have performed ceremonies at child birth such as *jata-karmam*, *barsa*, etc.,* which indicate a conscious assertion of a wish to be treated as married women. In *Bai Monghibai v. Bai Nagubai* (1) reference is made to Mayne's Hindu Law and other authorities which show that when there is a permanent connexion of women with a man analogous to that of female slaves in former times, the women and their offspring have been recognized as members of the family. This seems to have been the case at Tanjore. As permanent concubines they were members of the family and naturally took part in feast and ceremonials. The wearing of the tali by the sword wives only indicated their permanent connexion with the Raja. Temporary concubines and prostitutes would not have been given talis because talis are badges of the permanence of the union.

As to the legitimacy of Pratapa Singh, owing to the distance of time there is more room for a presumption of legitimacy being made. But the verdict of history is that he was illegitimate. The Subordinate Judge says that his sonship to a sword wife was a matter of local tradition. History relates that he was put on the throne by the popular vote owing to his good looks and his other good qualities in spite of his being a sword wife's son. We know from the inscription that his mother was of the same caste as her husband. The earliest of the

* Exhibits D-18, D-19 and D-28.

• Exhibit G-211, p. 108.

† Exhibit G-212.

‡ Exhibit B-172, p. 67

§ Exhibit G-212.

historians is Orme. He speaks in 1861* of Pratapa Singh as the son of Serboge born by one of his inferior wives. Mill's History of India† is to the same effect. Grant Duff plainly says that he was the son of a concubine. Aitchison's Treatise‡ speaks of Pratapa Singh as of illegitimate birth. Ranade in his "Rise of the Mahratta Power" at page 248 says the same. Mill in his History of India§ in his later edition speaks of Pratapa Singh as the son of a concubine. Mr. Kincaid in his History of the Mahratta People, Vol. II, page 273, says that Tukkoji left two legitimate sons and a natural son Pratapa Singh. Mr. Venkasami Rao, who wrote the Tanjore District Manual, observes "that Pratapa Singh was illegitimate is nowhere denied." These historians probably extracted the fact that Pratapa Singh was the son of a sword wife from the Tanjore temple inscription and drew their own conclusion as to the meaning of sword marriage, or the later writers may have accepted the verdict of the earlier. Dr. Swartz, the tutor of Serfoji, addressed the Governor-General on behalf of his ward and pupil. He attached to his letter a genea-

|| Exhibit B-81 (a).

logy. || This shows three sons Nana Sahib, Anna Sahib and Pratapa Singh born to Tukkoji by a concubine mother, and Pratapa Singh is shown as having left one son by his wife and two by a concubine, viz., Amar Singh and Krishnaswami. Mr. Swartz in his letter to Lord

¶ Exhibit A-455.

Hobart¶ states that he made careful inquiries as to the correctness of this pedigree. During the course of the hearing we directed that the Government of India and the Government of Madras should be addressed for

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the production of the original genealogy from which Exhibit B-81 (a) is a copy in order to see whether the description "born to a concubine" is in Swartz's own handwriting, but as the original is not now forthcoming, the statement must be taken for what it is worth. At this distance of time no evidence is forthcoming as to the ceremonies performed when Tukkoji married Annapurni. It may be presumed that the ordinary ceremonies attached to the institution of sword marriage were performed on that occasion. But, if, as I am inclined to hold, sword marriage is an institution peculiar to Kshatriyas and if it is proved that Tukkoji was only a Sudra in caste, there can be no presumption as to the legitimacy of the offspring of such a marriage.

As sword marriage is an institution peculiar to Kshatriyas, the sword being one of the characteristic insignia of the Kshatriya caste, the performance of ceremonies, if any, which fell short of a valid marriage by a Sudra ruler in a form of marriage recognized among Sudras, did not give rise to any higher status than permanent concubinage. There are indications that the members of the family were conscious that this was so.

Mr. Justice Ranade in his "Rise of the Mahratta Power," page 271, mentions the celebration of a marriage between the daughter of the Nizam of Hyderabad, who was a Muhammadan, and the Peshwa, Balaji Rao, who was a Brahman, and the form of the marriage was in that case a sword marriage. This is another indication that the presence of the sword indicates a difference in caste between the bridegroom and the bride.

There is evidence that a *Tonk* was put up to Mukta Bai. A *Tonk* is an image of a deceased person put in a temple. It is a very unconvincing piece of evidence to prove the status of sword wives. In my judgment no

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importance should be attached to the suggestion that the memory of sword wives was kept alive by *Tonks*, as it does not appear certain that Mukta Bai was a sword wife and not a mistress of Serfoji. Moreover, we find that *Tonks* were put up even to a servant put to death by Pratapa Singh and to a minister, to propitiate their ghosts.

On the question of caste the Subordinate Judge has come to the conclusion that the late Raja Sivaji was a Sudra, and I see no reason to doubt the correctness of this finding. The difficulty in arriving at a correct decision on this point is chiefly caused by the fact that *Mahratta* is the name of a nation, not of a caste. Certainly not all Mahrattas are of Kshatriya caste. Kunbis, who belong to the cultivating caste, are also Mahrattas. Mr. Enthoven, I.C.S., in his "Tribes and Castes of Bombay," Volume III, page 9, states :

"The common belief in Maharashtra regarding the origin of Mahrathas is that there is little or no difference, so far as caste is concerned between Mahrathas and Kunbis." . . . "The Kunbis do not lay any pretensions to Kshatriya origin."

The author in another place says :

"The line of demarcation between Mahrattas and Kunbis is not a hard and fast one ;" but "they are differentiated rather by wealth and social status than by any hard and fast caste distinction. The claim of the Mahrathas to belong to the ancient 96 families of the Kshatriya race has no foundation in fact, but must have been advanced after they rose to power."

Compare also the *Satara Gazetteer*, pages 75 to 79, and the *Kolhapur Gazetteer*, pages 71 and 72. The tradition that Mahrattas have a Rajput origin and that they are Kshatriyas may have received credit in Rajputana owing to a natural desire of Rajputs to connect themselves with a personality as famous as that of Sivaji the Great. There is no evidence that Kshatriyaship was claimed before the time of Sivaji the Great. It is a matter of history that Sivaji paid four lakhs of

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rupees to Gaga Bhat, a Brahmin of Benares, in order to have his *upanayanam* (thread marriage) performed when he was 47 years of age, and to be raised to the rank of a Kshatriya at the time of his coronation. In the *Kolhapur Gazetteer*, page 72, it is stated that the descendants of Sivaji claim to belong to the Kshatriya caste and say that their ceremonies are the same as those of Brahmins. The author proceeds :

"Brahmins admit this claim in the case of the ruling family and perform their ceremonies with Vedic texts. The ceremonies of other Kolhapur Mahratta families are performed according to the *Sudra Kamalakara*, a classical Sanskrit version of the Vedic passages. The well-to-do among the Kolhapur Mahrattas claim to perform the sixteen Brahmin sacraments or *Sanskars*, but the bulk of the people perform no ceremonies except at birth, thread girding, marriage, coming of age, and death."

Sivaji from dynastic reasons had a necessity to put forward a claim to the highest rank in order to found a Hindu Kingdom and to arouse Hindu national sentiments capable of withstanding the encroaching spread of the Moghul Empire. It is natural for that reason that no Hindu should wish to challenge his claim to Kshatriya rank at the time of his coronation. There is, however, no evidence of any coronation ceremony with Brahminical rites having been performed, when any of the rulers in the Tanjore branch ascended the *musnad*. It is unnecessary for the purpose of this case that we should make any pronouncement as to the right of Sivaji and his descendants to claim that they belong to the Kshatriya caste, though it is a matter of great moment to the direct descendants from Sivaji such as the Maharaja of Kolhapur, who is the fifteenth defendant, and to the fourteenth and twenty-fourth defendants, who represent the Satara and Jinti branches, that they should not be degraded by a judicial decision to which they are parties. Whether it is more correct to adopt the view of Mr. Justice TELANG in

his essay called "Gleanings from Mahratha chronicles" embodied in Mr. Justice RANADE's "Rise of the Mahratha Power" at page 288 where he says :

"Taking the whole evidence together, it looks like a case of a more or less deliberate manipulation of facts and religious rules, in aid of a foregone conclusion adopted for a purely political purpose,"

whether we believe the story given in J. Sarkar's "Shivaji," pages 240—246, that Sivaji underwent a public purification for having omitted to observe Kshatriya rites so long and that there was a meeting among the assembled Brahmins who asserted that there was no true Kshatriya in the Kali age when Gaga Bhat attempted to initiate Sivaji with Vedic mantrams and that he finally yielded to opposition and initiated him in a modified form of the life of the twice-born, or whether we should rather adopt the view of Mr. Sen in his recent book called *Siva Chhatrapati*, published while these appeals were awaiting a hearing, that the argument that there were many *Sudra* kings without any knowledge of Kshatriya rites, though urged for the space of a year and a half, had no effect on Gaga Bhat but that he was finally prevailed upon to crown Sivaji by the plea that he was kind to his subjects and maintained the true religion (pages 241—242), or whether the version given in Subasat's *Bakar*, page 114, that Gaga Bhat was satisfied by means of an emissary sent to Rajputana that Sivaji's ancestors came from Kshatriya families and that he was a *Suddha* (proper) Kshatriya is correct, it is unnecessary to express any opinion on this much vexed question whether Sivaji represented a fallen Kshatriya restored after penance or a good *Sudra* king elevated to Kshatriya rank by bribing the Brahmins, upon which historians have been at controversy, for two reasons—firstly because, assuming that Sivaji and his descendants are Kshatriyas, it does not follow that Ekoji, his half-brother,

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who did not go through the ceremonies of purification and coronation, as Sivaji did, and his descendants are anything more than Sudras, seeing that the two brothers separated before the date of Sivaji's coronation; and secondly because, if my finding is correct that Pratapa Singh was illegitimate owing to his mother not having been married to Tukkoji in any authorized form of marriage, the agnates in the Kolhapur, Satara and Jinti branches can have no claim to succeed to the property of the late Raja of Tanjore.

Now, turning to the evidence available in the Tanjore branch, and accepting the principle that the consciousness of a community is a good test of *Varna*, we may see if this branch's claim to Kshatriya origin has satisfied the test. Maloji was a Mahratta of the Bhonsle family; Ekoji's mother was a Mohitai. Mr. Bartle Frere, who was the Resident of Satara in 1848, in his narrative of

the early history of the Bhonsles of Satara,* says:

"The Bhonsles, like most of the old Mahratta families, had pretensions to a Rajput origin."

He adds:

"the Bhonsles of Deoor near Satara who are said originally to have come from Hingunburdee near Poona and from whom the Rajas of Nagpur are descended, are generally supposed to have been connected with the Satara House but the relationship has never been established."

There is no evidence that the Bhonsles had a Kshatriya origin beyond the temple inscription† which mentions Bhonsle, Mohitai, Nimbalkar, Ghantake and Jadav and other names familiar in the history of Shahji's parents among the 96 Sannavaguli branches descended from Rama, and the similarity of the names—Yadava, Rajput, Jadav (N.B.—Shahji's wife was the daughter of Jadava Rao—vide Kincaid, Vol. I, page 116) and between Bhonsle,

Bhosle, Sissode, and Bhosavat a village in Udaipur (vide Kincaid, page 113, footnote, and Sen's Siva Chhatrapati, Notes and Appendices, page 260, as to the three possible derivations of the word Bhonsle).

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Again the Mahratta family name of *Powar* has been attempted to be identified with *Puar*—vide Malcolm's Memoir of Central India, Vol. I, page 99, in his chapter on the Puars of Dhar and Vol. II, pages 125 and 126. Such conjectural evidence may satisfy the historian, the ethnologist, or the philologist, but will not do for a Court of law which looks for strict proof of the pedigree of an individual or the lineage of a particular family. An individual in England who laid claim to be descended from royalty would not advance his case far by merely showing that his mother's maiden name happened to be King. Mr. Ketkar in his History of Caste in India, Vol. I, at page 65, speaks of Yavanas or Greeks, which were mentioned by Manu as a warrior tribe, which became Sudras by not consulting the Brahmanas.

Kamakshi Bai made two very significant admissions during her lifetime. The first was when she brought her Bill in Equity for the recovery of the Tanjore estate and she said that her husband was a Mahratta of the Sudra caste and the fact was accepted by RAWLINSON, C.J., who observed in his judgment in *The Secretary of State in Council of India v. Kamachee Baye Sahaba*(1) that the Raja was "a Hindoo of the Soodra caste." Although the other widows who were parties to the suit may not have been interested in opposing Kamakshi Bai's statement of fact that the Raja was a Sudra, it is likely that the East India Company as defendant would have raised the defence that the Plaintiffs were *dwijas* if they had thought that the Bill could be defeated on

(1) (1859) 7 M.I.A., 478 at 405

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that ground. There is nothing to indicate that such an objection to Kamakshi Bai's Bill was ever thought of then. In those days pleadings were drawn up with much preciseness, and, in claiming the property of a deceased man, it may have been thought necessary that the widow should describe him very fully, name, age, caste, etc. Interrogatories were served on every point asserted in the plaint, as it was not a statutory rule in those days as it is now under Order VIII, rule 5, Civil Procedure Code, that every allegation of fact not specifically denied in the written statement was to be taken as admitted. The explanation now offered that Kamakshi Bai, being the sister's daughter of her husband, was in danger of having her marriage declared void if she claimed to be a twice born is not a convincing explanation. The natural tendency of human beings is to claim a higher caste or status rather than a lower one, so that the statement of Kamakshi Bai that Sivaji was a Sudra is all the more remarkable, if he was really a Kshatriya. It appears to be an honest statement of the truth. Then,

• Exhibit A-74. in reporting the adoption of Rajaram, Kamakshi Bai * stated

"although there are no mere formalities such as Datta Homam required to be performed for common classes under the prescribed rules of Hindu Law, yet, as from the days of the late Serfoji Maharaja, we do observe the same rules as are prescribed for higher classes."

This is a remarkable admission that, though they belonged to a family of Sudras, they had been aping Kshatriyas by performing the ceremonies prescribed for higher classes since the days of Serfoji. The motive for this incorrect statement, assuming it to be incorrect, is suggested to be that Kamakshi Bai wished to get over the objection of the other widows that Datta Homam had not been done for the adopted son at the death-bed of his adoptive father. Mr. Norton may have thought

that if the claim of the adopted son was put forward when Datta Homam had not been done and if he styled himself as a Kshatriya, the claim might fail. I think that this explanation is too far fetched.

Then, in a suit* to establish an adoption, the Civil Judge, Mr. DAVIDSON, recorded a judicial finding that the Tanjore Royal

family belonged to the Sudra caste "beyond all shadow of doubt." The parties were relations to the Tanjore royal family and the Court that tried the case had not the evidence before it which we have in the present case. The decision is relevant as an instance in which the caste of the family received judicial notice, though it is not binding on the present parties as *res judicata*.

In the Bombay Presidency a suit† was tried in which the parties were Nimbalkars and Soorves connected by marriage with the Tanjore branch. The Subordinate Judge found the parties to be Sudras: the Assistant Judge reversed his finding and found that they were Kshatriyas. The case came up in Second Appeal to the High Court of Bombay. The suit was in the end dismissed. The judgment in which it was found that the parties were Sudras has not been produced. The finding that Mahrattas were Kshatriyas was arrived at without any active contention. The plaintiff was not willing to succeed on a finding that he was a Sudra. As pieces of evidence these judgments are inconclusive.

The description of the relations of the Tanjore Raja's family of themselves as Kshatriyas, in sales, mortgages and other documents of title does not carry much weight. There seems to have been a division of opinion among the community; probably those who asserted that they were Sudras and those who claimed to be Kshatriyas

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† Exhibits A-170 and 171.

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each acted from personal motives in order to get some advantage for themselves. One of these instances is a suit * by a reversioner belonging to the Tiruvadamardur branch to recover property in which the plaintiff admitted that he did not belong to the Kshatriya caste. The judgment is useful in another connexion as containing a finding on the validity of the form of sword marriage, by which Radha Bai was united to Pratapa Singh.

As regards the inclusion of Bhonsle and other Mahratta family names, with which the Tanjore family was connected, among the 96 Sannavagulis mentioned in the inscription, it is conceded that these names are borne also by families who are admittedly Kunbis. Mr. Risley in his "People of India," pages 87 and 88, observes

"The highest class of Mahrattas is supposed to consist of ninety-six families, who profess to be of Rajput descent and to represent the Kshatriyas of the traditional system. But their claim to kinship with the Rajput is effectually refuted by the anthropometric data now published and by the survival among them of *Kuldevaks* or totems . . . A wealthy Kunbi, however, occasionally gains promotion to and marries into the higher grade and claims brevet rank as a Kshatriya. The fact seems to be that the ninety-six superior families represent Kunbis who came to the front during the decline of the Moghul Empire, won for themselves principedoms or estates, claimed the rank of landed gentry, and asserted their dignity by refusing their daughters to their less distinguished brethren."

In fact, the case of those who maintain that this family is a Kshatriya family has not been consistent throughout. They began by claiming that all Mahrattas were Kshatriyas. This was obviously untenable as it is notorious that there are Mahratta Brahmins and Mahratta Sudras. Then some witnesses said that all the Sannavagulis were Kshatriyas. This also failed because it is impossible to ascertain who the Sannavagulis

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are. There are among them Kunbis, who are admittedly Sudras with house names such as those borne by Mahrattas, who emulate Kshatriyas. Some belonging to this inferior class of Sannavagulis were found to be living in Tanjore. Lastly, some witnesses said that only Vajaratmas (or relations of the Raja) were Kshatriyas. But for this final position the rigidity of a caste is wanting and the evidence is insufficient. Russell in his "Tribes and Castes of the Central Provinces of India, Volume IV, page 200, says:

"In Satara the Kunbis have the same division into 96 clans as the Mahrattas have, and many of the same surnames."

He identifies the *Mahrattas* with *Mahars* from which he thinks the country came to be called Maharashtra—vide page 199—and the Rashtrakutas he conjectures to be Rathor Rajputs. In A.D. 600 a Chinese traveller called Hiuen Tsang found a Kshatriya king called Pulakesi reigning in Maharashtra—vide Kincaid, Vol. I, page 21. But this Pulakesi was a Chalukya who conquered the country from its native rulers, the Rashtrakutas. Mahrattas are not proved to be descendants of Chalukyas. It has been suggested that they were descendants of Rashtrakutas, but all Rashtrakutas have not been proved to have been Kshatriyas. The Chalukyas were in their turn conquered by the Yadavas, whose chief Billama was crowned at Devagiri. Devagiri is another name for Daulatabad, which is far remote from Deo near Poona which is said to be the home of the Bhonsles.

If we examine the claim of the Tanjore family to be Kshatriyas from the point of view of the ceremonial performances which they followed, their claim equally fails. The chief distinguishing mark of the twice born is the *upanayanam* or thread-wearing ceremony. There is evidence that some of the members of this family put

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on *poonul* or thread, but there is very little evidence that before doing so they went through the ceremony of *upanayanam*. 105th defence witness, a purohit from Tiruvadamarudur, was only able to mention two *upanayanam* ceremonies and he admitted that some of the Mahrattas have married without *upanayanam* being performed. He wished to have it believed that when marriages of the royal kinsmen were performed, they were accompanied with vedic rites, but that only puranic rites were observed when other Mahrattas were married. The Subordinate Judge has found that there is no uniformity of practice as regards the wearing of the *poonul* but that one thing is certain and that is that it was not worn as ordained. Again in the matter of *pindams* the Subordinate Judge has shown conclusively from the evidence that flour *pindams* were used for funerals in this family, and it appears from the evidence of the forty-sixth defence witness that *homam* was not done in this family at *shradhs*. There is no satisfactory evidence as to the *gayatri mantram* being recited. It appears from paragraph 21 of Mr. DAVIDSON'S

* Exhibit D-93. judgment * that Serfoji after his return from Benares when he was

over fifty years of age introduced the innovation of thread wearing into this family and that he compelled certain important persons, priests and others, to sign a statement such as the one signed by Balambat Bhat

† Exhibit B-147. Goswami † that he was a Kshatriya, and that he had the *homam* done and

vedic mantrams chanted. The omission to go through the ceremony of *upanayanam* cannot be explained by citing the instance of Rajputs who are not always careful to have it performed when their sons are between ten and twelve. It is not the lateness of the age when the ceremony is performed that is so striking

as the dearth of evidence that it is performed at all. Although Sivaji did penance and was allowed to undergo *upanayanam* when he was 47 years old, we do not hear of his brothers Sambaji or Ekoji performing it at any time. Nor is there any record of Sahu his grandson, who was a prisoner at Delhi, having gone through the ceremony. At Tanjore we do not hear of it before Serfoji's time.

Then there is proof that Sudra cooks were employed at the Tanjore palace. Two of the cooks, defence seventy-eighth witness who is a Kallar and defence eighty-second witness, a Brahmin, have proved this fact. It is true that there were Brahmin cooks also, but if the family was really a Kshatriya one, there would have been no need of Sudra cooks at all. One of the widows of the late Raja, Rani Ramakumaramba Bai Saheba, was examined as a witness in Original Suit No. 400 of 1907 in the Tanjore District Munsif's Court and she described herself then as a Mahratta Sudra. The deposition * was recorded on commission in 1908

by Vamana Rao who was the *Sirkels* of the Palace department of the Collector's office and it is in the handwriting of Vamana Rao who, according to defence 102nd witness, was the person who made the blue ink

entries in the pedigree†, which shows Pratapa Singh and Jaya Singh as sons of sword wives. As the description *sword wives* occurs in the original, there is no reason to suspect Vamana Rao's conduct. In describing the Rani as a Mahratta Sudra, he may have formed his own opinion that all the Tanjore Ranis were Sudras or he may have adopted the description given by the Rani herself. The ninety-fourth defence witness says that he was present at the time and that the deposition was read over to the Rani

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and that she signed it. He also adds in cross-examination that she was questioned about her husband's caste and that she mentioned it first as Mahratta and then as Mahratta Sudra. In the settlement deed * executed in 1907 both this Rani Ramakumaramba Bai and this witness before the Registration officer described themselves as Kshatriyas and the Rani is so described in the body of the document. Thus the probative effect of the description as to caste in the deposition is inconsiderable.

As regards the genealogy of this family, Tod in "Annals and Antiquities of Rajasthan," page 288, has given the genealogy of Sivaji. His ancestors are stated in the note to be Sambaji, Suttoji, Junkoji, Khailooji, Mahoolji, Oogursen, Deoraj, Bhoraji, Seoji, Duleepji, Sujunsi and Ajeysi. Ajeysi was a Rana of Mewar. According to Tod, Sujunsi was expelled from the country and became the founder of the Satara throne. Waring's History of the Mahrattas written in 1810 contains a statement at page 55 that

"Shajee, the father of Sevajee, was an illegitimate descendant from the Rana of Oodaipoor, a prince of the highest rank among the Hindus."

but he adds at page 57 that Jadoo Rao considered Shajee to be a wretched Kunbi. Kincaid in Volume I, page 112, says that Devrajji, one of the family of Udaipur, after a quarrel with the Rana of Udaipur, fled to the Deccan. His other name was Kakaji. Mr. Kincaid mentions another story that two brothers Khelkarnaji or Kheloji and Malkarnaji or Maloji came together from Udaipur to offer their services as free lances to the king of Ahmednugger, and that one of them died in battle and the other one was drowned. The latter left a son Babaji who purchased the patilki or headship of the village of Verul near Daulatabad and one of Babaji's

* Exhibit A-204.

sons was Maloji, the grandfather of Sivaji. These various versions do not agree with the pedigree prefixed to the lower Court's judgment nor with the inscription in the Tanjore temple. They are mutually destructive, the names differ and can only be reconciled on the hypothesis that some of them were aliases, and there is no proper explanation how a scion of a Rajput house came to found a dynasty so far south. On the whole it must be said that historically, genealogically, geographically, socially and ceremonially, the claim of this family to be classed as Kshatriyas has failed and the lower Court's finding on this point must be confirmed.

In *Ohuoturya Run Murdun Syn v. Sahub Purhulad Syn*(1), it has been established by the judgment of the Privy Council that Kshatriyas still exist in India. The theory put forward in the Sudra Kamalakaram* mentioned by Steele in his "Law and Customs of Hindu Caste" (1868), page 89, that Parasurama destroyed all the Kshatriyas and that they no longer exist, a theory said to have been started by a Brahmin conspiracy which Sir Thomas Strange in his Hindu Law, Vol. II, Appendix to Chapter IV, refers to, cannot be maintained in the face of the above decision: but in *Muthusami Mudaliar v. Masilamani*(2), SANKARAN NAYAR, J., observed that there was a presumption that all castes who were not proved to be twice born and who were not admitted to be untouchables were Sudras. This judgment, which treats of the evolution of Hindu castes by occupation, migration and intermarriage, considers the criteria according to which new castes which have been evolved among the descendants of Hindus are to be considered as having retained the Hindu religion, and observes that the

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(1) (1857) 7 M.I.A., 18 at 46.

(2) (1910) I.L.R., 33 Mad., 342.

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formation of new castes is a process which is constantly going on, has received the approval of the Privy Council in *Ma Yait v. Maung Chit Maung*(1), and it has been followed in *Soundararajan v. Arunachalam Chetty*(2) by SADASIVA AYYAR, J. The onus being on those who assert that they are Kshatriyas to establish their claim, when they fail, the only course open to the Court is to treat them as Sudras.

The next question I shall deal with is the adoption of the father of defendants Nos. 1 and 2 and its validity. The adoption of Rajaram Ingle by Kamakshi Bai on 1st July 1863 was reported to the Government of Madras in a letter * dated July 2nd addressed to Sir William Thomas Denison, Governor of Fort Saint George. The factum of adoption is not now denied. Objections are raised to its validity on behalf of the fifteenth defendant on three grounds: (1) that the Raja did not authorize the adoption, (2) that it was made from an improper motive and (3) that the widow lost her power to adopt owing to the escheat of the property to Government. On behalf of defendants Nos. 4 to 11 further objections have been advanced:

(1) that the Tanjore family is governed by Mitakshara Law which they adopted after they settled in Tanjore;

(2) that the existence of inferior sons is a bar to the adoption; and

(3) that the adopted son's rights, if any, are barred by limitation.

It is settled on the authority of the Privy Council in *Yadao v. Namdeo*(3), that a widow in Bombay Presidency may adopt a son even without the authority of her

(1) (1922) I.L.R., 49 Calo., 810 at 821 (P.O.)
(2) (1916) I.L.R., 89 Mad., 186 at 188. (3) (1923) I.L.R., 49 Calo., 1.

husband or kinsmen provided that her husband has not prohibited it and provided that she does the act from spiritual motives. Again it is settled by another Privy Council decision in *Balwant Rao v. Baji Rao*(1), that the personal law of a migrating family will govern them in their new domicile if it was the personal law at the time of migration and provided that they have not renounced the law of the province from which they have migrated. Their Lordships approved of the decision in *Vasudevan v. The Secretary of State for India*(2), to the same effect. But it is contended in the present case that at the time of the migration of this family to Tanjore about 1674 the law that a widow can adopt without the authority of her husband was not the law as expounded in Bombay. It is also contended that Kamakshi Bai acted from the bad motive of spiting the co-widows and depriving them of their shares. As to the first contention, the *Mayukha* was written by Nilakanta who was born about 1600 A.D. and lived in the first part of the 17th century. His work came into use by about 1700. In 1866 it was decided by the Bombay High Court in *Bayabai v. Bala Venkatesh Ramakant*(3), that a Hindu widow in the Mahratta country could not adopt if her husband in his lifetime had forbidden it. This case has come in for much criticism by the Judicial Committee in *Yadao v. Namdeo*(4), and the judgment of WESTROPP, J., has been critically examined. There was a later case decided in 1868 but reported earlier in *Rakhmabai v. Radhabai*(5). In this the learned Judges accept the opinion of certain Pundits and Shastris to the effect that a woman can adopt in Bombay without the injunction of her husband; and in summing up at

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(1) (1921) I.L.R., 48 Calo., 80 (P.O.). (2) (1888) I.L.R., 11 Mad., 157 at 162.
(3) (1866) 7 Bom. H.C.R., App., 1. (4) (1922) I.L.R., 49 Calo., 1.
(5) (1868) 5 Bom. H.C.R., App. Civ., 181.

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page 191 they do not make the consent of the kindred a *sine qua non*. At page 187, line 14, the learned Judges say that a widow ought to obtain the consent of the caste (gnatis) and that this corresponds with the custom of the country. In *Yadao v. Namdeo*(1), the Privy Council point out that this decision was based not merely on the custom of the country but also on the authorities prevailing in the Bombay Presidency. *Ramji v. Ghamau*(2) is only an authority for the proposition that a widow of a co-parcener has no power to adopt in an undivided family without the authority of her husband or the consent of the other undivided co-parceners. *Yadao v. Namdeo*(1), which was decided in 1921, has carried the widow's power to adopt in Bombay farther than it was carried by the same learned tribunal in the *Collector of Madura v. Moottoo Ramalinga Sathupathy*(3), where it was only decided that the adoption with the assent of the kindred (gnati) was the law of the Mayukha. The law of adoption as it prevails in Bombay is not, however, dependent only on the authority of the Mayukha. There is also the Samskara Kaustubha and the Nirnaya Sindu which came into use about 1611. In *Collector of Madura v. Moottoo Ramalinga Sathupathy*(3), the Mayukha and the Kaustubha are referred to as peculiarly Mahratta treatises, and a Full Bench of the Bombay High Court have also referred to the Kaustubha in *Bhagirthibai v. Kahnujirav*(4). In Second Appeal

* Exhibit A-170.

No. 404 of 1885,* the Bombay High Court observed that, though adoption in the Bombay Presidency is in a great measure governed by the Vyavahara Mayukha, yet the Kaustubha has great authority on this particular subject. In *Rakhmabai*

v. *Radhabai*(1), the Vyavahara Kaustubha is referred to for the purpose of understanding the Mayukha. The Nirnaya Sindu * is also an authority to be considered, and also Kamalakara Bhatta's Dharma Sindhu.†

* Exhibit A-469.
† Exhibit A-471.

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The established law of Bombay as expounded by the Privy Council on the strength of all these authorities is that in that Presidency a widow can adopt even without being authorized by her husband or his kinsmen provided that he has not prohibited it. These law books only reproduce the pre-existing custom of the country. They do not enact a new law. It has not been shown that the law was in any way different before the time when this family migrated to Tanjore than it was held to be in later decisions of the Bombay High Court and the Privy Council. The Vyavahara Mayukha did not introduce a new law of its own but only declared the law prevailing even before it was written.

As to the next objection, there is no doubt that Kamakshi Bai acted in opposition to the other widows in the matter of the adoption and in some other instances, but the objection that she was actuated by improper motives may be answered in the manner that a similar objection was answered by a Full Bench in *Ramchandra v. Mulji Nanabhai*(2), viz., by the observation that if the act can be referred to proper religious motives, the Court ought to presume that she was influenced by religious motives and not by mere caprice. There is no doubt that the Raja had expressed a desire for the continuance of his lineage.

As for the third objection, it has been laid down by the Privy Council in *Pratapsingh Shivosingh v. Agarsingji Rajasangji*(3) that a widow may exercise the power of

(1) (1922) I.L.R., 49 Cal., 1 at 20. (2) (1882) I.L.R., 6 Bom., 498 (F.B.).

(3) (1868) 12 M.I.A., 397 at 432.

(4) (1887) I.L.R., 11 Bom., 285 at 293 (F.B.).

(1) (1868) 5 Bom. H.C.R., App. Civ., 181 at 186.
(2) (1898) I.L.R., 23 Bom., 558. (3) (1910) I.L.R., 42 Bom., 778 (P.C.).

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adoption so long as it is not extinguished or exhausted even though the property is not vested in her unless there is some time limit fixed by the power which is given to her to adopt. So even if there was an escheat, she may adopt for spiritual purposes; but the Privy Council has stated in *The Secretary of State in Council of India v. Kamachee Boye Sahaba*(1) that there was no escheat. The annexation of the Raja's property was not on the date of the Raja's death and there was nothing to prevent the Government, in dealing with the property as absolute owners by sovereign right, from either making an original grant or restoring the property to those entitled to it by right of succession. If the widow had adopted after the Raja died and before the East India Company intervened, the adoption would not have been invalidated by the subsequent act of usurpation. The act of usurpation did not cause a legal title to vest in the Government. This was made clear in the Privy Council decision. The suit was dismissed simply because the Municipal Courts could not question the act of the State. The Government when they restored the property put a restriction on the power of the widows to divest the estate, and the widows and the daughter were designated as persons who should take the estate first. Government had power to impose any kind of conditions as they pleased. They could have imposed a condition that the widow should not adopt, but they did not do so. The effect of the grant was only to postpone the rights of all heirs other than the widows and the daughter. The cases which have been cited to us *Mussumat Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhry*(2), *Padmakumari Debi Chowdhry v. Court of Wards*(3), *Thayammal v. Venkatarama*(4), *Tarachurn Chatterji v.*

(1) (1859) 7 M.I.A., 476.

(3) (1882) I.L.R., 8 Cal., 302.

(2) (1865) 10 M.I.A., 279.

(4) (1887) I.L.R., 10 Mad., 206.

Sureshchunder Mukerji(1), *Krishnarav Trimbak Hasabnis v. Shankarrav Vinayak Hasabnis*(2), *Ramkrishna v. Shamrao*(3), *Vasudeo v. Ramachandra*(4), *Annammah v. Mabbu Bali Reddy*(5), *Datto Govind v. Pandurang Vinayak*(6), *Dattatraya Bhimrao v. Gangabai*(7), *Yeknath Narayan v. Laxmibai*(8) and *Shri Dharnidhar v. Chinto*(9) are all cases in which the widow's power of adopting came to an end owing to the estate vesting in some other full owner. See also *Tripuramba v. Venkataratnam*(10), which distinguishes *Madana Mohana Deo v. Purushotthama Deo*(11). The legal title never vested in Government after the annexation. Though previously the ownership was vested in a person who was not a subject of the Government, by the declaration of Government he became a subject with retrospective effect. The allegation that the family adopted the Mitakshara Law after they settled in Tanjore has not

* Exhibits A-456, D-114, D-159, A-300, A-34, A-35, A-46, A-100, A-115, A-121, B-37 and B-47.

† Exhibits A-217 and 218.

been substantiated. In several legal proceedings* they quoted the Mayukha law as being that applicable to the family. In 1904, Jijamba Bai who was the senior widow after the death of the adopted son brought a suit† to establish her right to the properties and it was then held that she and the remaining widows carried their personal Mayukha law with them. In *Rama Bai Ammani v. Rajah Sahib*(12) this Court noted the circumstance that the Mayukha law was that which the Subordinate Judge had found to be the personal law of this family which migrated from Poona. Although the family appear to

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- (1) (1890) I.L.R., 17 Cal., 122.
(3) (1902) I.L.R., 26 Bom., 526.
(5) (1875) 8 M.H.O.B., 108.
(7) (1922) I.L.R., 46 Bom., 541.
(9) (1896) I.L.R., 20 Bom., 250.
(11) (1918) I.L.R., 41 Mad. 855 (P.C.).

- (2) (1898) I.L.R., 17 Bom., 164.
(4) (1898) I.L.R., 22 Bom., 551.
(6) (1908) I.L.R., 32 Bom., 492.
(8) (1923) I.L.R., 47 Bom., 37.
(10) (1923) I.L.R., 46 Mad., 423.
(12) (1920) 12 L.W., 171.

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have employed Telugu purohits at funerals and to have adopted some practices of South India, and they appear to have worshipped Mari Amman, and other South Indian deities, they preserved many of their own habits, like *Sunmuk*, which are peculiar to the Mahrattas. There is evidence that the Telugu purohit was acting under the supervision of the western purohit named Bhat Goswami (see the evidence of D.W. 91). The mere employment of local priests under the supervision of family priests is not sufficient to show that the local law is applicable to a migrating family; *Huro Pershad Roy Chowdhry v. Shibo Shunkurao Chowdhry*(1) and *Murle Dos v. Manicka Chetti*(2). Even if it be held that this family was governed by the Mitakshara Law I should be prepared to find that the authority given by the Raja's mother, Avu Saheba, amounted to the consent of a kinsman which the Mitakshara Law requires; vide the *Collector of Madura v. Moottoo Ramalinga Sathupathy*(3).

The Subordinate Judge has rightly held that the adoption in the present case was not barred by the existence of the children of sword wives. The right of the sword wives' sons to take the shares of legitimate sons in the property and their power to invalidate the adoption stand on the same footing. If sword marriage is a valid form of marriage for one purpose, it is good for the other purpose also. But not so, if they are only entitled to take the shares of illegitimate sons of a Sudra. The existence of illegitimate sons is not a bar to the spiritual benefit which is attained by the adoption of a legal son. There is no decided case which may serve as an authority for the view that an adoption is illegal when the adoptive father has sons by a sword wife.

(1) (1870) 18 W.R., 47.

(2) (1897) 5 M.L.T., 181.
(3) (1868) 12 M.I.A., 297 at 444.

The last objection is that of limitation. It is argued that by Act IX of 1871, which provided a 12 years' period of limitation to establish an adoption, the adopted son's rights became barred in 1875 and that it was obligatory to establish his rights within the period prescribed by article 129 of that Act, which gives 12 years from the date of the adoption after the death of the adoptive father. If the right became barred under the Act of 1871, it could not be revived by the later Act of 1877 which split article 129 "to establish or set aside an adoption" into two articles, 118 "to obtain a declaration that an adoption is invalid when the alleged adoption becomes known to the plaintiff," and 119 "to obtain a declaration when the rights are interfered with." In all the cases cited to us, viz., *Jagadamba Chaothrani v. Dakkhina Mohun Roy Chaothrani*(1), *Mohesh Narain Munshi v. Taruck Nath Moitra*(2), *Harnabh Pershad v. Mandil Dass*(3), *Ratnamasari v. Akilandammal*(4), *Venkoba Row v. Nataraja Chettiar*(5) and *Somasundaram Chettiar v. Vaithilinga Mudaliar*(6) the adoption was followed by possession. The father of Defendants 1 and 2 might have brought a suit for a bare declaration under section 15 of Act VIII of 1859 which was in force till 1871; but it was not obligatory for him to do so. It was a contingency whether his right would materialise or not. If the daughter had survived all the widows, the adopted son would not have succeeded in preference to her. The case of *Bright v. Tyndall*(7) may be referred to. A distinction is there drawn between an interest that has arisen and is represented and an interest that has not arisen and may never arise.

(1) (1886) I.L.R., 13 Cal., 308 (P.C.) (2) (1893) I.L.R., 20 Cal., 487 (P.C.)
(3) (1900) I.L.R., 27 Cal., 379. (4) (1903) I.L.R., 28 Mad., 291.
(5) (1914) M.W.N., 903. (6) (1917) I.L.R., 40 Mad., 848.
(7) (1876) 4 Ch. D. 189 at 190.

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In an interpleader suit like the present not only the adopted son but also other claimants are in the position of plaintiffs and a suit to establish the adoption by the former is not more barred under article 129 of Act IX of 1871 than the suit of the latter to declare it invalid. The possession of the Receiver was not adverse to the adopted son nor to any of the other claimants and so time did not begin to run from the date of the adoption. So far as possession was concerned, the adopted son by bringing a suit to establish his adoption during the lifetime of the widows could not have been given the further relief of possession against the Receiver, for the grant had secured the enjoyment of the widows till the death of the last. As for the other parties the cause of action to set aside the adoption will only arise when possession is taken under colour of adoption—vide *Jagadamba Chaudhrani v. Dakhina Mohun Roy Chaudhri* (1) and *Tirbhuwan Bahadur Singh v. Rameshar Bakhsh Singh* (2); and the adopted son and his heirs have never obtained possession except for a brief period between Kamakshi Bai's transfer and the appointment of a Receiver in execution of the decree in *Jijoyiamba Bai Saiba v. Kamakshi Bai Saiba* (3). The adopted son was bound by the decision in that case, to which he was a party, to the effect that he had no present right as lineal heir of the Raja to divest the widows. He could not have got a bare declaration that his title as adopted son was valid, as the Court will not try questions of title as to future interests when neither claimant has a right to present possession, especially questions of title which may never arise—see *Kathama Natchiar v. Dorasinga Tevar* (4). The obligation of suing only arises when the

(1) (1886) I.L.R., 18 Cal., 308 at 319.
(2) (1906) I.L.R., 28 All., 727 at 739. (3) (1868) 3 M.H.C.R., 424.
(4) (1875) 15 B.L.R., 82 at 109; s.c. 2 I.A., 169.

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possession is with an adverse claimant. As the Receiver was in possession, the adopted son could wait till the last female died and sue for possession of the property as his heirs have done. See *Muhammad Umar Khan v. Muhammad Niaz-ud-Din Khan* (1). In 1881, the adopted son presented a petition for a succession certificate which was dismissed by Mr. PARKER (afterwards Mr. Justice PARKER) as there was no valid authority to adopt and no valid taking in adoption.* The Dis-

* Exhibit B-37. District Judge's decision was confirmed by the High Court in *Surfoji v. Kamakshiamba* (2) on the ground that no inquiry need be held in miscellaneous petitions into intricate questions of law and fact. As there was no final adjudication on the validity of the adoption, that decision will not estop defendants Nos. 1 and 2 from putting forward their claim in the present case.

In the abovementioned aspect of the widow's power to adopt of her own free will, it becomes unnecessary to find as a fact whether the late Raja authorized the adoption of Rajaram; but, if a finding is necessary on this point, I should hold on the evidence that nothing more than a designation of this boy as a suitable boy to be adopted, if an adoption were to be made, took place, and that no express authority was given by the Raja on his deathbed to his widows to adopt. His death was sudden. There are conflicting versions as to whether he actually adopted Rajaram or whether he authorized his adoption or whether he merely wished him to perform his funeral ceremonies. If he had actually adopted the boy, there would have been no occasion for the senior widow to go through the ceremony a second time eight years afterwards. It is not likely that he formed a definite

(1) (1912) 39 Cal., 418 at 432. (2) (1884) I.L.R., 7 Mad., 452.

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decision to adopt so long as he had hopes of a son being born to one of his lawfully wedded wives. In 1846, the

* Exhibit A-11.

Government issued a notification * to say that adoptions would be recognized only if they were reported to the Collector within six months before the death of the parties making them. The Raja married 17 wives on one day in 1852. Therefore the idea of adopting is not likely to have originated from the Government notification six years previously. The Raja must have intended to see if he could not beget a son by one of these wives before he had recourse to the remedy of the heirless, viz., adoption.

† Exhibit A-34.

In the petition † prepared for twelve widows and the mother of the Raja by Mr. Norton for presentation to the House of Lords in 1861, it is alleged that the Raja was "cut off by death before he could either himself perform the ceremony of adoption or give express authority to widows to adopt." There is a strange contradiction between this statement and the state-

‡ Exhibit A-184.

ment in Kamakshi Bai's memorial ‡ dated 11th October 1865, that the Raja "closed his eyes with the satisfaction of having after the first alarm of fainting, expressly authorized his surrounding wives, his old mother M. Avu Saheba, and other relatives on the subject of adopting the very boy he had selected." Again the

§ Exhibit A-286.

statement in Mr. Norton's journal § under date August 24th, 1856, to the effect that the mother of the Raja and Kamakshi Bai's brother Soorve Rao and another, "one and all declared that the Raja took the boy from his father on his deathbed and empowered his widows to perform the ceremonies" may be contrasted with the assertion of the Resident, Mr.

|| Exhibit A-298.

Cherry, in his letter || to Mr. Norton that the widows "one and all

asserted" that the adoption took place during the Raja's lifetime. In a letter * to Mr. Norton,

* Exhibit A-298.

Avu Saheba referred to the sanction that Bai Sahebas had obtained from the Maharaja and the recognition of the adoption by the Commissioner who allowed him to perform the obsequies of the Raja. It is not denied that he did in fact perform the obsequies

† Exhibit A-59.
Exhibit A-205.
Exhibit A-207.
Exhibit A-229.

of the Raja and those of the Raja's widows. In several documents † prepared for legal purposes, there is an unaccountable omission to mention the fact that the Raja had expressly authorized Kamakshi Bai to adopt when a mention of that fact would have been most material to the subject of those documents. The nearest approach to mention of an express authorization is in the last of the documents, Jijamba Bai's will, executed 48 years after the adoption

‡ Exhibit A-7.

took place. The statement ‡ of the maid servant that she overheard the Raja in his dying words authorize an adoption of Rajaram to be made is incredible. The truth came out in the course of her examination when she admitted that the Raja had an affection for Rajaram because he was a fair and intelligent child and took him with him when he went in processions and arranged for his education. On such materials, especially the statement of the widows in their petition to the House of Lords, the only conclusion that I can come to is that there was no express authority to adopt.

The lower Court has found that the fourteenth defendant has not proved his descent from a common ancestor, Shahji. We have no firsthand information in this age to arrive at a conclusion on this much disputed question of the paternity of Ramraja. The story is that in 1747 or 1748, Sahu, the grandson of Sivaji, was troubled about.

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the succession to the throne of Satara, his only son having died. His wife Sakwar Bai, who afterwards committed *sati*, wanted to adopt a son of Raghuji Bhonsle from Nagpur. Another proposal was to adopt Sambu who belonged to the Kolhapur branch. Tara Bai, the wife of Rajaram, brought in her grandson Ramraja with a wonderful tale that this boy had been posthumously born to her son Sivaji the Second by Bavani Bai during her captivity in the camp of Sahu and that as he was of the elder branch of the family and Sambu would have been jealous of his existence, he was hidden and after a mock funeral and a report that he was dead, he was secretly conveyed from Panhala to Bavade where he was kept with a Rajput woman and a Brahmin named Bhagavantrao and afterwards hidden in the Konkan jungles and taken from there to Pangoon to the care of Bavani's sister. Now of the historians, Elphinstone changed his opinion whether Ramraja was an imposter or not.* Kincaid does not

* Cf. Exhibit F-39 and the foot-note to p. 728 of 5th edition of Elphinstone's History of India.

refer to Tara Bai's taunting Ramraja as baseborn, mentioned by Duff at page 48, Volume II. He says at page 314, Volume II, that the old Queen grew very angry and let her grandson go without further conversation. Grant Duff in his History of the Mahrattas takes a different view from Elphinstone. See Volume II, page 39. To sum up. Grant Duff, Frere†, Kincaid and the Kolhapur and Satara Gazetteers‡ are in favour of Ramraja being the genuine son of Sivaji and Bavani Bai. If Tara Bai and Sahu, were both satisfied as to Ramraja's parentage, I do not see any reason why we should question it in this case. Tara Bai and Sahu had no motive to put a stranger or an upstart on the throne of the Maharashtra. Government have recognized

† Exhibit F-39.
‡ Exhibits F-5, p. 288
—291 and F-6, p. 229.

the claim and have given a pension to the present representative of the line. Raghuji Bhonsle, whose son was to be adopted, was satisfied as to Ramraja's parentage (cf. Duff, Volume II, page 39; Kincaid, Volume II, page 308). He was also eventually acknowledged by the Maharattas as the successor of Sahu. We are not told by historians what were the proofs which satisfied Tara Bai of her grandson's identity. It may have been Bhagavantrao's oath on

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holy water* or some mark of identification which she discovered on Ramraja's body. But we do know that

* Kincaid, Vol. II, p. 299.

she did acknowledge his parentage at first and later only in anger taunted him with his want of spirit which was unworthy of his noble birth. The Subordinate Judge has acted merely on suspicion arising out of Tara Bai's equivocal conduct and on Mr. Elphinstone's change of mind and on Frere's†

† Exhibit F-39, p. 112.

and Grant Duff's description of Sambhaji as the last of the lineal descendants of Sivaji, a statement true enough so far as Kolhapur dynasty was concerned, as Sambhaji's widow adopted a remote collateral named Sivaji, son of Shaji Bhonsle, Patel of Kanwat—vide page 337 of Volume II of Grant Duff. Lastly, the Subordinate Judge was influenced by a mistake as to the date of Sivaji's death. He thinks that Sivaji Raja died in 1711 and that the posthumous son must have been born a few months afterwards, but that he was not heard of till 1749. It was discovered by Sardesai that Sivaji died in 1723.

Mr. Kincaid, I.C.S., has accepted this fact‡. Grant Duff was mistaken in supposing that Sivaji died in 1713.

‡ Vol. II, p. 151 foot-note.

In 1750 Ramraja must have been 27 and not 38. Sivaji's wife, Bavani Bai, was imprisoned with him and there is nothing impossible in the fact of a posthumous

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son being born. There is no reason why we should disinherit the present representative on the strength of certain obscure references in contemporary documents to some person unknown being an imposter or because

* Exhibits G-86 to G-89.

of the ironical words of an angry old woman. The documents * produced are not only unsigned and unauthenticated but their meaning is far from clear. It is unnecessary to find whether Ramraja was adopted by Sahu. The genealogical tree in the Kolhapur Gazetteer shows him as adopted by Sahu and as a son of Sivaji,

† Exhibits F-38, F-84, F-5, and F-39.

and several documents † speak of him as adopted. Even if he was not adopted, he was the nearest male relation of Sahu and must be taken to have legally succeeded him.

The next question is what shares the children of the sword wives take. All the parties are agreed that they take *per stirpes*. The doctrine of representation applies to the illegitimate sons as well as to the legitimate sons. See *Gopalasami Chetti v. Arunachellam Chetti*(1) and *Ramalinga Muppan v. Pavada Goundan*(2) According to the latest Privy Council decision in *Kamulammal v. Visvanathaswami Naicker*(3), an illegitimate son of a Sudra takes half of what he would have taken had he been legitimate. As the Raja left six illegitimate sons and one son has been since adopted, the estate must be divided into seven shares. The sword wives' sons will get three sevenths and the adopted son will get four sevenths of the whole. In *Kamulammal v. Visvanathaswami Naicker*(3) there was a widow in existence who took along with the illegitimate sons. At the date of the

(1) (1904) I.L.R., 27 Mad. 32.

(2) (1902) I.L.R., 25 Mad., 519.
(3) (1923) I.L.R., 46 Mad., 167 (P.C.).

present suit there was no widow alive, and therefore there is no difficulty in making the apportionment.

In paragraph 2117 of the lower Court's judgment, the Subordinate Judge states that the seventeenth defendant is the nearest bandhu, because all the other bandhus are at least one degree more remote. This is incorrect. The seventeenth defendant is the sister's grandson. The third defendant, being a daughter's grandson, is nearer to the propositus, the last Raja Sivaji; and the authorities, Mayne, Trevelyan, Ghose and Sarvadhikari are all agreed upon this. They put the daughter's son's son at No. 2 before the sister's grandson at No. 10, giving the *descendants* preference over *ascendants*.

The Subordinate Judge has found the adoption of Sambu Singh by Sakharam Saheb who married the Princess Muktamba Bai and also the adoption of the third defendant by Sambu Singh to be proved. The adoption of Sambu Singh by Sakharam is not now seriously challenged. But the adoption of the third defendant by Sambu Singh is attacked on the ground that Sambu Singh was not in a state of mind capable of making an adoption at the time when it took place.

• Exhibit B-113
Exhibit B-114
Exhibit B-115
Exhibit B-22 (a).

He died at 5 a.m., on 4th March 1891 of fever.* The adoption is alleged to have taken place in haste that night between 12 and 3 in the morning. The Subordinate Judge has found in favour of the adoption on the strength of the evidence of the fifty-fourth witness. He says that it is rather difficult to refuse credence to such a witness. The other witnesses were more or less interested and contradict each other, but fifty-fourth witness is well-to-do and has been credited on that account, as if wealth were a guarantee of veracity. The patient was suffering from *janni* which has been translated in the deposition as *coma*. The dictionary meaning of the word is "affection.

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of the brain, convulsions, apoplexy, paralysis, delirium." The same word is translated in the previous deposition taken on commission as "*delirium*." In his judgment the Judge has translated it as "failure of pulse," for which meaning there is no authority. The fifty-fourth witness'

* Exhibit C-71.

previous deposition * in which he says that whenever the patient had consciousness he was able to speak, indicates that there were times when the patient was unconscious. The statement that Sakham and Veeraraghava Ayyangar consulted with each other as to which boy might be adopted suggests that the dying man was not consulted as he was too far gone to have a voice in the matter and that the whole adoption was the doing of Sakham. Veeraraghava Ayyangar demanded Rs. 25,000 for his part in the transaction (vide evidence of D.W. 61) and he attested Sakham Sahib's will.†

† Exhibit A-451.

The adoptive mother, Jamna Bai, was alive at the time of the suit, but was not examined. Sakham made a will in 1895 leaving his property to Sethuram, a younger brother of Sambu Singh's widow, and directing him to perform his funerals. His funerals were actually performed by Jamna Bai, his daughter-in-law (vide statement of D.W. 52). There was a suit against the widow of Sambu Singh and the legatee under Sakham's will to establish the adoption (O.S. No. 36 of 1895 on the file of the Tanjore

† Exhibit B-94.

Sub-Court) and the matter was compromised.‡ There was another suit (O.S. No. 41 of 1903) brought by Sakham's reversioner contesting the will and the adoption in which

* § Exhibit B-47.

the adoption was found to be true but the judgment § is not *res judicata* in the present suit among different claimants. Again

in a suit upon a mortgage (O.S. No. 8 of 1910) * the adoption was again put in issue and found to be true but this

* Exhibit B-27.

judgment also for the same reason will not operate to make the matter *res judicata*. The mortgagor only wanted a proper discharge and for that purpose put Plaintiff to proof of the adoption. The 54th witness' statement that the patient was delirious and had stertorous breathing and that at 6 p.m. he knew that he would not recover and his condition was hopeless makes it extremely doubtful if Sambu Singh was conscious when the adoption was performed. Considering this witness's dependence on Sakham, who was interested in supporting the alleged adoption, and his contradictory statements as to whether the other doctor Ramaswami Nayudu gave medicine to the patient and his description of the illness, which was accompanied by delirium, stertorous breathing and coldness of the extremities, it is not difficult to conclude that the dying man was, after 6 p.m., not in a state of mind capable of taking any initiative in the matter or of understanding the nature of the act of adoption attributed to him. When he says in his statement at the trial that Sambu Singh had no delirium nor unconsciousness nor lapses of memory, I think that the Court should decline to believe his statement. One of the witnesses who was present deposed that he (Sambu) was three-fourths in his senses and that life was not extinct.† It is

† Exhibit A-2.

evident that the patient was *in extremis*, and when we know that he was delirious and not in full possession of his faculties, the onus lies on those who propound the adoption of proving that he was in a fit state of mind to perform the act of taking the child in adoption with a proper consciousness of the nature of the act that he was performing (vide *Tayammaul*

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v. *Sashachalla Naicker*(1). The conduct of Sakharam in contemplating the adoption of a son to himself in 1895 as shown by his letter to the Collector and the Collector's reply * betrays a consciousness on his part that the adoption of March 4th, 1891, was not a good adoption. After the Collector reminded him of his telegram † he executed a will in favour of another boy. As the daughter's grandson can only take as a bandhu after the agnates, the question of the third defendant's adoption has now only an academic interest. If it is necessary to record a finding on the point, I should reverse the finding of the Subordinate Judge and find that the third defendant's adoption is not proved. If there was no evidence available beyond the fact that he was recognized as an adopted son, I should be prepared to accept the adoption as proved but when the adoption is challenged by the other parties and there is an attempt to prove by direct evidence how and when the adoption was made, the onus being on him, and he fails to prove the fact, he must abide by the consequences.

The last question relates to the claim of the 24th defendant, whom the lower Court has found to be nearer than the 15th defendant in propinquity to the deceased. This defendant claims to be descended from Sambhaji the elder brother of Sivaji who was killed at Kanakgiri (vide Kincaid, Vol. I, p. 147 and F-39). If the genealogy † given in Rama Bai's written statement is correct, there can be no doubt about the claims of the 24th defendant, but this depends on the question whether one Umaji shown as son of Sambhaji married ~~Maku~~ Bai and had a son called Persoji, and whether this ~~Maku~~ Bai is

* Exhibit B-142.

† Exhibit B-113.

the same as Saku Bai mentioned in the Tanjore inscription, Exhibit B-140. The letter "S" (स) in Sanskrit or Devanagari characters is the same as "M" (म) with a tail and it is possible that an error was made in transcribing the rough mural inscription. The manuscript (Exhibit B-141) has Maku Bai. If Maku Bai mentioned

* Exhibits N-1 to N-6.

in the Exhibits* produced by this defendant is the same person as Maku Bai or Saku Bai of the inscription, the pedigree may be accepted. The inscription shows that Umaji and Saku Bai had a son named Persoji (paragraph 2122 of the lower Court's judgment). In the Sanad, dated 1709† Persoji is mentioned as

† Exhibit N-3.

having requested the Raja to exempt a new market place from taxes. If this Persoji is the son of Maku Bai to whom the grant Exhibit N-1 was given, and the temple inscription shows that Umaji had a son named Persoji by his wife Maku Bai, the correctness of the pedigree is further proved. Doubts have been principally caused

‡ Exhibit N-14.

by the fact that in Rama Bai's genealogical tree‡ the grandfather of Maloji is shown as Vyankaji, not Persoji as in the inscription, and by certain branches being shown as extinct or issueless when we know that such is not the case, and by the statement of Rama Bai, widow of

§ Exhibit -16.

Hanumanta Rao, to the Inam Commissioner in 1855§ that she had no documents to prove the correctness of her statement that the original sanad was granted to Maloji, an ancestor removed by eight generations from the then holders, and her husband's statement

|| Exhibit N-19.

to the same effect in 1831.|| The title ~~Raja~~ ~~Shah~~ affixed to the inamdar's names in N series indicates that the claim of this family to a royal

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origin is not a novel one. In the absence of any other claimants to be descended directly from Sambhaji, I think we should not act on an unverified statement in the genealogy in Hickey's book * opposite to page 82 that Sambhaji died without issue, but we should accept the claim of the present 24th defendant to be a representative of Sambhaji's branch. Some links in the chain of this defendant's ancestry are very weak but for the purpose of the present case his title to be descended from Sambhaji, elder brother of Sivaji the Great, has only an academic interest, seeing that so long as the findings in favour of the adopted and illegitimate sons hold good, the distant agnates such as 14th, 15th and 24th defendants can take no share of the property. Under these circumstances there is no sufficient reason made out for reversing the lower Court's decision on the first part of the 72nd issue.

The net result of these appeals will be that the lower Court's decree will be modified by directing that the suit properties be divided into 7 instead of 8 shares, of which defendants Nos. 1 and 2 will take 4 shares and defendants Nos. 4 to 11 will take the remaining three shares *per stirpes*, and by confirming the decree of the lower Court in other respects, dismissing the Appeals Nos. 199, 200, 201 and 248 and modifying the decree in consequence of Appeals Nos. 333 and 334. Costs of the appellants in all the appeals to come out of the estate, as was ordered in the lower Court, seeing that this is an interpleader suit and the contentions of the appellants have been reasonable and fairly argued, and they adopted each other's arguments so far as they suited their particular cases. The memoranda of objections, except those of second

defendant, which follow the result of Appeals Nos. 333 and 334, are dismissed.

We are much indebted to all the practitioners, counsel, and vakils, who have appeared in these appeals for the infinite pains they have taken in scrutinizing and analysing the masses of evidence on the record and the keen legal acumen and rare learning they have displayed in presenting the various questions of law that have had to be decided and in dealing with the interesting historical records of this famous family. I am fully conscious that much more might be said upon some of the questions at issue, especially that of the caste of the parties, but I have endeavoured to avoid prolixity and to make my judgment as succinct as possible, on the principle that if there are sound reasons for deciding a particular point in a particular way, those reasons rather gain than lose clearness by not being obscured by references to matters of minor importance.

KUMARASWAMI SASTRI, J.—These appeals rise out of the judgment of the Subordinate Judge of Tanjore in Original Suit No. 26 of 1912 filed by the Receiver of the Tanjore Palace Estate for the purpose of obtaining an adjudication as to the person or persons legally entitled to succeed to the properties mentioned in the plaint on the death of Jijamba Bai Saheba, the last surviving widow of Maharaja Sivaji who was the last king of Tanjore.

The first and second defendants claim the estate as the sons of Rajaram Ingle, who, it is alleged, was the adopted son of Maharaja Sivaji. The third defendant claims the estate as the grandson by adoption to Vijaya Mohana Mukta Bai, the second daughter of Maharaja Sivaji. It is alleged that she adopted Sambu Singh who in turn adopted the third defendant. Defendants Nos. 4 to 11 claim descent from the Raja through what are

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called the sword wives. Fourth and fifth defendants claim the estate as the sons of the Maharaja. Defendants Nos. 6 to 11 claim as the grandsons of the Maharaja. Defendants Nos. 12 to 24 claim the estate as the nearest reversionary heirs on the death of the widows.

The Tanjore Raj was founded about the year 1674 or 1675 by Venkaji otherwise known as Ekoji who was the half-brother of Sivaji, the founder of the Mahratta kingdom. As I shall have to refer to more than one person of that name, I shall refer to him as Sivaji the Great to avoid confusion. Shahaji, their father, married two wives. By his first wife Jeja Bai, he had two sons Sambaji and Sivaji the Great, and by his second wife Thuka Bai, he had a son Venkaji also known as Ekoji. Venkaji had three sons who succeeded to the Raj one after the other. The last son Thukaji had a son called Ekoji. He (Thukaji) had a son called Pratap Singh who is said to have been born to his sword wife Annapurni Bai. Pratap Singh reigned from 1740 to 1763 and had two sons Tulasaji and Amar Singh. Tulasaji died leaving an adopted son Serfoji and Serfoji, who reigned from 1799 to 1832, had a son Sivaji who was the last Raja of the Tanjore Dynasty, as the East India Company on his death in 1855 declared the Raj to be extinct and took possession of all the properties alleging an escheat. On Tulasaji's death, his brother Amar Singh disputed the adoption of Serfoji and claimed the estate. His claim was at first recognized by the East India Company and he ruled from 1787 to 1798. Subsequently the claims of Serfoji, the adopted son of Tulasaji, were recognized and Amar Singh was deposed. He resided in a place called Tiruvadamarudur on a pension which was assigned to him. He died leaving a son Pratap Singh. Pratap Singh adopted a son and the twelfth defendant Bhavani Bai is the widow of the adopted son, who died leaving

no male issue. She claimed the estate as the nearest heir to Sivaji Maharaja on the ground that under the Mayukha which applies to the parties she was a *Gotraja Sapinda* entitled to succeed in preference to other collaterals. A few years after the death of Sivaji Maharaja, his eldest surviving widow Kamakshi Bai Saheba adopted Rajaram Ingle, the sister's grandson of the late Sivaji Maharaja. The first and second defendants are the sons of Rajaram Ingle. Sivaji Maharaja had two daughters Rajes Bai and Mukta Bai. Rajes Bai, the elder daughter, died without issue on the 26th of December 1856. Mukta Bai, the younger daughter, who was unmarried at the date of the Raja's death, married Sakharam Saheb. She had two sons who predeceased her. She and her husband adopted one Sambu Singh and the third defendant is the adopted son of Sambu Singh. He claims as the daughter's grandson by adoption of the late Maharaja. Sivaji Maharaja had three sisters. The first Bayamma Bai had a son Ramachandra Soorve. The seventeenth defendant is the son of Ramachandra Soorve. The twenty-third defendant is the son of the seventeenth defendant. They claim as the sister's grandsons. Sulakshana Bai, another sister of Sivaji, had a son Manoji, who died leaving a son Eswant Mohitai. Defendants Nos. 21 and 22 are the sons of Eswant Mohitai. Sakwar Bai, another sister of Sivaji, had a son Pratap Rudra Ingle. Pratap Rudra Ingle had three sons Ramachandra, Eswant and Rajaram. As already stated, Rajaram, the youngest son, was adopted to Sivaji. Ramachandra left a son, who is the twentieth defendant. Sivaji Maharaja is alleged to have married a number of ladies referred to in the case as the Mangala Vilas ladies by a rite which is stated in the evidence to be "a sword marriage," and defendants Nos. 4 to 11 are, as already stated, either

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the sons or grandsons of Sivaji by six of the sword wives. Sambaji, the eldest brother of Sivaji the Great, died during the lifetime of his father Shahaji and his descendants played no part in the events that succeeded Shahaji's death. The twenty-fourth defendant claims as the descendant of Sambaji and the nearest agnatic reversioner to Sambaji. Sivaji the Great had two sons Sambaji and Rajaram. When disputes arose between Sambaji and Rajaram, the kingdom left by Sivaji was carved into two principalities, Sambaji and his descendants ruling a principality with the capital at Satara and Rajaram and his descendants ruling another principality with the capital at Kolhapur. The thirteenth and fourteenth defendants claim as the direct descendants of Sambaji to be the next heirs. The principality of Satara was declared extinct by the East India Company in 1838 and the thirteenth and fourteenth defendants are political pensioners residing in Satara and they claim to be the nearest reversionary heirs. The fifteenth defendant, who is a descendant of Rajaram, is the ruling Prince of Kolhapur and he claims as the person entitled to the Tanjore Raj. Shahaji, the father of Sivaji the Great, had an uncle Vittoji and the sixteenth defendant is the widow of one Somanath, who is said to be a direct descendant of Vittoji. Her claim is similar to that made by the twelfth defendant. Defendants Nos. 18 and 19 claim to be the grandsons of the step-sister of the late Sivaji Maharaja.

The East India Company which had, on the death of Sivaji in 1855, taken possession of the Raj and the private properties of the Raja restored the Raja's personal estate in 1862. The circumstances tending to the restoration and the terms of the Government Order will be referred to later on.

Written statements and additional written statements were filed and each claimant wanted to cut out the rest by raising every possible ground of exclusion. As many as 73 issues were settled. It is, however, necessary to refer only to the contentions raised before us in appeal by the appellants in the various appeals. I shall not refer to the contentions of such of the parties as have filed neither an appeal nor a memorandum of objections.

The contention of all the defendants except defendants Nos. 1 to 11 is that under the terms of the grant all the heirs under Hindu Law who would have taken the estate before the daughters are excluded and that even assuming that defendants Nos. 1 and 2 have been validly adopted and defendants Nos. 4 to 11 are the legitimate children of the late Raja, they would be excluded by the terms of the grant from claiming the property. The contention of the first and second defendants is that succession on the death of the last widow is to be traced among those who would be the next heirs to the Raja and that they, as the sons of the validly adopted son of the Raja, would exclude all the other claimants. Their case is that defendants Nos. 4 to 11 have no title as a sword marriage does not confer the status of a wife and that defendants Nos. 4 to 11 are at best the illegitimate children of the Raja. They also state that the parties are Kshatriyas and that as they belong to one of the twice-born classes, the illegitimate children have no right to succession. They also contend that as Pratap Singh who reigned from 1740 to 1763 was not the son of the legally married wife of Ekoji but only the son of a sword wife, he is only an illegitimate son and that therefore in tracing succession back, the collateral descendants of the founder Ekoji claiming descent from those above Pratap Singh would be excluded as they would not be *sapindas*, there being under Hindu Law no

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right of collateral succession between the legitimate and the illegitimate branches of a family. They state that in any event they will be entitled to four-sevenths share and defendants Nos. 4 to 11 to three-sevenths share. The contention of the third defendant who claims to be the adopted son of one Sambu Singh who was himself adopted by the surviving daughter of the last Raja of Tanjore is that under the terms of the grant the daughter of the last Raja took a vested interest in the estate re-granted by the Government which she was capable of transmitting to her heirs, that the adoption of the first and second defendants is invalid, that in any event they would be excluded by the terms of the grant, that a sword marriage is not a legitimate form of marriage, that defendants Nos. 4 to 11 are illegitimate children who by reason of the parties being Kshatriyas would have no right of inheritance, that defendants Nos. 12 to 24 cannot succeed to the estate as Pratap Singh, the ancestor of Serfoji, was illegitimate, being a sword wife's son, and there can be no succession between Pratap Singh's heirs and the collateral branches who are descended from the legitimate stock. All the other defendants dispute the factum and validity of the third defendant's adoption. The contention of defendants Nos. 4 to 11 is that sword marriage is a legal form of marriage conferring upon the issue a full legitimate status, that they are not excluded by the terms of the grant, that there was no adoption of the father of defendants Nos. 1 and 2 and that, even if the adoption was made, the existence of defendants Nos. 4, 5 and 6 (the legitimate sons of the Raja) at the time of the adoption would render the adoption invalid. The contention of defendants Nos. 12 to 24, the other contesting defendants, is that the adoption of defendants Nos. 1 and 2 is invalid, that the sword marriage is a legal form of

marriage, that the sons by such a marriage are legitimate. They, however, contend that the mothers of defendants Nos. 4, and 5 and the grandmothers of defendants Nos. 6 to 11 were not married according to the sword marriage ritual to Sivaji the last ruler, but were only permanently kept concubines. As between themselves, each disputes the claim of the other to be the nearest heir on questions of facts which will be referred to more fully in dealing with their respective claims.

The question is also raised as to whether the parties are governed by the Mayukha, which is in force in the territories from which the founder of the dynasty migrated to Tanjore or the Mitakshara.

The Subordinate Judge in an able and exhaustive judgment covering 817 printed pages dealing minutely with every contention raised and with the voluminous oral and documentary evidence adduced, has held that the parties are Sudras, that the first and second defendants were validly adopted and that sword marriage is a legal, though an inferior form of, marriage conferring on the issues a legitimate status but giving them only the shares of illegitimate children. On a construction of the grant he held that it did not exclude the first and second defendants, the sons of the adopted son, or defendants Nos. 4 to 11 who are the descendants of what are called the Mangala Vilas ladies. As regards the propinquity of the various contesting defendants, he held that the fourteenth defendant, the representative of the Satara Branch, did not prove that he was a descendant of Sivaji the Great, that the third defendant, owing to the death of the daughter of Sivaji, before the widows, acquired no interest, and that the twenty-fourth defendant has proved his descent but that he is not entitled on the other findings to succeed. As regards the fifteenth and twenty-fourth defendants, the Subordinate Judge held

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that they have proved their relationship and would be *bandhus*, the twenty-fourth defendant being nearer than the fifteenth defendant, but that both of them are excluded on the other findings of the Subordinate Judge on the construction of the grant, the validity of adoption of defendants Nos. 1 and 2 and the legitimacy of defendants Nos. 4 to 11. In the result, he passed a decree declaring that the properties in dispute are divisible between defendants Nos. 1 and 2 and 4 to 11 into eight shares of which defendants Nos. 1 and 2 are entitled to two shares, defendants Nos. 4, 5, 6, 7, 8 and 9 together and defendants Nos. 10 and 11 together are entitled to six shares. As regards the Tanjore Palace Library which is one of the items in the suit, the parties consented to a decree being passed excluding it from the suit and creating a fund of a lakh of rupees for its maintenance and upkeep. It is, therefore, unnecessary to consider this portion of the claim.

Appeal No. 199 of 1919 is filed by the fifteenth defendant. Appeal No. 200 of 1919 is filed by the third defendant. Appeal No. 201 of 1919 is filed by the fourteenth defendant. Appeal No. 248 of 1919 is filed by the twenty-fourth defendant. Appeal No. 333 of 1919 is filed by the first defendant. Appeal No. 334 of 1919 is filed by defendants Nos. 4 to 11. In appeals Nos. 333 and 334 of 1919 memoranda of objections have been filed by the second defendant and the twenty-third defendant relating to such findings of the Subordinate Judge as are opposed to the contentions raised by the parties.

It will thus be seen that the main questions to be decided in these appeals are—

(1) What is the construction to be placed upon the re-grant by the Government of the private properties of the late Maharaja Sivaji?

(2) Whether the issues by a wife married in sword marriage form are legitimate or illegitimate?

(3) Whether there was in fact sword marriage contracted between the late Sivaji Maharaja and the mothers or grandmothers of defendants Nos. 4 to 11?

(4) Whether the parties are Sudras or Kshatriyas?

(5) Whether the Mayukha or Mitakshara applies to the parties?

(6) Whether the adoption of defendants Nos. 1 and 2 is valid?

(7) If defendants Nos. 1 and 2 and 4 to 11 are to be excluded, which of the other parties have proved that they are the next descendants of Sivaji? and

(8) If defendants Nos. 1 and 2 and 4 to 11 are entitled to succeed, what are their respective shares in the estate?

Before dealing with the grant by the Government it is necessary to consider the circumstances under which the private estate of the late Raja was granted by the Government by its order, dated the 21st of August 1862, which has been filed as Exhibit A-46 in the case. Sivaji, the last king of Tanjore, died on the 29th of October 1855. Prior to 1852 Sivaji Maharaja had married three wives according to the orthodox ritual. One of them Padma Bai died in 1842 leaving no issue. The next Sydamba Bai died in 1840 leaving two daughters, and Kamakshi Bai was the only wife alive in 1852. On the 18th of July 1852 he married 17 wives. Of these ladies two died before Sivaji. He left his adoptive mother Avu Bai Saheba, 16 wives who were married according to the ordinary Hindu ritual and 40 sword wives so called because they were alleged to have been married according to a ritual called "sword marriage." They were accommodated in a building called Mangala Vilas

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and have been referred to in the evidence and judgment as the Mangala Vilas ladies. Of these 40 ladies it is only necessary to refer to six ladies who had male issue. The Raja had by Lakshmi Bai a son who is the fourth defendant in the suit. By Meena Bai he had a son the fifth defendant. By Kasi Bai he had a son Sadanandaji who died leaving a son, the sixth defendant. By Bagi Bai he had a son Kamanandaji who died leaving a son, the seventh defendant. By Kamu Bai he had a son called Bavani who died leaving the eighth and ninth defendants, and by Guna Bai he had a son Bagyanandaji who died leaving the tenth and eleventh defendants. Sivaji had two daughters by his predeceased wife Sydamba Bai. Rajes Bai, the elder daughter, was given in marriage to Sakharam Saheb. She died without leaving any issue on the 26th of December 1856. The younger daughter Mukta Bai was born in 1846 and was nine years old at the date of the death of the Raja and was then unmarried. She was subsequently given in marriage to Sakharam Saheb, her deceased sister's husband. She died in 1885 without male issue but leaving Sambu Singh her adopted son who died without male issue and who in turn is alleged to have adopted the third defendant.

It will thus be seen that at the date of the Raja's death he had 16 wives married according to orthodox Hindu ritual and 40 sword wives and six sons by six of them whose names I have already given and two daughters by a predeceased Rani. On the 29th of October 1855 Mr. Forbes, who was then the Resident at the Court of Tanjore, reported the Raja's death to the Government and Exhibit B-32 is the report. It merely states that the Raja was seized with a slight illness two days previously, that the danger was apparent only on the 29th and that the Raja died before the Resident arrived at the Fort. He sent a detailed report, Exhibit

G-208, dated the 6th November 1855. He treated the sword wives as mere permanent concubines and reported that the Raja left no male issue and suggested the continuance of the line by making the younger daughter the ruler of the State, as the elder daughter who was very ill was not expected to survive long. Mr. Forbes pointed out that there was no bar to female succession, that the officers of the Raja's darbar met the day after his death and decided to urge the claims of the younger daughter to succeed, that on a previous occasion when the ruler died without issue, his widow succeeded him and that he was informed that similar successions took place in Satara and Kolhapur. The Madras Government did not acquiesce in the view taken by Mr. Forbes or adopt his suggestion and they addressed a letter to the Court of Directors which is published in the appendix to Exhibit C-69 (Hickey on the Tanjore Mahratta Principality). The view taken by the Madras Government was that there was no male heir or any legitimate claimant to the Raj : that the Raj consequently became extinct and should be so declared : and that the family of the Raja should be treated with liberality and consideration. The Court of Directors in their despatch, dated the 16th of April 1856, were of opinion that

"as the Raja died without leaving a son by birth or adoption or any brother him surviving, there cannot be a male claimant to the dignity, that the Tanjore Raj was therefore extinct and that it lapsed to the British Government."

The Government of Madras immediately on the death of Sivaji took possession of all the properties belonging to the State and the personal properties of the Raja. Arrangements were then made for the maintenance of the family and dependants of the Raja. The widows secured the services of Mr. John Bruce Norton, one of the leading Barristers in Madras, and sent up a memorial to the Government, wherein they alleged, among

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other things, that the deceased Maharaja had intended to adopt his sister's grandson, and that the sister's grandson performed the funerals with the consent of Mr. Forbes. A petition was also sent by numerous residents of Tanjore praying that Rajaram Rao may be elevated to the vacant throne as he was adopted by the widows and performed the funeral rites with the approval of the Resident. These petitions were referred to the Resident, and he sent the letter, Exhibit B-91, dated 18th February 1856, to the Government denying that Rajaram Rao was adopted by the Raja or performed his funerals with his sanction and stating that it is improbable that the late Raja would have had any intention of adopting the boy or given any instructions regarding the adoption, having regard to the fact that the death of the Raja was sudden. He also stated that any adoption by the widows would be illegal. As the Government had taken possession of the properties of the late Raja and sold some of the movable properties including livestock and did not pay any attention to the requests of the members of the late Raja's family, Mr. Norton advised the ladies to file a Bill in the Supreme Court at Madras restraining the Government from disposing of the private properties of the late Raja, and a Bill was filed in the Supreme Court on the 18th November 1856. Exhibit D-159 is the Bill filed in the Supreme Court by Kamakshi Bai Saheba against the East India Company. It prayed that Kamakshi Bai Saheba, as the eldest widow of the late Sivaji Maharaja and the first married among his surviving widows, may be declared by a decree of the Court entitled to inherit and possess the private and particular estate, movable and immovable, left at the time of his death subject to the payment of any debts and demands against the private estate, that the East India Company may be declared to be trustees for

the plaintiff in respect of such estate taken possession of by them, that an account be taken of such estate and possession be decreed to be given of the properties so found and for an injunction restraining the East India Company from selling or interfering with the private and particular estate and effects, real and personal, left by Sivaji. After the filing of this Bill, 15 of the other widows were added as supplemental defendants. The Supreme Court of Madras granted a decree in plaintiff's favour. An appeal was filed to the Privy Council, and the judgment of the Supreme Court was reversed on the ground that the act of the East India Company in seizing the properties of the Tanjore Raja being an act of State, the Supreme Court had no jurisdiction to interfere. The judgment of the Supreme Court, dated 11th December 1857, as well as that of the Privy Council, dated 27th July 1859, is reported in *The Secretary of State in Council of India v. Kamachee Boye Sahaba*(1). Though their Lordships of the Privy Council disposed of the appeal on the ground that Municipal Courts had no jurisdiction, their Lordships made strong observations on the confiscation of the private estate of the Raja. Lord KINGSDOWN who delivered the judgment observed :

"It is extremely difficult to discover in these papers any ground of legal right on the part of the East India Company, or of the Crown of Great Britain, to the possession of this Raj, or of any part of the property of the Raja on his death; and, indeed, the seizure was denounced by the Attorney-General (who, from circumstances explained to us at the hearing, appeared as counsel for the respondent, and not in his official character for the appellant) as a most violent and unjustifiable measure. The Raja was an independent sovereign of territories undoubtedly small, and bound by treaties to a powerful neighbour, which left him, practically, little power of free action; but he did not hold his territory, such as it was, as a fief of the British Crown or of the East India Company; nor does there appear to have been any pretence for claiming it, on

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the death of the Raja without a son, by any legal title either as an escheat, or as *bona vacantia*. It should seem, therefore, that the possession could hardly have been taken upon any such grounds."

On the receipt of the decision of the Privy Council the Government of Madras passed proceedings as regards provision to be made for the relatives and dependants of the Raja. These proceedings appear at pages 540 to 547 of *The Secretary of State in Council of India v. Kamachee Boye Sahaba*(1). It was resolved that a pension should be granted to the immediate members of the Raja's family, to his relations and to the servants and pensioners, and a list of persons who would be entitled to pension was drawn up and proposals were made for the granting of pensions. Exhibit K-12, dated the 5th of December 1859, is the proceedings of the Madras Government considering the claims of the individual members of the Raja's family and fixing their pensions. Kamakshi Bai Saheba and several of the Ranis, however, refused to receive the pensions granted.

After the judgment of the Privy Council went against the Rani, Mr. John Bruce Norton wrote Exhibit A-297, dated the 6th of September 1859, to the Rani stating that between the seizure of the Raj in 1855 and the disposal of the case by the Privy Council, there was a complete revulsion of feeling owing to the intervention of the mutiny and the assumption of the Government of India by the Queen and the issue of the Proclamation of 1858. He suggested a public agitation and stated that he was prepared to go to England and advocate her cause. On the 1st of March 1860, the mother and the widows of the late Raja submitted a memorial, Exhibit A-22, to the Secretary of

(1) (1859) 7 M.I.A., 476.

State through Mr. Norton praying for the restitution of the private property of the Raja, and the restoration of the Raj. Mr. Norton proceeded to England to interview the authorities and obtain orders favourable to the petitioners. Mr. Norton also submitted a memorial to the House of Lords. The memorial has not been filed, but Exhibit A-34, which is a letter written by Mr. Norton to the Rani, refers to the petition signed by 12 out of the 15 Ranis. Mr. Norton's efforts in England appear to have been crowned with a measure of success so far as the private property of the Raja was concerned. He returned to India and submitted a memorial, Exhibit A-35, dated the 20th of May 1861, to the Governor-General on behalf of Kamakshi Bai Saheba praying that the Raj may be restored as a permanent provision for herself and the family. In paragraph 9 of the memorial, it was alleged that the late Raja was desirous of adopting, and fully intended to adopt one Rajaram Saheb, a youth in every way fitted for affiliation, but that death cut him off too suddenly for the performance of the necessary ceremonies, that the youth with the consent of the whole of the royal family performed the Raja's funeral ceremonies with the knowledge of the Resident Mr. Forbes, that by the Mahratta custom no express authority from the husband to the widow is required to render an adoption valid, that Kamakshi Bai Saheba has always expressed and now expresses her willingness to forego her own legal claim in favour of the boy designated by the Raja for his successor and that she has only refrained hitherto from adopting the boy from a desire not to embarrass the action of the British Government while her case was under consideration. The result of the memorial sent up and the efforts in England of Mr. Norton were that the Government of

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India resolved to relinquish the whole of the private properties of the Raja in favour of his heirs. Exhibit A-37, dated 23rd of June 1862, is a letter from the Secretary to the Government of India, Foreign Department, to the Chief Secretary to the Government of Fort St. George, and it runs as follows:—

"I am directed to acknowledge the receipt of your letter, dated 17th ultimo, No. 194, soliciting further instructions regarding the disposal of the landed property of the Tanjore Raj, and in reply to state that since it is doubtful whether the lands in question can be legally dealt with as State property and since the plea in equity and policy for treating them as the private property of the Raja is so strong that it commands the unanimous support of the members of the Madras Government, the Governor General in Council sanctions the relinquishment of the whole of the lands in favour of the heirs of the late Raja."

Before dealing with the grant by the Government (Exhibit A-46, dated the 21st of August 1862), it is necessary to see what the state of affairs then was. It will be seen from the report of Mr. Forbes that immediately after the Raja's death there were three parties. The Queen mother Avu Bai Saheba and those who supported her wanted that the Raj should continue in favour of Rajaram Ingle, the grandson of Sakwar Bai, sister of the deceased Raja, and whom the Raja was bringing up probably with the intention of being ultimately adopted, should he have no issue, but who was not actually adopted at the time of the Raja's death. Sakharam Saheb, the husband of the elder daughter of the late Raja, and those who supported him were anxious that he should be recognized as heir and if that was not possible, the second Princess should be declared heiress as the first Princess was suffering from an incurable malady and was not expected to live long (she in fact died in 1856). There can be little doubt that Sakharam Saheb who put forward in his

petitions to Government, Exhibits B-50, B-51 and B-52, the claim that he was married to the elder daughter on the understanding that he was to succeed in case there was no issue, hoped to marry the second Princess on the death of her elder sister and was intriguing for the purpose. He ultimately married her shortly afterwards. Mr. Forbes was in favour of the Raj being continued in favour of the second daughter of the Raja. The third party consisted of Kamakshi Bai Saheba and her adherents. She was the eldest of the Ranis and Mr. Norton strongly urged that as the senior Rani she was the person entitled to succeed in the absence of any male issue.

So far as the alleged adoption is concerned, although attempts were made soon after the death of the Raja to make out that the circumstance that Rajaram Ingle was brought up by the late Raja coupled with the performance of the funeral ceremonies on his death created a valid title as the adopted son in the boy, this claim was negatived almost in its inception by Mr. Forbes, the Resident, and the Government completely ignored any such claim. Though Kamakshi Bai Saheba was at one time willing that the estate should be conferred on the boy and was prepared to waive her own claim, she was advised by Mr. Norton that she should file a Bill in equity in her own name and that any formal adoption by her of Rajaram Ingle should be postponed till she recovered the estate. This advice prevailed and no adoption was made at the date of the grant Exhibit A-46.

It is clear from the proceedings of the Government which I shall refer to that the only claims which the Government had before it at the time of the re-grant and which it considered, were the claims of Kamakshi Bai Saheba and the widows on the one hand and those

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of Mukta Bai, the second and only surviving daughter of the Raja at that time on the other. During the course of these proceedings it seems to have been assumed by all parties that the Mangala Vilas ladies were only the permanent concubines and that their children by the Raja were only illegitimate children. They were then young and nobody thought of advancing any claims in their favour to succession. The Government observed in paragraph 2 of Exhibit A-46 that it having been resolved that the whole of the lands are to be relinquished in favour of the heirs of the late Raja,

"it had to be determined on what principle the distribution of the property both real and personal should be made or in other words what are the respective rights of the Raja's widows and of his daughter."

The question before the Government being only whether the estate should be delivered over to the widows or the daughter, the question was referred to the Pundits. The answer by the Senior Pundit was that where a person separated from his co-parceners, dies leaving no male issue, all his widows remaining chaste are entitled to participate equally in his personal property, that as regards the real property it goes solely to the widow who has a daughter but that if there be no such widow, all the widows are entitled to participate equally in it, that the widows are competent to dispose of their respective shares of the personalty, at will, but that they cannot alienate the real property without the consent of their *dayadis* except for most indispensable purposes, that the law is the same in this respect for Mahrattas as for other Dravida Hindus and that Mayukha is an acknowledged authority for the Mahrattas being in accordance with the Dharma Sastras governing the other Dravidas. The Junior Pundit was of opinion that where a man, either with

the consent of his eldest wife, or from a belief that she is incapable of bearing male issue, marries other females, the latter would become his lawful wives but that if he marries them notwithstanding the knowledge of his eldest wife's capability of bearing issue, the other wives cannot be regarded as lawful wives but only such as were intended for purposes of sensual gratification, that according to Mayukha all the widows may of their own accord enjoy the property in common, but that in doing so they should take the property each in turn according to seniority, that the party in possession should support the rest, that, so long as the property was undivided, it cannot be used for any but legal purposes but that when divided, each of the widows can dispose of their respective shares of the personal property as they please, that they can also dispose of the real property under the special circumstances noticed in the Sastras, that in respect of inheritance the Mahrattas as well as the other Hindus are governed by Mitakshara and that the Mayukha is particularly applicable to the Mahratta country but that if there was any special custom among Mahrattas in respect of inheritance, such custom must be acted upon. The Junior Pundit was asked a specific question as to what are the rights of the widows if they are of unexceptional character? He replied that if the widows are of unexceptional character, they should enjoy the property according to the seniority, the party in possession being bound to afford the rest full protection. The Government agreed with the opinion of the Junior Pundit.

Having regard to the above facts and the circumstances which existed at the date of Exhibit A-46, the question is what are the rights of the parties? The material portions of Exhibit A-46 run as follows:—

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"4. The Governor in Council concurs in the opinion of the Junior Pundit which, he observes, is in accordance with the provisions of the Hindu Law as sanctioned by several decisions of the Sudder Court. In the decree passed by that Court in Appeal Suit No. 5 of 1824 printed at page 454 of the 1st Volume of "Selected Decrees" and in that passed in Appeal Suit No. 1 of 1835 printed at page 40 of the second volume, the principle that where there are no male heirs, the senior widow is entitled to succeed to the management of the Estate, both real and personal, is distinctly recognized. The Senior Pundit admits that the rights of the widows, according to his construction of the law, whereby they are severally declared to be entitled to an equal share of the real and personal property, are limited to the use of it during their lifetime, that they cannot alienate it, and that on the death of the widows it goes to the next heir of the husband. It is obvious that such a distribution of the property, as the Senior Pundit contends for, would greatly endanger its security and the rights of those next in succession. On the other hand, the recognition by the law of a senior widow who during her lifetime manages the property providing for the due participation in its proceeds by the other widows—her co-heirs, prevents much confusion and endless disputes, and by limiting the responsibility to a single individual gives greater security to the property itself.

"5. The Senior Pundit refers to an opinion given by himself and by the Junior Pundit in reply to a question put to them on the 22nd October 1855 which, it appears to the Governor in Council, exactly meets the case now under consideration. The opinion in question is referred to by the Senior Pundit with the view of showing that the Junior Pundit did not always hold the opinion for which he now contends, but it appears to the Government to tell just the other way. In the opinion referred to it is not suggested that the property should be divided, but it declared (and no distinction is made between real and personal property) that it vests first in the widows and after their deaths is to be inherited by the daughter. This, the Governor in Council conceives, is strictly in accordance with the principles of Hindu Law as expounded by the Court of Sudder Adawlut in the decrees already referred to, and with the evidence adduced in, and decision given by, the Supreme Court in the suit instituted against the Government by Kamakshi Bai; and by this principle the Government must be guided in dealing with the Estate of the late Raja of Tanjore. The Estate will, therefore, be made over to the senior widow

who will have the management and control of the property, and it will be her duty to provide in a suitable manner for the participative enjoyment of the Estate in question by the other widows—her co-heirs. On the death of the last surviving widow, the daughter of the late Raja, or failing her the next heirs of the late Raja, if any, will inherit the property.

"6. The Governor in Council directs that the Government Agent at Tanjore will communicate this decision to the widows and daughter of the late Raja, and will take steps to place the senior widow in possession of the property, both real and personal, impressing upon her the responsibility which will attach to her both in regard to her conduct towards her co-heirs and for the security of the property. She will, of course, be required to give a receipt for the whole of the personal property on being placed in possession of it."

In pursuance of the proceeding mentioned above, Kamakshi Bai Saheba as the eldest of the widows of the Raja was put in possession of the properties. As already pointed out, Avu Bai Saheba, the mother, and several of the Ranis that were siding with her including Kamakshi Bai Saheba were keen on adopting Rajaram Ingle. Mr. Norton advised the postponement of the adoption till the Raj or at least the private property of the Raja was recovered and was of opinion that any adoption made when the claims made for the restoration of the Raj and the properties were not disposed of by the Government would be extremely inconvenient. After the properties were delivered over to Kamakshi Bai Saheba in pursuance of the Government Order, the ceremony of adoption was gone through on the 1st of July 1863. I shall refer to the events which preceded and followed the adoption in dealing with the issue as to its validity. After the adoption, Kamakshi Bai Saheba desired to put the adopted son in possession of the properties which she took possession of and took steps for the purpose. She maintained that her co-widows had no interest in the property or any right to control its management and she did not make provision for their maintenance. Owing

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to disputes between the parties, two out of the 15 Ranis then surviving filed O.S. No. 16 of 1866 on the file of the District Court of Tanjore praying for a declaration that the adoption was invalid, that all the widows were entitled to share equally and that the Estate should be divided between them. Kamakshi Bai and 13 of the widows were defendants Nos. 1 to 13 in that suit and the adopted son was the 14th defendant. Neither the daughter of the Raja nor the issues by the Mangala Vilas ladies were parties to that suit. The District Judge, without taking evidence, upheld the contention of the plaintiffs that the widows were entitled to equal enjoyment of the property but that they had no right to have the estate partitioned and he appointed a Receiver. He expressed an opinion that the adoption was not binding on plaintiffs. An appeal was filed in the High Court and the case is reported in *Jijoyamba Bai Saiba v. Kamakshi Bai Saiba* (1). As the judgment of the High Court deals with the effect of this grant on the rights of the parties before it, it is necessary to refer in some detail to the view taken by the High Court. As neither the daughter of the Raja nor the Mangala Vilas sons were parties to the suit or appeal, it would of course not be binding on them; but the judgment will be valuable as an expression of opinion by two of the eminent Judges of this Court.

In dealing with the question whether the grant was an original grant from the Government of their mere grace and favour, or a restoration of the property to those entitled to it by right of succession, or an abandonment by the Government of all claim of right by virtue of their State act of seizure, the learned Judges after referring to the proceedings of the Government observe :

(1) (1868) 3 M.H.C.R., 424.

"There is nothing in those proceedings indicative of an abandonment of proprietary right from the time of seizure, and it would have been strange to have found it otherwise after the firmness shown by the Government in the maintenance of their unfettered sovereign ownership. They evidence, we think, the retention throughout of the absolute State right to the property, and the intention that the more liberal restoration resolved on should take effect as a beneficent grant of the proprietary right by the Government from the date of the transfer. No doubt the transfer was for the benefit of those who were then the legal representatives of the Raja, and put them (as the Advocate-General argued, and we were about to hold) in the position to enjoy the rights, which the law gave to such representatives: but not therefore, as was further argued, in the same legal position as if the Government had never taken the property. It might have been otherwise made, and there is the further circumstance against the intention to recognize the right of inheritance from the Raja's death, that provision was not made at the time of the transfer for the restoration of the income of the lands during the interval that possession was withheld, as we find was the case on the restoration to the Raja's daughter of three villages the mirasi rights of which were recognized by the Government to have been vested in her mother. The net profits, it appears, were afterwards disbursed to the senior widow; but the Court cannot regard that disbursement otherwise than as a still more liberal State donation, induced by the memorial appealing to the further exercise of the benevolence of the Government and stating that unless the senior widow was provided with funds, the benevolent object of providing for the comfort and respectability of the family would be defeated, owing to the load of debt with which they were burthened. For these reasons we are of opinion that this Court is bound to consider the transfers under the order as a grant of grace and favour by the Government in right of their absolute sovereign ownership, just as if it had been thought proper to make the disposition in favour of persons who were not the nearest representatives, and consequently that the widows' and daughter's proprietary rights are derivative from the Government, and have not relation back to inheritance on the death of the Raja. It is only on the ground that the Government had confessed themselves completely in the wrong in regard to the possession of the property and passed the order as a reparation that the Court could hold differently, and we think the contrary of that inconsistent and most unlikely position appears."

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In dealing with the rights of the adopted son who was the 14th Defendant in the suit they observe :

" This decision renders it unnecessary to send to the lower Court an issue raising the question of the validity or invalidity of the alleged adoption of the 14th defendant. For if found to be valid (a result at present very problematic) his present claim by right of adoption being as lineal heir of the Raja in preference to the widows would not be maintainable. To that claim, the absolute ownership of the Government in the interval from the death of the Raja until the act of State by which the transfer was made to the widows and daughter is, we think, fatal. As heir inheriting by descent he appears to us to be in no better position before the Municipal law of the country than he would be if the property in dispute still remained with the Government, and he were claiming it or the entire former territory of the Raja. Whether as adopted son he may become entitled to claim under and by virtue of the transfer, is not a question on which we need or can properly say anything in this suit."

Dealing with the interest which the grant gave to the widows the learned Judges held that the order was intended to pass and did pass the property to the widows to be held and enjoyed with the same rights as the law of succession gives widows on the devolution of property by inheritance. After reviewing the authorities the learned Judges held that the widows took a joint estate for life in their husband's property with the rights of survivorship and equal beneficial enjoyment. The case was sent down to the Civil Judge to return findings as to the nature and value and income of the properties handed over by the Government to Kamakshi Bai Saheba. Findings were returned and the High Court pronounced judgment on the findings which has been marked as Exhibit D-61. A final decree was passed by the High Court on the 8th of May 1868 which has been filed as Exhibit B-179. The material portion of the decree runs as follows :—

" This Court doth adjudge and declare that the plaintiffs and the defendants who are the surviving widows of the late Raja of

Tanjore derive their title to the property in the plaint mentioned from the Government under the order of the 21st August 1862 and are possessed of a joint estate for their respective lives with rights of survivorship and severally entitled to an equal share of the rents, produce and profits of the said property and the beneficial use and enjoyment of the movable portion thereof in common."

The grant Exhibit A-46 was considered by the Madras High Court in two later decisions. *Kaliana Sundaram Ayyar v. Umamba Bai Saheba*(1) arose out of a suit filed by Umamba Bai Saheba, the then Senior Rani, to recover possession of the Devasthanam and endowments which were in charge of the late Kamakshi Bai Saheba, the senior widow, at the date of the death of the Raja of Tanjore in 1855 and which after her death were transferred to the Devasthanam Committee by the Government. In dealing with the grant, dated the 21st of August 1862, the learned Judges observe :

" On the 21st August 1862 an order was made by Government to the effect that the private property of the late Raja should be handed over to the Senior Rani, the late Kamakshi Bai, on the terms mentioned therein [see *Jijoyiamba Bai Saiba v. Kamakshi Bai Saiba*(2)]. The nature of these terms was such that the Senior Rani and the other Ranis and the Raja's daughter were practically placed as between themselves in the position in which they would have been under Hindu law, had no confiscation of the property taken place."

In dealing with the estate which the Senior Rani took, their Lordships observe at page 431 :

" The question still remains what was the precise nature of the estate intended to be taken by the Senior Rani. It must be taken that the estate was in the nature of self-acquired property in the Rani's hands, in this sense, that her rights were derivative from Government and had no relation back to inheritance on the death of the Raja."

That was the view taken with regard to the private property restored by the order of 21st August 1862

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(1) (1897) I.L.R., 20 Mad., 421.

(2) (1868) 8 M.H.C.R., 424.

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[see *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*(1)]. In *Sundaram Ayyar v. Ramachandra Ayyar*(2), where the question arose as to the rights of tenants in a Mokhasa in the Tanjore Palace Estate, there is a passing reference to the grant Exhibit A-46 and the CHIEF JUSTICE observes :

"It was expressly decided in *The Secretary of State in Council of India v. Kamachee Boye Sahaba*(3) that the villages forming the so-called private estate of the Raja then became the property of the Government, and some years later they were granted as a matter of grace and favour to the widows of the late Raja and after them to his daughter or failing her his next heirs as held by the Court in *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*(4).

The contentions of the parties as regards the meaning and legal effect of the words

"on the death of the last surviving widow, the daughter of the late Raja, or, failing her, the next heirs of the late Raja, if any, will inherit the property,"

raise questions of some difficulty. It is contended by Mr. Grant who argued this part of the case for the 15th defendant who is the appellant in Appeal No. 199 of 1919 that the effect of the grant by the Government was to confer on the widows what in law would be a pure Hindu widow's estate with all its legal incidents, thus vesting the whole of the inheritance in them, that the daughter had only a *spes successionis* as would be the case if the property devolved on the widows by right of inheritance and that the words "or failing her, the next heirs of the Raja will inherit the property" mean that if the daughter should predecease the widows, the persons who under Hindu Law would be the heirs of the Raja next after the widows and the daughter will be entitled to inherit the

(1) (1888) 8 M.H.C.R., 424.
(8) (1889) 7 M.I.A., 476.

(2) (1917) 82 M.L.J., 338.
(4) (1868) 8 M.H.C.R., 424 at p. 444.

property. He argues that as under the Hindu Law a natural (Aurasa) son or an adopted son would take before and not after the daughter, the terms of the grant necessarily excluded the adopted son and the Mangala Vilas sons, even assuming that the findings of the Subordinate Judge as to the validity of the adoption and the legitimacy of the Mangala Vilas sons are right. This contention has been adopted by the vakil for the 14th defendant who is the appellant in Appeal No. 201 of 1919 and the vakil for the 24th defendant who is the appellant in Appeal No. 248 of 1919. The contention for the third defendant is that under the terms of the grant successive estates were conferred on the widows and daughter, that the daughter's rights were not merely those of an expectant heir but that the daughter took an absolute vested remainder on the death of the widows which was capable of transmission to her heirs, that the words "failing her" meant "failing her and her heirs," that the next heirs would be the heirs of the Raja on the date of her death and not heirs on the date of the death of the last of the Ranis. It is contended that the Hindu Law makes no distinction between natural and adopted sons who are both equally entitled to succeed collaterally and that the third defendant or the adopted son of the son adopted by the daughter will be in the same position as he was the natural grandson of the daughter and that as she left an heir, namely, the third defendant, he is entitled to the property. He, however, accepts the contention of Mr. Grant that under the Government order, Exhibit A-46, the adopted son and the Mangala Vilas sons are excluded as they would not be heirs next after the daughter but heirs who under Hindu Law would take precedence over her. The contention of defendants Nos. 1, 2 and 4 to 11 is that under the terms of the grant the widows had a

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life-estate, that the daughter, if she survived, would have succeeded, that on her death, succession has to be traced back to the heirs of the Raja and that the heirs of the Raja would undoubtedly be the first and second defendants who are the sons of the adopted son and defendants Nos. 4 to 11 who represent the issue of the Raja by the Mangala Vilas. They contend that the grant discloses no intention to exclude anybody, that, as the adoption of the father of the first and second defendants was made in 1863 after the date of the grant, there could have been no intention to exclude anybody, and that the next heirs of the Raja simply means the nearest heirs of the Raja and that in fixing that class, the rule of Hindu Law will apply, namely, that in seeking for reversioners to the estate of a sonless Hindu the selection will be made from such of the heirs as would be the heirs of the Raja if he had died on the date of the death of the widow. It is further contended for defendants Nos. 4 to 11, that assuming that they were treated as illegitimate sons and grandsons of the late Raja, under the Hindu Law as it then stood, illegitimate sons were treated as coming after the widow and the daughter and that in any event they cannot be cut out under the terms of the grant, assuming that it excluded persons who would in the ordinary course have inherited prior to the widows and the daughter. It was argued that in construing the terms of a grant the state of the law as then current should be kept in view and reference was made to *Abdul Aziz Khan v. Appayasami Naiker* (1).

I do not think that there are any grounds for holding that the Government in re-granting the property wanted to exclude anybody. It should be remembered that while the annexation of the Raj and the taking

possession of the private properties of the Raja took place in 1855, the restoration was in 1862 and during the interval, the Great Indian Mutiny had completely changed the attitude of the Government in the matter of recognizing adoptions or annexing Native States. The avowed policy of Lord Dalhousie who was the Governor-General of India between 1848 and 1856 was to annex Native States and principalities in all cases where the Raja died without leaving legitimate male issue. Adoptions were not recognized. His policy in his words was that "of getting rid of those petty intervening principalities which may be made a means of annoyance but which can never be a source of strength to the British." The States of Kolaba, Satara, Nagpore and Jhansi were annexed on the ground that the Rajas left no male heirs and that the Government would not recognize any adoption made by the Rajas. Exhibit A-11 is a notification, dated 16th March 1846, extending the rule to shrotriyams and mokhasas and the protest of the Raja is filed as Exhibit A-12, dated the 20th of July 1846. No heed was paid by the Government to the representations made by the Raja and the other Ruling Chiefs and State after State was being annexed. It was to prevent such a fate overtaking Tanjore that on the 18th of July 1852 the Raja of Tanjore married 17 wives with the hope that one at least of them may bear male issue to succeed to the Raj. The Great Indian Mutiny which began in 1857 opened the eyes of the British Government to the unwisdom of the policy and one result of the assumption by the Crown of the Government of India was a complete reversal of the policy. Lord Canning's Proclamation in 1860, after the Mutiny was quelled and the Government was transferred to the Crown, recognized the full and unfettered power of adoption and the Queen's Proclamation was a public

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(1) (1904) I.L.R., 27 Mad., 181.

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assurance that private rights of Native rulers including the right of adoption would be fully recognized. There was therefore no possible ground on which the Government in 1862 would have objected to the adopted son succeeding to the private property of the Raja if there was at that time a validly adopted son in existence, more especially as the restoration was not of the Raj but only of the private property which belonged to the Raja. There was also no reason why the Government should forbid a future adoption if it could have been validly made under Hindu Law. In fact the attitude of the Government when the adoption was brought to its notice by Kamakshi Bai Saheba and the other Ranis and when the contemplated adoption was objected to by the daughter was one of complete indifference so far as the private properties of the Raja which were restored by the order, Exhibit A-46, was concerned. It should also be borne in mind that in addition to the complete change of policy which was publicly announced and faithfully carried out after the assumption of the Government of India by the Crown in the year 1858, the seizure by the East India Company of the private property of the Raja was condemned in emphatic terms by the Supreme Court and the Privy Council as an act for which there was not even a shadow of legal justification. Petitions were submitted by Kamakshi Bai Saheba and the other Ranis and the effect of the memorials submitted and the able and persistent advocacy of Mr. Norton both in India and in England was to convince the Government of India and the Home authorities of the injustice done to the heirs of the Raja by the seizure of his private property.

It is unfortunate that we have not got all the correspondence which passed between the Madras Government and the Government of India and the Home authorities.

Exhibit A-37, dated the 23rd of June 1862, which is a letter from the Secretary to the Government of India, Foreign Department (Political), to the Chief Secretary to the Government of Fort St. George, throws considerable light on the reasons which prompted the restoration of the private property. It runs as follows:—

“I am directed to acknowledge the receipt of your letter, dated 17th ultimo, No. 194, soliciting further instructions regarding the disposal of the landed property of the Tanjore raj and in reply to state that, since it is doubtful whether the lands in question can be legally dealt with as State property, and since the plea in equity and policy for treating them as the private property of the Raja is so strong that it commands the unanimous support of the members of the Madras Government; the Governor-General in Council sanctions the relinquishment of the whole of the lands in favour of the heirs of the late Raja.”

This letter shows that the Government recognized the doubtful nature of the seizure of the private property and that it wanted to relinquish that property in favour of the persons who would have been rightly entitled to it as the heirs of the Raja but for the seizure. Exhibit A-46 which evidences the re-grant begins by referring to Colonel Durand's letter and paragraph 2 states that the question of the relinquishment in favour of the heirs of the Raja having been settled,

“It has to be determined on what principles the distribution of the property both real and personal shall be made, or in other words what are the respective rights of the Raja's widows and of his daughter. The Government have now before them the opinion of the Hindu Law officers of the Sadder Court on a question put with the view of ascertaining the Hindu Law as applicable to the case.”

The words “relinquishment of the whole of the lands in favour of the heirs of the late Raja” show clearly that no person who would be the heir at the time or subsequently was to be excluded and that, though technically the relinquishment may by virtue of the anterior seizure in the professed exercise of sovereign

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rights have the effect of a fresh grant, there was as far as possible to be no break with the past and no change for the future,—things being put in the same position as if there had been no seizure. The position therefore was that it was resolved to relinquish the property which had been seized and the Government was anxious to give it back to the heirs of the Raja, i.e., to the persons who would have taken the property on the death of the Raja, had there been no seizure. The adoption of Rajaram Ingle, the father of the first and second defendants, by Kamakshi Bai Saheba was on the 1st July 1863, so that on the date of the Government Order of the 21st of August 1862 there was no adopted son in existence to claim the property. It is no doubt true that attempts were made to set up the claims of Rajaram Ingle to the raj soon after the Raja's death on the ground that he had been brought up by the Raja with the intention of adopting him and that he had performed the funeral ceremonies with the knowledge and consent of the Resident; but it was admitted that no ceremony of adoption had been performed by the Raja. Mr. Forbes had at the earliest opportunity denied that Rajaram Ingle was adopted by the Raja or had any claims as such. The plaint in the suit by Kamakshi Bai Saheba against the East India Company to which the Secretary of State for India and the other Ranis were parties specifically stated that the Raja had died leaving neither a natural son or a son by adoption and that consequently Kamakshi Bai Saheba was the sole heir under Hindu Law. None of the parties to that litigation which was the chief cause of the restoration of the private property in 1862 ever set up the rights of the adopted son and legal proceedings went on on the footing that the only persons entitled to the estate were the widows. Between the disposal of the suit by the Privy Council and the

re-grant nobody ever set up the rights of the adopted son and all the petitions and memorials which were submitted and which led to the restoration of the property were submitted by Kamakshi Bai Saheba and the other widows. There is nothing in the memorials to the Government which states that an adoption was going to be made before the date of the re-grant.

Under these circumstances it is difficult to hold that the Government had in view the rights of Rajaram Ingle, the father of the first and second defendants or that it would have, if the adoption had been made before 1862 and was otherwise valid under Hindu Law, excluded him from succession.

So far as the Mangala Vilas sons are concerned, it had been assumed from the very commencement by all parties that the Mangala Vilas ladies, though called sword wives, were in effect only in the position of permanently kept concubines of the late Raja and that the sons by them of the Raja were illegitimate. It was stated by Kamakshi Bai Saheba in the suit she filed against the Secretary of State and which has been already referred to that the deceased Raja was a Sudra by caste. This fact was admitted by the East India Company in the answer to plaintiff's interrogatories and the judgment of the Supreme Court affirmed this. Under the law as then understood the illegitimate sons were postponed to the widows and the daughters and there was no question of any immediate rights of the Mangala Vilas children or any motives for excluding them if there were no preferable heirs in existence when the last of the widows died.

Exhibit D-240 is a judgment of this Court in 1865 where it was held that an illegitimate son of a Sudra is postponed to his widow. Though it was reversed by the Privy Council on the facts of the case, the law was

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not dissented from. Sir Thomas Strange in his Hindu Law, page 69, published long before 1862, states that the illegitimate son takes after the daughter. I may also refer to *Parvathi v. Thirumalai*(1). It was only so late as the year 1909 that it was finally decided in *Meenakshi Anni v. Appakutti*(2) that the illegitimate son takes with the widow and is not excluded. Mr. Norton who was at one stage of the proceedings authorized to act for the Mangala Vilas ladies never set up any independent claim of the Mangala Vilas ladies or their sons to the private property of the Raja but contented himself with claiming and getting the restoration of the properties which belonged to the Mangala Vilas. Nobody at the date of grant thought of setting up the claims of the Mangala Vilas sons who were then little boys. Pensions had been granted to them by the Madras Government which were being received by the Mangala Vilas ladies. There is no ground for thinking that the Government had in view the rights of the Mangala Vilas sons when it made the grant and wanted to exclude them from succeeding. The only persons before the Government who had any present right according to the state of facts which were then before the Government were the only surviving daughter of the Raja and the widows who were married according to the orthodox ritual. Of these ladies Kamakshi Bai Saheba was the eldest and questions arose as to the rights of the daughter and of the widows *inter se*. It is these questions that the Government wanted to solve by reference to the Pundits and they wanted to solve them with reference to the rights of the parties under Hindu Law. Of the Raja's two daughters, the elder died on the 26th September 1856 and the younger who was nine years old at the date of his death married

Sakharam Saheb, the husband of her deceased elder sister in 1860. They adopted one Sambu Singh on the 3rd July 1884. The junior Princess died on the 31st January 1885. Her husband died on the 28th January 1895. Sambu Singh died in March 1891 after adopting the third defendant on 4th March 1891.

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It is abundantly clear that the Government wanted to wash its hands of the private properties of the late Raja and did not reserve to itself any interest when it made the grant in 1862. While on the one hand it wanted to safeguard the property from waste and the consequent prejudice to the reversionary heirs, it did not want to prefer one heir to the other or to exclude persons who would be the heirs of the Raja when according to the Hindu Law succession to the Raja who was the last male holder, opened on the death of the widows. It should be remembered that there were 17 widows at the date of the Raja's death, some of whom were girls who had not even attained puberty. In the ordinary course of things it would have taken several years for the last of them to die and I find it difficult to believe that the intention of the Government was to cut out the nearer branches in favour of branches more remote, if such nearer branches should exist, when succession opened in the distant future.

Various contentions were raised by the parties as to what estate each of the persons specified in the Government grant took, and as to whether the interest taken was vested or contingent. So far as the widows, daughter and the other heirs of the Raja are concerned, it was contended by Mr. Grant for the fifteenth defendant that the widows took what under the Hindu Law would be a widow's estate, that they represented the whole inheritance leaving nothing but a *spes successionis* to those who come after them and that the Government

(1) (1887) I.L.R., 10 Mad., 334.

(2) (1910) I.L.R., 38 Mad., 226.

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having exhausted the whole estate by conferring it on the widows left no remainder to anybody else. He contends that the reference to the daughter and the next heirs of the Raja are descriptive of the nature of the estate granted to the widows and that the widows are the only donees, the other words in the grant being words of limitation appropriate to the character of a widow's estate. Mr. Raja Ayyar for the third defendant contended that what was given to the widows was only a life estate, that the daughter got a vested remainder capable of transmission to her heirs and that any estate which the next heirs of the Raja may take was contingent on the death of the daughter and on there being no heirs of her own to succeed her under Hindu Law. Mr. Alladi Krishnaswami Ayyar for defendants Nos. 4 to 11 contended that the widows took a life estate, that the estate taken by the daughter was contingent on her surviving the widows and that, if she predeceased the widows, the estate went to the next heirs of the Raja who were to be ascertained at the date of the death of the last Rani. He adds that so far as his clients are concerned, it does not matter whether the estate taken by the daughter was vested or contingent, as, even if it was vested, it was defeasible on her predeceasing the widows and that there is nothing in law to prevent a vested estate from being defeasible.

In dealing with the estate which the widows took, the actual words of the grant do not throw much light. The important words of the grant are

"the estate will therefore be made over to the senior widow who will have the management and control of the property, and it will be her duty to provide in a suitable manner for the participative enjoyment of the estate in question by the other widows—her co-heirs."

There are no powers of alienation in terms given to the widows; but reading the document as a whole and

having regard to the intention of the Government to dispose of the property in a manner that would least conflict with the Hindu Law as then understood, I think the Government intended to confer an estate in several respects analogous to that taken by a Hindu widow by inheritance.

The question whether it is open to a stranger to create what would *strictly* be a Hindu widow's estate in property by a grant or devise is not free from doubt. In *Vengamma v. Chelamayya*(1) the learned Judges doubted if a Hindu widow's estate can be conferred by a stranger by grant or devise, but in *Ram Bahadur v. Jager Nath Prasad*(2) it was held that such an estate can be conferred. The grant being a Crown grant, Act XXV of 1895 (Crown Grants Act) which is made retrospective applies and the grant must take effect according to its tenor irrespective of the Hindu Law. There is, however, nothing to prevent a grant imposing many of the limitations which would be imposed by Hindu Law upon a widow succeeding as heir without altering the course of succession. I am unable to agree with the contention of Mr. Grant that because the Government intended to grant an estate to the widows which should be analogous to an estate taken by a Hindu widow, there could be no gift over to anybody. The impossibility of a gift over to somebody would only arise if the action of the Government can be taken to be a mere restoration of the estate wrongfully seized and not a fresh grant; but as pointed out by the Subordinate Judge in paragraph 656 of his judgment all the parties were agreed before him that the properties being vested in the Crown and granted by it again, there was no lineal descent or direct inheritance from the Raja as would have been the

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(1) (1918) I.L.R., 36 Mad., 484.

(2) (1918) 3 Pat. L.J., 199 (F.B.).

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case if the act of State had been annulled and succession was therefore governed primarily by the terms of the grant. They take the same ground before us on appeal. It was on this ground that the *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*(1) case negatived any present right in the adopted son to divest the widows and it is contended with considerable force by Mr. Raja Ayyar who appears for the third defendant that if the Government really conferred a strict widow's estate with all the incidents attached thereto, the divesting by the adopted son is one of the incidents which is inseparable from the widow's estate, and that it is no answer to say that the confiscation put an end to divesting by the adopted son, as the grant of a pure Hindu widow's estate would carry with it the liability of being divested by an adopted son—the divesting being not because of a claim by inheritance but of a claim by virtue of the terms of the grant conferring a Hindu widow's estate with all its incidents.

Much stress was laid on the use of the word "inherit" in the grant, Exhibit A-46. There can be little doubt that if confiscation put an end to all antecedent rights and rights have to be determined on the footing of a fresh grant, the words "inherit" and "next heirs" cannot have their ordinary meaning of taking property by virtue of intestate succession. "Inherit" must only mean "take."

It has been argued that the use of the word "inherit" in the grant precluded any idea of a gift in favour of the daughter or next heirs. I do not think that this is so; and I need only refer to *Bhagabati Barmanya v. Kalicharan Singh*(2). In that case the testator by his will after giving his properties to his

mother and wife for life directed that after their death the property should go to his sister's sons who were then in existence and who may be born thereafter in equal shares and that they were "to hold the said properties in possession and enjoyment by right of inheritance." Their Lordships of the Privy Council at page 472 observe as follows:—

"It will be convenient at the outset to dispose of a point suggested by the words 'by right of inheritance.' It was said that there was really no bequest in favour of the nephews, and that so far as they were concerned, the will only declared the right of inheritance. The High Court had no difficulty in rejecting that contention, and their Lordships are of the same opinion."

I think the word "inherit" in the grant simply means "take." In *John Lloyd Vaughan Watkins v. Arthur Frederick*(1) the words used were the elder son "to inherit" before the younger. Lord CHANCELLOR (WESTBURY) was of opinion that the words "to inherit" were used as simply equivalent to the verb "to take." Under Hindu Law the husband of a woman and his heirs would succeed to the absolute properties of the woman in preference to her father and his heirs and it could not have been the intention of the Government to divert the line of succession to Sakharam Saheb, the daughter's husband and to his heirs, if she died issueless before the widows. I am clearly of opinion that "failing her" does not mean "failing her and her heirs" as contended for by Mr. Raja Ayyar who appears for the third defendant—the adopted son of the adopted son of the daughter. I am also of opinion that the words "the next heirs of the late Raja" mean the nearest heirs of the Raja at the time when succession opened and do not mean the heirs next after the daughter. No authority

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(1) (1868) 8 M.H.C.R., 424.

(2) (1911) I.L.R., 38 Cal., 468.

(1) (1865) 11 H.L.O., 358.

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has been cited for the contention that the words "the next heirs of the late Raja" must necessarily mean the heirs *after* the daughter. It will lead to strange consequences to hold that when properties are given to two of the relations of a person who are related to the donor, and it is provided that on failure of them or the second of them, the next heirs of the donor should take the property, all the persons who would under the Hindu Law of inheritance, be heirs in preference to the heirs of the second donee should be excluded. Suppose, for example, a man gives or bequeaths property to his wife to be enjoyed for her lifetime and then to his sister's son for whom he has a great affection and provides that, if the sister's son dies before the widow, the property should go to the donor's or testator's next heirs. Can it be said that because the sister's son is only a Bhandu (cognate) and comes much lower down in the table of succession after the list of agnatic heirs, all the agnates of the donor (e.g., his brother's son) would be excluded and the property should go to one further removed in succession than the sister's son? Such a construction would lead to absurd results. I see no reason for holding that the words "next heir" should not be used in the ordinary sense of "nearest heir." Ordinarily the words "next heir" mean the nearest, rightful or true heir. Reference may be made to section 80 of the Succession Act where the words, heirs, right heirs, relations, nearest relations, family, kindred, nearest of kin, next of kin are used and where it is stated that in such cases the nearest heir in the table of succession to the testator takes the property. In *Doe v. Chaffey*(1) it was held that "next heir" means the true heir when the gift takes effect and not the person next in order to the

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first son. Numerous cases were cited dealing with vested and contingent remainders and the construction placed by Courts on wills conferring successive estates. I think that several of the cases cited have no application to the facts of the present case. The principles which ought to guide Courts in the construction of wills, many of which apply with equal force to the construction of grants, have been laid down with great clearness by their Lordships of the Privy Council in *Narasimha v. Parthasarathy*(1). It has been pointed out in more cases than one by their Lordships of the Privy Council that the construction placed on the terms of one document is not a safe guide for construing another and I think the following observations of Lord SHAW in *Lucas Tooth v. Lucas Tooth*(2) may well be borne in mind in dealing with the cases cited:

"My Lords, there are two things in construction which ought to be avoided: the first is the danger of misplaced analogy and the second is the treatment of a stated category as necessarily exhaustive of the possibilities of signification of a term employed."

I think that unless the terms of the grant, Exhibit A-46, clearly render it necessary to do so the nearer heirs of the Raja under Hindu Law ought not to be excluded in favour of remoter heirs. I can see no such intention in the grant, Exhibit A-46, which only dealt with the widows and daughter, the next heirs under Hindu Law then in existence. It has been argued that the mere fact that the adopted son would ordinarily take before the daughter implied that the Government wanted to exclude him. I do not think this result necessarily follows. It is competent to a Hindu having power to deal with his property by will to direct an adoption to be made by his widow and to postpone the rights of the

(1) (1914) I.L.R., 37 Mad., 199. (2) (1921) 1 A.C., 594 at page 613.

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adopted son to possession and enjoyment of the properties till after the death of his widow. It is also competent to the widow and the adopted son if he is a major, to agree that the adopted son shall get possession of the properties only after the death of the widow; and the decision in *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*(1) above referred to that the adopted son had no present right may be rested on the ground that the Government having given the properties to the widows as *persona designata* to be enjoyed by them for their lives with rights of survivorship necessarily excluded the adopted son from claiming possession or enjoyment during the lifetime of the widows. There is nothing to prevent estates being granted to take effect on the death of a Hindu and a woman's estate being treated merely as interposition and for succession to be traced to a deceased person on the analogy of the ordinary Hindu Law where the last male owner dies leaving persons who are entitled either simultaneously or in succession to what is known as a woman's estate. In such cases it is well settled that succession is traced to the last male holder on the supposition that he died on the date of the death of the holders of limited estates: Persons might come into existence who are nearer heirs to those existing on the date of his will or grant who may have taken earlier if in existence but who are postponed by the express terms of the grant. In cases of a Hindu widow obtaining estate by adverse possession as against a preferential heir of a deceased person, where circumstances indicate that she prescribed only for a widow's estate, it has been held that the heir of her husband succeeds even though he might have preference to the widow under the ordinary Hindu Law and would

(1) (1868) 8 M.H.C.R., 424.

have taken before her but for her taking possession. I need only to refer to *In re Prattipati Seshayya*(1). In dealing with the estate taken by the widows under Exhibit A-46, I do not think it makes any difference whether the widows took what in law would be a strict Hindu widow's estate or whether they took an estate in several respects analogous to it or merely an estate for life, because it seems to me to be clear that whatever view may be taken, it is competent for remainders whether vested or contingent being tacked on to the estate conferred on the widows by the grant. In *Mahomed Shumsool v. Shewukram*(2) property was conveyed by a Hindu to the widow of his deceased son. The document recited that "except her none other is nor shall be my heir and malik." It also recited that his daughter-in-law had two daughters "and that the two daughters named above, together with their children who, after their marriage, may be given in blessing to them by God Almighty, are and shall be heir and malik." The daughter-in-law who was the first donee borrowed moneys and sold the property comprised in the will. A suit was filed by the daughter's son for declaring his right as reversioner and for cancelling the sale. The High Court passed a decree setting aside the sale on payment of Rs. 14,000 which was all they held was binding on the reversioner. An appeal was filed to the Privy Council and their Lordships of the Privy Council confirmed the decree of the High Court. In dealing with the nature of the estate taken by the first donee, their Lordships held that

"she did not take an absolute estate but that she took the estate subject to her daughters succeeding her in that estate: whether succeeding her as heirs of herself or succeeding her as heirs of the original testator is immaterial."

(1) (1912) M.W.N., 515.

(2) (1874) 2 I.A., 7.

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As regards the use of the word "heir," their Lordships observed:

"it would appear that the testator uses the word "heir" as signifying the person who is to take immediately in succession to another, that he applies it to the Rani as the person who is to take in immediate succession to him, and to the two daughters as the persons who are immediately to succeed to the Rani,"

and their Lordships think that, viewing the will as a whole, when he uses the expression "except Mussumat Rani Dhun Kowur aforesaid, none other is nor shall be my heir and malik," it may be fairly construed as meaning that she shall take a life interest immediately succeeding him, without that interest being shared by her daughters or by any other person. In another portion of the judgment dealing with the power of the widow to confer an absolute estate if there were debts to pay, their Lordships observe

"they apprehend the law to be this: that Rani Dhun Kowur, who may be considered as very much in the position of a Hindu widow might have sold the estate absolutely if it could have been shown (and the burden of showing this is upon the purchaser) that to convey such an absolute estate was necessary in order to pay the debts of the testator, and was for the benefit of his estate generally."

This decision is important as showing that there is nothing illegal in an estate analogous to a widow's estate being granted to A and to a gift over being made to other persons. There is another case in the same volume *Mussumat Bhagbutti Dace v. Chowdry Bholanath Thakoor*(1). In this case one Odan Thakoor adopted his brother's son Girdhari Thakoor. He had at that time a wife called Mussumat Chundarbutti and a daughter Mussumat Suntbutti. Shortly before his death he executed a document, which was construed in this case, in favour of the adopted son, and got a document in

similar terms from his adopted son. In the document executed by Odan Thakoor he gave his daughter Mussumat Suntbutti a certain share in the property

"for her maintenance in order that she may enjoy possession of the same with her children, as proprietress and thus pass her days."

He gave certain other properties to his wife

"to be enjoyed during her lifetime, in order that she may hold possession of all the properties and milkiut possessed by me, the declarant, during her life-time, and by the payment of the Government revenue, appropriate the profits derived therefrom, but that she should not by any means transfer the milkiut estates and the slaves, that after the death of my aforesaid wife the milkiut and household furniture shall devolve on Girdhari Thakoor, my kurta (adopted son) and that no objection thereto raised by any one shall be ever held valid."

The Subordinate Judge construed the document as giving Chundarbutti an estate for life with power to appropriate the profits, and to Girdhari, the adopted son, a vested remainder on her death. On appeal, the High Court differed from the Subordinate Judge and observed as follows:—

"Shortly, the effect of the two ikrarnamas which have been read to us appears to be this, that by an understanding between Odan Thakoor and his adopted son, carried out in those instruments, it was agreed that notwithstanding the adoption, Chundarbutti should take and enjoy the estate of her husband, whose death was then apprehended and which did shortly afterwards occur, in the same mode as she would have taken and enjoyed it, if no adoption had taken place,"

that is, in her character as a Hindu widow. Their Lordships of the Privy Council disagreed with the view of the High Court and stated that there was no evidence to show that there was any understanding as that referred to by the High Court and observed as follows:—

"If she took the estate only of a Hindu widow, one consequence, no doubt, would be that she would be unable to alienate the profits, or that at all events, whatever she purchased

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out of them would be an increment to her husband's estate, and the plaintiffs would be entitled to recover possession of all such property, real and personal. But, on the other hand, she would have certain rights as a Hindu widow; for example, she would have the rights under certain circumstances, if the estate were insufficient to defray the funeral expenses or her maintenance, to alienate it altogether. She certainly would have the power of selling her own estate; and it would further follow that Girdhari would not be possessed in any sense of a vested remainder, but merely of a contingent one. It would also follow that she would completely represent the estate, and under certain circumstances the Statute of Limitations might run against the heirs to the estate, whoever they might be. Their Lordships see no sufficient reason for importing into this document words which would carry with them all these consequences, and they agree with the Subordinate Judge in construing it according to its plain meaning."

In *Ram Bahadur v. Jager Nath Prasad*(1), one Fateh Chand died leaving a widow Mussumat Sheodei Kuer and his brother's daughter Mussumat Bibi Sabodra. He executed a will to the effect that should any son or daughter be born to him during his lifetime such son or daughter should be the owner of the property, that if there be no son or daughter, his niece should take a bequest of a lakh of rupees, that the rest of the moveable and immoveable properties should remain in the possession of his wife till her death and that after her death it should pass to his niece, but that if on the death of his wife and niece there should be living a son and a daughter born to his niece, they should share it in the proportion of two-thirds and one-third. After the death of the widow, Sabodra alienated certain properties and the question was whether the alienation was valid beyond her lifetime. It was held that Sabodra did not take an absolute estate by inheritance giving her unfettered rights of alienation but an estate which the Hindu Law confers on a woman who inherits

in case of intestacy, that such an estate is capable of being granted by grant or by will and that the estate of those who took after the niece was a contingent and not a vested remainder. These decisions are authority for holding that even if a widow's estate was granted, there can be a remainder fastened upon it.

A question was raised in these appeals as to whether the period when the heirs of the Raja were to be ascertained was the date of the grant or the date of the death of the last Rani. On this point it has been held that no general rule can be laid down but that is a question of construction which will yield to the context. I need only refer to *Hutchinson v. National Refuges for Homeless and Destitute Children*(1) and *Lucas Tooth v. Lucas Tooth*(2). There is nothing in law to prevent a person taking as heir of the testator or donor by virtue of his satisfying the requirements in an ultimate bequest even though he may be excluded either expressly or by the terms of the grant from taking under a prior clause. Reference was made to the Succession Act and the Transfer of Property Act and though the Acts were long after the date of the grant, the Acts were referred to as affording a safe guidance. If any of the provisions of the Acts afford guidance for the interpretation of this will, I think section 111 and illustration (e) of the Succession Act and section 23 of the Transfer of Property Act are in point. Illustration (e) to section 111 of the Succession Act runs as follows:—

"A legacy is bequeathed to A for life and after his death to B 'and in case of B's death' to C. The words 'in case of B's death' are to be considered as meaning 'in case B shall die in the lifetime of A'."

I think the words in the present grant "or failing her" mean "if she should die before the last surviving widow."

(1) (1920) A.C., 794.

(2) (1921) 1 A.C., 594.

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Reference was made by Mr. Rajah Ayyar to *Brij Lal v. Suraj Bikram Singh*(1), where a testator bequeathed property to his wife directing that after his death she should remain in possession and enjoyment of the property with all powers or authority like himself and that after her death his daughter-in-law should remain in possession and enjoyment like himself and his wife. It empowered the daughter-in-law to nominate any one whom she may think fit as "heir" so that the name of the family may continue as formerly and now with honour. Their Lordships of the Privy Council affirming the decision of the Judicial Commissioners held that the daughter-in-law took only an estate for life and observed :

"In the first place there is no estate at all given to the lady in terms. The only direction is that she is to remain in possession and occupation of the property, and then she is invested with the power of appointing an heir either in her lifetime or by will. It seems to their Lordships that the word 'heir' in that clause means heir to the testator and that the judgment of the Judicial Commissioners is perfectly right."

It is argued that in the present grant no estate is in terms conferred on the widows, that all that is said is that the estate will be made over to the senior widow who will have the management and control of the property, and that it will be her duty to provide in a suitable manner for the participative enjoyment of the estate in question by the other widows—her co-heirs, and that no powers are given of alienation, nor do any of the terms used in the grant denote that the widows had anything more than the right to enjoy the property for their lives as life-tenants. I do not think that the nature of the estate taken by the widows is very material as there is no question of any alienation by the widows or anything done by them which would prejudice the

(1) (1912) I.L.R., 34 All., 405.

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reversion. The property in dispute is almost identical with the property which the Receiver took possession of in 1866 and there are no claims of any alienees to be considered. The authorities which I have referred to show that where the widows took a life estate or an estate analogous to the estate of a Hindu widow, there is nothing to prevent remainders being fastened on to such estate and we are more concerned with the nature of the remainders than with the powers of the widows, the first donees under the grant. However, having regard to the terms of the grant and the attending circumstances pointed out by me, I think it was the intention of the Government to grant to the widows an estate corresponding as nearly as possible to the estate which a Hindu widow would take in her husband's property if she succeeded him in the ordinary way.

I think that the proper construction of the grant is that the widows were to enjoy an estate for their lives analogous to Hindu widow's estate with rights of survivorship, the management of the estate being in the hands of the senior widow, that the daughter was to succeed to the estate if she survived the last widow, and that if she predeceased her, the estate was to be taken by the person or persons who at the date of the death of the last surviving widow would under Hindu law be the next or nearest heirs of the Raja, he being treated as the stock of descent. I think the words "or failing her" mean "if the daughter should die before the widows" and that they do not mean failing her and her own heirs. The grant does not mean that the daughter is to be treated as a fresh stock of descent and it is clear from the succeeding words "the next heirs of the Raja will, if any, inherit," that the heirs of the daughter were not intended to come in unless they were also

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the next heirs of the late Raja if she died before the widows.

The next question is whether what is called a "sword marriage" is a valid form of marriage and whether the issue of such marriage have all the rights of legitimate issue. Connected with it is the question whether the mothers of defendants Nos. 4 and 5 and the grandmothers of defendants Nos. 6 to 11 were the sword wives of the late Maharaja Sivaji.

So far as the pleadings go, none of the defendants except defendants Nos. 4 to 11 allege that sword marriage is a legal or customary form of marriage. In paragraph 10 of the fourth defendant's written statement he states as follows:—

"This defendant is the legitimate son of His Highness Sivaji by Saubhagya Lakshmi Bai who was brought to the Palace as a virgin when she was about 11 years old and married to His Highness in the presence of sword—a form of marriage which is customary and recognized as valid and legal in the family of His Highness and in the Mahratta community to which His Highness belonged."

Defendants Nos. 5 and 7 to 11 in paragraph 13 of their written statement allege:—

"That it was the custom of the Royal family of Tanjore to enter into sword marriages and to take as wives girls married according to that form. Such sword wives were admitted into the family as members thereof, were treated with respect and consideration by the other members including the wives married in the ordinary form."

It is clear that this form of marriage is not one of the forms of marriage referred to in any of the Smritis or authoritative ancient works on Hindu law or in any of the commentaries which are accepted as authorities in the various provinces of India. It is not included in one of the eight forms of marriage and it was not disputed before us that there was no reference to such a marriage in Manu, Parasara, Yajnavalkya, or in any

of the Dharma Sastras which deal with the subject of marriage. So far as the eight forms of marriage referred to in the Sastras are concerned, it is now accepted law that all except the Brahma and the Asura forms are obsolete (see Mayne on Hindu law, paragraph 88, page 97).

The only reference made to the sword marriage in any Sanskrit work is that contained in a work called Jyotirvidabharanam. This is not a book dealing with Hindu law but is a work on Astrology; and though ascribed to the great poet Kalidasa, it is clearly a work of much later origin. Professor Weber in his History of Hindu Literature is of opinion that the book was written about the 16th century. The only reference to the sword marriage is that contained in a verse which has been translated as follows:—

"In the Kali-age a king should perform the auspicious sword marriage ceremony in the summer solstice on the day having the five auspicious parts (angas) the austeric being fit for the marriage, in the evening."

The next stanza gives the horoscope of the sword. The previous slokas refer to the eight kinds of marriages mentioned in the Sastras and divide them into marriages where the Panigrahana ceremony, i.e., the ceremony where the bridegroom takes hold of the hand of the bride before the sacred fire, is necessary and those where it is not necessary. Of the eight forms of marriage the author states that the Brahma, Prajapatya, Dyva and Arsha are the forms which require the Panigrahana ceremony in which the hand of the bride is held by the bridegroom. The other forms of marriage, Gandharva, Paishachi, Rakshasa, and Asura are forms where the Panigrahana ceremony is not necessary. As regards the first four forms of marriages the author states that they should be performed at the time stated.

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by him in the previous portion of the work and as regards the latter four forms where no such ceremony is necessary, they could be performed at any time. Then comes the stanza relating to the sword marriage which I have set out above.

It is argued by the vakil for the first and second defendants that the sword marriage referred to in that stanza does not refer to any marriage between a man and a woman, but to a ceremony whereby the king performs a ceremony by which he becomes wedded to the sword which is the emblem of kingly power, the object being that with the help of the sword he should be victorious in the wars which he undertakes. It is also argued that the word "Dharadhibu" which really means "the Ruler of the Earth" refers only to Kshatriyas or Rajputs who belong to the warrior class and not to Brahmans, Vysias or Sudras. It is also argued that no work on Hindu law refers to sword marriage as a form of marriage and that it is unlikely that the Jyotirvidabharanam, which really deals with the auspicious hour for performing marriages known to Sastras would in this casual manner refer to a form of marriage unknown and not referred to in any previous works on Hindu law. It is stated that the casting of the horoscope of the sword in the next sloka would be perfectly unnecessary if the marriage was to a woman, because in such cases the horoscope of the woman would be the horoscope that would guide the union.

It is contended on the other side that, having regard to its position in the book and having regard to the fact that it comes in Chapter XIII which fixes the Lagna or the auspicious time for performing the marriage and also having regard to the arrangement whereby marriages are divided into two kinds, i.e., where Panigrabana is necessary and where it is not, the sloka relating to

the sword marriage really refers to a form of marriage between a man and a woman, the sword playing an important part in the ceremony and not to a marriage with an inanimate object like a sword. I have read the stanza carefully and I think that the stanza refers to a customary form of marriage that probably arose after the Muhammadan conquest. It seems to me, however, that the verse only refers to a union by a Kshatriya. It is clear that a sword marriage is a form of union which by custom has been recognized by Rajputs and some other communities. Mr. Enthoven in his "Castes and Tribes of Bombay," Vol. III, page 218, deals with the custom of sword marriage among the Rajputs who are Kshatriyas. He gives a detailed account of the marriage and it appears from his description that, though a sword was sent to the house of the bride with certain ceremonies, the bride and bridegroom met afterwards and other ceremonies were performed. The case reported in *Ramasami Kamaya Naik v. Sundaralingasami Kamaya Naik*(1), which relates to the Sattūr Zamindari where the parties were Sudras also shows that it was the custom in certain families in Southern India to perform what was known as sword or dagger marriage, the wife being known as the sword or dagger wife. It appears from the judgment that all the usual ceremonies in connexion with a marriage were gone through—the dagger being placed as a symbol to show that the status of the wife was inferior. This case does not help us much. Mr. Ganapathi Ayyar in his work on Hindu law refers to a sword marriage and at page 491 observes :

"Among the Kshatriya castes there is a form of marriage known as the sword or dagger marriage (kadga vivaha) and this prevails even now among some zamindar families. In the Jyotirvidabharanam which is supposed to be the work of

(1) (1894) I.L.R., 17 Mad., 423.

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Kalidasa, it is said that in the Kaliyuga even a marriage without Panigrahanam is good as in the case of kings who celebrate marriages in the sword or dagger form (kadga vivaha)."

The issues framed in the suit base the claim on custom and although defendants Nos. 4 to 11 state that it was a custom in the Royal family to which Raja Sivaji belonged and among the Mahrattas generally to have sword wives, there is no evidence that in the Royal families of Kolhapur or Satara which equally with the Royal family of Tanjore descended from the Great Sivaji, there was any instance of a marriage known as sword marriage having ever been contracted by any of the members of the Royal family. There is no reference to any custom of sword marriage amongst the Mahrattas in the Dekhan or the Bombay Presidency in the Kolhapur, Satara or other Gazetteers published under the authority of the Government. As I said before, the only reference I can find is in Enthoven's "Castes and Tribes" and it refers to the custom amongst the Rajputs. Only one witness Vittal Rao Sahib Mohitai, the eighty-seventh witness for defendants Nos. 4 to 11, speaks to a sword marriage having been contracted by a relation of his in Bhore in the Satara district and describes the ceremonies the parties went through. Mahadeva Rao Nimbalkar, the eighty-third witness of defendants Nos. 4 to 11, speaks to his maternal grandfather having performed a sword marriage but states he can give no details of that ceremony. This evidence is totally insufficient to prove any general custom amongst the Mahrattas generally.

The question therefore resolves itself into whether any special customs existed in the royal family of Tanjore and, if so, what were the rights of the issue. So far as the Tanjore Royal family is concerned, there is the evidence of Dharmavalli Bai Amma whose deposition

has been marked as Exhibit D-236. She states that she was the brother-in-law's daughter of Sivaji Maharaja, that she was married according to the sword form of marriage, that the marriage was over in a day, that a sword was placed and *homam* performed, that she went round the *homam* when the priest chanted the mantrams, that after she did that, she prostrated before the Raja who tied a tirumangaliam or tali round her neck, that there was a dinner afterwards and that the Raja's adoptive mother Avu Bai Saheba performed a ceremony known as *summuk*, i.e., a ceremony where the mother-in-law for the first time after the marriage looks at the face of the daughter-in-law. It is unfortunate that this witness who would have been an important witness for defendants Nos. 4 to 11 was not examined earlier. She was ill when she was examined-in-chief, and her examination was adjourned after a few sentences in cross-examination were recorded. She died before cross-examination could be resumed. There was considerable argument as to the admissibility of her evidence which it was not possible to test by cross-examination. I do not think that the evidence can be rejected as inadmissible, though it is clear that evidence untested by cross-examination on a question like the present can have little value. I need only refer to Taylor on Evidence, section 1469: *Davies v. Otty*(1), *Elias v. Griffith*(2), *Man Gobinda Chowdhuri v. Shashindia Chandra Chowdhuri*(3) and *Dhanu Ram Mahto v. Murli Mahto*(4). There is nothing in the Evidence Act which renders such evidence inadmissible. In *Rosi v. Pillamma*(5) it was pointed out that the evidence was admissible though the learned Judges were of opinion that it should not be acted upon. I think

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(1) (1865) 35 Beav., 208.

(2) (1877) 46 L.J. Ch., 808.

(3) (1908) I.L.R., 35 Calo., 28.

(4) (1909) I.L.R., 36 Calo., 566.

(5) (1910) 20 M.L.J., 400.

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the correct rule is that the evidence is admissible but that the weight to be attached to such evidence should depend upon the circumstances of each case and that, though in some cases the Court may act upon it, if there is other evidence on record, its probative value may be very small and may even be disregarded. I am not disposed to attach any weight to the evidence of this witness. There is no other witness examined in this suit who speaks to any ceremony which was usual in the case of sword marriage in the Tanjore family or among the Mahrattas. Though commission was taken out to examine witnesses in the Bombay Presidency, there was no attempt made to adduce any evidence as to the ceremonies which usually follow or the incidents which attach to a sword marriage or the issue by such a marriage. There was some evidence adduced in previous litigations as to the ceremonies that accompany sword marriage. [After referring to some oral evidence recorded in some previous litigations and discredited by the Judges who recorded them his Lordship proceeded as follows:—] I am of opinion that there is no satisfactory evidence in this case to show what ceremonies were necessary to constitute a sword marriage.

No accounts or documents are filed to show that any expenses were incurred in connexion with any of the sword marriages either of Serfoji or Sivaji though Serfoji had no less than 26 sword wives and Sivaji, the father and grandfather of defendants Nos. 4 to 11, had 40 sword wives. [After discrediting the reasons for the absence of accounts, his Lordship proceeded as follows:—] There can, however, be little doubt that in the Tanjore Raja's family there were unions by which women were admitted to the seraglio and were known as sword wives.

The first recorded instance of a sword marriage is that between Tukkoji, son of Venkoji, the founder of the Tanjore Dynasty, and Annapurni Bai; and Pratapa Singh who reigned from 1740 to 1763 was the issue of such a union. The next instance is that of Amar Singh, son of Pratapa Singh. The third instance is that of Paratapa Singh (son of Amar Singh) and his wife Radha Bai, and it was this marriage that was in question in the suit which I have already referred to and the judgment in which is filed as Exhibit E-100. The next instance is that of Serfoji who had a number of sword wives and who founded an institution called Kalyana Mahal for them and the last instance is that of his son Sivaji the last Raja of Tanjore who had 40 sword wives and who founded an institution known as Mangala Vilas for them.

It is significant that none of the records show that the children by sword wives were as regards property or succession treated as legitimate issue entitled to the same rights and privileges as the children by wives married according to orthodox form.

So far as Pratapa Singh, the son of Tukkoji by his sword wife Annapurni Bai, is concerned, he was treated as illegitimate not only in early documents and by all historical writers but also by his grandson Serfoji Raja in the inscription, Exhibit B-140, to which I shall refer later on. [After referring to some documents on this last point his Lordship proceeded as follows:—] It is not likely that a Ruling Prince as Serfoji then was would deliberately bastardize his ancestor who on all accounts was the greatest of the Tanjore kings, unless the facts were so well known or strong as to prevent any attempt to distort them.

However sceptical one may be as to the statements made regarding the descent of the ancestors of the

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Rajas from the lunar and solar dynasties of ancient India, especially when it is known that Sivaji the great-grandfather was a humble Patel and cultivator in an obscure village, I think that there is no reason to discredit the statement against the honour and reputation of the grandfather of the Raja who caused the inscription to be made. There is in Exhibits B-140 and B-141 a clear indication that the women with whom the ceremony of sword marriage was gone through were looked upon as no better than permanently kept concubines.

Turning to Mahratta History, Orme in his history, Vol. I, page 108, refers to Pratapa Singh as a person born of an inferior wife of his father Serfoji and states that he was placed on the throne by the general concurrence of the principal men in the kingdom which had suffered much from the weak administration of Shahuji. The early writers seem to have treated a permanent concubine as a kind of inferior wife. In Strange's Manual of Hindu Law, Vol. II, published in 1825 he states that kept women are regarded as inferior wives. I may also refer to the decision reported in *Datti Parisi Nayudu v. Datti Bangaru Nayudu* (1) where it is said that a permanently kept concubine ranks as if she were a secondary wife. Grant Duff in his History of the Mahrattas (a book which has been exhibited as B-177) at page 462 of Vol. I, states that Pratapa Singh is the son of a concubine. Mill in his history of India which has been filed as Exhibit G-212 at page 62 of Vol. III, refers to Pratapa Singh being the son of one of the inferior wives of Tukkoji, but Mr. H. H. Wilson's note states that Pratapa Singh was the son of a concubine. In Aitchison's Treaties, Vol. X, which has been marked as Exhibit B-172, reference is made to Pratapa Singh as

(1) (1869) 4 M.H.C.R., 204.

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being of illegitimate birth. Justice RANADE in his History of the rise of the Mahratta Power refers to Pratapa Singh as an illegitimate son of Tukkoji and states that the Mahratta officers in the service of Tanjore finally succeeded in raising him to the throne. In the Tanjore District Manual published under the orders of the Government which has been marked as Exhibit B-173 Pratapa Singh is said to be the illegitimate son of Tukkoji. In the genealogical table given at page 764 of the Manual Tukkoji is said to have had three illegitimate children, Anna Saheb who died before his father issueless, Nana Saheb who died before his father leaving an infant son, and at pages 775 and 777 reference is made to Pratapa Singh as the illegitimate son of Tukkoji. So far therefore as Pratapa Singh is concerned, though his father and mother were united according to a form known as sword marriage, the union was not regarded as one which conferred on him the status of a legitimate son.

Much stress has been laid on the fact that Pratapa Singh did succeed to the throne and that his illegitimacy was no bar to succession. The succession of an illegitimate son, if he is a capable person, and there were no legitimate issue of proper age or any ability, was an event not unknown in those troubled times. For example, there were cases of illegitimate sons succeeding where the legitimate issues were weak or incompetent. Mahadaji Scindia, though an illegitimate son, succeeded Junkoji and Jeswant Rao Holkar, though illegitimate, was ruler for several years. (Duff's History of the Mahrattas and Sir John Macolm's Central India.) It is also significant that, although Pratapa Singh was a major, he did not succeed at once. On the death of his brother Bava Saheb his widow Siyari Bai was placed on the throne and it was only because there was no competent person to govern the State that Pratapa Singh was

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installed by the people. According to Exhibit B-141 he was raised to the throne by the army and the chief men in the State. The following passage at page 777 of the Tanjore District Manual which has been filed as Exhibit B-173 is instructive :

"That Pratap Sing was illegitimate is nowhere denied and that Saiyaji was a legitimate son, may, it seems, be fairly assumed upon the authority of Duff. Mill, upon the authority apparently of the 'History and Management of the East India Company from an authentic M.S. account of Tanjore' ascribes all the revolutions between the death of Bava Saheb and the elevation of Pratapsing, as well as the latter event, to the Mahomedan commander Saiyid, and considers Orme, who gives a different version, to be 'in some particulars misinformed;' but Orme's version that Saiyaji was deposed and Pratapsing was placed on the throne 'by the general concurrence of the principal men in the kingdom' is apparently accepted by the Tanjore Commission (their report 1799, Appendix) and seems more probable."

The next instance of sword marriage relied upon is that of Amar Singh, son of Pratapa Singh. The Tanjore District Manual at page 764 refers to Amar Singh as the illegitimate son of Pratapa Singh, and at page 814 it refers to Amar Singh as the son of Pratapa Singh by a sword wife. Amar Singh who succeeded his brother Tulsaji was on the throne between 1787 and 1798. The claims of Serfoji, the adopted son of Tulsaji, were advanced by Mr. Swartz and others and the East India Company ultimately deposed Amar Singh and put Serfoji on the throne in 1799.

[After referring to some documents on the question of Amar Singh's legitimacy, his Lordship continued as follows:—] There is no evidence beyond the statements contained in the Tanjore District Manual that Amar Singh was the son of a sword wife. If the B series of documents that I have referred to are of any value, they rather show that he was the son of a concubine.

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The next instance referred to is that of Radha Bai. Amar Singh, whom I have already referred to, had a son Pratapa Singh who adopted one Ekoji. After Amar Singh was deposed, a pension was conferred on him and he was sent to Madhyarjunam, 29 miles from Tanjore. He died in 1802 and his pension was continued to Pratapa Singh who died in 1849 leaving an adopted son Ekoji. Pratapa Singh is said to have left a sword wife Radha Bai. So far as Radha Bai is concerned, she was called either a sword wife or concubine in the correspondence between her and the Government officials. [After referring to some documentary evidence on the point his Lordship continued as follows:—] I do not think that the instance of Radha Bai can be considered as proof that a sword marriage confers legitimacy on the issue.

Coming to the time of Serfoji, the father of Sivaji, we find that he founded a separate establishment known as Kalyana Mahal. The case for defendants Nos. 4 to 11 is that the ladies who were installed by Serfoji in the Kalyana Mahal were his sword wives and the earliest instance of a sword marriage by Serfoji is said to be his marriage with one Mukta Bai. [After referring to some documents on this point his Lordship continued as follows:—] So far as Mukta Bai is concerned, Exhibit B-141 refers to her as a concubine and not as a wife and she is nowhere referred to as a wife in any document. [After referring some oral and documentary evidence on the position of ladies in Kalyana Mahal, his Lordship continued as follows:—] So far as Kalyana Mahal is concerned, I think the evidence is not sufficient to show that the numerous women whom Serfoji gathered together in the Kalyana Mahal had any rights other than those of permanently kept concubines.

So far as the Mangala Vilas ladies are concerned, Exhibit B-173, the Tanjore District Manual, at page

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828, states that Sivaji had a large seraglio to which he gave the name of Mangala Vilas. It appears from the exhibits that in 1841 there were five ladies in the Mangala Vilas, that in 1844 the number was increased to 16 and that in 1847 there were about 45. After 1847 two more seem to have been admitted, one of them being Dharma Valli Amma whom I have already referred to. It is unnecessary to consider the names and castes of all the ladies who were alive at the time of Sivaji's death as we are only concerned with six of them who left male issue. The fourth defendant is the son of Lakshmi. The fifth defendant is the son of Meena. The sixth defendant is the son of Sadanandaji who is the deceased son of one Kasi. The seventh defendant is the son of Kamanandaji who is the deceased son of one Bagi. The eighth and ninth defendants are the sons of Bhavani who is the son of one Kamu and the tenth and eleventh defendants are the sons of Bagyanandaji who is the son of one Guna.

I think the evidence shows beyond all dispute that these women were described as the sword wives of Raja Sivaji. All the sons by the sword wives were minors at the time of the death of Sivaji, the eldest being about eleven years old. Owing to the time that has elapsed, it is not possible to call any witness who was alive at the time when each of these ladies was married to Sivaji. [After referring to some oral and documentary evidence on the sword marriages of these six ladies in Mangala Vilas, his Lordship continued as follows :—] I have little doubt from the evidence that the Raja went through the form of what was called sword marriage with the mothers and grandmothers of defendants Nos. 4 to 11. The way they were treated and the ceremonies they took part in before and after the Raja's death which I shall refer to later on show to my mind clearly that they were not merely the sons of dancing girls but they were the

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sons of women who were permanently attached to the Raja's seraglio. The evidence which has been set out at great length by the Subordinate Judge shows this. The question, however, is whether, they were only the sons of permanently kept concubines, the sword marriage being a ceremony which merely gave the women the status of permanently kept concubines, or were legitimate children being the offspring of a form of marriage which, though inferior to a regular orthodox form of marriage, still conferred the status of legitimacy. The Subordinate Judge, in paragraph 1772 of his judgment, page 666, states that the institution of sword marriage is true, that the Mangala Vilas sons are the issue of such marriage, that it is an inferior form of marriage wherein the sons are postponed in succession and are not an impediment to adoption, that they are all nevertheless legitimate children and that defendants Nos. 4 to 11 are therefore entitled to succeed as the heirs of the late Raja. In the concluding portion of his judgment, however, he states in paragraph 2169, page 810, that the existence of the sons of the sword wives of the Raja is not an impediment to the adoption and that they are only inferior sons and of lower caste to him, who cannot sit in mess and worship with him on a footing of equality and who were incompetent to do the full duties of sonship under the Hindu ceremonial and family laws and rules. In paragraph 2175, page 811, he states that the status of sword wives was inferior to those married in the *Lagna* form and that such sword wives were inferior wives and not the permanent concubines of the Raja, and he continues and states that the sons born to such ladies are illegitimate children within the meaning of Hindu Law so far as the shares are concerned. In paragraph 2181 he gives reasons for giving shares to illegitimate children and observes :

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"I took into consideration that their existence is not of any value to the family socially because they are not members of it entitled to sit and eat and intermarry with them; in religion because they cannot perform the *Sradhs* of the ancestors or take part in religious ceremonies; in festive vrithams, marriages and so on, due to the inequality of caste; and legally their existence will not bar the succession of the superior widow and daughter or the adoption of a son of superior caste. I am not sure whether such inferior sons can claim right in collateral succession, in competition with relations of superior caste."

I am unable to agree with the Subordinate Judge in holding that sword marriage conferred the status of legitimacy. I am of opinion that the documentary evidence distinctly shows that defendants Nos. 4 to 11 were not only treated as illegitimate children both by the Raja during his lifetime and by the Courts and Government after his death, but that they themselves until quite recently considered themselves to be illegitimate and described themselves as such. It is clear that Sivaji during his lifetime did not consider his children by the Mangala Vilas ladies to be entitled to succeed to the raj. In 1846 the policy of the Government was to discourage adoptions. On the 16th of March 1846 the Government communicated a notification to the Raja which prevented adoptions without the consent of the Government in case of shrotriems, mokhasa and other grants. The Raja on the 20th of July 1846 through his Secretary protested against the notification. There can be little doubt that the Raja was considerably alarmed at the policy of the Government and though he had two wives alive and a number of sword wives, he adopted the expedient in 1852 of marrying no less than 17 girls. In his letter, Exhibit A-13, to the Resident he states that the measure was essential to the happiness of his family and his people. In Exhibit A-14, dated the 29th of July 1852, the Raja gives the reason for his marrying so many wives on one day and states that his

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action will appear justifiable when the importance of the object for the accomplishment of which that measure was adopted is taken into consideration, evidently meaning the birth of an heir to succeed him so as to prevent an escheat. It is therefore fairly clear that the Raja did not consider the Mangala Vilas children as persons who would be the proper persons to succeed him, should he die without issue by the wives married according to orthodox form. Finding he had no issue in spite of the numerous marriages which he performed in 1852, he brought up from about three years before his death in 1855 his sister's grandson Rajaram Ingle with a view to adoption. I shall deal with the adoption later on, but it is sufficient here to state that I agree with the Subordinate Judge in thinking that the Raja took the adopted boy from his father and was bringing him up with a view to eventual adoption, should circumstances compel him to do so. It is significant that the Raja thought none of the Mangala Vilas sons as counting in the matter and though he was treating them with affection and bearing all their expenses, he did not consider that their status was sufficient to enable them to succeed to the raj. On the death of the Raja although there were six Mangala Vilas sons in existence, they were all treated as illegitimate by the Government and by the relations of the Raja and no attempt was made by their mothers or by the other Mangala Vilas ladies to assert their rights as married wives or to bring forward the claims of their children to succeed. None of the Mangala Vilas sons performed the funerals of the deceased Raja or of any of his wives married according to orthodox form. In the report sent by Mr. Forbes immediately after the Raja's death no mention is made of the Mangala Vilas sons as legitimate issue and Mr. Forbes states that the Raja left no

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legitimate sons. In Exhibit D-35 which is a report by the Resident to the Chief Secretary, dated 9th of September 1856, Mr. Forbes in paragraph 24 states :

“ There are two kinds of marriage among Mahrattas, one in which the tali is tied round the neck of the bride by the bridegroom whose full wife she then becomes ; the other in which the tali is tied to a sword—a ceremony which constitutes the woman the permanent concubine of the man.”

I have already referred to the exhibits where the mothers and grandmothers of defendants Nos. 4 to 11 are called sword wives. Mr. Forbes treated these sword wives as permanent concubines in his report and under the orders of Government pensions were allotted to them on that footing ; and the Government order which I have already referred to states that the pensions were not descendable to their heirs. Exhibit D-53 are the proceedings of the Madras Government, dated the 21st of April 1864, providing for the marriages of the fifteen illegitimate children left by the Raja by the Mangala Vilas ladies and granting Rs. 3,000 for the expenses of the marriage of each. In Exhibit D-85, dated the 23rd of September 1865, the Government Agent refers to the Mangala Vilas people as the unfortunate illegitimate brothers and sisters of the Princess. In Exhibit D-65 which is a letter from the Government of Madras to the Secretary of State for India, dated the 26th of June 1874, reference is made to the fifteen illegitimate children for each of whose marriage expenses a sum of Rs. 3,000 was granted in 1864 and the Government requests that provision may be made for the marriage of their children and suggests a sum of Rs. 1,000 for the marriage of each. Exhibit D-68, dated the 6th of September 1880, is the Government order on a petition of one of the Mangala Vilas daughters of the late Raja and it refers to her as illegitimate daughter. Exhibit K-12, a Government order of 1859, contains the persons whose

claims for maintenance were forwarded by Mr. Forbes and refers to “ the late Raja Sivaji’s seraglio, in number 59 persons ” including apparently, six natural sons and eleven natural daughters of the Raja. So far therefore as the Resident and the Government were concerned, the Mangala Vilas children were from the date of the Raja’s death referred to and treated as illegitimate children of the Raja, the position taken up by the Resident and the Government being that sword marriage created only a permanent form of concubinage. Though claims were set up by the relations of the Raja and the public for the restoration of the raj, nobody thought of the Mangala Vilas children as being legitimate though inferior sons or as having any right to succession. In the suit filed by Kamakshi Bai Saheba against the Secretary of State it is stated that the Raja died issueless and there is no reference made to the Mangala Vilas children as having any rights. It is also clear that the relations of the Raja treated the Mangala Vilas children as illegitimate and objected to their use of the Royal paraphernalia on occasions and I need only refer to Exhibits A-137, A-194, B-71 and B-72. So far as defendants Nos. 4 to 11 are concerned, they have described themselves as illegitimate sons of the Raja and are so termed and described in judicial proceedings. [Then his Lordship referred to the documentary evidence in which they were so described and continued as follows :—] Great reliance is placed by the vakil for defendants Nos. 4 to 11 on the treatment of the Mangala Vilas ladies and their children during the Raja’s lifetime and after his death and on the religious ceremonies which they performed. There can be little doubt from the evidence that *sradhs* and funeral ceremonies were performed for the Mangala Vilas ladies during the Raja’s lifetime and various

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ceremonies were performed to the children borne by the Mangala Vilas ladies. There can also be little doubt that the Mangala Vilas ladies performed a number of ceremonies which are usually performed by married women. [After referring to the documentary evidence relating to the performance of ceremonies on auspicious and inauspicious occasions, his Lordship proceeded as follows:—] The evidence also is that the Mangala Vilas ladies were kept in strict gosha just as the married wives were and that even their relations were not given any access to them.

[After referring to the oral evidence as to performance of ceremonies by the Mangala Vilas ladies and their children and the treatment accorded to them, his lordship continued:—] I do not think that the nature of the treatment accorded to the Mangala Vilas ladies and children as disclosed in the evidence and exhibits shows that sword marriage was a recognized form of union conferring the status of a lawfully married, though inferior, wife or that the children can be said to be legitimate. In estimating the evidence of treatment, it is necessary to bear in mind that the Mangala Vilas ladies were introduced into the seraglio, when they were young and were cut off from the rest of the world and were permanently annexed to the Raja's seraglio. The paternity of the Mangala Vilas children was never doubted by anybody and there can be little doubt that the Raja having no male issue of his own treated these children with considerable affection. The position in the Hindu households of permanently kept concubines is very analogous to the married wife who often resides in the same building.

In *Yashvantrav v. Kashibai*(1), NANABHAI HARIDAS, J., observes:—

(1) (1888) I.L.R., 12 Bom., 26.

"The position of a deceased co-parcener's permanent concubine in his family is in some respects analogous though necessarily inferior to that of his widow not inheriting. They are both dependent members of the family and, as such, entitled to maintenance, as above stated. (1 Str. 171, 174; 1 Norton 48, 51.) During the co-parcener's lifetime, if not even after his death, his concubine is by the Hindu Criminal Law regarded as his wife, for it ordains punishment as for adultery for any sexual intercourse with her by another as if she were his wife, and the ceremonial law also regards her in that light, for it declares the same length of impurity for her when he dies as for the death of a real husband."

The learned Judge evidently refers to verse 290 in the Vyavaharadhyaya of Yajnavalkya which is translated by Mandlik as follows:—

"A man (having intercourse) with an Avarudha (protected female slave) and Bhujishya (another's mistress) shall be required to pay a fine of fifty panas, even though intercourse with them be (in other respects) permissible."

The position of the Mangala Vilas ladies was similar to that of an Avarudha Stree defined in Mitakshara as a woman who is prohibited by her master from intercourse with other men with an injunction to stay at home with the object of avoiding any lapse of service. In *Brindavana v. Radhamani*(1) the question was whether a person who was living with a zamindar for a number of years was his wife or only a permanently kept concubine. The learned Judges Sir ARTHUR COLLINS, C.J., and MUTTUSWAMI ATTAYAR, J., observe:—

"The first of those questions is whether, as alleged by the respondents, Padmamala was the lawful wife of Padmanabha Deo by gandharva marriage. The Judge has recorded no finding in regard to it, but treated the matter as one of little moment. We observe, however, there is no satisfactory evidence in support of the contention. None of the respondents' witnesses deposed to the factum of a gandharva marriage between Padmamala and Padmanabha Deo, and there is no direct evidence at all on the point. It was no doubt in evidence

(1) (1889) I.L.R., 12 Mad., 72.

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that Padmanala was addressed as Maha Devi, that she wore gold jewels on her legs, that she performed a ceremony called Bandapon which married woman alone ordinarily perform and that she was the brother's daughter of Nila Patta Maha Devi, the senior wife of Padmanabha, admittedly a lady of the Kshatriya caste. But these circumstances are not in themselves conclusive on the question of lawful marriage, and although Padmamala was the niece of the senior wife and taken by Padmanabha under his protection on her recommendation, yet it is by no means unlikely that her status was not higher than that of a concubine if she was only an illegitimate relation."

Great reliance was placed on the fact that talis were tied to the sword wives and that they were removed on the Raja's death, but there is nothing to prevent permanently kept women who are brought to the palace when young and kept there as permanent concubines of the Raja from having talis though the tali is no doubt invariably tied to a woman at the time of her marriage.

[Then his Lordship referred to some documentary evidence as to tying talis for certain Mangala Vilas ladies and to the observance of *satti* by some of them and proceeded as follows:—] There is nothing in the ceremonial law or Shastras prohibiting permanently kept women in Hindu households from performing the various vratham or ceremonies which married women perform; and, as pointed out in the *Brindavana v. Radhamani*(1) the performance of such ceremonies does not necessarily show that the women must have been married.

Some stress was laid on the fact that the women were called sword wives. I do not think the mere designation of sword wife raises any necessary implication of marriage. It is a convenient English expression to use. The original expression in Mahratti is "to the sword united."

[After referring to some documentary evidence to show that the Mangala Vilas ladies were treated only as

(1) (1889) I.L.R., 12 Mad., 72.

permanently kept concubines, his Lordship proceeded as follows:—] One test of the legitimacy is the capacity to perform funeral ceremonies and sradhs. As observed by Sarvadhikari in his "Principles of the Hindu Law of Inheritance" (page 101), the importance of the Sradha ceremonies from a legal point of view cannot be over-rated. The competence of a person to offer these oblations forms the test of his title to the inheritance. It is admitted in this case that none of the Mangala Vilas sons performed the funeral ceremonies of the late Raja though on the date of his death he left no son by his married wives and had made no adoption and that none of them performed the sradhs of any of the Bai Sahebas who died before the date of the adoption of Rajaram Ingle in 1863. Nobody thought of them in that connexion as being competent.

It also appears that both Serfoji and Sivaji not only established the women in two separate houses but also made provision for them by purchasing lands for the maintenance of the inmates of those two institutions. If the Kalyana Mahal and the Mangala Vilas ladies were the legally married wives of the Raja, there would have been no necessity for any such differentiation to make separate provision.

Authorities were cited to show that presumption of marriage ought to be raised when two people live together for several years as husband and wife and reference was made to *Sastry Velaidar Aronegary v. Sembecutty Vaigalie*(1) in support of the view that the mere fact that concubinage exists should be no ground for not applying the presumption of marriage from long cohabitation. I may state that, though where nothing more is known than that persons have been living

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(1) (1881) 6 A.C., 364.

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together as husband and wife and treated as such by the community for a long series of years, presumption of marriage may, if nothing more appear, be drawn, the presumption will be considerably weakened and it will be altogether rebutted where facts are shown which make it more consistent with continued concubinage than with legal marriage. I may in this connexion refer to *Ma Wun Di v. Ma Kin*(1), where the question was whether there was a valid marriage. Lord ROBERTSON in delivering judgment of their Lordships of the Privy Council observes:—

“The case, however, deserves attention, for there has been a strong appeal made to the general presumption of marriage arising from cohabitation with habit and repute. It is necessary, before applying this presumption, to make sure that we have got the conditions necessary for its existence. It is not superfluous to suggest that, first of all, there must be some body of neighbours, many or few, or some sort of public, large or small, before repute can arise. Again the habit and repute, which alone is effective, is habit and repute of that particular status which, in the country in question, is lawful marriage. The differences between English and Oriental customs about the relations of the sexes make such caution especially necessary. Among most English people, open cohabitation without marriage is so uncommon that the fact of cohabitation in many classes of society of itself sets up, as a matter of fact, a repute of marriage. But, in countries where customs are different, it is necessary to be more discriminating, more especially owing to the laxity with which the word ‘wife’ is used by witnesses in regard to connexions not reprobated by opinion, but not constituting marriage.”

Treating the question merely from the point of view of presumption to be raised from persons living together, I think there is ample material on record to rebut the presumption. I have already referred to the various circumstances which in my view show that the Mangala Vilas ladies were treated as permanently kept concubines

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of the Raja and the Mangala Vilas children were considered by the Government, the other members of the Royal family and by themselves until almost before the present suit, as illegitimate. Though there can be little doubt that their mothers were brought into the seraglio as unmarried girls and were continuously kept by the Raja in the Mangala Vilas Sadma without any access to the outside world and that defendants Nos. 4 and 5 and the fathers of defendants Nos. 6 to 11 are the sons of the Raja, I think their position is only that of illegitimate children. I agree with the Subordinate Judge that the parties are Sudras and the result of my finding that defendants Nos. 4 to 11 are illegitimate is that they will only be entitled to the shares which illegitimate children of a Sudra would get.

The next question is as to the caste of the parties. The case for defendants Nos. 4 to 11 is that the Tanjore Royal family are Sudras by caste, while the case for the other defendants is that they are Kshatriyas. The Subordinate Judge finds on the evidence that the Tanjore Rajas were Sudras by caste. He has dealt with the evidence with great care and minuteness in paragraphs 1292 to 1599 of his judgment and I see no grounds to differ from him.

It was conceded before the Subordinate Judge (see paragraph 1556 of the judgment) and also before us that caste is the result of birth and not of choice or volition, though a person may lose caste he cannot by any act of his rise to a higher caste.

Manu, Yagnavalkya and the other Smriti writers expressly state that there are only four castes, namely, Brahmana, Kshatriya, Vaisya and Sudra. The first three are called Dvijas or twice-born (from *dvi*, two, and *jayate*, is born, the second birth being on the performance of the *upanayana* or the investing of sacred

(1) (1908) I.L.R., 85 Cal., 232.

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thread) and all the religious rites enjoined for them are performed with Vedic mantras. Manu says the three twice-born classes are the Brahma, Kshatriya and Vaisya but the fourth or servile (Sudra) is once born, that is, has no second birth from the Gayatri and wears no thread. Nor is there any fifth class—Chapter X, verse 4.

Yagnavalkya in verse 10 of the Acharadhyaya says :

“The castes are the Brahmanas, the Kshatriyas, the Vaisyas and the Sudras. Only the first three of these are twice-born, the performance of the ceremonies beginning with the rite of impregnation and ending with the funeral rites in the cremation ground of these only is prescribed with the sacred formulas.”

In Balambhatta's Gloss on the Sloka, the commentator says :

“The word Dvija (twice-born) is a technical term retaining also its etymological meaning, namely, they are twice-born or regenerate for the investiture with the sacred thread is the second birth. All ceremonies of the higher castes are performed by reciting the sacred formulas, those of the Sudras are performed in silence and without such recitation.”

It is clear that so far as the Sudra is concerned there is no Upanayana or investiture with the sacred thread and in fact the non-investiture is the main ground of differentiation between the three higher castes and the Sudras.

The ceremony whereby the Brahmana, Kshatriya and Vaisya become initiated into the Gayatri or the sacred mantra and become twice-born is called Upanayana, which literally means bringing near, i.e., student near the teacher who instructs him in the sacred Gayatri verse and makes him fit to receive instructions in the Vedas. According to Manu, Chapter II, verse 38, the maximum age for the performance of the Upanayana or the investiture of sacred thread is the sixteenth year for the Brahmanas, 22nd for the Kshatriyas and 24th for the Vaisyas and in verse 39 Manu states that all the

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youths of these three classes who have not been invested with the sacred thread at the proper time become “Vratyas or out-castes, degraded from the Gayatri, and condemned by the virtuous” and he prohibits a Brahman even when he is in distress for subsistence from having any connexion with such a Vratya or impure man. Yagnavalkya in verse 39 of the Acharadhyaya also gives the same age and in verse 38 states that after the age is passed the youths of the three classes, namely, the Brahmanas, Kshatriyas, and Vaisyas, for whom no Upanayana has been performed, fall out-castes from religion, degraded from the Gayatri, and become Vratyas, unless the ceremony which is called Vratya-stoma is performed.

In the Grihya Sutra of Asvalayana he describes Vratyas as being impure and unfit for Upanayana, for receiving the Vedas, and for intercourse as to food, worship, etc. But he nowhere expressly provides expiation for them (see Mandlik, page 165).

All the text-writers and commentators are agreed that in the case of Sudras there is not only no Upanayana or the investiture of sacred thread which is the exclusive privilege of the three higher classes but there is also no recitation of the Vedic mantras in respect of any rites which they are enjoined to perform by the Shastras.

As observed by the Subordinate Judge in paragraph 1326 of the judgment three distinct cases appear to have been set up during the trial of this suit. The first is that all Mahrattas are Kshatriyas; the second is that Sannavagulis or the 96 families among the Mahrattas are Kshatriyas; and the third is that Sivaji and the relations of the Royal family known as Vajratmas are Kshatriyas.

As regards the first point, reference was made to the Histories of the Deccan to show that the Mahrattas

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were really the descendants of the Rajput clans who, owing to the Muhammadan conquest of Northern India were thrown back on the Deccan. Reference was made to Elphinstone's History of India, Vincent Smith's Ancient History, Duff's History of the Mahrattas and Bandharker. But it is difficult to establish any definite historical connexion between the Mahrattas who sprung into fame during the period of the father of Sivaji the Great and the Rajput clans who were in Northern India during the period of the first Muhammadan invasion and during the time of Ala-ud-din Khilji's invasion of the Deccan.

The origin of the term Mahratta has been the subject of speculation and various derivations—some of them entirely fanciful—have been given to the word. On the one side, we have the view that the word Maharashtra is derived from Maha, great and Ratha, Chariot-warrior or from the Rashtrakutas; and on the other, that word means the country of the Mahars, a low caste tribe (see Russell on Castes and Tribes, Vol. 4, page 199).

It has been argued that the Mahrattas are descendants of the Rashtrakutas. Mr. Vincent Smith is of opinion that they were indigenous tribes of the Deccan and not Rajputs. We learn from history that on the fall of the Andhra Kings about 200 A.D. the Rashtrakutas became the rulers of the Deccan and that about the sixth century A.D. they were in turn overthrown by the Chalukyas whose greatest ruler was one Pulakesi II—the rival of Harsha of Kanouj about 750 A.D. Mr. Vincent Smith is of opinion that the Chalukyas though provided by obsequious Brahmans with a first-class Hindu pedigree going back to the hero Rama of Ayodhya really were of foreign origin and belonged to the Huna-Gurjara group of invading tribes (page 200 of Oxford

History of India). The Chalukyas were overthrown by a new Rashtrakuta dynasty; about 900 A.D. the western Chalukyas again came into power and continued in power till the twelfth century. In the closing years of the twelfth century, the Yadavas of Devagiri extended their power, but in 1294 the Afghans under Ala-ud-din Khilji conquered the last of the Yadavas and razed his capital Devagiri to the ground and thereafter the Deccan came under the rule of the Emperors of Delhi. It is suggested that the Mahratta clan of Jadavs are descended from the Yadavs, but beyond similarity of name there is nothing to support this theory. There was a class of shepherds called the Yadavs and there is as much, if not greater, probability in the Jadavs being descended from them. It is also worthy of note that no surname corresponding to Jadav has been pointed out among the ancient Rajput families. It is stated in the *Satara Gazetteer* that

"as far as is known the Devagiri Yadavs passed from the south northwards, and it is possible they were not northerners but southerners, Kurubars or other shepherds, who, under Brahman influence, adopted the great northern shepherd name of Yadav" (page 75).

The Bhamani Kingdom which continued from 1347 to 1526 was founded by Hussain Ganga as a result of revolt against the Delhi Emperor. After 1526 the kingdom broke up into five Muhammadan principalities, of which Bijapur and Ahmednugger formed the principal ones. The kingdom of Ahmednugger was ultimately conquered by the Mughal Emperors of Delhi. In 1600 the capital was conquered by the Mughal Emperor and thereafter the kingdom fell on evil days. In this troubled period Maloji, the grandfather of Sivaji the Great, entered the service of Murtuza Nizam Shah, the King of Ahmednugger, and the rise of the Mahrattas as a nation is said to commence from the time of Maloji, son of Sahaji, the

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father of Sivaji the Great, though it was the genius of Sivaji that organized the Mahrattas into a nation. It is difficult to connect the Mahrattas whom Sivaji welded into a nation with the Rashtrakutas in the Deccan who reigned in that part of India and were overthrown, as we do not hear of the Rashtrakutas from A.D. 973 when they were overthrown to 1600 when the rise of the Mahratta power in the Deccan began. Nor is there any definite historical connexion between the Rashtrakutas and the Rathor tribes of Rajputs and Vincent Smith is of opinion that the Rashtrakutas have nothing to do with the Rajput tribes. Elphinstone states that the Mahrattas were more of the lower orders of Hindustan than the southern neighbours in Kanara and contrasts them with the Rajputs in character and physique. Speaking of the Mahratta Chiefs at a time when the Mahrattas rose into power, Elphinstone observes : —

“The Chiefs in those days were men of families who had for generations filled the old Hindu offices of Heads of villages or functionaries of districts and had often been employed as partisans under the Government of Ahmednugger and Bijapur. They were all Sudras of the same caste with their people, though some tried to raise their consequence by claiming an infusion of Rajput blood.”

Later on speaking of Maloji he says :

“If any Mahratta had claimed a Rajput descent, it was the family of Jadu. The name is that of one of Rajput tribes, it was borne at the first Muhammadan invasion by the Ruler of Devagiri, the greatest Prince of the Deccan, and it is not improbable that the protector of Maloji (who was the Deshmuk of a district not far from Devagiri) may have been descended from that stock. Whatever was his origin, Lukji Jadu Rao had attained to a command of 10,000 men under Malik Amber and was a person of such consequence, that his desertion to Shah Jahan turned the fate of a war against his former master.”

I do not think that a reference to the History of the Deccan supports his view that all Mahrattas are

Kshatriyas or that there is any strong probability that the Mahrattas are descendants of Rajput clans.

The result of the recent researches has been embodied by Mr. Enthoven of the Bombay Civil Service in his work “Tribes and Castes of Bombay” and by Sir Herbert Risley, Director of Ethnography for India, in his work “The people of India.” Mr. Enthoven in Vol. III of his book observes at page 8 as follows :—

“The word Maratha covers three classes that were probably one in origin but are now distinct. These are—

(1) Marathas proper, the Chiefs, land-owners, and fighting Marathas of the Deccan and Konkan, claiming Kshatriya rank, eschewing widow-remarriage and socially superior to the cultivating classes, from whom, however, in places, they will take girls in marriage.

(2) Maratha Kunbis or cultivators also known as Kulvadi.

(3) Maratha occupational castes such as the following : Bhandari, Lohar, Mali, Teli, . . .

These would be classed as Marathas when found in other parts of India, and have certain features of special significance in common with the first two groups.

It has already been noted that Marathas proper claim to be Kshatriyas, the second of the fourfold divisions of Manu. As proofs in support of this claim they state that they belong to the four ancient Kshatriya royal *vamshas* or branches, viz., Suryavamsha, Somavamsha, Brahmavamsha and Seshavamsha, that they have the ninety-six mythological Kshatriya families, or *kuls*, that many of their *kul* or family names are common clan names of Rajputs (who are supposed to be the modern representatives of the ancient Kshatriya race), that there is historical evidence to show that marriage connexions were formed between royal Rajput houses and the ruling Maratha families, that like the Rajputs they observe *pardah*, wear the sacred thread and prohibit widow re-marriage, that they have bards or Bhats like Rajputs, and that as among Rajputs, the Nhavi or barber performs the function of serving water at their feasts, although he is considered comparatively unclean by the surrounding population in the Deccan. But against the above it can be said that when a caste or a portion of a caste rises in the social scale on account of worldly prosperity, it adopts a mythological pedigree

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like the four *vamshas* from which the Marathas claim descent; that, as shown later on, there is a great difference of opinion as to the names of the ninety-six *kuls* claimed by the Marathas (in fact the number far exceeds ninety-six), that the Rajputs have formed marriage connexions even with Koli and Bhil chiefs who have not the least pretensions to Kshatriya blood; and that it is the universal practice among the lower castes, when they wish to rise in the social scale, to imitate the higher by prohibiting widow marriage, wearing the sacred thread, and adopting other similar customs. Admitting the similarity of clan names, this is by no means necessarily a proof of similarity of descent. The *pardah* system, the employment of family genealogists or Bhats, etc., can very easily be adopted by a caste ambitious to be classed as Kshatriyas and imitating with that view Rajput manners and customs.

The common belief in Maharashtra regarding the origin of Marathas is that there is little or no difference, so far as caste is concerned, between Marathas and Kunbis. Some indeed, among whom are Marathas themselves, are of opinion that the two classes are one and the same. The line of demarcation between the two communities is not a hard and fast one, as intermarriages between well-to-do Kunbi families and the lower sections of Marathas are not infrequent. Such intermarriages usually take the form of a Maratha boy being married to a Kunbi or Kulvadi girl. Such marriages are common in remote parts of the Presidency. On the other hand, Maratha girls would not be given in marriage to Kunbi boys. Thus the Marathas proper assert their social supremacy, and though akin to Kunbis, they must be considered distinct. Kunbis prefer the designation Maratha to that of Kunbi, as more honourable. The Kunbis, however, do not lay any pretensions to Kshatriya origin. They are as a rule connected with field work, while the Marathas, though they may be mere cultivators, more often follow other avocations and regard cultivation as a secondary profession on which they may fall back if they are unsuccessful in other lines. Hence it would appear that Kunbis and Marathas are differentiated rather by wealth and social status than by any hard and fast caste distinction. Socially the Maratha is the superior of the Kunbi, and this is evidenced by the facts that while Kunbi widows remarry, Maratha widows do not, that while Maratha ladies of recognized rank observe *pardah*, Kunbi women do not observe it, and that while Maratha ladies insist on gold in preference to silver ornaments, Kunbi women are content with any that they can get.

It is not possible in these pages to deal finally with the controversy that exists regarding the origin of Marathas proper and their relation to the other Maratha divisions in the Presidency. But in the course of the survey some important evidence has been collected dealing with the social structure of Marathas of all three classes, and indicating reasons for assuming that they had a common origin."

The author then goes on to refer to Devaks and Balis and gives a list of Devaks found among Marathas proper and Maratha Kunbis with other castes.

"Assal Marathas claim to belong to four main branches or *vamshas* each containing twenty-four *kuls* or families. They are—

- (1) Brahmavamsha or the Brahma branch.
- (2) Sheshavamsha or the Serpent branch.
- (3) Somavamsha or the Moon branch.
- (4) Suryavamsha or the Sun branch.

This classification has evidently been adopted from the mythological divisions of the Kshatriya race in support of their claim to Kshatriya origin. But it has not been found possible to assign definitely to each branch the twenty-four families attributed to it, neither are the names of ninety-six families or *kuls* the same in all places. In fact, if all the names of the ninety-six *kuls* are compiled in one list, the total far exceeds ninety-six and many of the names disclose identity with the Kunbis, whom the aristocratic Marathas consider to be distinct from them."

He then gives a list of the *kuls*, and points out that the list of *kuls* given by one author does not agree with that given by another and concludes as follows:—

"The above remarks are made by way of showing that the claim of the Marathas to belong to the ancient ninety-six families of the Kshatriya race has no foundation in fact, but must have been advanced after they rose to power . . . But similarity of surnames by no means implies similarity of race . . . as surnames such as Chavans, Cholkes, Mores, Pavars, Shelars and Yadavs among Kolis are adopted by Kolis, Dhangars, Mahars, Malis, Ramoshis, Mongis and several wandering tribes.

There are cases where even Brahmans have assumed the surnames of their Maratha patrons, e.g., the Ghorpades of Inchalkaranji, the Dhamdheres of Poona, etc.

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The majority of the castes do not know to which gotra they belong, their guides in this respect being the caste priests and printed books. And even among these authorities there is great confusion in the matter of assignment of *kuls* to gotras. Thus, according to one account, the Mores belong to the Gantam gotra, while another account assigns them to the Bharadwaja gotra. Sameness of gotra is not necessarily a bar to inter-marriage, the chief restrictions in this respect still being sameness of *kul* and Devak. This would seem to suggest that the gotras, like the four vamshas and *kuls*, were adopted by the tribe after they rose in social dignity."

Sir Herbert Risley at page 87 of his book observes as follows:—

"If the Marathas can be described as a caste, their history and tradition certainly stamp them as a caste of the national type. . . . According to Mr. Enthoven (Census Report of Bombay, 1901, Vol. I, p. 183 *et seq.*), the Bombay Marathas may be classified as a tribe with two divisions, Maratha and Maratha Kunbi, of which the former are hypergamous to the latter, but were not originally distinct. It remains to be explained that the Kunbis also consist of two divisions, Desh Kunbis . . . and Konkani Kunbis. . . . Intermarriage between these divisions is not usual. The barrier, however, seems to be purely geographical. It may not withstand the altered conditions due to improvements in communications, and it is not apparently based on any religious prohibition of inter-marriages. . . . The highest class of Marathas is supposed to consist of ninety-six families who profess to be of Rajput descent and to represent the Kshatriyas of the traditional system. They wear the sacred thread, marry their daughters before puberty and forbid widows to marry again. But their claim to kinship with the Rajput is effectually refuted by the anthropometric data now published, and by the survival among them of *Kuldevaks* or totems such as the sun-flower, the *Kadamba* tree (*Nauclea Kadamba*), the mango, the conch-shell, the peacock's feather, and turmeric, which are worshipped at marriages and at the ceremony of dedicating a new house, while their close connection with the Kunbis is attested by the fact that they take Kunbi girls as wives, though they do not give their own daughters to Kunbi men. A wealthy Kunbi, however, occasionally gains promotion to and marries into the higher grade and claims brevet rank as a Kshatriya. The fact seems to be that the ninety-six superior families represent Kunbis

who came to the front during the decline of the Mughal Empire, won for themselves principedoms or estates, claimed the rank of landed gentry, and asserted their dignity by refusing their daughters to their less distinguished brethren."

It was admitted in argument that the Kunbis who are a cultivating tribe are Sudras; and it is also admitted that the Kunbis have got the same division into 96 families. There is therefore not much force in the contention that the adoption of surnames as Bhonsle, Nimbalkar, Jadhav, etc., raises any presumption of Kshatriya origin, even assuming for argument's sake that some of the Mahratta families with those surnames were of Rajput descent.

The contention that all Mahrattas are Kshatriyas and that consequently Sivaji and his descendants must be assumed to be Kshatriyas is, in my opinion, devoid of all historical foundation.

I shall now deal with the argument that even if all Mahrattas are not Kshatriyas, the Sannavagulis or the members of the 96 clans are Kshatriyas and that the Rajas of Tanjore who belong to the Bhonsle family which is one of the 96 families must necessarily be of Kshatriya descent. The term "Sannavagulis" means 96 *Kuls* or families. In Exhibit B-140 which is an inscription of the year 1803 it is stated that from the Solar and Lunar races rose up a Kshatriya family which consists of 96 branches. Then the 96 branches are named, the first being the Bhonsle family from which Sivaji is said to have descended. I have already pointed out that the Kunbis who form the agricultural portion of the Mahratta community are Sudras and that they also have the same divisions into 96 clans. This is clear from the extract from Mr. Enthoven's book which I have already set out *in extenso* and from a reference to the Satara and Kolhapur District Manuals. It is stated at page 76 of the Satara District Manual that almost all

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the leading tribal surnames such as Cholke, More, Povar, Shelar and Yadav are found besides among Kunbis who do not appreciably differ from Mahrattas. A large body of evidence in this case is to the effect that the Sannavagulis in Tanjore far from being Kshatriyas are Sudras. Vagoji Rao, sixteenth witness for defendants Nos. 1 and 2, who is the brother-in-law of the late Maharaja Sivaji states that there are no intermarriages between the Sahebs of the Royal family and Sannavagulis. He classes the Sannavagulis along with Appa, Akka and other divisions who are admittedly Sudras. As regards funeral ceremonies, he states that the ordinary Mahrattas make the pindam or offerings to ancestors of flour while the higher classes make it of cooked rice. Thirty-first witness for defendants Nos. 1 and 2 Savalairam Saheb Soorve who is also related to the Royal family states that all Mahrattas are not Kshatriyas, that the word "Mahratta" is a general name including Kshatriyas and some minor castes and that the latter are Sannavagulis, Satyavagulis and Mangalavilasam. The twenty-first defendant who is the great-grandson of the sister of Sivaji and who was examined as forty-sixth witness for defendants Nos. 1 and 2, states :

"The Mahrattas who were cart-drivers were not of my caste. They are said to be Sannavaguli Mahrattas. We are not Sannavaguli Mahrattas. They are not Kshatriyas or Sudras. I do not know if they are Vaisyas or Sudras. I do not know their caste. They wear Poonool (sacred thread)."

He expressly disclaims the suggestion that he is a Sannavaguli. Manoba Saheb, twenty-sixth witness for defendants Nos. 1 and 2, who is also related to the Royal family, states :

"There is a class called Sannavagulis. They are Mahrattas. I do not know if they are Dvijas (twice-born). We do not intermarry."

The Subordinate Judge deals with this part of the case at pages 474 to 479 of his judgment, and I think the evidence is totally insufficient to prove that because the Tanjore Rajas claim to belong to one of the 96 families, they must necessarily be of Kshatriya descent.

All the available authorities show that Babaji, the great-grandfather of Sivaji, was a patel or village headman of a village in Poona district. It is not shown, nor was it suggested before us, that Babaji was anything more than a cultivator and village headman. His two sons, Moloji and Vittoji, not satisfied with village life and being ambitious, enlisted themselves in the service of Lukhji Jadhav who held military service in the Ahmednugger kingdom, and entered his service on the modest salary of five hons (pagodas) each. Takakhav, in his "Life of Sivaji Maharaj" which has been referred to during the course of the argument, states that Maloji had two sons Shahaji and Serfoji, and Shahaji who was the father of Sivaji was a handsome and intelligent youth and was ultimately married to the daughter of Jadhavrao. An account is given as to how the statement made by Jadhav in jest that Shahaji and his (Jadhav's) daughter who were then little children would make a handsome couple was seized upon as a promise. Waring in his "History of the Mahrattas," states that that objection was taken by Jadhav's wife who upbraided him with the folly of harbouring even a thought of giving his daughter to a wretched Kunbi, the son of a common horseman, and that Maloji and Vittoji thereupon were discharged from the service and were again under the necessity of resorting to their former occupation of husbandry. Takakhav also states that, owing to Maloji treating the jest of Jadhav seriously, he and his brother were discharged from service and "were forced to return to their paternal

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homestead at Verul, again to become farm hinds and till the land." Maloji subsequently became wealthy. The Mahratta Chronicle credits this to a divine interposition and to the finding of a secret treasure disclosed in dream by the Goddess Bhavani, while Duff and other historians attribute it to the more probable and prosaic result of Maloji having taken to plunder on his own account and having amassed a fortune. However this be, Maloji got rich and prospered and ultimately his son was given in marriage to Lukhji Jadhav's daughter. The Mahratta Chronicle states that Maloji, after he became rich, enlisted horsemen and infantry and began to give trouble to the Bijapur Sultan, that he defiled a mosque and that the Sultan, to put a stop to this, compelled Jadhav to give his daughter in marriage to Maloji's son Shahaji—see page 280 of Justice RANADE's "Rise of the Maratha Power." Pressure brought to bear by the Sultan and not the recognition by Jadhav of Maloji's high caste was thus the reason for the alliance which was once rejected with scorn being subsequently entered into. Shahaji, both with the aid of the connexion so formed and by his own powers and genius, rose to considerable eminence in the Courts of Ahmednugger and Bijapur, and Sivaji the Great extended Shahaji's conquests and founded the Mahratta Empire. The humble occupation of Sivaji's grandfather and his ancestors who were village headmen and cultivators of the soil probalilizes the view that they were really of Kunbi origin. Coming to Sivaji the Great, we find that the first time that any Kshatriya origin was claimed for him or any reference was made to his kinship to the Rajput house of Udaipur was at the time of his coronation which took place in 1674. The circumstances attending the coronation, I think, throw a great deal of light upon the origin of the caste of Sivaji.

Sivaji, from the outset of his career, set himself forward as a champion of Hinduism against Moslem oppression and during the early years of his career there can be little doubt that the fanaticism of Aurangazeb and his ruthless destruction of Hindu temples and the persecution of the Hindus led to a strong feeling that Hindu forces should be organized under a capable leader and effective resistance offered to Aurangazeb who was attempting to conquer the Deccan. Sivaji's success marked him out as the person who was best capable of leading the Hindus. Professor Jadunath Sarkar, one of the foremost authorities on the period of Aurangazeb and Sivaji, whose works relating to the two monarchs have received very high praise from eminent eastern and western scholars, in Chapter IX of his "Shivaji and His Times," gives with great clearness the reasons that induced Sivaji and his advisers to think of his coronation. Though one would have expected that, if Sivaji was a descendant of the Rajput chief and a Kshatriya, no objection would have been raised to his coronation, it appears from all accounts that Sivaji had to overcome strenuous opposition based on his being a Sudra. Professor Jadunath Sarkar, whose work "Sivaji and His Times" embodies the latest researches, at page 267 (1st Edition), says—

"But there was one curious hindrance to the realization of this ideal. According to the ancient Hindu scriptures, only a member of the Kshatriya caste can be legally crowned as king and claim the homage of Hindu subjects. The Bhonslas were popularly known to be neither Kshatriya nor of any other twice-born caste, but mere tillers of the soil, as Shivaji's great-grandfather was still remembered to have been. How could an upstart sprung from such a *Shudra* (plebeian) stock aspire to the rights and honours due to a Kshatriya? The Brahmins of all parts of India would attend and bless the coronation of Shivaji, only if he could be authoritatively declared a Kshatriya. It was, therefore, necessary first to secure the support of a pundit,

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whose reputation for scholarship would silence all opposition to the views he might propound. Such a man was found in Ganga Bhatta of Benares, the greatest Sanskrit theologian and controversialist then alive, a master of the four Vedas, the six philosophies, and all the scriptures of the Hindus, and popularly known as the Brahma-deva and Vyas of the age. After holding out for some time, he became compliant, accepted the Bhonsla pedigree as fabricated by the clever secretary Balaji Avji and other agents of Shiva, and declared that that Rajah was a Kshatriya of the purest breed descended in unbroken line from the Maharanas of Udayapur, the sole representatives of the solar line of the mythical hero Ramachandra (Dig. 410-12). His audacious but courtierly ethnological theory was rewarded with a huge fee, and he was entreated to visit Maharashtra and officiate as high priest at the coronation of Shiva."

At page 271 he states how Sivaji had to be purified and made a Kshatriya. It is admitted that Sivaji till the date of his coronation, i.e., till his 47th year, had not been invested with the sacred thread and his ancestors never seem to have gone through that ceremony. Professor Sarkar, at page 271, observes:

"But one great defect had to be removed before his coronation could take place. He had to be publicly purified and 'made a Kshatriya.' On 28th May he performed penance for his ancestors and his own sin of omission in not having observed the Kshatriya rites so long, and was invested by Gaga Bhatta with the sacred thread, the distinctive badge of the twice-born castes like the 'pure' Kshatriyas of Northern India."

In this connexion I might refer to an account of the coronation in two Mahratta histories published by Mr. Surendranath Sen under the authority of the Calcutta University. The first is Siva Chhatrapati (life of Sivaji) by Sabhasad Bakhar who was a contemporary of Sivaji and who says he wrote the book at the request of Rajaram, the son of Sivaji the Great. Speaking of the coronation he says at page 113:

"The one Vedmurti Rajari Gaga Bhat drawn by the Raje's fame came to see him. The Bhat Gosavi was a great scholar, well versed in the four Vedas and six *Sastras* and well practised

in the *Yoga*, skilled in astrology, *mantras*, and all (branches of) learning; he was the Brahma Dev of the Kali age;—such a learned man was he;—the Raje and the *Sarkarkuns* went forward to receive him, and brought him with (all) honours. He was worshipped with the offerings of jewelled ornaments of many varieties, palanquins, elephants, horses, and immense property. Gaga Bhat was very much pleased. In the opinion of the Bhat Gosavi, (as) the Musulman Badshah reigned (seated) on a throne with an umbrella (over his head), and Sivaji, though he had subdued four Badshahis and possessed seventy-five thousand cavalry, infantry, forts and strongholds, had no throne, the Maratha Raja should (also) be the Lord of the Umbrella (Chhatrapati); so he reasoned. And the Raje also approved (of it). All the principal men were summoned and when consulted gave their approval. Then the Bhat Gosavi said (that the Raje) should be installed on a throne. Then an enquiry being held about the Raje's family, it was found that the Raje was a Suddhakshatriya; a Sisodia family had come from the north to the Deccan, that was the Raja's ancestral family. Having previously decided that the sacred thread ceremony should be performed as the Kshatriyas of the north assumed the sacred thread, the Bhat Gosavi conferred the sacred thread on the Raje at a holy place. (The Raja) was made a Suddhakshatriya before (the coronation). Much wealth was distributed in charity. Fifty thousand Brahmans learned in the Vedas were assembled from the home provinces, as well as from foreign territories and holy places of great sanctity. They were all made to stay. Every day they were fed with sweets. Then for the coronation a throne was made . . . jewels of great value were sought from among the nine varieties of priceless jewels that were in the treasury, and set in the throne . . . Many gold lotuses inlaid with jems of nine varieties and various other gold flowers and clothes were distributed in abundance . . . To Gaga Bhat (who had officiated as) the chief priest was given immense wealth. The total expenditure amounted to one *Kror* and forty-two lakhs of *Hons*."

In Sen's book there are some extracts from Sivadigvijaya and Chitnis Bakhar and at page 241 an account is given of Sivaji's coronation. According to this account Sivaji was advised that there was a very learned Brahman named Gaga Bhatta in Benares and that he ought to be consulted. The narrative then proceeds as follows:—

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"Thereupon Balaji Baba submitted to the Maharaja that there was a very great Kasi Brahman named Gaga Bhatta, somebody should be sent to him to obtain from him the Sastrik injunctions and that it would be well to get the ceremony performed by him. The Maharaja was highly pleased and commissioned Balaji Baba to despatch a Karkun to Kasi and to pay what money was necessary from the treasury. Ramachandra Babaji was accordingly sent. He went with the Maharaja's letter and explained his mission. Whereupon the Bhatta replied that he would answer after proper deliberation. Several Brahmans of the place, great and small, were accordingly consulted, and the Bhatta answered that only the Kshatriyas were entitled to *Chhatra* and *sinhasan*, the Sudras were not For a year and a half Ramachandra Babaji pleaded that there were so many Sudra kings without any knowledge of Kshatriya rites, but to no avail. Thereupon Balaji Ayyar wrote to Ramachandra to enquire on what grounds the *Chhatra* and *sinhasan* had been conferred on the Udayapur Royal family, with whom the Raja was connected The Maharaja, however, remarked, 'How is it that one who does good to the subjects and establishes the religion should have no right (to *chhatra* and *sinhasan*). He who has power is really a king. Are not many kings of low origin enjoying sovereignty? In what respects do they behave like the Kshatriyas?'"

Pausing here, I may observe that it is significant that Shivaji is represented as laying no claims to Kshatriya descent. He rather advances the argument that a low descent is no obstacle to the coronation as many low born kings have been sovereigns and that power is after all the test of kingship. It is also clear that it required a year and a half to persuade the Brahmans to consent and it is probable that the Rajput pedigree was created during that period.

These two accounts as to the coronation throw a great deal of light on the claims of Shivaji to the Kshatriya origin. It seems to me to be fairly clear that this claim to Rajput descent from the Udayapur family was made for the first time for the purpose of enabling Shivaji to be crowned in the same manner as the Kshatriya kings were. It is also clear that there was very great

difficulty in inducing Brahmans to consent to the claim of Kshatriyaship made on behalf of Shivaji and to crown him with Vedic rites and that it required a lot of persuasion and an immense amount of expenditure before the Brahmans would give their reluctant consent.

The late Mr. Justice TELANG, a great oriental scholar in an essay by him entitled "Gleanings from Maratha Chronicles," published as an appendix to Justice RANADE's "Rise of the Maratha Power" observes :

"But from those which relate to Shivaji himself, it rather appears, if we read between the lines, that the claim set up on his behalf to be of the *Kshatriya* caste was not universally regarded as really and truly tenable, although from considerations of policy and expediency it might be conceded. From the Biographies of Shivaji by Krisnaji Anant Sabhasad, and by Chitrugupta, it seems to follow that the search for the origin of Shivaji's family, which resulted in the discovery that he belonged to the Sisode clan of Rajputs who reigned in Udayapur, was not commenced until after the idea of a formal installation (or *Abhiseka*) had been started. And Malhar Ramrao Chitnis's narrative, although it proceeds on the assumption of the fact as already established, rather indicates that Gaga Bhatta, the great Pandit of Benares, whose services were put in requisition for the installation ceremonies, had some considerations of policy put to him before he was persuaded to join in those ceremonies. They had also to strain a point, when as a preliminary to the installation, the third ceremony essential for a Kshatriya was performed on Shivaji at a time when he was 'forty-six or fifty years old, and had already had two sons—an irregularity, which also was, we are told, expressly assented to by all the Brahmans and Pandits. How the Brahmans and Pandits worked their way to this decision, none of our authorities states. Further, it is remarkable that none of those authorities anywhere mentions the performance of the thread ceremony upon any of the members of Shivaji's family, except the ones who were installed on the gadi, and then that ceremony is mentioned only in connection with the installation ceremony. In view of these facts, it may be permissible to doubt whether the statements of both Krishnaji Anant Sabhasad and Malhar Ramrao Chitnis, about Shahaji claiming to be a Rajput of the Sisode clan, or about Jayasing Mirza Raja of Jeypore acknowledging Shivaji as a *Kshatriya* and dining with him before the installation,

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deserve to be entirely trusted . . . Taking the whole evidence together, it looks like a case of a more or less deliberate manipulation of facts and religious rules, in aid of a foregone conclusion adopted for a purely political purpose."

As regards the Rajput ancestry, I do not think there is very much to support it. Lieut.-Col. James Tod in his "Annals and Antiquities of Rajasthan," Vol. I, refers to the Odayapur ancestry of Sivaji. According to Tod, Vol. I, page 286, which has been marked as Exhibit B-175, when Ala-ud-din Khilji in 1275 sacked Chitore, Ajeyasi is said to have escaped with Hamir, the minor son of his eldest brother. Ajay Singh's son Sajan Singh is said to have left for Deccan to carve his fortune. So that, there must have been an unbroken line of descent between 1270 and Sivaji's birth in 1627. Tod refers to a genealogy of Sivaji which he says was obtained from the Bhats or Troubadours of Mewar. The statements of Bhats can hardly be accepted as of much historical value. It is well known that in India bards and poets will exalt the lineage of a liberal patron. There is, however, very little, historically, to support this genealogy which was for the first time thought of at the time of Sivaji's coronation. Though Tod will go back so far as 1275, Waring in his "History of the Marathas" says that Shahaji, the father of Sivaji, was an illegitimate descendant from the Rana of Odayapur and that Babaji Bhonsle, the grandfather of Sivaji, upon the death of his father, moved from Odayapur into Kandesh. This story does not agree with the account of Tod as the migration from Odayapur is put in by Waring as only three generations from Sivaji. Mr. Justice RANADE in his History observes at page 46 :

"It is in the spirit of the same fond superstition that native historians trace for Sivaji a fabled descent from the Royal house of Udayapur."

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It is significant that in Exhibit B-141 there is no reference made to the descent of Sivaji the Great from the Ranas of Odayapur though, if it were a fact, it is hardly likely that the Rajas of Tanjore would have omitted to mention, among the numerous details which they give of the ancestry, so important a connexion.

Though commissions were taken out to examine witnesses in Kolhapur and other places no attempt was made to examine any witness in Odayapur to show that the families of Sivaji and the Rana of Odayapur were related. Reference has been made to a statement by Mr. Enthoven in the Bombay Census Report that a Rana of Odayapur admitted Sivaji's claim to Rajput descent, but no authority is given for this statement and if it is true it could easily have been proved by reference to the genealogies preserved in the State. Colonel Tod gives the statements of Bhats or Troubadours as his authority for the statement of Sivaji's ancestors being descendants of a branch of the Odayapur family. The rhapsodies of bards are not of much historical value. No attempt has been made to get any evidence from Rajputana on the Rajput connexion claimed for the family of Sivaji.

I may also point out that there has been no case of intermarriage between the members of the Royal family of Odayapur (however remote they may be connected with the Royal family) and the family of Sivaji or any of his descendants. It seems to me to be extremely unlikely that, if Sivaji was really related to the Ranas of Odayapur, there would have been no alliance considering that the Empire of Sivaji and his descendants was certainly very much more extensive than that of the Ranas of Odayapur. I agree with the Subordinate Judge in his conclusion that no reliance can be placed on the supposed connexion of Sivaji with the Odayapur family.

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It is argued that the objection to Sivaji's coronation was due to the fact that there was a belief at the time that in the present age (Kaliyuga) there were no Kshatriyas, but only two castes, namely, the Brahman and the Sudra. It is argued that it was this belief that prevented the Brahmans from consenting to Sivaji's coronation. Reference was made to the sloka in the Bhagavathapuram wherein it is stated that the Nandas were the last of the Kshatriyas. Reference was also made to the legend that Parasurama, the contemporary of the avatar of Vishnu, Sri Rama, destroyed all the Kshatriyas. I may state in passing that the theory as to there being no Kshatriyas was referred to and overruled in *Chuoturya Run Murdun Syn v. Sahub Purhulad Syn*(1). There is no doubt that this extreme theory is, like several other extreme theories, held by some Brahmans who want to exalt themselves denying rights to other castes. For example, reference is made to it in the Sudra Kamalakara, and defendants' eighty-sixth witness Venkatarama Ayyar says that in his opinion whosoever is not a Brahman is a Sudra. But this view has never been adopted by the Brahmans as a working rule or enforced. I may here point out that this theory that there were no Kshatriyas in the Kaliyuga or the fourth cycle which commenced over 4,000 years ago does not find a place in any of the books dealing with Hindu Law. Neither in Mitakshara which was composed in the 11th century A.D. nor Dayabyagha or Mayukha which were written much later is there any reference made to the absence of the Kshatriya caste. On the contrary, all the Smriti writers and commentators state as a fact that the four castes, namely, Brahman, Kshatriya, Vaisya and Sudra, exist in the Kali age. There have been

(1) (1857) 7 M.I.A., 18.

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coronations of numerous kings and it is nowhere suggested that objection was taken to the coronation of Hindu Emperors because of the supposed non-existence of the Kshatriyas in the Kali age and of the fact that all the kings were Sudras, owing to there being only two castes, the Brahman and the Sudra. History records the crowning of several Emperors like Vikramaditya, Bhoja, Harsha and others. So far as the Puranas are concerned, they are works several of which were written about the 6th century A.D. and some of them later, and though they are the store-houses of Hindu mythology and several of them are sectarian in character, they have not influenced to any great degree the rules of conduct or the division of castes which are laid down by the Smriti writers and by the numerous commentators thereon.

In the case of Sivaji we have the undisputed fact that his great-grandfather was only a village headman and cultivator, that neither Sivaji's father, grandfather or great-grandfather had the Upanayana ceremony, which is the distinctive ceremony conferring the status of twice-born, performed to them, that though Sivaji was 47 or 50 years old at the time of his coronation and had been married and had children, the Upanayana ceremony which under the Sastras had to be performed before he completed his 22nd year if he was a Kshatriya, had not been performed to him till then and that it was only performed at the time of his coronation for the purpose of enabling him to be crowned.

When it is borne in mind how strict and rigid orthodox rules of caste were at that period and how jealously caste privileges were maintained, the non-performance of the chief rite of Upanayana by Sivaji's father, grandfather and great-grandfather which confers the status of *Dvija* or twice-born and differentiates the three upper classes from the Sudra, is significant. I have

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already pointed out that one great division of the Mahrattas is the Kunbi class or the cultivating classes who are admittedly Sudras and who have no Upanayana ceremony performed to them and that they have surnames like Bhonsle, Nimbalkar, etc. Under these circumstances, it seems to me that the probabilities all point to Sivaji's ancestors being of Kunbi descent. This is the view that eminent authorities whom I have referred to have taken and a view which I consider to be most consonant with the proved facts of history.

It was suggested that the coronation of Sivaji with Vedic rites and with the concurrence of eminent Brahmans conferred on Sivaji the status of a Kshatriya or made him a twice-born even assuming that he had not that status before his Upanayanam and coronation. There is no authority in any of the Smrithis or Hindu Law books for holding that the mere performance of those rites would change the caste so as to entail the advantages or disadvantages which the Hindu Law confers upon the members of each caste. But assuming for argument's sake that Sivaji was thus raised to the status of a twice-born and became a Kshatriya, it is not suggested that this act would similarly raise the status of all his collateral relations. It is clear that Sivaji's father Shahaji left for the Carnatic several years before Sivaji's coronation and died there and that Ekoji, the founder of the Tanjore Raj, the half-brother of Sivaji, was separate from Sivaji and pursued his own conquest in the Carnatic. Ekoji had admittedly no coronation ceremony performed like Sivaji, and it is difficult to see how Ekoji can have been raised to the status of a Kshatriya, simply because his step-brother got the Brahmans to crown him king.

So far as Sambhaji, the son of Sivaji is concerned, no Upanayanam ceremony was performed till he was

installed as Yuvaraj in 1679. He had been married and had children by then. There is no evidence that Sahu, who reigned till 1749, his son, or Rajaram, his brother, had any such ceremony performed at any time, much less any evidence to show that they had Vedic rites and ceremonials. Exhibit F-86 is an account of the year 1750, showing that Upanayanam ceremony was performed to Ramaraja, Sahu's successor. He was brought up in obscurity by a humble family and was said to have been kept in hiding owing to fear of assassination by Sahu. Doubts were thrown on his being related to the house of Sivaji. I shall refer to him later on when dealing with the claims of the Satara branch to succession to the Tanjore estate. There is no other evidence showing that Upanayana to any other member of the Satara Raj which came to an end on the deposition of the Raja in 1849 was performed. It is pointed out by Mr. Sen in his extracts from documents relating to Mahratta history at page 114 that an extract from the Peshwas' diaries shows that the descendants of Sivaji had for sometime after the rise of the Peshwas given up the practice of wearing the sacred thread.

It is argued that so far as the Satara branch is concerned, the successors of Sahu were virtually prisoners, that the Peshwas were the real rulers and that it was to the interest of the Peshwas to discourage Upanayanam. I find it difficult to follow this argument. The Peshwas, though virtually the rulers outwardly, conformed to the theory that they were only ministers of the descendants of Sivaji who ruled at Satara. Every Peshwa sought for investiture from the king in Satara and it is difficult to see what interest the Peshwas had in preventing Upanayanam ceremony from being performed and in thus degrading the rulers in the eyes of the people.

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It seems to me that as a matter of policy it would have been to the interests of the Peshwas to show that they were ministers of a Kshatriya prince rather than of a Sudra if as a matter of fact the descendants of Sivaji were Kshatriyas. That the Peshwas did not object to Upanayana being performed is clear from Exhibit F-86 which shows that when they set up Ram Raja in 1750, Upanayanam was performed when he was brought from his place of exile to Satara. The Peshwas claimed to be high class Brahmans; service under a Sudra is condemned by Manu and other Smrithi writers. For example, Manu, Chapter XI, verse 70, makes attendance by a Brahman on a Sudra, a ground of social degradation. The Peshwas are not likely to have put themselves in this position especially as their power was too deeply rooted to be affected by the caste of the king. The probabilities are that the ceremony of Upanayanam was only gone through as an adjunct to coronation following the example of Sivaji and was given up latterly when that rite had no political necessity or significance during the time of the Peshwas.

So far as the Kolhapur branch is concerned, Exhibit G-204 which is dated the 25th of May 1762, shows that a dress of honour was despatched by the Peshwas on the 25th of May 1762 in connexion with the Vrithabandha ceremony to Sivaji, Raja of Kolhapur. This ceremony, it is argued on one side, is the Upanayana or thread ceremony; but this is not admitted by the other side. The account gives no details except the robes of honour sent and there is nothing to indicate that those articles were articles which were usually presented at the sacred thread ceremony. From 1762 to 1867 we find nothing to show that the rulers of Kolhapur had Upanayana performed to them. Exhibit G-83, which is an account of 1867, shows that Upanayanam or thread

ceremony of Rajaram Maharaja, the great-grandfather of the present Maharaja, took place in 1867. Exhibit G-79 is an account, dated the 13th of May 1878, showing that Upanayanam was performed to Sivaji, the grandfather of the present Raja. Exhibit G-75 shows that Upanayanam was performed for Sahu, his father.

The evidence regarding the Kolhapur branch suggests that Upanayanam was continued to be regularly performed only from 1867. There was, according to the evidence, a dispute in Kolhapur as to whether the rulers were Kshatriyas or Sudras and whether they were entitled to the performance of ceremonies with Vedic rites like Kshatriyas or with Puranic rites like Sudras.

[Then his Lordship referred to the oral evidence on this last point and proceeded as follows:—] On the question of the caste of the Mahrattas, the evidence is by no means clear that they belong to the Dvija or twice-born castes.

[After referring to the oral evidence on this point his Lordship proceeded as follows:—] This is all the evidence, oral and documentary, adduced by the fifteenth defendant on the question of caste and I consider it insufficient to prove either that all those who call themselves Mahrattas are Kshatriyas or that the term Mahratta includes the two classes only, the Kshatriyas and the Sudras, the higher class known as the Kshatriyas and the lower known as the Sudras.

Coming to Tanjore which was founded about 1675 or 1676 by Ekoji or Venkoji, we find no reference to any Upanayanam performed to any of the nine kings that preceded Serfoji who reigned from 1790 to 1832 and we hear of Upanayanam for the first time during Serfoji's period. Even as regards Serfoji, there is no documentary evidence to show that any Upanayanam

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was performed to him except a statement in the judgment, Exhibit D-93, where Mr. Davidson, the District Judge, states that Serfoji got Upanayanam performed to him when he was over 50 years and a grandfather and that this was merely a piece of vanity on his part.

[After referring to the absence of any accounts relating to any Upanayanam up to 1855 when Sivaji died, his Lordship proceeded as follows:—] As regards Upanayanams performed after the death of Sivaji in 1855, the evidence of the performance of Upanayanam is, as the Subordinate Judge remarks in paragraph 1514 of his judgment, equally unsatisfactory.

[After referring to want of pomp or publicity as regards any of the Upanayanams alleged to have been done, his Lordship proceeded as follows:—] It is argued by Mr. Krishnaswami Ayyar for defendants 4 to 11 that no accounts were produced after the death of the Raja to show that Upanayanams were performed though minute accounts have been kept relating to various expenses. Taking the case of the father of defendants 1 and 2, Rajaram, who was adopted by Kamakshi Bai Saheba, the senior widow of the deceased Raja in 1863, one would have expected to find clear evidence of Upanayanam being performed to him as he was performing the Raja's funerals, sradh and other ceremonies, and all the Ranis were contributing handsomely for his maintenance and support.

Three different versions are given as to Rajaram's Upanayanam having been performed. One is that it was performed at the time of his adoption in 1863; the other is that it was performed eight years later in 1871 and the third is that it was performed at the time of his marriage in 1883.

[After referring to the conflicting versions on this point and the absence of accounts for Rajaram's

Upanayanam, his Lordship proceeded as follows:—] As the Upanayanam was the first important ceremony which would be performed to Rajaram after the adoption, one would expect that there would be accounts to prove it. Not only are there no accounts but it does not appear that any invitations were issued for the ceremony. None of the male relations speak to the Upanayanam.

[Then his Lordship referred to the absence of oral evidence from important witnesses and proceeded as follows:—] I think it is very doubtful whether any Upanayanam ceremony was performed to Rajaram who was adopted by Kamakshi Bai Saheba and the other Ranis.

So far as the first and second defendants are concerned, there is evidence that Upanayanam was performed but the ceremony was finished in one day although usually it lasts four days. No accounts are produced of the expenses although it is said that large expenses were incurred by Ramakumaramba Bai and Kamakshi Bai Saheba.

[After rejecting the reasons for non-production of the accounts as unsatisfactory and after adverting to the want of invitations for the Upanayanams, his Lordship proceeded as follows:—] It is significant that Sethuramaswami, the Guru or the spiritual preceptor of the Royal household, whose evidence has been marked as Exhibit A-8, states that he was not invited for nor did he attend any Upanayanam ceremony in the palace and that he has not even heard that any such ceremony took place. This witness was installed as a Guru in 1888 and though he says that he was invited for marriages and performed upadesam, no explanation has been given or suggested as to why he was not invited for such an important ceremony as Upanayanam if it did take place.

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According to the evidence of the first defendant the Upanayanam for himself and his brother took place in 1904 when the Royal Guru or priest was 31 years old and fully capable of officiating and performing the rites.

So far as Sambu Singh, the adopted son of the Princess and the father of the third defendant, is concerned, he was adopted in 1885. It was alleged that his Upanayanam was performed in 1885 shortly after the Princess' death and though it is proved by third defendant's 60th witness Ramachandra Rao that Sakharam Saheb, the adoptive father, kept regular accounts, no accounts are produced to show that any expenses for Upanayanam were incurred.

[After referring to the absence of invitations and of publicity for this Upanayanam his Lordship proceeded as follows:—] One would expect that, if Upanayanam was performed, the tutor would have received invitation for so important a ceremony.

So far as the third defendant is concerned, it is alleged that his Upanayanam took place in 1891 after the death of his adoptive father Sambu Singh. Although the account books (Exhibit B series) of 1891 are produced to prove his adoption and minute expenses of even Re. 0-1-6 are entered in the accounts there is no entry showing that any Upanayanam was performed in the accounts produced. The oral evidence as to when the Upanayanam took place is contradictory.

[After referring to the oral evidence, his Lordship proceeded as follows:—] I have dealt in detail with Upanayanam, because it is admitted on all hands that it is the ceremony which differentiates the three higher classes, namely, the Brahman, the Kshatriya and the Vaisya, from the Sudra. It appears from the evidence, and it is not disputed before us, that several lower

orders who, according to Sastras, would not be entitled to wear sacred thread have been putting on the sacred thread and going through a ceremony like the Upanayanam ceremony of the three higher classes with a view of raising their status. In the District Manual it is stated that all Mahrattas, higher and lower, wear the sacred thread (pages 173 and 175), and the evidence adduced shows that classes who are admittedly Sudras, like blacksmiths and goldsmiths, wear the sacred thread (for example, see the evidence of Sitarama Dikshadar, D.W. 43). In *Jogendro Bhupati v. Nittyanund Man Singh*(1), which was affirmed on appeal by the Privy Council in *Jogendro Bhupati Hurrochundra Mahapatra v. Nittyanund Man Singh*(2), it was pointed out that wearing the sacred thread, though worthy of notice, is by no means conclusive on the question of caste. GARTH, C.J., observed :

"But it is contended that the fact of Jogendro being invested with the sacred thread tends to show that the Sukanda Rajas as well as Panikota Rajas belonged to the Kshatriya caste. We think this circumstance, although well worthy of notice, is by no means conclusive on the point. No doubt, the Rajas of Sukanda, like other Rajas of Kuttuk, endeavoured to assume the rank of true Kshatriyas, but whether they were so in fact is more than doubtful."

The CHIEF JUSTICE also lays great stress on the fact that the Ranis stated in the written statement that they were Sudras. I shall refer to the statement of the Ranis in this case that they were Sudras, later on.

This would not make them twice-born or raise their status from Sudraship to anything higher. There can be little doubt that, so far as the first three twice-born classes are concerned, Upanayanam is regularly performed. It is an important ceremony which is invariably performed with a certain degree of pomp and

(1) (1885) I.L.R., 11 Calo., 702. (2) (1891) I.L.R., 18 Calo., 151 (P.C.).

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publicity. Where in cases of controversy as to whether a person belongs to the twice-born class or to the Sudra class, it is shown that Upanayanam ceremony was not performed, it is a very important piece of evidence to show that the person belongs to the Sudra caste and not to the higher caste, though the converse case of the non-performance of Upanayanam by the twice-born would not necessarily show that the person not performing it belongs to the lower class.

It was argued that the mere non-performance of Upanayanam would not, in the case of the higher classes, necessarily reduce the person to the level of a Sudra. This may be so only where it is proved that the person giving up the ceremony belonged to the higher class. So far as the ceremonies that are essential to give persons the status of twice-born are concerned, they are fixed by the Smrithis. Where the question is as to the caste of a particular person, the performance of the essential rites required by the Shastras assumes importance in fixing the caste. I have gone through the evidence relating to the Tanjore branch of the family and I do not think the evidence shows that Upanayanam was performed to any of the kings until we come to Serfoji, the adoptive father of the last Raja, and that from that period the evidence is by no means satisfactory as to the performance of the Upanayanam in the case of the adopted son and the near relations of the deceased Raja.

In cases of Sudras for whom Upanayanam ceremony is not prescribed, there is the practice of putting on the sacred thread at the time of the marriage or funeral ceremonies. This is called the *Alankara Poonool* or *Loukika Poonool* (or the ornamental sacred thread) and is merely an imitation of the higher classes involving no religious consequences—not being prescribed by any of

the Smrithis. The fact that, in the instances of any reference to the Upanayanam in the account, it is part of the marriage ceremony and the fact that a very small sum is spent shows that the ceremony was more in the nature of putting on an *Alankara Poonool* or *Loukika Poonool*. The whole evidence as to Upanayanam is discussed in paragraphs 1484 to 1526 of the judgment. I do not think the evidence shows that the Mahrattas in Tanjore have the Upanayanam performed with the rites prescribed for the twice-born classes.

Closely connected with the Upanayanam ceremony is the Gayatri Upadesa or the teaching of the sacred verse in the Vedas called Gayatri. It is the teaching of the Gayatri mantra at the Upanayanam that really confers on the Brahman, the Kshatriya or the Vaisya the status of a twice-born. The Gayatri mantra is a mantra from the Rig Veda. According to the Asvalayana Grihya Sutra, the Gayatri for the Brahman is also the Gayatri mantra for the Kshatriya. As an alternative, in some of the Grihya Sutras two other Vedic verses are prescribed for Kshatriyas, one beginning with *Tam Savitah* and the other with *Deva Savithuhu*. There is no Gayatri mantra for Sudras. The Brahman Gayatri is one of the most sacred verses of the Rig Veda which, when translated, runs as follows:—

“Let us meditate on the sacred light of that divine Sun that it may illuminate our minds.”

I have already referred to the texts wherein Vedic mantras are prescribed only for the three higher or twice-born classes and prohibited for the Sudras. In case of Sudras, rituals had to be performed without the recitation of sacred mantras. In course of time it was felt that, so far as the Sudras were concerned, though Vedic mantras were forbidden, there should be some substitute

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and the Puranas, which, although looked upon with reverence by the mass of Hindus, ranked below the Vedas in point of sacredness, were resorted to for the purpose of supplying the mantras to be recited for ceremonies among Sudras and Vedic ritual was confined to the three higher classes, while the Puranic ritual was confined to the Sudras. It was thought that, just as the Gayatri mantra was the hall-mark of the three superior classes, the Sudras should have some mantra of their own and the first verse in *Devi Bhagavatham*, one of the Puranas, was selected as the mantra which the Sudras ought to use. That sloka begins *Sarva Chayithanya Roopanam* and may be translated thus:—

“I meditate on the beginningless Vidya which is of the nature of all consciousness. May She stimulate our intelligence to the realization of that (the Supreme Being).”

The evidence in this case is conflicting both as to the caste of the parties, whether the rituals were Vedic or Puranic and whether the mantra taught was the Gayatri or the sloka from the *Devi Bhagavatham*. Each side has adduced evidence. Those called for defendants 4 to 11 want to make out that the parties are Sudras, that the rituals were Puranic and that the Gayatri which was taught to the members of the Royal family was not the Vedic Gayatri which is imparted to the members of the three higher classes. The other defendants want to make out that the parties are Kshatriyas and that the ritual was the ritual of the twice-born classes. In estimating the value of the evidence given, it has to be borne in mind that during the time of Sivaji, the last Prince, and Sivaji's father, attempts were made to adopt the rituals of the twice-born classes; but the mere performance of ceremonies which are performed by the twice-born classes would not as is conceded on all hands elevate the Sudras or

the fourth class to the status of the twice-born class, though where the caste of a family is doubtful and its origin cannot be traced, the performance of Vedic or Puranic rituals without any objection for a long series of years will be important evidence as to the caste.

[After referring to the oral evidence on this point his Lordship proceeded as follows:—] Their evidence has been referred to in detail by the Subordinate Judge and as I agree with him in his conclusion that the evidence does not prove that the parties belong to the twice-born class, I do not think it necessary to set out the evidence in detail. I agree with the Subordinate Judge in his observation in paragraph 1599 of his judgment that “the evidence merely confirms the idea of a pathetic but vain attempt to elevate themselves in the social scale through caste.”

[His Lordship here referred to some oral evidence adduced in previous litigations regarding the caste of the Tanjore Rajas and proceeded as follows:—] The Subordinate Judge deals with this part of the case in paragraphs 1518 to 1521 of his judgment and I agree with his remarks.

[After referring to the oral evidence of the 67th witness for the third defendant, his Lordship proceeded as follows:—] The evidence is by no means clear that the members of the Tanjore family or the Mahrattas of Tanjore had the Gayatri mantram prescribed in the Grihya Sutras for the three twice-born classes taught to them at such of the Upanayanam ceremonies as have been proved to be performed to the members.

It was argued that the Mahrattas have got gotras connecting them with Rishis and that this is one indication of their being one of the twice-born classes. The mere fact of having a gotra would not settle the question as many Sudra families have gotras—some Rishi gotras

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and some non-Rishi gotras. One important thing connected with gotra is pravara; and gotra and pravara go together. Almost all the witnesses who say that the defendants are Kshatriyas are unable to give their pravara. So far as the Sudras are concerned, though they have gotras, there is no question of any pravara. Defendant's 103rd witness Sankara Rao, who is a Mahratta Sudra, states that he wears a sacred thread and that his gotra is Kapila Rishi gotra. Defendants' 89th witness Kannuswami Ayyar, who is a priest, states that, among Sudras, Nayudus and Chetties have got gotrams.

There is one other very important point which shows that the parties are Sudras. It is admitted that, so far as the twice-born classes are concerned, marriages between members of the same gotra and pravara are absolutely forbidden, and, if performed, would be invalid; among Sudras this rule does not apply. (See Mayne's Hindu Law, paragraphs 86 and 87, pages 103 to 105.) The evidence in this case is that, among Mahrattas, marriages are contracted between members of the same gotra. Manoba Saheb, the 26th witness for defendants 1 and 2, who is a close relation of the Ranis, states that Mahrattas marry in the same gotras and admits that it is a deliberate overriding of the Shastras. The third defendant in his evidence states that his adoptive father belongs to Vasishta gotra and his natural father to Jabalasa gotra. He admits that the gotra of his mother before marriage was also Vasishta; so that his adoptive father would have married a girl of the same gotra. The seventh defendant in his evidence gives instances of marriages between members of the same gotra, namely, Athri gotra and Vasishta gotra. An attempt was made at the examination of the defendants' first witness Mr. Ghautige

to explain the sagotra marriages by stating that the girl was given in adoption before the marriage. The question was put to him in re-examination in a leading form and he gave the answer. There is nothing in Hindu Law which sanctions a girl being given in adoption; and the evidence of this witness has not been followed up by the other witnesses by giving instances of adoption. It should be remembered that, as in the case of marriages, the prohibition of sagotra would apply to the gotra of both the natural and adoptive fathers; so that mere adoption would not take away the prohibition even assuming the girl was given in adoption. A man cannot marry his sister's or brother's daughter by resorting to an adoption with another family. The fact that sagotra marriages exist among Mahrattas and among the members of the Royal family strongly probabalizes the view that the parties are Sudras, and that as such prohibition does not apply to Sudras, sagotra marriages have taken place.

The next point is about the funeral ceremonies. In regard to sradhs, the offerings to the ancestors called pinda consists in the case of Kshatriyas, of cooked rice balls or pindas, while in the case of Sudras cooked rice is not used but only flour. So far as the accounts relating to sradhs go, they all show that the pindas offered were made of flour and not of cooked rice. No document was referred to in the course of the argument which shows that cooked rice pindas were offered. The Subordinate Judge deals with this portion of the case in paragraphs 1470 to 1475 of his judgment. Having regard to the accounts which give minute details as to the quantity of flour purchased and used, the evidence of the witnesses called to show that at sradhs rice pindas were offered is, in my opinion, not true. Another important point in the ceremony is the

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performance of the homam or the giving of oblations in the sacred fire that is lighted. According to Smrithis, the Kshatriyas are entitled to have the homam performed at sradhs and if sradhs are performed according to Vedic rites, homam is indispensable. The 21st defendant Hari Saheb Mohitai, who examined himself as the 46th witness for defendants 1 and 2 and who claims to be a Kshatriya, states that no homam was performed at the sradhs performed by him. Yeswant Rao Saheb, 69th witness for defendants, who is related to the Ranis, states that he does not do homam in performing Brahma-yagnyam at sradhs. The witnesses called by defendants 4 to 11, whose case is that the parties are Sudras, state that no homam was performed. As regards inter-marriages, there is reliable evidence to show that the descendants of Sivaji contracted alliances with the families of Sindia and Holkar, who are Sudras. (Sir John Malcolm's Central India, pages 116 and 142.) The Subordinate Judge refers to the marriages in paragraph 1382 of his judgment. It is also proved that Sudra cooks were employed in the Tanjore Royal Palace and having regard to the well-known fact that none of the three twice-born classes would take food prepared by Sudra cooks, this circumstance is also a strong piece of evidence as to the caste of the parties.

Turning to the judicial proceedings and to statements of parties made therein, we find that in the suit filed by Kamakshi Bai Saheba against the Secretary of State, Kamakshi Bai Saheba alleged that the parties were Sudras and this was admitted by all parties and it is so stated in the judgment of the Supreme Court.

[After referring to the circumstances in which the above statement was made and rejecting the reasons adduced for considering it false his Lordship proceeded as follows :—] The next important judicial proceeding is

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the judgment in Original Suit No. 8 of 1866, on the file of the Civil Court, Tanjore. It was admitted at the hearing that the parties to that litigation were members of the Tanjore Royal family. The plaintiff in that suit claimed to be the adopted son of the last male holder of the properties and the first and second defendants were the widows. One of the pleas raised was that the adoption was illegal and invalid because the plaintiff was the sister's son of the deceased Raja and the family belonged to the Kshatriya caste and the question of caste of the parties therefore became important. Though the adoption of sister's son has subsequently been held to be valid in Southern India, it was contended in 1866 that the adoption was invalid unless the parties were Sudras. The depositions of witnesses are not available as the records have, under the Civil Rules of Practice, been destroyed. But the judgment has been filed as Exhibit D-93. The suit was contested, and all the parties were represented by counsel throughout the trial. In dealing with the caste of a particular family, I think the evidence given in litigations between members of that family which raise the question of caste and decisions of Courts as regards the caste of the family are relevant. If the judgment is evidence, the recital in the judgment of the evidence of the witnesses is also relevant especially when the original depositions have been destroyed under the rules of Court. Mr. DAVIDSON, the learned Judge, in his judgment, Exhibit D-98, deals exhaustively with the evidence adduced in that case and holds that it was proved beyond all shadow of doubt that the parties were Sudras. It is clear from the judgment that evidence was let in by the parties as to the caste of the Royal family of Tanjore as that question is important to determine the caste of the relations of the Royal family, both the plaintiffs and the

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defendants being related to the Royal family. In paragraph 21 the learned Judge finds on the evidence that Serfoji, the father of Sivaji, the last ruler, got Upanayanam performed to him with considerable difficulty when he was upwards of 50 years and a grandfather and that Sivaji got Upanayanam performed to him when he was upwards of 22 years and that Serfoji's act would not raise him to a higher caste. The learned Judge says that all the witnesses for the plaintiff and many for the defendants including two grandsons and other near relatives of Serfoji, one and all distinctly state that Serfoji, Sivaji, they themselves, Kanoji the plaintiff, defendants and all relations were, and are, emphatically of the Sudra caste and that, although Mahratta Sudras, they have their food cooked by Tamil Sudras, eat in the presence of Tamil Sudras, have their water for drinking and ablution purposes brought by Tamil Sudras. This judgment is important as showing that in 1866, i.e., ten years after Kamakshi Bai's suit against the Secretary of State, an attempt made to show that the members of the Royal family were Kshatriyas failed and that the evidence of the close relations of the Royal family referred to by the Civil Judge in his judgment was that the parties were Sudras. In Exhibit A-74, a memorial, dated the 2nd July 1863, from Kamakshi Bai Saheba to the Government of Madras requesting the Government to recognize the father of the first and second defendants as the adopted son of the Raja, she states that no ceremony as Datta Homam was necessary as the parties belonged to the common classes, but that "as from the days of the late Serfoji Maharaja, we do observe the same rules as are prescribed for higher classes," she performed the ceremony of Datta Homam and other ceremonies on the 1st of July 1863. This memorial shows that in 1863 Kamakshi Bai admitted that the

parties were Sudras and also stated that her father-in-law Serfoji began to observe the same rites as are prescribed for the twice-born classes, and this accords with the view taken by Mr. DAVIDSON in his judgment. Exhibit D-78 is a deposition by Ramakumaramba Bai Saheba (one of the widows of the late Raja) in Original Suit No. 400 of 1907 on the file of the District Munsif of Tanjore. In the deposition, while giving her religion she has stated "Hindu Sect, Mahratta Sudra." Defendants' ninety-fourth witness, T. Dasarathi Sahib, who speaks to this statement being recorded and whose father was the younger brother of the Rani Ramakumaramba Bai Saheba, states that he was a party to Original Suit No. 400 of 1907 and that he was present when Ramakumaramba Bai Saheba was examined as a witness by Sirkle Vaman Rao who was appointed Commissioner to take her evidence as she was a gosha. He states that the deposition was read out to her and that she signed it. In cross-examination he states that the deposition was read over to her, that the Commissioner swore her in Mahratti and then questioned her about her husband's name and caste and that he remembers well that she said he was a Mahratta Sudra. It is clear from the evidence of this witness whom the Judge believes on this point that the statement of caste was made by Ramakumaramba Bai Saheba herself; and thus there is no force in the contention founded on the decision of their Lordships of the Privy Council in *Maqbulan v. Ahmad Husain*(1). There is no reason to suppose that the Commissioner who was a Sirkle and disinterested falsely put in the description of caste. It has been pointed out that Ramakumaramba Bai Saheba had in another document Exhibit A-204, a deed of

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(1) (1904) I.L.R., 30 All., 108.

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settlement executed by her on the 10th of August 1907, described herself as a Kshatriya. But this only shows that in judicial proceedings, etc., she was on oath, and was not prepared to state that she belonged to the Kshatriya caste just as Kamakshi Bai Saheba when she had to file a duly verified Bill in a Court of Justice described herself as a Sudra. It is stated by Mr. Varadachari that there was no necessity to use the expression "Mahratta Sudra." But as pointed out by defendants' twelfth witness Rowji, a Sudra will say Sudra or Mahratta Sudra and that Sudras will describe themselves also as Mahrattas simply. There is therefore nothing improbable in the Rani having said that she was a Mahratta Sudra when she gave her deposition.

[After referring to a litigation in the Bombay High Court in which the caste of some of the parties to this suit was in issue in the Original Court, and rejecting the judgments of the Appellate Courts as inconclusive on the question of caste as it was by the consent of the parties not submitted for their decision, his Lordship proceeded as follows:—] I shall now deal with the question as to how the members of the Tanjore Royal family described themselves.

[After referring to the documentary evidence on the point his Lordship proceeded as follows:—] There can be no doubt that in these documents the parties call themselves Kshatriyas, but these documents are all after 1870 and after the Judgment—Exhibit D-93 [see page 193]. It cannot therefore be said that among the Rajas or the members of their family, there has been a uniform or consistent description by themselves as Kshatriyas.

It is argued by Mr. Varadachari for the fifteenth defendant that where the caste of a particular family is not clear from the evidence, the assertion made for 200

years by the members of that family that they belong to a particular caste would be valuable evidence and would raise a *prima facie* presumption that they belong to the caste to which, they allege, they belong. As, however, in the case of the Tanjore Raj there has been no such uniform description of the parties by themselves as Kshatriyas, I do not think any such presumption arises. Again we have the fact that so far as the family of Sivaji is concerned, the claim to Kshatriyaship has been denied. It was denied at the time of the coronation of Sivaji. It was denied when the members of the Kolhapur Raj wanted to have Vedic rites performed on the footing that they were Kshatriyas and recourse had to be had to dismiss the priests and resume their jaghirs and otherwise coerce them to submission and in the case of the Tanjore Raj, Serfoji, the father of the last Raja, had to exercise considerable pressure upon the priests before they would perform the ceremony of investing him with the sacred thread on his return from Benares and when he was about 50 years old. Under these circumstances, I do not think that there is any ground for drawing a presumption from a long course of conduct. The caste of Sivaji must therefore be proved like any other fact without any presumption that, either because he was a Mahratta or because the surname which his family bore was one which is included in one of the 96 clans, he should be a Kshatriya.

There was some argument at the bar as to the presumption to be drawn as to the caste of a party when the evidence was unsatisfactory. The Subordinate Judge in his judgment, after a reference to the authorities, was of opinion that the presumption in the absence of evidence that parties are of twice-born classes is that they are Sudras. He deals with the question in paragraphs 1295 to 1302 of the judgment. I do not think it

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necessary to discuss the question as there is evidence on both sides and there is no question of onus or presumption. If it were necessary, I think that *Muthusami Mudaliar v. Masilamani*(1) approved by the Privy Council in *Ma Yait v. Maung Chit Maung*(2) and in *Soundararajan v. Arunachalam Ohetty*(3) support the view that all Hindu castes that are not proved to be twice-born classes must be treated as Sudras.

I am of opinion that the evidence establishes that the members of the Tanjore Royal family are Sudras and not Kshatriyas, and I agree with the Subordinate Judge in his conclusion on this point.

The next question is as to the validity of the adoption of Rajaram Ingle (called after his adoption Serfoji), the father of first and second defendants. It is contended by the 1st and 2nd Defendants that their father was validly adopted by Kamakshi Bai Saheba in 1863. Their case is that Kamakshi Bai Saheba had, as a matter of fact, authority to adopt conferred upon her by Sivaji, that, even assuming for argument's sake that no express authority was given to her, consent to the adoption was given by Avu Bai Saheba, the mother of her deceased husband, and by the relations of the Raja, and that such consent would validate the adoption made by her and that in any event the parties being Mahrattas and governed by the law in force in Bombay according to which a widow has power to adopt without authority from her husband or his kinsmen, the adoption by Kamakshi Bai Saheba would be perfectly valid. Though the other contesting defendants put the first and second defendants to the proof of the factum of adoption by Kamakshi Bai Saheba and although a very large volume of evidence

was let in on this point, the factum of adoption by Kamakshi Bai Saheba has not been disputed before us.

Objection is taken to the validity of the adoption on the following grounds:—(1) that Kamakshi Bai Saheba had no authority from her husband to make the adoption; (2) that there was no such consent by the kinsmen or sapindas of the Raja as would validate the adoption; (3) that the extinction of the Raj by the East India Company and the confiscation of the estate on the death of the Raja put an end to any power which Kamakshi Bai Saheba might have had to make the adoption; and (4) that the parties are governed by the Mitakshara and not the Mayukha.

It is also argued that the claims of Rajaram Ingle, the adopted son, are barred by limitation as his rights were denied in the litigation which ended in the decree of this Court (*vide Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*(1)).

The Subordinate Judge has held that no express authority from the Raja was proved, but that the consent of Avu Bai Saheba, Kamakshi Bai Saheba's mother-in-law, and the Raja's relations in Tanjore, was sufficient consent to render the adoption valid, that the parties are governed by the law in force in Bombay which empowers a widow to make an adoption in all cases except where the husband has forbidden it, that the act of the East India Company in taking possession of the Raj would not invalidate the adoption and that the claims of defendants Nos. 1 and 2 are not barred by limitation.

In order to appreciate the evidence and the case of defendants Nos. 1 and 2 that the Raja authorized the adoption, it is necessary to bear in mind certain facts. [After referring to the events and circumstances adduced as

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(1) (1860) I.L.R., 33 Mad., 342.

(2) (1922) I.L.R., 49 Cal., 810 at 821 (P.C.).

(3) (1916) I.L.R., 39 Mad., 186 at 188.

(1) (1868) 3 M.H.C.B., 424.

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probabilizing the Raja's authority to adopt, already noted in the judgment, his Lordship proceeded as follows:—] In 1853 Sivaji took Rajaram Ingle, the youngest of the three grandsons of his sister from the boy's father and brought him up in the palace, evidently with the view of a future adoption in case he had no male issue by the wives he had married.

[After referring to the argument that the late Raja was not likely to have thought of the adoption because he had married 17 wives, and referring to the argument that the Raja was *in extremis* on the alleged date of oral authorization, his Lordship proceeded as follows:—] I think that, if the oral evidence be considered with reference to these facts, there is no inherent improbability in the Raja having authorized the adoption, should it come to the worst. [After referring to some evidence as to the conduct of and treatment of the Ranis towards Rajaram Ingle, his Lordship proceeded as follows:—] There can be little doubt from the evidence that Kamakshi Bai Saheba and the other Ranis at least from 1874 treated Rajaram Ingle as a validly adopted son. Of the sixteen Ranis, twelve died during Rajaram's life-time and he performed the funeral ceremonies as regards eleven of them. [After referring to the paucity of oral evidence as to the oral authority, at this distance of time his Lordship proceeded as follows:—] I think the evidence of Nagayi Amma and Yogambal (which the Subordinate Judge says he would not discredit but for what he considers to be the non-mention of the adoption on the four occasions which he refers to) when taken with the probabilities shows that the Raja asked Kamaskhi Bai Saheba (who was his senior widow) to adopt Rajaram Ingle if anything should happen to him. I see no reason to hold that so many of the Ranis would have made the false statement that the Raja gave

permission to adopt especially as Kamakshi Bai Saheba's case from the commencement was that the parties were governed by the law in force in the Bombay Presidency which required no express authority from the husband for adoption. After disputes arose owing to Kamakshi Bai not acting up to the terms of the agreement, Exhibit A-58 (a), some of the Ranis disputed the validity of the adoption in the suit of 1866, but this is not of much value especially as after 1874 they again agreed to the adoption and treated him as an adopted son.

It was argued on the strength of the decisions in *Ohandramala v. Muktamala*(1), *Venkata v. Subhadra*(2) and *Subbarayar v. Subbamal*(3), that express authority is unnecessary, if the adoption was in accordance with wishes of the deceased. The first of the above three cases does not touch the question. There is, no doubt, a finding at page 22 that the Raja died without giving any express authority, but that the adoption was in accordance with his wishes. There was no plea of want of authority, and all that the case decided was that the non-performance of Datta Homam and other ceremonies was not fatal to the adoption as the parties were Kshatriyas. The second case decided that the adoption of a son of a maternal aunt's daughter was valid and that the gift of the boy by his elder brother, in pursuance of a promise made by the father, was valid. The facts of the case were that the father of the boy gave him to the appellant who desired to adopt him and that the boy was brought away from his father's house and kept by the appellant under his protection. In the meantime the boy's father died and at the ceremony of adoption the boy was given away by his elder brother. It was

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(1) (1883) I.L.R., 6 Mad., 20. (2) (1884) I.L.R., 7 Mad., 548.
(3) (1888) I.L.R., 21 Mad., 497.

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held that the adoption was valid. Sir CHARLES TURNER, C.J., and MUTTUSWAMI AYYAR, J., observe :

“ As the boy was actually given by his natural father with the intention that the boy should be adopted subsequently, the death of the boy's natural father made no difference, the gift during Datta Homam by the boy's brother not being an act of his own mere motion as a brother but being only ancillary to perfect by religious rite what the father had done.”

It is argued on this authority that, as the finding of the Subordinate Judge is that Rajaram Ingle was given by his natural father to Sivaji with a view to future adoption and was brought up by Sivaji with that object, the performance of the religious ceremonies by Kamakshi Bai Saheba was only the completion of an act done by the Raja by the taking of the boy and that even if no special authority was given at the time of his death, the adoption would be valid. The third case is a case where a boy was brought to the house of the deceased about three years prior to his death and treated as the adopted son. The will directed the boy's Upanayanam to be performed by the widow. It was held that the direction in the will that the widow should cause the Upanayanam to be performed implied that Datta Homam and other ceremonies preceding Upanayanam were also authorized, and *Venkata v. Subhadra*(1) was referred to with approval. These cases are, I think, authority for the proposition that where a person takes a boy from his natural father with a view to adoption and brings him up in his own house, there being a giving and taking of the boy with a view to a future adoption, and the actual ceremony is performed by the widow, the adoption may be supported on the ground of implied authority to adopt. Having regard to the finding of the Subordinate Judge as to the late Raja taking the boy from his father and bringing him up with a view to adoption if

(1) (1884) I.L.R., 7 Mad., 548.

circumstances required it, there is considerable force in the argument of the vakil for first and second defendants that the Raja's wish often expressed is sufficient authority, even assuming there was no express authority conferred on the day of his death. It is, however, not necessary to rest my decision as to the validity of the adoption on this ground as I think the evidence as to express authority is probable.

There was some discussion at the trial as to whether the death of Arunamba Bai Saheba, one of the Ranis, before the actual performance of the ceremony by Kamakshi Bai Saheba in 1863 would affect the adoption. Reference was made to *Narasimha v. Parthasarathy*(1). That was a case where the will of a deceased person, which is printed at page 218 of the report, required the widows to exercise their discretion in more than one respect, namely, as to whether the adoption was to be made at all, and, if so, when it was to be made and who was the boy to be adopted. This discretion on almost every point connected with the adoption was to be exercised by the widows jointly and it was held that the death of one of the widows put an end to the authority. I may point out that, if the widows had exercised a discretion and resolved to adopt a boy, the actual ceremony could only be done by the senior widow. In the present case the evidence and the finding of the Subordinate Judge is that Sivaji selected the boy to be adopted and resolved upon his adoption if necessity arose; and if his authority given to the widows is found, there was no discretion given to them on any matter because the boy had been fixed upon and all that they had to do was to go through the formal ceremony of adoption. In the present case it is also clear that Arunamba Bai Saheba,

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(1) (1914) I.L.R., 37 Mad., 199.

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who died before the actual ceremony of adoption, was a consenting party to Rajaram being adopted and she desired him to perform her funeral ceremonies in her letter Exhibits A-111 and A-113 already referred to by me and he did perform them. This shows beyond all doubt that Arunamba Bai Saheba, the widow who died before the ceremony of adoption took place, consented to Rajaram's adoption and that she was anxious that he should perform her funeral ceremonies. Assuming that there was any discretion to be exercised by the deceased widow, she had exercised it in favour of the adopted boy and her death would make no difference.

I am also of opinion that the consent of Avu Bai Saheba, the Queen mother, was sufficient in Hindu Law to validate the adoption. There can be little doubt, and it is not disputed before us, that she was from the beginning anxious that Rajaram, her grandson, should be adopted and that she not only consented to the adoption but did her best to bring it about. It is not disputed that Avu Bai Saheba was a sapinda. She was the only sapinda of the Raja who was in Tanjore. The Kolhapur, Satara and other branches, in view of my finding that Pratap Singh who was the son by a sword wife was illegitimate, would not be agnates under Hindu Law of the last Raja of Tanjore. They would have no claim to succession, they representing a legitimate branch of Sivaji the Great, and Sivaji the last Raja being descended from Pratap Singh who was illegitimate. It is clear from the decision of their Lordships of the Privy Council in *The Collector of Madura v. Mootoo Ramalinga Sathupathy*(1), that the consent of Avu Bai Saheba, the mother of Sivaji, would validate the adoption in the absence of any other Sapindas. In that case it

(1) (1868) 12 M.I.A., 397.

appeared that one Mootoosamy, a male relation, who gave his consent was not a sapinda but only a Samanodaka and was the natural brother of the late Raja. Mootoo Veeroyee was the mother-in-law of the adopting widow and there were no nearer relations in the adopting family. Their Lordships of the Privy Council at page 444 state :

"Nor is it by any means unusual in a Hindu family to find the mother-in-law occupying a position of considerable power and importance. Moreover, she was unquestionably the heir to the property next in succession to Rani Parvata Nachiar, after the failure of Ramasami's descendants. It, therefore, appears to their Lordships that in this state of the family the assent of Mootoo Veeroyee, of Mootoosamy and of the other persons who are proved beyond all question to have assented was sufficient to legitimate the adoption, even if the evidence failed to prove the consent of the yet remoter kinsman, Ramraj Taver."

There were no sapindas except Avu Bai Saheba in existence. The Kolhapur, Satara and other collateral branches, claiming descent from Shaji the common ancestor, would, even if they were entitled to inherit, be only Samanodakas, and, if my finding is correct that Pratap Singh was illegitimate, they would be no relations at all. The Raja's sisters and their husbands and their adult sons consented to the adoption and were present when after the adoption the Raja was installed on the throne and all did homage to him as the adopted son. Under these circumstances it seems to me that the consent of Avu Bai Saheba, the nearest sapinda, would be sufficient to validate the adoption. The Subordinate Judge deals with this question of consent in paragraphs 577 to 605 of his judgment and I agree with him in holding that the consent given by Avu Bai Saheba would, under the circumstances of the case, be sufficient consent to validate the adoption.

Even assuming that there was no express authority given by the Raja and the consent of Avu Bai Saheba

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was insufficient, I think it is clear that the members of the Tanjore Royal family who migrated in 1675 from a place called Verole in the Bombay Presidency (see Tanjore District Manual, page 761, and Duff, Vol. I, page 69) are governed by the law as prevailing in Bombay according to which no authority from the husband is necessary. The law applicable to families migrating from one province to another has been settled by the recent decision of their Lordships of the Privy Council in *Balwant Rao v. Baji Rao*(1). As this decision was pronounced after the suit was disposed of by the Subordinate Judge, it is not referred to in his judgment; and I think it is unnecessary to refer to the various authorities cited, as in my opinion this decision settles the law on this question. It was held by their Lordships of the Privy Council that the law of succession was to be determined according to the personal law of the individual and that where a family migrates from one province to another which is governed by another law, it carries its own personal law with it. That personal law, however, in their Lordships' opinion, must be the family law as it was when they left one province to another.

On the question of fact as to whether Ekoji, the founder of the Tanjore Raj, and his descendants gave up their personal law by which they were governed when they were in the Bombay Presidency and adopted Mitakshara, I think the evidence is clear that they continued to be governed by their own personal law and I agree with the Subordinate Judge who, after an exhaustive review of the evidence, has come to the conclusion that the parties continued to retain their personal law. He deals with this question in paragraphs 883 to 1260 of

(1) (1921) I.L.R., 48 Cal., 30 (P.C.).

his judgment. Mr. Varadachari who argued the appeal on behalf of the Maharaja of Kolhapur said that he did not canvass the finding of fact arrived at by the Subordinate Judge; and none of the parties before us, excepting the Mangala Vilas defendants, canvassed the finding of the Subordinate Judge. I do not think it necessary to repeat evidence which the Subordinate Judge has referred to with great minuteness and detail.

The law as interpreted by Courts in the Bombay Presidency has always been that a widow is competent to make an adoption after the death of her husband in all cases where there has been no prohibition by the husband. Express consent is unnecessary, it being implied from the absence of any prohibition. The whole law on the subject has been discussed and settled by their Lordships of the Privy Council in *Yadav v. Namdeo*(1). I think it is unnecessary for me to go into the earlier authorities. Their Lordships of the Privy Council, after an exhaustive review of all the authorities, held that in the Mahratta country of the Bombay Presidency a Hindu widow whose husband does not expressly forbid her to adopt a son to him, has power to do so without the consent of her husband's kinsmen whether or not her husband's estate is vested in her and whether or not he died separated.

There was considerable discussion as to what the law was in 1674 when Venkoji migrated from the Mahratta country and settled down in Tanjore. I am of opinion that in the absence of any evidence to the contrary the law in force when Ekoji migrated in 1674 must be presumed to be the same as it was declared to be by judicial decision. In this connexion the observations of their Lordships of the Privy Council in *Balwant Rao v.*

(1) (1922) I.L.R., 49 Cal., 1.

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Baji Rao(1) are important. Their Lordships at page 41 observe :

"Further it must always be remembered that the commentaries are only commentaries. They do not enact; they explain and are evidence of the congeries of customs which form the law"

and at page 48, their Lordships observe :

"The law must be the family law as it was when they left. A judgment declaratory of law as having always been would bind; but it would be a different thing if subsequent customs became incorporated into law. The distinction is pointed out in the case of *Vasudevan v. The Secretary of State for India*(2), by Sir ARTHUR COLLINS, C.J., and MUTTUSWAMI AYYAR, J."

In *Chandika Bakhsh v. Muna Kunwar*(3), their Lordships of the Privy Council point out that, although the migration of the family took place before the Mayukha was written, it may well be that the rule was in force in earlier times and that on this point the Mayukha only embodied and defined a pre-existing custom. In *Narayanamsami v. Kuppusami*(4) Sir ARTHUR COLLINS, C.J., and MUTTUSWAMI AYYAR, J., observe :

"The Mayukha, Kaustubha and other treatises of special authority in Bombay introduced a theory of implied authority (for a widow to adopt) on the ground that an adoption by a widow was a meritorious act which, unless forbidden by the husband, might be taken to have been sanctioned."

The law being thus settled so far as the Bombay Presidency is concerned and there being nothing to show that there was a change in the law as regards the widow's power of adoption at any time, it must be presumed that the law in force in 1674 was the same as it is at present. No useful purpose will be served by an examination of the ancient texts. I may point out in this connexion that there is nothing in Manu or Yagnavalkya prohibiting widows from adopting. The divergence between the

(1) (1921) I.L.R., 48 Cal., 30 (P.C.)

(3) (1902) I.L.R., 24 All., 273.

(2) (1888) I.L.R., 11 Mad., 157.

(4) (1888) I.L.R., 11 Mad., 48.

various schools has arisen on the interpretation of the texts of Manu and Yagnavalkya which enjoin on women dependence upon their husbands or parents or their relations. Each school, however, interprets the consequence of this dependence in a different way, and the conclusion of the leading commentators of the Bombay school is that, adoption being a meritorious act, express permission is not necessary. I may in this connexion refer to the translations of the passages in Viramitrodaya and the Kaustubha by Mandlik in pages 463 to 467 of his book on Hindu Law.

As regards the objection that the escheat by the East India Company put an end to the power of adoption, I find it difficult to see how an act of State by the East India Company can put an end to the power of the widow to adopt. As pointed out by their Lordships of the Privy Council in *Pratapsing Shivsing v. Agarsingji Rajasangji*(1), "The right of the widow to make an adoption is not dependent on her inheriting as a Hindu female owner her husband's estate" and "she can exercise the power, so long as it is not exhausted or extinguished, even though the property is not vested in her." The argument of Mr. Raja Ayyar on behalf of the third defendant is based on the decisions of their Lordships of the Privy Council in *Mussumat Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhry*(2) and *Padmakumari Debi Chowdhrani v. Court of Wards*(3) and on the later cases following those decisions. In the first case it was held that an authority to adopt became incapable of execution when the estate of the person giving authority devolved by heirship on a person who became the full owner and his wife succeeded him on his death as his heir to a widow's estate. The Right

(1) (1919) I.L.R., 48 Bom., 778 (P.C.). (2) (1885) I.L.R., 11 A., 279.

(3) (1882) I.L.R., 8 Cal., 802.

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Honourable Lord KINGSDOWN in delivering the judgment of their Lordships of the Privy Council observed :

"The question is, whether the estate of his son being unlimited, and that son having married and left a widow, his heir, and that heir having acquired a vested estate in her husband's property as his widow, a new heir can be substituted by adoption who is to defeat that estate, and take as an adopted son what a legitimate son of Gour Kishore would not have taken. This seems contrary to all reason and to all the principles of Hindu law, as far as we can collect them. It must be recollected that the adopted son, as such, takes by inheritance and not by devise. Now, the rule of Hindu Law is, that in the case of inheritance, the person to succeed must be the heir of the last full owner. In this case, Bhowanee Kishore was the last full owner, and his wife succeeds, as his heir, to a widow's estate. On her death, the person to succeed will again be the heir at that time of Bhowanee Kishore. If Bhowanee Kishore had died unmarried, his mother, Chundrabullee Debia, 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 but no case has been produced, no decision has been cited from the text-books, and no principle has been stated to show that by the mere gift of a power of adoption to a widow, the estate of the heir of a deceased son vested in possession, can be defeated and divested."

In *Padmakumari Debi Chowdhrani v. Court of Wards*(1) a question arose as to the same estate and the question was whether it would make any difference if the estate came back to the widow making the adoption, and their Lordships of the Privy Council held that it made no difference, as the vesting of the estate in the widow of the deceased son was a proper limit to the exercise of the power given to the mother of the deceased son. In *Velanki Venkata Krishna Rao v. Venkata Rama Lakshmi*(2) their Lordships of the Privy Council held that a widow, having authority from her husband to adopt

(1) (1882) I.L.R., 8 Cal., 302.

(2) (1876) I.L.R., 1 Mad., 174.

a son in the event of the natural-born son dying under age and unmarried, may on the happening of that event, make a valid adoption. Their Lordships of the Privy Council distinguish the Bhoobun's case *Mussumat Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhry*(1) on the ground that the adoption only divested the estate of the adoptive mother and did not divest any heir of the deceased son, and observe :

"They are, therefore, of opinion that there is no ground for saying that because the estate descended to the son natural-born of the original zamindar, and the widow of the latter took it as heiress of her son and not immediately from her husband, the adoption made by her, if otherwise valid, therefore became invalid."

In *Thayammal v. Venkatarama*(2) it was held that the power of a father's widow to adopt a son to him was exhausted upon the vesting of the estate in the son's widow and that an adoption made subsequently was invalid. This case was referred to and followed by their Lordships of Privy Council in *Tarachurn Chatterji v. Sureshchunder Mukerji*(3) where it was held that, though a testator had authorized his widow to make an adoption if the testator's son should die without leaving a son or daughter and although the testator's son died leaving a widow but issueless, the power to adopt was exhausted on the death of the testator's son and on the estate vesting in the son's widow.

The same principle has been applied to cases in Bombay where no authority is required. In *Krishnarav Trimbak Hasabnis v. Shankarrav Vinayak Hasabnis*(4) it was held that an adoption made by the mother of a deceased person who succeeded to the estate after the death of her son and the son's widow is invalid as the power was exhausted and the estate descended to the

(1) (1865) 10 M.I.A., 270.

(3) (1890) I.L.R., 17 Cal., 123.

(2) (1887) I.L.R., 10 Mad., 205.

(4) (1898) I.L.R., 17 Bom., 164.

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son's widow and the fact that at the time of adoption her own estate was divested made no difference. SARGENT, C.J., was of opinion that this was the positive result of the decision in *Mussumat Bhoobun Moyee Debi v. Ram Kishore Acharj Chowdhry*(1) as explained in *Padmakumari Debi Chowdrani v. Court of Wards*(2). In *Ramkrishna v. Sham Rao*(3) it was held by a Full Bench of the Bombay High Court that the power of the mother to adopt was exhausted where her son leaves a widow or a heir. This decision has been approved of by their Lordships of the Privy Council in *Madana Mohana Deo v. Purushotthama Deo*(4). CHANDAVARKAR, J., was of opinion that the test of the principle defining the limit to the period within which an adoption may be made by a widow to her deceased husband does not depend upon the mere vesting of the estate in her at any time, and the learned Judge states that the principle to be deduced as governing the time limit can be stated in these words:—

"Where a Hindu dies leaving a widow and a son and that son 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."

With reference to the argument that the principle so enunciated was not in accordance with either the letter or spirit of Hindu Law as expounded in the books or by the Hindus themselves as understood, the learned Judge states that it was not open to him to go into that question as the decision of their Lordships of the Privy Council in *Bhoobun Moyee's* case was conclusive. The same principle was laid down by their Lordships of the Privy Council in *Madana Mohana Deo v. Purushotthama Deo*(4).

(1) (1885) 10 M.I.A., 279.

(3) (1902) I.L.R., 26 Bom., 526.

(2) (1882) I.L.R., 8 Cal., 302.

(4) (1918) I.L.R., 41 Mad., 855 (P.C.).

In *Tripuramba v. Venkataratnam*(1) it was held following *Venkappa Bapu v. Jivaji Krishna*(2) and *Sangapa v. Vyasapa*(3) that the mere attainment of age by a son before his death would not, when he left no son or widow, put an end to the power of the mother to adopt.

In all these cases a time limit was fixed for the exercise of the authority conferred on the widow to make the adoption. There is nothing in any of the Smritis or texts which lays down any limit and the principle enunciated by their Lordships of the Privy Council has reference more to general considerations of expediency than to any known principles of Hindu Law. The motive for adoption in Hindus is the perpetuation of the lineage and the performance of the rites prescribed to ensure salvation. I have referred to the above cases as it was argued that they support the view that the power is incapable of execution in all cases where the estate is for any reason in the hands of a third person and could not be recovered by the widow. I find no such doctrine enunciated. All the cases refer to succession and in all the cases the person sought to be divested was in a position to confer spiritual benefit as in every case the *sradhs* performed will when oblations are offered include the father and grandfather of the person who conferred power to adopt or to whom the adoption is sought to be made. There seems to be absolutely no ground for extending the principle enunciated in the above cases of the Privy Council to cases where the property of the last holder is lost to the family by adverse possession, escheat or in any other manner. Supposing at the date of adoption all the property left by the husband has been in the possession of a third

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(1) (1923) I.L.R., 46 Mad., 423.

(2) (1901) I.L.R., 25 Bom., 306.

(3) (1896) 8 P.J. of Bom. H.C., 684.

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person who could successfully plead adverse possession or is taken away to a place where the Indian Courts would have no jurisdiction, can it be said that the widow has no power to adopt a son to her husband and thus deprive the husband of the spiritual benefits that would arise from adoption? The whole principle underlying the rule as to divesting estates is that a superior title as heir cannot be created by a widow, while the property has already vested in a person who in law has taken the estate from the deceased heir of the last male holder. In the present case there is the additional fact that the confiscation was after the death of the Raja and there was an interval during which the property vested in the widow.

The act of the East India Company was, as held by their Lordships of the Privy Council, unjustifiable under any municipal law but was an act of State. They were taking steps to get the property back by petitions to the authorities, and eventually succeeded in doing so before they made the adoption. The mere deprivation of the widows by an act of State would not amount to a vesting of the property by succession in a person who in law has title to the property, and the re-grant of the property would in any event restore the power to adopt in the grantee. The Government never claimed that the act of State put an end to the power of adoption nor did they prohibit the adoption when they restored the property or were informed of the adoption. I am of opinion that the adoption is not invalid because of the confiscation of the Tanjore Raj.

The plea as to the right of the first and second defendants being barred by limitation is based on the Limitation Act of 1871. I agree with the Subordinate Judge in holding that the claim of the first and second

defendants is not barred. Their father Rajaram Ingle was adopted on the 1st of July 1863. I have already referred to the agreement, Exhibit A-58 (a), dated the 15th of September 1862, between Kamakshi Bai Saheba and the other Ranis as regards the enjoyment of the properties which were restored by the Government under the grant, Exhibit A-46. Disputes arose between Kamakshi Bai Saheba and ten other Ranis as Kamakshi Bai Saheba did not give them any portion of the income from the properties made over by the Government. Suit No. 16 of 1866 was filed in the District Court of Tanjore by Jijamba Bai Saheba and Aparupamba Bai Saheba, two of the Ranis, against Kamakshi Bai Saheba and twelve other Ranis and against the adopted son who was impleaded as the fourteenth defendant in that suit. The plaintiffs alleged that the adoption was invalid and the first prayer was for a partition and delivery to them of their shares in the estate granted by the Government and "declaring that the fourteenth defendant's adoption is invalid because it was not duly made and is illegal." It appears from the judgment of Mr. DAVIDSON (Exhibit C-22) that defendants Nos. 6, 8 and 9 supported the plaintiff's allegations. The first defendant supported the fourteenth defendant, the adopted son, whose written statement is filed as Exhibit A-147. The District Judge did not take any evidence. He held, without deciding the validity of the adoption, that the plaintiffs were entitled to share in the income of the properties granted by Government in 1862 by Exhibit A-46 and decreed the appointment of a Receiver to take possession of and manage the properties. Two appeals were filed, one by Kamaskhi Bai Saheba, the first defendant, and the other by Jijamba Bai Saheba, the first plaintiff. The decision of the Appellate Court is reported in *Jijoyiamba Bai*

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Saiba v. Kamakshi Bayi Saiba(1), which I have already referred to. The High Court declined to make any adjudication as regards the validity of the adoption on the ground that the adopted son could not divest the widows who were donees under the Government grant Exhibit A-46. The learned Judges observe :

“ whether as adopted son he may become entitled to claim under and by virtue of the transfer is not a question on which we need or can properly say anything in this suit.”

It appears from the evidence that on the 1st of January 1864 Rajaram Ingle was placed in possession of the estate and continued to be in possession till the 25th of November 1866 when the Receiver appointed by the District Court took possession of the estate (see Exhibits A-81, A-82, A-415 to A-121 and paragraphs 154 and 395 to 402 of the judgment of the Subordinate Judge). After the disposal of the suit by the High Court and a few years after the Receiver took possession, all the Ranis including those who in the litigation of 1866 denied his right became reconciled to Rajaram. He performed the funeral ceremonies of Girijamba Bai who died in 1874, and got the properties of the Ranis. It appears from Exhibit A-243, dated the 13th of February 1877, that twelve of the Ranis requested the Receiver to pay the adopted son Rs. 1,500 every month out of the estate and also to give him Rs. 2,220 and 480 kalams of paddy every year for meeting the expenses of the funeral ceremonies. Exhibit A-277 is a telegram, dated the 30th of December 1876, sent to the Governor of Madras by twelve of the Ranis who were then living, acknowledging the right of the adopted son and requesting that he should be placed on the Masnud of Tanjore. The adopted son was married on the 1st of June 1883 and each of the Ranis contributed Rs. 2,000 towards the

expenses of the marriage (see Exhibits A-240 A-241 and A-257). The evidence shows that from at least 1874 all the Ranis, including those who objected to the validity of the adoption in 1866, acknowledged the validity of the adoption.

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It is contended by Mr. Raja Ayyar for the third defendant that the claim of the adopted son is barred under article 129 of the Limitation Act of 1871. This article prescribed a period of twelve years for suits to establish or set aside an adoption—the starting period being the date of the adoption or, at the option of the plaintiff, the date of the death of the adoptive father. It is contended that the claim of defendants Nos. 1 and 2 became barred as the adoption was denied in Suit No. 16 of 1866 and they ought to have filed the suit within twelve years from the date of adoption. Before dealing with this argument, I may point out that High Court in the decision on appeal *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*(1), to which the adopted son and all the widows were parties, expressly refused to adjudicate on the validity or invalidity of the adoption. The factum of adoption was not disputed by anybody. The only objection was to its validity. If Rajaram Ingle did not file a suit to establish his adoption, none of the parties who objected to the validity of the adoption filed suits either. The present is an inter-pleader suit and each of the contesting defendants attacks the title of the other, so that each is virtually in the position of a plaintiff. If the adopted son had to file a suit within twelve years under the Act of 1871, it was equally incumbent on those who disputed his adoption to have filed suits to set aside the adoption or declare the adoption invalid, and if the first and second defendants are barred from

(1) (1868) 3 M.H.C.R., 424.

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maintaining the validity of the adoption so would the other claimants of the estate also be barred from wanting a declaration that the adoption is invalid. There is again the fact that the Ranis who objected to the adoption on the ground of its invalidity subsequently admitted the title of the adopted son, paid him till his death a portion of the income from the property, got his marriage performed and after his death were supporting and treating his sons, the first and second defendants, as their grand-children. It is difficult to see what necessity there was for the adopted son to file a suit for a declaration of his title when before the expiry of twelve years his title was admitted by those who contested it. Again, the possession which was taken by the Receiver was taken in pursuance of the decree of the High Court which only decided that the adopted son had *no present right to possession*. Under the grant, Exhibit A-46, the widows were entitled to be in possession during their lifetime, and the daughter was entitled if she survived them. On the death of the last surviving widow and if the daughter predeceased her, succession would have to be traced to the heirs of the Raja. I think the possession of the Receiver must be deemed to be possession for the Ranis and on their death, possession for such person as may be proved to be the nearest heir of the Raja. I find it difficult to see what suit Rajaram Ingle could have filed in 1866. The decision in *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*(1) was to the effect that the case of the adopted son would only arise for consideration when the time came after the death of all the widows, and that he could only claim under the terms of the grant, Exhibit A-46, any claim as heir under Hindu Law to the late Raja being untenable owing to the act of the

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East India Company declaring the Raj extinct and taking possession. A suit filed by him for a declaration that he is under the terms of the grant entitled to succeed to the properties as adopted son on the death of all the widows and on the contingency of the daughter of the Raja predeceasing them would, I think, be dismissed on the ground that no Court will grant a declaration of a bare possibility which may or may not ripen. It is also difficult to see how in the face of the decision of the High Court that it was unnecessary to decide on the validity of the adoption, a suit by the adopted son against the widows who denied his adoption would lie. They were all parties to the suit which terminated in the decree reported in *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*(1), and were bound by it.

I do not think it was open to the adopted son after the decision in *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*(1) to sue for a bare declaration. Section 42 of the Specific Relief Act was not enacted till 1877 and we have to see whether under section 15 of the Civil Procedure Code of 1859 he could have filed a suit. As pointed out in *Kathama Natchiar v. Dorasinga Tevar*(2), this section has to be construed with reference to the principles upon which the Court of Chancery proceeds with such slight modifications as the conditions in India may require. Their Lordships observe :

“It appears to their Lordships that the construction which must be placed upon the clause in question is that a declaratory decree cannot be made unless there be a right to consequential relief capable of being had in the same Court or in certain cases in some other Court.”

I may also refer to *Bright v. Tyndall*(3), where the distinction is pointed out between

(1) (1868) 3 M. H. O. R., 424.

(2) (1875) 2. I. A., 169.

(3) (1876) 4. Ch. D., 189.

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"an interest that has arisen and is represented, and an interest that has not arisen, and that never may arise, but with regard to which there is a remote possibility that the event which has not occurred, and upon which it is made to hang, may hereafter occur."

Sir RICHARD MALINS, V.C., observed :

"The latter is not an interest—it is not a right—it is nothing more than a bare expectation of a future right."

Under the decision in *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*(1), the adopted son had only a chance of succession if he survived the widows and the daughter predeceased them. This is clearly only a chance.

Articles 118 and 119 of the Act of 1877 took the place of article 129 of the Act of 1871. Article 118 applied to suits to obtain a declaration that an alleged adoption is invalid, or never, in fact, took place, and article 119 applied to suits to obtain a declaration that an adoption is valid. The period of limitation prescribed in each of these articles was six years, the starting point as regards article 118 being when the alleged adoption became known to the plaintiff and that as regards article 119 being when the rights of the adopted son, as such, were interfered with. The decisions of their Lordships of the Privy Council in *Tirthuwan Bahadur Singh v. Rameshar Bakhsh Singh*(2), and *Muhammad Umar Khan v. Muhammad Niaz-ud-din Khan* (3) are clear authorities for the view taken by the Madras High Court that the Act of 1877 applies only to declaratory suits in respect of adoptions and not to suits for possession of immovable property. This is the view taken by all the High Courts and the recent Full Bench decision of the Bombay High Court in *Doddawa v. Yellawa*(4) brings the High Court of Bombay on a line

with the other High Courts as regards the construction of the Act. It is therefore unnecessary to consider any denials of the adopted son's title subsequent to the year 1877 when the Limitation Act of 1877 made a difference in the law of limitation applicable.

I am of opinion that the claim of defendants Nos. 1 and 2 is not barred.

As regards the objection that the existence of the Mangala Vilas sons of Sivaji precluded the adoption, it is unnecessary to consider the objection in detail as I am of opinion that the Mangala Vilas sons are illegitimate sons and it is conceded by all parties that the existence of illegitimate sons is no bar to an adoption. Even assuming that a sword marriage is a lawful form of marriage and that the sons are legitimate though inferior sons, the inferiority which the Subordinate Judge points out and which affects the right to perform funeral ceremonies, etc., in my opinion, does not prevent an adoption. The texts as to a sonless man adopting, in my opinion, mean a man who has no son capable of performing the necessary ceremonies prescribed by Hindu sastras for the welfare of the adopting father's soul and his salvation. In fact D.W. 82 called by defendants Nos. 4 to 11, as pointed out by the Subordinate Judge, admits that the existence of sword wife's sons does not preclude an adoption.

The next question is as regards the adoption of the third defendant. The third defendant claims as the grandson of the second daughter of Sivaji. His case is that the second Princess and her husband Sakharam Sahib adopted Sambu Singh. The Princess died before her adopted son, Sambu Singh, and the case for the third defendant is that Sambu Singh adopted the third defendant on the night of the 3rd March 1891. The adoption of Sambu Singh by Sakharam Saheb is not disputed

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(1) (1868) 3, M.H.C.R., 424.

(2) (1906) I.L.R., 28 All., 727.

(3) (1912) I.L.R. 39, Calo., 418 (P.C.). (4) (1922) I.L.R., 46 Bom., 776 (F.B.).

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before us. Mr. Muttukrishna Ayyar for the twenty-third defendant, however, denied the factum and validity of the adoption of the third defendant. The Subordinate Judge deals with this question in paragraphs 1773 to 1850 of his judgment and finds in favour of the third defendant. I do not think there is any reason to differ from the Subordinate Judge who has gone into the evidence and exhibits very fully. [Then his Lordship discussed the evidence as to whether the adoptive father had severe fever and was unconscious on the day of the alleged adoption and proceeded as follows:—]

Exhibits B-129 to B-139 are letters ranging from the 17th of November 1903 to 1905 written by the adoptive mother which show that she recognized the third defendant as her adopted son.

The oral evidence as regards the adoption shows beyond all doubt that the ceremony of adoption was gone through. [Here His Lordship discussed the oral evidence on the point and proceeded as follows:—] I may state in this connexion that the twenty-third defendant who is the legal representative of the seventeenth defendant called no evidence and did not even cross-examine the witnesses called by the third defendant to prove his adoption. The fact that his adoption was upheld in three previous suits where it was questioned, that for twenty-five years and until the date of the present suit the adopted son was recognized as such by all the relations, that he was in possession of his adoptive father's property and that he was cut off from any share in his natural family are circumstances which cannot be easily ignored when we have to determine the state of mind of Sambu Singh when he made the adoption long before the suit and we have to estimate the value of the evidence given in support of the adoption. The

Subordinate Judge has believed the evidence in favour of the adoption and I do not think that the considerations urged by Mr. Muttukrishna Ayyar are sufficiently strong to enable me to reverse the decision of the Subordinate Judge on this point.

I hold that the third defendant was validly adopted by Sambu Singh.

The question, however, arises as to whether, assuming the adoption to be proved, the third defendant is the nearer heir. I think the Subordinate Judge is in error in thinking that the third defendant is a remoter heir. It is clear that under Hindu Law the daughter's son's son is the nearer bandhu to the father's sister's son's son. I need only refer to Mayne on Hindu Law and the table of bandhus given at page 637 of Sarvadhikari's Hindu Law. This is conceded by Mr. Muttukrishna Ayyar who appears for the twenty-third defendant. I hold that the third defendant is the nearer bandhu than the twenty-third defendant.

The next point for determination is the heirship of the fourteenth defendant who claims descent from the Satara branch of Sivaji's family. The Subordinate Judge is of opinion that the fourteenth defendant is not an agnate because in his view Ram Raja who succeeded Sahu who died in 1750 was not related to Sahu, but was an impostor. I find it difficult to agree with the Subordinate Judge. All histories agree that Ram Raja succeeded Sahu on the throne in 1750 and died as king and that his descendants were kings until the last of them was deposed by the British Government. The whole question turns upon whether Ram Raja was an impostor or the son of Rajaram's brother. In this connexion a short statement of facts which followed the death of Sivaji is necessary. [Here his Lordship dealt with the facts and proceeded as follows:—] I do not

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think that Exhibit G-89 shows that Ram Raja was an impostor. As I am of opinion that Ram Raja was related to the family of Sivaji, it is unnecessary to consider whether he was adopted by Sahu, because it is conceded by Mr. Varadachari who argued the case against the fourteenth defendant that, adoption or no adoption, if Ram Raja was the grandson of Rajaram, the younger son of Sivaji the Great, he would be an agnate, and if there is no other impediment, he would be in the line of heirs to the Tanjore Raj.

It has been argued by Mr. Varadachari that the grandfather of the fourteenth defendant Shahji *alia* Appa Saheb who was the last king of Satara and who was deposed and sent to Benares, adopted a son Venkoji, that on the death of Appa Saheb, the State was annexed by the Government and Venkoji was given some property and that as Venkoji was suspected of complicity in the Great Indian Mutiny he was sent as a prisoner to Benares. He married and had a daughter. His wife and daughter predeceased him. Venkoji died in 1864. On his death, Ayi Saheb, the wife of Appa Saheb, the last king, adopted in 1865 Rajaram, the father of the fourteenth defendant. It is contended that Ayi Saheb had no power to adopt as the adopted son Venkoji had attained majority, and reliance is placed on *Bhoobun Moyee's case*(1) and the other decisions which I have already referred to. The contention in the lower Court was that as Pratap Singh, his adopted son Jangley Raja, and Pratap Singh's brother Sahu were undivided, the adoption by Ayi Saheb of Rajaram, the father of the fourteenth defendant, without the consent of Jangley Raja was invalid. But having regard to the decision of their Lordships of the Privy Council in *Yadao v. Namdeo*(2),

(1) (1885) 10. M.I.A., 279.

(2) (1922) I.L.R., 49 Cal., 1.

which I have already referred to, this contention can no longer be advanced. As regards the existence of Venkoji being a bar to the adoption of Rajaram, the father of the fourteenth defendant, Venkoji had no male issue. His wife and daughter predeceased him and I do not think there is any legal bar to the widow adopting after Venkoji's death. In *Tripuramba v. Venkataratnam*(1) it has been held by the CHIEF JUSTICE and WALLACE, J., that an adoption under such circumstances would be valid. I agree with my learned brother in holding that the fourteenth defendant has proved his relationship to Sivaji the Great, and that he would be an agnatic descendant of Sivaji the Great.

The next point is as regards the heirship of the twenty-fourth defendant. The Subordinate Judge has held that he is a descendant of Sambajee the brother of Sivaji the Great and that he is a nearer heir than the fifteenth defendant the Raja of Kolhapur. If the relationship which he claims is proved, there can be little doubt that he would be the nearer heir. The contention of Mr. Grant who appears for the Raja of Kolhapur is that the twenty-fourth defendant is not an agnate at all and that he has no connexion with the family of Sivaji. The case for the twenty-fourth defendant is that he is the descendant of Sivaji the Great's elder brother Sambaji. History records that Sambaji died in battle near Kanakgiri in his father Shahaji's lifetime.

[Here his Lordship discussed the documentary evidence on the point and proceeded as follows:—] I do not think that there are sufficient grounds to differ from the Subordinate Judge who has held that the twenty-fourth defendant has proved his descent from Sambajee the brother of Sivaji the Great.

(1) (1923) I.L.R., 46 Mad., 423.

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The last question for determination is as to the shares of the first and second defendants on one side and defendants Nos. 4 to 11 on the other. Defendants Nos. 4 to 11 by their vakils agree that their share should be *per stirpes* and consequently we can treat defendants Nos. 1 and 2 as one unit and defendants Nos. 4 to 11 as another. Defendants Nos. 4 and 5 are the illegitimate sons of the Raja. The sixth defendant is a grandson of the late Raja whose father died in 1901. The seventh defendant is another grandson whose father died on the 25th of February 1877. The eighth and ninth defendants are grandsons whose father died on the 20th of February 1912. The tenth and eleventh defendants are grandsons whose father died in 1891. Succession opened on the date of the death of the last widow.

The doctrine of representation would apply to illegitimate sons [see *Ramalinga Muppan v. Puvadai Goundan*(1)]. It follows from my findings that the first and second defendants who are the sons of Rajaram Ingle, the adopted son, and defendants Nos. 4 to 11 who represent the Mangala Vilas branch, will be entitled to the properties in dispute. It was agreed both at the trial in the lower Court and before us here in appeal that whatever shares the Mangala Vilas branch got should be divided *per stirpes* among that branch.

It has now been settled by their Lordships of the Privy Council in *Kamulammal v. Visvanathaswami Naicker*(2) that the half-share which, under Mitakshara, Chapter I, section 12, an illegitimate son of Sudra takes in the estate of his deceased father is half of that which he would have taken had he been legitimate, not a half-share which the other participants take. Applying this

(1) (1902) I.L.R., 25 Mad., 519 at pages 522 and 524.
(2) (1928) I.L.R., 46 Mad., 167 (P.C.).

principle, the first and second defendants will be entitled to four-sevenths and defendants Nos. 4 to 11 to three-sevenths, this three-sevenths being divided between them *per stirpes*. The decision of the Subordinate Judge as regards the shares which was passed before the ruling of their Lordships of the Privy Council referred to above and which proceeded on the view that we must take one legitimate son as being equal to two illegitimate sons cannot now be supported.

Mr. Alladi Krishnaswami Ayyar for defendants Nos. 4 to 11 raised a very ingenious contention that according to the decision of the Privy Council in estimating the shares we must imagine that illegitimate sons are legitimate, see what their shares will be on that footing and then divide it by half; so that if there is one legitimate and one illegitimate son, we must proceed on the footing that there are two legitimate sons each of them getting one-half and then we must see that illegitimate son gets one-half of that half or one-fourth; that if there is an illegitimate son and a widow, the illegitimate son must be treated as legitimate and he would exclude the widow and get the whole and by applying the rule above referred to he would get one-half of the whole and the widow would get the other half. He states that in cases of competition between an illegitimate son and an adopted son, it will, for the purposes of his argument, make no difference, if the adoption is before or after the birth of the illegitimate son. Applying that principle, he says that, if we assume that the illegitimate sons are legitimate, the adopted son would get nothing because there could be no adoption made when there are legitimate sons; so that the illegitimate sons would get the whole; and applying the rule, the illegitimate sons would get one-half and the legitimate sons would get the remaining half.

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I am unable to appreciate this argument and I think it by no means follows from the observations of their Lordships of the Privy Council. It has been held in more than one case that the adopted son is similar in all respects to the natural son and I need only refer to *Pratapsingh Shivsingh v. Agarsingji Rajasingji*(1) where their Lordships of the Privy Council held that the rights of the adopted son, unless curtailed by express texts, are in every respect the same as those of a natural-born son and that an adoption, so far as the continuity of the line of inheritance is concerned, has a retrospective effect. In *Arumilli Perrazu v. Subbarayadu*(2) their Lordships of the Privy Council held that in the case of Sudras in the Madras Presidency an adopted son on partition of the family property, shares equally with a son or sons of the adoptive father born after the adoption. In cases of competition between an adopted son and an illegitimate son of a Sudra, it would be unreasonable and against all precedents in computing the shares to treat the illegitimate sons as legitimate, presume that the adoption was after the birth of the illegitimate son, add to it the consequence that the adoption is invalid and hold that the illegitimate son could therefore get the whole property and then it should be divided by half as to give the illegitimate son and the adopted son equal shares. I think the proper course is to assume the adopted son to be in the same position as a natural-born son, imagine the illegitimate sons to be legitimate, assume that they can co-exist with the legitimate sons, see what shares they would get on that footing, and give the illegitimate sons one-half of it. In this view the illegitimate sons would get three-sevenths and the first and second defendants as representing the adopted son would get four-sevenths.

(1) (1919) I.L.R., 48 Bom., 778 (P.C.). (2) (1921) I.L.R., 44 Mad., 686.

In the result the decree of the Subordinate Judge will be modified by declaring that the first and second defendants are entitled to four-sevenths' share and defendants Nos. 4 to 11 between them are entitled to three-sevenths' share which should be divided between them *per stirpes*. There will be a decree for partition on the above lines. So far as the other defendants are concerned, it follows from my findings that they have no right to any share in the properties in dispute.

I agree with the learned CHIEF JUSTICE in expressing our indebtedness to the gentlemen who represented the various parties, and cordially endorse his remarks.

Appeals Nos. 199, 200, 201 and 248 will be dismissed. As regards Appeals Nos. 333 and 334 the decree of the Subordinate Judge will be modified as stated above and the memorandum of the objections, except those of the second defendant, will be dismissed—those of the second defendant follow the result of Appeals Nos. 333 and 334.

I agree with the CHIEF JUSTICE as to costs.

N.R.

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PRIVY COUNCIL.*

SRI RAJAH VATSAVAYA VENKATA SUBHADRA-
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v.

POOSAPATI VENKATAPATI RAJU AND OTHERS (DEFEND-
ANTS), RESPONDENTS.[On Appeal from the High Court of Judicature at
Madras.]*Assignment—Money advanced for conduct of suit—Compromise
of suit—Charge on money paid under compromise—
Repudiation of contract—Election to treat contract as existing.*

Money, up to two lakhs of rupees, was agreed to be advanced for the purpose of the conduct of a suit claiming a zamindari estate. The agreement provided (inter alia) that upon the suit being compromised the borrowers, "out of the movable and immovable properties" thereby obtained, would first repay the money advanced with interest. After a large sum had been advanced the borrowers refused to comply with certain terms of the agreement as to accounting and vouching, and the lender consequently declined to make any further advances. The borrowers subsequently compromised the suit for a large sum in cash. The lender's widow claimed that the advance and interest thereon were a charge on the money paid under the compromise:

Held, that she was entitled to the charge claimed. The agreement was an assignment of part of the fruits of the litigation; and even if they were to be regarded as non-existing property at the date of the agreement, the agreement attached upon the money being paid; the agreement was still in force, as the lender had elected not to accept the borrowers' repudiation.

Glegg v. Bromley, [1912] 3 K.B., 474, approved and applied.

APPEAL (No. 145 of 1920) from a decree of the High Court (March 21, 1918) reversing a decree of the Subordinate Judge of Vizagapatam.

* Present:—Lord ATKINSON, Lord SHAW, Lord BLANESBURGH, Sir JOHN EDGE and Mr. AMER ALI.

The suit was brought by the present appellant, the widow of the Raja of Tuni, claiming (inter alia) a declaration that Rs. 1,68,629, money advanced by her deceased husband together with interest, was a charge upon the money which the respondents had received upon the compromise of a suit. The money had been advanced under agreements, dated May 22, 1906, and August 14, 1907, for the purpose of the conduct of the suit in question.

The facts appear fully from the judgment of the Judicial Committee.

The trial Judge held that the plaintiff was entitled to the declaration for which she prayed, but that decision was reversed by the High Court (AYLING and SESHAGIRI AYYAR, JJ.) upon grounds which appear from the present judgment.

The present litigation had been concluded by compromise save so far as concerned respondent No. 1, the trustee under the deed of July 12, 1902 (referred to in the present judgment), and respondents Nos. 5 and 6, beneficiaries of a one-sixteenth share of the trust property under that deed.

Upjohn, K.C., De Gruyther, K.C., and Narasimham for the appellant.—There was power under the trust deed of July 11, 1903, to obtain loans for the conduct of the litigation. The appellant has a first charge upon the fruits of the compromise, both by the terms of the agreement when rightly construed, and upon the principle of subrogation: *In re Johnson*(1); *Todd v. Moorhouse*(2); *Leslie v. French*(3). The lender committed no breach of the agreement; he was entitled to decline to make further advances, having regard to the refusal of the borrowers to account in the manner

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(1) (1880) 15 Ch. D., 548, 552, 553.

(2) (1874) 19 Eq., 67.

(3) (1888) 23 Ch. D., 552, 560.

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agreed. That refusal was a repudiation by the borrowers, but the lender treated the agreement as still subsisting, as he was entitled to do: *Johnstone v. Milling*(1). If there was a breach by him, it was, as the High Court found, not material.

Kenworthy Brown for respondents 1, 5 and 6.—The borrower had no power under the trust deed to charge the property save as to his own interest therein. These respondents were not parties to the agreements. In any case, the Raja's failure to make further advances was a breach going to the root of the agreement. Clause (12) of the agreement of August 12 1907, was an assignment of future rights, and could take effect as a contract only if specific performance was obtainable, but that remedy was not available owing to the previous breach: *Bhoboosoondree Dasseah v. Issurchunder Dutt*(2); *Prahlad Sen v. Budhu Singh*(3); *Tailby v. Official Receiver*(4).

[Lord BLANESBURGH referred to *Performing Right Society v. London Theatre of Varieties*(5).]

Further, as the High Court held, the compromise was not one within the terms of the contract. The principle of subrogation does not apply. It applies only when a loan is made at the request of a trustee: *Todd v. Moorhouse* (6). A request by these respondents was not proved. The transaction was not a loan, but a speculative transaction giving no equitable rights.

Upjohn, K.C., replied. There was, under clause (12), a good assignment of so much of the fruits of the litigation as would repay the advances and interest; even if it related to future property, it attached upon the money being paid under the compromise.

(1) (1886) 16 Q.B.D., 480.

(3) (1869) 2 Ben. L.R., 111, 117 (P.C.).

(5) (1924) A.C., 1.

(2) (1872) 11 Ben. L.R., 36 (P.C.).

(4) (1888) 13 App. Cas., 523.

(6) (1874) 19 Eq., 67.

The JUDGMENT of their Lordships was delivered by

Lord ATKINSON.—The suit out of which this appeal has arisen was instituted in the Court of the Subordinate Judge of Vizagapatam on April 4, 1913, by the present appellant, the widow of the Raja of Tuni deceased, who died in the year 1911, against the six respondents, to recover the sum of Rs. 1,68,629 and to obtain a declaration that that sum was well charged upon a certain sum of money received by the respondents, under a decree, dated March 12, 1913, made under a compromise in a suit, No. 18 of 1903, and also for payment of three thirty-seconds of what remained of the sum received under such compromise after payment of the sum of Rs. 1,68,629.

The Subordinate Judge, on December 6, 1915, made a decree in favour of the appellant, the plaintiff in the suit, for the sum of Rs. 1,91,058, and also made the declaration asked for to the effect that this sum was well charged on the sum paid to the respondents in pursuance of the compromise decree. The learned Subordinate Judge decided against the appellant on the other matters claimed, and no appeal has been taken by her against this decree on these latter matters. An appeal was, however, taken by the defendants to the High Court of Judicature at Madras. The Court pronounced a decree, dated March 21, 1918, reversing the decree of the Subordinate Judge and dismissing the appellant's suit with costs. From this latter decree, the appellant has appealed to this Board.

The litigation has been determined by compromise save so far as the respondents 1, 5, and 6 are concerned; this appeal is accordingly now proceeded with against those respondents alone.

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On the hearing of the appeal before this Board, counsel on behalf of the appellant abandoned all claim for a decree against any of the respondents of a personal nature, or for payment of three thirty-seconds of the sum received on the compromise, and has confined the relief he asks for to having it declared that a sum of Rs. 92,000 with the interest thereon at the rate specified, is well charged upon the sum of $2\frac{1}{2}$ lakhs received by the respondents in the compromise of suit No. 18 of 1903.

The facts upon which the appellant depends are of a somewhat complicated nature, and must unavoidably be unravelled at some length.

The Maharaja of Vizianagram, who owned an estate of that name, died on May 22, 1897, having made a will by which he devised this estate to one Raja Chitti Babu for life. This devisee may for convenience sake be styled the tenant for life, though that is not in strictness, according to Indian law, his true position. The testator made no disposition of the absolute interest in his estate. As to that he died intestate. Ramachandraraju, respondent No. 2, claimed to be the heir of the deceased Maharaja, as his nearest agnate, and by the joint operation of Hindu law and the Maharaja's will claimed to be entitled to the absolute interest on the aforesaid estate subject to the life interest of the so-called tenant for life. He was confronted, however, with this difficulty in asserting his claim—namely, the fact that the mother of the deceased Maharaja contended falsely, as Ramachandraraju alleged, that she had adopted the tenant for life as the son of her deceased son, and that this adoption defeated Ramachandraraju's title, as it undoubtedly would have done, if the adoption was validly made. In this state of things Ramachandraraju resolved to assert his title, and thus to test in a Court of law the validity

of the alleged adoption of the tenant for life. He was, however, a poor man. He apparently realized that the suit would be an expensive one, and that it would be absolutely necessary for him to induce some persons to advance to him the money necessary and sufficient to prosecute the suit. To effect this purpose he took a step, the object of which is not very apparent and the result of which has undoubtedly proved embarrassing.

The day before he instituted the suit to establish his title—namely, on July 12, 1903—he executed a deed of trust, by which, after reciting the death of the Maharaja, the devise to the tenant for life, the pretended adoption by the testator's mother, and alleging that it was necessary for him to take proceedings, he appointed Poosapati Venkatapatiraju Garu (hereinafter referred to as the original trustee), trustee of all the property in which he, Ramachandraraju, claimed to have a vested interest in remainder as heir of the deceased Maharaja, in trust to administer the fifteen-sixteenths of the same for his, the settlor's, own benefit, and one-sixteenth of the same for the benefit of respondents Nos. 5 and 6 in the present suit. There is nothing to show that these two latter beneficiaries were in any way connected with the settlor or had any claim upon his bounty. The provision thus made for them was, as far as can be seen, a voluntary gratuitous gift.

It is plain that the property thus put in trust by this deed was all the property the settlor would have been entitled to as heir of the deceased Maharaja had there been no adoption of the tenant for life, or had that adoption been invalid. Each one of these three beneficiaries, the settlor and respondents Nos. 5 and 6, had interests in the litigation identical in character though not in equal value, in this sense that each would gain his share

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if the suit should succeed, and each would lose everything if it should fail.

By the trust deed powers were conferred upon the trustee and upon the settlor respectively, which were both wide and important. The words conferring them run thus: "Therefore you (i.e., the trustee) should not only manage the trust property subject to the arrangements I may make regarding the consideration for your trouble, etc., and other matters, but also full authority is given you to conduct suits, etc., either jointly with me or separately, and to manage it in such a way as you may think fit for the preservation of the properties."

Having regard to this last provision it is clearly the view of their Lordships that the trustee would have been acting within his express powers, if, having money of his own at his command, he thought proper to advance it, or some of it, to finance the contemplated litigation directed to secure and preserve the trust property for the purpose of the trust, by establishing that the alleged adoption never took place or was invalid, and in the event of that suit being successful would have been entitled to a lien on the property gained for the sum advanced. Their Lordships further think that if the trustee, not having money of his own available, borrowed money from a third party for the purposes above mentioned and actually used it to promote those purposes, then, in case the litigation were successful, the person who advanced the money would be entitled to stand towards the trust property in the place of the trustee and be entitled to a similar lien on that property. The same would be the case if the settlor, with the assent and concurrence of the trustee, borrowed money absolutely necessary to finance the suit from a third party for the purposes above mentioned and so applied it.

The contemplated suit was, on July 13, 1903, commenced in the District Court of Vizianagram. Its number in that Court was O.S. No. 18 of 1903. The plaintiffs in it were the original trustee and the three beneficiaries—namely, the settlor as to fifteen-sixteenths of the trust property and respondents Nos. 6, 5 and as to one-sixteenth of it. These three beneficiaries were the absolute owners in equity of the trust estate if the adoption proved invalid. The relief prayed for was that it might be declared that the settlor, as the nearest heir of the late Maharaja, was entitled to the vested remainder in the estate of Vizianagram after the demise of the present zamindar (i.e., the tenant for life). The settlor and these two beneficiaries were, therefore, in the position of joint adventurers in this litigation, in which success would bring much gain for each, and failure absolute and complete loss to each. The efforts these adventurers made to obtain the necessary funds to prosecute the suit, of which they themselves were entirely destitute and were unable to supply, are detailed by the witness Lakshmi, the private secretary of the Raja of Tuni, from whom the necessary funds were ultimately obtained. The evidence of this witness, which, save as to one matter to be mentioned presently, is practically uncontradicted, is of the utmost importance. He said a body of people came to have an interview with the Raja of Tuni, his master. He stated that the original trustee, the settlor, and two beneficiaries, respondents Nos. 5 and 6, and the two sons of the settlor, were members of this body, that they asked the Raja of Tuni to help them in the suit Original Suit No. 18 of 1903, that they represented that a vakil then named (since deceased) had told them that the settlor had a good case, that unless the Raja of Tuni advanced money to finance the suit the settlor would lose it, and that the original trustee and

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respondents Nos. 5 and 6 joined in making these requests, and that they were asked to sign the agreement. He stated also that the trustee said that he was plaintiff in the suit, that they were conducting the litigation for the settlor, that the settlor only must enter into the agreement and that a draft of exhibit A (i.e., the agreement of May 22, 1906) was produced, but the witness does not know who drew it. The two beneficiaries, respondents Nos. 5 and 6 in the present suit, by their written statements denied that they had anything to do with the negotiations which lead up to the agreement of May 22, 1906, or with those which lead up to that of August 14, 1907. As to the first of these negotiations, they do not specifically deny a single statement deposed to by the witness Lakshmi, who knew all the parties.

Their Lordships think that Lakshmi's statement is a truthful account of what took place in his presence; they accept it and rely upon it, while they look upon the statement of respondents Nos. 5 and 6 in reference to the negotiations out of which the agreement of May 22, 1906, sprang, as wholly unreliable.

Upon this supposition it is well to consider what was in reality the true nature and effect of the arrangement come to by all the parties concerned on the occasion of this visit to the Raja of Tuni. The suit recently started dealt with the whole trust property. The negotiation to have such a suit financed necessarily dealt with the whole trust property. The settlor could, *prima facie*, by signing the agreement for himself alone only bind his own interest in the trust property. That would not have sufficed, and therefore when of the three beneficiaries only one signed the agreement designed to affect the whole trust property and by its very terms did so, this one must, in the circumstances already detailed, have signed it not only for himself, in his own right, but

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as agent, accredited in that behalf, of his co-beneficiaries. In all the transactions which succeeded, the advancing of the money, the accounting for the money, and the direction of the steps to be taken in the suit, the two beneficiaries do not appear to have taken any independent or active part. From May, 1906, onward, the settlor was regarded as the manager the *dominus litis* in the whole business. He was never removed from his position, his authority to act as the agent of his co-beneficiaries never questioned or withdrawn.

The original trustee, Poosapati Venkatapatiraju, died during the progress of the suit, and his nephew, the present respondent No. 1, by a deed, dated December 17, 1906, was appointed a trustee in his place, and accordingly added as a plaintiff in that suit.

It was contended by Mr. Upjohn on behalf of the appellant that the agreement of August 14, 1907, was not a substitution for the earlier agreement of May 22, 1906, but a supplement to the latter. It is therefore necessary to examine the provisions of both to determine whether the earlier agreement is superseded by the second or only added to by it. The parties to the first are the Raja of Tuni of the first part and the settlor and his two sons, respondents Nos. 3 and 4, of the second part. The word "we" is used throughout this agreement as well as throughout that of August 14, 1907, to indicate, it appears to their Lordships, all the plaintiffs in the suit not merely the settlor and his two sons, the executing parties to the agreement in each case. The Raja by the earlier agreement undertook to advance at most Rs. 1,50,000 to finance the suit started by the settlor, O.S. No. 18, 1903, in consideration for which, if the suit should be successful, three-sixteenths of the movable and immovable property in dispute should by sale-deed be conveyed to him, the Raja.

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Should the whole of this sum not be needed for, or not be actually applied to financing the suit in the lower Court, the unexpended balance should be deposited with a person interested in both the Raja and the settlor to be spent by the latter in financing the suit in the Appellate Court on appeal from the District Court. Then follows a paragraph, No. 3, clearly providing that the Raja was not to be bound to advance the large sum of one lakh for the abovementioned purpose, but that if he did not want to spend the money claimed to conduct the suit in all the three Courts, he should only be bound to advance Rs. 50,000 for the prosecution of the suit in the original Court and was not to be bound to spend anything more than that. A further provision then followed to the effect that though the Raja might only finance the suit in the original Court and should refuse to make further advances, and they (i.e., the plaintiffs) should be obliged to get financial help elsewhere and conduct the appeals themselves, they should, as soon as they should get possession, sell to the Raja, by means of a sale-deed, only one-third of the property agreed to be sold to him (i.e., one-third of three-sixteenths), namely, one-sixteenth of the property recovered by the Raja's conducting the suit in all the Courts, and would put the Raja in possession of the same. It is then further provided that should the Raja not like to take this sale-deed they and their heirs should be bound to pay the Raja the amount spent in the lower Court with interest at 2 per cent per mensem from the date of the judgment of that Court, on the security of the property proposed to be sold to him. It was evidently contemplated by the plaintiffs in the suit and the parties to the agreement that the suit might be compromised while it was in the Appellate Court, as in fact it subsequently was, and accordingly elaborate

provisions are introduced into the agreement dealing with that event and purporting to fix and determine what the rights of the respective parties should be, if the contemplated compromise should take place.

The first provision is to the effect that should this compromise take place while the Raja was spending money financing the suit, then *prima facie* the plaintiffs should pay to him the sums so spent by him with interest at 1 per cent per mensem from the respective dates at which the said sums were spent. It is then provided that these sums should be derived out of the movable and immovable property obtained by the plaintiffs from the compromise, and further that out of the remnant which should remain of the movable and immovable property after deducting the principal and interest so paid, the parties designated should be bound to give the Raja a three-thirty-second share. Here are introduced some immaterial and, for the purpose of the matter criticized, irrelevant provisions, and then follow the clauses, which it may be best to quote *in extenso* :—

"It is agreed that we should not compromise or withdraw this suit without your consent; that, in case you think that, under the then existing circumstances, it is better to compromise, we should consent to it; that, when we represent to you that it is better to compromise, you should consent to it; and that out of the amount that may be got in the said compromise we should pay you the amount advanced by you with interest at 1 per cent per mensem from the respective dates of advance of the several sums and also give you three-thirty-seconds of the property remaining after deducting the aforesaid. It is further agreed that, soon after the suit is disposed of, we should execute documents in your favour as per all the abovementioned terms and that, as soon as we get possession of the property, we should put you in possession of the property as per those documents. We and our heirs are bound by the aforesaid conditions and we execute this agreement with our free consent."

The Raja then made the advances necessary for financing this suit.

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In the agreement of August 14, 1907, it is stated he had advanced sums up to Rs. 71,500 in all, yet it is contended by respondents Nos. 5 and 6 in their written statements that they are not liable for, nor is their share of any property liable to be charged with, any portion of this sum given to their own agent to finance their own suit, which it is inconceivable they did not know had been so advanced and applied. The sum of Rs. 71,500 so advanced was found to be insufficient for the prosecution of the suit O.S. No. 18 of 1903, and a second agreement, dated August 14, 1907, between the settlor and his two sons respondents Nos. 3 and 4 and the Raja of Tuni was entered into by which the Raja undertook to advance a sum not exceeding Rs. 2,00,000 for its further prosecution.

This agreement contained many special provisions with which it is necessary to deal at some considerable length for reasons which will presently appear. In it, after reciting at considerable length some of the steps which had already been taken in the suit, the insufficiency of the advances, and the kindness of the Raja in undertaking to advance two lakhs of rupees including the sum of Rs. 71,500 which he had already advanced, it provided that as soon as the financed suit was decided in favour of the plaintiffs in that suit, they, the plaintiffs, would, in addition to the three-sixteenths portion of the property recovered in the suit already agreed to be sold to him, sell to him another one-sixteenth, making together one-quarter of that property, and also a garden and a strip of quarry land therein described. It is then further provided that in respect of the moneys, portion of these two lakhs, advanced from time to time, detailed receipts of the vakils' day fees, etc., printing, stamps, house-rents should be furnished to him, the Raja, that is, as regards the whole of the balance, accounts of receipts

and expenses should be furnished to him for the sums so ascertained, and for which sums receipts should be given by the settlor, and that with respect to the money that might again be required, the Raja should, at the request of the settlor, advance the money looking into accounts and getting detailed vouchers for money spent, and then settle accounts without giving room for any disputes.

By the figures mentioned in paragraph 2 of the agreement it is shown that a sum of Rs. 87,500 was then due to the Raja, and it is again provided that, out of the balance remaining after deducting this sum, the plaintiffs should, on the receipt of the settlor, receive the sums required thereafter for the expenses in the original Court on furnishing to the Raja as above stated accounts of receipts and disbursements of the money already received by the settlor, and further that the Raja, on the rendering to him of the debtor and creditor accounts as stated, would, within a week of his being applied to for money required for the suit, pay the same.

In paragraph 3 of the agreement there are further provisions for the advance of money to finance the suit in the Appellate Court on accounts being rendered in the manner thereinbefore described. There is then a provision that if a decree in the suit should be given in favour of the plaintiffs, one-quarter of the property for which the decree would be passed should by sale-deed be conveyed to the Raja.

And then come the three paragraphs dealing with a compromise of the suit upon the construction of which the High Court have mainly, if not entirely, founded the judgment and decree appealed from. These paragraphs run thus:—

“ 10. We shall not compromise with the defendant or file razinamah or withdrawal without your consent.

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11. It is agreed that, if Mr. Krishnaswami Ayyar, High Court vakil, who is working on our behalf in this suit, advises us from the then existing circumstances of this suit, that it would be better for us to compromise, we should agree to it and compromise or withdraw the suit.

12. Moreover, out of the movable and immovable properties that may be obtained by such compromise, etc., we shall first pay to you the principal money advanced by you together with interest at one rupee per cent per mensem from the respective dates, and out of the movable and immovable properties that remain after so giving away to you we shall at once execute and give you a proper sale-deed and place in your possession three-thirty-seconds of a share. All of us and our heirs are liable to you and your family members according to all the aforesaid terms and are also bound to give effect to them without fail. This agreement is executed with our whole-hearted consent."

This agreement and the previous one of 1906 are, in the main, constructed on similar lines. The maximum sum to be advanced under the first was Rs. 1,50,000 and that under the second Rs. 2,00,000, but the distinguishing feature of the second is that strict accounts of the sums advanced and spent are to be kept, receipts given for those sums when received, all disbursements duly vouched, advances of further sums required and asked for are only to be made when those receipts and vouchers have been given. There is nothing whatever to indicate that the entire trust property as distinct from the settlor's share of it is not dealt with. Nothing to suggest that the authority already conferred upon the settlor by the negotiation out of which the first agreement to act in the matter of obtaining funds to finance the pending action had been either limited or revoked. In the absence of any provision indicating that result it must, in their Lordships' view, be held that this authority was continued.

Death has been very busy with the chief actors in this business. Krishnaswami, the vakil mentioned in the attestation clause, died in the year 1911, as did also the Raja of Tuni, who is succeeded and represented by his widow. The settlor died immediately after the forwarding of the appeal to this Board and he is succeeded by his two sons.

The widow, according to her counsel, does not claim that the sum of Rs. 92,000 due to her is a debt due on a loan. Neither does she claim to get specific performance of any contract giving her any property obtained by the compromise. She merely claims a lien on the sum of Rs. 2,50,000 paid under the compromise, for the sum of Rs. 92,000 for principal with interest on the sum she and her husband have advanced to finance the suit. This amount is admitted to be due.

The Raja of Tuni seeing from such accounts as were furnished to him that very large sums, as he thought extraordinarily large sums, had been paid to two vakils engaged for the plaintiffs in the suit No. 18 of 1903, objected to those items, and contended that these vakils had promised to act gratuitously, and that the sum paid should be recovered by action at law. He was proved to be wrong in this. It was shown that these vakils had not undertaken to work for nothing, but in addition to this he insisted that these alleged disbursements should, like every other disbursement, be vouched. In making this demand, he was, in their Lordships' view, perfectly justified by the terms of the agreement of 1907.

[The judgment then referred at length to a letter from the diwan of the Raja of Tuni to the settlor dealing with the accounts and demanding certain further items and vouchers. The judgment proceeded:]

These demands made by the Raja through his diwan are not extravagant or unreasonable in their nature.

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They are not only those which he was, by the letter of his agreement of August 14, 1907, entitled to make, but such as, according to business methods and practices, he would be entitled to make in any business transaction such as he had embarked upon.

[The judgment then set out a letter of January 28, 1908, in which the diwan stated that, if the details and vouchers required were given, more money would be sent, if it was required for the purposes of the suit; a letter of February 14, 1908, from the settlor refusing the further details and vouchers, as being unnecessary; and a letter of August 14, 1908, in which the settlor stated that if the money was not sent, he should obtain it elsewhere and conduct the suit as far as possible. The judgment continued:] The vouchers demanded were in fact never sent to the Raja of Tuni. The letter of August 14, 1908, in their Lordships' view, amounts to a refusal to send them, coupled with an intimation that if money be not sent, though they should not be furnished in the first instance, he, the settlor, would treat the contract of August 14, 1907, as at an end and make other arrangements. The course the settlor adopted amounted to a distinct breach of the contract, a violation of obligations it imposed upon him. The Raja of Tuni never was furnished with these vouchers; not having been furnished with them, he did not advance any more money to the settlor. He was, in their Lordships' view, amply justified by the provision of the agreement of 1907 in taking that course.

The settlor being bound to furnish these vouchers, the Raja might, if he wished, have taken this refusal to do so as a repudiation by the settlor of his contract, and have elected to treat the contract as at an end, but he did not do so; on the contrary he stated explicitly in a letter of February 21, 1908, that if the vouchers justifiably demanded were not sent and on examination found

correct, he would not send any more money which might be needed for the conduct of the suit. The agreement of August 14, 1907, has not been put an end to, it still exists. It is hardly necessary to point out that a party to a contract cannot put an end to it simply by committing a breach of it. The High Court had apparently supposed that this agreement no longer existed and were led into error thereby, since the Raja never elected to treat the settlor's breach as a repudiation of the contract terminating it, as he might have done.

The only remaining point to be dealt with is the construction put by the High Court upon the last three paragraphs of the agreement of August 14, 1907. The judgment of the Court runs thus:

"The real difficulty arises from the use of the words 'movable and immovable properties obtained by such compromise' in clause 12. In clause 9 a right is given to a twelfth of the property in case the whole of the expense for the litigation in the first Court is borne by the lender. The clause says, 'It has been agreed that you should without fail meet all the expenses incurred in the original Court.' Then comes clause 10, which prohibits any compromise without the consent of the lender. Clause 11 stipulates for an enforceable compromise in case Mr. Krishnaswami Ayyar gave his assent to it. Then follows the expression in clause 12 which we have quoted. The words 'such compromise' can only refer to a compromise to which either the plaintiff's husband consented or which was brought about on the advice of Mr. Krishnaswami Ayyar. It is not disputed that in the present case the compromise which came into existence was not due to either of these two causes. The argument that although a compromise may be otherwise brought about it was open to the plaintiff's husband to have accepted such a compromise because the provision for his assent and for Mr. Krishnaswami Ayyar's advice was for his benefit, does not meet the difficulty. The lien which is claimed is in respect of a property got under a particular compromise. Whatever may be the personal rights against the debtor, treating the money advanced as a loan, in order that the lien may fasten upon the compromise amount, it must have relation to the two contingencies provided for in the agreement. The specific property or the

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identifiable property on which the lien is sought to be attached is not the property which the parties contemplated by the agreement. We may state at once that we are in entire agreement with the contention of the learned vakil for the respondent that the mere fact that only Rs. 93,000 out of the contemplated 2 lakhs was advanced would not derogate from the lien if it otherwise existed . . . But as we pointed out, the identity of the property is wanting as clause 12 creates a charge only on property secured by a compromise effected in one of the two ways suggested in the previous clauses. In this view our conclusion is that no lien was created over the money given by the plaintiff's husband. The theory that a lien on specific property would attach itself to the substituted property contemplates that the contract creating the original lien subsists. Granting for argument's sake that the lien on the compromise amount, contemplated in clauses 10 and 11, will fasten itself upon the new compromise amount, the fact that before that compromise was effected, the parties had broken off relations would render this impossible."

The High Court treat the agreement embodied in paragraph 12 of the agreement of August 14, 1907, as one of those agreements dealing with property which at the time the contract was made was non-existent, which might never come into existence, but which, when it did come into existence, would be operated upon by the agreement made before it existed. Their Lordships are not at all convinced that is the true view to take of this agreement of 1907, which must be considered as a whole. The main purpose and objects of its provisions are to finance a suit brought to establish title to an existing thing, an estate extending over a large portion of the earth's surface.

The point in controversy was not the existence or non-existence of that thing, but which of two adverse claimants was entitled to a vested interest in it, subject to a life estate in one of them. The fruits of success in this action which would be gathered in by a decree would be this vested remainder. The fruit of it which

would be gathered in by a compromise might be something different, but in essence the same. What the agreement really does is to provide that the fruit, which may be either movable or immovable property, shall be divided in certain shares between the parties to the agreement. The terms of the compromise might have been that one-half, or some other portion, of the trust property, had to be given to the plaintiffs by the defendant or that jewels which had been the property of the defendant for years might be given to the plaintiffs: the two lakhs of rupees that he has given might all then have been in existence and in the defendant's possession for years. No proof was given that the tenant for life was not possessed of this 2½ lakhs of rupees, kept in his safe, or packed in his money bags long before the year 1907. On the face of clause 12, its language points rather to existing things than to non-existing things, and the agreement embodied in it is entirely different in its nature and character from an agreement assigning for a certain sum what, for instance, some relative might leave a contracting party, but who might never leave him anything whatever. In India, of course, champerty or maintenance is not illegal.

In *Glegg v. Bromley* (1) PARKER, J., as he then was, stated the law, as was his custom, with great clearness and precision. In that case one Mrs. G. was plaintiff in an action against one H. for false representation. She was also plaintiff in an action for slander against Lady B. She was at the time greatly indebted to her husband and she executed in his favour a deed of assignment whereby, as further security, she assigned to him "all that the interest sum or premises that she is or may become entitled under or by virtue of any verdict, com-

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promise or agreement which she may obtain or to which she may become a party in or consequent upon the said action or otherwise howsoever, under or by reason of the same to hold the same . . . subject to redemption on payment of the money due to him." Both actions proceeded, that against H. resulting in a verdict for the defendant, with costs amounting to 218*l*. That against Lady B. resulted in a verdict for the plaintiff Mrs. G. for 200*l*. with costs. H. then took garnishee proceedings against Lady B. to attach this sum of 200*l*. and Mrs. G.'s husband also claimed it under his assignment. It was held that the assignment was not an assignment of a mere expectancy or of a cause of action, but was an assignment of property, that is of the fruit of an action as and when recovered, and that it was consequently not void under 13 Eliz., c. 5. There is no distinction, and can be no distinction on this point between the fruits of an action which the plaintiff gets by compromise and the fruits he would receive by a decree or verdict in his favour.

PARKER, J., in that case said :

"It is to be observed that an equitable assignee of a chose in action whether it is legal or equitable could institute proceedings and maintain proceedings for its recovery. The question was whether the subject matter of the assignment was in the view of the Court property with an incidental remedy for its recovery or was a bare right to bring an action either at law or in equity. With regard to the assignments of future property they stand, I think, on a totally different footing. Nothing passes, even in equity, until the property comes into present existence. Only when this happens can the assignment attach and an interest pass. . . . Even a solicitor who is conducting an action or suit may take a mortgage on the fruits for the purpose of securing the payment of his proper costs. He may not be able to purchase an interest in such fruits because of the doctrine of champerty."

In their Lordships' view the agreement embodied in paragraph 12 of the agreement of August 14, 1907, is an agreement by the plaintiffs to assign to others part of the

fruits they may acquire in an action at law and therefore perfectly legal. Besides, if even the money given to the plaintiffs in the compromise was a non-existing thing at the date of the agreement and only came into existence at the date of the compromise decree, the agreement of August 14, 1907, which is still in existence, not terminated, as the High Court erroneously supposes, attaches to the things so coming into existence subsequently.

It is not very clear what the High Court means by the words "identity of the property" in the passages already cited from their judgment. If the consent to the compromise by the two persons named in paragraph 12 of the agreement had the effect of transfusing into the property the parties might receive under it some quality, or attached to it some quality, then this language might be appropriate enough, but obviously their consent, if given, could not have any such effect. The property mentioned in paragraph 12 is of a universal and not of a special character. The words are "movable or immovable property," which may be obtained by such compromise. That includes almost every conceivable kind of property, and the words of this paragraph would be satisfied if half the estate sued for, or another estate or the jewels of the tenant for life deposited in his safe, and the money packed in his money bags had been awarded under the compromise.

In the construction of written or printed documents, it is legitimate, in order to ascertain their true meaning, if that be doubtful, to have regard to the circumstances surrounding their creation and the subject matter to which it was designed and intended they should apply. The litigation which was to be compromised was instituted in the year 1903. It had hung fire for four years when this agreement of August 14, 1907, was executed.

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The decision of the case in the original Court was not made till the year 1908. The appeal to the High Court was not lodged till the year 1909, and the compromise was not decreed till May 12, 1913. The plaintiffs in the suit and presumably their vakil knew all about these delays. The Raja of Tuni, when he became a party to the agreement of May 22, 1906, must have also become aware of the negotiations out of which that agreement sprung and, by the agreement itself, of these delays; unless these persons were all devoid of intelligence they must, thus forewarned, have anticipated that somewhat similar delays might occur in the future, and yet they are by the High Court taken to have provided expressly and with clearness that, unless the Raja of Tuni, if not the vakil also, lived long enough to be able to consent and to consent to the compromise referred to in the clause, no compromise could be arrived at. For in paragraph 10 it is expressly provided that the plaintiffs in the suit will not make any compromise "without your consent," which means of course the Raja of Tuni's consent. In their Lordships' view, having regard to the abovementioned fact, the construction of these three clauses, 10, 11 and 12 of the agreement of August 14, 1907, which would make the giving of the consent of the Raja of Tuni, and of the vakil named, a condition precedent which must be performed before any compromise could be validly made, is not their true construction. Both these men died in the year 1911. Having regard to the uncertainty of human life, which contracting parties when providing for possible future events must be presumed to bear in mind, it would be unbusinesslike and indeed irrational, if not absurd, for the parties in August, 1907, to have entered into such a contract as the High Court have construed this contract to be. Whereas it would be quite businesslike, quite rational and perhaps prudent

for them to have entered into it if the things required to be done under it should only be required to be done where it was possible to do them. In their Lordships' view it is reasonably certain that parties to this agreement intended that this is what it should mean, and that therefore a term must be implied to exist in it, to the effect that the consent mentioned should be given when possible, and that the giving of consent of the Raja himself to a compromise accepted by his representatives was not such a condition precedent when it had become impossible for himself to give it.

Their Lordships are therefore of opinion that the decree appealed from was erroneous and should be reversed with costs and the decree of the Subordinate Judge should be restored, and they will humbly advise His Majesty accordingly. The first, fifth and sixth respondents must pay the costs of the appeal.

Solicitor for appellant : *Douglas Grant.*

Solicitors for respondents Nos. 1, 5 and 6 : *Chapman-Walker and Shephard.*

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PRIVY COUNCIL.*

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PALANI AMMAL (21ST DEFENDANT), APPELLANT,

v.

MUTHUVENKATACHALA MONIAGAR AND OTHERS
(PLAINTIFFS AND DEFENDANTS), RESPONDENTS.

[On Appeal from the High Court at Madras.]

Hindu Law—Partition—Severance of joint status—Plaint claiming partition—Withdrawal of plaint—Agreement to remain joint after severance of one member—Family business—Inference.

The filing of a plaint claiming partition by a member of a joint Hindu family, if the plaint has been withdrawn before trial, does not result in the family being separate at a later date, although it is evidence that an intention to separate had been entertained by the plaintiff, *Kedar Nath v. Ratan Singh* (1910) I.L.R., 32 All., 415; 37 I.A., 161, followed.

When a member of a joint family has separated, an agreement by the remaining members to continue undivided may be inferred from the way in which their business is carried on after the separation.

In a suit for partition which proceeds to a decree, it is the decree which shows whether the separation was only a separation of the plaintiff from his coparceners or was a separation of all the members from each other.

APPEAL (No. 67 of 1922) from a decree of the High Court (August 26, 1917) affirming a decree of the District Judge of Madura.

The appeal arose out of a suit brought in 1906 for partition of an estate known as the Vadimitta estate. The plaintiffs, respondents Nos. 1 and 2, with their youngest brother (defendant-respondent No. 36) who was born after the institution of the suit, were the sons of defendant No. 1 and represented the branch of the second son of the zamindar. The present appellant was

* Present:—Lord SUMNER, Lord PHILLIMORE, Sir JOHN EDGE and Sir LAWRENCE JENKINS.

defendant No. 21; by her written statement she pleaded that the estate was the separate property of her deceased brother, who represented the branch of the first son, and that the members of the family had separated long ago.

The material facts appear from the judgment of the Judicial Committee.

The District Judge found that the award made in 1900 was fraudulent and collusive and that the family was joint and undivided. He made a decree for partition.

The decree was affirmed on appeal to the High Court.

Dube for the appellant contended that the family had separated; he referred to *Balkishen Das v. Ram Narain Sahu*(1), *Kawal Nain v. Budh Singh*(2) and *Jatti v. Banwari Lal*(3).

Wallach for respondents Nos. 1, 2 and 3 was not called upon.

The JUDGMENT of their Lordships was delivered by

Sir JOHN EDGE.—This is an appeal by Palani Ammal, a Hindu lady, who is one of several defendants, from a decree, dated 29th August, 1917, of the High Court at Madras, which affirmed a decree for partition of the Vadimitta estate, dated 23rd April, 1909, of the District Judge of Madura.

The estate in question, which appears to be a large zamindari, was purchased by Peraiyar Muthukumara-swami, who died in 1834. He was a Hindu Sudra, who and his descendants were governed by the law of the Mitakshara. His descendants, unless they separated, constituted a Mitakshara joint family, the property of which was in law joint property unless the contrary was

(1) (1903) I.L.R., 30 Cal., 738 (P.C.); 30 I.A., 139.
(2) (1917) I.L.R., 39 All., 496 (P.C.); 44 I.A., 159.
(3) (1923) I.L.R., 4 Lah., 355 (P.C.); 50 I.A., 192.

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proved. For the sake of brevity, he will hereafter be referred to as the propositus. The propositus had two wives; by the senior wife he had six sons, most of whom married and left male issue, by his junior wife he had one son, who left male issue. It is stated in the judgment of SASTRI, J., in this case, and doubtless correctly, that "the property admittedly continued to be in the possession and enjoyment of the descendants of the first son of the propositus." As the family was not an ancient family, the property, which was acquired in quite modern times, was in the possession of the senior son and his descendants as managers of the joint family and not as the senior male member of a joint family.

There are two questions in this suit and in this appeal upon which there are concurrent findings of the District Judge and the High Court. Those questions are whether the principal parties to the suit are bound by an award which was made by some arbitrators, who have been made defendants to the suit, and if they are not bound by the award, then the question arises whether the joint family which descended from the propositus ever separated.

The question relating to the award may be disposed of at once. The District Judge and the High Court found, for reasons which their Lordships consider to have fully justified their findings, that the award was not binding upon any of the parties. No argument has been addressed to their Lordships in this appeal in support of the award, and they accept the concurrent findings that it is not binding as correct. The sole appellant, Palani Ammal, claimed that some of the estate sought to be partitioned had vested under the award in her. Her claim under the award fails, but as she appears, when the suit for partition was brought, to have been in possession of part of the estate, the right of the plaintiffs

to a decree for partition must be established, and it is necessary to consider whether the joint family had ever separated.

It is beyond question that the estate which the propositus had purchased vested on his death, in 1834, if not on the purchase, in the joint family, and was held jointly by the male members of the joint family as coparceners. Their Lordships do not know whether the estate was purchased with joint family money or with self-acquired funds of the propositus, but for the purposes of this judgment they will assume that the estate did not vest in the joint family until the death of the propositus.

In coming to a conclusion that the members of a Mitakshara joint family have or have not separated, there are some principles of law which should be borne in mind when the fact of a separation is denied. A Mitakshara family is presumed in law to be a joint family until it is proved that the members have separated. That the coparceners in a joint family can by agreement amongst themselves separate and cease to be a joint family, and on separation are entitled to partition the joint family property amongst themselves, is now well-established law. An authority for that proposition is the judgment of the Board in *Appovier v. Rama Subba Aiyar*(1), which applies to joint families such as the joint family which descended from the propositus. But the mere fact that the shares of the coparceners have been ascertained does not by itself necessarily lead to an inference that the family had separated. There may be reasons other than a contemplated immediate separation for ascertaining what the shares of the coparceners on a separation would be. It

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(1) (1866) 11 M.I.A., 75.

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is also now beyond doubt that a member of such a joint family can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off for him, and that the remaining coparceners, without any special agreement amongst themselves, may continue to be coparceners and to enjoy as members of a joint family what remained after such a partition of the family property. That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on after their previous coparcener had separated from them. It is also quite clear that if a joint Hindu family separates, the family or any members of it may agree to reunite as a joint Hindu family, but such a reuniting is for obvious reasons, which would apply in many cases under the law of the Mitakshara, of very rare occurrence, and when it happens it must be strictly proved as any other disputed fact is proved. The leading authority for that last proposition is *Balabux Ladhuram v. Rukhmabai*(1).

The fact that any member of a joint family has separated himself from his coparceners may be proved by his suing for a partition of the joint family property, and if the suit is decreed the date of his severance from the joint family will, if nothing else is proved, be treated as the date when the suit was instituted. In *Kedar Nath v. Ratan Singh*(2) a member of a joint Hindu family had filed a plaint claiming a partition but afterwards had withdrawn it, and the Board held that no severance of the joint status resulted. Their Lordships see no reason to depart from that view, although

such a plaint, even if withdrawn, would, unless explained, afford evidence that an intention to separate had been entertained, see *Girja Bai v. Sudashiv Bhundiraj*(1) and *Kawal Nain v. Budh Singh*(2). In a suit for partition which proceeds to a decree which was made, the decree for a partition is the evidence to show whether the separation was only a separation of the plaintiff from his coparceners or was a separation of all the members of the joint family from each other. It appears to be obvious to their Lordships that in a suit for partition no effective decree can be made for a partition unless all the coparceners whose addresses are known, are parties to the suit, and that it is the decree alone which can be evidence of what was decreed.

With the observations which their Lordships have already made, they will proceed to consider whether the joint family which descended from the propositus ever separated. It will be necessary for their Lordships in referring to evidence to refer only to such evidence as they consider is material. In the present case there were concurrent judgments of the District Judge and the High Court that the family descended from the propositus never separated, and that the property sought to be partitioned is partible. The onus of proving that there had been an effective separation was upon the defendants. The Courts below were, as their Lordships are, obliged to construe documents according to their legal effect, but the Courts below were, and their Lordships are, entitled to draw all legitimate inferences as to the intentions of the parties to them, and the inferences so drawn are findings of facts.

It was pointed out by SASTRI, J., in his judgment in this case, that so far as division or non-division of the

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(2) (1910) I.L.R., 32 All., 415 (P.C.); 37 I.A., 161.

(1) (1916) I.L.R., 43 Calo., 1031 (P.C.); 43 I.A., 151.
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estate is concerned, "there has been no formal partition deed between the various members of the family, and it is not alleged that the estate was at any time divided by metes and bounds." The defendants, whose case is that the estate, of which partition is claimed, is not now partible, rely upon certain decrees and documents as showing that the estate was divided and partitioned between descendants of the propositus and that the joint family had ceased to remain joint.

In 1842 a suit was filed in the District Court of Tinnevely by some of the sons of the propositus against his eldest son claiming that the estate should be divided according to his will. The District Judge in 1846 found rightly that the division made by the propositus was invalid in law, but he made an equally invalid decree declaring that the sons of the first wife were entitled to one-half of the estate and the son of the second wife to the other half of the estate. On the 23rd July, 1849, the Suddar Adalat Court in appeal held that all the sons were entitled to equal shares, but held that the Court was not called upon to subdivide the estate in accordance with the law of inheritance, no such question being before the Court, and decided—

"37. It is, therefore, left for the heirs, or for such of them as may be dissatisfied with the management of the joint estate by the head of the family, to adopt such a course of proceeding as they may see fit to obtain the surrender to them of their respective portion or portions of the estate."

A razinama had been filed in that suit on the 1st June, 1846, by the great-grandfather of the plaintiffs in this suit stating that he no longer wished to press the eldest son for a partition of the family estate.

After the decree of the Suddar Adalat of 1849 a son of the fifth son of the propositus brought a suit in the Zilla Court of Tinnevely in 1849 against the eldest son

of the propositus for a fifth share in the estate, and the defendant in that suit pleaded that the then plaintiff's father had in a previous suit admitted that the estate ought to be held according to the law of primogeniture and had renounced all claim to a division of the estate. The Zilla Court on 22nd January 1852, holding that the Suddar Adalat in 1849 had held that the estate was divisible gave the then plaintiff a decree for a one-fifth share in the estate. On the 31st October 1870, the widow of the plaintiff in the suit in the Zilla Court sold her deceased husband's interest in the estate to the son of the first son of the propositus, who was the father of Ponnusami Moniagar who was the brother, deceased without issue, of the appellant, Palani Ammal.

Their Lordships have in considering the facts in this appeal had the great advantage of the very careful and elaborate judgments which were delivered in the appeal to the High Court by Sir JOHN WALLIS, C.J., and SASTRI, J., and they agree with their conclusions as to the facts. Their Lordships have no doubt that this joint family never did separate.

Their Lordships think that so far from the members of that joint family intending to separate, their object probably was to establish themselves, if possible, as a joint family with an impartible estate descending according to the rule of lineal primogeniture with rights of maintenance and other privileges for the junior members. Such a joint family could not be established in modern times.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellant: *H. S. L. Polak.*

Solicitor for respondents Nos. 1, 2 and 3: *E. Dalgado.*

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APPELLATE CRIMINAL—FULL BENCH.

Before Mr. Charles Gordon Spencer, Officiating
Chief Justice, Mr. Justice Kumaraswami Sastri and
Mr. Justice Krishnan.

1924,
October 16.

VEERAPPA NAIDU (PETITIONER), PETITIONER,

v.

AVUDAYAMMAL AND OTHERS (RESPONDENTS),
RESPONDENTS.*

*Criminal Procedure Code (Act V of 1898), ss. 148, 423 (1) (d),
435, 439 and 561-A—Order of Magistrate under Chapter
XII—Revision by High Court—Costs—Power of High Court
to award costs of revision proceedings—Inherent powers—
Incidental or consequential orders.*

The High Court, when exercising its powers of Criminal Revision from an order passed by a Magistrate in proceedings under Chapter XII of the Criminal Procedure Code, has no inherent power to award to the successful party the costs incurred in the Revision Proceedings; *Sankaralinga Mudaliar v. Narayana Mudaliar* (1922) I.L.R., 45 Mad., 913 (F.B.), applied; nor can the award of costs be regarded as incidental or consequential to the disposal of the revision petition within the meaning of section 423 (1) (d) of the Code, for it does not necessarily follow from an order passed in revision. See *Mehi Singh v. Mangal Khandu* (1912) I.L.R., 39 Cal., 157 (F.B.).

Costs referred to in section 148 of the Code are those incurred in the magisterial proceedings under Chapter XII; but the High Court, sitting in revision, is not exercising the powers of a Magistrate under this chapter, and therefore the costs in the revision proceedings cannot be included under this head.

PETITION under sections 435 and 439, Criminal Procedure Code, 1898, and section 107 of the Government of India Act, to revise the order of the Court of the Subdivisional Magistrate of Sivakāsi in Possession Case No. I of 1923.

This is a criminal revision case from the order of a Subdivisional Magistrate in a possession case. The

* Criminal Revision Case No. 987 of 1923 (Criminal Revision Petition No. 754 of 1923).

material facts and contentions appear from the following order of WALLACE, J., in directing the case to be laid before the CHIEF JUSTICE for reference to a Full Bench :—

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ORDER.

The question has been raised in connexion with this petition whether the High Court can grant costs to the successful party and to the Public Prosecutor in a matter coming up before it in revision from an order passed by a Magistrate in proceedings under Chapter XII of the Criminal Procedure Code. It must be conceded that there is no specific provision in the Code which allows the High Court to grant such costs and I am referred to the Full Bench ruling in *Sankaralinga Mudaliar v. Narayana Mudaliar*(1), for the proposition that the High Court has no jurisdiction to grant costs in criminal cases except in those cases where the Code of Criminal Procedure makes express provision. In that ruling, however, it was pointed out that section 148, one of the sections under Chapter XII of the Code, does provide for the award of costs; so that the granting of costs in proceedings under Chapter XII was not under consideration by the Full Bench in that case. Section 148 lays down that, when passing his decision in the case, a Magistrate may direct costs to be paid. Mr. Ethiraj, in an ingenious argument, contended that the awarding of costs in such proceedings is an incidental order within the meaning of section 423 (d), and that the High Court has the power of exercising it by force of section 439, which empowers a High Court, in revision, to exercise any of the powers conferred on it by section 423. I am clear that the High Court, in revision, could pass any order which the Magistrate himself could have passed: that is, the High Court could, in revision, direct the costs before the Magistrate himself to be paid by one party to another. But that is not the same thing as the High Court directing costs before it in revision to be paid by one party to another. As the learned CHIEF JUSTICE has said in *Sankaralinga Mudaliar v. Narayana Mudaliar*(1) "The whole machinery of revision is the creature of statute and has to be found within the four walls of the Criminal Procedure Code". It is obvious that Chapter XXXII of the Criminal Procedure Code does not specifically provide for costs incurred in the High Court by parties in revision petitions. I hesitate to hold that any

(1) (1923) I.L.R., 45 Mad., 913 (F.B.).

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exception was intended to be made in a case where the first Court was itself empowered to award costs, and that the power conferred on the first Court was intended to extend to the High Court also, and form thus an exception to the general rule that no costs are awardable in criminal revision petitions.

I may refer to certain cases of this Court in which costs in the High Court have been awarded in criminal revision cases, relating to orders under Chapter XII of the Criminal Procedure Code, one of which is a judgment of my own. These are Criminal Revision Cases Nos. 519 of 1916, 51 of 1922, 352 of 1922 and L.P.A. No. 2 of 1915. The two cases of 1922 are later than the Full Bench decision. In none of these cases has authority been quoted for the award of costs.

Mr. Ethiraj has argued further that the term "Magistrate" in section 148 will include the High Court, and quotes the Privy Council Ruling in *Clarke v. Brajendra Kishore Roy Chowdhury*(1), an *obiter dictum* stating that, in the Criminal Procedure Code, the term "Magistrate" and "Court" are convertible. The question there, however, was only whether the Magistrate in doing a certain act was acting as a Court or not. To hold that wherever the term "Magistrate" is used, the term "High Court" can be substituted is obviously an untenable proposition, which would *inter alia* extend the original criminal jurisdiction of the High Court throughout the whole Presidency. Where the Code means the High Court it uses the term "the High Court."

It appears to me as at present advised that the High Court has no power to award costs incurred before it on the hearing of a criminal revision petition against an order passed under Chapter XII of the Criminal Procedure Code; but, as the practice of the Court is not uniform and the point as a question of jurisdiction has not been considered, I direct that the case be laid before the CHIEF JUSTICE for reference to a Full Bench.

K. Balasubrahmanya Ayyar for petitioner.—The High Court has no power to award costs to the successful party in a criminal revision case. The matter is concluded by the decision of the Full Bench in *Sankaralinga Mudaliar v. Narayana Mudaliar*(2). There is no specific provision in the Criminal Procedure Code to award such costs. Section 148 of the Code empowers only the

(1) (1912) I.L.R., 39 Cal., 953 at 966 (P.C.).
(2) (1922) I.L.R., 45 Mad., 913. (F.B.).

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Magistrate to award costs incurred in the proceedings before him. Costs incurred in the proceedings before the High Court are not included under section 148.

V. L. Ethiraj and A. Sriranga Achariyar for respondents.—Costs are incidental to orders under section 439 of the Code. See section 423 (1) (d) of the Code; *Ediga Thimmiah, In re*(1). There is a right of action by suit for damages in respect of costs incurred; *Nemai Chundra Ghose v. Ajahar Chowdhury*(2). The High Court, in a revision from an order, under Chapter XII of the Code, can exercise the same powers as the Magistrate has under section 148; power is given to award costs under that section: see *Clarke v. Brajendra Kishore Roy Chowdhury*(3).

R. N. Aingar for Public Prosecutor.—Inherent power is given under section 561 A, which is a new section added to the Code after the decision of the Full Bench in *Sankaralinga Mudaliar v. Narayana Mudaliar*(4); section 148 specifically authorizes the Courts to award costs in proceedings under Chapter XII, and the powers of the High Court in revision from such an order attracts the power to award costs in such proceedings.

K. Balasubrahmanya Ayyar in reply.—An order to pay costs is not incidental to an order in revision. See *Mehi Singh v. Mangal Khandu*(5).

The Court delivered the following

OPINION.

We are agreed in thinking that the question whether the High Court, when exercising its powers of criminal revision, has inherent power to award costs to the successful party, has been settled by the decision of the Full Bench in *Sankaralinga Mudaliar v. Narayana*

(1) (1924) 20 L.W., 293.

(2) (1903) 8 C.W.N., 178.

(3) (1912) I.L.R., 39 Cal., 953 at 966 (P.C.).

(4) (1922) I.L.R., 45 Mad., 913 (F.B.). (5) (1912) I.L.R., 39 Cal., 157 (F.B.).

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Mudaliar(1). Meanwhile the amendment of the Criminal Procedure Code has not made any difference, since the Legislature has not acted upon the suggestion thrown out by COUTTS TROTTER, J., who sat upon the above-mentioned Full Bench, that in order to check the activities of private prosecutors in revision proceedings the Court should be invested with power in proper cases to award costs. It is true that section 561-A of the Code of Criminal Procedure which deals with the inherent power of the High Court is new. But as observed by the learned CHIEF JUSTICE in *Sankaralinga Mudaliar v. Narayana Mudaliar*(1), the Court cannot by invoking its inherent powers extend the powers given to it by statute. Nor can the award of costs be treated as incidental or consequential to the disposal of the revision petition within the meaning of section 423 (1) (d), for it does not necessarily follow from an order passed in revision [compare *Mehi Singh v. Mangal Khandu*(2)].

Magistrates have power under section 148 to direct by whom any costs incurred by parties in proceedings before them under Chapter XII are to be paid, but the costs referred to in this section are evidently the costs incurred in the magisterial proceedings. When the High Court sits in revision, it is not exercising the powers of a Magistrate under this chapter and therefore the costs in the revision proceedings cannot be included under this head.

We consider that WALLACE, J., who made this reference, was right in holding that he had no power to make an order for costs in the two petitions which were before him and they will therefore be returned to him with our opinion for passing the necessary orders.

K.R.

(1) (1922) I.L.R., 45 Mad., 918 (F.B.). (2) (1912) I.L.R., 39 Cal., 157 (F.B.)

APPELLATE CIVIL.

Before Mr. Charles Gordon Spencer, Officiating Chief Justice, and Mr. Justice Srinivasa Ayyangar.

PYDA SATYARAZU (PETITIONER), APPELLANT,

v.

1924,
August 18.

THE GUNTUR COTTON AND PAPER MILLS
COMPANY, LIMITED (RESPONDENTS), RESPONDENTS.*

Indian Companies Act (VII of 1913), sec. 162—Company, winding-up of—Petition by a mortgagee of the company on the Original Side of the High Court—Claim disputed by the company—Petition for winding up, when an abuse of process of the Court—Preliminary and final order on the petition—Appeal against final order by creditor—Memorandum of objections by respondent against validity of preliminary order, whether maintainable.

A petition for the winding-up of a company, filed by a creditor with the view of enforcing payment of a disputed debt, is an abuse of the process of the Court and should be dismissed.

In re London and Paris Banking Corporation, (1874) 19 Eq., 445; and *Tulsidas Lallubhai v. The Bharat Khand Cotton Mill Co., Ltd.*, (1915) I.L.R., 39 Bom. 47, followed.

Held also, that with respect to all Courts, more especially Courts of Record such as the Original Side of the High Court, the order of the Court is the order that comes to be embodied in the formal order drawn up and issued by the Court, and when the first order of the Court is in the nature of a preliminary order, an appeal against the final order would undoubtedly be held to include any principles decided for the purpose of the preliminary order.

APPEAL from the judgment of Mr. JUSTICE KUMARASWAMI SASTRIYAR, dated 26th April 1923, passed in the Ordinary Original Civil Jurisdiction of the High Court in Original Petition No. 136 of 1922.

* Original Side Appeal No. 62 of 1923.

This is an appeal arising out of an application for the winding-up of the respondent company filed by the first petitioner, who was the mortgagee of the company, and the second and third petitioners who were share-holders of the company. The petition was filed on the Original Side of the High Court. The mortgagee was the wife of a Director and ex-Secretary of the company, who executed the mortgage along with another for a large sum of money, more than a lakh of rupees, in 1918. Three suits had been instituted between the parties in the Courts in Guntūr; in one suit, the company sued the Director for accounts and charged him with misfeasance as a Director, and had by a resolution of share-holders removed him from the secretaryship of the company; in another suit the company had sued the Director for a declaration that the mortgage was not valid and binding on the company, and the third suit was by the mortgagee to enforce the mortgage; the latter suits were pending in the District Court of Guntūr, while an appeal from the first suit was pending in the High Court. There was a receiver appointed in the first suit, and certain moneys of the company were in deposit in the District Court in the first suit.

It appeared that the mortgagee had sent a notice to the company for payment of the mortgage debt; the share-holders passed a resolution that the mortgage was not binding on the company and that the mortgagee was not a creditor. The Sub-Court which had appointed a receiver in the first suit, ordered that the amount in deposit in the Imperial Bank to the credit of the suit, should not be paid to the mortgagee. In these circumstances, this petition for winding up was filed and the petitioner applied for payment to her of the amount of the company in deposit to the credit of the company in the District Court in O.S. No. 2 of 1921. The learned

Judge (KUMARASWAMI SASTRI, J.), who heard the petition for winding up, was of opinion

"that although there is an order directing the said sum to be appropriated for dividends, it would still be liable to the debts of the company as a first charge and that it will meet the ends of justice in the present case, if the said sum is brought into this court and paid to the petitioner on her furnishing security to the effect that she will repay any sum she receives if so ordered in any proceeding in appeal or in a suit the company may institute"

and the formal order, dated 29th January 1923, drawn up, was as follows:—

(1) That the further hearing of this petition do stand adjourned to 19th February 1923, and that in the meanwhile the first petitioner do submit a statement of accounts showing the exact amount due under the mortgage in her favour which will be calculated on the basis of actual principal amount of mortgage found to have been advanced by her and simple interest thereon at 12 per cent per annum, etc., and, . . .

(2) that the respondent do in the meanwhile apply for the money, now standing to the credit of the company in O.S. No. 2 of 1921 on the file of District Court of Guntūr, which admittedly will be subject to a first charge for the debts of the company, to be brought into Court to the credit of this matter."

On the 26th April 1923, the learned Judge held that

"Having regard to what transpired at the trial and the undertaking of their counsel, the company will have to pay into Court the sum of Rs. 65,000, that the amount will stand to the credit of the petitioner and will be paid over to the petitioner in the event of the suit filed by the company on the mortgage being unsuccessful, and that the amount when paid into Court will be invested in 6 per cent war bonds, etc."

Against the latter order the petitioners preferred this appeal. The respondent company preferred a memorandum of objections impeaching the propriety of the original order and contending that the application for winding up ought to have been dismissed. The appellants took the objection that the memorandum of objections could not be heard, as the correctness of the

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original order, dated 29th January 1923, was not appealed against by the respondent company and became final.

T. R. Ramachandra Ayyar and *S. Srinivasa Ayyar* for appellant.

A. Krishnaswami Ayyar for respondents.

JUDGMENT.

Respondents represent a company called "The Guntūr Cotton Jute and Paper Mills Company, Ltd." The appellant Pyda Satyarazu is the wife of one of the Directors who is also the Secretary of the company. She is stated to have a mortgage, dated 2nd January 1918, for Rs. 1,23,354 upon the assets of the firm. Rs. 74,000 out of this sum having been paid towards interest and principal, about Rs. 90,000 remain to be paid. Three suits have been brought in the Guntūr Courts which raise questions as to the validity of this mortgage and none of these suits have been finally settled. One is Original Suit No. 42 of 1919 on the file of the Additional Subordinate Court for accounts in which the appellant's husband was charged with misfeasance in his capacity as company Director. We are informed that the appeal in this suit is still pending. The other two are Original Suit No. 15 of 1923 brought for a declaration that the debt is not binding on the company, and Original Suit No. 21 of 1924, the mortgagee's suit for the enforcement of the terms of her mortgage. In a meeting of December the 30th, 1917, the share-holders passed a resolution terminating the office of Secretary held by the appellant's husband to take effect from the 31st March 1918. The mortgage in favour of the appellant was executed on the 2nd January 1918 by the appellant's husband as Secretary of the company in favour of his own wife and by his brother-in-law.

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During the pendency of Original Suit No. 42 of 1919 the Sub-Court appointed a receiver. The appellant sent a notice to the company on the 10th January 1920 demanding the payment of the balance due on her mortgage with interest within one month. The Sub-Court refused to permit the receiver to pay up the debt. At a meeting of the share-holders a resolution was passed on the 18th November 1922 refusing the winding-up of the company and declaring that the appellant was not a creditor of the company. In these circumstances, the appellant and two others applied on the Original Side of this Court for an order for winding up the said company. KUMARASWAMI SASTRI, J., who heard the petition, upon the Advocate-General who appeared for the company admitting that there was a sum of Rs. 60,000 belonging to the company in Court, ordered that this sum should be paid to the appellant upon her furnishing security for its repayment if she might be ordered to do so in any proceedings in appeal or suit, and he adjourned the matter for some time in order to allow the appellant to produce a statement of accounts showing the exact amount due to her. Upon the adjourned date the learned Judge ordered the company to pay into Court Rs. 65,000, the amount to stand to the credit of the appellant and to be paid over to her in the event of her being successful in the suit filed by the company to declare her mortgage to be invalid, and the amount was ordered to be invested meanwhile in war bonds. Now the appellant appeals on the ground that the learned Judge had no power to alter his first order because the money was not paid into her hands but was allowed to be deposited in Court. The respondents have filed a memorandum of objections in which they maintain that the appellant's petition should have been summarily dismissed.

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We will deal with the memorandum of objections first.

Mr. T. R. Ramachandra Ayyar has raised the preliminary point that it should have been in form an appeal against the original order of Mr. Justice KUMARASWAMI SASTRI bearing date 29th January 1924, and no appeal having been filed against that order, it became final and it was not open to the respondent to attack that order or the grounds thereof by an appeal against the later order of the 26th of April, and also that in any case any appeal from the order of the 29th January was out of time. With regard to this objection it seems to us sufficient to observe that with respect to all Courts, more especially Courts of record such as the Original Side of the High Court, the order of Court is the order that comes to be embodied in the formal order drawn up and issued by the Court and that secondly when the first order of Court is in the nature of a preliminary order, an appeal against the final order would undoubtedly be held to include any principles decided for the purpose of the preliminary order.

As regards the merits, the law is perfectly clear that petitions for winding up which are put in in order to obtain an unfair advantage over other creditors at a time when the company is not known to be insolvent amount to an abuse of the process of the Court and should be dismissed—see Buckley on the Companies and Limited Partnerships Act, paragraph 4, page 313. In Palmer's Company Precedents, paragraph 2, chapter 3, page 52, it is stated :

"It is now well settled that a petition for winding up with a view to enforcing payment of a disputed debt is an abuse of the process of the Court and should be dismissed with costs. A winding-up petition is not to be used as machinery to try a common law action."

In re London and Paris Banking Corporation (1) JESSEL, M.R., observed :

"I should be bound by authority (even if I entertained a different opinion which I do not) to hold that if the debt is *bona fide* contested and there is no evidence other than non-compliance with the statutory notice to show that the company is insolvent, and the company denies its insolvency (as this Company does) I ought to dismiss this petition."

Having further found that the petition in that case had not been presented *bona fide*, that is, not with the view of obtaining a winding-up order, but with the object of extorting from the company a larger sum than they thought was fairly due, under pressure of a threat to present the winding-up petition, he dismissed the petition with costs. In *Tulsidas Lallubhai v. The Bharat Khand Cotton Mill Co., Ltd.* (2), two learned Judges of the Bombay High Court observed that if a party presenting a petition to wind up a company had the object of bringing pressure to bear upon the company in order to make it pay cheaply and expeditiously a heavy debt which it desired to dispute in the Civil Courts, he commits one of the worst abuses to which the winding-up sections of our statute law could be perverted. The learned Judge who heard this petition on the Original Side stated that he could not hold that the claim was a fraudulent one or one made with an indirect motive to establish by a short cut an otherwise unsustainable claim. Without going so far as to say that the claim was a fraudulent one, we feel no doubt in saying that no order for payment should have been made. The debt is disputed; suits are pending contesting the validity of the mortgage; the share-holders have passed a resolution denying the status of the appellant as a creditor. She is the wife of one of the

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(1) (1874) 19 Eq., 445.

(2) (1915) I.L.R., 39 Bom., 47.

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Directors whose conduct has been condemned. The company is not admitted to be insolvent and there is no reason why the appellant, if the amount is due, should not get her remedy in the usual course by obtaining a decree in the suit instituted by her. It is urged on her behalf that the order was made by consent and therefore that the respondents are not in a position to object to it. In the order it is stated that the Advocate-General offered to bring the money into Court. We do not think that this implies that he was ready to submit the case of his client to any order that the Court might pass. If he did make any admission that would enable the appellant to abuse the process of the Court, then we think that the learned Judge should not have acted upon it. The only order that can be made upon this appeal and the memorandum of objections is to cancel the learned Judge's order for payment of Rs. 65,000 into Court and to dismiss the petition for winding up, with costs to be paid to the respondent company both here and in the original Court. The memorandum of objections is allowed with costs. The appeal is dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Jackson.

K. M. P. R. N. M. FIRM (PLAINTIFFS), PETITIONERS,

v.

M. SOMASUNDARAM CHETTY & CO. (DEFENDANTS),
RESPONDENTS.*

1924,
September
11.

Evidence Act (I of 1872), sec. 92, proviso (5)—Proof of mercantile usage—Admissibility of evidence aliunde—"Thavanai," meaning of.

Held, that according to the usage proved to be prevailing amongst the piece-goods merchants in Godown Street, Madras Town, sales of piece-goods with a stipulation to charge interest at $\frac{1}{4}$ per cent per mensem after sixty days' "thavanai," are sales on credit for the period stipulated, and not cash sales and that accordingly limitation for a suit for the price begins to run from the expiry of the period.

Held further, that evidence *aliunde* can be given under section 92, proviso (5) of the Evidence Act as to the meaning of technical terms in a contract and as to incidents of the usage, of the trade not expressly mentioned.

CASE stated under section 69 of the Presidency Small Cause Courts Act XV of 1882 by the Registrar, Court of Small Causes, in New Trial Application No. 115 of 1923 preferred against the decree of C. R. TIRUVENKATA ACHARIYAR, Chief Judge of Small Cause Court, in Suit No. 10565 of 1921.

The facts are given in the judgment.

S. Subrahmanya Ayyar for S. Rangaswami Ayyangar for petitioners.

K. Bhashyam Ayyangar and T. K. Srinivasathathachariyar for respondents.

* Referred Case No. 10 of 1924.

JUDGMENT.

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SUBBA RAO, J.

VENKATASURBA RAO, J.—This is a reference under the Presidency Small Cause Courts Act made on a difference of opinion between the learned Chief Judge on the one hand and the Second and the Third Judges on the other.

The suit is for the balance due for the price of piece-goods sold. The plaintiffs are a firm of traders carrying on business at Coral Merchant Street, Georgetown, Madras, and the defendants are also traders carrying on business in another portion of the City, Godown Street. The defendants have raised the plea that the suit is barred by limitation. The decision of this issue turns upon the question whether the sale was a credit sale as contended for by the plaintiffs or it was a cash transaction as alleged by the defendants.

The contract is not in writing and the parties have agreed that according to the usage of the trade certain terms are implied in contracts of this description and that those terms are—

(1) That the price charged is that payable on the expiry of 70 days from the date of sale;

(2) that after that period the seller is entitled to charge interest on the price at 9 per cent per annum;

(3) that if the purchaser pays the price or any part of it within the said 70 days, he is entitled to a discount at 12 per cent per annum on the amount actually paid for the unexpired portion of the 70 days from the date of payment.

So far there is no dispute. But the plaintiffs contend that the price is payable only on the expiry of the period mentioned, in other words that the sale is for credit. The defendants urge that the price becomes payable on the date of the sale, in other words, that it is a cash transaction.

The learned Chief Judge (Trial Judge) on the evidence adduced as well as on his interpretation of Exhibit A which is the bill sent by the plaintiffs to the defendants, came to the conclusion that the sale was for credit and applied article 53 of the Limitation Act. The witness examined for the plaintiff deposes:

"The agreement was that the defendants should have a credit period. Within that period of 'thavanai' no demand could be made."

Likewise, a defence witness also says:

"It is intended that no suit can be instituted until the period of *thavanai* expires. I am not aware of any such suit being brought within the *thavanai* period."

This witness, however, prevaricates and tries to go back upon the statement he has made. Whatever this may be, the trial Judge is entitled to find the terms of the contract on the evidence and his finding on a question of fact is final.

But the Judge bases his decision to some extent also on the terms of the bill to which I have made reference. After the sale, the sellers sent Exhibit A to the purchasers and at the top of it the following words appear:—

"Debit to M. Somasundaram Chetty and Company Godown, (Defendants), interest at $\frac{1}{4}$ per cent per mensem after 60 days' *thavanai*."

By common consent, 60 days means 70 days, and incidentally I may take this opportunity to observe that it reflects little credit on those engaged in piece-goods trade at Madras who glibly say that when they note down 60 days they always mean 70 days. This habit has grown through several decades into a vice and the sooner it is given up the better.

Now, returning to the bill, the learned Judges of the Small Cause Court have put to themselves the question: What is the meaning of this word "*thavanai*"?

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The trial Judge has held that it means "credit period." If he is correct, the sale is clearly a credit sale and the suit is within time. But the other two Judges are of the opinion that the word "thavanai" means "a fixed period or a stipulated space of time." According to them, the period is mentioned in the bill merely for the purpose of the calculation of interest. In their view, the object of fixing a period is to provide that interest shall be calculated only on the expiry of this stipulated space of time. Their explanation for the term relating to discount is, that it has the effect of inducing the purchaser to promptly pay up the amount. I think it is necessary to extract the following passage from the judgment of the learned Chief Judge :—

"I need hardly say that the particular meaning to be attached to a term of a contract is one which has to be decided with reference to the facts of each case and upon the evidence in this case which I have considered carefully. . . . I incline to the view that the *thavanai* period in this case was the period of credit given to the purchaser."

The learned Judge was certainly entitled to find on the evidence that the word "thavanai" was used by the parties to the suit in the sense of a "credit period." If it has obtained a technical meaning and is used in that sense in a particular context, the document must be interpreted in the light of that meaning. That the word "thavanai" has acquired various meanings in various lines of business, admits of no doubt. It is sufficient to refer for this purpose to *Ponnuswami Chetty v. The Vellore Commercial Bank, Ltd.*(1), *Narayanan Chetty v. Suppiah Chetty*(2), *Muthiah Chettiar v. Ramanathan Chettiar*(3) and *Ramanathan Chetty v. Subramaniam Chetty*(4). Oral evidence may be given under section 98 of the Indian Evidence Act to show the meaning of

(1) (1920) 38 M.L.J., 70.
(3) (1918) 7 L.W., 330.

(2) (1920) 38 M.L.J., 437.
(4) (1915) 28 M.L.J., 373.

technical, local and provincial expressions. Under this section, evidence of the meaning which words bear in mercantile transactions can be given. The dictionary meaning of the word "thavanai" is said to be "a term or a fixed term," but if the word has obtained a technical meaning in a particular trade or when used in a particular context, the Courts when construing that word are bound to take into account that meaning. The learned Chief Judge says that on the evidence he finds that the word "thavanai" is equivalent to a credit period, and speaking for myself with experience of such transactions extending over two decades, I am glad to find that the effect of the evidence as stated by the Chief Judge confirms what I have always believed to be the meaning of this word occurring in this context.

The Second and Third Judges were influenced by the observations of Mr. Justice COUTTS TROTTER, as he then was, in a suit decided on the Original Side of the High Court. He said in that judgment :

"All that 'thavanai' means, so far as I can gather from the expert witnesses and from the dictionary that was produced, is 'a fixed period or a stipulated space of time' so that the word 'credit' which appeared to me to be almost fatal to the defendants' case is not there at all."

The learned Judge was not in that case called on to find what the technical meaning of the word "thavanai" was and for that purpose no witnesses were examined. He relied upon the dictionary meaning of the word and the testimony of an interpreter of the Court who of course gave a meaning to the word which he took from the dictionary. The case is not an authority in regard to the sense in which that word is used in the piece-goods trade as carried on in Godown Street. It is clear from the observations of all the three Judges that by usage certain terms are implied in transactions in piece-goods among Godown Street dealers and the

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learned Second Judge also adds that in Coral Merchant Street business is now done in conformity with the Godown Street usage.

In *Rayner, In re Rayner v. Rayner*(1) VAUGHAN WILLIAMS, L.J., says that the meaning of a word is relative to the circumstances and occasion and date on which the word is used and that it is the duty of the Judge to inform his mind not only by reference to dictionaries of good reputation but also by evidence of the meaning ordinarily given to it amongst those who use it. In *Holt & Co. v. Collyer*(2) FRY, J., observes :

"that before evidence can be given of the secondary meaning of a word the Court must be satisfied from the instrument itself or from the circumstances of the case that the word ought to be construed not in its popular or primary signification but according to its secondary intention."

In that case a person who had entered into a covenant not to use a house as a beer-house, opened a grocer's shop there at which he carried on the sale of beer to be drunk off the premises, as ancillary to his grocer's business. Evidence to show that the word "beer-house" was understood in the trade in a technical sense was rejected. The reason is stated by FRY, J., the lease was an ordinary lease by a landlord, who was not shown to be a brewer or connected with the brewing trade, to a person who was not, in any way, engaged in the business of selling beer. In these circumstances, if there be a technical signification to that word in the brewing trade there was no reason to suppose the parties who were not connected with that trade so used it and on that ground the evidence offered was rejected. The present case is very different. The word "*thavanai*" has been used by traders in piece-goods in a document relating to that trade and there can be no doubt that evidence can be

(1) [1904] 1 Ch. D., 176 (C.A.).

(2) (1881) 16 Ch. D., 718.

given to show that the word is used in a particular sense. This again is a question of fact and the learned Trial Judge is entitled to find the meaning of the word as used in the document.

Supposing the word as used in the document really means a fixed period or a stipulated space of time, the defendants can found no argument on that. If that is the meaning of the word, the sale may be either a cash or a credit sale, and even assuming for a moment that Exhibit A is the contract, which it is not, oral evidence can be given under proviso 5 of section 92 to show that by the usage of the trade an incident not expressly mentioned in the contract (here that the sale is on credit) is a term of that contract. The learned Trial Judge is even then justified in finding that the sale is a credit sale. I answer the question submitted to us by the Small Cause Court by saying that the view taken by the learned Trial Judge is right.

JACKSON, J.—This reference has been made by three Judges of the Presidency Small Cause Court under section 69 of the Act.

They state that the question of law on which they differ is whether the cause of action in a certain suit dates from a sale (in which case the suit would admittedly be time-barred) or whether it dates from the expiry of 70 days allowed for credit after the date of the sale (in which case the suit would not be time-barred). This is a question of fact rather than of law; and the reference has really been made because the learned Judges have differed in construing a document which in their opinion affects the merits of the case. This document, Exhibit A, is correctly described by them as being a bill, which contains a bill head to this effect: "Interest at $\frac{3}{4}$ per cent per mensem after 60 days' period (*thavanai*).". The mere construction of this bill presents no difficulty. Its

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heading is an announcement to the effect that after 60 days interest will be charged. But at the end of their reference the learned Judges speak of this bill heading as if it were the suit contract. The bill is not a contract and its wording does not import a period of credit for the payment of the price. "Thavanai" is a colourless expression meaning only "period." In itself it has no more significance than the Latin word "per." It does not in itself convey the idea of credit. I agree with my learned brother that any particular sense in which the word may have been used must be proved *aliunde*. I would answer the reference of the Small Cause Court in the above terms.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Jackson.

1924,
August 27.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
(DEFENDANT), APPELLANT,

v.

V. K. RAMANUJACHARIAR AND FIVE OTHERS (PLAINTIFFS),
RESPONDENTS.*

Madras Revenue Recovery Act (II of 1864), sec. 53—Ryotwari land settled and assessed as dry for thirty years—Resettlement during that period as wet and demand of increased assessment—Suit for declaration of illegality of demand, maintainability of.

When once ryotwari lands are classed as dry under a settlement for a period, say, thirty years, they cannot during that period be reclassified as wet and a demand by the Government of increased assessment on that footing is illegal and *ultra vires*; and a suit to declare such assessment illegal and *ultra vires* and for the recovery of the increased amount levied is not barred

by section 58 of the Revenue Recovery Act. *Prasad Row v. Secretary of State for India*, (1917) I.L.R., 40 Mad., 886 (P.C.), followed.

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SECOND APPEALS against the decrees of R. A. JENKINS, District Judge of Chingleput, in Appeal Suits Nos. 396 to 401 of 1919, preferred against the decrees of A. P. P. SALDANHA, District Munsif of Poonamallee, in Original Suits Nos. 468 to 470 and 503 to 505 of 1918, respectively.

The facts are given in the judgment.

T. R. Venkatarama Sastriyar (Advocate-General) with *K. Jagannatha Ayyar* for appellant.—Achukattu lands are dry lands which are cultivated wet by the raising of ridges and catching the water and detaining it for wet cultivation. Those lands the cultivation of which with the aid of achukattus or ridges did not affect the water-supply of the public tanks were registered "manavari" (rain-fed) and charged at a rate higher than ordinary dry but lower than the wet lands. Objectionable achukattus, i.e., those that affected the water-supply of the tanks were directed to be registered dry as they ought to be cultivated dry, with a direction that if they were cultivated wet with the aid of achukattus or ridges they ought to be dealt with in accordance with the district practice, so as to prevent such improper cultivation. Irrigation cess was imposed in accordance with the practice but the Government held it incorrect to charge water-cess but directed a charge of wet rate on the lands. There is no contract at all between the ryot and the Government. The settlement did not fix a rate which will last for the period. The very provision about district practice shows that the dry rate was not fixed for these lands. The fixing of wet rate was not prevented by the terms of the settlement and so the remarks in *Prasad Row v. The Secretary of State*

* Second Appeals Nos. 1352 to 1357 of 1921.

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for India(1) which are *obiter* are inapplicable to this case. The power to fix and levy land revenue is based on the prerogative right of the Crown and cannot be questioned in Courts; see *Secretary of State v. Veeran Reddi*(2), *Secretary of State for India v. Venkatapathi Raju*(3) and section 58, Revenue Recovery Act. The settlement provides for changing classification in some cases and this case was therefore rightly dealt with by the Government by changing the classification of the land into wet.

A. Krishnaswami Ayyar (with K. Gopalaratnam and P. Narasimha Achariyar) for respondents.—The practice of the district as to imposition of water-rate was declared to be illegal. The Government cannot do indirectly (i.e., by reclassifying these lands as wet) what it is prohibited from doing directly. Increase of amount during the period of settlement is illegal; see *Prasad Row v. The Secretary of State for India*(1). The remedy for the Government is only by legislation.

JUDGMENT.

JACKSON, J.

JACKSON, J.—Appeal from the decree in A.S. No. 396 of 1919 on the file of the District Court of Chingleput—Original Suit No. 468 of 1918 on the file of the Court of the District Munsif of Poonamallee.

The plaintiff is a ryot holding certain lands which at the last revenue settlement in Chingleput district were assessed as dry. Since then, the assessment has been enhanced under orders of the Board of Revenue and the plaintiff has brought this suit against the Secretary of State for India for a declaration that such enhancement is illegal, for the recovery of the amount so levied, and for a permanent injunction restraining the defendant from levying such enhanced rates in

future. The original Court and first Court of Appeal have decreed the suit as prayed for by the plaintiff and the defendant brings this Second Appeal.

The lands in question are of the sort described as “achukattu.” They are surrounded by high bunds which in the wet season retain sufficient water for raising a paddy crop. At the settlement in 1909, the bulk of these lands was classified as “manavari” or “rain-fed” and charged rather more than ordinary dry, and less than ordinary wet. But a certain number lying within the catchment area of tanks were held to be objectionable as interfering with the supply of water, and these were still classed as ordinary dry. Had they too been transferred to “manavari,” Government would practically have conceded the claim of these lands to enjoy additional water facilities, when that claim was held to be objectionable. The G.O. No. 2240, Revenue, dated the 14th August 1909 (page 36 of the printed documents) lays down that those which lie so close to the foreshore of a Government tank as materially to interfere with its supply should be entered in a special list and left to be dealt with by the Collector in accordance with the existing district practice as embodied in G.O. No. 573, Revenue, dated 24th June 1905. In this G.O. (page 17 of the printed documents) the procedure enjoined is that water-rate should be charged if the achukattu intercepts water which would otherwise flow into a Government irrigation work. Accordingly in the settlement notification, dated June 1, 1910, Exhibit A (at page 45 of the printed documents) it is declared that achukattus which materially interfere with the supply of a Government irrigation work will be retained as ordinary dry, and will be dealt with by the Collector in accordance with the practice obtaining in the district.

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(1) (1917) I.L.R., 40 Mad., 886 (P.C.). (2) (1910) 20 M.L.J., 869.
(3) (1912) 28 M.L.J., 746.

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The Collector proceeded to levy water-rate upon these lands, and several appeals were preferred to the Board of Revenue. The Board acting under confidential instructions from Government ruled that such water-rate was not leviable under the Irrigation Cess Act, but that the lands concerned were, in accordance with the orders of Government, liable to enhanced assessment. An appropriate enhancement would be the difference between the wet and dry rates.

"The water rates levied will be refunded, but an enhanced assessment will be charged for the wet 'achukattu' cultivation and this should be the corresponding wet assessment minus the dry assessment already levied—Exhibit I (page 49 of the printed document)."

In conformity with this resolution the Collector enhanced the rates on the plaintiff's lands as set forth in paragraph 7 of the plaint.

The point for determination is whether such enhancement is legal.

The defendant contends that the provision in the notification, Exhibit A, "will be dealt with by the Collector in accordance with the practice obtaining in the district" allows a large discretion. The practice, no doubt, was to charge water-rate if a paddy crop was raised; but since such charges are not rightly leviable under the Irrigation Cess Act, an enhanced assessment practically amounts to the same thing, and can be described as "in accordance with the practice obtaining in the district." The short answer is that such practice never did obtain nor could obtain. Once a settlement has been duly notified by Government, the Collector acting under the orders of the Board of Revenue cannot vary the rates of assessment. The defendant relies upon paragraph 36 of the notification, Exhibit A:—

"The thirty years' limit does not apply to lands the irrigation of which may be improved by Government subsequent to the settlement nor to lands which may be converted from dry to wet or 'manavari'."

Conversion here of course refers to physical conversion. It does not mean that Government reserve to themselves the right at any time to convert the classification of a land as dry to one of wet. If that were so, there would have been no settlement.

It is claimed, however, apart from the notification that Government are at liberty to revise any assessment within the settlement period of thirty years (4th ground of appeal, *et seq.*). But in the light of the Privy Council ruling in *Prasad Row v. The Secretary of State for India*(1) this claim was not seriously pressed in argument. The Judicial Committee rules that

"the annual payment is incapable of increase during the period for which the settlement is made"—page 897.

It is useless to say that for all practical purposes the enhanced assessment is the same as the water-rate or to urge that if the settlement is allowed to stand unrevised, unobjectionable achukattus classed as "manavari" will actually pay a heavier assessment than objectionable achukattus which are classed as dry. An executive act may be based on logic and common-sense and yet be none the less illegal. The finding of the lower Courts must be upheld that when once these lands have been assessed as dry at the revenue settlement, they cannot within the period of thirty years during which that settlement remains in force be reassessed as wet. Such assessment being illegal and *ultra vires*, the plaintiff is not debarred from bringing this suit by the provisions of section 58 of the Revenue Recovery Act.

The appellant further complains that no decree should have issued in regard to the collections for fasli

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1326 for which no notice was given and no injunction should have been granted. In cases of this sort, Government does not resort to technicalities and may be trusted to see that justice is done in regard both to fasli 1326 and to subsequent faslis. There is no necessity therefore to modify the decree of the lower Appellate Court as regards fasli 1326, nor any need to grant an injunction. The decree therefore will contain no injunction and is otherwise confirmed. The appeal in the main fails. Appellant will pay costs of the respondent in this appeal.

The other Second Appeals Nos. 1353 to 1357 of 1921 follow with costs to respondents.

DEVADOSS, J. DEVADOSS, J.—I agree.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Reilly.

1924,
August 21. KATTAMANCHI KRISHNA REDDY (SECOND DEFENDANT),
APPELLANT,

v.

THOTA RAMAKRISHNAYYA SETTY (PLAINTIFF),
RESPONDENT.*

Madras Regulation X of 1831, sec. 2—Sale of minor's property for arrears of revenue—Minor taking property by survivorship whether protected by the Regulation—"Regular course of inheritance," construction of—Minor owner, not registered, whether protected by the Regulation—Madras Revenue Recovery Act (II of 1864), sec. 63—Saving of Regulation X of 1831, under section 63 of the Act, whether applicable to minor owners, not registered as landholders.

Section 2 of Madras Regulation X of 1831, prohibiting the sale of property of minors for arrears of revenue, applies to cases of minors who take the property by survivorship.

The provisions of section 63 of Madras Revenue Recovery Act (II of 1864), saving the operation of Regulation X of 1831,

apply to all minor owners of property, whether they are registered as landholders or not.

Swaminatha Aiyar v. Govindasami Padayachi, (1918) I.L.R., 41 Mad., 733 (F.B.), referred to.

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APPEAL against the decree of K. P. LAKSHMANA RAO, District Judge of Cuddapah, in Original Suit No. 30 of 1922.

The plaintiff and his father were the only members of a joint Hindu family, and on the father's death, the plaintiff, who was then a minor, succeeded to the suit shrotriyam village by right of survivorship. For arrears of revenue which accrued due after his accession to the property, it was sold in revenue auction, during his minority, and purchased by one Narasimha Raju, who sold it to the second defendant. The plaintiff sued to recover the property on the ground that the sale was void under Madras Regulation X of 1831, section 2. Neither the plaintiff's father nor the plaintiff was registered as landholder in respect of the suit lands. The lower Court decreed the suit in favour of the plaintiff. The second defendant preferred this appeal.

Section 2, clause (1) of Madras Regulation X of 1831, runs as follows:—

"From and after the date of the promulgation of this Regulation, no estate, the property of a minor, and descended to him by the regular course of inheritance, not under the charge of the Court of Wards, shall, during his minority, be sold for arrears of revenue accruing subsequently to his accession to the same."

Section 63 of the Madras Revenue Recovery Act (II of 1864) runs as follows:—

"Nothing in this Act shall be held to bar the operation of the provisions of Regulation V of 1804 and of Regulation X of 1831, in respect to the sale of lands of minors and other disqualified landholders."

A. Krishnaswami Ayyar for appellant.

S. T. Srinivasagopala Achariyar for respondent.

JUDGMENT.

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RAMESAM, J.—In this Appeal, the second defendant is the appellant and the plaintiff the respondent. The suit was filed to declare the sale of the shrotriyam village of Vasudevapuram in May 1911, for arrears of revenue, void on the ground that it was made during plaintiff's minority and therefore opposed to Regulation X of 1831.

The plaintiff alleged that the village originally belonged to the plaintiff's family as joint family property and that it fell to plaintiff's father's share in a partition. When the father died in 1905, the plaintiff became sole owner. The second defendant admitted that the village belonged to the joint family consisting of plaintiff's father and others but denied the partition and that the plaintiff became the sole owner in 1905. The first issue was framed with reference to this plea.

In appeal, he wishes to argue that the property did not belong exclusively to plaintiff's family. According to his present suggestion, the plaintiff's family owned only 3/14th share in the village and the appellant filed new documents to substantiate his plea. Having regard to his admission in the written statement, we do not think this plea should be allowed to be raised at this stage. We say nothing on the merits of this plea.

The partition must be found to be true as plaintiff's first witness whom we see no reason to disbelieve proves it.

The next point argued is that the sale is not void. The argument consists of two parts: (1) The Regulation X of 1831 does not apply; (2) the operation of the Regulation is partly cut down by section 63 of Act II of 1864.

Taking up the first point, the appellant's contention is that section 2 of the Regulation applies only to cases

where the minor owner obtained the property by "regular course of inheritance" and this does not include cases of survivorship in a joint family. In the present case, the village was not plaintiff's father's self-acquisition.

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RAMESAM, J.

I think section 2 itself throws some light on the words "regular course of inheritance." The word "accession" occurring at the end of the section seems to have been used in the same sense as "inheritance." This is not an unnatural use of the word (*vide* "inherit," "inheritance" and "inheritor" in Stroud's Judicial Dictionary and my judgment in A.S. No. 141 of 1921 referring to *Watkins v. Frederick*(1).

The word "inheritance" occurs in Regulation IV of 1822 (preamble), Regulation V of 1804 (section 3) and Regulation III of 1802 (section 16) and it is difficult to hold in these instances that "inheritance" does not include "the taking of property by survivorship." I think it is a fair inference that in section 2 of Regulation X of 1831 the word is used in the same general sense.

It is next contended that section 63 of Act II of 1864 saves the operation of Regulation X of 1831 only in respect of minor landholders. In the present case, the village was not registered in the name of plaintiff's father or plaintiff and the plaintiff is not a minor landholder. But the words in the sentence are "minors and other disqualified landholders." The word "minors" includes registered and unregistered owners and this may be the reason why the word "other" is used with reference to disqualified landholders. No doubt the results would have been the same even if the word "other" is omitted; but the two parts of the phrase would have been overlapping. We have not got "minor and other" but "minors" and we do not see any reason

(1) (1864) 11 H.L.O., 358.

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RAMESAM, J.

to cut down the natural meaning of the words as they stand. It seems to me that the object of the words beginning with "in respect of" was to compendiously refer to the subject matter of Regulation V of 1804 and X of 1831 so far as it was pertinent.

In *Srinaminatha Aiyar v. Govindaswami Padayachi*(1) the Regulation was applied to a minor whose name was not registered. It is true that the ground of the decision was that the Government ought to find out the correct heir of the deceased person and the responsible officer should enter his name in the proper register. Whatever the ground may be, it must be conceded that the decision is inconsistent with the appellant's contention based on section 63 of the Revenue Recovery Act. In *Sangapathy Lakshmayya v. Intoory Rolla Reddy*(2) it is not clear whether the first defendant's name was registered or not.

I am, therefore, of opinion that Regulation X of 1831 applies to all minor owners of property whether registered or not.

The appeal fails and is dismissed with costs.

REILLY, J. — I agree that the appeal must be dismissed. Plaintiff succeeded before the District Judge on the ground that the sale was held while he was a minor for arrears which accrued after his accession to the property and was therefore in contravention of Regulation X of 1831. For defendant No. 2, the transferee of the auction purchaser, it is contended that after the enactment of the Madras Revenue Recovery Act, 1864, the special protection given to minors by Regulation X of 1831 was preserved only by section 63 of the Act and that in that section the word "minors" includes only minor landholders and plaintiff is not a landholder within the meaning of the Act, never having been registered as such.

I agree with Mr. Srinivasagopala Achariyar who appears for plaintiff, that "minors" in the phrase "minors and other disqualified landholders" in section 63 cannot be treated as equivalent to "minor and other disqualified landholders" so as to make the word "minors" mean "minor landholders." The effect of section 63 in my opinion is to leave the special rights conferred on minors by Regulation X of 1831, whether they are technically landholders or not, unaffected by the Act.

2. We have therefore to see whether plaintiff comes within the protection of Regulation X of 1831. It is admitted that his right to the property in question is that of the last surviving member of the joint family of his father and himself. Can it be said within the words of the regulation that the property "descended to him by the regular course of inheritance"? Strictly those words are far from appropriate to property taken by survivorship, which has not really descended to plaintiff and to which he is not heir. But I agree with my learned brother that it is probable that in 1831 when the true incidents of survivorship were less clearly recognized than now, those who enacted Regulation X of 1831 intended the words quoted to include property taken by survivorship by a minor who was the last surviving member of a joint family. The property of such a minor would need protection no less than that of a minor who took as heir. Moreover the use of the word "accession" at the end of the sentence points to something not confined strictly to inheritance by an heir being intended. I agree that the sale was in contravention of the Regulation and that the appeal must be dismissed with costs.

K.R.

(1) (1918) I.L.R., 41 Mad., 733 (F.B.).

(2) (1908) I.L.R., 36 Mad., 365.

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APPELLATE CIVIL.

1924,
July 29.

*Before Mr. Charles Gordon Spencer, Officiating Chief
Justice, and Mr. Justice Ramesam.*

RUKMANI AMMAL (PETITIONER), APPELLANT,

v.

RAJAGOPALA AIYAR AND FIVE OTHERS (RESPONDENTS
1 TO 6), RESPONDENTS.*

*Provincial Insolvency Act (V of 1920), sec. 9—Creditor, consenting
party to a deed of arrangement by debtor, estopped from
presenting petition for adjudication of debtor.*

A creditor who is a consenting party to a deed of arrangement by a debtor is estopped from filing a petition for adjudicating the debtor as an insolvent, alleging the execution of the very deed as an act of insolvency. Provincial Insolvency Act (V of 1920) has not effected any change in this respect. *Kheta Mal v. Chuni Lal*, (1879) 1 L.R., 2 All., 173 at 180, followed.

APPEAL against the order of J. I. SMITH, District Judge of West Tanjore at Tanjore, in I.P. No. 6 of 1922.

The facts are given in the judgment.

A. Krishnaswami Ayyar for (petitioner) appellant.—Under the Provincial Insolvency Act of 1907 which embodied the principles of the Deeds of Arrangement Act of 1887 and those underlying the English cases, a creditor who assents to a deed of arrangement by a debtor in favour of his creditors may be estopped from presenting a petition in insolvency alleging the very same deed of arrangement as an act of bankruptcy. In 1914 in England the law relating to deeds of arrangements was consolidated by the Deeds of Arrangements Act of 1914, under which such deeds are liable to be set aside unless certain conditions are fulfilled and creditors generally are estopped from impugning it under certain

other circumstances. At the time of the passing of the new Provincial Insolvency Act, V of 1920, the new Deeds of Arrangements Act of 1914 must have been before the framers of the new Act, and in the absence of a specific provision in it corresponding to the provision in the English Act disqualifying assenting creditors from presenting an insolvency petition, the assenting creditor is not disqualified under the Indian Act. The omission must be taken to be deliberate and the English case law can no longer apply.

T. M. Krishnaswami Ayyar with K. Narasimha Ayyangar for respondents 2 to 6.—From the earliest times in England, an assenting creditor could not present a petition in insolvency alleging the very arrangement to which he was a consenting party; for cases from 1788 and under the English Bankruptcy Acts of 1826, and 1849, see *Bumford v. Baron*(1), *Marshall v. Barkworth* (2), *Ex parte Alsop*(3), *Ex parte Stray*; *In re Stray*(4); see also Williams on Bankruptcy, 12th edition, page 4, Baldwin on Bankruptcy, 9th edition, pages 101–102. The same was the law even after the English Act of 1883 on which the Provincial Insolvency Act of 1907 was based; see *In re Brindley*(5), *In re Sunderland*(6), *In re Jones Brothers*, *Ex parte Associated Newspapers*(7). Act V of 1920 simply copies word for word the old Act of 1907. In India there is no provision at all corresponding to the English Deeds of Arrangements Act and as such whatever might be the case in England, the old English law as embodied in the old English Bankruptcy Act and the cases decided in England apply to India. The old law is not affected either in England or in India as to assenting creditors.

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(1) (1788) 2 T.R., 534 (n.). (2) (1833) 4 B. & Ad., 508.
(3) (1859) 1 De. F. & J., 289 (n.). (4) (1867) 2 Ch. App., 374.
(5) [1906] 1 K.B., 377. (6) [1911] 2 K.B., 653.
(7) [1912] 3 K.B., 234.

* Civil Miscellaneous Appeal No. 312 of 1922.

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Lastly, the new Act of 1920 is not exhaustive because it is not a consolidating Act and therefore the general principles as deducible from the English cases from the earliest to the latest times apply. The appellant who had assented to the trust deed is therefore estopped.

The JUDGMENT of the Court was delivered by RAMESAM, J.—This Appeal under section 75 of the Provincial Insolvency Act arises out of a petition by a creditor to adjudge the first respondent an insolvent. The learned District Judge found that the petitioner was a consenting party to the deed of arrangement executed on 3rd December 1921 (Exhibit I) for the benefit of all the creditors and on this ground she was disentitled from filing this petition and dismissed it. The petitioner appeals.

On the evidence we have no hesitation in finding that the petitioner was a consenting party to the deed. She is a marks-woman, but there is evidence to show that she was present and put her mark along with that of another lady. The petitioner is the aunt of the first respondent who still lives in her house and it seems to be probable that the petition has been filed in collusion with him.

The question of law argued for the appellant is that there is a difference between the law in England and in India on the question of the disability of a creditor who assented to a deed of arrangement. The contention of Mr. Krishnaswami Ayyar is that when section 9 of the Provincial Insolvency Act now in force (V of 1920) was enacted, the Indian Legislature had before it the English Act of 1914, but did not choose to enact the clause relating to deeds of arrangement towards the end of sub-section (1) of section 4.

The right of the creditor to apply for adjudication was dealt with in section 6 of the Bankruptcy Act of

1883. That section has been adopted by the Indian Legislature as section 6 (4) of the Indian Act III of 1907. The English Consolidating Act of 1914 was then enacted with the additional clause relating to deeds of arrangement after section 4 (1) (d). The Indian Act of 1920, section 9, was then enacted repeating the language of Act III of 1907. In England, a "Deeds of Arrangement Act" was passed in 1887, and another in 1913 and they were consolidated by the Act of 1914 (4 and 5 Geo. V, C. 47).

Now, in England, it was the established law since 1785 that a creditor who assented to a deed of arrangement could not set it up as an act of bankruptcy—*Bamford v. Baron*(1). In 1826, the Bankruptcy Act (6 Geo. IV, C. 16) was passed and this was followed by 1 and 2 Will. IV, C. 56. It was held that there was no alteration in the law in *Marshall v. Barkworth*(2). In 1849 the Bankruptcy Law Consolidation Act was passed. With reference to that Act, it was held in *Ex parte Alsop*(3) that, though a deed of arrangement is an act of bankruptcy so far as non-consenting creditors are concerned, the consenting creditor cannot found a petition for adjudication on it. This was followed by Lord CAIRNS, in *Ex parte Stray; In re Stray*(4). (See Williams on Bankruptcy Practice, 12th edition, page 4, and Baldwin's Law of Bankruptcy, 9th edition, pages 101-102). On the Bankruptcy Act of 1883, we have got the cases of *In re Brindley*(5), *In re Sunderland*(6) and *In re Jones Brothers, Ex parte Associated Newspapers*(7). The section of the Bankruptcy Act of 1883 has been adopted in India in 1907 and repeated in 1920 and these decisions apply.

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(1) (1788) 2 T.R., 504 (n).

(3) (1859) 1 De. F. & J., 289 (n).

(5) [1906] 1 K.B., 377.

(2) (1833) 4 B. & Ad., 503.

(4) (1887) 2 Ch. App., 374.

(6) [1911] 2 K.B., 653.

(7) [1912] 3 K.B., 234.

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We do not see how the addition of a clause in section 4 (1) (d) in the English Act of 1914, the effect of which seems to extend the disability to a non-assenting creditor also "in cases where he is prohibited from so doing by the law for the time being in force relating to deeds of arrangement" (see section 24 of the Deeds of Arrangement Act, 1914, according to which any creditor is prohibited from applying, after the expiration of one month from the receipt of a notice from the trustee under the deed), can affect the law in India. This extension to non-assenting creditors is not available in India and this seems to be the only effect of the addition in the English Act. The old law is not affected either in England or India as to assenting creditors [see also *Khetu Mal v. Chuni Lal*(1)].

This contention of the appellant is therefore disallowed.

His next contention that the District Judge erred in not considering the other grounds alleged in the petition is legally correct. But he seems to have abandoned the other grounds in the Court below and on the facts as disclosed in the case there is no substance in them. The result is that the appeal fails and is dismissed with costs of respondents 2 to 6. It follows that the injunction, dated the 4th October 1922, in C.M.P. No. 2326 of 1922 is dissolved.

N.R.

(1) (1879) I.L.R., 2 All., 173 at 180.

APPELLATE CRIMINAL.

Before Mr. Justice Venkatasubba Rao.

SARASWATHI AMMAL (PETITIONER),

v.

1924,
July 14.

DHANAKOTI AMMAL AND THREE OTHERS (RESPONDENTS).*

Criminal Procedure Code (Act V of 1898), sec. 491—Habeas corpus—Application by guardian—Considerations for the Court—Wishes of the infant—Welfare—Practice in England, how far applicable to India.

In dealing with an application for a writ of *habeas corpus* by a guardian to recover custody of an infant, the main consideration for the Court is the infant's welfare in its widest sense, moral, religious and physical. Due regard must be had to the ties of affection. The rules that guide the Court of Chancery in such matters are applicable to the Courts in this country also. If the infant is capable of forming intelligent opinions the Court must take them into consideration. There is no hard and fast rule obtaining in England that the Court has no option but to give effect to the wishes of an infant of over 14 if a boy, and over 16 if a girl, without reference to its mental capacity. Even if such a rule prevails in England it is inapplicable to India.

PETITION praying the High Court to (i) issue a writ in the nature of *habeas corpus* directing the respondents to produce the minor Kripasankari Ammal before the High Court on such date as the High Court may fix to be dealt with according to law, (ii) to restrain (1) Dhanakoti Ammal, (2) K. L. Vasudeva Gramani and (3) K. P. Satagoparamanuja Pillai, respondents Nos. 1 to 3 by order of injunction from disposing of the said Kripasankari Ammal in marriage to the fourth respondent or to any other person, (iii) to restrain the fourth respondent by an order of injunction from marrying the said Kripasankari Ammal and (iv) to make such other

* Criminal Miscellaneous Petition No. 323 of 1924.

order or orders as the High Court may deem fit to make in the circumstances of the case.

The facts are given in the judgment.

R. N. Aingar, O. Thanikachalam Chetti and T. N. C. Srinivasa Varada Achariyar for petitioner.

A. Krishnaswami Ayyar for first respondent and for Kripasankari Ammal.

M. Subbaraya Ayyar for Kripasankari Ammal.

Respondents Nos. 2 to 4 appeared in person.

JUDGMENT.

This is an application made under section 491 of the Criminal Procedure Code. It is in the nature of an application for *habeas corpus*. The applicant is the mother of the girl who is said to be illegally detained. There was some dispute as regards the age of this girl, and there was conflicting medical testimony on the point. But Mr. A. Krishnaswami Ayyar who appeared for the girl as well as for her step-sister (from whose custody the minor girl was produced) agreed to proceed with the application on the footing that the age of the girl was a little over 17 and under 18. The parties belong to a wealthy Gramani family residing at Kodambakkam, outside the municipal limits of Madras. The members of this family have shown themselves extremely litigious and repeated applications have been made before this Court from time to time in regard to disputes that have arisen between them. It is unnecessary to go into these various matters, because the more essential of the facts can be brought within a very small compass. The applicant left the family house or was compelled to leave it about a year or two ago, and the girl has been continuing to live with her step-sister. Arrangements were recently made to give the girl in marriage to her paternal aunt's son who is also

a respondent to this motion, and the mother thereupon applied for a writ to DEVADOSS, J., who was the Vacation Judge, and an *interim* order was made for the production of the minor as well as restraining the marriage. I must mention that the step-sister has shown herself to be a person of very strong will and that the mother, on the other hand, is liable to be easily led away. I have examined the minor herself with a view to ascertain her own wishes in the matter. She is a full-grown girl and is resolute and self-willed. She expressed her wishes very strongly and stated to me that she would not return to her mother and that she was determined to marry the young man to whom her mother objects. The only relevant allegation made against him is that he is not possessed of any property worth mentioning. He is employed as proof reader in the Government Press and gets a pay of about Rs. 25 a month. He looks healthy and strong, and the girl herself, as I have observed, has a decided preference for him.

The short question to be decided is, has a case been made out for the issuing of directions in the nature of *habeas corpus*? It has been repeatedly held in England that the main consideration which ought to weigh with a Court of Chancery is really the question of the welfare of the child. The jurisdiction arises from the power of the Crown delegated to the Court of Chancery and it is essentially a parental jurisdiction, and it is to be exercised for the benefit of the infant. It is also settled law that the word "welfare" must be taken in its widest sense. The moral and religious welfare must be considered as well as its physical well-being, and due regard must be had to the ties of affection. With reference to all the circumstances of the case the Court makes an order; they relate to the position of the

parent, the position of the child and the happiness of the child. There can be no question that this is the law that is administered by a Court of Chancery in England. The Courts in India act on the same principle, and the Guardian and Wards Act, Act VIII of 1890, recognizes that the rules that guide the Court of Chancery are applicable in this country. Section 17 enacts that the Court shall be guided by what appears in the circumstances to be for the welfare of the minor, and, where the minor is old enough to form an intelligent preference, it is further enacted that the Court may consider that preference.

A question of law has been raised, and as I consider it to be of great importance I proceed to deal with it. The basis of *habeas corpus* is illegal restraint. If the person that is alleged to be illegally detained is an adult, the case presents little difficulty, because he appears before the Court and says either that he has been wrongfully detained or that there has been no wrongful detention. But in the case of a minor he cannot be said to be capable of giving consent, and detention against the wishes of a lawful guardian is *prima facie* illegal. The consent to which the Court must thus refer is the consent of the guardian and not that of the infant. If therefore the *de jure* guardian applies for *habeas corpus* in respect of a child detained against his will what are the considerations which must guide the Court in determining the rights of the parties? I have said that the question of the interests and the welfare of the infant is the dominant question, and the Court must dispose of the application with reference to it. But it is argued by Mr. A. Krishnaswami Ayyar that in the case of a boy over 14 and in the case of a girl over 16 the Court has no option in the matter and that the wishes of the infant must be given effect to. He puts his argument in

this way. The application deals with the liberty of a subject. If the infant is of an age to exercise a choice or use a discretion and the infant declares to the Court that he is not in unlawful custody, the Court is bound to make no further order than merely to declare him at liberty; only where the person is too young to be competent to choose, the Court makes an order giving the custody to the lawful guardian. The next step in his argument is, that the right to such an election depends upon age and age alone and not on mental capacity. In support of his proposition he chiefly relies upon *Queen v. Howes* (1), *In re Andrews* (2) and the observations of BRETT, M.R., *In re Agar Ellis* (3).

In *Queen v. Howes* (1), COCKBURN, C. J., thus observes :

"The whole question is, what is that age of discretion? We repudiate utterly, as most dangerous, the notion that any intellectual precocity in an individual female child can hasten the period which appears to have been fixed by statute for the arrival of the age of discretion; for that very precocity, if uncontrolled, might very probably lead to her irreparable injury. The Legislature has given us a guide, which we may safely follow, in pointing out sixteen as the age up to which the father's right to the custody of his female child is to continue; and short of which such a child has no discretion to consent to leaving him."

The *ratio decidendi* would appear to be applicable to cases arising in India, as, corresponding to the English Statutes which fix the age, there is the provision of the Indian Penal Code, section 363, which makes it penal to entice a minor under 14 years of age if a male, or under 16 years of age if a female.

In *In re Andrews* (4) ARCHIBALD, J., makes the following observations :—

"The right to such an election, it has been clearly decided, depends upon age alone, and not on mental capacity ;

(1) 8 E. & E., 332; 121 E.R., 467. (2) (1873) 8 Q.B., 153.

(3) (1888) 24 Ch. D., 317.

(4) (1873) 8 Q.B., 153 at 159.

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see *Reg v. Clarke*(1), and it may be taken as settled that no such choice can be made, at all events by a female infant under the age of sixteen; *Queen v. Howes*(2) followed by the Court of Probate and Divorce, in the cases of *Carlidge v. Carlidge*(3) and *Mallinson v. Mallinson*(4)."

It will be convenient to set out *in extenso* the observations of BRETT, M.R., in *In re Agar Ellis*(5) which have been strongly relied on :—

"It is the universal law of England that if any one person alleges that another is under illegal control by anybody, that person, whoever it may be, may apply for a *habeas corpus* and thereupon the person under whose supposed control, or in whose custody, the person is alleged to be illegally and without his consent, is brought before the Court. But the question before the Court, upon *habeas corpus*, is whether the person is in illegal custody without that person's consent. Now up to a certain age children cannot consent or withhold consent. They can object or they can submit. But they cannot consent. Because the Court cannot inquire into every particular case, the law has now fixed upon certain ages, as to boys the age of fourteen and as to girls the age of sixteen—up to which as a general rule the Court will not inquire upon a *habeas corpus*, as between the father and the child, as to the consent of the child to the place wherever it may be. But above the age of 14 in the case of a boy, and above the age of 16 in the case of a girl, the Court will inquire whether the child consents to be where it is; and if the Court finds that the infant, no longer a child but capable of consenting or not consenting, is consenting to the place where it is, then the very ground of an application for a *habeas corpus* falls away."

With reference to Mr. A. Krishnaswami Ayyar's argument it is necessary to examine whether the passages extracted above express the law of England correctly on the point. In *Queen v. Gyngall*(6) which related to an application for *habeas corpus* in respect of a female infant aged 15, the Court of Appeal refused to give to the mother of the minor custody although she had not been guilty of any misconduct. The child in that

(1) 7 E. & B., 186.
(3) (1862) 2 Sw. and Tr., 567.
(5) (1883) 24 Ch. D., 317.

(2) 3 E. & E. 332.
(4) (1866) L.R., 1 P. & D., 221.
(6) (1893) 2 Q.B.D., 232.

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case, although she was a female infant under sixteen, was examined and the Court inquired into her wishes. KAY, L.J., refers with approval to *Ex parte Hopkins*(1), which related to three girls, the eldest of whom was only 13, whom KING, Lord Chancellor, questioned to ascertain her own wishes. The observations of BRETT, M.R., in *In re Agar Ellis*(2) to which I referred are set out in the judgment of KAY, L.J., who proceeds thus :

"This language, of course, had reference to the case of *Reg v. Clarke*(3), in which the application being for *habeas corpus* before the Judicature Act and the child in question being a girl and under 16, Lord CAMPBELL, C.J., said that in the Courts of Common Law such a child being deemed incapable of consenting he would not inquire into the wishes of the child. I have already shown by reference to the case of *Ex parte Hopkins*(1) that there never was any such rule in the Court of Chancery."

In the same case Lord ESHER, M.R., referring to *Reg v. Clarke*(3), says :

"It appears to me that that ruling was quite correct. That case is no authority for the present where a different jurisdiction comes into play."

Both Lord ESHER, M.R., and KAY, L.J., refer to the passing of the Judicature Act and clearly lay down that the decisions prior to that Act are not authorities for cases arising after the passing of that Act. If in the light of these remarks one turns again to *In re Andrews*(4) one cannot fail to notice that the decision rests upon the authority of *Reg v. Clarke*(3) which the Court of Appeal refused to follow in *Queen v. Gyngall*(5) on the ground that it was no longer applicable after the passing of the Judicature Act. KAY, L.J., refers in this connexion to a child being of a reasonable age and says that the Court would hardly then desire to determine the question without seeing and speaking to the child and

(1) 3 P. Wms., 151.
(3) 7 E. B., 186.

(2) (1883) 24 Ch. D., 317.
(4) (1878) 8 Q.B., 153.
(5) (1893) 2 Q.B.D., 232.

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ascertaining its wishes on the matter. This expression of opinion is hardly consistent with what COCKBURN, C.J., said in regard to intellectual precocity of any particular individual child.

The subject is considered again in *In re Harriet O'Hara*(1). FITZ GIBBON, L.J., summarizes the principles deducible from the judgments of Lord ESHER and KAY, L.J., in Gyngall's case and repudiates the suggestion that the girl in question there ought not to have been consulted because she was only 11 years of age. He thus observes :

"I entirely dissent from this contention. From the time of KING, Chancellor, in *Ex parte Hopkins*(2) the Court of Chancery has exercised its discretion in seeing the young children not for the purpose of obtaining their consent but for the purpose and as one of the best modes of determining what is really for their welfare though the Common Law Courts as a general rule would not inquire as between parent and child as to the child's consent below the age of 14 for a boy or 16 for a girl."

I think I have made it fairly clear that the hard and fast rule which Mr. Krishnaswami Ayyar asks me to accept does not obtain at the present day in England. I have been referred by Mr. Krishnaswami Ayyar also to Simpson on *Infants*, 3rd Edition, page 188, and Short and Mellor's *Practice of the Crown Office*, 2nd Edition, page 313. But the learned authors rely upon cases decided before the passing of the Judicature Act and I cannot therefore act upon the passages to which my attention has been drawn.

In each case the Court must decide with reference to the interests and the welfare of the minor. If an infant capable of forming an intelligent opinion expresses its views, the Court is bound to take them into consideration. In weighing the question what is for the benefit of the child, this will form an important element

(1) (1900) 2 Ir., 232.

(2) 8 P. Wms., 151.

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and the degree of the child's mental development must to a certain extent weigh with the Judge in deciding how far its wishes shall be given effect to. In the same way, the age of the child is also an important factor. It seems to me that the rule that fixes an inflexible limit in regard to age is too artificial and even if the contention is correct (which in my opinion is not) that such a rule obtains in England, I am emphatically of opinion that there is no warrant for the extension of the doctrine to India where different considerations may apply and different conditions do prevail.

In *Pollard v. Rouse*(1), WALLIS, J. (as he then was), thus observes at page 293 :

"Lastly it is well established that the Court will not ordinarily force a minor of more than 14 if a boy, and of more than 16 if a girl, to remain in a custody to which he or she objects."

It is urged by Mr. Krishnaswami Ayyar that WALLIS, J., by qualifying his statement by the use of the word "ordinarily" has failed to correctly set forth the effect of the English decisions. It is doubtful whether WALLIS, J., brought his mind to bear upon this particular aspect of the question because at page 298 there occurs in his judgment the following passage inconsistent with his earlier observation :—

"As regards the girls over 16 and boys over 14 it is now conceded in accordance with the principles I have explained that the Court cannot in the present case force them to return to the plaintiff against their will.

It seems to me that this case cannot be of much value as an authority upon this particular point.

In *In the matter of Saithri*(2), a minor, BAYLEY, J., points out in a judgment which refers to various authorities that it is not right to apply the very artificial rule to which reference has been made.

(1) (1910) I.L.R., 33 Mad., 288.

(2) (1892) I.L.R., 16 Bom., 307.

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I have therefore looked at the question purely from the point of view of the welfare of the minor. I have paid necessarily, as any Court will pay, great attention to the expressed wishes of the infant who will soon reach the age of 18, the age of majority. She is in a position to decide for herself and she expresses a decided preference to remain in the custody from which she has been produced. She is able to form a judgment as to what is in her own interest and for her benefit. She has freely chosen to give her hand in marriage to her paternal aunt's son. It is also not impossible that she has been on terms of friendship and familiarity with this young man and it is not desirable to take her away from the surroundings to which she has been accustomed and to place her in the custody, against her will, of her mother who is a woman not of strong will and easily capable of being influenced by the person who at the time happens to be nearest to her; and it is necessary and important to bear in mind that the mother is not being deprived of the custody of the infant but on the contrary I am asked to take the child away from the custody which she prefers and place her in the custody of the mother to whom she expresses a positive dislike.

The order that I propose to make therefore is, that she be freed from all restraint and be at liberty to go where she chooses.

In the circumstances of the case, I make no order as to costs.

D.A.B.

APPELLATE CIVIL.

Before Mr. Justice Jackson.

THE PRESIDENT, TALUK BOARD, HOSPET

(COUNTER-PETITIONER), PETITIONER,

v.

CHANDRAPPA (PETITIONER), RESPONDENT.*

*Madras Local Boards Act (XIV of 1920), sec. 55 (2) (iv)—
More resignation of office by an honorary magistrate—Dis-
qualification for election or appointment as member of local
board until acceptance of resignation.*

An honorary magistrate ceases to hold his office not on his mere resignation but only when his resignation is accepted. Hence until his resignation is accepted by the Government he is disqualified under section 55 (2) (iv) of the Madras Local Boards Act to be elected or appointed as a member of the local board within whose local area he is an honorary magistrate; *Sudarasana Rao v. Christian Pillai*, (1923) 45 M.L.J., 798, referred to.

PETITION under section 107 of the Government of India Act praying the High Court to revise the order of R. A. JENKINS, District Judge of Bellary, in O.P. No. 47 of 1922.

The facts are given in the Judgment.

Section 55 (2) of the Madras Local Boards Act (XIV of 1920) is as follows:—

"A person shall be disqualified for election or appointment as a member of a local board if such person is at the date of nomination, election or appointment . . .

(iv) an officer or servant holding office under this Act, or an honorary magistrate for the local area over which the local board concerned has jurisdiction."

K. Raja Ayyar for petitioner.

C. Sambasiva Rao for respondent.

JUDGMENT.

Petition to revise the order of the District Judge of Bellary on a reference made to him under section 57 of

* Civil Revision Petition No. 133 of 1923.

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Madras Act XIV of 1920. The point referred to by the Judge, which is the sole question for determination, is whether an honorary magistrate who is disqualified for election as a member of a local board under section 55 (2) (iv) of the above Act can relieve himself of that disqualification by submitting his resignation to Government, or whether, on the contrary, the disqualification subsists until Government have removed him from his office.

The point was also referred to the Local Self-Government Department by the President of the District Board, Bellary, and it replied in G.O. Mis. No. 1308, L. and M., dated 1st August 1922 :—

"An honorary magistrate is disqualified for election or appointment as a member of a local board before his resignation is accepted by the Government."

This order was filed before the District Judge who held that it was in literal conformity with the law, and there, it would be thought, the matter might have ended. But the learned Judge proceeding upon what he describes as the spirit of the law, apparently meaning the intention of the legislature which it had failed to express in its statute, declared that a bare resignation is sufficient. A Judge has no dispensing power which allows him to go behind the plain import of a statute, and on this particular point the law is clear. Under section 14 (1) of the Code of Criminal Procedure the local Government may confer upon any person all or any of the powers conferrable on a magistrate. Under section 26 of the Code of Criminal Procedure all magistrates may be removed from office by the local Government. A person so appointed cannot remove himself by resignation. This is the doctrine of the English Common Law :

"After an office was conferred and assumed, it could not be laid down without the consent of the appointing power."

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(Paine's Law of Elections, 1890, page 201.) English Case Law is not of much assistance unless we know the exact terms on which the office sought to be renounced was held. But *Pease v. Lowden*(1) follows the above principle of Common Law. Two Scotch cases quoted in Rogers on Elections, Volume II, page 27, carry the matter no further, as shown in *Sударасана Rao v. Christian Pillai* (2), where they are discussed. In this Madras case it is remarked :

"It may be that the need for acceptance does not apply to honorary appointments. But it is unnecessary to pursue this line of argument further"—page 779.

I do not know what line of argument was then advanced. It is suggested before me that the appointment of an honorary magistrate is analogous to a contract without consideration, but pursued to its logical conclusion, this became absurd, for such an appointment would be void *ab initio*. I see no distinction in law between a magistrate who receives and a magistrate who does not receive a salary for the performance of his duties. Therefore the head note to *Sударасана Rao v. Christian Pillai*(2), is correct

"An honorary magistrate does not cease to hold his office on his resignation, but only when the resignation is accepted" although the actual judgment contains, *obiter*, a query in the contrary sense.

The Civil Revision Petition is allowed with costs.

N.R.

(1) [1899] 1 Q.B., 386.

(2) (1923) 45 M.L.J., 798.

PRIVY COUNCIL.

VENKATADRI APPA RAO AND OTHERS (DEFENDANTS),
APPELLANTS

v.

1925,
January 30.

PARTHASARATHI APPA RAO AND OTHERS (PLAINTIFFS),
RESPONDENTS.*

[AND CONNECTED APPEALS.]

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
MADRAS.]

*Indian Limitation Act (IX of 1908), Sch. I, art. 123—Suit for
legacy—Time from which limitation runs—"Payable"—
Construction of will—Implied intention to postpone payment.*

In 1916 suits were instituted to recover legacies bequeathed by a testatrix who had died in 1899. The will provided that the legacies were to be paid out of a fund in Court; the fund would have come under the control of the testatrix only if and when a suit which she had brought to recover an estate was successful. The suit, which was pending at the death of the testatrix, was continued by her representatives; it failed in both Courts in India but succeeded in 1913 upon appeal to the Privy Council. It was not until after the decision of 1913 that anyone had possession or control of the fund out of which the legacies were directed to be paid.

By the Indian Limitation Act, 1908, Schedule I, article 123, a suit for a legacy must be brought within twelve years of the time when the legacy "becomes payable or deliverable."

Held, that the suits were not barred by limitation, since a legacy does not become "payable" within the meaning of article 123 until the executor, or other person liable to pay it, has in his hands money with which it could be paid; also, because it was to be inferred from the terms of the will, and the circumstances in which it was made, that the intention of the testatrix was that the legacies were not to be paid until the suit had been finally determined.

* Present:—Viscount FINLAY, Lord ATKINSON, Sir JOHN EDER, and Sir LAWRENCE JENKINS.

CONSOLIDATED APPEAL (No. 25 of 1924) from three decrees of the High Court (April 4, 1922) in appeals under the Letters Patent, reversing three decrees of the Division Bench of the same Court, which affirmed three decrees of the Subordinate Judge of Bezwada.

The three suits giving rise to the consolidated appeal were brought in 1916 by the respondents against the appellants to recover legacies bequeathed by the will of Venkayamma Rao, who died in 1899.

The main questions arising upon the appeal were as to the construction and effect of the will, and as to whether the suits were barred by limitation.

The facts, including the material parts of the will, appear from the judgment of the Judicial Committee.

The Subordinate Judge held that the suits were barred by the Indian Limitation Act, 1908. In his view article 123 did not apply as the defendants were not executors or administrators of the will, but he held that the suits were barred under either article 120 or article 52.

Upon appeal to the High Court, SADASIVA AYYAR, J., agreed with the view of the Subordinate Judge, but PHILLIPS, J., was of opinion that the suits were not barred. Decrees dismissing the appeal were accordingly made.

Upon appeal by the present first respondent under clause 15 of the Letters Patent, the learned Judges (SCHWABE, C.J., COUTTS TROTTER, J., and KUMARASWAMI SASTRI, J.), held (vide I.L.R., 46 Mad., 190) that article 123 applied, but that the suits were not barred thereby as the period of limitation did not begin to run until there were available assets, namely, until after the decision of the Privy Council in 1913. The suits were remitted for inquiries and accounts.

Dunne, K.O., Swaminathan, Dube, and Narasimham for the appellants.—Clauses 5 and 6 of the will

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purported to deal with the whole fund derived from the income of the Medur estate; the testatrix was not competent to deal with the fund, and the legacies were therefore invalid. If the clauses can be construed as making the legacies payable out of that part only of the fund which the testatrix could deal with, clause 5 restricts the fund to income paid into Court before the date of the will. But in any case the suits were barred by the Indian Limitation Act, 1908. Article 123 is applicable. Under that article the period was twelve years from the date when the legacies "became payable." Having regard to section 117 of the Probate and Administration Act, 1881, the legacies "became payable" within one year of the death of the testatrix (sections 130, 131 also were referred to). The plaintiffs could have brought suits earlier; if there were no assets, they could have obtained a decree for administration. The decision of the Privy Council in 1913 had no effect upon the period of limitation. (Reference was made to *Khetramani Dasee v. Dhirendra Nath Roy*(1).

De Gruyther, K.C., Clauson, K.C., Parikh and P. Chenchayya for the first respondent, who were called upon only on the question of limitation, were stopped.

The JUDGMENT of their Lordships was delivered by Sir JOHN EDGE.—These are consolidated appeals from three decrees, dated 4th April 1922, of the High Court at Madras, which had reversed three decrees, dated 22nd April 1921, of a Division Bench of that Court, by which three decrees, dated the 29th November 1917, of the Subordinate Judge of Bezwada, dismissing Original Suits numbered 30, 87 and 88 of 1916 had been affirmed. The suits had been instituted in the

(1) (1914) I.L.R., 41 Cal., 271.

Court of the Subordinate Judge of Bezwada, on the following dates: No. 30 of 1916 on 26th April 1916; No. 87 of 1916 on 6th December 1916; and No. 88 of 1916 on 9th December, 1916. It was agreed at the hearing of these appeals that in drawing up the decree of the High Court in Original Suit No. 30 of 1916, Letters Patent Appeal No. 20 of 1921, that the words "mesne profits" in paragraph 3 of the decree should have been "income" and their Lordships amended that decree by substituting in it for the words "mesne profits" the word "income." There was no question of mesne profits in the case.

In suit No. 30 of 1916, Sri Rajah Parthasarathi Appa Rao Bahadur was the plaintiff, and Sri Rajah Venkatadri Appa Rao Bahadur, Sri Rajah Venkataramayya Appa Rao Bahadur and Sri Rajah Sobhanadri Appa Rao Bahadur and the Court of Wards were defendants. By an order of the Court of 6th December 1916, the Court of Wards was discharged from being a defendant, and the second defendant was appointed guardian of the third defendant, who was a minor. The suit was to recover a legacy of Rs. 80,000 bequeathed by Venkayamma, a widow, by her will of 30th January 1899, to her sister-in-law Inuganti Kasturamma, a legacy of Rs. 40,000 bequeathed by the same will to another sister-in-law Inuganti Venkataramanayamma, and shares of the residue of the testatrix's property which she had bequeathed to her brothers Chinna Rao and Buchi Thammayya. The plaintiff was the assignee of all the abovementioned legacies, and he claimed them as such assignee. He also claimed interest on those legacies, and other relief.

In suit No. 87 of 1916, Sri Damera Venkata Rajagopala Seeta Rayamma Rao was the plaintiff, and Sri Rajah Meka Venkatadri Appa Rao Bahadur Garu, Sri

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Rajah Meka Venkataramayya Appa Rao Garu, and Sri Rajah Sobhanadri Appa Rao Bahadur Garu, by his brother and guardian the second defendant, were the defendants. The plaintiff claimed to recover a legacy of Rs. 40,000 bequeathed to him by the same Venkayamma by her will, with interest thereon, and other relief.

In suit No. 88 of 1916, Lakkaraju Bapayya was the plaintiff, and the defendants were the persons who were the defendants in suit No. 30 of 1916 and in suit No. 87 of 1916. The plaint in the suit was filed under section 26 of the Code of Civil Procedure, 1908, and under Order I, rule 8, and Order VII, rule 1, of that Code. The plaintiff claimed to recover Rs. 2,000 bequeathed to him by Venkayamma by her will and interest thereon and a decree that for such purposes necessary accounts should be taken and that the property of the testatrix should be administered by the Court, and prayed for other relief.

When it may be necessary later in the judgment to refer to any of the parties to this litigation, they will be referred to by their names without any descriptive addition.

Except the Court of Wards, all the original defendants and the representatives of those who died, who have been brought on the record, were nearly related to each other and to Venkataramayya Appa Rao, of whom Venkayamma was the widow.

To understand how these suits arose and the positions of the parties to them, it is necessary to refer briefly to a litigation which began on 21st October 1895, and to some other facts.

The suits in which these consolidated appeals have arisen were instituted in 1916 in the Court of the Subordinate Judge of Bezwada to obtain payment

of legacies which Venkayamma, a Hindu widow, had bequeathed by her will of 30th January 1899. She died on the 9th March 1899. The due execution of the will is admitted, but the suits have been contested by the defendants on several grounds of which those which are now in the least material are that the testatrix left no property out of which the legacies could be paid; that the will has been incorrectly construed by the High Court at Madras; that the suits or one of them is barred by a previous suit which was brought in 1902; and that the suits were not brought within time. In order to understand those contentions it is necessary to refer at some length to a somewhat complicated history.

Venkayamma, the testatrix, was the widow of Venkataramayya Appa Rao, who had died before 1890. They had one child, a son, Narayya Appa Rao, who died on 4th August 1895 while he was a minor. He died unmarried and had not made a will. When he died he was the last male owner of the Medur estate. The Court of Wards had taken charge of the Medur estate during his minority and continued to be in charge of it until December 1895 when a Receiver, appointed by a Civil Court having jurisdiction, took possession of it. The estate of Medur continued to be in charge of Receivers, duly appointed, until after 1902. The Receivers acted as officers of the Civil Court, and it was their duty to bring and to defend suits affecting the estate, to collect the rents and profits of the estate, to render accounts to the Civil Courts, to invest balances of money which might be in their hands, and to pay monies received by them into a local branch of the Bank of Madras after deducting necessary and legal expenses. The monies paid into the Bank by the Receivers, and the Government promissory notes and other securities in which monies derived from the Medur estate were

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invested, were under the control of the Civil Court for the benefit of those who might be entitled to them.

The Medur estate and the Nidadavole estate—with the latter these suits are not concerned—had formed parts of a large Zamindari in the Province of Madras, and the families respectively in which they were vested were nearly related. In December 1890, Rani Papamma Rao, who was the childless widow of the last male owner of the Nidadavole estate, went through a ceremony of adopting Narayya Appa Rao as a son to her late husband. As will later be seen, it was held by the Board in 1913 that she had not power to make the adoption and that it was invalid. Until that decision of the Board in 1913 it seems to have been generally considered that the adoption was valid. Shortly after Narayya Appa Rao died in August 1895, disputes arose between Rani Papamma Rao and Venkayamma as to the right to the possession of the Medur estate. The former claimed a right to the possession as the mother by adoption of Narayya Appa Rao; the latter, alleging that the adoption was invalid, claimed a right to the possession as his natural mother. The Court of Wards, in September or October 1895, passed a resolution to hand over to Rani Papamma Rao the possession of the Medur estate unless restrained by an injunction of a competent Court before 1st December 1895, and, thereupon, Venkayamma instituted, on 21st October 1895 in the Court of the Subordinate Judge of Ellore, a suit against Rani Papamma Rao and the Collector of the Kistna district, who was the local agent of the Court of Wards, in which she claimed a declaration that the adoption of Narayya Appa Rao by Rani Papamma Rao was invalid, and also claimed to be placed in possession of the Medur estate with all the savings, appurtenances, etc., of the

estate. That suit was suit No. 35 of 1895 in the Register of the Court at Ellore.

When Venkayamma died on 9th March 1899, her suit, No. 35 of 1895, was still pending in the Court of the Subordinate Judge, and, on 1st May 1899, on the application of Venkatanarasimha Appa Rao, he and his brother Rangayya Appa Rao were brought on the record of suit No. 35 of 1895 as plaintiffs as being the two surviving uncles of Narayya Appa Rao and the nearest legal reversioners to the Medur estate. The Subordinate Judge of Ellore, on the 2nd December 1899, made a decree dismissing the suit, and Venkatanarasimha Appa Rao and Rangayya Appa Rao separately appealed from that decree to the High Court at Madras. To those appeals, Parthasarathi Appa Rao, who was a cousin of Narayya Appa Rao's natural father and had claimed a third share in the Medur estate, was made a party. He had claimed that third share in a suit No. 44 of 1899 in the Court of the District Judge of Godavari in which his claim to a third share in the Medur estate was dismissed by a decree of that District Judge on the 12th December 1903. From that decree of the District Judge of Godavari dismissing his claim to a third share Parthasarathi Appa Rao appealed to the High Court at Madras. The three appeals above mentioned were heard together by the High Court at Madras, and on the 20th November 1905, the High Court by a decree dismissed the appeals of Venkatanarasimha Appa Rao and Rangayya Appa Rao and allowed the claim of Parthasarathi Appa Rao to a third share in the Medur estate. From that decree of the 20th November 1905 of the High Court at Madras, Venkatanarasimha Appa Rao and Rangayya Appa Rao appealed to His Majesty in Council. Before the appeal came on for consideration by the Board, Rangayya Appa Rao and

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Venkatanarasimha Appa Rao had died, and Venkatadri Appa Rao, son of Rangayya Appa Rao, and Venkataramayya Appa Rao and Sobhanadri Appa Rao, sons of Venkatanarasimha Appa Rao, were brought on the record as the appellants.

On 10th December, 1913, the Board reported to His Majesty, so far as is now material, that it ought to be declared that the adoption of Narayya Appa Rao by Rani Papamma Rao was invalid, and that on the death of Venkamma Rao (Venkayamma) Rangayya Appa Rao and Venkatanarasimha Appa Rao became entitled as reversionary heirs to the Medur estate and the lands with mesne profits and movable properties appertaining thereto and that the said estate with mesne profits and the movable properties appertaining thereto ought to be divided into moieties between the appellants Venkatadri Appa Rao as to one such moiety and Venkataramayya Appa Rao and Sobhanadri Appa Rao, minors, as to the other moiety. His Majesty, on 19th December 1913, having taken that report into consideration, was pleased by and with the advice of His Privy Council to approve thereof and ordered that the same be punctually observed, obeyed and carried into execution.

It will be observed that the claim to a third share in the Medur estate which Parthasarathi Appa Rao had made was not allowed, and that the right of Rangayya Appa Rao and Venkatanarasimha Appa Rao to the possession of the Medur estate as reversionary heirs did not arise until Venkayamma had died on 9th March 1899.

The result of the appeal to His Majesty in Council established the fact that Venkayamma had a right to the income received from the Medur estate from the death of her son Narayya Appa Rao on 4th August 1895, until she died on 9th March 1899, less the expenses of

collecting it and less such expenses as were necessarily incurred in maintaining the Medur estate. That income included any interest which was paid or payable upon any Government promissory notes which the Court of Wards may have held in respect of monies received from the Medur estate before 4th August 1895, and any interest paid or payable by banks in respect of such part or parts of her income which during her life the bank or banks had received on deposit or otherwise at interest. If Venkayamma had actually received that income she might have added it to the Medur estate as an accretion, but she did not, and it remained at her absolute disposal by will or otherwise, and on her death it was part of her estate which was applicable for the payment of such legacies as she might bequeath by her will.

Owing to the disputes which have been referred to and to the necessary action taken by the Civil Court to protect the Medur estate for the benefit of whoever might be entitled to the possession of it, Venkayamma never obtained actual possession of the income to which she was entitled, but her estate, which would be available for the payment of legacies bequeathed by her, consisted to a great extent of that income to which she had been entitled, and no one who was not her executor or an administrator of her estate appointed by a Court or a legatee under her will was entitled to receive what represented that estate or any part of it. After the death of Venkayamma her estate consisted of the income to which at the time of her death she was entitled and to what represented that income which had been invested or deposited in the Government Treasury, or in a bank or banks, and of any interest which might become payable in respect of such investment as long as it remained under the control and custody of the Court. If the Court should hand over to any person not entitled to

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receive that estate it or any part of it, such person would be liable to repay it to the person entitled to receive it with such interest in respect of it as it had made, or at least as it might have made if it had been deposited at interest with the Bank of Madras or any other similar Indian bank of position.

On 30th January 1899, Venkayamma made her will which, so far as is material, was as follows :—

"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 Inuganti Venkata Rajagopala Buchi Thammayya Bahadur Garu, and from my younger brother, Chiranjivi Sri Rajah Inuganti Rajagopala Venkatarama Chinna Rao, for the expenses of the Medur Estate suit and for our maintenance and other expenses . . .

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 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."

Under the heading "Particulars of the expenses to be incurred" a list of 27 legacies followed, including the 4 legacies sued for in the suits under appeal.

The will was duly executed, and attested, and was registered shortly after the death of the testatrix.

The sole executor appointed by the will did not take upon himself the duties of an executor and died shortly after the testatrix.

It was the will of a Hindu of the Province but not of the town of Madras, and had not been made by her within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Madras, and did not relate to immovable property situate within the local limits of that original civil jurisdiction.

After the death of Venkayamma, a Sub-Magistrate of Ellore took possession of certain jewellery and other things which had belonged to her as her stridhanam. He handed over the things to the police, who gave them into the possession of Rangayya Appa Rao and Venkatanarasimha Appa Rao, who had no title to them as reversioners or otherwise, and they took possession of them and claimed them as reversioners. Thereupon the two brothers of Venkayamma, who are mentioned in the first and second clauses of her will, brought a suit on the 2nd March 1902 in the District Court of Godavari, against Rangayya Appa Rao and Venkatanarasimha Appa Rao for possession of that property. The first plaintiff in that suit having died, his son and heir was made a plaintiff. Finally a decree for possession of the property claimed was made in favour of the plaintiffs. It is necessary to refer to that suit as one of the contentions of the appellants in this appeal has been that the suit of 1902 having been brought these suits were not maintainable. That contention was founded on misconception. The causes of action were not the same. The suit of 1902 was for the wrongful conversion (trover, it used to be called in England) of goods. The present suits are to obtain payment of legacies, and there is no claim in

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respect of any of the goods to which the suit of 1902 related.

The other contentions of the appellants in this appeal were that (a) Venkayamma had no disposing power to bequeath the legacies; (b) that clauses 5 and 6 of the will had been wrongly construed by the High Court; and (c) that the suit was barred by the law of limitation.

As to the objection that Venkayamma had no disposing power to bequeath the legacies, the question is involved in the contention that clauses 5 and 6 of the will have been wrongly construed by the High Court. Their Lordships will consider these two contentions together. On the death of her son Narayya Appa Rao on 4th August 1895, she became entitled to the Medur estate and its income to hold for her own life, and that income included the interest on investments of all monies received in respect of the Medur estate collected before the death of her son on the 4th August 1895. To that income she remained entitled until her death on 9th March 1899. That income or any part of it she could, while she remained entitled to it, have added as an accretion to the Medur estate if she had wished to do so. There is no evidence to suggest that she had ever added any part of that income as an accretion to the Medur estate. She was consequently entitled to dispose of it by will or otherwise.

It has been contended on behalf of the appellants that the High Court, in the decree of 4th April 1922 in Parthasarathi Appa Rao's Letters Patent Appeal, must have misconstrued clauses 5 and 6 of Venkayamma's will as to those promissory notes in those clauses mentioned which represented monies received by the Court of Wards before 4th August 1895 in Narayya Appa Rao's lifetime, and included them in the income of the Medur estate mentioned in the third paragraph, as amended

by their Lordships, of that decree. There was no misconstruction of clauses 5 and 6 of the will. Venkayamma was, after the death of her son on the 4th August 1895, entitled to hold during her life as part of the Medur estate those promissory notes or other investments which represented monies received by the Court of Wards in respect of the Medur estate so that she might receive for her own use and as part of her income such interest as might be payable under them, but by her will she did not bequeath these promissory notes which represented monies which had been received by the Court of Wards before 4th August 1895; she only dealt with the promissory notes to which she was absolutely entitled as representing monies which had been received after her son's death by the Court of Wards as the receivers. That is the only reasonable construction of her will and the High Court in the decree of 4th April 1922, passed in Letters Patent Appeal No. 20 of 1921, was under no misconception of Venkayamma's position or of her rights.

There remains to be considered the question of limitation. The article of the first schedule of the Indian Limitation Act, 1908, which applies to the suit in which these consolidated appeals have arisen is article 123, which allows twelve years, calculated from the time "when the legacy or share becomes payable or deliverable," for bringing 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 question as to what the word "payable" means is not without difficulty. It has been contended on the part of the appellants that the legacies sued for became payable at latest twelve months after the death of Venkayamma, in which case the suits would be barred by limitation. Looking at article 123 as one of general

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application to such suits, it appears to their Lordships that a similar interpretation must be given to the words "payable" and "deliverable" as used in the article, and that a share in the property of an intestate would not be "deliverable" until the administrator, to whom letters of administration had been granted, had in his hands the share to be delivered, and, similarly, a legacy or share in a legacy does not become "payable" until the executor or other person liable to pay it has in his hands money with which it could be paid.

In the present case no one could have had in his possession or control any fund representing the income of the Medur estate, which Venkayamma had had a right to enjoy for her own use but had not received, until it had been finally decided by the Board in 1913 that the adoption of Narayya Appa Rao by Rani Pappamma Rao was invalid, and there was no other fund. It was suggested on behalf of the appellants that the plaintiffs in these suits might have brought suits for these legacies as soon as Venkayamma had died or within twelve months after her death against her heir, whoever he might then have been, and might have obtained decrees against him for the payment of the legacies when he might be in possession of assets with which the legacies might have been payable.

Without expressing any opinion as to whether such a suit could or could not have been maintained against a Hindu heir who had received no property belonging to Venkayamma, their Lordships may quote a passage from the judgment of the Board in *Bassu Kuar v. Dhum Singh*(1) as to the effect of article 97 of Act XV of 1877. The passage is as follows:—

"Baru Mal might have sued for his debt, but the utmost benefit that could have come to him from such a suit would have

been to have it suspended or retained in Court till after the decision of the appeal in the specific performance suit. Dhum Singh's defence would have been that the debt was paid by virtue of the contract, and that defence must have prevailed if the suit were heard while the decree of 1881 still stood unreversed. It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not. It would be a lamentable state of the law if it were found that a debtor, who for years has been insisting that his creditor shall take payment in a particular mode, can, when it is decided that he cannot enforce that mode, turn round and say that the lapse of time has relieved him from paying at all."

In this case no difficulty of applying article 123 of the first schedule of the Indian Limitation Act, 1908, arises when the will of Venkayamma is considered. It was a carefully drawn will bequeathing legacies of, in the aggregate, a large sum of money. Venkayamma had already, when she made her will, commenced her suit which would determine whether she was entitled to any fund out of which any legacies which she might bequeath could be paid. If the adoption of Narayya Appa Rao by Rani Pappamma Rao should be finally held to have been valid, Venkayamma and her advisers must have known that there was and would be no fund out of which the legacies could be paid. They could not be paid unless it should be finally decided that the adoption was invalid. She stated in her will that she had been very ill for four months and was afraid that she would not survive, and that she had sold the major part of her jewels and other valuables and had spent the amount (obtained by the sale of them) as well as the amount of money which she had borrowed from her two brothers, mentioned in her will, "for the expenses of the Medur estate suit and for our maintenance and other expenses," and in clause 5 directed that "the Government promissory notes and cash relating to the

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(1) (1889) I.L.R., 11 All., 47, 55 (P.C.); 15 I.A., 211, 218.

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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" in the manner which she directed. And in clause 6 she directed that "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." And then she set out as expenses to be incurred a full and complete list of the legacies to be paid. The only conclusion which, on these facts, their Lordships can arrive at is that the testatrix intended that the legacies should be payable and be paid after the final determination of the suit which she had brought for a declaration that the adoption of Narayya Appa Rao by Rani Papamma Rao was invalid and to establish her right to the income of the Medur estate. That litigation was not finally determined until the judgment of the Board was delivered in 1913, and these suits were instituted in 1916 and were within the time allowed by article 123 of the First Schedule to the Indian Limitation Act, 1908.

If any authority were necessary to show that the intention of a testatrix, when not expressly and unambiguously stated in her will, may be inferred by a Court from other facts stated or referred to in her will, that legacies bequeathed by the will should not be paid until the conclusion of litigation in which she was engaged when she made her will, it may be deduced from the judgment of TURNER, L.J., in *Lord v. Lord*(1).

(1) (1867) 2 Ch. App. 782.

In *Roddy v. Fitzgerald*(1), Lord WENSLEYDALE, in referring to the rules for the construction of wills, said :

"These rules are perfectly plain and clear. The first duty of the Court expounding the will is to ascertain what is the meaning of the words used by the testator. It is very often said that the intention of the testator is to be the guide, but that expression is capable of being misunderstood, and may lead to a speculation as to what the testator may be supposed to have intended to write, whereas the only and proper inquiry is, what is the meaning of that which he has actually written. That which he has written is to be construed by every part being taken into consideration according to its grammatical construction and the ordinary acceptance of the words used, with the assistance of such parol evidence of the surrounding circumstances as is admissible, to place the Court in the position of the testator."

And then Lord WENSLEYDALE referred to other rules to be followed by Courts in construing wills.

In *Gordon v. Gordon*(2) Lord CAIRNS, as to the construction of wills, said :—

"I take the law on this subject to have been expressed with much accuracy and felicity by Lord CRANWORTH, than whom no Judge more consistently adhered to sound and strict principles of construction in the interpretation of wills. In the case of *Abbott v. Middleton*(3) before this House, Lord CRANWORTH speaks thus: "Where, by acting on one interpretation of the words used we are driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, then, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most obvious, or the most grammatically accurate. But if the words used are unambiguous, they cannot be departed from merely because they lead to consequences which we consider capricious, or even harsh and unreasonable."

The case of *Lord v. Lord*(4) was referred to by Sir W. S. SCHWABE, C.J., by COUTTS TROTTER, J., and by

(1) (1857) 6 H.L.C., 823.
(3) (1858) 7 H.L.C., 68.

(2) (1871) 5 H.L. Cas., 254.
(4) (1867) 2 Ch. App. 782.

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KUMARASWAMI SASTRI, J., in their learned judgments in the Letters Patent Appeals.

It appears from the judgments of the Subordinate Judge of Bezwada of 29th November 1917, and from the judgment of KUMARASWAMI SASTRI, J., of 4th April 1922, that at different dates between 1903 and 1908 Rangayya Appa Rao, Venkata Narasimha Appa Rao and Parthasarathi Appa Rao each obtained on his own application to the High Court one-third of the amount standing to the credit of suit No. 35 of 1895. They each gave some security. It also appears that after the order of His Majesty in Council of 19th December 1913 had been made, Venkatadri Appa Rao, Venkata-ramayya Appa Rao and Sobhanadri Appa Rao obtained from Parthasarathi Appa Rao the one-third which he had received. For the amounts received by Rangayya Appa Rao and by Venkata Narasimha Appa Rao, their sons, as their heirs and legal representatives, are responsible.

The decrees of the High Court from which these consolidated appeals have been brought, having been amended as to one of them by substituting "income" for the words "mesne profits," were the right decrees to make in the appeals under the Letters Patent, and their Lordships will humbly advise His Majesty that these consolidated appeals should be dismissed with costs.

Solicitor for Appellants: H. S. L. Polak.

Solicitor for first respondent: E. Dalgado.

A.M.T.

APPELLATE CIVIL.

Before Mr. Charles Gordon Spencer, Officiating Chief Justice, Mr. Justice Devadoss and Mr. Justice Srinivasa Ayyangar.

G. KRISHNASWAMI AYYAR, HIGH COURT VAKIL
AND CHAKRAPANI ACHARI (PETITIONERS), APPELLANTS,

1924,
August 26.

v

T. V. SWAMINATHA AYYAR (RESPONDENT).*

Insolvency Court at Madras—Vakils—Right of audience of vakils—Insolvency Court, whether separate or subordinate Court or branch of High Court—History of Insolvency Courts—Statutes—9 Geo. IV, ch. 73—Indian Insolvency Act, 1848, 11 and 12 Vict., ch. 21, sec. 3—Indian High Courts Act, 1861 (24 and 25 Vict., ch. 104)—Indian Legal Practitioners' Act of 1879, sec. 4—Presidency Towns Insolvency Act (III of 1909), sec. 121—Effect of—Conflict of Acts—Rule of construction—Sec. 3 of Indian Insolvency Act, 1848, whether repealed by sec. 4 of Legal Practitioners' Act.

Vakils have no right of audience in the Insolvency Court at the Presidency Town of Madras.

Historically, the Insolvency Court, which was first established in India in 1828 under 9 Geo. IV, ch. 73, and was re-constituted in 1848 under the Indian Insolvency Act, 11 and 12 Vict., ch. 21, was a separate Court and was not a part or branch of the Supreme Court or of the High Court, until the Presidency Towns Insolvency Act (III of 1909) was passed, although a Judge of the Supreme or of the High Court presided over the Insolvency Court.

Under the Indian Insolvency Act, 1848, only advocates and attorneys of the Supreme Court, and no other persons whatsoever, were allowed to practise in the Insolvency Court, and after High Courts were established under the Indian High Courts Act, 1861 (24 and 25 Vict., ch. 104), the provisions of the former Act referring to the Supreme Court and Judges thereof became applicable to the High Court and its Judges under section 11 of the later Act, with the result that only advocates and

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attorneys became entitled to practise before the Insolvency Court, presided over by a Judge of the High Court.

Although, under section 4 of the Legal Practitioners' Act (XVIII of 1879), advocates and vakils, as such, are allowed to practise in any Court subordinate to the High Court and in any Court in British India other than a High Court, still this general provision of this later Act, cannot be deemed to have impliedly repealed the special provisions of section 3 of the earlier Indian Insolvency Act, 1848, which expressly prohibited any persons other than advocates or attorneys from practising in the Insolvency Court.

Even though insolvency jurisdiction was transferred to the High Court under the Presidency Towns Insolvency Act (III of 1909), and the Insolvency Court became by reason of that Act merged in the High Court, still the effect of section 121 of the Act is that, if vakils had the right of audience in the Insolvency Court before 1909, it was not taken away, but, if they had not such right previously, it was not conferred on them by the Act.

APPEAL from the judgment of Mr. Justice WALLER passed on the application of Mr. G. Krishnaswami Ayyar, a vakil of the High Court, claiming a right of audience in the Insolvency Court on behalf of Chakrapani Achari, the detaining creditor in Insolvency Petition No. 392 of 1923.

In this case an application was filed by Mr. G. Krishnaswami Ayyar, a vakil of the High Court, claiming a right of audience in the Insolvency Court on behalf of one Chakrapani Achari, the detaining creditor in Insolvency Petition No. 392 of 1923, in the matter of the insolvency of T. V. Swaminatha Ayyar. Mr. G. Krishnaswami Ayyar presented a vakalat on behalf of the creditor in the said petition. It was returned by the Deputy Registrar on the ground that vakils had no right of audience in the Insolvency Court. The matter was then brought before the learned Judge who presided over the Insolvency Court (WALLER, J.) for final orders, after notices were issued to the Bar, Vakils' and Attorneys' Associations. The matter was

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argued by Mr. G. Krishnaswami Ayyar and by the representatives of the associations; and the learned Judge held that vakils had no right of audience in the Insolvency Court at any time since 1828 until the Presidency Towns Insolvency Act, 1909, and under section 121 of that Act, no right of audience was acquired by vakils, as they did not have it before the Act. The learned Judge accordingly held that the Deputy Registrar was right in returning the vakalat. Against this order, the petitioners preferred this appeal.

G. Krishnaswami Ayyar for appellants.—Under the Letters Patent of 1800, when the Supreme Court was established, the vakils were included under the fourth class of persons who were declared competent to appear in the Supreme Court. Vakils were consequently entitled to appear in the Insolvency Court, which was presided over by a Judge of the Supreme Court. Under the Presidency Towns Insolvency Act (III of 1909), the Insolvency Court is merged in the High Court: see section 3. Vakils are allowed a right of audience on the original side of the High Court. There are no rules of the Insolvency Court to negative the right of the vakils, i.e., no rule prohibiting them from appearing in the Insolvency Court.

The Insolvency Court, before it became merged in the High Court under the Presidency Towns Insolvency Act (III of 1909), was a separate Court; it was subordinate to the High Court as appeals lay from the former to the latter Court; it was in any event a Court within British India; and under section 4 of the Legal Practitioners' Act, 1879, vakils acquired a right of audience in the Insolvency Court. Their right of audience on the original side of the High Court has been recognized under the Full Bench decision in *In the matter of the petition of the Attorneys*(1), *Numberumal Chetty v. Narasimha chari*(2), and *Mangiah Chetty v. Samiah Chetty*(3).

The term "Advocate" is not defined in the Indian Insolvency Act, 1848. It is used therefore in its ordinary sense of one who pleads for another. Even in English law an attorney is called an advocate in Bankruptcy Courts.

A. Krishnaswami Ayyar for the Vakils' Association.—Before the Presidency Towns Insolvency Act, 1909, the Insolvency

(1) (1875) I.L.R., 1 Mad., 24 (F.B.).

(2) (1916) 31 M.L.J., 698.

(3) (1908) 18 M.L.J., 565.

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Court was either part of the original jurisdiction of the High Court or was a separate or subordinate Court. If it was part of the original jurisdiction of the High Court, vakils have a right of audience in such Court under the Letters Patent, 1865, clauses 9 and 10, which correspond to clauses 17 and 18 of the Letters Patent, 1862. See also rule 583 of Original Side Rules. Unless there is something to take away the right of audience of vakils in any Act or Rules, clause 9 of the Letters Patent, 1865, gives such right to the vakils.

If the Insolvency Court was regarded as a separate Court under the Indian Insolvency Act, 1848, then, after the High Courts Act, 1861, and the Letters Patent of 1862 and 1865, the insolvency jurisdiction became part of the jurisdiction of the High Court. And the vakils thus gained a right of audience. It is not necessary that there should be an express rule giving the right.

If the Insolvency Court be deemed an independent Court even after the High Courts Act, 1861, then under section 3 of the Indian Insolvency Act, 1848, only advocates of the Supreme Court can appear in the Insolvency Court; after the Supreme Court was abolished in 1861, the position is (1) either no one can appear or (2) all can appear. The Indian High Courts Act does not say that the advocate of the High Court is the advocate of the Supreme Court. Advocate of Supreme Court in section 3 of Indian Insolvency Act cannot be read as advocate of the High Court. The advocates of the Supreme Court had to be admitted as advocates of the High Court, see High Court Rules of 1862, Rule 1.

Next, the Indian Insolvency Act, 1848, can be repealed by an Indian Statute; it has been so repealed by the Legal Practitioners' Act, 1879, section 4. That section says that a vakil can practise in any Court in British India. If it is a Court subordinate to the High Court, of course then also he can appear. Section 4 of the Act says in all Courts subordinate to the High Court and in any Court in British India which are wide enough to include the Insolvency Court. It is true, as a broad rule of construction, a general provision is controlled by a special provision; but there are special indications in section 4, by the use of the words "all" and "any," that the general provisions of section 4 of the Legal Practitioners' Act, 1879, is meant to apply to all Courts. Section 4 of that Act has repealed the special provisions of section 3 of the Indian Insolvency Act, 1848. See Craike's Interpretation of Statutes (3rd edition), page 319, and 6 M.L.J., 498.

Nugent Grant for the Attorneys' Association, in reply.—Section 121 of the Presidency Towns Insolvency Act, 1909, seems to imply that some class of practitioners had not the right of audience in Insolvency Courts before 1909. Under section 3 of the Indian Insolvency Act, 1848, vakils had no right of audience in the Insolvency Court. The insolvency jurisdiction was transferred to the High Court only under the Presidency Towns Insolvency Act, 1909. Till then the Insolvency Court was a separate Court, though a Judge of the High Court was appointed to preside over the Insolvency Court. Section 9 of the High Courts Act did not confer insolvency jurisdiction on the High Court. By section 11 of the High Courts Act, you must substitute the High Court for the Supreme Court. Power to hear advocates was conferred on the Supreme Court, and it was to be exercised by the High Court under section 11 of the High Courts Act; vakils were unknown to the Supreme Court. Letters Patent, 1865, follows the Charter Act, section 9, and allows practitioners to appear in jurisdictions under section 9 of the Act, which, however, did not include insolvency jurisdiction. The insolvency jurisdiction was exercised by the High Court not under section 9 of the High Courts Act, but under the provisions of the Indian Insolvency Act; therefore vakils cannot have right of audience under the rules of the High Court, made under the Letters Patent. On the original side, vakils get the right of audience under the Rules of 1866. See Biligiri's Rules, page 159. There is no allusion in the Rules of 1863 or 1866 to insolvency jurisdiction. The Letters Patent of 1862, 1863 or 1866 do not touch the insolvency jurisdiction which is expressly dealt with by section 3 of the Indian Insolvency Act. Vakils are not mentioned either in the rules made by the Supreme Court in 1848 (which mention only attorneys not even advocates), or in the rules made by the High Court in 1905 or in the Rules of 1910, Order XV, made under the Presidency Towns Insolvency Act, 1909. Up to the present moment, the High Court has not made any rule allowing or recognizing vakils' right of audience in Insolvency Courts. It is unnecessary to consider whether a rule allowing vakils, if made, would not be ultra vires. Under the Legal Practitioners' Act, 1879, the prohibition contained in section 3 of Indian Insolvency Act, 1848, is not affected. Section 3 of the Act of 1848 is not reconcileable with Legal Practitioners' Act, 1879, sections 4 and 5; but the former section of the earlier Act is not expressly repealed, which could have been easily done if that was the intention of the later Act.

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Indian Insolvency Act of 1848 is a special Act, and the Legal Practitioners' Act is a general Act. The maxim "*Generalia specialibus non derogant*" applies. See Maxwell on Interpretation of Statutes, page 285.

A. Krishnaswami Ayyar for Vakils' Association in reply.—So much of Act of 1848, section 3, as is covered by section 4 of the Legal Practitioners' Act, 1879, is repealed. Repeal may be effected either expressly or impliedly. For cases of implied repeal, see Craike's Statutes, page 306; Halsbury's Laws of England, Vol. 27, page 197, section 392.

"As such" in section 4, Legal Practitioners' Act, 1879, means without further permission. As regards the prohibition in section 3 of the Indian Insolvency Act, 1848, and the effect of section 11 of the High Courts Act: (1) it should be read consistently with clause 9 of the Letters Patent, 1865; (2) under section 11 of the High Courts Act the expression High Court should not be substituted wherever Supreme Court occurs, but it only deals with powers to be exercised by the High Court.

Sidney Smith for the Bar Association supported the counsel for Attorneys' Association.

JUDGMENT.

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SPENCER, OFFG. C.J.—The question that comes up for our decision in appeal is whether vakils have a right of audience in the Insolvency Court at the Presidency Town of Madras. We have heard full arguments from Mr. G. Krishnaswami Ayyar and Mr. A. Krishnaswami Ayyar on behalf of the vakils and from Mr. Grant and Mr. Sidney Smith for the advocates. The whole question has been dealt with in their arguments exhaustively and in every aspect.

Vakils appear and plead on the Original Side of the High Court at Madras, notwithstanding that the Charter of 1800 authorized only three classes of practitioners, namely, (1) *bona fide* practitioners of the law in the old Court of the recorder, which was thereby abolished; (2) barristers-at-law in England or Ireland; and (3) attorneys or solicitors admitted in one of the Courts at Westminster or otherwise capable of acting as well in

the character of advocates as of attorneys, and that the Charter went on to

"declare that *no other person or persons whatsoever* shall be allowed to appear and plead, or act in the said Supreme Court of Judicature at Madras for and on behalf of such suitors or any of them";

notwithstanding also that, in 1879, the Legal Practitioners' Act provided in section 4 that no vakil should be allowed to practise under that section before any Judge of the High Court exercising original jurisdiction in a Presidency Town.

To this day, in the High Courts of Calcutta and Bombay vakils have no right to practise on the original side. How vakils obtained a footing on the original side of the Madras High Court is a matter of history, which is set out in *In the matter of the petition of the Attorneys*(1), and *Namberumal Chetty v. Narasimhachari*(2).

I do not propose to deal in detail with the history of the original side. It is sufficient to state that clauses 7, 8, and 9 of the Letters Patent of 1862 empowered the High Court to enrol so many advocates to appear and plead, so many vakils to appear, plead and act, and so many attorneys to appear and act, as the Court deemed fit, while clause 9 of the amended Letters Patent of 1865 empowered the High Court to enrol such and so many advocates, vakils and attorneys as the Court deemed fit, and described the functions of each class of practitioners collectively without the use of the word "respectively"; that, in the rules made on August 28, 1863, under the first Letters Patent, rule 8 runs thus:

"Vakils shall not appear, plead and act for any suitor in this Court in any matter of ordinary original jurisdiction, civil or criminal, or in any matter of appeal from any case of ordinary

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civil jurisdiction or upon review of any criminal case under clause 25 of the Letters Patent,"

but rules 1, 2, and 3 made on the 1st of October 1863 recognized the right of vakils to practise on the original side; and that rules 4 and 5 made on July 5, 1866, under the amended Letters Patent of 1865 permitted vakils admitted under the rules of October 1863 to appear, plead and act for the suitors in all matters over which the Court had any jurisdiction. In *In the matter of the petition of the Attorneys*(1), it was held in 1875 by a Full Bench that these rules were within the powers of the High Court: and when the matter came up again in 1916 *COUTTS TROTTER, J., in Namburumal Chetty v. Narasimhachari*(2), felt bound to follow the earlier decision. Rule 533 of the Original Side Rules declares that "a vakil may appear, plead and act upon all proceedings, whether in Court or in Chambers." There is no mention of the Insolvency Court in any of these rules. In fact historically there is no reason to treat the Insolvency Court as a part or branch of the original side.

In 1828 Courts were established for the relief of insolvent debtors in the East Indies by the Statute 9, Geo. IV, ch. 73. The Insolvency Court was from those early days a separate Court, and the Indian Insolvency Act, 11 and 12 of Vict., ch. 21, enacted in 1848 by section 3 that a Court for the relief of insolvent debtors should be held once a month in Calcutta and so often as might be necessary within the towns of Madras and Bombay and be presided over by a Judge of the Supreme Court, and it declared that every advocate and attorney of the Supreme Courts at Calcutta, Madras and Bombay should be entitled to practise in the way of his profession in the said Courts

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(2) (1916) 31 M.L.J., 698.

and that *no other persons* should practise as advocates or attorneys in the said Courts. This section remained in force until it was repealed in 1909 upon the passing of the Presidency Towns Insolvency Act, III of 1909. When High Courts were established at Calcutta, Madras, and Bombay in 1861, the Indian High Courts Act, 24 and 25 Vict., ch. 104, made the provisions of the Indian Insolvency Act which referred to the Supreme Courts of Bengal, Madras and Bombay and to the Judges of those Courts, applicable under section 11 to the High Courts of those places so far as the provisions were consistent with that Act and with the Letters Patent.

Section 121 of the Presidency Towns Insolvency Act states,

"Nothing in this Act, or in any transfer of jurisdiction effected thereby, shall take away or affect any right of audience that any person may have had immediately before the commencement of this Act, or shall be deemed to confer such right in insolvency matters on any person who had not a right of audience before the Courts for the relief of insolvent debtors."

The effect of this section is that, if vakils had the right of audience in the Insolvency Courts before 1909, it was not taken away from them; but, if they had not such a right previously, it was not conferred on them.

No rules have been framed either before or since the passing of that Act permitting vakils to appear in insolvency proceedings before a Judge of the High Court. The rules made on December 22nd, 1848, for regulating the proceedings in the Court for the relief of insolvent debtors speak only of the attorney of every prisoner representing him in the said Court. The Insolvency Rules of 1910 in Order XV speak only of attorneys and advocates representing insolvents in the Insolvency Court. Section 9 of the Indian High Courts

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Act of 1861 confers on the High Court jurisdiction in all civil, criminal, admiralty and vice-admiralty, testamentary, intestate and matrimonial matters, but is silent on the subject of insolvency. Clause 18 of the Letters Patent of 1865 refers to the Court for the relief of insolvent debtors as a Court governed by its own laws and held before one of the Judges of the High Court. In paragraph 13 of the Secretary of State's letter, dated 14th May 1862, that accompanied the Letters Patent, the omission to reserve the right of pleading in the Insolvent Court after the issue of the Charter to attorneys of the Supreme Court is explained as due to the fact that the Insolvent Court was a separate tribunal, not affected by the Act authorizing the Letters Patent. In conclusion, it is stated, (The Insolvent Court)

"will continue a separate Court, though for the future presided over by a Judge of the High Court. The attorneys, therefore, will, as heretofore, practise in accordance with the rules of the Insolvent Court itself."

Although the Court for the relief of insolvent debtors was always treated as a *separate Court* presided over by one of the Judges of the Supreme Court or *High Court*, as the case might be, the fact that appeals lie from the decision of the presiding Judge to the High Court, and the fact that section 15 of the High Courts Act invests the High Court with the power of superintendence over all Courts which are subject to its appellate jurisdiction do not necessarily make it a *subordinate Court* any more than the Original Side Court or an Admission Court, from which appeals lie under the Letters Patent against the decision of a single Judge, can be described as subordinate to the rest of the High Court. Rule 13 of the Appellate Side Rules, chapter III, which states that advocates, vakils, and attorneys of the High Court are entitled to practise in any of the Courts subordinate to the High Court has therefore no application.

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For the vakils, reliance was placed on section 4 of the Legal Practitioners' Act. This declares that any person entered as an advocate or vakil on the roll of any High Court who ordinarily practises in that Court or in some Court subordinate thereto shall, notwithstanding anything herein contained, be entitled, as such, to practise in any Court in British India other than a High Court on whose roll he is not entered, or, with the permission of the Court, in any High Court on whose roll he is not entered. Although this Act was passed in 1879, it did not purport to expressly repeal, section 3 of the Indian Insolvency Act. No doubt, under clause 44 of the Letters Patent of 1865, the provisions of the Letters Patent were made subject to the law making powers of the Governor-General in Council, but I should hesitate to imply that an earlier Act is repealed by implication by a later Act without more express words to that effect. In Volume XXVII, Halsbury's Laws of England, page 197, we find the principles laid down, that a statute may be repealed by implication (1) if its provisions are wholly incompatible with the subsequent statute or (2) if the two, standing together, will lead to wholly absurd consequences or (3) if the entire subject-matter of the first is taken away by the second. Now, section 4 of the Legal Practitioners' Act is not wholly incompatible with the provisions of the Indian Insolvency Act or of the Presidency Towns Insolvency Act. It merely provides that a person entered on the rolls of a High Court, who ordinarily practises in that Court or in some Court subordinate to it, may practise, *as such*, in any High Court where he is not enrolled if he gets the permission of that Court, or without such permission he may practise in any other Court in British India but a High Court.

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The words "as such" denote that his claim to practise must be in his capacity as an enrolled vakil ordinarily practising in the Court where he is enrolled. As there are no rules made by the Madras Court for the practice of vakils in the Insolvency Court, such practice is not a feature of their ordinary practice, and therefore they cannot claim a right to practise, *as such*, in any other Court. For instance a Madras High Court Vakil could not legitimately claim to be heard in the Insolvency Court of Bombay, because he does not ordinarily practise in the Insolvency Court of Madras, nor could a vakil demand to be allowed to practise as an advocate in a Court on whose rolls he is not entered. By this section advocates and vakils who wish to practise outside the High Court in which they are enrolled are placed on the same footing as regards obtaining permission of the High Court where they wish to practise when they are not on the roll of that Court.

On the principle of *generalia specialibus non derogant* I think that section 4 of the Legal Practitioners' Act was not intended to override the special provisions relating to insolvency in the Presidency Towns.

Mr. G. Krishnaswami Ayyar at one time suggested that the word "advocate" in the Indian Insolvency Act might be understood in its wider significance of one who pleads the cause of another; but it is clear from the Charter Act that it was meant to include only those barristers who had been enrolled as advocates in the Courts at Calcutta, Madras and Bombay, respectively, and those who had been practitioners in the Recorder's Court, if any such were still alive in 1848.

I have come to the conclusion that the order of WALLER, J., refusing to allow vakils to appear and plead in the Insolvency Court is correct. The appeal will be dismissed but without costs.

DEVADOSS, J.—This is an appeal from the order of WALLER, J., upholding the action of the Deputy Registrar, Original Side, who returned a vakalat filed in I.P. No. 392 of 1923 by Mr. G. Krishnaswami Ayyar on the ground that a vakil had no right of audience in the Insolvency Court. Mr. G. Krishnaswami Ayyar has preferred this appeal and the Vakils' Association, Madras, supports it. The Bar Association and the Attorneys' Association, Madras, oppose the appeal. The appellant's contention is that a vakil has a right of audience in the Insolvency Court. The arguments advanced on behalf of the appellant may be summarised under the following heads:—

(1) The vakils had a right of audience in the Supreme Court, Madras, and are, therefore, included in the class of practitioners mentioned in section 3 of 11 and 12 Vict., ch. 21.

(2) Even if they had not the right of audience in the Supreme Court, after the establishment of the High Court they were given by the High Courts Act and the Letters Patent the right of audience on the original side, and section 3 of 11 and 12 Vict., ch. 21, should be read as applying to all the practitioners of the High Court.

(3) The class of practitioners mentioned in section 3 of 11 and 12 Vict., ch. 21, having become extinct, the term "advocate" used in section 3 of the Act should be held to apply to vakils who exercise the profession of advocates.

(4) The Insolvency Court being a Court subordinate to the High Court, a vakil had a right of audience in that Court under section 4 of the Legal Practitioners' Act. Even if it was not a subordinate Court, the Court for the relief of insolvent debtors having been a Court

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in British India, the vakil had a right of audience in that Court.

(5) The Court for the relief of insolvent debtors having been abolished and the insolvency jurisdiction having been vested in the High Court by the passing of the Presidency Towns Insolvency Act, a vakil of the High Court has the right of audience when the High Court exercises insolvency jurisdiction.

(6) Granting that the High Court has power to frame rules prohibiting vakils from appearing in insolvency cases, no such rule having been framed, a vakil's right of audience on all sides of the High Court subsists.

The question involved in this appeal is the right of audience of a vakil before a Judge exercising original insolvency jurisdiction and before the Deputy Registrar, Original Side, who is empowered under the rules to hear and determine certain matters. The question whether a vakil is entitled to appear in appeals from orders and judgments of the Judge exercising original insolvency jurisdiction was settled so far back as 1888 in favour of the vakils. In O.S. Appeal No. 10 of 1888 a Bench of the High Court held that a vakil was entitled to appear in an appeal from an order of the Insolvency Commissioner. In this appeal we are therefore concerned with the right of the vakil to appear in what I may call, for brevity's sake, original insolvency cases.

In order to determine whether a vakil had the right of audience in the Supreme Court, it is necessary to see what class of practitioners were allowed to practise before the Supreme Court. A Mayor's Court was established in Madras in 1753. It was superseded by the establishment of the Recorder's Court in 1798. The Supreme Court of Madras was established by a Royal Charter in 1800 by virtue of the Government of India

Act of 1800. The Letters Patent of that year contained the following provision as regards the practitioners of that Court : They

“authorized and empowered the Supreme Court of Judicature to approve, admit and enrol such and so many persons being *bona fide* practitioners of the law in the said Court of the Recorder at Madras at the time of the publication of this our Charter at Madras or having been admitted barristers-at-law in England or Ireland or having been admitted attorneys or solicitors in one of our Courts at Westminster or being otherwise capable according to such rules and qualifications as the said Court shall for that purpose make and declare, to act as well in the character of advocates as of attorneys in the said Court. And we do declare that no other person or persons whatsoever shall be allowed to appear and plead or act in the said Supreme Court of Judicature at Madras for and on behalf of such suitors or any of them.”

The persons permitted to practise before the Supreme Court under the Letters Patent were :

(1) Persons being *bona fide* practitioners of the Law in the Court of the Recorder at Madras ;

(2) Barristers-at-law in England or Ireland ;

(3) Attorneys or solicitors in one of the Courts at Westminster ;

(4) Being otherwise capable according to such rules and qualifications as the said Court shall for that purpose make and declare to act as well in the character of advocates as of attorneys in the said Court.

It is contended that the fourth class contemplated in the Letters Patent were vakils. What the clause means is, persons otherwise capable according to such qualifications as the Court shall for the purpose make and declare, may be admitted to practise as advocates or attorneys. It was never intended by that clause that there was to be a class of practitioners who had the right to appear, plead and act. Such a practitioner was unknown to the Courts in England and to the Mayor's Court as well as the Recorder's Court at Madras. The

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Supreme Court was established on the model of the King's Bench Court as is clear from the Supreme Courts Act of 1800, 39 and 40, Geo. III, ch. 79. The Letters Patent establishing the Supreme Court of Judicature at Madras, dated 26th December 1800, states, the Court was to have

"such jurisdiction and authority as our justices of our King's Bench Court have and may lawfully exercise within that part of Great Britain called England as far as circumstances may permit."

The King's Bench Court knew of no class of practitioners who could appear, plead and act. An attorney appears and acts, and an advocate appears and pleads and their privileges and functions as well as their disabilities are well defined. It would be doing violence to language to construe the words of the Letters Patent as introducing a class of practitioners unknown to the framers of the Act. That the Supreme Court recognized no class of practitioners as vakils is clear from the rules of the Supreme Court now available. Under the rules in force so late as 1849, only attorneys, solicitors and proctors were recognized as the persons who could act in that Court. There is no evidence that a vakil was ever allowed to practise before the Supreme Court. This circumstance may be taken to be some indication of what was meant by the Letters Patent and what the Judges and practitioners understood them to mean. The Letters Patent empowered the Supreme Court to enrol persons properly qualified according to its rules as advocates or attorneys and did not empower it to enrol persons who as practitioners had the right to appear, plead and act. The clause

"we do declare that no other person or persons whatsoever shall be allowed to appear and plead or act in the said Supreme Court of Judicature at Madras for and on behalf of such suitors or any of them"

is very emphatic. The Letters Patent did not give a wide discretion to the Supreme Court but empowered it to enrol duly qualified persons as advocates or attorneys whose functions, privileges and disabilities were well known to the framers of the Supreme Courts Act of 1800. That their Lordships of the Privy Council attach great importance to the negative clause of the Letters Patent in construing the whole clause is clear from the case reported in *Morgan v. Leech*(1). In the light of this decision it cannot be reasonably contended that the fourth class contemplated by the Letters Patent were the vakils.

Second point.—Before the Crown took over the Government of India, the Supreme Court or the King's Court exercised jurisdiction within the limits of the Madras city, and the East India Company's Courts called Sudder Adalat and Fouzdari Adalat, exercised appellate jurisdiction, civil and criminal, over the territories of the East India Company in the Presidency of Madras. After the Crown took over the Government of India, the Courts continued to exercise their several functions till the passing of the Indian High Courts Act of 1861, 24 and 25 Vict., ch. 104. It empowered the Crown to establish High Courts of Judicature in Bengal, Madras and Bombay. By section 8 of the Act the Supreme Court of Madras and the Sudder Adalat and Fouzdari Adalat of this Presidency were abolished upon the establishment of the High Court. Clause 7 of the Letters Patent of 1861 authorized and empowered the High Court to approve, admit and enrol such and so many advocates as to the said High Court should seem meet. Clause 8 authorized and empowered the High Court to approve, admit and enrol such and so many

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vakils as the High Court should deem fit. Clause 9 relates to attorneys. Clause 10 empowered the High Court to make rules for the qualification and admission of advocates, vakils and attorneys. The High Court was given civil and criminal appellate jurisdiction and extraordinary original jurisdiction over the Presidency, and ordinary original civil and criminal jurisdiction within such local limits as may be declared by law or regulation of the Governor in Council. Rule 7 of the High Court Rules, dated 28th August 1862, allowed vakils to appear, plead and act in all matters of appellate jurisdiction, civil or criminal, and in matters of extraordinary original civil jurisdiction under section 13 of the Letters Patent. It is clear from the rules that vakils had no right of audience on the original side of the High Court, whether it exercised civil or criminal jurisdiction and also in appeals from orders, judgments and decrees passed in the exercise of original jurisdiction. For the first time in 1863 it appears from the rules of the High Court, dated 1st October 1863, that some vakils were permitted to practise on the original side. A few vakils were enrolled as vakils on the original side and a separate roll was maintained for that purpose. Rule 2 relating to remuneration and practice of the vakils on the original side of the High Court was framed on the 1st October 1863. In 1865 Amended Letters Patent were issued. Clause 9 of the Letters Patent empowered the High Court to enrol advocates, vakils and attorneys. Fresh rules and orders relating to advocates, vakils and attorneys and the taxation for allowance of costs were framed by the High Court and were published on 5th July 1866. The rules of 1863 were to be read as part of the rules so far as the qualification and admission of advocates, vakils and attorneys were concerned. The

rules recognized a vakil as a practitioner on the original side. In 1874 the attorneys objected to the vakils practising on the original side on the ground that the rules permitting them to practise were *ultra vires*. But a Full Bench of the High Court held that the rules were *intra vires*. Vide *In the matter of the petition of the Attorneys*(1). It is neither desirable nor expedient to question the correctness of the decision. It was not challenged till quite recently. Vested interests have been created and on the principle that what has been once settled should not be lightly upset it is not proper to question the soundness of the decision.

The right to appear on the original side did not *ipso facto* give the vakil a right to appear in the Court for the relief of insolvent debtors. The Letters Patent did not give insolvency jurisdiction to the High Court. The Court for the relief of insolvent debtors was first established by an Act of Parliament, 9 Geo. IV, ch. 73, and the Act was extended from time to time. In 1848, 11 and 12 Vict., ch. 21, was passed, wherein it was enacted that

“the Court for the relief of insolvent debtors was to be holden by any Judge of the Supreme Court of Judicature in Calcutta and within the towns of Madras and Bombay and ‘every advocate’ and attorney of the said Supreme Courts at Calcutta, Madras and Bombay, respectively, shall be entitled to practise in the way of his profession in the Court for the relief of insolvent debtors of that Presidency and no other persons shall practise as advocates or attorneys in the said Court for the relief of insolvent debtors.”

This section did not allow vakils to practise before the Court for the relief of insolvent debtors.

Third point.—It is next argued that the class of practitioners mentioned in section 3 of 11 and 12 Vict., ch. 21, ceased to exist when the Supreme Court was

(1) (1875) I.L.R., 1 Mad., 24 (F.B.).

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abolished and there could not have been advocates and attorneys of the Supreme Court when there was no such Court and therefore the word "advocate" could only apply to one who exercised the profession of an advocate, and a vakil being one who exercised the profession of an advocate became entitled to appear before the Court for the relief of insolvent debtors. Section 3 of 11 and 12 Vict., ch. 21, recognized only advocates and attorneys. When the Supreme Court ceased to exist the advocates and attorneys of that Court became advocates and attorneys of the High Court in its original civil and criminal jurisdiction, and special provision was made by rule 4 of the rules, dated 28th August 1862, for their being enrolled as vakils on the appellate side of the High Court. The rules of 1862 did make a marked distinction between the original and the appellate sides of the High Court. The advocates and attorneys of the Supreme Court became advocates and attorneys of the High Court. Their qualifications, rights and privileges as well as their disabilities remained the same. Though the Supreme Court was abolished, all its functions, powers and privileges were transferred to the High Court by section 10 of the High Courts Act of 1861. This section was repealed by 28 and 29 Vict., ch. 15, section 2. Section 11 of the High Courts Act of 1861 made applicable to the High Court and the Judges thereof all the provisions then in force of Acts of Parliament, or of any orders of Her Majesty in Council, or of any Acts of the Legislature of India, etc. What was applicable to the Supreme Court by virtue of section 3 and other provisions of 11 and 12 Vict., ch. 21, became applicable to the High Court and the Judges thereof. Clause 18 of the Letters Patent makes it clear that the law and practice of the Court for the relief of insolvent debtors

was not to be changed by the abolition of the Supreme Court and by the establishment of the High Court but was to be continued as it was before 1861. Clause 18 is in these terms :

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"And we do further ordain that the Court for the relief of insolvent debtors at Madras shall be held before one of the Judges of the said High Court of Judicature at Madras, and the said High Court and any such Judge thereof shall have and exercise, within the Presidency of Madras, such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in India."

The portion of the clause

"such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in India"

leaves no room for doubt that the old order of things was to continue. The Chief Justice of the High Court deputed one of the Judges to preside over the Court for the relief of insolvent debtors, and he was known as the Commissioner in Insolvency. That Court was governed by the laws relating to the insolvent debtors in India. With regard to the practitioners, section 3 of 11 and 12 Vict., ch. 21, was in force. Before 1861 only advocates and attorneys practised before the Court for the relief of insolvent debtors, and after 1861 the same practitioners continued to practise and section 3 did not permit any other person to practise before it.

The contention that advocates and attorneys ceased to exist when the Supreme Court was abolished and therefore the advocates and attorneys of the High Court had no right of audience in the Court for the relief of insolvent debtors is not worth serious consideration in the light of clause 18.

The extreme contention that a vakil is an advocate and therefore he is entitled to practise in the Insolvency Court overlooks plain facts. Advocates are a distinct

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class with qualifications, rights and privileges and disabilities of their own. They are enrolled as a distinct class as advocates, whereas vakils do not possess the same qualifications and are not subject to the same disabilities. A vakil therefore cannot come within the term "advocate" as used in the High Courts Act, in the Letters Patent and in section 3 of 11 and 12 Vict., Ch. 21. It is unnecessary to consider this contention further.

The Court for the relief of insolvent debtors was not a part of the High Court but a distinct Court and any practitioner of the High Court was not as such entitled to a right of audience unless he fulfilled the conditions laid down in section 3 of 11 and 12 Vict., ch. 21.

Fourth point.—"The Court for the relief of insolvent debtors was a Court subordinate to the High Court, and under section 4 of the Legal Practitioners' Act, a vakil was entitled to appear in that Court."

It is argued that the Court for the relief of insolvent debtors was a Court subordinate to the High Court because the High Court was empowered to make rules for that Court and was authorized to call for reports and hear appeals from it. There is no warrant for saying that the Court for the relief of insolvent debtors was a Court subordinate to the High Court. The original side of the High Court is presided over by one or more Judges of the High Court. It can by no means be said to be a Court subordinate to the High Court. The High Court frames rules for the conduct of business on the original side and hears appeals from the orders and decrees passed on that side. The original side of the High Court is a part of it and not a Subordinate Court. The Court for the relief of insolvent debtors was a distinct and separate Court established by an Act of

Parliament and was presided over by one of the Judges of the Supreme Court, Madras, and after the High Court was established, by one of the Judges of the High Court; and appeals from orders and judgments in insolvency cases lay to the Supreme Court during its existence and thereafter to the High Court. This circumstance did not make the Court for the relief of insolvent debtors a Court subordinate to the High Court within the meaning of section 4 of the Legal Practitioners' Act.

It is next urged that, even if the Court for the relief of insolvent debtors was not a Court subordinate to the High Court, section 4 of the Legal Practitioners' Act authorized a vakil to practise in all the Courts in British India except a High Court on the roll of which he was not entered, and the Court for the relief of insolvent debtors being a Court in British India a vakil was entitled to practise before it. If this contention is to be upheld an attorney on the roll of the Madras High Court would be entitled to practise in the Court for the relief of insolvent debtors in Bombay or Calcutta.

Great reliance is placed upon the words "and all" used in section 4. The same words are used in section 5 which relates to attorneys. From the use of these two words it cannot be said that the legislature intended to repeal section 3 of 11 and 12 Vict., ch. 21. When the High Courts of Bengal, Bombay and Madras had not insolvency jurisdiction *qua* High Courts, it would be imputing absurdity to the Indian legislature to say that it intended that a vakil on the roll of the High Court should have the right to practise before the Court for the relief of insolvent debtors established by a special Act of Parliament wherein it was enacted what class of practitioners should practise before it. It is strongly urged on behalf of the appellant that section 3 has been

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impliedly repealed by the enactment of section 4 of the Legal Practitioners' Act. The principle upon which the Courts should interpret a later Act as repealing a former enactment by implication has been laid down by eminent Judges, and the tests which they lay down do not apply to the present case. In *Dobbs v. Grand Junction Water-works Company*(1), FIELD, J., in delivering the judgment of the Court observes as follows :—

"Repeal by implication is never to be favoured; it is no doubt the necessary consequence of inconsistent legislation whenever it occurs, but which must not be imputed to the legislature unless absolutely necessary."

In *Seward v. "Vera Cruz"*(2), EARL OF SELBORNE, L.C., lays down the principle in the following terms :

"Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that the earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so. For that principle I may refer to *Hawkins v. Gathercole*(3)."

A. L. SMITH, J., states the principles upon which the Court should be guided in construing whether a later enactment repeals a former one by implication in *Kutner v. Phillips*(4):

"Now a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together, in which case the maxim *leges posteriores contrarias abrogant* applies. Unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied, and special Acts are not repealed by general Acts, unless there is some express reference to the previous legislation or unless there is a necessary inconsistency in the two Acts standing together: *Thorpe v.*

(1) (1882) 9 Q.B.D., 151 at 158.

(3) (1855) 6 De.M. G., 1.

(2) (1885) 10, App. Cas., 59 at 86.

(4) [1891] 2 Q.B. 267 at 271.

Adams(1). Lord COKE in *Gregory's Case*(2), lays it down that a later statute in the affirmative shall not take away a former Act, and *eo potiore* if the former be particular and the latter be general; and Lord HARDWICKE in the case of *Middleton v. Crofts*(3) is to the same effect."

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Lord BLACKBURN explains the principles in 'his own inimitable way in *Garnett v. Bradley*(4):

"I think that where only general words are used there is a strong presumption that the legislature did not intend to take away a particular privilege, right, or property, of a particular class, unless they have done something to show that. If they have done something in such a way as would show that that was their intention, if they have said in negative words that those rights or privileges shall all be taken away, any enactment to the contrary notwithstanding, that would prevent the presumption arising at all. But in the absence of that, I think it is an intelligible principle to say that the legislature shall not be presumed to have done anything unfair, and to have taken away this particular privilege, not having stated openly that they meant to take it away, or in such open or clear language that the persons affected might come and resist and use arguments to show why it should not be taken away, but having simply used general words quite consistent with their never having thought of this privilege at all. I think, my Lords, that that principle will reconcile almost all the cases; certainly it will reconcile all I have cited, and it is a good and intelligible principle."

See Browne's Legal Maxims, 7th Edition, page 19.

11 and 12 Vict., ch. 21, was a special enactment. The Legal Practitioners' Act is a general Act made applicable to the whole of India. It cannot be said that, in passing a general Act like the Legal Practitioners' Act, the rights and privileges enjoyed by a particular class of persons under a special enactment which established a particular Court, were taken away and that the Legislature intended to alter the existing state of things and intended to repeal section 3 of 11 and 12 Vict., ch. 21. The intention of the legislature not to alter vested

(1) (1871) 6 C.P., 125.

(3) (1736) 2 Atk., 659.

(2) (1596) 6 Rep., 19 (b).

(4) (1878) 3 App. Cas., 944 at 969.

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rights or existing state of things is clear from the proviso to section 4 itself. That proviso is in these terms :

“ Provided that no such *vakil* or pleader shall be entitled to practise under this section before a Judge of the High Court, Divisional Court or High Court exercising original jurisdiction in a Presidency Town.”

When the legislature took care to perpetuate the state of things existing in 1878 in Bombay and in Calcutta in the High Court itself for the benefit of whose practitioners it was enacting section 4, can it be said that the legislature intended to throw open the Insolvency Court to the *vakils*? I think this proviso is an answer to the contention of the appellant.

In construing section 4 the reason for enacting it should not be overlooked. Before the Legal Practitioners' Act of 1879 was passed, advocates and *vakils* of the High Court had to get permission from the presiding Judge of the District Court and other Subordinate Courts before they could appear and plead in such Courts, though in Madras the High Court by its rules of 1863 gave advocates and *vakils* the right to appear in all the Subordinate Courts. In order to remove this restriction of the right of the advocates and *vakils* to appear before the Subordinate Courts section 4 was enacted. The Act was not primarily intended for the practitioners on the roll of the High Court but for the pleaders not on the roll of the High Court. Only sections 4, 5, 7, 16, 25, 27, 32 and 36 are made applicable to advocates, *vakils* and attorneys admitted and enrolled by the High Court under the Letters Patent. This contention of repeal by implication is an untenable one.

Fifth point.—In 1909 the Presidency Towns Insolvency Act was passed repealing 11 and 12 Vict., ch. 21. The Act gave insolvency jurisdiction to the High Courts

of Judicature at Fort William, Calcutta, Bombay and Madras, and the Chief Court of Burma. The insolvency jurisdiction is now one of the several jurisdictions of the High Court. It is contended that the *vakil* is entitled to appear before the High Court whatever jurisdiction it may exercise. Section 121 of the Presidency Towns Insolvency Act was specially enacted to preserve the state of things prevailing on the date of the passing of the Act with regard to the rights and privileges of the practitioners entitled to practise in the Court for the relief of insolvent debtors. The section did not confer any right of audience on persons who had it not before the passing of the Act. Section 121 is in these terms :

“ Nothing in this Act, or in any transfer of jurisdiction effected thereby, shall take away or affect any right of audience that any person might have had immediately before the commencement of this Act, or shall be deemed to confer such right in insolvency matters on any person who had not a right of audience before the Courts for the relief of insolvent debtors.”

The section is emphatic in its terms. The Court for the relief of insolvent debtors did not allow *vakils* to practise before it. By the transfer of the jurisdiction to the High Court the right of audience which did not exist before was not conferred on any class of practitioners. In order to prevent the practitioners of the High Court who had not the right to appear in the Court for the relief of insolvent debtors claiming the right of audience in the new jurisdiction, section 121 was enacted.

Before the passing of the Presidency Towns Insolvency Act the rules framed for the conduct of the business in the Court for the relief of insolvent debtors recognized only one class of practitioners, namely, attorneys—see rules 117 and 118 of the rules under 11 and 12 Vict., ch. 21. After the passing of the Presidency Towns Insolvency Act fresh rules were framed by the Madras

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High Court. They also recognized only attorneys—vide Order XV, rules 121 to 131 of the rules framed under Presidency Towns Insolvency Act. For nearly a century, only advocates and attorneys were recognized as practitioners in the Court for the relief of insolvent debtors. For nearly half a century after the establishment of the High Court, no vakil claimed a right of audience in the Court for the relief of insolvent debtors. After the passing of the Act of 1909, there is nothing to show that, till this case came up, any vakil claimed the right of audience in the Insolvency Court. On the principle that vested rights should not be lightly interfered with and that the existing state of things should be maintained, section 121 was enacted. It denies vakils the right of audience when the High Court exercises original insolvency jurisdiction. A very strong case must be made out before a long-established practice could be considered as illegal or opposed to law: In this connexion I may refer to a decision of FLETCHER, J. in *A vakil's application, In re.*(1). In that case a vakil claimed a right to file a warrant of attorney in respect of a suit pending before the Midnapur District Court, in which a rule had been issued on behalf of the defendant calling upon the plaintiffs to show cause why the suit should not be transferred to the High Court in its extraordinary original civil jurisdiction. FLETCHER, J., refused to allow the vakil to appear and made the following observations at page 854:

“There has been a long-continued practice in which vakils have never appeared, dating from the establishment of the High Court in 1862 and continuing down to 1910; and one would have thought that, had the vakils the right to appear, some exercise or claim to exercise that right would have been put forward during a period of almost half a century. I am satisfied that the claim to appear on an application for transfer has never yet been

(1) (1910) I.L.R., 37 Cal., 853.

made. That being the established practice of this Court, it would be obviously improper for a single Judge sitting on the original side to depart from a practice regulating the various branches of the profession for such a period unless he was satisfied that the practice was wrong.”

The High Courts of Calcutta and Bombay have not thrown open the insolvency side of the High Court to vakils. This may not be a satisfactory argument against the appellant's contention, but it shows that the other High Courts have taken the same view. At least it shows that the vakils did not put forward a right to appear in insolvency cases. I am quite satisfied that section 121 is a bar to the vakil's claim to appear in insolvency cases.

Sixth point.—It is further urged that granting that the High Court has power to frame rules prohibiting vakils from appearing in insolvency cases, no such rules have been framed and the vakil's right of audience on all sides of the High Court subsists. The Act which created the Court for the relief of insolvent debtors laid down what class of practitioners were to practise before it, and unless it can be held that the law relating to insolvency jurisdiction and its practice has been changed, it would not be open to a class of practitioners who had not the right to practise in an Insolvency Court to claim that right now. There are no rules prohibiting vakils from appearing in insolvency cases. Nor are there rules permitting them to appear in insolvency matters. The rules relating to practitioners both before and after the passing of the Indian Insolvency Act apply only to attorneys. There are no rules providing for the remuneration of vakils and taxation of their costs in insolvency matters. A safe inference can be drawn from the absence of rules as to remuneration of vakils in insolvency matters that the High Court denied them the right of audience in insolvency cases. The long established

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practice has to be taken into consideration in deciding this point. Though there are no positive rules prohibiting a vakil from practising in the Insolvency Court, yet it must be presumed that the High Court gives effect impliedly to section 3 of 11 and 12 Vict., ch. 21 and section 121 of the Presidency Towns Insolvency Act. If the vakils have no right to appear in insolvency matters, the absence of a rule prohibiting them would not entitle them to appear in such cases. It was vehemently argued that the High Court could not make rules prohibiting vakils from appearing in the Insolvency Court. The High Court has power to frame rules for regulating the conduct of advocates, vakils and attorneys, and it has also power to frame rules with regard to their rights and privileges. The High Court can frame rules, if it likes that a vakil shall not practise before the Insolvency Court. It is unnecessary to pursue this matter further as there are no rules prohibiting vakils from appearing in insolvency matters. The absence of any rule prohibiting vakils from appearing in insolvency matters does not give them the right to appear. On a full and anxious consideration of the question, I have no hesitation in holding that a vakil has no right of audience in insolvency matters. The appeal fails and is dismissed.

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SRINIVASA AYYANGAR, J.—The question raised in this appeal has been invested with almost a sensational importance by reason of a long-standing and perhaps natural jealousy between two important and influential sections of the Bar in Madras. So far as I am personally concerned, the process of coming to a decision on such an important question has not been rendered easier for me by the bias in my mind imbibed, albeit unconsciously, during my close association with three generations of one of those sections of the Bar. I am now free

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to confess that during many years past the belief that the vakils had an unquestionable right of audience in the Insolvency Court and that, therefore, their exclusion from it has been maintained only by the continued perpetration of a wrong has been one of the cardinal articles of creed in that branch of the profession and the names of some of the most eminent lawyers who belonged to that branch of the profession have come down associated with that faith. I have had, therefore, necessarily to steel myself against all such preconceived bias and approach the decision of the question merely as a dry question of law. After giving my earnest and anxious consideration to all the aspects of the arguments so ably placed before us by the learned gentlemen who appeared to represent the various branches of the profession, I have felt bound to come to the conclusion that under the law and the rules of Court, as they stand at present, the vakils have no right of audience in the Insolvency Court. By the courtesy of my Lord the CHIEF JUSTICE, I have had the advantage of perusing his judgment. It is not, therefore, necessary for me to go over the entire ground. Mr. G. Krishnaswami Ayyar argued that even prior to the constitution of the High Court in 1861 under the Charter Act, vakils had a right of audience in the Insolvency Court as constituted by 11 and 12 Vict., ch. 21. I am constrained to observe that that branch of his argument was more subtle than convincing and I am not sure that he was himself inclined seriously to press it. Mr. A. Krishnaswami Ayyar who appeared for the Madras High Court Vakils' Association confined himself only to two arguments, both of which call for a close and critical examination. The pith of the contentions with regard to these two arguments may be summed up somewhat as follows: When under the Charter Act the High Court was established in the year

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1861 the Insolvency Court established under 11 and 12 Vict., ch. 21 either remained and continued as a separate Court or else became merged in the High Court. If it be held that it became merged in the High Court, we shall show that as High Court vakils enrolled as such on the rolls of the High Court we are entitled, in the absence of any express rules prohibiting the same, to an audience in the Insolvency Court and we shall also show that by express rules the right of practising in all the jurisdictions of the Court has been expressly granted to us. If, on the other hand, it should be held that even after the constitution of the High Court the Insolvency Court remained and continued a separate Court, then we say that on the passing of the Legal Practitioners' Act of 1879 and under the provisions of section 4 of that enactment we became entitled to practise before the Insolvency Court, because that Court is subordinate to the High Court and subject to its supervision or is at any rate a Court in British India not being a High Court. At first sight this dilemma seems no doubt staggering and almost unanswerable. I shall first deal with the first branch of this dilemma, namely, the arguments based on the theory of the merger of the Insolvency Court in the High Court. I am unable to see my way to accept any such theory of merger. The Court for the relief of insolvent debtors was the creature of a separate Parliamentary Statute, 11 and 12 Vict., ch. 21. That statute is independent and complete in itself. The only connexion which that Court had under that statute with the Supreme Court at the time was that the person to be appointed the Commissioner in insolvency was to be one of the Judges of the Supreme Court. This and any other incidental connexions with the Supreme Court cannot take away from the statutory independence as a separate Court of the Court for the

relief of insolvent debtors. The Charter Act of 1860 and the Letters Patent issued thereon did no more than substitute the High Court in the place of the Supreme Court for purposes of such incidental connexions. There are no apt words in any enactment by which it could be deemed that the Court for the relief of insolvent debtors either became abolished or was merged in the High Court. It is not, therefore, necessary for me to consider the arguments based on the theory of merger. I admit there would be considerable force in the arguments advanced on the basis of the theory of merger if such merger could be found: but as it could not be found that there has been any such merger, no useful purpose is likely to be served by considering those arguments.

We are then left only with the other branch of the dilemma, namely, that of the Insolvency Court having continued as a separate Court in British India until the passing of the Legal Practitioners' Act and the enactment of section 4 therein. I feel I cannot agree with the contention that as a separate Court the Insolvency Court was not a Court subordinate to the High Court. The provisions of law for the High Court making rules, appointing officers, etc., are of such a character which to my mind would make the Insolvency Court subordinate to the High Court within the meaning of any enactment and certainly within the meaning of section 4 of the Legal Practitioners' Act. It is not necessary for me to labour that point, because it is inconceivable that the Insolvency Court should not be held to be at any rate a separate Court in British India. Under section 4 of the Legal Practitioners' Act every High Court vakil is given a right to practise in every Court in British India other than the High Court on the rolls of which he is not enrolled. If therefore the Insolvency Court is a

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separate Court in British India, it follows that High Court vakils should, under the provisions of section 4 of the Legal Practitioners' Act, have a right of audience in it. The position then is this: Under section 3 of 11 and 12 Vict., ch. 21, a Parliamentary Act, only advocates and attorneys are allowed to practise in the Court for the relief of insolvent debtors. Then in 1879 the Government of India passes the Legal Practitioners' Act under which in general terms High Court vakils on the rolls of any of the High Courts are accorded the right of practice in all the Courts in British India except the High Court on the rolls of which they are not so enrolled. The Indian legislature has undoubtedly the power under the Parliamentary Statutes themselves to vary, modify and rescind with certain exceptions any enactment relating to India passed by the Imperial legislature. The question then resolves itself into this. Has the Indian legislature by passing the Legal Practitioners' Act rescinded, varied or modified section 3 of 11 and 12 Vict., ch. 21? The question has to be solved merely as a question of interpretation of Statutes. It is clear that the Legal Practitioners' Act has not purported to rescind, modify or vary section 3 of 11 and 12 Vict., ch. 21, or any provision therein contained. It is true that the general words of section 4 of the Legal Practitioners' Act granting a right of audience to vakils are inconsistent with the right of exclusive audience given by section 3 of 11 and 12 Vict., ch. 21, to advocates and attorneys. *In limine* it seems to me that while the subordinate legislature is given power by the supreme legislature to rescind, modify or vary within limits any enactments of the supreme legislature, such power should, generally speaking, be exercised only expressly, and in the absence of any express exercise of such power it ought not to be open to

construe any enactment of the subordinate legislature as involving necessarily an implied exercise of such power. The conflicts between the enactments of superior and inferior legislatures should not be dealt with or considered in the same manner as if such conflicts arose between two enactments, one earlier and the other later, of the same legislature. On principle there ought to be a difference made between the two cases, and I would venture to suggest that in the former case, where the subordinate legislature has only a power to vary within limits, the exercise of such power should either be express or at any rate be under circumstances or in terms tantamount to such express exercise of power. I cannot in the case before us see in the terms of the Legal Practitioners' Act any express exercise of power or intention to abrogate any enactment of the Imperial legislature or any circumstances or terms tantamount to such express exercise of power. Assuming, however, that the principles of construction applicable to this conflict between the Imperial enactment and the Indian enactment are exactly the same as those applicable to the earlier or later enactments of the same legislature, even then, I am unable to come to the conclusion that the Legal Practitioners' Act should be deemed to have abrogated or rescinded the provisions of section 3 of the Insolvency Act. The principle of the maxim "*generalia specialibus non-derogant*" is not only a proper rule of statutory construction, but is a rule based on good common sense. To take a common illustration, if a gentleman should give directions to his peon that a particular person should never be allowed to enter his house and some days afterwards give a general direction that all visitors should be admitted between certain hours, it cannot possibly be suggested that the later general direction was intended to cancel the particular

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order with regard to the particular person previously given. The principle on which such a rule of construction is based would appear to be that the cancellation or rescission of a previous special order could not have been intended if there is no indication whatever of the attention being drawn to such special order in connection with the more general directions given subsequently. In other words, it being a question of intention of the legislature, unless there is something to indicate such intention or in the absence of anything to show that the attention of the legislature was specially drawn to the previous special provision, no such intention could be inferred from a mere general provision subsequently made. In section 3 of the Indian Insolvency Act the special provision is not only to the effect that every advocate or attorney of the Supreme Court shall be entitled to practise in the way of his profession in the Court for the relief of insolvent debtors but there is the further proviso that no other person shall practise as advocate or attorney in the said Courts. It is a distinct, affirmatively excluding, provision. It is a provision not only special but special in a special sense, namely, that while declaring the right to practise of certain persons it expressly excludes from practice all other persons. Now the question is whether by the terms of section 4 of the Legal Practitioners' Act the Indian legislature intended or should be deemed to have intended to abrogate or cancel the special provisions contained in section 3 of 11 and 12 Vict., ch. 21. It seems to me that no such intention could be inferred. Language much more apt than was used in section 4 of the Legal Practitioners' Act would and should have been used by the Indian legislature if it was so intended. Further in the clause which specially enables High Court vakils to practise in any Court in British India the words used are "any person so entered shall

notwithstanding anything herein contained be entitled as such to practise." If the contention of the appellant in this case should be correct, the word used in that section should be not "*notwithstanding anything herein contained*" but some such words as "*notwithstanding any law or provision of law to the contrary*." It almost seems to me that the express limitation of the words to anything contained in the Act itself would rather seem to indicate that the intention of the legislature was not to interfere with any other special law or provision of law contained elsewhere. The words "as such" must have been put in, in order specially to prevent members of one branch of the profession claiming to practise as members of any of the other branches of the profession. I doubt however whether these words "as such" are apt enough by themselves to exclude High Court vakils from practising in any Court in British India merely because previously to the Act, High Court vakils were not allowed to practise in such Courts. But it is unnecessary to consider this point as, even apart from it, I have come to the conclusion that on a proper construction of section 4 of the Legal Practitioners' Act it could not be held that the provisions of section 3 of the Indian Insolvency Act have been abrogated or repealed.

If therefore even after the passing of the Legal Practitioners' Act, High Court vakils had no right of audience in the Insolvency Court, it follows that when the Presidency Towns Insolvency Act was passed in 1909 they were not so entitled, and that, even though the Insolvency Court became by reason of that Act merged in the High Court, by reason of the provisions of section 121 of that Act nothing in any transfer of jurisdiction effected by that Act shall be deemed to confer any right of audience not possessed by any person at the time of the passing of the said Act, and as

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I have come to the conclusion that there was no such right previous to 1909 it follows that no such right could have been obtained merely by reason of the merger of the Insolvency Court into the High Court under that Act. I therefore agree that the appeal fails and is liable to be dismissed.

K.R.

APPELLATE CIVIL SPECIAL BENCH.

Before Mr. Charles Gordon Spencer, Kt., Officiating
Chief Justice, Mr. Justice Kumaraswami Sastri,
and Mr. Justice Krishnan.

1924,
Oct. 15.

THE ACTING SECRETARY, BOARD OF REVENUE,
SEPARATE REVENUE (PETITIONER), REFERENCE.

v.

THE AGENT, SOUTH INDIAN RAILWAY COMPANY,
LD., TRICHINOPOLY RESPONDENT.*

Indian Stamp Act (II of 1819 and VI of 1922), art. 4 (c) or art. 30 of Sch. I-A—Lease—Licence—Distinction between—Test—Sole and exclusive possession, whether granted—Transfer of interest—Agreement executed to a consignee of coal to stack coal on a plot of ground in station yard, whether a lease or licence—Construction of document.

The test for determining whether a transaction is a lease or a licence is to see whether sole and exclusive occupation is given to the grantee, so as to amount to a transfer of an interest in immovable property to the grantee.

Frank Warr & Co. Limited v. London County Council, [1904] 1 K.B., 713; and *Sweetmeat Automatic Delivery Company v. Commissioners of Inland Revenue*, [1895] 1 Q.B., 484, referred to; *Seeni Chettiar v. Santhanathan Chettiar*, (1897) 1 L.R., 20 Mad., 58 (F.B.) and *Mammakkutti v. Puzhukkal Edom*, (1906) 1 L.R., 29 Mad., 353, followed.

* Referred Case No. 6 of 1924.

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Where a Railway Company granted permission to certain consignees of coal to stack coal on certain plots of ground in the station yard prior to its removal by them, and it appeared that the former had no power to grant a lease without the sanction of the Secretary of State for India, and in the document evidencing the agreement, it was expressly stated that nothing therein contained should be construed to create a tenancy, but there were some clauses in it imposing conditions which would be ordinarily implied in a licence,

Held, on a proper construction of the document,

that it was a licence and not a lease; that the special provisions, though unnecessary in a licence, had been put in *ex abundante cautela*, and did not operate to make it a lease,

and that the document fell under article 4 (c) and not article 30 of Schedule I (a) of the Indian Stamp Act.

REFERENCE under section 57 of Act II of 1899 by the Acting Secretary to the Board of Revenue (Separate Revenue) in reference No. 59 (Mis.) for the decision of the High Court regarding stamp duty chargeable on a document which is termed an agreement between the South Indian Railway Company (Ld.) and the Chairman of Municipal Council, Chidambaram, by which the Company let out a piece of land to the Council for storing coal.

The material facts appear from the letter of reference; the material portions of which were as follows:—

1. The document is termed an agreement between the South Indian Railway Company and the Chairman, Municipal Council, Chidambaram. Under it the Company let out a piece of land to the Municipal Council for the purpose of storing coal imported by the Municipality subject to the rules of the Company; clause 6 of the deed provides for payment to the Company of a monthly rent of Rs. 7 8-0 per 100 feet by 25 feet of the plot assigned. Clause 12 says that "nothing herein contained shall be construed to create a tenancy in favour of the licensee of the said land, and the administration may of their motion upon the determination of this licence, re-enter upon and re-take and absolutely retain possession of the said land."

2. The Board is inclined to think that the above deed by which immovable property is let on a periodical rent is a lease

within the definition of that term in section 2 (16) of the Stamp Act and that it is chargeable to duty under sub-clause (viii) of article 30 (a) of Schedule I-A in the Stamp Act as the lease does not purport to be for any definite term. The Agent of the Railway, however, contends that the document is chargeable only as an "agreement not otherwise provided for" under article 4 (c) of Schedule I-A. He points out that the Company have not the legal right to lease out the Government lands in their occupation, that the document is only a licence permitting the Municipality to use the sites on payment of a nominal rent and that it has been drafted on the model fixed by the Government of India for such purposes. An extract of paragraph 6 of the Agent's letter and of the Railway Board's circular No. 3222 R.G., dated 26th November 1912, which accompanied it are enclosed for perusal. The Board does not agree with the Agent as it appears unnecessary for purposes of the definition of lease in the Stamp Act that the lessor should have the legal right to lease out the land nor does it consider that the document is a mere licence chargeable under article 4 (c) as an agreement to lease is chargeable as a lease under article 30 of Schedule I-A. As however the matter is not entirely free from doubt and the question is important as affecting several other similar documents executed by the Railway Company, the Board submits the case for favour of a ruling by the High Court.

The agreement was as follows :—

Agreement, dated 21st April 1922.

An agreement made this 21st day of April, 1922, between the South Indian Railway Company, Limited, hereinafter called "The Administration" of the one part, and the Chairman, Municipal Council, Chidambaram, hereinafter called "the Licensee" of the other part.

Whereby it is agreed as follows :—

1. The licensee shall have the use of the piece of land described in the schedule hereto for the purpose of receiving and storing thereon coal imported by Railway (inwards) subject to such rules, regulations and by-laws as may from time to time be made by or on behalf of the Administration, or on behalf of any local authority, in relation to the transport, discharge and storage of and subject to the conditions hereinafter contained.

2. The licensee shall not construct or put up any building erection or convenience on the said land.

3. The licensee shall not use the said land for transporting, discharging or storing any other goods than his own.

4. The licensee shall allow the General Traffic Manager for the time being of the Administration (hereinafter referred to as the Manager) or any one authorized by him in this behalf free access at all times to the said land.

5. The licensee shall pay a deposit of Rs. 10 per plot of 100 feet by 25 feet as a guarantee for the due and faithful performance of this licence and the said deposit shall be returned to the licensee on the termination of this licence, less any amount that may be found due to the Administration.

6. The licensee shall, from the 1st day of March 1922, pay to the Administration a rent of Rs. 7-8-0 per month or part of month per plot of 100 feet by 25 feet, which shall be paid in advance on or before the 1st day of the month for which the same shall become due.

7. The licensee shall, without notice from the Administration, forfeit the entire deposit money referred to in clause 5 hereof on his making default in complying with the terms in clause 6 hereof, and his licence shall be deemed cancelled and revoked as and from the 15th day of the month for which the rent became due and was not duly paid by him.

8. The licensee shall not remove from the said plot of land any of his goods stored thereon until all his dues to the Administration have been duly paid, and the said goods shall be liable to wharfage from the date of the cancellation of the licence referred to in clause 7 hereof, such wharfage being calculated as per scale laid down in the Goods Tariff published by the Administration from time to time.

9. The Administration shall, of their mere motion and without an order from a Court of Law, after the expiry of fifteen days' written notice to the licensee, have the right to sell by auction the goods of the licensee stored on the said plot or piece of land for the purpose of recovering all charges due to the Administration by the said licensee, the surplus of the sale-proceeds, if any, being rendered to the licensee.

10. The licensee shall not transfer or sub-let the privileges mentioned in clause 1 hereof without the consent in writing of the said Manager.

11. The said privileges in clause 1 hereof are granted on the express understanding that either party may be at liberty to determine and put an end to this licence by giving to the other of them at any time 15 days' notice in writing, and such privileges may be so determined by the Administration without any claim for compensation whatever on the part of the licensee, and on the expiration of such notice, the licensee shall

discontinue to use and shall yield up to the Administration the said plot or piece of land.

12. Nothing herein contained shall be construed to create a tenancy in favour of the licensee of the said land and the Administration may of their mere motion upon the determination of this licence re-enter upon and re-take and absolutely retain possession of the said land.

13. The licensee shall at all times keep the Administration indemnified against, and shall reimburse to the Administration all claims, demands, suits, losses, damages, costs, charges and expenses whatsoever which the Administration may sustain or incur by reason or in consequence of any injury to any person or to any property resulting directly or indirectly from the combustion or otherwise of the coal kept or placed by the licensee upon the said land or by the reason or in consequence of the non-observance or non-compliance on the part of the licensee with any rule, regulation or by-law referred to in clause 1 hereof.

14. The licensee shall pay all the costs of the stamping and execution of this licence.

S. S. Ramachandra Ayyar for the Company.—The agreement is not a lease. There is no transfer of interest in immovable property. See section 107 of the Transfer of Property Act for definition of "lease." No specific plot is transferred. Section 59 of the Indian Easements Act defines a "licence." It is a bare permission to do an act, which would otherwise be unlawful. It is revokable at any time. Mere occupation does not convey an interest in the property. See *Frank Warr & Co., Limited v. London County Council*(1).

The Government order says that the South Indian Railway Company had no power to lease. Paragraph 12 of the agreement expressly says it is not a tenancy. The grantee cannot here transfer or sub-let. Here power is reserved by grantor to control user by grantee; when control is not given up, there is no lease but only a licence: see *London and North Western Railway Co. v. Buckmaster*(2), *Taylor v. Caldwell*(3); *Sweetmeat*

(1) [1904] 1 K.B., 713.

(2) (1874) 10 Q.B.D., 70 at 75.
(3) (1883) 3 B. & S., 826; 122 E.R., 309.

Automatic Delivery Company v. Commissioners of Inland Revenue (1), *Middlemas v. Stevens*(2), *Seeni Chettiar v. Santhanathan Chettiar*(3).

Government Pleader (C. V. Anantakrishna Ayyar) for Referring Officer.—Paragraph 4 of the agreement provides (1) that grantee should "allow" grantor to have access at all times to the land—which provision would be meaningless if it is not a lease and only a licence; (2) the agreement uses the term "rent" and not a "fee;" (3) the grantee is not to transfer, which again implies a lease; (4) notice in writing is stipulated for; (5) the grantee is to yield up the land under paragraph 11; (6) the grantor is given power "to re-enter upon" and re-take possession of the land. These provisions indicate that the grantor gave occupation or possession to the grantee. *Young & Co. v. Liverpool Assessment Committee*(4). When parties use a term of art, they are bound by its legal significance. See Norton on Deeds, Leases, page 51; *Glenwood Lumber Company v. Phillips*(5). *London and North Western Railway Co. v. Buckmaster*(6), is doubted in *Paris and New York Telegraphic Co. v. Penzance Union*(7). Statutes relating to rating are not relevant or conclusive on the present question. See *Holywell Union and Halkyn Parish v. Halkyn Drainage Company*(8).

JUDGMENT.

SPENCER, OFFG. C.J.—This is a reference made to us by the Board of Revenue under section 57 of the Stamp Act, and the question we are called upon to decide is whether certain documents entered into between the South Indian Railway Company and certain coal

(1) [1895] 1 Q.B., 484.

(8) (1897) 1 L.L.B., 20 Mad., 58 (F.B.).

(5) [1904] A.C., 405.

(7) (1884) 12 Q.B.D., 552.

(2) [1901] 1 Ch., 574.

(4) [1911] 2 K.B., 195.

(6) (1875) 10 Q.B.D., 444.

(8) [1895] A.C., 117.

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merchants, by which the latter are given leave to stack coal on small plots of land measuring 100 feet by 25 feet in station yards, are required to be stamped as leases under article 30 of Schedule I-A, or whether they are mere licences which fall within the description of agreements not otherwise provided for under article 4 (c).

Ordinarily a lease is a grant of property for a time by one who has a greater interest in the property, the consideration being usually the payment of rent. A licence, on the other hand, is a permission to do some act which, without such permission, it would be unlawful to do. All the cases to which we have been referred make the distinction between a lease and a licence to depend upon whether sole and exclusive occupation is given.

Now, the document in its terms contains a number of restrictions which might be consistent with the grant of a lease but which collectively indicate in my opinion that what was granted was a licence. The drawer of the document was evidently anxious to avoid giving a lease so as not to contravene the instructions of the Government of India that Railway Companies have no permission to lease lands in their possession without the concurrence of the Secretary of State. Throughout the document the person who is given possession is called a "licensee," and in clause 12 there is an express provision that "nothing herein contained shall be construed to create a tenancy in favour of the licensee." The fact that certain clauses of the agreement impose conditions which would be ordinarily implied by the grant of a licence but would be exceptions to the grant of a lease, does not necessarily indicate that it is a lease. These clauses were probably inserted *ex abundante cautela*; for instance, under clause 4

"The licensee shall allow the General Traffic Manager * * * or any one authorized by him in this behalf free access at all times to the said land."

Clause 1 makes the use of the land subject to any regulations or bye-laws as may from time to time be passed. Under clause 2 the licensee is prohibited from erecting any building on the land. Under clause 3 he cannot allow the land to be used for any other goods but his own. Under clause 6 there is an agreement to pay rent, but that of itself will not make the document a lease. It is simply a misuse of the term to call it "rent" instead of "fees," if it is not a lease. Clause 10 further provides for the "privileges," as they are termed, not being transferred or sub-let without the consent of the General Traffic Manager. Clause 11 provides for the licence being revokable on 15 days' notice on either side. Finally, the document is one signed by both parties to the agreement and is not a unilateral deed. All these terms which I have quoted indicate that the merchants were not given sole and exclusive occupation of the plots of the ground upon which they were to deposit the coal.

That being so, the intention of the parties as gathered from the document is against its being construed as a demise of an interest in property. The ground put forward by the Agent of the Railway for holding that the document is a licence rather than a lease, namely, that in every lease the lessor should have a legal right to lease out the land, does not affect my judgment. Even a person without a title to land may execute what purports to be a lease of that land. The test is not the right of the lessor to give the lease, but the interest intended by him to be created by the document. The fact however that the Railway Company is prohibited by orders of the Government of India from executing leases of lands in their possession is important for

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understanding the intention of the framer of the document, as showing that the Company would be naturally averse to giving away any rights that ought to be reserved. A number of cases have been quoted before us, but the two which, to my mind, appear to have most bearing on the question are *Frank Warr & Co., Limited v. London County Council*(1), where the use of refreshment rooms was given by the lessees of a theatre, and *Sweetmeat Automatic Delivery Company v. Commissioners of Inland Revenue*(2), where automatic machines were placed on the platform of Railway Stations. In both these cases the permission given was held to fall short of a lease, for the reason that no interest in land was given by the agreements.

Coming now to decisions of this Court, both in *Seeni Chettiar v. Santhanathan Chettiar*(3), and in *Mammikuttu v. Puzhakkal Edom*(4), the test of whether a document was a lease or not was held to be whether it vested any exclusive interest in immovable property in the transferee or whether it gave him merely a right to enter on the property and to do something thereon.

For these reasons, I think, we must hold that the specimen document in the reference sent to us is not a lease but is an agreement not otherwise provided for.

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KUMARASWAMI SASTRI, J.—I agree with my lord. The question is whether the document which is before us is a lease or only a licence. The document purports to be an agreement between the South Indian Railway Company and persons who got consignments of coal. The object of the document was to provide facilities for the unloading of coal and for its removal from the Railway Station. Ordinarily the coal would have to be removed as soon as it arrived or within the time allowed

by the Railway; otherwise demurrage would be charged. The object of the agreement was to allow the coal to remain stacked in the Railway premises and to be removed at the convenience of the consignees. A "lease" is defined in section 105 of the Transfer of Property Act, and a "licence" is defined by section 52 of the Easements Act. In both cases certain rights are conferred on the lessee or the licensee. In the case of a licence something may be paid as consideration for allowing a person to do an act on another man's land. Both have several elements in common but it seems to me that the difference between a lease and a licence is that, in the case of a licence, there is no interest in immovable property transferred to the licensee; while in the case of a lease there is a transfer or carving out of the interest in favour of the person in whose favour the lease is granted. One chief consideration is whether there is any right of exclusive possession given. When a document is clear and unambiguous we cannot go outside its terms for the purpose of determining the stamp duty but where it is otherwise I think the question is whether, having regard to the purpose of the agreement and the terms in which it is expressed, the document can be said to confer any interest in the land on the licensees. Numerous cases have been cited on both sides, but I think the case which is most in point is the case reported in *Frank Warr & Co., Limited v. London County Council*(1). As observed by ROMER, L.J., in that case, where a document does not amount to a demise or to a parting, in respect of any portion of the premises, with the possession which the owner has when he executes the document, it would only amount to a licence and not a lease. Having regard to the purpose of the document, I think that the

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(3) (1897) I.L.R., 20 Mad., 58 (F.B.).

(2) [1895] 1 Q.B., 484.

(4) (1906) I.L.R., 29 Mad., 353.

(1) [1904] 1 K.B., 713.

purpose was simply to allow the consignees to store coal upon a portion of the land in the railway compound; and it could not have been the intention of the Railway Company to part with any interest in the property in favour of the lessee. It is important to note in this connection that, having regard to the orders of the Government of India, the Railway Company had no right to execute any lease of this property and it was with a view to protect themselves that they have inserted clause 12 in the agreement that it was not to be a lease of the property. It is no doubt true, as observed by the Privy Council in *Glenwood Lumber Company v. Phillips*(1) that, if the effect of the document is to give the holder an exclusive right of occupation of the land, it will be a demise of the land and that it is not a mere question of words but of substance. The mere calling a document a licence would not affect the question; but in arriving at a conclusion where the terms are not clear, one has to see what the circumstances are, to judge of the intention of the parties. Now, the Railway Company had no power to grant a lease, and it is hardly likely that they would, with the knowledge that they had no power, try to execute a lease or do something which would be *ultra vires* so far as they are concerned. We start, therefore, with the fact that the Railway Company had no power to grant a lease; I may add here that, if they executed a document the terms of which amount to a lease, want of power would not of itself decide the question. But in considering whether the document is a lease or a license, I think it is relevant to consider what the rights of the parties were and what the object of the agreement was. On both these points I think the considerations weigh in favour of the view taken by the Railway Company that they

(1) [1904] A.C., 405.

only intended to grant a licence and never intended to part with possession of the piece of land in the railway compound. My Lord has referred to the various terms of the document. I agree with him in thinking that some of those clauses were put in by way of abundant caution, and that the Railway Company did not intend to give up possession or part with possession of the property. I think clause I is a very important clause. It expressly reserves to the Railway Company a great measure of control as regards the transport, discharge and storage of the coal. It may be that the mere fact that there are restrictive covenants would not by itself make a lease a licence if the other terms are clear but in considering what the intention of the parties was, it is relevant to see what control the one party has over the property on which another party is allowed to do certain things. Here I think the Railway Company reserved to itself a very large measure of control; and, reading the document as a whole, I think it is merely a licence given to the grantees to keep the coal on the Railway premises for some time and to pay for the privilege which they have got.

I would answer the question by saying that the document is not a lease but would come under Article 4(c) as an agreement not otherwise provided for.

KRISHNAN, J.—In this case we have been called upon to express our opinion as to what the proper stamps are on three documents which have been referred to us by the Revenue Board. They are all more or less similar in terms; one of them alone has been printed and placed before us; it is the document executed by the South Indian Railway Company to the Chairman, Municipal Council, Chidambaram.

It is contended by the Railway Company that the document in question amounts only to a licence and falls

under Schedule I-A, article 4 (c) and need be stamped only as an "agreement not otherwise provided for" under the Act. On the other hand, it is contended for the Revenue Board by the learned Government Pleader that the document amounts to a lease and should be stamped as such under article 30 of the same schedule. The question we have to decide is which view is correct.

The document is certainly drawn up in terms as a licence. It throughout speaks of the grantee under it as a "licensee." But I agree that the question is not a question merely of words but of substance and that parties cannot by the mere use of a term of art alter the truth as pointed out by HAMILTON, J., in *Young & Co. v. Liverpool Assessment Committee* (1). We have, therefore, to look at the substance of the arrangement between the parties and decide under what article the document really falls. I do not think that we should go outside the language of the document in deciding what the proper stamp is or pay any attention to the circumstances under which it was executed or to the authority of the grantor. We are not concerned with the title of the grantor, but we should decide the case with reference solely to the language of the document. That is my view. But taking that view I am glad to find myself in agreement with the learned Chief Justice and my learned brother in thinking that this document really amounts only to a licence and does not go far enough to be held to be a lease. There is an express clause in paragraph 12 of the document which says, "Nothing herein contained shall be construed to create a tenancy in favour of the licensee of the said land." Is there anything in the document which would lead us to throw overboard that statement and hold that the document is

(1) [1911] 2 K.B., 195.

still, by its character and by the terms agreed to between the parties under it, a lease? What it purports to give to the grantee, as I read it, is a right to stack coal on a plot of land in the station yard to be pointed out by the Railway Company; for though it refers to a schedule as describing the piece of land dealt with, no schedule is produced. It gives the right to the grantee to use the piece of land for the purpose of storing or stacking coal which he gets for his own use. His right to do that is itself subject to the rules, by-laws and regulations that the Railway Company may make from time to time as regards transport, discharge and storage of the coal, see paragraph 1. There is no particular plot of land whose possession can be insisted upon by the grantee, so far as I can gather from the document, for he is entitled only to get such plot of land as the Railway Company may point out for the storage of coal, and for that it is provided that he is to pay a certain consideration, namely, at the rate of Rs. 7-8-0 a month for a plot which is 100' x 25' in extent. He has also to pay a deposit of Rs. 10 for such a plot as a guarantee that he would perform his part of the contract properly. He may take one such plot or more than one, the rate being as stated above. Either party is given power to cancel the arrangement by 15 days' notice. This is clearly merely a licence, no interest being given in the land itself except to the right of limited user of it.

The learned Government Pleader has referred to certain terms of the document as supporting him in his argument that it is a lease. The first point he urged was that in clause 4 there was a special provision put in which said that

"the licensee should allow the General Traffic Manager for the time being or any one authorized by him in this behalf free access at all times to the said land."

He argues that, if the grantee was a mere licensee, there is no necessity for such a provision at all because it is always open to a licensor to have access, possession being with him and not transferred to the licensee under the law. This may be so, but, as observed by the learned Chief Justice, this provision might have been put in merely by way of abundant caution so that no disputes might arise in the future when the Railway Authorities require the land.

The next point referred to by the learned Government Pleader was the use of the word "rent" in clause (6). No doubt, that is not a happy word to have been used if the transaction was a licence; the proper word would have been "fee." But I do not think that we can draw any inference from the careless use of the word "rent"; for if it was used to connote a lease as argued by the learned Government Pleader, clause 12 of the document, which expressly says, "Nothing herein contained shall be construed to create a tenancy in favour of the licensee" contradicts it.

The next point taken by the learned Government Pleader was with reference to the wording in clause 10 of the document. It says, "The licensee shall not transfer or sub-let the privileges mentioned in clause 1 without the consent in writing of the said Manager." Here again, no doubt, it is an unnecessary provision altogether if the arrangement is to be treated as a licence, for a licensee has no power under the law of transferring his privileges unless it is given to him by contract. Here again one may well accept the explanation given by the Railway Company that it was put in to avoid all disputes in the future.

The strongest point in the learned Government Pleader's favour is what is stated in clause 12 which says that

"upon the determination of the licence the Administration may of their mere motion *re-enter* upon and *re-take* and absolutely retain possession of the said land."

This would seem to indicate that possession had been given; but, as a matter of fact, no legal possession was intended to be given at all. The only right that the transferee was intended to have was the right to go upon this land to stack coal and nothing more. In fact, it seems to me that there is nothing in the document to prevent the Railway Company from changing, from time to time, the plot which the grantee was to have if the Railway Company desired it. When that is so, it seems to me that this case is very near the case of *Sweetmeat Automatic Delivery Company v. Commissioners of Inland Revenue*(1). There is really no lease of any particular plot of land at all but only a licence or permission granted to the grantee to store coal on a plot pointed out by the Railway Company. I have no doubt whatever that this is a case of a mere licence and not of a lease. In this connection the case in *Frank Warr & Co., Limited v. London County Council*(2), may also be consulted. There it was held by their Lordships that the use of certain rooms for the purpose of storing wine, etc., by the persons to whom the exclusive right of selling refreshments in a theatre was given did not give them a lease at all but only a licence, as the right to sell refreshments itself was a licence. The principles enunciated there might well be applied here. There are two cases in our High Court in *Seeni Chettiar v. Santhanathan Chettiar*(3), *Mammikkutti v. Puzhakkal Edom*(4), where the points of difference between a lease and a licence had to be considered. In both those cases it was

(1) [1895] 1 Q.B., 484.

(2) [1904] 1 K.B., 713.

(3) [1897] I.L.R., 20 Mad., 53 (F.B.).

(4) [1906] I.L.R., 29 Mad., 353.

held that the right to cut and enjoy timber on a certain land did not amount to a lease but was only a licence.

Since the transaction in this case did not amount, in my view, to a lease, the only article under which the document before us can fall is article 4 (c) of Schedule I-A. It is true that there is no definition of the word "lease" in the Stamp Act as it contents itself with saying in section 2, clause (16) what a lease includes; it includes among other things (b) a Kabuliyat or other undertaking in writing, not being a counterpart of a lease, to cultivate, occupy, or pay or deliver rent for immovable property; but there is no definition of the word "lease." The present document cannot be brought under clause (b) either, as we cannot say that it is an "undertaking in writing to occupy, or pay or deliver rent for, immovable property." Although the document uses the word "rent," it is not used in the same sense as it is used in the statute. In the statute it is clearly used as meaning rent as defined in the Transfer of Property Act, i.e., as something which a tenant is bound to pay a landlord. The definition of "lease" given in the Transfer of Property Act is, I think, the proper definition to take in this case. The word "licence" is defined in the Easements Act and we are entitled to use that definition as the proper definition of the term for the Stamp Act.

In these circumstances, I agree with my Lord the Chief Justice and my learned brother in thinking that this document cannot be brought under the term "lease" and that we should answer the reference accordingly.

K.B.

APPELLATE CRIMINAL.

Before Mr. Justice Ramesam.

TURKA HUSSAIN SAHEB AND 3 OTHERS (ACCUSED IN
CAL. CASE NO. 137 OF 1924 ON THE FILE OF THE COURT
OF THE STATIONARY SUB-MAGISTRATE, PATTIKONDA).*

1924,
August 15.

*Criminal appeal—Disposal of—Criminal Procedure Code, sec. 421
—Posting of appeals, practice—Practitioner not prepared to
argue the appeal when presenting it—Whether guilty of
professional misconduct.*

A criminal appeal should not be heard at the time of presenting the papers, even for the purpose of dismissal under section 421 of the Code of Criminal Procedure (Act V of 1898). There must be a special posting of the appeal, after a reasonable time, for the purpose of hearing under section 421.

An appeal raising questions of fact ought not to be disposed of under section 421 without the original records being called for from the lower Court.

A pleader who has drafted the grounds of appeal, but is not prepared to argue it at the time of presenting the appeal, is not guilty of professional misconduct.

CASE referred for the orders of the High Court under section 438 of the Code of Criminal Procedure by R. GOPALA RAO, Sessions Judge of Kurnool division in his letter, dated 25th July 1924.

The accused were convicted under section 297 of the Indian Penal Code by the Sub-Magistrate of Pattikonda. They preferred an appeal to the Subdivisional Magistrate of Dhône who directed their pleader to argue the appeal immediately on its presentation. The pleader asked for two days' time to prepare his arguments, but the request was not granted and the appeal was dismissed. Against the order of dismissal a revision petition under section 435 of the Code of Criminal Procedure was presented to the Sessions Judge of Kurnool

* Criminal Revision Case No. 520 of 1924.

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who referred the case under section 438 to the High Court for its orders and stated in the course of his letter of reference—

"3. The Magistrate, to whom the affidavit filed along with the revision petition was sent for remarks, admits that he asked the vakil to argue the appeal at once when the appeal petition was presented to him, as the same showed that the vakil was fully prepared. He makes some other observations in his reply which show that he did not fully realize his responsibility as an Appellate Court and one observation especially does not appear to me to be proper, and that is 'after preparing the appeal petition, if a vakil says he is not ready with the case, I should consider his conduct quite unprofessional.' There may be some justification for this remark only if sufficient opportunity is given to a vakil to argue the appeal and he is yet unready, but not otherwise.

"4. Now, the petitioner's vakil urges that his client is entitled to a remand of the appeal for its being regularly heard on the strength of the mere ground that he was not given sufficient opportunity to prepare himself to support the appeal, and that, in the circumstances stated by the Magistrate, he had no power to summarily dismiss the appeal under section 421, Criminal Procedure Code. In support of this position, he has quoted two rulings, namely, *Rangacharlu v. Emperor*(1), and *Ramtahal Dusadh v. Emperor*(2). The latter ruling laid down that a pleader for an appellant should not be called upon, immediately on the filing of an appeal, to support it, but should be afforded reasonable opportunity of being heard even when the Appellate Court does not want to admit the appeal at once and wants to hear the appellant before deciding to admit the same under section 421, Criminal Procedure Code. The facts of that case appear to have been similar to those here, for the ruling states 'here the very moment that a petition was filed the pleader was called to support the appeal on any or of all of the grounds upon which it was based. We do not think that this is a reasonable opportunity of being heard.'

The Judges who decided this case were of opinion that the same sort of opportunity as to time should be given to the appellant's pleader as is usually given to the Public Prosecutor, if it is thought necessary to serve him with notice before deciding the appeal. In *Rangacharlu v. Emperor*(1), the appellant

presented the appeal in person though it had been prepared and signed by a pleader for him, and the Madras High Court held that it should not have been summarily rejected under section 421, Criminal Procedure Code, without giving an opportunity to the pleader to support the appeal and I venture to think that the principle on which both the rulings are based is the same, and that is that before dismissing an appeal under section 421, Criminal Procedure Code, the appellant, or if he has engaged a pleader that pleader, must be given a fair opportunity of being heard. *Rangacharlu v. Emperor*(1), has further decided that if the appeal grounds impeach the credit of the witnesses on which the conviction is based, the appeal should not be summarily dismissed under section 421, without calling for records of the case from the Original Court. The appeal grounds Nos. 2 and 4 clearly show that this case falls under the above description. I am therefore of opinion that in the interests of justice the Subdivisional First-class Magistrate, Dhone, should be directed to hear the appeal anew after giving a fair opportunity to the petitioner's pleader to support the grounds of appeal with reference to the merits and case-law."

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JUDGMENT.

I entirely agree with the remarks of the Sessions Judge in his letter of reference. The decisions mentioned by him, viz., *Ramtahal Dusadh v. Emperor*(2) and *Rangacharlu v. Emperor*(1), both lay down that a criminal appeal should not be heard at the time of the presentation of the papers, even for the purpose of dismissal under section 421. The posting for the purpose of hearing under section 421 must be a special posting after a reasonable time not less than a week. *Ramtahal Dusadh v. Emperor*(2). This is the practice in the High Court and ought to be the practice in the mufussal wherever it is not.

I may also point out that the view of the learned Subdivisional Magistrate, viz., that a pleader who has looked into the papers of a case for the purpose of

(1) (1906) I.L.R., 29 Mad., 236.

(2) (1909) I.L.R., 36 Cal., 385.

(1) (1905) I.L.R., 29 Mad., 236.

(2) (1909) I.L.R., 36 Cal., 385.

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drafting grounds of appeal is guilty of professional misconduct if he is not prepared to argue the appeal at the time of presentation of the appeal papers is not correct. It is well known that a memorandum of appeal containing all possible grounds (some of which may be ultimately untenable) can be drafted by a mere perusal of the judgment and without the use of the depositions, whereas for arguing the questions of fact, the depositions have to be carefully studied.

In *Rangacharlu v. Emperor*(1), it is pointed out that, if questions of fact are argued in the appeal, the appeal ought not to be disposed of even under section 421 without sending for the original records of the Court below containing the depositions. I agree with this.

The result is, the dismissal of the appeal by the Sub-divisional Magistrate is set aside and the appeal is remanded to him for rehearing and disposal according to law.

D.A.R.

APPELLATE CRIMINAL.

Before Mr. Justice Wallace.

APPICHI GOUNDAN, OF UNSOUND MIND, REPRESENTED
BY HIS MOTHER PONGI AMMAL (PETITIONER),

v.

KUTTIYAMMAL (RESPONDENT).*

*Criminal Procedure Code—Sec. 488—Maintenance claim—
Counter-petitioner's plea of insanity—Procedure.*

When maintenance under section 488 of the Code of Criminal Procedure (Act V of 1898) is claimed and the plea of insanity is set up on behalf of the counter-petitioner, the Magistrate must hold a judicial enquiry into his sanity and put him, if necessary, under medical observation. If he is found insane

(1) (1905) I.L.R., 29 Mal., 236.

* Criminal Revision Case No. 269 of 1924.

and incapable of understanding questions put to him, the Magistrate must postpone further proceedings until he is satisfied that the counter-petitioner can understand the same.

The proceedings under section 488 are wholly governed by the provisions of the Criminal Procedure Code.

PETITION under sections 435 and 439 of the Code of Criminal Procedure Code, praying the High Court to revise the order of I. A. PIR MUHAMMAD, Subdivisional Magistrate of Gobichettipalaiyam, in M.C. No. 44 of 1923.

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

K. Aravamuthu Ayyangar for T. M. Krishnaswami Ayyar for the petitioner.

P. R. Janakirama Ayyar for the respondent.

Public Prosecutor for the Crown.

JUDGMENT.

The question that arises in this revision petition is one of some difficulty. The counter-petitioner claimed maintenance from the petitioner, under section 488 of the Criminal Procedure Code, before the Subdivisional Magistrate of Gobichettipalaiyam. It was pleaded on the petitioner's behalf that he is insane and that therefore the Divisional Magistrate ought to have followed the procedure laid down in Chapter XXXIV of the Criminal Procedure Code. The Magistrate on 9th January 1924, on a petition by the petitioner's mother, apparently held the petitioner to be insane and appointed the mother as his guardian *ad litem* but, when the case came into Court on 24th January 1924, the Magistrate considered from his own observation of the petitioner that he was not insane or incapable of understanding the proceedings. He then, without cancelling his order appointing the mother as the guardian *ad litem*, heard the case and passed an order that the counter-petitioner was entitled to separate maintenance.

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1924,
October 13.

On the petitioner's behalf it is claimed that he is really insane and incapable of understanding the proceedings and that therefore the Magistrate's proceedings are void.

It may be pointed out at once that the Magistrate had no power under the Criminal Procedure Code to appoint a guardian *ad litem* for a lunatic. The proceedings under section 488 may be *quasi* civil but they are also criminal and are wholly governed by the provisions of the Criminal Procedure Code alone. The Magistrate made no sort of enquiry and got no medical opinion on the insanity of the petitioner but, merely because the petitioner "stood speechless" before him, concluded apparently that his previous information that he was insane was erroneous. Such a casual settlement of the important question whether the petitioner was insane or not indicates to my mind that the Magistrate merely thought it best to come to that conclusion because he did not know how to treat the case if he came to any other conclusion.

Clearly such a perfunctory enquiry will not do. It is the Magistrate's duty to hold a judicial enquiry into the sanity of the petitioner, and put him, if necessary, under medical observation. If, as a result of that enquiry, he is satisfied that the petitioner is sane and capable of understanding the proceedings, then that matter is simple; but if he concludes that the petitioner is insane and not capable of understanding the proceedings, the question is what is the proper procedure to be followed, and that is a matter of some difficulty. The procedure laid down in Chapter XXXIV will not strictly apply because the petitioner, under the amended section 488, is not an "accused" person. The word "accused" used in the old section 488 has been avoided in the new section, evidently with deliberation. However, the

provisions of section 464 at least are those which a Court of equity and good conscience would naturally follow; that is, if it finds that the petitioner is insane and incapable of understanding questions put to him and giving rational answers, it must postpone further proceedings until it is satisfied that the petitioner is capable of so understanding the proceedings. This is all the more necessary in a maintenance case as the counter petitioner in such a case is an important witness on his own behalf and has the right of offering terms to the petitioner therein; and, if he cannot understand the proceedings and cannot give evidence on his own behalf, the Court is not able to hear both sides of the case and cannot, therefore, come to a judicial conclusion. To proceed to pass an order in such a case would have the result, for example, that, if the Court makes the order against a lunatic for maintenance and the lunatic does not obey it, he is liable to imprisonment, a result which no one can reconcile with justice, equity and good conscience.

I have emphasised above that the Court must find not only that he is a lunatic but that he is prevented by his lunacy from understanding the questions put to him and making rational answers to them. This is with regard to the provisions of section 118 of the Indian Evidence Act.

It is true that to postpone further proceedings indefinitely postpones also the wife's prospect of relief under section 488; but this seems an inevitable result of the omission of the legislature to legislate for such a case. She is not without remedy as she can sue for maintenance in the Civil Court.

I reverse the order under revision and direct the Magistrate to re-hear the case in the light of the above remarks.

D.A.R.

APPELLATE CIVIL.

Before Mr. Justice Srinivasa Ayyangar.

KRISHNA KONE (PETITIONER), PETITIONER,

v.

KULASEKHARA MUDALIAR (RESPONDENT), RESPONDENT.*

Sec. 55, Madras Local Boards Act (XIV of 1920)—Nomination of a member of village panchayat for election as member of a Local Board, validity of.

A member of a village panchayat exercising magisterial functions under the Madras Village Courts Act (I of 1889) is not an "Honorary Magistrate" within the meaning of section 55 of the Madras Local Boards Act (XIV of 1920); hence such member is not disqualified for nomination for election as a member of the Local Board.

"Magistrate" in the Madras Local Boards Act means according to section 3, clause 18 of the Madras General Clauses Act (I of 1891) one who exercises the powers of a Magistrate under the Code of Criminal Procedure and a member of a village panchayat who derives his magisterial powers only from the Madras Village Courts Act and not from the Criminal Procedure Code is not such a Magistrate.

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, dated the 11th December 1922, of J. K. LANCASHIRE, District Judge of Tinnevely, in O.P. No. 156 of 1922.

The facts are given in the judgment.

K. S. Sankara Ayyar for petitioner.

V. Rajagopala Ayyar for respondent.

JUDGMENT.

The petitioner in this case was duly nominated for election to a Union Board according to the rules relating thereto. The President of the Taluk Board rejected the

* Civil Revision Petition No. 704 of 1923.

nomination of the petitioner on the ground that he was a person disqualified to be nominated under the provisions of section 55 of the Local Boards Act, Act XIV of 1920. Under clause 4 of that section, no officer or servant holding office under the Act or an Honorary Magistrate for the local area over which the Local Board concerned has jurisdiction is competent to be appointed as a member of such Local Board. The ground on which the President of the Taluk Board held the petitioner disqualified was that the petitioner was a member of the panchayat of the village which exercised criminal jurisdiction within the same jurisdiction and that as for the services rendered by the petitioner as a member of the panchayat in the administration of criminal justice he was not paid, he was an Honorary Magistrate within the meaning of clause 4 of section 55 of the Local Boards Act.

The word "Magistrate" is defined by the Madras General Clauses Act, Act I of 1891, section 3, clause 18. It sets out that the term "Magistrate" shall mean

"any person exercising all or any of the powers of a magistrate under the Code of Criminal Procedure, 1882."

And when we come to the Criminal Procedure Code we find that there are only four classes of Magistrates, namely, the Presidency Magistrates, Magistrates of the First Class, Magistrates of the Second Class, and Magistrates of the Third Class. Section 77 of the Village Courts Act (Madras Act I of 1889) provides that excepting section 403 of the Code of Criminal Procedure nothing contained in the Criminal Procedure Code shall apply to village courts. From this it necessarily follows that a member of the village panchayat exercising criminal jurisdiction under section 76 of the Village Courts Act is not a Magistrate within the meaning of the Local Boards Act. Having regard to the definition of "Magistrate" in the General Clauses Act no person

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can be said to be exercising any powers of the Magistrate under the Code of Criminal Procedure to whom, under the express terms of section 77 of the Village Courts Act, the Code of Criminal Procedure is made inapplicable. Further there can be no doubt whatever that a member of a village panchayat derives his jurisdiction in criminal cases not from the Criminal Procedure Code but from the Village Courts Act.

It has been also attempted to be argued by the learned vakil for the petitioner that under the Village Courts Act it is a body of persons that is constituted into a Criminal Court and vested with magisterial powers and that therefore no individual member of that body could be said to be a Magistrate. I cannot possibly accede to such a contention. The object with which I take it that under the Local Boards Act an Honorary Magistrate is disqualified to be appointed as a member of the Taluk Board or the Union Board is that there may frequently be cases in which the Board is prosecuting and that it would be opposed to all the principles that a person who is really in the position of a prosecutor should also be a Judge.

Having regard therefore to the principle underlying this disqualification I have no hesitation in rejecting this contention that a member of a body exercising the powers of a Magistrate is not a Magistrate. But having regard to the definition of "Magistrate" I cannot hold that a member of the village panchayat is an Honorary Magistrate within the meaning of the Local Boards Act. I have therefore come to the conclusion that the lower Court was clearly wrong in holding that the action of the President of the Taluk Board in rejecting the nomination of the petitioner was right.

I therefore allow the petition of the petitioner in the lower Court and setting aside the declaration of the

election of the respondent as a properly appointed member of the Union Board, direct that the nomination of the petitioner be accepted as right and that an election be held on that basis.

The respondent will pay the petitioner his costs both in this Court and the lower Court.

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APPELLATE CIVIL.

*Before Mr. Justice Wallace and Mr. Justice
Madhavan Nayar.*

KALYANJI (NOW DEAD) AND ANOTHER (RESPONDENTS 2 AND 3
AND PLAINTIFFS 2 AND 3), APPELLANTS,

1924,
November 6.

v.

RAM DEEN LALA (PETITIONER AND SECOND DEFENDANT),
RESPONDENT.*

*Criminal Procedure Code (V of 1898 and XVIII of 1923),
ss. 476 and 195—Order under sec. 476, Criminal Procedure
Code, by a Judge of the Presidency Small Cause Court, Madras,
to prosecute for offences under sections 193 and 196, Indian
Penal Code—Appeal against order to the appellate side of the
High Court, maintainability of.*

An appeal against an order of a Judge of the Presidency Small Cause Court, Madras, directing under section 476, Criminal Procedure Codes, the prosecution of a person for offences under sections 193 and 196, Indian Penal Code, lies only to the appellate side of the High Court and not to the Full Bench of the Small Cause Court under section 38 of the Presidency Small Cause Courts Act (XV of 1882) or to the original side of the High Court. *In re Shival Padma*, (1910) I.L.R., 34 Bom., 316, followed. *Munisamy Mudaliar v. Rajaratnam Pillai*, (1922) I.L.R., 45 Mad., 928 (F.B.), explained.

As an order under section 476, Criminal Procedure Code, directing a prosecution for offences under sections 193 and

* Civil Miscellaneous Appeal No. 412 of 1923.

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196, Indian Penal Code, amounts to a complaint under section 200, Criminal Procedure Code, the Court before making the order must hold an inquiry and must itself specify by its order (1) the witnesses to prove the complaint, (2) the false evidence complained against and (3) whether the person complained against knew that the evidence which he was using as genuine was false.

An order which does not itself specify these matters but leaves them to be fished out by the trying Magistrate is liable to be set aside as illegal.

APPEAL against the order of C. R. TIRUVENKATA ACHARIYAR, Chief Judge of the Court of the Small Causes, Madras, in M.P. No. 358 of 1923 in Suit No. 4774 of 1922, dated 19th October 1923.

The facts and arguments are given in the judgment.

S. T. Srinivasagopal Achariyar for appellants.

Govinda Menon for Crown Prosecutor.

S. Rangaswami Ayyar and *M. Krishna Bharathi* for respondent.

JUDGMENT.

WALLACE, J.

WALLACE, J.—This is an appeal against an order of the Chief Judge of the Court of Small Causes, Madras, under section 476 of the Criminal Procedure Code, directing that a complaint under sections 193 and 196 of the Indian Penal Code be filed against the appellants. Mr. Menon for the Crown Prosecutor raised two preliminary objections, first, that the appellate tribunal in a case like the present is not the High Court but a Bench of the Court of Small Causes, and secondly, that, if the appellate tribunal is the High Court, the appeal must be put in on the original side of the High Court.

As to the first objection, an appellate tribunal is, by force of sections 476 (b) and 195 (3) of the Criminal Procedure Code, the Court, if there is such a Court, to which appeals from the appealable decrees of the Court of Small Causes ordinarily lie. Mr. Menon relies on

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section 38 of the Presidency Small Cause Courts Act, which states that, in the case of a contested suit, either party has the right to apply for an order for a new trial or for altering, setting aside, or reversing the decree. Section 38 does not talk of an appeal, but the heading of the chapter is "New trials and appeals." The rules of procedure governing an application under section 38 are contained in Order XLI of the Presidency Small Cause Court Rules, headed "Application for a new trial," and it is to be in form No. 15 described as an "application for a new trial." Order XLI throughout speaks of an application, not of an appeal. We also understand that no stamp is levied on such applications. No doubt rules of procedure could not take away a right of appeal given by a Statute: but the rules are an indication that the High Court which framed them did not consider that the right conferred by section 38 was a right of appeal. There is no direct authority of the Madras High Court on this point, unless the case in *Srinivasa Charlu v. Balaji Rau*(1) be taken as such: but, with due respect to the learned Judges who decided that case, I do not think that section 37 settles the question whether there is or is not an appeal, since section 37 itself on its own wording is subject to the other provisions of that chapter. It is not necessary, however, in the view I take, to press this point further. I agree with the judgment in *In re Shivalal Padma*(2), a case directly in point, that section 37 implies that decrees of the Presidency Small Cause Court are not ordinarily appealable. The Bench in that case held that that was a sufficient ground for holding that there was no Court to which, in the language of section 195 of the Code of Criminal Procedure as it then was, "appeals ordinarily lie." The amended section 195 now uses the phrase "the Court

(1) (1898) I.L.R., 21 Mad., 232.

(2) (1910) I.L.R., 34 Bom., 316.

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to which appeals ordinarily lie from the appealable decrees . . . of such former Court," which would imply that, although ordinarily there is no appeal, yet, if there are decrees of the Court which are appealable, then an appeal against an order under section 476 (b) will lie to the Court to which appeals from such appealable decrees ordinarily lie. So that the real question now is not whether there is any ordinary right of appeal from the decrees of the Presidency Small Cause Court, but whether any of the decrees passed by that Court are appealable decrees. This question has to be decided not under section 37 of the Act but under section 38, and I am constrained to hold that section 38 does not give what is usually known as a right of appeal. Had this been meant, it would have been laid down in unambiguous language such as section 96 of the Civil Procedure Code employs, "an appeal shall lie." Section 38 also makes no provision for a higher Court, for example, a Bench of the Small Cause Court, to hear an appeal; and does not talk, for example, as section 96 of the Civil Procedure Code does, of the "Court authorized to hear appeals." An application under section 38 is to the same Court which passed the decree and, in so far as appears from the section, it may be even to the same Judge who passed the decree, and there is no statutory provision elsewhere constituting a Court of Appeal to hear such applications. I therefore hold that section 38 does not imply that any decree of the Presidency Small Cause Court is an appealable decree. It follows that there is no Court to which appeals ordinarily lie from the appealable decrees of that Court.

The second preliminary objection then has to be met. Since there is no Court to which appeals ordinarily lie from appealable decrees of the Presidency Small Cause Court, an appeal has to be put in to the principal Court

having ordinary original civil jurisdiction within the local limits of whose jurisdiction the Presidency Small Cause Court is situated. Mr. Menon contends that this phrase can apply only to the original side of the High Court. Under the unamended Code, there was a clear authority, *Jamna Doss v. Sabapathy Chetty*(1) that the Original Side of the High Court was not a different Court for purposes of this section from the rest of the High Court, and that the High Court generally was the principal Court of original jurisdiction. I cannot see that the alteration of language in the section displaces this ruling. The High Court generally is still the principal Court having ordinary original civil jurisdiction. Mr. Menon, however, calls our attention to a ruling in *Munisamy Mudaliar v. Rajaratnam Pillai*(2), in which it was held that an appeal from an order under section 195 by a Judge sitting on the original side of the High Court lies to a Bench of the High Court, and argues from that and from the language of section 195 (3) that, therefore, these two tribunals must be different Courts. I do not think that that follows. *Munisamy Mudaliar v. Rajaratnam Pillai*(2) may be pressed so far as to say that under the first portion of section 195 (3), when an order by the original side of the High Court is in question, the term "Court" may be taken to mean "side of the High Court"; but *Munisamy Mudaliar v. Rajaratnam Pillai*(2) has not reversed *Jamna Doss v. Sabapathy Chetty*(1), nor under the second part of section 195 (3) can the word "Court" be made to mean "Side of the High Court." The difficulties that would follow in holding that the High Court is not one Court but is as many Courts as there are varieties of Original and Appellate jurisdictions

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(2) (1922) I.L.R., 45 Mad., 928 (F.B.).

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comprised in it are much greater than the difficulty of reconciling the language of section 195 (3) with *Munisamy Mudaliar v. Rajaratnam Pillai*(1). I am not prepared to sustain either of these preliminary objections and they both fail.

On the merits we are concerned only with the third plaintiff, Vadivelu Mudaliar, since the second plaintiff is now dead. In the first place, the lower Court has misconceived the scope of section 476. It was for the lower Court to hold such inquiry that its order, when sent to the Magistrate, will amount to a complaint under section 200 of the Criminal Procedure Code. For that purpose, the complaining Court must decide upon and name the witnesses to be examined by the Magistrate, or the complaint is liable to be dismissed on the ground that there are no witnesses. The lower Court, however, has apparently left it to the Magistrate to inquire for himself and find out who the witnesses may be. Again, so far as the complaint filed by the lower Court goes, the offences alleged to have been committed by the third plaintiff are offences under sections 193 and 196 of the Indian Penal Code. Section 193 is "giving false evidence," but the complaint, which we have gone through, does not state what was the false evidence given by the third plaintiff. It is not for the Magistrate to fish about in order to find out what statements the lower Court may have considered to be false. The complaint itself must make that clear. The complaint under section 193 cannot therefore stand.

Section 196 is "using as genuine evidence known to be false." This is with reference to certain entries of a symbol for "and Company" found interpolated in the account books of the firm of which the third plaintiff is

(1) (1922) I.L.R., 45 Mad., 928 (F.B.).

a partner, the book having been filed in the case, S.C. Suit No. 4774 of 1922, by the third plaintiff who was conducting it. The complaint or order of the lower Court does not indicate why the lower Court thought that the third plaintiff knew the addition of this symbol to amount to a false entry. The third plaintiff had merely put into Court his own firm's accounts, which contained, let us suppose, interpolations for the purpose of showing that the transactions were with Chandu Lala & Co. instead of with Chandu Lala only. Even so, I find it difficult to bring the case within section 196. The third plaintiff put forward the accounts of the firm as they were at the time he produced them. He did not write these accounts nor is it suggested that he wrote the interpolations. The office manager was second plaintiff, and the accounts are in Guzerati, which is not third plaintiff's language. The lower Court does not indicate that there was any evidence that the third plaintiff knew that the interpolation was a false statement and relies merely on the fact that it was the third plaintiff who produced the accounts into Court. I am clear that no conviction could stand under section 196 on such meagre evidence.

I am therefore of opinion that the order of the lower Court should be reversed *in toto* and would direct accordingly.

MADHAVAN NAYAR, J.—I have had the advantage of reading the judgment of my learned brother with which I agree.

This is an appeal against an order passed by the Chief Judge of the Court of Small Causes, Madras, under section 476 of the Code of Criminal Procedure, by which he forwarded a complaint to the Chief Presidency Magistrate for holding an inquiry as to whether the two appellants are guilty of offences under sections

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193 and 196 of the Indian Penal Code. The sanction was applied for under section 195 of the Criminal Procedure Code, but the matter was dealt with by the Chief Judge under section 476 of the new Code.

The two appellants along with another as partners of firm instituted S.C. No. 4774 of 1922 before the Court of Small Causes against the respondent as second defendant and another as first defendant for the recovery of the balance of money due for principal and interest for the price of goods sold by them to the defendants. The sanction applied for related to certain entries in the account books of the plaintiffs' firm which were adduced in evidence on plaintiffs' behalf in the said suit and marked as Exhibits B-3 to B-5 and C to C-8. Those entries were relied upon by the plaintiffs in support of their case that they dealt with a firm styled 'T. Chandu Lala & Co. of which both the defendants were partners. The first defendant remained *ex parte*. The respondent pleaded that he was not a partner and that there was no firm with the name 'T. Chandu Lala & Co., and that the first defendant carried on business as 'T. Chandu Lala only without the addition of the words "& Co." The learned Judge held that the second defendant was not a partner, that the plaintiffs' accounts were suspicious and that the word "Ku" in Guzerati was probably interpolated subsequently in the plaintiffs' accounts for the purpose of supporting the plaintiffs' case. On these facts, the learned Judge came to the conclusion that a *prima facie* case under sections 193 and 196, Indian Penal Code, was made out against the appellants and therefore forwarded a complaint to the Chief Presidency Magistrate under section 476, Criminal Procedure Code.

As the first appellant is dead, we have to deal with the appeal only so far as it concerns the second

appellant Vadivelu Mudaliar who was the third plaintiff in S.C. No. 4774 of 1922. On the merits I have no doubt that the order of the lower Court should be set aside. Proceedings are directed against this appellant as already mentioned under sections 193 and 196, Indian Penal Code. The complaint which we have perused does not state what the false evidence given by the plaintiff was and the Magistrate is left to find this out for himself. Nor does the complaint give any list of witnesses in support of the prosecution case. As the complaint does not disclose the nature of the false evidence given by the appellant, I do not think it can be said that a *prima facie* case under section 193, Indian Penal Code, has been made out against him. As regards the complaint under section 196, the evidence is not sufficient to convict the appellant for that offence. It is not proved that the appellant wrote the accounts or that he made the interpolation. This interpolation is in the Guzerati language and the appellant does not know that language. The learned Judge does not refer to any evidence to show that the appellant knew that this interpolation amounted to a false entry in the account books. He is said to have produced the account books in Court. Under these circumstances, it cannot be said that a *prima facie* case under section 196, Indian Penal Code, has been made out against the appellant.

The main argument of Mr. Govinda Menon who appeared for the Crown Prosecutor on behalf of the respondent is that reading sections 476 (b) and 195 (3) of the Criminal Procedure Code together, the appellant should have preferred his appeal (1) not to this Court but to the Full Bench of the Court of Small Causes under section 38 of the Presidency Small Cause Courts Act and (2) even if an appeal lay to this Court, he should have preferred it to the original side of the High Court and

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not to the Appellate Side. Section 38 of the Small Cause Courts Act runs as follows :—

“Where a suit has been contested, the Small Cause Court may, on the application of either party, made within eight days from the date of the decree or order in the suit (not being a decree passed under section 522 of the Code of Civil Procedure), order a new trial to be held or alter, set aside or reverse the decree or order, upon such terms as it thinks reasonable, and may, in the meantime, stay the proceedings.”

In my opinion, this section does not confer a right of appeal on a defeated litigant; it also does not imply that a decree of the Court of Small Causes is an appealable decree. It is true that the section appears in the chapter headed “New trials and appeals”; but it is a rule of construction that headings are not to be taken into consideration if the language of the section is clear. The section itself does not speak of appeals. If it was intended to confer a right of appeal, I have no doubt that we should have found in the section itself appropriate language such as “an appeal shall lie,” as we find in the Civil Procedure Code, for instance, in section 96. The right of appeal is given to a party to carry the case from a lower Court to a higher tribunal for testing the correctness of the lower Court’s judgment. It cannot be said that the jurisdiction conferred by section 38 is necessarily upon a Bench consisting of more than one Judge, for, according to the language of the section, the application under it is to be made to the same Court that passed the decree and it is not stated that the Court is to consist of more than one Judge. In this connexion, the rules of the Small Cause Court governing the procedure under section 38 may be usefully referred to. A proceeding under section 38 of the Small Cause Courts Act is called an “application for new trial” (see Order XLI of the Rules) and is to be in form No. 15 which is termed an “application for new trial.” The

Rules show that what is contemplated under section 38 is not an appeal but only an application. We have been informed that no stamp fee is levied on such applications. I may also refer to section 37 of the Small Cause Courts Act which shows that ordinarily a decree of a Presidency Small Causes Court is not appealable.

The question discussed in the above paragraph has not been considered in any decision of this Court, but most of the considerations pointed out are referred to in *In re Shivlal Padma*(1), with which I agree. In that case it was held that where a sanction to prosecute has been granted by a Judge of the Presidency Small Causes Court at Bombay, a Full Court of that Court has no power to revoke the sanction. Though it is a decision under section 195 of the old Code, the reasoning of the learned Judges in that case may be relied upon for holding that a Full Bench of the Small Causes Court is not the Court to which an appeal will lie in this case under section 476 (b) read with section 195 (3) of the Criminal Procedure Code.

The next point argued on behalf of the respondent is that if the High Court is the appellate Court contemplated under section 195 (3) in this case, then the appeal should have been preferred to the original side of the High Court and not to the appellate side. The decision in *Jamna Doss v. Sabapathy Chetty*(2) is an authority against this argument. When a similar contention was put forward in connexion with section 195 (7-c) of the old Code, it was pointed out by the learned Judges in that case that

“The original side of the High Court is not a different Court from the appellate side and that the High Court is the principal Court of original jurisdiction though it exercises both original and appellate jurisdiction.”

(1) (1910) I.L.B., 34 Bom., 316.

(2) (1913) I.L.B., 36 Mad., 138.

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This decision has not been overruled by the decision in *Munisamy Mudaliar v. Rajaratnam Pillai*(1) which held that an appeal from an order under section 195 passed by a Judge sitting on the original side lies to a Bench of the High Court. I do not think it follows from this decision that the High Court is not one Court but is composed of as many Courts as there are original and appellate jurisdictions in it.

I, therefore, overrule the contentions put forward on behalf of the respondent; and, as I have already decided that the order of the lower Court cannot be supported on the merits, I allow this appeal and set aside the order passed by the Chief Judge.

N.R.

(1) (1922) I.L.R., 45 Mad., 228 (F.B.).

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Reilly.

V. LINGAYYA CHETTY (FIRST DEFENDANT), APPELLANT,

1924,
August 28.

v.

CHENGALAMMAL AND OTHERS (PLAINTIFFS AND
SECOND DEFENDANT), RESPONDENTS.*

Hindu Law—Adoption—Sudras—Adoption of a Sudra after his marriage, whether valid—Dattaka Chandrika, authority of—Reasoning on which rule is based, whether sound—Rule, acted upon for more than a century—Rule ought to be followed, though based on slender foundations.

Adoption of a Sudra, after his marriage, is invalid under the Hindu Law. [*Vythilinga v. Vijayathammal*, (1883) I.L.R., 6 Mad., 43; *Pichuvayyan v. Subbayyan*, (1890) I.L.R., 13 Mad., 128; *Janakiram Pillay v. Venkiah Chetty*, (1911) 10 M.L.T., 21, and other earlier cases, followed.]

This rule is based on the opinion of the Dattaka Chandrika, which is recognized as an authority in all the provinces except Bombay which follows the Mayukha, see *Arumilli Perrazu v. Subbarayadu*, (1921) I.L.R., 44 Mad., 656 (P.C.); 42 I.A., 280; and although this conclusion of the Dattaka Chandrika may rest on slender foundations, still the work is recognized as an authority in all the provinces outside Bombay, and the rule has been acted upon for more than a century and it is too late to question it.

APPEAL from the judgment of KUMARASWAMI SASTRI, J., passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 186 of 1921.

In this suit the two plaintiffs who are daughters of one V. Chengayya Chetty who died intestate leaving no son but only daughters and a widow sued, after the death of the latter, to recover possession of the properties left by their father, from the first defendant who

* Original Side Appeal No. 108 of 1922.

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was alleged to have been adopted by the widow, and the second defendant who was a donee of a portion of the property from the first defendant. The plaintiffs disputed the factum and validity of the adoption on various grounds, one of which was that the adoption, even if true, was invalid as the first defendant was a married man at the time the adoption was made. It was admitted that the parties were Sudras and that the first defendant was a married man at the date of the adoption. The learned trial Judge (KUMARASWAMI SASTRI, J.) held that the adoption was invalid on this ground and decreed the plaintiffs' suit. The material portion of the judgment of the learned Judge was as follows:—

"It is admitted that the first defendant was a married man at the date of the adoption, and so far as the authorities in Madras go, it is clear on the authorities that the adoption of a married man is invalid. The parties in this case are admittedly Sudras. The first case as regards the validity of the adoption of a married man among Sudras is the case of *Prusunna Vencatachella Reddyar v. Moodoo Vencatachella Reddyar*(1). The question in that case was whether the adoption of a married Sudra was valid and the Court of Sadr Adaulat held that it was invalid. This is what they state in the judgment:

"The Court of Sadr Adaulat having very maturely considered this case, are fully of opinion that the adoption of the appellant after his marriage is illegal and void under the rules and restrictions of Hindu Law."

The next case is *Vythilinga v. Vijayathammal*(2), where TURNER, C.J., and MUTTUSWAMI AYYAR, J., observe as follows:—

"As to the validity of the adoption the decision of this Court in the appeal of Ayyavaru is the only reported case in this

(1) (1825) 1 M.S.D., 406 at 412.

(2) (1883) 1 L.R., 6 Mda., 34.

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Presidency which lends any colour to the opinion that even among Sudras the adoption of a married man would be regarded as valid under Hindu Law. It would certainly be invalid under the Dattaka Chandrika which declares that marriage concludes the period within which a Sudra may be adopted. In *Prusunna Vencatachella Reddyar v. Moodoo Vencatachella Reddyar*(1), the Sadr Court in 1823 ruled that the adoption of a Sudra after marriage was illegal and void. It will be seen that the decision of the High Court in the appeal of Ayyavaru did not proceed on the ground that the adoption was valid. The Court conceived it was precluded by the decree obtained by the appellant in the earlier litigation from examining its validity ;"

so that the learned Judges were of opinion that the adoption of a married Sudra was illegal. The question was again referred to in *Pichuvayyan v. Subbayyan*(2). Though that case was a case between Brahmans the question was discussed as to marriage being a bar to adoption, and it was held that in all cases, whether Brahmans or Non-Brahmans, marriage would be a bar. MUTTUSWAMI AYYAR and SHEPHARD, JJ., observe :

"Apart from the Bombay cases, which proceed upon texts which have no authority in this Presidency, no text or other authority can be cited to justify an adoption taking place after marriage, notwithstanding that the person taken in adoption may belong to the same gotra as the adopter. On the other hand such authority as there is on the subject is against the respondent's contention."

In the Dattaka Chandrika, the author, treating of the rites which must be performed in the adopter's family, refers to the right of marriage as that by which the filial relationship can be completed in the case of Sudras. An adoption, therefore, in order to be valid, even among Sudras, must take place before the marriage of the adopted son. (Dattaka Chandrika, s. II—29-31, p. 643, Stoke's Hindu Law Books.) The same writer

(1) (1825) 1 M.S.D., 406.

(2) (1890) 1 L.R., 13 Mad., 128.

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fixed upanayanam as the rite which completes the filial relationship in the case of Brahmans, and though this rule with regard to upanayanam has been relaxed in the case of sagotras, there is no warrant for the contention that the relaxation should be extended to marriage. The rule that no one is eligible for adoption after marriage was recognized by the Sadr Adaulat in 1823—*Prusunna Vencatachella Reddyar v. Moodoo Vencatachella Reddyar*(1) and *Ranee Sivakamee Nachiar v. Mooto Vizia Raghunadha Satooputty*(2) and in 1830 Sir T. STRANGE sums up his view of the law by saying

“Upon these principles it would seem as if there could be no adoption of one who is married, marriage not being capable, like tonsure and investiture, of annulment.”

Reference was made by the learned Judges to *Vythilinga v. Vijayathammal*(3), already referred to by me. In *Janakiram Pillay v. Venkiah Chetty*(4), Sir ARNOLD WHITE, C. J. and SANKARAN NAYAR, J., were of opinion that an adoption after marriage among Sudras was clearly invalid. The proposition is treated as one admitting of no doubt. The view that marriage is an absolute bar to adoption has been adopted by all the Courts where Dattaka Chandrika and Dattaka Meemamsa are accepted as authorities, and except in Bombay all the Courts have taken the view that such adoption is invalid. I may refer to the case in *Ganga Sahai v. Lekhraj Singh*(5), where MAHMOOD, J., in an elaborate judgment after dealing with all the authorities came to the conclusion that marriage was an absolute bar to the validity of adoption among Sudras. STRAIGHT, J., agreed with that judgment. The same view was taken in *Jhunka Prasad v. Nathu*(6), where the decision

in *Pichuvayyan v. Subbayyan*(1) was approved and followed, and in *Damodarji v. The Collector of Banda*(2), STANLEY, C.J., and KARAMAT HUSSAIN, J., after referring to the authorities, held that among Sudras marriage is a bar to adoption and that a boy can only be adopted till marriage and not afterwards. As they pointed out in that judgment their Lordships of the Privy Council in *Bhagavan Singh v. Bhaghavan Singh*(3) have referred to Dattaka Chandrika as a work of authority which Courts are bound to follow. Mayne in his *Hindu Law*, eighth edition, page 181, refers to the authorities in Bengal and Southern India and states that so far as Sudras are concerned adoption subsequent to the marriage would be invalid. Trevelyan in his *Hindu Law* at pages 146–147 also gives the result of the authorities that according to the Bengal, Benares and Madras schools of law in the case of Sudras adoption must take place before marriage. As pointed out in the Madras case, in the Bombay Presidency where the Mayukha is a paramount authority, the Bombay High Court has adopted the view of Neelakanta, the author of Mayukha, and of his father Sankarabhatta and has ruled that in all classes a married man, even if he has children, may be adopted. But in Courts where Dattaka Chandrika is an authority, the prohibition in Dattaka Chandrika has been accepted as binding.

Reference has been made by Mr. Radhakrishnayya to the view taken by Sarkar in his *Law of Adoption* at page 361 as to the slender foundations on which the rule in Dattaka Chandrika is based. But it seems to me that, having regard to the long catena of authorities it is not open to me to hold that the Dattaka Chandrika's view is

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(1) (1825) 1 M.S.D., 406.

(3) (1883) I.L.R., 6 Mad., 43.

(5) (1887) I.L.R., 9 All., 253.

(2) (1825) 1 M.S.D., 106.

(4) (1911) 10 M.L.T., 21.

(6) (1918) I.L.R., 35 All., 263.

(1) (1890) I.L.R., 13 Mad., 128.

(2) (1910) 7 A. L.J., 927.

(3) (1899) I.L.R., 21 All., 412; 26 I.A., 153.

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not an authority and that the decisions I have referred to are not binding on me.

In the view I take that the adoption of the first defendant is invalid, it is not necessary to go into the other reasons put forward for the invalidity of the adoption."

Against this judgment, the first defendant preferred this appeal.

V. Radhakrishnayya for appellant.

S. Rangaswamy Ayyangar for respondent.

JUDGMENT.

RAMESAM, J.

RAMESAM, J.—This is an appeal against a judgment of our brother KUMARASWAMI SASTRI, J. He decreed the plaintiffs' suit holding that the adoption of the first defendant was invalid on the ground that he had been married at the time of the adoption. Unless the appellant (first defendant) successfully challenges this conclusion, the other points in the case do not arise. It is admitted that the parties are Sudras.

Apart from Sanskrit texts, the earliest opinion available in Madras is the case No. 18 of 1814 in Vol. I of the Select Decrees of the Sadr Adaulat, page 101. The pandit's answer at page 106 runs thus:

"Sudras may be adopted till the sixteenth year. But as it is a rule that a married boy cannot be adopted it must be understood that an unmarried boy may be adopted, till he has attained the age of sixteen. These are the rules for the Sudra caste. Thus it is declared in the Dutta Mimamsa, Dutta Chandrika and other Sastras."

The point did not arise in the case.

The point was actually decided in another case in the same volume at page 406, *Prusunna Vencatachella Reddyar v. Moodon Vencatachella Reddyar*(1). The

(1) (1825) 1 M.S.D., 406.

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pandit stated that the adoption was invalid (page 410) and the Court of Sadr Adaulat held (page 412) that

"the adoption of the appellant after his marriage was illegal and void under the rules and restrictions of Hindu Law."

We have next the statement of Sir T. Strange in his Hindu Law (Vol. I, page 91):

"Accordingly in a case referred to in a subsequent page (page 96, case of Raja Nobkissen) the pandits stated an assumption of the string in the higher classes and marriage in the fourth as obstacles to adoption."

After referring to the possibility of annulment of ceremonies already performed in the natural family he says,

"Upon these principles it would seem, as if there could be no adoption of one who is married; marriage not being capable, like tonsure and investiture, of annulment."

In the judgments of Sadr Court, 1861, at page 147, *Vira Kumara Servai v. Gopalu Servai*(1) (cited at page 1066 of West and Buhler's Hindu Law, 3rd edition), the same point arose and the District Munsif held the adoption to be illegal as at the time thereof the plaintiff was a married man. Though the case went up on appeal and second appeal, the plaintiff did not challenge the District Munsif's ruling and in second appeal the District Munsif's decision was restored.

In *Ayyaru Muppanar v. Niladatchi Ammal*(2), the plaintiff succeeded as adopted son on the ground that, in a previous litigation, his adoption was recognized (rightly or wrongly) and he got a decree for maintenance against his adoptive father on the footing of a validly adopted son. The matter in the second litigation was *res judicata* between the plaintiff and his adoptive father. It appears that the pandits (in the first case) declared against its validity (page 47) but the Registrar who gave

(1) (1861) 1 M.S.D., 147.

(2) (1862) 1 M. H.C.R., 45.

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the decree in appeal thought that the parties were of a class not strictly bound by the requirements of the Hindu Law. There was an appeal to the Privy Council, but the matter was compromised and the appeal withdrawn. One of the terms of the compromise was that a daughter of the alleged adopted son should be married to a natural son of the adoptive father. In a later litigation, this marriage was attacked on the ground that it was invalid. The High Court in *Vythilinga v. Vijayathammal*(1) held that the adoption was invalid (the question of the validity of the adoption not being *res judicata*) and that the marriage was valid. TURNER, C.J., and MUTTUSWAMI AYYAR, J., said :

"It would certainly be invalid, under the Dattaka Chandrika, which declares that marriage concludes the period within which a Sudra may be adopted."

In *Pichuvayyan v. Subbayyan*(2), all the above authorities were reviewed and the adoption of a boy after his marriage was held to be invalid. It is true that the parties were not Sudras, but the reasoning was general and applied to all Hindus. The respondent in it attempted to support the adoption by arguing from *Viraragava v. Ramalinga*(3), that, as the parties were of the same gotra, marriage was no obstacle, just as upanayanam was no obstacle. This argument was repelled. The Judges said :

"There is no colour for the argument that this decision abrogated the rule according to which the previous marriage of the child is an obstacle to his adoption. There is, as we have shown, distinct authority for the rule and the recognition of it is in no way inconsistent with the decision regarding the ceremony of upanayanam. It must be borne in mind that a valid adoption presupposes a gift by the father or mother, and they have no power under the Hindu Law to give the daughter-in-law or their son's wife in adoption."

(1) (1883) I.L.R., 6 Mad., 43.

(2) (1890) I.L.R., 13 Mad., 128.

(3) (1886) I.L.R., 9 Mad., 148 (F.B.).

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The learned vakil for the appellant argues that, so far as the last reason is concerned, the adoption of a childless widower would be valid. In the present case, the appellant was not a widower at the time of the adoption. In *Janakiram Pillay v. Venkiah Chetty*(1), the question was whether Gopalakrishna Pillai was validly adopted. The Court observed that there was no reliable evidence of an adoption before marriage and any adoption after marriage was invalid.

The authorities in Allahabad have been referred to by our learned brother and need not be repeated. The learned Vakil for the appellant draws our attention to a quotation by MAHMOOD, J., in *Ganga Sahai v. Lekhraj Singh*(2) from Dr. Jolly who says :

"The Dattaka Tilaka does not consider marriage even as a bar to adoption, in case the person to be adopted belongs to the same gotra as the adopter. The Dattaka Siddhanta Manjari declares that it is not lawful to adopt a married man."

But the Dattaka Tilaka has never been used in Southern India. I doubt if its existence is known among the people and it does not appear that it has been followed in this respect in Allahabad or Bengal.

The most important argument of the vakil for the appellant is that most of the authorities against him are based on the Dattaka Chandrika and that the reasoning of the Dattaka Chandrika is not sound. There is no doubt as to the opinion of the author of the Dattaka Chandrika in verse 29 of section 11. It is true that the preceding reasoning from verse 23 relates to the question whether the performance of tonsure operates as an obstacle. Mr. Sarkar in his Hindu Law of Adoption is of opinion that the conclusion of the Dattaka Chandrika rests on slender foundation. This may be

(1) (1911) 10 M.L.T., 21.

(2) (1887) I.L.R., 9 All., 253.

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so, but we have to recognize the fact that, whatever its reasoning may be, and whoever its author may be, the work is recognized as an authority in all the provinces outside Bombay. I need only refer to the latest decision of the Privy Council recognizing its authority, *Arumilli Perrazu v. Subbarayadu*(1).

Above all, it must be recognized that the rule has been acted upon for more than a century and it is too late to question it. The opposite rule in Bombay is based on the special authority of the Mayukha and cannot help us.

The decision of the learned Judge is right and the appeal is dismissed with costs.

The receiver will be allowed to take his costs from the estate in the first instance.

REILLY, J. REILLY, J.—I agree. It has been contended before us for appellant that the passages of the Dattaka Chandrika, on which is based, so far as that work is concerned, the doctrine that a married Sudra cannot be adopted, have been misunderstood. But at the least it cannot be denied that it is possible to interpret the terms of verses 29 and 32 of section 11 of the Dattaka Chandrika taken together, as stating by implication that, in the author's opinion, the adoption of a married Sudra is not permissible. That interpretation, it appears, has been accepted and acted upon in this Presidency for more than a century; and there does not appear to be any reported case in which it has been decided finally that the adoption of a married Sudra is possible. That being so I do not think that we are at liberty to re-open the question.

K.B.

(1) (1921) I.L.R., 44 Mad., 656 (P.C.).

APPELLATE CIVIL.

Before Mr. Charles Gordon Spencer, Officiating Chief Justice, and Mr. Justice Srinivasa Ayyangar.

THE MADRAS AND SOUTHERN MAHRATTA RAILWAY
COMPANY, LIMITED (DEFENDANTS), APPELLANTS,

1924,
September
12.

v.

JAYAMMAL (PLAINTIFF), RESPONDENT. *

Tort—Negligence—Suit for damages against Railway Company—Personal injuries caused to plaintiff—Plaintiff, a girl aged seven years, knocked down by locomotive engine of defendant Railway Company, while crossing railway line at an unauthorized point after passing through a wicket gate—Short cut, habitually used by people in the neighbourhood, whether an allurement—Plaintiff, whether trespasser, licensee or invitee—child, whether capable of negligence in law—Contributory negligence whether imputable to children—Defendant, whether negligent—Special care—Duty of Railway Company—Proximate or effective cause—Trap, allurement or invitation, nature of.

The plaintiff, a little girl of seven years of age, was knocked down by an engine of the defendant Railway Company while she was crossing the railway line, and sustained severe injuries. Starting from one side of the line to go to a place on its other side, she passed through a wicket gate and stepped on the loop line on which the engine was running on its way to the engine shed, when the accident happened. It appeared that there were other level crossings with gates duly protected at some distance, but the people in the neighbourhood were in the habit of passing through the wicket gate and crossing the line at a point near it as a short cut. There was no proof that any special look-out was kept by the driver or other servants while the engine was passing near the wicket gate. The plaintiff, by her father as next friend, sued the Company for damages for the injuries sustained by her.

Held, that the proximate or effective cause of the accident was the negligence of the plaintiff in not looking out for

* Original Side Appeal No. 61 of 1923.

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any passing engine when she was crossing the line; that the plaintiff, though a child of seven years, was capable of appreciating danger and was old enough to have a sense of discrimination, so as to be guilty of negligence in not taking ordinary care; that the plaintiff, if not a trespasser, was at any rate a licensee, and when a licensee was concerned, an owner of the premises was not liable for injuries caused to the licensee, provided the owner did not place any trap in the way, and there was no allurement or invitation to the person injured; that the existence of a short cut could not be treated as an allurement within the meaning of the English decisions, and there was no trap or invitation in this case; *Cooke v. Midland Great Western Railway of Ireland*, [1909] A.C., 229; *Glasgow Corporation v. Taylor*, [1922] 1 A.C., 44; that the negligence of the plaintiff being the proximate cause of the accident, the defendant Company was not liable in law to pay damages to the plaintiff for her injuries; *Davey v. London and South-Western Railway Co.*, (1884) 12 Q.B.D., 70, referred to.

Held, by SPENCER, Offg. C.J., that the defendant Railway Company and their officials were not guilty of any negligence at any stage of the case.

Held by SRINIVASA AYYANGAR, J., that the defendant Company was guilty of negligence in not keeping a special lookout when the engine was passing near the wicket gate, that children, capable of discrimination and perceiving danger, can be guilty of contributory negligence in law, that, as the plaintiff was guilty of contributory negligence in not having exercised ordinary care and circumspection by looking out for an engine or train, when she was about to step on the line, she was not entitled in law to claim damages from the defendant.

APPEAL from the judgment of COURTS TROTTER, J., dated 20th April 1924, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 465 of 1922.

The plaintiff, a little girl of seven years of age, was knocked down by an engine of the defendant Railway Company. The village of Amoor lies on both sides of the railway line and the Wallajah Road railway station is in the middle of the village. The plaintiff, living with her parent in the village on the northern side of the railway line, had gone on an errand to a shop on the south

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side of the line and was returning home. She had to cross the line on her way; she passed through the wicket gate near the station master's house on the southern side of the line and went to the west along the line for some distance, when she turned to the right to cross the line. There were two recognized level crossings with gates, at a considerable distance from the station platform, but the evidence showed that people in the neighbourhood were in the habit of passing through the gate and crossing the line at the point where the accident happened. The engine, which had brought the Ranipat train from the west, was uncoupled from the train, and went to the east beyond the wicket gate and then came back to the west on the loop line to go to the engine shed for watering, when the accident happened. The learned Judge (COURTS TROTTER, J., as he then was) held that the plaintiff was not a trespasser but at least a licensee, and that the Company through their servants was guilty of negligence; that the Company would be entitled to rely upon a plea of contributory negligence, if this had been a case of an adult, but, as the plaintiff was a child of seven years, the doctrine was not applicable and relied on *Cooke v. Midland Great Western Railway of Ireland*(1) as overruling the law laid down in the earlier English cases, such as *Stiefsohn v. Brookebond & Co.*(2) and referred also to *Glasgow Corporation v. Taylor*(3); that there was no allurement in this case, as a short cut is not an allurement; that, though as against an adult the Company would be liable only for a trap, as against a child, who was allowed to be on the premises, the owner would be liable if he is guilty of even ordinary negligence, i.e., that what in the case of an adult would be merely negligence, in the case of children, would be regarded

(1) [1909] A.C., 229.

(2) [1889] 5 T.L.R., 684.

(3) [1922] 1 A.C., 44.

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as a trap; and that consequently the defendant Company was liable in damages for the injury caused to the plaintiff. His Lordship awarded Rs. 3,500 as damages to be paid to the plaintiff by the defendant. Against this judgment, the defendants preferred this appeal. The judgment of the learned Judge (COUTTS TROTTER, J.) is reported in *Jayammal v. M. & S.M. Ry. Co.*(1)

Vere Mockett for appellant (defendant).—This is a suit for damages for injury caused to the plaintiff by a railway accident. The plaintiff was knocked down by a railway engine belonging to the defendant Company. The plaintiff, though a child of seven years of age, was not so young as not to know the consequences of her act; she was capable of shifting for herself in dangerous situations. The learned Judge (COUTTS TROTTER, J., as he then was) concedes that if the plaintiff was an adult, no case was made out against the Railway Company. The learned Judge erred in holding that contributory negligence cannot be imputed to a child so as to disentitle her to damages against the defendant for an injury caused by the negligence of the latter. There is no evidence in this case, that *children* were ever usually at this place for crossing the railway line. The child was going along the line, and not on the line. The engine-driver could not do anything to prevent the accident, and hence there was no negligence on the defendant at any time or stage of the occurrence. The plaintiff was at best a licensee, if not a trespasser. The duty of an owner of property towards a licensee is no higher than that he should not set a trap for the licensee. See *Fairman v. Perpetual Investment Building Society*(2). The plaintiff was not an *invitee* but only a licensee. A licensee, taking advantage of a licence, must take it with

(1) (1923) I.L.R., 46 Mad., 929.

(2) [1923] A.C., 74.

its risks: only traps should not be set up by the owner. See *Hayward v. Drury Lane Theatre and Moss' Empires* (1). Ordinary negligence on the part of the owner, even if made out, is not a trap—*Lowery v. Walker* (2). Only a trap and not ordinary negligence will give a cause of action to a licensee. The defendant was not guilty of negligence at any stage in this case. The plaintiff was clearly guilty of contributory negligence in this case. The proximate or effective cause of the accident was the gross negligence of the plaintiff herself. The contributory negligence of children has the same effect in throwing the responsibility on them, as in the case of adults. *Abbot v. Macfie*(3) and *Burchell v. Hickisson*(4). These cases are not overruled by the House of Lords in *Cooke v. Midland Great Western Railway of Ireland*(5) and *Glasgow Corporation v. Taylor*(6). The two cases decided by the House of Lords, viz., *Cooke's case* and *Taylor's case* were cases of allurement and of dangerous animals, respectively. There was no allurement in this case: a short cut is not an allurement. The learned Judge held that a child is incapable of contributory negligence. The earlier English cases decide the contrary. Those cases have not been overruled by the House of Lords in *Cooke's case* or *Taylor's case*, but indirectly approved by the House of Lords in *Fairman v. Perpetual Investment Building Society*(7). See also *Jenkins v. Great Western Railway*(8), *Latham v. R. Johnson & Nephew, Limited*(9) and *Hardy v. Central London Railway Company*(10). There was thus (1) no proof of negligence on the part of defendant, (2) if there was such

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(1) [1917] 2 K.B., 899.

(3) (1863) 33 L.J. (N.S.), Ex. 177.

(5) [1909] A.C., 229.

(7) [1923] A.C., 74.

(9) [1913] 1 K.B., 398.

(2) [1911] A.C., 10.

(4) (1881) 50 L.J. (N.S.) C.P., 101.

(6) [1922] 1 A.C., 44.

(8) [1912] 1 K.B., 525.

(10) [1920] 3 K.B., 459.

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negligence, there was clearly contributory negligence on the part of the plaintiff, who was capable of circumspection and did not look out with any care for any engine or train on the line while she was about to cross it; and (3) there was no invitation or licence to the plaintiff; (4) either the child was capable of circumspection in which case there was negligence on her part, or if she was not capable of taking care, she had no licence to be there, but her guardian was guilty of negligence.

T. V. Ramanatha Ayyar for respondent.—The Company was guilty of negligence. At the point where the wicket gate was situated, the defendant should have taken special care to protect passengers from an engine passing on the line near the gate. The defendant Company had taken no care. The Company had allowed adults and children to pass by the wicket gate and cross the line. Special watchfulness should have been exercised by the Company's servant at that point, and no care was taken both generally and on that occasion in particular. There is no evidence that there was blowing of the whistle when the engine started on the loop line or when it passed near the wicket gate. There was a general licence to all people in the neighbourhood in the village of Amboor to cross the railway line at that point and pass by the wicket gate. It was a licence to children as well as adults. There was negligence firstly as there was no whistling before the engine started on the loop line, and secondly, people in charge of the engine did not exercise such special care, which, the engine-driver himself admits, he was bound to take at the wicket gate. If the engine-driver saw her, as he should have done, he ought to have whistled or stopped the engine; he did neither; if he did not look out to see if there was any one on the line about the wicket gate, that is itself negligence. If a

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Railway Company allows persons to pass and repass the line at a particular point, they must take all reasonable precaution at that place. See Halsbury's Laws of England, Volume XXIII, page 723, also Volume XXI, pages 373—393; Beavan on Negligence, Volume I, page 443, 3rd Edition; *Dublin, Wicklow and Wexford Railway Co. v. Slattery*(1). The Railway Company is bound to take a greater degree of care towards a child than towards an adult: [See Salmonds on Torts, page 420, as to degree of care as against a child.] Even if the plaintiff was negligent, the defendant was bound to have exercised ordinary care and diligence to avoid the accident. See *Radley v. London and North Western Railway Co.*(2). There was no negligence at all on the part of the plaintiff, as the engine was coming from behind on the loop line on its way to the engine-shed without warning and the child could not anticipate its coming back. The onus of proof of initial negligence of defendant may be on the plaintiff, but the contributory negligence of the plaintiff should be proved by the defendant, and the defendant has not proved contributory negligence on the part of the plaintiff.

"Short cut" afforded by the passage through the wicket gate and crossing the line near that gate is an allurement to children as well as to adults, and the Company is liable for accidents on the principle laid down by the House of Lords in *Cooke v. Midland Great Western Railway of Ireland*(3).

Vere Mockett in reply.—The child was walking by the side of the railway line before she turned to cross the line; she did not walk on the line. The existence of railway lines is itself a notice that people should avoid them. The allurement cases have no application to this

(1) (1878) 3 App. Cas., 1155. (2) (1876) 1 App. Cas., 751.
(3) [1909] A.C., 229.

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case. The engine-driver or the other persons in charge of the engine could not have avoided the accident by stopping the engine.

JUDGMENT.

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SPENCER, OFFG. C.J.—The plaintiff-respondent is a little girl of seven years of age who was run over by a locomotive engine at Wallajah Road Railway Station and lost her right arm and her right leg. She has been awarded Rs. 3,500 damages and costs in the Court of first instance by COUTTS TROTIER, J. The Railway Company has appealed.

The facts are clear that the plaintiff, who lived with her father in the village of Amoor adjoining Wallajah Road Station, crossed the line in order to go to her grandmother's house and that she was returning with a basketful of grass when she was knocked down by the engine of the Ranipet train, which had left its carriages standing by the platform after uncoupling and had gone up the line eastwards, tender foremost, to the points, then reversed and was running down, head foremost, along the loop line towards the engine-shed, where it had to water, when the accident happened. The plaintiff herself states that on her way home she crossed by the way leading from the wicket gate near the Assistant Station Master's house, the engine ran over her, and she was injured. Of her fourth and fifth witnesses, who are merchants professing to have been eye-witnesses of the accident, P.W. 4 states, "The girl came with a basket of grass on her head and entered the gate and was walking towards the west. She had to pass along the line a little to reach the station platform and then go to her village. When she put her leg on the line the accident happened." P.W. 5 states, "The girl with a basketful of grass over her head entered the gate and turned

towards the west. She went and then turned to the north to go to the big platform which was sloping. The engine came and she was run over." The engine-driver, D.W. 2, was standing on the right hand side of the engine and driving it. He, therefore, did not see the child before the accident happened. D.W. 4, a fireman on the engine, was standing on the left hand side and suddenly saw the child at a distance of four or five feet from the engine. The fact that the child's right arm and right leg were run over by the engine wheels makes it probable that she was knocked down just as she was stepping on to the line from the south and that she was hit on the right side by the engine. This accords with the statements of the eye-witnesses who profess to have seen the accident and with her own account. There is evidence that people living in the neighbourhood were in the habit of crossing the railway line first over the overbridge and then from the platform crossing the station yard in a direction which led to a wicket gate beside the Assistant Station Master's house. There is no evidence that there was a worn foot-path in this direction, but there is no reason to doubt the statements of the witnesses that this short cut was being used. The driver of the engine and a fireman (D.W. 4) stated that the whistle was blown when the engine was uncoupled from the train and again when it started down the loop line to go westwards. The plaintiff said that no whistle was blown. P.W. 3, the Branch Postmaster, says that no warning was given. The next witness was not asked. The fifth witness says he did not hear any whistle. The Station Master (D.W. 5) does not remember whether it was blown. The learned Judge rightly observed that the witnesses cannot be expected to be able to speak from memory as to whether the usual formality of blowing the whistle was observed

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on that day unless there was something to call their attention to the fact.

The existence of a wicket gate close to the Assistant Station Master's house has been made much of. There is a notice board warning persons not to use that crossing, but whether it was in existence before the accident happened has been questioned. I do not consider that the existence of the wicket gate is a material circumstance in the case. Even if it had been kept locked, as suggested by the learned Judge in the Court below, it would have been easy for children like the plaintiff to have slipped through the wire fencing that enclosed the station yard.

On the evidence I find that the proximate cause, the *causa causans* as it is called, of the accident was that the plaintiff stepped on the railway line in front of a moving engine and that she was guilty of negligence in not keeping a sharper look out for passing trains when she was crossing the line at an unauthorized place of crossing. As she was carrying a load of grass on her head, it is likely that she could not readily turn her head to the right and left and look up and down the line and see if anything was coming. Though she was capable of appreciating danger and was old enough to have a sense of circumspection, she did not use it owing to the heedlessness of youth or the burden on her head. The accident happened in broad daylight. The engine was an obvious danger, capable of being perceived even by a child of tender years. She must have seen the train standing by the platform without its engine if she had looked in front of her. The fact that the engine had gone to the east was no guarantee that it would not return along the line which she was about to cross. The danger of being run over by a passing engine when crossing the railway lines imposes a necessity for the

utmost caution on all persons walking on or near the track. Persons, who cross an open railway line at an unrecognized crossing, do so at their own peril. The plaintiff, if not a trespasser, was at least a licensee; and, where a licensee is concerned, the owner of the premises is not liable for damage caused by the negligence of the licensee, provided that he does not place any trap in the way of those who come upon his premises. In the present case there was no trap, no allurement and no invitation. It has been suggested that leaving the wicket gate unlocked was an invitation to people wanting to go to the other side of the line to take the short cut instead of crossing by the level crossings further down on the east and west. The learned Judge on the original side held that this short cut was not an "allurement" in the sense in which the phrase has been used in reported cases where negligence has been alleged. I have no doubt that the existence of a short cut cannot itself be treated as an allurement. Otherwise, people might make short cuts across the railway at any point, and the railway would always be liable for accidents occurring to persons using the short cuts and no measure to prevent such accidents would be effective short of guarding the line at short intervals for its entire length, or putting up some impassable barrier. In Cooke's case it was not the gap in the hedge but the turn-table which was the allurement, as it was used by the youth of Navan as a kind of glorified merry-go-round (vide Lord MACNAGHTEN's judgment).

The decision of this case in favour of the plaintiff seems to be based upon two errors. In the first place, the learned Judge thought that, if a proper look-out had been kept on the left side of the engine, this accident could have been avoided either by blowing the whistle again, or by stopping the engine as soon as it got near

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the child. Secondly, the learned Judge was of opinion that what would be merely negligence in the case of an adult, in the case of children might be regarded as a trap and that the conduct of the railway officials was negligent in inviting children to cross lines of railway over which the Company's trains run.

On the first point there is no evidence in this case as to the distance within which an engine going at between five and ten miles an hour could have been brought to a standstill. The fireman, D.W. 3, first saw the child when she was four or five feet off. It is not likely that the engine could have been stopped within that distance. Unlike a motor-car, the course of a train cannot be altered to avoid running over pedestrians. Nor has it been proved that a proper look-out was not kept by the engine-driver who was on the right side of the engine.

The respondent's pleader argues that the engine-driver knowing that the track between the wicket gate and the platform was being used by the public, should have kept a special look-out when they came near that spot. In *Davey v. London and South Western Railway Co.*(1) (a most instructive case) BRETT, M.R., laid down the law thus in a case where the plaintiff claimed damages from a Railway Company for negligence. He said :—

"In such an action as this the burden of proof lies entirely upon the plaintiff. There are two things for him to establish, one affirmative and the other negative. It is for the plaintiff to show that the accident which happened to him was caused by a negligent act of the defendants, or of those for whose negligent acts the defendants are liable, and that that accident was produced, as between him and the defendants, solely by the defendants' negligence in this sense, that he himself was not guilty of any negligence which contributed to the accident; because even though the defendants were guilty of negligence which contributed to the accident, yet if the plaintiff

also was guilty of negligence which contributed to the accident, so that the accident was the result of the joint negligence of the plaintiff and of the defendants, then the plaintiff cannot recover, it being understood that, if the defendants' servants could by reasonable care have avoided injuring the plaintiff, although he was negligent, then the negligence of the plaintiff would not contribute to the accident."

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This imposes a duty upon defendants to do all in their power to avoid an accident in cases where one is imminent owing to the negligence of the plaintiff. This point is well brought out in the judgments of the Court of Appeal in *Gaffney v. The Dublin United Tramways Company*(1). In other words, it is the party who is last negligent, who is made responsible for an accident arising from the negligence of both parties.

In *Davey's case*(2) BOWEN, L.J., observed :

"It was broad daylight, and as soon as he had entered the wicket gate—had he been a sensible man he would have looked up and down the line to see if there was a train coming either way. A train was in fact so close to him that he was only able to cross fifteen feet before he found himself between its buffers, and yet he never took the trouble to look and see if the train was coming. Now is it open to any reasonable mind to draw the inference that that accident was caused by anything except the gross negligence of the man who never looked at a train which was within a few feet of him?"

It seems to me that every reasonable mind which has before it the facts of the present case must agree that it was the gross negligence of the plaintiff which led her to step on the permanent way in front of an approaching engine without first assuring herself by looking to the right and the left that there was no possibility of being run over.

The facts of the present case do not support the inference that the Railway Company's servants were negligent. Supposing the driver had seen the plaintiff coming from the wicket gate towards the line, there was

(1) (1916) 2 Ir. Rep., 472.

(2) (1884) 12 Q.B.D., 70.

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no reason for him to anticipate that she would attempt the very rash act of crossing in front of the engine. Every day drivers of cars and carriages, seeing foot passengers on the public road, proceed on the assumption that they will act rationally and not commit the imprudence of running in front of a car or carriage. It would not be reasonable to compel drivers to form a mental estimate as to the age and capacity of taking care of themselves of every one of the pedestrians that they meet in their way through traffic and to adjust their speed accordingly, though they would naturally proceed slowly past a school or playground where children are likely to congregate, as children are notoriously careless owing to their inexperience.

In *Burchell v. Hickisson*(1) an action was brought on account of damage sustained by a boy of four years of age who fell through a gap in railings leading up the steps to a house. It was held that there was no invitation to a person of the plaintiff's age to use those steps unless he was in charge of some older person who could take care of him, and if he was in charge of others, then there was no concealed danger. This gives rise to a dilemma. COUTTS TROTTER, J., seems to have been of opinion that this case, decided in 1880, no longer represented sound law and that it had been exploded by the decision of the House of Lords in *Cooke v. Midland Great Western Railway of Ireland*(2). That was a case of a turn-table which formed a great attraction to children living in the neighbourhood to play with. But it was a dangerous object when unlocked because, if used without care, it was liable to crush the user, as it did to the boy Cooke. In *Jenkins v. Great Western Railway*(3) a child of two and a half years was run over by an express train

(1) (1881) 50 L.J. (N.S.) C.P., 101. (2) [1909] A.C., 229.
(3) [1912] 1 K.B., 525.

having got on the main line and it was held by the learned Judges that there was no invitation to trespass on the main line of the railway, although children had been allowed to play on a pile of sleepers close to dwelling-houses on the side of the line. The sleepers had not been properly fenced off so as to prevent children coming and playing upon them, and therefore it was held that they were licensees so far as the timber pile existed, but there was no invitation or leave to go on to the main line where the accident took place. It was considered that to hold that there was an invitation to cross the railway line would be an undue extension of the doctrine in *Cooke's* case, the ground of that decision being that there was leave and licence to play with a turn-table which was a dangerous machine and that it was because the person injured availed himself of that leave and licence he was injured. If the railway staff had left an unattended locomotive with steam up standing in the station yard for boys to play with, I have no doubt that that would have constituted an allurements and the Company would have been responsible for the consequences. But I cannot agree that the failure of the Railway Company to prevent passengers from crossing the line through the wicket gate opposite the platform at the Wallajah Road Station was an invitation or allurements either to adults or children to cross the railway lines without proper circumspection. In *Fairman v. Perpetual Investment Building Society*(1) the House of Lords recently approved of the decision of the Court of Appeal in *Latham v. Johnson*(2) as containing a concise and accurate expression of well-known principles of law. In the latter decision *Burchell v. Hickisson*(3) and *Lowery v.*

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(1) [1928] A.C., 74 at p. 80. (2) [1918] 1 K.B., 398.
(3) (1881) 50 L.J. (N.S.) C.P., 101.

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Walker(1) are referred to as still being good law. Latham was a child hurt by playing with paving stones on unfenced waste land. As there was no allurement, nor trap, nor invitation, nor dangerous object, it was held that the defendants were not liable for the injuries caused to the plaintiff's hand.

The case of *Glasgow Corporation v. Taylor*(2) where a child of tender years was attracted by belladonna berries grown in a public garden which were a danger to young children unable to take care of themselves within the knowledge of those who put such plants in a public place, and the case of *Lowery v. Walker*(1), where a savage horse was placed in a field over which the public had a licence to walk are easily distinguishable both from the facts in Cooke's case and from the facts of the present case, the former being a case of a trap and allurement to children using a public right, and the second being a dangerous thing placed in the way of licensees, who did not know it to be dangerous, as horses in general are not dangerous animals. The distinction between those cases and the present is that the plaintiff in the present case was not using a right of way across the rails when she was injured and that everybody knows an engine to be likely to hurt those who come in contact with it. In *Abbot v. Macfie*(3), where a boy of tender age meddled with the flap of a cellar, which was placed so as to lean almost upright against a wall, judgment was given for the defendants, although it was stated that, if an adult passer-by had accidentally and without carelessness pulled the flap over and been hurt, he might have successfully maintained an action for damages arising through negligence to which he did not contribute.

(1) [1911] A.C., 10.

(2) [1922] 1 A.C., 44.

(3) (1863) 33 L.J. (N.S.) Ex., 177.

In *Singleton v. Eastern Counties Railway Company*(1), where a child of three and a half years of age got on to a parapet of a bridge and had his leg cut off by a passing train, the action was dismissed, in spite of the fact that the driver made no attempt to stop the train, as it was held that the plaintiff was wrongfully upon the railway, and though he was only a child of tender age, the accident must have been due to his negligence or the negligence of his parents and through no fault of the Railway Company.

On the finding that the accident was due to the plaintiff's want of care and that the Railway Company and their officials were not guilty of negligence, the appeal must be allowed and the suit dismissed. Under the circumstances the parties will bear their own costs.

While absolving the Railway Company from all legal liability for this sad accident, I consider that the pitiable plight of this unfortunate girl mutilated by collision with one of the Company's engines deserves the sympathetic consideration of the Agent of the Company and I rejoice to hear from the Appellant's Counsel, Mr. Mockett, that the Company have decided to give her some form of compassionate pension or a gratuity of a substantial amount.

SRINIVASA AYYANGAR, J.—This is a most unfortunate case, for the necessary result of the conclusions I have felt bound to arrive at on the questions of fact and law argued before us in this appeal, would be to deprive a little girl aged about 8 years of the benefit of the decree granted in her favour against the appellant Railway Company by Mr. Justice COUTTS TROTTER, as he then was. In the suit instituted on behalf of the minor girl by her father as her next friend, the claim was for

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(1) (1859) 7 C.B. (N.S.), 287.

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damages in respect of the injuries caused to her by an engine belonging to the appellant railway administration, running over her, as the result of which both her right hand and right leg had to be amputated. But however much one's heart may go out in sympathy for the sufferings of the little plaintiff and more especially for the years of crippled and unhappy life awaiting her in the future, I do not see how I can fail to give effect to my conclusions. Lord Justice FARWELL observed in the case of *Latham v. R. Johnson and Nephew, Limited*(1):

"We must be careful not to allow our sympathy with the infant plaintiff to affect our judgment; sentiment is a dangerous will'o-the-wisp to take as a guide in the search for legal principles."

Nevertheless, one cannot but regret such a consequence following on one's conclusions.

Except in cases where the injuries are caused as the result of a wanton attack on the person of the plaintiff, in cases of claims for damages for personal injuries the cause of action generally is negligence: that is to say, the charge against the defendant is to the effect that though the defendant was, at the time when the accident happened which caused the injury, doing something not in itself unlawful he was guilty of negligence in the doing of it and that such negligence was the proximate cause of the injury. But what is negligence? Whether any particular act or omission constitutes negligence would have to be decided having regard to the person injured, the manner in which the injury was occasioned and the time, place and circumstances in each case. Negligence is the failure to exercise proper care. But what is proper care depends on the time, place and circumstances.

(1) [1913] 1. K.B., 898 at 408.

It is once over again the apotheosis of the law, the ideal man of ordinary prudence. What this ideal man of ordinary prudence would have done or omitted at the particular time and place and in the circumstances is the standard and measure of proper care; and whenever and wherever the act or omission of the defendant falls short of this standard or measure then and there is negligence. It seems to me that the classification of the injured into trespassers, bare licensees, licensees, invitees, servants and so on has no more fundamental basis than the repeated application of this standard or measure to the varying circumstances, under which the injured persons came to be at the particular place and at the particular time. Thus before the plaintiff in such an action as this can be entitled to a verdict in her favour, it has to be proved that the appellant Railway Company in having the engine driven at the particular time and place and in the circumstances was guilty of negligence and that such negligence was the proximate cause of the injuries sustained by the plaintiff.

For the determination of these questions, the first thing to be considered is whether the plaintiff was at the time and place a trespasser or a licensee. It is not however as if that a licensee as such has got any more rights so to say than a trespasser but the question becomes of importance only with regard to the other question, the main question in the case, whether or not the driving of the engine was negligent. For this purpose a trespasser is merely an unexpected visitor or, to put it a little more clearly, one whose visit to the place at the time and in the circumstances could not have been foreseen by a man of ordinary prudence. Similarly for this purpose the licensee is merely a person or a member of a class whose presence at the time and about the place should in the circumstances have been foreseen and

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provided for by a man of ordinary prudence. In this sense then, was the plaintiff at the time and place a trespasser or a licensee? It seems to me that to this question there can on this evidence be only one answer. There is considerable independent testimony, which I have absolutely no reason to doubt or refuse to accept, that the villagers of Amoor have been, for a long time, allowed by the railway authorities without any effective objection, to cross the Ranipet line and pass through the wicket gate both on their way from the part of the main village on the northern side of the line to the part of the village on the southern side of the line and back again. The following extract from the evidence of Rupert Johnson examined as the second witness for the defence puts it beyond all doubt.

Question.—You keep a special look-out when you come near the wicket gate to see that the passengers do not cross the line?

Answer.—Yes.

This is conclusive evidence as regards the knowledge and consciousness on the part, at any rate, of the most important servant of the Railway Company concerned, namely the engine-driver. It is an admission that persons passing through the wicket gate were in the habit of crossing the line at that point. It is also an admission for the consequent necessity on the part of the railway servants to keep a special look-out at the place. If therefore the presence of persons crossing the line at the place was or must have been anticipated, it follows that the plea of the Railway Company that the plaintiff was a trespasser fails or at any rate loses its point. The degree of prudence therefore incumbent on the Railway Company, namely, the need for special look-out at that point in the line having thus been admitted,

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it becomes unnecessary to discuss further that aspect of the case. But it is one thing to say that generally persons were suffered by the railway authorities to cross and recross the line at the particular point and another thing to say that such sufferance amounted also to a similar permission by the Railway Company in favour of infants of tender years unable to take care of themselves or incapable of avoiding dangers necessarily incidental to the place. I cannot possibly suppose that any implied licence by the Railway Company could extend to such infants. But on the evidence I am unable to hold that the plaintiff, though stated to be only seven years of age, was an infant unable to take care of herself or of avoiding dangers incidental to the place. It was not the first occasion on which she was there crossing and recrossing the line and as a fact it is clear she had been doing so alone by herself for quite a considerable time previously. Her parents would seem not only to have allowed her to do so but to have sent her on errands on which she was crossing and recrossing the railway line at the point.

It follows necessarily from all this that the plaintiff had sufficiently developed in her the faculty of circumspection, and the capacity of taking care of herself even in such somewhat dangerous surroundings. If, on the other hand, the contention on behalf of the plaintiff should be that she had not attained such faculty and such capacity, the necessary result of it would obviously be that in such a case the Railway Company could not be deemed to have included in any such implied licence a person of such tender years. This, in passing, I may state is the dilemma referred to by Lord Justice HAMILTON at page 414 in the course of his judgment in Latham's case. I must, therefore, find that the plaintiff was not a trespasser so-called but was as found by the

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learned Judge in the trial court a person whose presence in or about the place was or must have been anticipated by those in charge of the engine.

I shall now proceed to the question whether or not the negligence charged has been established. I gather that four acts of negligence have been so charged against the Railway Company. In paragraph 6 of the plaint there seems to be in the words "had he slowly backed" a suggestion that the engine was at the time of the accident being driven not slowly but fast. This was not even sought to be proved. In the same paragraph the word "backed" would seem to indicate that the engine was at the time of the accident tender foremost. I do not see how this matters. Further the evidence in the case undoubtedly points to this allegation being incorrect. In the same paragraph 6 of the plaint another charge made is that the whistle was not blown. This charge is not sufficiently particular. If the reference is to the practice of sounding the whistle of the engine when it is about to start from the east on its journey to the engine-shed towards the west, I must say that the evidence with regard thereto is discrepant and not by any means satisfactory. For one person that heard the whistle a hundred persons even in or about the place might not have attended to it and therefore not heard it and it requires very strong and cogent evidence to establish a negative. Further, I am unable to appreciate how a whistle by the engine some hundred yards off would have averted the accident.

The charge in paragraph 7 of the plaint is substantially to the effect that though the Railway Company had reason to know that the public was in the habit of crossing the line at the point, proper safeguards were not adopted. The extract from the evidence of the engine-driver which I have already reproduced above

goes to show the need for and the practice of "special look-out" by those in charge of the engine while passing near the wicket gate. There is absolutely no evidence whatever of such special look-out having been kept either by the driver or any other person in or in charge of, the engine. No one says that a special look-out was kept by any person on the engine. The driver was on the right side, and if he was on the look-out from a place sufficiently far off on the east from the wicket gate, I fail to see how he could have failed to notice the plaintiff, and assuming he was unable to see who was passing on the left side, there is no evidence whatever as to what look-out was kept on the left side of the engine. I hold therefore agreeing entirely in this respect also with the learned trial Judge that the special look-out spoken to by the engine driver has not been proved and that therefore the appellant company was guilty of negligence on the occasion.

Assuming however that there was this negligence on the part of those who were in charge of the engine at the time of the accident, it does not necessarily follow that such negligence was the sole or even the proximate cause of the accident.

The theory of contributory negligence is not a special or separate branch of the law nor is the theory which relates to what may be called the further or secondary negligence of the defendant. They are all but different aspects of the one sole question in the case "What was the proximate or effective cause of the accident?" If the defendant was negligent, still if the plaintiff could have by the use of ordinary prudence avoided the accident the plaintiff is held not entitled to recover, not because he was also negligent but only because the proximate cause of the accident should be held in such cases to have been not the primary

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negligence of the defendant but really the negligence on the part of the plaintiff which was what largely contributed to the result. Similarly if in spite of the negligence or as it is called the contributory negligence of the plaintiff, the defendant could even then by the exercise of ordinary care have avoided the accident and injury, the plaintiff is held entitled to recover not because he was not negligent but only because the negligence that proximately caused the injury was the negligence not of the plaintiff but of the defendant. The whole thing therefore is a problem in causation and courts of law are allowed and required to do their best to piece out the events and arrive at a conclusion with regard to the proximate or as it may be otherwise called the effective cause of the accident or injury. It follows from this that assuming that the appellant company was through the persons in charge of the engine at the time and place of the accident guilty of the negligence found against them, did that negligence alone cause the accident or was there anything that the plaintiff did or failed to do on the occasion which was really the proximate and effective cause of it? What happened then in this case? It may be that when the plaintiff entered through the wicket gate and was about to turn to the left to pass alongside the rails she might not have noticed the engine which might have been still at some distance to the east. The plaintiff after going some distance alongside the line towards the west, turned to her right again with the object of crossing the line, and either while she was so turning to cross the line or as she had taken just a step with a view to cross, she was according to the evidence knocked down by the engine. The fact that her right hand and right leg alone were injured would seem to show that the impact of the engine was on the right side and was

such as to throw the whole of the left side and also the trunk of the body beyond the line of the left wheels of the engine. It seems to me that this could have happened only if the impact of the engine against the plaintiff was just as she was turning to cross, her left side still not quite turned. It is only in such a case that the impact of the engine would have served to throw the left side and the trunk outside the line of the wheels while the right leg and the right hand would fall just under the line of the wheels. From this it follows that while she was in the act of turning, the engine was not on the rails directly in front of her but must have been only about five or six feet off. I take it that even in the case of an infant of about seven years, the ordinary instinct of self-preservation would have impelled her to withdraw, if when about to turn she had noticed the engine. I have therefore to conclude that she did not look to the right before crossing. It seems to me that it was not even necessary to look to the right because such a huge thing as an engine at a distance of five or six feet could not possibly have failed to draw her attention to it. It is also strange that she should not have either heard the noise of the approaching engine or perceived the vibration caused by its near and nearer approach. I am therefore led to conclude that the plaintiff must have been on the occasion either very absent-minded or her child-nature so wholly absorbed in something else as to leave no attention available for hearing the noise or perceiving the vibration or see the form of the approaching engine. This was not the conduct of a person of ordinary prudence. No person of ordinary prudence would, especially while attempting to cross the railway line, fail to look about to see whether any train was approaching. But if she was not capable of circumspection or taking care of

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herself, she ought not to have trusted herself there or have been allowed by her reckless parents to cross and recross the line without some care-taker. If she was capable of circumspection or of taking care of herself, she failed to exercise ordinary prudence before turning to cross the line. Her failure to realize that the engine was approaching could only be ascribed to carelessness on her part. If she had exercised such ordinary care, the accident would have been averted or avoided in spite of the negligence of the railway company.

A further argument was advanced to us on behalf of the plaintiff, that, assuming that she was negligent, even then when the fireman noticed her and cried out, the engine should have been stopped and the injury averted. This argument was based on the principle of what is called "The Donkey Case," *Davies v. Mann*(1). I do not think it could possibly have been managed. The engine must have been within a few feet of the plaintiff and in any case there is absolutely no evidence on which I can hold that it was possible to bring the engine to a dead stop at such short notice and distance.

I have therefore come to the conclusion and feel constrained to hold that as the injury could have been avoided by the plaintiff herself by the exercise of ordinary care on her part and was brought about by her failure and omission to exercise some circumspection, her own negligence was the proximate or effective cause of the accident.

Reviewing the facts of this case, I almost wish that the law were that in such a case the damages should be apportioned between both the parties held to have been negligent as they do in Admiralty cases; but as

observed by Lord BIRKENHEAD in a recent case *Admiralty Commissioners v. S. S. Volute*(1).

"In a court of common law the plaintiff has no remedy if his negligence in any degree contributed to the accident."

In the result it follows that the plaintiff cannot recover.

It only remains for me briefly to examine the grounds on which the learned Judge who tried the case came to a different conclusion.

Summing up his findings the learned Judge observes as follows:—

"I entertain no manner of doubt that if a proper lookout 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 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 entirely agree with this observation of the learned Judge. But he has not paused for a moment to consider what, assuming this negligence on the part of the railway company, was the conduct of the plaintiff and whether her negligence, such as it was, was not the more proximate cause of the accident. He brushed aside that whole aspect of the case holding that a child of seven could not possibly be guilty of contributory negligence. It was however at the same time assumed by the learned Judge that children, including in that expression children unable to take care of themselves, should also be presumed to be included in the implied licence given by the railway company. Though there was evidence of the plaintiff having been crossing the line, there is absolutely no evidence of the fact that this at any time came to the notice of the servants of the railway company and that they nevertheless permitted the

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(1) (1842) 10 M.W., 546; 152 E.R., 588.

(1) [1922] 1 A.O., 129.

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plaintiff to cross knowing that she was still so young as not to be able to take care of herself. In the case of an implied licence, the circumstances have to be looked to for the purpose of determining the terms of such implied licence. In the case of *Jenkins v. Great Western Railway*(1) the learned Judges of the Court of Appeal refused to infer from the circumstances a licence from the railway company for a child of tender years to go upon the main line of a railway, even though the jury found a licence for such a child to cross the fence and go and play on stacks of timber close by. And to the same effect is the judgment of the Court of Appeal in the case of *Latham v. Johnson and Nephew, Limited*(2). There is really no ground for the supposition made by the learned Judge that such a case as *Stiefsohn v. Brookebond and Company*(3) was no longer good law. There was nothing in Cooke's case or in any of the later cases to question the principle on which that case was decided. In that case Lord Justice FRY held that a child of seven even in England could be guilty of such negligence as to disentitle it to damages. The learned Judge says the danger was evident even to a child. I fail to see how it could be said that the danger of a running engine would not be obvious to a child even of seven years in this country.

The dilemma I referred to was that if a child should be too young to take care of itself no licence could be implied in its favour and if it were not too young to take care of itself, it would be capable of contributory negligence. It was in reference to this that the learned Judge observes as follows:

"That would seem to afford a complete dilemma but the later cases negative the soundness of such a view."

(1) [1912] 1 K.B., 525.

(2) [1913] 1 K.B., 398.

(3) (1889) 5 T.L.R., 684.

The later cases referred to by the learned Judge are Cooke's case, and Taylor's case. In another place referring to the doctrine of contributory negligence by a child on which Lord Justice FRY based his judgment in the case of *Stiefsohn v. Brookebond and Company*(1) the learned Judge observes that the later decisions of English Courts have left no room for such a doctrine. The learned Judge therefore, it is clear, proceeded on the assumption that Cooke's case and Taylor's case had the effect of reversing all the earlier decisions of the English Courts with regard to the possibility of a child being guilty of contributory negligence. If I may respectfully say so, it is this erroneous supposition that led the learned Judge after much hesitation, as he himself says, to arrive at the decision at which he did. It seems to me that these cases did nothing of the kind, but merely proceeded on a principle fairly established for a long time in English Law of the responsibility in law of a person leaving unguarded something intrinsically dangerous, something intrinsically alluring or tempting to child-nature at a place where as a person of ordinary prudence he must have had reason to believe that children were frequenting. In other words, those two cases proceeded and are clearly based on the doctrine of what is called allurement. Allurement is an irresistible call to the emotions which for the time, if it does not paralyse, at any rate overwhelms the faculty of reasoning. I for my part do not see why the doctrine of allurement should be confined only to dogs and children and be incapable of extension even to adults if on the facts a proper case should arise at any time. In *Latham's case*(2) Lord Justice HAMILTON, as he then was, at page 418 says this:

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(1) (1889) 5 T.L.R., 684.

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"Of Cooke's case the following things are clear. Their Lordships declared no new law and overruled no old cases."

It is remarkable that in the case of *Fairman v. Perpetual Investment Building Society*(1), Lord BUCKMASTER who dissented from a majority of the House of Lords in that case has stated as follows at page 80 :

"Now the liability in tort of the owner of premises to those who use them is carefully discussed in the case of *Latham* against *R. Johnson* and nephew and the statement of law there is a concise and accurate expression of well-known principles."

Thus, it is clear that the decision in *Latham's* case in which *Cooke's* case was referred to as an extreme case, was approved of by the House of Lords. It therefore follows that the learned Judge was wrong in regarding that in *Cooke's* case the House of Lords overruled all the earlier cases. If, then, it is clear that *Cooke's* case and *Taylor's* case proceeded on the doctrine of allurement and not on any principle of law which had the effect of overruling all the earlier cases in English Reports which recognized the possibility of contributory negligence on the part of children, it is significant that the learned Judge himself considers that the doctrine of allurement could not possibly apply to the present case. He says :

"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 learned Judge was obviously disinclined to regard the engine as a trap and finally concludes by formulating what he considers to be the law in the following words :

"To invite children to cross lines of railway over which trains run is to expose them to the danger of being run over by

(1) [1923] A.C., 74.

a passing train or engine which must be apparent to the railway authorities and is not apparent to a child."

I am unable to understand how from regarding the girl who is the plaintiff in this action as a mere licensee, the learned Judge insensibly passed on to regard her and refer to her as an invitee. By no stretch of English language could the plaintiff in this case be regarded as an invitee, and when the learned Judge speaks of an engine as a danger not apparent to a child, I must take it that he means in the present case he regards the plaintiff as a child to whom a running engine was not an obvious danger. I regret it is not possible to agree with the learned Judge when he says that. But if indeed the plaintiff was so young as not to realize that a running engine was an obvious danger, we are only relegated back to the dilemma and compelled to hold that the plaintiff had no right whatever to be there and that her parents had no right whatever to allow her to be there. For, adopting words which were used by the learned Judge himself in another place, we might say that the appellant railway administration while allowing persons of ordinary intelligence to cross a line of rails cannot be supposed to have licensed them not to look and see whether there was an approaching engine or train before they stepped on the track.

For these reasons I have reluctantly come to the conclusion that the decree in favour of the plaintiff-respondent could not be supported and I therefore agree with my Lord the Chief Justice that the appeal should be allowed. As I have also found negligence on the part of the railway administration, I agree the more readily, that there should be no costs allowed to either party.

In conclusion I feel bound to state that though I have felt compelled to uphold the law as I understand it

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and find it and allow the appeal, I agree entirely with the learned Officiating Chief Justice that it is eminently a case in which the appellant railway administration in consideration of the infant plaintiff crippled and maimed for life by the accident would, now that their legal liability has been declared against, see their way out of common humanity to make suitable provision for her. In the case of *Stiefsohn v. Brookebond and Company*(1), the counsel on behalf of the defendant company stated that irrespective of the decision of the Court the defendants would compensate the child for the injuries sustained, and I only trust that the learned Counsel in this case for the Railway Company would be in a position to make a similar announcement.

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APPELLATE CIVIL.

Before Mr. Charles Gordon Spencer, Officiating Chief Justice and Mr. Justice Srinivasa Ayyangar.

1924,
November 5.

SABAPATHY RAO AND OTHERS (PETITIONERS),
APPELLANTS

v.

SABAPATHY PRESS Co. (LTD.), (RESPONDENTS),
RESPONDENTS.*

Indian Companies Act (VII of 1913), sec. 162 (8)—Company—Winding up—Application to Court—Sufficiency of grounds—Just and equitable grounds under sec. 162 (8), meaning of—Whether ejusdem generis with clauses (1) to (5) of section—Lack of confidence in Managing Director whether sufficient ground.

(1) (1889) 5 T.L.R., 684.
* Original Side Appeal No. 19 of 1923.

On an application to the Court for the winding up of a Company under the Indian Companies Act, VII of 1913, the reasons for a Court considering it to be just and equitable that a Company should be wound up under clause (6) of section 162 of the Act need not be *ejusdem generis* with those contained under clauses 1 to 5 of the section.

Lock v. John Blackwood Co., Ltd. [1924] A.C., 783, followed.

Held, on the facts proved in the case, that there were sufficient grounds to call upon the Director for an explanation with a view to deciding on the winding up of the Company.

APPEAL from the order of KUMARASWAMI SASTRI, J., in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Original Petition No. 94 of 1922.

This appeal is from an order of KUMARASWAMI SASTRI, J., on an application filed by some of the shareholders of the Sabapathy Press Company, Ltd., Bellary, for the winding up of the Company under section 162 of the Companies Act, 1913. Several charges against the Directors of the Company and several grounds were alleged in the affidavit filed in support of the petition. The learned Judge overruled a preliminary objection of the respondents that the petition and affidavit disclosed no ground for the winding up, and allowed the parties to adduce evidence on the allegations made in the affidavit; evidence was adduced by the petitioners but the respondents were not called upon to adduce their evidence, as the learned Judge thought that no case had been made out for winding up. The learned Judge held that the facts proved did not justify the winding up of the Company. The learned Judge observed, with regard to the appointment of K.V.S.R. & Co., of which Mr. K. Venkata Rao was a partner, as Secretaries and Treasurers of the Company, that it was done unanimously at a meeting of the shareholders; with regard to the lease of Company's factories to

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K. V. S. Ramachander & Co., that there was no fraud, and, though profits were made out of the sub-leasing by the lessee, that did not afford a ground for winding-up of the Company. His Lordship observed, however:

"I do not mean to suggest that everything that has taken place in the company is regular or proper, but what I do think is that no ground has been made out for the winding up of this Company under section 162, clause (6) of the Indian Companies Act, 1913. That the minority have grievances some of which are real is proved by the evidence called by the petitioners; but beyond the ordinary grievances which the minority have owing to the tyranny of the majority, the petitioners have not shown that any grounds exist for winding up the Company against the wishes of the majority of the shareholders."

The learned Judge dismissed the petition with costs. Against this order the petitioners preferred this appeal.

B. Somayya for appellants. — Out of 500 shares of the value of rupees five hundred each, 301 shares are owned by one Bellary Venkata Rao the members of his family and his nominees. The Company's shareholders who are not of Venkata Rao's party have no voice in the affairs of the Company. The various charges contained in the affidavit in support of the petition have been substantiated by the evidence let in by petitioners. The learned Judge erred in overruling them and suggesting that there might be other remedies than winding up. The minority of the shareholders (who are a considerable number) are injured by the majority who constitute the Directorate; and the Company is run in the interest of the Managing Director, his family and his nominees. This is a fit case for the action of the Court to wind up the company under clause (6) of section 162 of the Act VII of 1913, as it is just and equitable to do so. The grounds under clause (6) of the section need not be *ejusdem generis* with clauses (1) to (5)

of the same section. See the decision of the Privy Council in *Loch v. John Blackwood Co. (Ltd.)*(1).

C. Sambasiva Rao for respondents supported the order of the lower Court.

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JUDGMENT.

SPENCER, OFFG. C.J.—This is an appeal in the matter of an application for the winding up of the Sabapathy Press Company, Limited, Bellary, under section 162 of the Indian Companies Act. The learned Judge who heard the petition admitted evidence both documentary and oral adduced by the petitioners, but he did not call upon the respondents to adduce any evidence, as he thought that no case had been made out for winding up the Company. He made some observations to the effect that everything that had taken place in the Company's proceedings might not be quite regular and proper and that the minority had some real grievances as proved by the evidence adduced by the petitioners. But he held that there was no ground made out under section 162, clause (6) for a winding-up order, the other clauses of this section being not applicable to the case before him. Clause (6) provides that a company may be wound up if the Court is of opinion that it is just and equitable that the company should be wound up. In a recent case before the Privy Council *Loch v. John Blackwood Co. (Ltd.)*(1), it was held that the reasons for a Court considering it to be just and equitable that a company should be wound up were not necessarily *ejusdem generis* with the reasons given in clauses (1) to (5). That was a case coming up from the Barbadoes which had several features resembling those of the case before us. There, as in the present case, it

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(1) [1924] A.C., 783.

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was alleged that the Directors were able to exercise a dominant influence on the management of the company and the Managing Director was able to outvote the minority of the shareholders and retain the profits of the business between the members of his family. Their Lordships held that, where there was a lack of confidence in the conduct and management of a company's affairs based on a lack of probity on the part of the Managing Directors, not in respect of their private life or affairs but in regard to the company's business, then it would be just and equitable under the Statute that the company should be wound up. In the present case, it was recognized by Mr. Justice KUMARASWAMI SASTRI that Mr. Venkata Rao had a preponderating voice in the company by controlling a large number of shares. There are several other matters which seem to require an explanation at the hands of the respondents. Ramachander and Co. were appointed treasurers of the company, and Mr. K. Ramachander himself, who is Mr. Venkata Rao's son and has several shares standing in his name, took leases of all the factories, and disposed of them by sub-leases to other persons, thereby making a profit to himself which might have been secured to the company if the sub-leasing of the rights of lessees had been prohibited. Then rule 109 of the Articles of Association in Table A of the 1st schedule of the Indian Companies Act, requires that a copy of the balance sheet and the Directors' report should be sent to every person entitled to receive notice seven days before the General Meeting. There have been several complaints that the shareholders did not receive a copy of the balance sheet nor was the Auditor's report read at the General Meeting or attached to the balance sheet, as required by section 131 of the Act. Dividends have not been regularly paid, and the rate of dividend has

been steadily diminishing which may be attributed to the factories not having been leased for larger amounts. It is true that in some cases, where the shareholders have sued the company's officials for the recovery of dividends, the defence has been based upon some technical ground such as the want of succession certificate, failure to get the shares transferred in their names, or some similar reasons. But in one case, Exhibit M series, it appears that the company raised an untenable defence that they were not responsible for the appropriation of dividends made by the former treasurers under an arrangement between those treasurers (Arumugam and Sambandam Mudaliar) and Ramachander and Co., their present Treasurers, and they refused to pay the dividend on that plea. That plea was found to be untenable, and the shareholder got his decree and the company had to pay the costs, which fell indirectly upon the shareholders. In a well regulated company dividends are paid regularly and punctually and it is almost unheard of that shareholders should be driven to bring suits against the company before they can get payment of their dividends. These and similar objections require further investigation. Neither Venkata Rao nor Ramachander have as yet gone into the witness-box and attempted to explain the ugly facts appearing against them. I am of opinion that the petitioners have proved sufficient facts to call upon the respondents to enter on their defence if the conduct of the affairs of the company is capable of an honest explanation. The order dismissing the petition is therefore set aside. Costs of this appeal will be costs in the cause and will follow the event.

SRINIVASA AYYANGAR, J.—I agree to the order proposed.

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APPELLATE CIVIL.

*Before Sir Victor Murray Coultts Trotter, Chief Justice, and
Mr. Justice Srinivasa Ayyangar.*

1924,
November
26.

THE OFFICIAL ASSIGNEE OF MADRAS (RESPONDENT),
APPELLANT,

v.

BASUDEVADOSS BADRINARAYAN DOSS (PETITIONER),
RESPONDENTS.*

*Transfer of Property Act (IV of 1882), sec. 59—Mortgage—
Equitable mortgage by deposit of documents of title—Patta of
ryotwari lands in the mufassal—Deposit of such patta alone,
whether sufficient to create an equitable mortgage—Patta,
whether a document of title.*

A ryotwari patta in respect of lands in the mufassal of this Presidency is a document of title, by the deposit of which in the City of Madras an equitable mortgage on the property can be validly created.

APPEAL from the judgment of Mr. Justice RAMESAM in the exercise of Insolvency Jurisdiction of the High Court in Insolvency Petition No. 82 of 1921 in the matter of Y. V. Subbiah and S. Venkatasamy Naidu (insolvents).

This appeal arises from the judgment on a petition filed by the respondent in the insolvency proceedings of the two insolvents above named. The respondent claimed to be an equitable mortgagee by deposit of title-deed by the second insolvent (S. Venkatasamy Naidu), who deposited a ryotwari patta in respect of some of his lands situated in Kodur village in Cuddapah district. He applied by motion in the insolvency jurisdiction of the High Court that his claim might be recognized by the Official Assignee, the property be sold by the latter free of his mortgage, that the amount due to him on the mortgage be paid to him out of the sale-proceeds and

* Original Side Appeal No. 53 of 1923.

that, for the balance if any, he might be allowed to rank as a creditor against the insolvents' estate. The Official Assignee contended that the petitioner had not obtained a valid equitable mortgage because a patta was not a document of title and that, in the absence of a sale deed and other title-deeds, it was not sufficient to create a valid equitable mortgage by deposit of documents of title. The learned Judge, who heard the petition, held that the patta was a sufficient document of title, the deposit of which created a valid equitable mortgage in petitioner's favour, and directed that the Official Assignee should give effect to his claim and granted the prayers in the petition. Against this judgment, the Official Assignee preferred this appeal.

The Advocate-General (T. R. Venkatarama Sastri) for appellant.—A patta is not a document of title or title-deed. It is not a conveyance, as it does not transfer title. Reference was made to the following cases:—

Freeman v. Fairlie(1), *The Secretary of State for India in Council v. Kasturi Reddi*(2) and *Muthu Veera Vandan v. The Secretary of State for India in Council*(3).

Nugent Grant for respondent.—A patta is a sufficient document of title for the purpose of creating an equitable mortgage by deposit, though it may not by itself convey a title. There must be an intention to create a security and deposit of a document of title. See *Transfer of Property Act*, section 59. All the title-deeds need not be deposited. See 21 Halsbury, page 79, paragraph 142.

JUDGMENT.

SRINIVASA AYYANGAR, J.—The only point raised and argued in this appeal is whether a patta in respect of

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(1) (1828) 1 M.I.A., 305.

(2) (1903) I.L.R., 26 Mal., 268.

(3) (1906) I.L.R., 29 Mad., 461.

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land in the mufassal of the Presidency is such a document as by the deposit of which in the City of Madras an equitable mortgage over the property can be said to be validly created. The contention is that a patta is not a title-deed or a document of title relating to property and that therefore the deposit of a patta cannot serve to create an equitable mortgage over the property. It is true that a patta has been held in various cases not to be a title-deed, but in none of those cases had the question been raised or had to be decided with respect to a patta being a title-deed or a document of title for the purposes of the creation of a mortgage by mere deposit. It is quite true that a patta is not a title-deed in all senses of that expression or for all purposes but at the same time it is clear that what is requisite for the creation of an equitable mortgage is firstly an intention to create a security and secondly such intention evidenced by deposit of a document which can be described as a document of title. There is no question here in this case about the intention. Is then a patta in respect of land a document with respect to property such as would be sufficient by being deposited, to evidence the required intention? It must vary according to the conditions of the country and the consciousness on the part of the members of the community. In England it has been held that all the material documents of title need not be deposited and that a complete title need not be shown by the deeds deposited to the depositor's interest in the estate. (*Ex parte Wetherell*)(1). In that case Lord Chancellor ELDON was inclined to hold that that would be taken to be a sufficient deposit which could be taken upon looking at the instruments to amount to evidence that the estate was meant to be security. Thus in the absence of title-deeds a receipt for purchase-money

(1) (1805) 11 Ves. Jun., 318.

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containing the terms of an agreement for sale was deemed sufficient. [*Goodwin v. Waghorn*(1).] In the case of copyholds, copies of Court rolls and, in the case of leasehold land, an office copy of the registered lease, have been held to suffice. In Ireland a map of the property was by deposit held to create an equitable mortgage. [*Simmons v. Montague*(2).] So far as South India is concerned, there is no doubt that a patta has generally been regarded as a document of title. I use the words "documents of title" and not "title-deed," because it may be that there is some plausible distinction between the two expressions. I have no hesitation in holding that a patta has always been regarded by people in this country as a document of some evidence with regard to possession if not also to title. The original meaning of the word "patta" appears to have been a "lease," but it has always been used to indicate what is called occupancy right, that is, whether it be under a landlord who is a zamindar or under the Government as suzerain, occupancy right, which is really recognized to be practically proprietary right in the soil. Having regard to this meaning that the expression "patta" has acquired among the land-owning classes, it will lead to serious results if it should be held that a patta is not such a document of title as by depositing which an equitable mortgage could not be created. As a matter of fact, I am not at all sure whether in respect of a very large percentage of property in the country, there are any documents of title at all other than pattas.

I therefore hold that the learned Judge was right in holding that a patta was such a document as by depositing which an equitable mortgage could be created. The appeal therefore fails and is dismissed with costs on the Original Side scale.

(1) (1835) 4 L.J. Ch. N.S., 172.

(2) (1900) 1 Ir. Rep., 87.

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COUTTS TROTTER, C.J.—I am of the same opinion. I have had doubts in this case, but the argument that concludes the matter to my mind is the fact which is known to every one familiar with these matters, viz., that in many cases, the piece of paper which we call a patta is the only document that a ryot holds in respect of his land, and that to say he cannot effect a valid equitable mortgage of that piece of paper, would be in effect to say that he could not equitably mortgage his land at all—a result which I cannot believe to have been the desire of, or contemplated by, the framers of the Transfer of Property Act. I would rather wish to guard myself against the suggestion of my learned brother that where a statute gives a definition for an instrument that definition can be controlled by the understanding of the common people with regard to it, but I do not think that the decision of this case turns on that.

Finally, I have to say this. As this is a subject matter with which I am very unfamiliar, I should require very grave reasons indeed to dissent from the opinion of two of my colleagues to whom the subject is familiar and who are acquainted with the land tenures of this Presidency in a way in which I cannot pretend to be.

I therefore agree in the result.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Odgers.

P. K. P. S. SIVANANDAM CHETTIAR (PLAINTIFF),
APPELLANT,

1924,
December 4.

v.

BATCHU SURAYYA AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Contract — Charterparty — Advance freight — Meaning of — Advance, made by charterer—Ship stranded before loading of cargo—Voyage not begun by ship—Advance, whether recoverable by shipper—English rule as to advance freight, whether and when applicable.

On a contract of charterparty, the charterer advanced a sum of money on the date of the contract, which was to be taken in part payment of freight on loading, the balance being payable at the port of destination. The ship, however, did not start on its voyage, as it stranded before reaching the port fixed for loading. On the charterer suing for return of the money advanced by him, the owner contended that the amount was not recoverable as being advance freight;

Held, that advance freight does not arise until the voyage has actually begun, or at any rate until the goods for which freight is payable have been loaded on the ship or accepted by bills of lading;

that the advance in this case did not amount to advance freight, and that consequently the plaintiff was entitled to recover from the defendants the amount paid by him.

Allison v. Bristol Marine Insurance Co., (1875) 1 A.C., 209; *Smith Hill & Co. v. Pyman, Bell & Co.*, [1891] 1 Q.B., 742 followed; *A. Coker & Co., Ltd. v. Limerick Steamship Co.*, (1918) 118 L.T., 726, distinguished.

APPEAL against the decree of BALARAMADAS, Subordinate Judge of Cocanada, in Original Suit No. 21 of 1921.

The material facts appear from the judgment.

K. V. Krishnaswami Ayyar and N. S. Rangaswami Ayyangar for appellant.—Advance freight has not been

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earned in this case as the vessel did not start. Freight is the consideration for the carriage of goods—as the vessel never started, the consideration did not come into force. See *Smith Hill & Co. v. Pyman Bill & Co.*(1), *Allison v. Bristol Marine Insurance Co.*(2). The technical rule of English law as to the irrecoverability of advance freight applies only when the vessel has started on the voyage—see *Weir & Co. v. Girwin & Co.*(3). The vessel in this case was not in a position to start. This is not an advance freight within the meaning of the term.

P. Somasundaram for respondent.—There is no such distinction in law, as contended for the appellant. It is immaterial whether the ship started on the voyage or not. The law has been laid down in unqualified terms by the Law Lords in *Allison v. Bristol Marine Insurance Co.*(2). The cases cited for the appellant are all cases where there was a condition precedent to be fulfilled before the payment of advance freight and as the condition was not fulfilled, the ship owner was held not entitled to the advance freight. Here the charterparty clearly treats the payment as “Advance freight,” and so it is not recoverable whether the voyage commenced or not. The defendant was ready and willing to place another vessel at the disposal of the plaintiff. The decision in *A. Coker & Co., Ltd. v. Limerick Steamship Co., Ltd.*(4) is an authority in favour of the respondents. It is a privilege of the ship-owner to replace the lost vessel by another and to carry the goods. The Indian Contract Act does not apply to common carriers. The contract of charterparty is governed by the provisions of the law of common carriers. See *Kumber v. The British India Steam Navigation Co., Ltd.*(5).

(1) (1881) 1 Q.B., 742 at 744.

(2) [1900] 1 Q.B., 45.

(3) (1915) 1 L.R., 88 Mad., 941.

(4) (1875) L.R., 1 A.C., 209.

(5) (1918) 118 L.T., 726.

JUDGMENT.

ODGERS, J.—This was a suit for the recovery of a sum of Rs. 6,600 payable on a contract of charter, party (Exhibit A) entered into between the plaintiff and defendants. The Subordinate Judge has held that by the terms of Exhibit A this sum was in fact paid by the plaintiff as “advance freight” which is by a doctrine peculiar to the English Law, irrecoverable. How this occurs is explained by BRETT, J., in *Allison v. Bristol Marine Insurance Company*(1). The plaintiff has appealed. Exhibit A after clauses contracting for two voyages of the defendants’ barque “Bhagyalakshmi” from Akyab to Jaffna proceeds, “Payments of freight at the above rates to be made as :—

1. Rs. 6,600 (Rupees six thousand six hundred only) advance on acceptance of the charterparty, paid by charterers’ representative Sabapathy Chettiar at Cocanada, subject to deduction of Rs. 3,300 per trip on loading.

2. Rs. 3,300 to be paid in Akyab per each trip at the time of loading.

3. The balance freight as the vessel reaches her destination and lands the cargo.”

Thus the whole sum of Rs. 6,600 was payable on signing Exhibit A, but half of it was to be notionally distributed at Akyab on each trip *at the time of loading there*. Exhibit A was made on 9th October 1919, the first voyage was to be in January 1920 and the second February-March 1920.

The money was paid, but no voyage was made according to the charterparty by the “Bhagyalakshmi,” as she stranded on the Nellore Coast while proceeding to Akyab to load for her first voyage.

(1) (1875) L.R., 1 A.C., 209 at 226.

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The question is whether this sum of Rs. 6,600 is advance freight. In Leake on Contracts (7th edition), page 73, the doctrine as to advance freight is said to be an example of money paid for an executed consideration, if it was in fact the consideration bargained for, cannot be recovered back merely on the ground that it proved to be of no value. The learned author says:

"Upon this principle freight paid in advance cannot be recovered back after the voyage has commenced, though the goods are lost during the voyage; for it is the uniform though perhaps anomalous rule that the money to be paid in advance of freight must be paid, though the goods are before payment lost by perils of the sea."

The words to be noted here are "after the voyage has commenced."

In *Weir & Co. v. Girvin & Co.*(1), VAUGHAN WILLIAMS, L.J., at page 52 refers to the old view that advance freight was different from freight and meant a loan or a sum payable when goods were put on board in consideration of their being received on board. The opinions of the Law Lords in *Allison v. Bristol Marine Insurance Company*(2), make it clear that

"Freight whether used in respect of advanced freight or otherwise, always has the same meaning. The practical difference between advanced freight and freight is a difference arising from the stipulations which are made as to payment."

Lord ESHER, M.R., in *Smith Hill & Co., v. Pyman, Bell & Co.*(3), says:—

"Now there are two peculiarities of the English Law as regards freight; first, that if part of the freight is advanced and the ship is lost, or the goods are lost, the part so advanced, although really not due under the terms of the contract unless there has been delivery of the goods, nevertheless cannot be recovered back by the charterer from the ship-owner; and secondly, that if there is no stipulation to the contrary, but only a stipulation that there shall be advance freight, it is payable at the moment of starting, and, even if not paid, can be

recovered by the ship-owner from the charterer upon the loss of the ship."

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Advance freight is then payable "at the moment of starting" or in other words the ship must sail, unless there is some special contract to the contrary. As against this Mr. Somasundaram for respondents relies on *A. Coker & Co., Ltd. v. Limerick Steamship Co., Ltd.*(1), where freight was on the contract payable in Liverpool before sailing on signing the bills of lading. Some of the bills were signed and the House of Lords held that under the agreement a proportional part of the advance freight became payable on the signing of each bill of lading. The question turned on the construction of the charterparty. In the present case no cargo was loaded and no bills of lading signed. The case in the House of Lords can have no bearing on it. It appears to me therefore that the present payment of Rs. 6,600 can in no sense be viewed as advance freight. It was a pure advance made to the defendants on account of what would be payable to them as freight by the plaintiff but the conditions precedent, viz., the starting of the voyage or at least of loading were absent to make it amount in law to advance freight. The wording of clauses (1) and (2) above proves this and there are no special clauses, e.g., as to freight being payable on signing bills of lading.

A faint attempt was made to argue that the defendants were competent to substitute another vessel, the "Mahalakshmi" for the "Bhagyalakshmi" and were entitled to compel the plaintiff to accept her. The documents show that some such proposal was made. The Subordinate Judge has held that it never got beyond the stage of proposal and that plaintiff never consented to the substitution. The authority of Carver's

(1) [1900] 1 Q.B., 45.

(2) (1875) 1 A.C., 209 at 226.

(3) [1891] 1 Q.B., 742.

(1) (1918) 118 L.T., 726.

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"Carriage by Sea" (article 304), clearly shows that a ship-owner is only entitled to compel the acceptance of a substituted ship after the voyage in the ship contracted for has begun, which is not the case here. The appeal must be allowed with costs throughout; interest will be calculated at 6 per cent from date of plaint.

PHILLIPS, J. PHILLIPS, J.—I agree. I am quite clear that neither under the contract, Exhibit A, nor under the doctrine of English Law can the Rs. 6,600 advanced be treated as "advance freight." "Advance freight" must connote freight, and it is clear from the authorities referred to by my learned brother that the idea of freight does not arise until the voyage has actually begun, or at any rate until the goods for which freight is payable have been loaded on the ship or accepted by bills of lading. In this case the ship has never been loaded, nor was it attempted to be loaded and, consequently, there can be no question of freight. Even if the provisions of the Indian Contract Act are applied to this case (it is unnecessary to decide this point which has not been argued before us), the plaintiff must succeed under the provisions of section 65, because the contract has become impossible of performance.

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APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Devadoss.

KRISHNASWAMI THEVAN AND OTHERS (DEFENDANTS
1 AND 4 TO 6), APPELLANTS

v.

PULUKARUPPA THEVAN AND OTHERS (PLAINTIFF AND
DEFENDANTS 1 AND 24), RESPONDENTS.*

*Hindu Law—Partition—Suit by minor son against his father—
Birth of another son, conceived after date of plaint but born
before preliminary decree—Quantum of share of plaintiff,
whether affected by birth of the son—Division of status, from
what date.*

Where a Hindu minor, represented by a next friend, sued his father for partition, and another son of the father, conceived after the date of the plaint, was born before the preliminary decree was passed in the suit, the share to which the minor plaintiff was entitled at the date of the plaint was not diminished by the subsequent birth of the son.

A suit by a minor for partition, if it ends in a decree for partition, has the effect of creating a division of status from the date of the plaint.

Chelimi Chetty v. Subbamma, (1918) I.L.R., 41 Mad., 442, distinguished.

APPEAL against the decree of P. S. SITARAMA AYYAR, Additional Subordinate Judge of Ramnad at Madura, in Original Suit No. 16 of 1919.

In this case the minor plaintiff, represented by his mother as next friend, sued for partition against his father (the first defendant) and other defendants who were alienees from him. After the settlement of issues, another son conceived after the date of the plaint was born and the latter was brought on the record as the twenty-fourth defendant, and an additional issue was framed as to the quantum of the share to which the plaintiff was entitled by reason of the birth of the other

1924,
December
11.

* Appeal Suit No. 188 of 1922.

son to the father. The Subordinate Judge passed a preliminary decree for partition in favour of the plaintiff holding that the plaintiff's share was diminished by the subsequent birth before the decree of the other son (twenty-fourth defendant) and that he was entitled only to one-third and not to one-half share as at the date of plaint. He also held with regard to certain alienees, first and fourth to sixth defendants, that the sales were not binding on the plaintiff. They preferred an appeal, contending *inter alia* that the property sold to them should be allotted to the first defendant for his share in the partition. The plaintiff filed a memorandum of objections raising the contention that he was entitled to a half share as at the date of the plaint undiminished by the birth of another son.

ON THE MEMORANDUM OF OBJECTIONS —

K. Raja Ayyar for plaintiff-respondent.—The plaintiff is entitled to a half share as at the date of the plaint. The status of division is effected by the institution of the plaint. In this case a decree for partition had been passed by the Court. The decree effects a division from date of plaint; *Krishna Lal Jha v. Nandeshwar*(1), *Chelimi Chetty v. Subbamma*(2), *Lalta Prosad v. Sri Mahadeoji Birajman Temple*(3), are distinguishable as no decree for partition was passed in those cases. If a guardian of a minor alienates his share, the shares of the alienee are fixed from the date of alienation. Similarly a guardian of a minor, if his act is bona fide, can sue for partition and fix his share by the plaint. The cause of action is to be fixed at the date of suit; see *Rai Charan v. Biswa Nath*(4). The decree takes effect from the date of plaint. The Court accepts

(1) (1919) 4 P.L.J., 38.

(3) (1920) I.L.R., 42 All., 461.

(2) (1918) I.L.R., 41 Mad., 442.

(4) (1914) 20 C.L.J., 107.

the plaint, as in the case of sanction for compromise at any stage of the proceeding; see *Kancherla Kanakayya v. Mulpuru Kotayya*(1). If a major sues for partition, the share is fixed as on the date of the plaint; so also in a suit for partition on behalf of a minor, which is accepted by the Court as a fit case and a share is awarded on partition.

K. S. Champakesa Ayyangar for respondent, relied on *Chelimi Chetty v. Subbamma*(2). *Lalta Prosad v. Sri Mahadeoji Birajman Temple*(3). The Court can take cognizance of altered circumstances and subsequent events and can decree relief appropriate to the altered conditions at the date of the decree.

The judgment on the appeal is omitted as unnecessary for this report.

The memorandum of objections filed by the first respondent coming on for hearing the Court delivered the following:—

JUDGMENT.

SPENCER, J.—This suit was brought by a minor plaintiff represented by his mother as next friend for partition of the properties belonging to the undivided Hindu family consisting of himself and his father the first defendant. It involves a new and interesting point of Hindu Law. After the institution of the suit on 31st January 1919, another son was born in May or June 1920 to the first defendant by a second wife. Conception must have taken place about August 1919, certainly after the filing of the plaint. This after-born son has been brought on the record as the twenty-fourth defendant.

On the principle that if a suit for partition is instituted by a co-parcener who is *sui juris* the mere

(1) (1921) 41 M.L.J., 75.

(2) (1918) I.L.R., 41 Mad., 442.

(3) (1920) I.L.R., 42 All., 461.

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filing of the plaint effects a severance of the joint status of the family, but that in the case of a minor it is the Court that decides whether there is to be a division or not, the lower Court has found the twenty-fourth defendant to have come into existence before there was any change of status and has awarded the minor plaintiff a one-third share instead of one-half. The Subordinate Judge quotes *Chelimi Chetty v. Subbamma*(1) and *Lalta Prosad v. Sri Mahadeoji Birajman Temple*(2) as his authorities for so deciding. The learned Judges (ABDUR RAHIM and OLDFIELD, JJ.) who decided the former case, were, if I may say so, perfectly right in saying that it should not depend on the choice or option of any person calling himself the next friend of a minor to say whether the family to which the minor belongs shall in future be joint or separate and that the law has left it to the Court that hears the minor's partition suit to decide whether it is in the interest of the minor that he should become divided. But in cases where the Court gives a decree to a minor for partition, it seems to me, with due respect, that there should be no departure from the general rule that every suit has to be tried on the cause of action as it existed at the date of its commencement—vide *Rai Charan v. Biswa Nath*(3). Therefore in my judgment the only sound principle will be to regard the prayer in the minor's plaint for division as a conditional request that, provided that the Court sees fit, it may declare the status of the minor divided as from the date of the plaint. It is true that there can be no division of status unless the Court sees fit to decree it, but there is no reason why the Court should not make its decree take effect from the date of the institution of the suit.

(1) (1918) I.L.R., 41 Mad., 442.

(2) (1920) I.L.R., 42 All., 461.

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

If a suit abates owing to the death of the only other co-parcener as in *Lalta Prosad v. Sri Mahadeoji Birajman Temple*(1), or if the plaintiff comes of age during the pendency of the suit and elects to abandon or repudiate it under Order 32, rules 12 and 13, of the Code of Civil Procedure, no change of status takes place because the suit does not proceed to the stage of decree, not because the filing of a partition suit by a minor has not by itself the effect of causing a division of status. It does have that effect when it ends in a partition decree.

In *Krishna Lal Jha v. Nandeshwar*(2) it was held that even a minor might make through his next friend an unequivocal expression of his intention to become separate and that, if he did so, the subsequent birth of another member into the family would not cause any diminution in his share of the family property. In that case the birth took place after the passing of the preliminary decree, but in the view taken by the learned Judges, who were not referred to the decision in 41 Madras, it was not that date but the date of the institution of the suit that was the date when severance took place, if at all. That is the law as regards major co-parceners—vide *Soundararajan v. Arunachalam Chetty*(3) and *Ramalinga Annavi v. Narayana Annavi*(4).

As soon as severance takes place, the plaintiff's share is not liable to decrease by birth thereafter of other co-parceners—vide *Chinnu Pillai v. Kalimuthu Chetti*(5). As regards the date from which divided status begins, I fail to see why any distinction should be made between adults and minors so far as their shares are subject to alteration in consequence of events that occur between the commencement and the end of a partition suit.

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(1) (1920) I.L.R., 42 All., 461.

(2) (1919) 4 P.L.J., 38.

(3) (1916) I.L.R., 39 Mad., 159 (F.B.).

(4) (1922) I.L.R., 45 Mad., 489 (P.C.).

(5) (1912) I.L.R., 35 Mad., 47 (F.B.).

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As my learned brother agrees with me upon this point, the memorandum of objections is allowed and plaintiff's right to a one-half share will be declared in the preliminary decree. He will consequentially be entitled to an account from first defendant of profits from the date of suit and the lower Court's decree will be modified accordingly with costs of the memorandum of objections.

DEVADOSS, J.

DEVADOSS, J.—The main question raised by the first respondent in the memorandum of objections is, whether the share of a minor plaintiff who sues his father for partition is liable to be diminished owing to the birth of another son conceived after the date of the filing of the plaint but born before the date of the preliminary decree?

The plaintiff, who is a minor, is the son of the first defendant. The suit was filed on 31st January 1919. The twenty-fourth defendant was born to the first defendant in June 1920. Issues were settled in the case on 8th October 1919 and after the birth of the twenty-fourth defendant an application was made to bring him on record. That application was filed on 26th September 1920 and an additional issue was framed on 21st July 1921. The Subordinate Judge gave a decree to the plaintiff for one-third of the family properties. The contention of Mr. Raja Ayyar is that the twenty-fourth defendant having been born after the suit was filed, the plaintiff's share is not liable to be diminished to one-third.

It is well settled that an unequivocal unilateral declaration of a member of a joint family of his intention to be separated from the other members is sufficient to give him a divided status; *Musammatt Girja Bai v. Sadashiv Dhundiraj*(1) and *Suraj Narain v. Ikkal*

Narain(1). It was decided by a Full Bench of this Court in *Soundararajan v. Arunachalam Chetty*(2), that a member of a joint Hindu family becomes separated from the other members by the fact of suing them for partition. On the strength of this decision Mr. Raja Ayyar contends that on the filing of a plaint by a minor through his next friend he becomes divided from the other members of the family. If the plaintiff were a major no doubt on the filing of a plaint or on the sending of a proper notice he would become divided from the other members of a family. But the law is quite clear that a minor cannot enter into a valid contract and cannot enforce a partition by his mere volition. In an action for partition by a minor through his guardian or next friend, the Court has to see whether there are circumstances which would justify granting relief to the minor and whether it would be in the interests of the minor and to his advantage to separate him from the family. Till the Court determines the question whether a partition should be effected in favour of a minor, the joint status of the minor with the other members of the family is not in any way severed. It is only by the decree of the Court that a minor becomes divided from the other members of the family. No doubt, in the case of a suit by an adult member or in a partition at the instance of an adult member, a minor may become separated from the other members, but where the minor himself comes into Court with a prayer for partition from the other members of the family, it is the Court that determines whether he should be divided or not and therefore it is not the act of the next friend or the guardian that determines the issue whether there should be division or not, but it is

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(1) (1913) 1 L.R., 35 All., 80; 40 I.A., 40.

(2) (1916) 1 L.R., 39 Mad., 159 (F.B.).

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the judgment of the Court which determines the issue, and therefore the mere filing of a plaint cannot bring about a divided status so far as a minor plaintiff is concerned. This question was decided by a Bench of this Court in *Chelimi Chetty v. Subbamma*(1). The facts in that case were: a minor brought a suit for a partition of his share. Pending the suit, the minor plaintiff died and the mother applied to be brought on record as the legal representative of the minor plaintiff and asked for permission to continue the suit. The Subordinate Judge held that no cause of action survived to the mother and rejected her application. On appeal the District Judge set aside the order of the Sub-Court holding that the mother was entitled to continue the suit as the legal representative of the plaintiff. ABDUR RAHIM and OLDFIELD, JJ., held that the cause of action did not survive to the mother. ABDUR RAHIM, J., observes at page 445:

"In the case of an adult he has not to give any reasons why he asks for partition but has simply to say that he wants partition, and the Court is bound to give him a decree. In the case of a minor the law gives the Court the power to say whether there should be a division or not and we think that it will lead to considerable complications and difficulties if we are to say that other persons also have got the discretion to create a division in the family, purporting to act on behalf of a minor."

Mr. Raja Ayyar wanted to contend that this decision is wrong and that on the filing of the plaint by a minor he becomes divided from the other members of the family. Such a contention is opposed to the principle that it is the Court that determines whether there should be a partition of the family property at the instance of the minor plaintiff and not any relation, guardian or next friend. Whatever may be the circumstances which justify a guardian in bringing a suit on behalf

(1) (1918) I.L.R., 41 Mad., 442.

of a minor, there is no warrant for saying that it is his view that should prevail. The matter is entirely for the decision of the Court and therefore it is opposed to principle as well as to policy to hold that a minor or anybody on his behalf, has the power to give him a divided status without the decree of a competent Court. Mr. Raja Ayyar relied for his contention upon a decision in *Krishna Lal Jhu v. Nandeshwar*(1). In that case the learned Judges remark at page 48:

"We are unable to accede to the proposition that under Hindu Law a minor cannot express either himself or through his guardian an intention to do what was clearly not against his own interests."

With due respect to the learned Judges, I am unable to accept the argument. When the law is clear that there cannot be a partition at the instance of a minor except under a decree of Court, it is not proper to hold that the guardian or the next friend could do what the Court alone is competent to do. The decision in *Chelimi Chetty v. Subbamma*(2), though of August 1917, was evidently not brought to the notice of the learned Judges of the Patna High Court. There is no reason to doubt the soundness of the decision in *Chelimi Chetty v. Subbamma*(2).

An argument was advanced by Mr. Raja Ayyar that in a partition action by a minor the Court acts upon the representation of the guardian or next friend and in a way approves of the action of the guardian; in other words, the Court approves of the conduct of the guardian and grants his prayer and therefore it sanctions what the minor through his guardian or next friend wished to be done; and he relied upon *Kancherla Kanakayya v. Mulpurn Kotayya*(3) and others as supporting his contention. In that case the next friend of a minor

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(1) (1919) 4 P.L.J., 38.

(2) (1918) I.L.R., 41 Mad., 442.

(3) (1921) 41 M.L.J., 75.

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transferred a decree obtained on behalf of a minor without the leave of the Court. The High Court held that the leave to transfer the decree might be given at any time. This case does not support Mr. Raja Ayyar's contention. In a partition action, the Court does not merely sanction what the guardian or next friend has done; it hears and determines on the evidence whether the minor plaintiff should be given his share of the family property by effecting a partition or not. It does not merely sanction what the minor wants, but it comes to a conclusion on the evidence as to whether the prayer of the minor plaintiff should be granted or not.

But the question whether the plaintiff's share is liable to be diminished by the birth of the twenty-fourth defendant is not concluded by the decision in *Chelimi Chetty v. Subbamma*(1). Though the minor plaintiff becomes divided in status from the first defendant only by reason of the decree of the Court, yet his share in the family property is what it was on the date of the plaint. The Court determines on the evidence before it whether on the date of the plaint the minor plaintiff was entitled to partition or not. In the case of an adult plaintiff, his share is not liable to be diminished by the birth of a member who was not conceived at the time of the filing of the plaint. If a member of a joint Hindu family alienates his share, the alienee is entitled to the share of his alienor as on the date of the alienation and not as on the date on which he obtains a decree for partition. It is difficult to see why in the case of a minor plaintiff a different principle should prevail. In the case of an adult plaintiff suing for partition the Court has not to determine whether he is entitled to partition or not. It is his undoubted right to claim partition. No body has a right to deny him his share if he is entitled to

(1) (1918) I.L.R., 41 Mad., 442.

one. In the case of a minor plaintiff, he is entitled no doubt to a share. All that the Court is asked to determine is whether in the circumstances of the family it is advantageous to the minor plaintiff to be separated from the other members of the family or not. Though it is the Court that determines that question, its determination does not affect the share of the minor plaintiff which was his on the date when he filed his plaint. If the twenty-fourth defendant had been conceived before the date of the filing of the plaint, no doubt the plaintiff would be only entitled to one-third share, but the twenty-fourth defendant was born only in June 1920. So he could not have been *en ventre sa mere* on 31st January 1919, and no such case is put forward on his behalf, so he must have been conceived long after the plaint was filed. On the date when the plaintiff filed his suit, he was entitled to a half share, and the mere fact that the Court took two years to decide the suit is not a ground for diminishing his share which was a moiety on the date of the suit. Supposing in a partition suit at the instance of a minor several unnecessary contentions are raised, and the case takes a number of years before it is ready for trial, and before it is decided several members are added to the family, is it reasonable to hold that the plaintiff for no fault of his should be deprived of the share which he was entitled to on the date he filed his plaint either owing to the obstructive conduct on the part of the defendants or to the unavoidable delay in the Courts? I think it is but reasonable to hold that the plaintiff's share is not diminished owing to the birth of the twenty-fourth defendant before the preliminary decree was passed. The plaintiff is therefore entitled to a half share of the joint family property and not to one-third as found by the Subordinate Judge.

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The next question is whether the first defendant is liable to account for the income. In a partition suit the managing member of the family is not liable to account for the income and profits; but in this case the plaintiff was not supported by the first defendant and all the income was enjoyed by the first defendant. The plaintiff had to be maintained by his maternal relations and it is but fair that he should get his share of the income from the date of the plaint. The Court has a discretion in this matter and I think this is a fit case in which the discretion should be exercised in favour of the plaintiff by giving him a moiety of the income from the date of plaint to the date of his being put in possession of his share of the property.

Respondents 2 and 3 were not represented in this Court, but I must say in fairness to Mr. Raja Ayyar that he presented his case very fairly before the Court.

The memorandum of objections is allowed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Madhavan Nayar.

VEERAPPA CHETTIAR (PLAINTIFF), PETITIONER,

v.

MUNICIPAL COUNCIL, PALNI (DEFENDANT), RESPONDENT.*

*Madras District Municipalities Act (V of 1920), sec. 95—
"Reside," meaning of.*

A person who neither himself personally resides nor maintains a residence for himself or his family within the limits of a municipality but merely maintains an office for collection of rent accruing outside such limits does not "reside" within the

* Civil Revision Petition No. 413 of 1923.

municipality within the meaning of section 95 of the Madras District Municipalities Act (V of 1920), and is therefore not liable to be assessed to tax under that section.

PETITION under section 25 of Act II of 1887, praying the High Court to revise the decree and judgment of K. R. RAMAKRISHNA AYYAR, District Munsif of Palni, in S.C. No. 306 of 1922.

The facts are given in the judgment.

T. L. Venkatarama Ayyar for petitioner.—The income was derived solely from lands outside the municipality. Therefore section 93 does not apply. Income "from any other source" in section 93 must be *ejusdem generis* with "profession, trade or calling" and it cannot be mere ownership of lands for which section 81 makes provision. The words "inside the municipal limits" qualify "source" and "not houses and lands." Under the Local Boards Act the petitioner may be liable to be taxed under section 78 for the lands and it cannot be that for the same income he is liable to be taxed again. The income cannot even be said to be legally received inside the municipality, because *prima facie* they are received where they accrue, that is, outside the municipality; see *Board of Revenue v. Ripon Press*(1), *Aurangabad Mills, Limited, In re*(2), *Sundar Das v. Collector of Gujrat*(3). Even if section 93 applies, the petitioner is not liable because he has not resided himself within the municipality for sixty days, as required by section 95. Then again, as the Zamindari is permanently settled any further land-tax is *ultra vires*; see *Chief Commissioner of Income-tax v. Zamindar of Singampatti*(4), and the municipality cannot do what the State itself cannot. See Dillon on Municipal Corporations, Vol. VI, pp. 2393-2397.

K. V. Krishnaswami Ayyar for respondent.—Section 93 only requires receipt of income inside the municipality as the source of liability. That condition is satisfied and the levy is within the letter of the law. As for residence, it is found that the agent resides within the limits and carries on business. "Residence" is of vague significance and the question is whether the Act intended personal residence. The legislature might have said that "residence" does not include "carrying on business by the agent" but it did not say so; and rule 18 only

(1) (1923) I.L.R., 48 Mad., 703.

(2) (1921) I.L.R., 45 Bom., 1286.

(3) (1922) I.L.R., 3 Lah., 849 (F.B.).

(4) (1922) I.L.R., 45 Mad., 518.

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requires the existence of an office. Municipal tax is in the nature of a poll-tax and *Chief Commissioner of Income-tax v. Zamindar of Singampatti*(1) refers only to cases of land-tax.

T. L. Venkatarama Ayyar in reply.—Rule 18 applies in terms only to cases of carrying on a profession and not to cases of receipt of income without reference to a profession, in which case residence is required.

JUDGMENT.

The petitioner seeks for the revision of the decree of the lower Court in a Small Cause Suit instituted by the plaintiff to recover from the defendant, the Municipal Council of Palni, the amount of profession tax levied on him by the Council for the half-year ending 31st March 1922. The facts appear to be as follows: The plaintiff is a Nattukōttai Chetti, whose profession is money lending and he exercises that profession at Devakottai. He has purchased the Zamindari of Rettiampani in the Palni taluk. This zamin is situated wholly outside the limits of the Palni municipality. The plaintiff maintains in Palni town a resident collection agent who collects his zamin rent for him. In these circumstances the lower Court has held that the plaintiff has through his agent been in receipt of income within the municipality and is therefore liable to be taxed for profession tax.

The legal correctness of this decision depends on the interpretation of sections 93 and 95 of the Madras District Municipalities Act. It is contended for the petitioner that he or his agent is not a person in receipt of income from "any source other than houses or lands inside the municipal limits," and it is sought to make the words "inside the municipal limits" qualify "source" and not "houses and lands." This view is untenable. There is no reason whatever why a person residing within the municipality and drawing income from rent

(1) (1922) I.L.R., 46 Mad., 518.

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of houses outside it should not pay profession tax as he obtains the benefit of municipal activities in the same manner as any other resident. The phrase is clearly used in order to exempt a person from paying profession tax on rent from property inside the municipality, since he is already taxed on that under section 81.

We cannot say that the petitioner is not in receipt of this income. He admits that his agent collects it and remits it to him. He is therefore *prima facie* liable under section 93, if he has been in receipt of that income within the municipality for the period laid down in section 95. Section 95 lays down that, though a person may be liable for the tax under section 93, it is not payable unless he resides in the municipality for sixty days in the half-year in question. This proposition is not affected by the principle laid down in illustration (3) of section 93, because section 93 is only laying down the qualification for liability to tax and has nothing to do with the conditions under which the tax becomes payable. That is dealt with under section 95. This point has been overlooked by the lower Court and it has thus fallen into an error.

Now, the plaintiff in this plaint clearly stated that he never resided in Palni for sixty days in the half-year. In the written statement the Council did not controvert that statement. Had the plaintiff resided for sixty days in the half-year it would have been the most obvious answer to the plaintiff's suit. We must take it then that the plaintiff did not reside within the municipality for sixty days in the half-year in question.

The respondent has tried to argue that "residence" will include "the maintenance of an office" although the principal never appears there. No doubt the word "residence" has been interpreted in various ways when it has been necessary to interpret its meaning in income-tax

and other Statutes; but we think that its meaning in this Act may be decided by a consideration of the reported rulings under the old District Municipalities Act of 1884, and the consequent alteration of the provisions in the new Act. Under the old Act, section 55, a person exercising a profession, etc., or holding an office was liable under section 53 to the tax, and had to pay it, if he exercised the profession or held the office for sixty days in the half-year. In the two rulings in *Chairman, Ongole Municipality v. Mounsey*(1) and *Hammick v. President, Madras Municipal Commission*(2), this Court held that a Government servant, whose head office was in the municipality, was not, while he was himself outside the municipality, holding his office within the municipality. So that, unless he himself was for sixty days within the municipality he was not liable to the tax. To meet that difficulty, we presume, the legislature provided in schedule IV, rule 18 of the new Act that a person must be deemed to have exercised a profession or held an appointment for the period specified in section 95

"if his principal office is within the municipality and his connexion therewith has lasted for the specified number of days."

Under the old Act the test for liability in the case of a person holding an appointment was personal presence within the municipality; under the new Act, in such a case personal presence is not necessary. Had the legislature meant that, in the cases of persons in receipt of pension or income, personal presence in the municipality was equally not necessary, we think they would have made it equally clear. We think, therefore, that the test in such a case is personal presence within the municipality, and that "residence" in section 95 has to be interpreted in the sense of personal residence and

(1) (1894) I.L.R., 17 Mad., 453.

(2) (1899) I.L.R., 22 Mad., 145.

that one who neither himself personally resides nor maintains a residence for himself or his family within the municipality but merely maintains an office for the collection of his rent cannot be said to reside within the municipality. The petitioner, on this ground, therefore will not be liable to pay the profession tax.

The petitioner raised a further ground of objection, namely, that since all his zamin land rents are already taxed to a fixed peshkash this peshkash cannot be increased by any further tax by Government, either directly by Government itself or indirectly by Government authorizing a municipality to tax such rent without a direct statutory declaration of its interference with his permanent sannad rights. He quoted *Chief Commissioner of Income-tax v. Zamindar of Singampatti*(1), in aid of his contention that the State cannot authorize a municipality to levy a tax which it cannot itself levy. This question is not free from difficulty but need not be decided in this case.

On the ground that the petitioner has not resided for sixty days within the municipality, the levy of a profession tax on him was contrary to law. We must hold that he was not liable for this tax and that the lower Court has made a mistake in law in dismissing this suit. We think this is a case in which we must interfere in revision. We reverse the decree of the lower Court and give the plaintiff a decree for the amount sued for with costs in both Courts.

N.R.

(1) (1922) I.L.R., 45 Mad., 518.

APPELLATE CIVIL.

Before Mr. Justice Ramesaïn and Mr. Justice Jackson.

1924,
October 1.

RAMASAMI alias PALUNNA NATHAN AND OTHERS
(DEFENDANTS), APPELLANTS,

v.

M. P. M. MUTHAYYA CHETTY (RECEIVER, PLAINTIFF).
RESPONDENT.

Suit on judgment, maintainability of—Suit maintainable, when judgment is not enforceable in execution, but not when judgment is executable—Civil Procedure Code (V of 1908), sec. 47—Limitation Act (IX of 1908), art. 122—Suit for dissolution of partnership—Decree creating new right—Enforceable by suit—Limitation—Cause of action.

In India it is settled law that no action lies on an executable judgment, the only remedy being execution, and this principle is embodied in section 47, Civil Procedure Code, but where a judgment creates a new obligation without providing for its execution but indicating a suit as the only method of enforcing it, a suit on the judgment to enforce the obligation is maintainable.

The period of limitation applicable to such a suit is article 122 of the Limitation Act (IX of 1908).

APPEAL against the decree of T. M. FRENCH, Subordinate Judge of Ramnad, in Original Suit No. 13 of 1920.

The plaintiff sued to recover a sum of money from the defendant under the judgment and decree in a previous suit (Original Suit No. 143 of 1909), instituted for the dissolution of a partnership. The preliminary decree in that suit was passed on 27th October 1909, declaring the partnership dissolved from the date of the plaint (4th January 1909) and appointing a Commissioner to take accounts. The Commissioner reported that a sum of Rs. 2,611-6-3 was due to the partnership from the first defendant. The final decree was passed on the 25th

November 1910. Paragraph 6 of the final decree was as follows:—

“It is, therefore, ordered that the above-referred report of the Commissioner be confirmed, that the first defendant do forthwith pay into Court the sum of Rs. 2,611-6-3 being the amount found due to the partnership by him, that in default of such payment, the fifth plaintiff is appointed Receiver to realize and collect the said amount with power to bring and defend suits in his own name, to grant receipts, and generally to act as the owner thereof might act, that the amount so realized and collected be paid into Court, and that out of the said amount the cost referred to in paragraph 5 of the order be paid out of Court, and the balance be distributed amongst partners in the proportion of shares held by them as set out in the preliminary decree.”

This decree was confirmed on appeal and on second appeal on 5th February 1917. On an application for execution, filed in 1914 (E.P. No. 309 of 1914), the Subordinate Judge held that the decree was not enforceable in execution. He observed as follows:—

“As the decree stands it appears to me that the Receiver (fifth plaintiff) has to sue the first defendant for the money due by him to the partnership, and that he cannot recover the amount in execution as there is nothing in the decree to the effect that the first defendant is to pay the sum to the petitioner (fifth plaintiff).”

The fifth plaintiff (Receiver) instituted the present suit on 4th February 1920 to recover the said amount with interest declared in the previous decree to be due from the first defendant therein. The Subordinate Judge decreed the suit. The defendants appealed.

A. Krishnaswami Ayyar and M. Patanjali Sastri for appellants.

K. Bhashyam Ayyangar for respondents.

JUDGMENT.

The facts of this appeal may be briefly stated. The plaintiff, the first defendant's father, and two others carried on a partnership business at Zanzibar.

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Original Suit No. 143 of 1909 was filed in the Subordinate Court of Madura (East) for its dissolution. In that suit, the present plaintiff was the fifth plaintiff and the father of the present first defendant was the first defendant. A preliminary decree was passed on 27th October 1909 and a Commissioner was appointed. The Temporary Subordinate Court of Ramnad, to whose file the suit was then transferred, confirmed the report of the Commissioner. Paragraph 6 of the order confirming the report runs as follows:—"It is, therefore, ordered that the first defendant do forthwith pay into Court the sum of Rs. 2,611-6-3 being the amount found due to the partnership by him, that in default in such payment, the fifth plaintiff is appointed Receiver to realize and collect the said amount with power to bring and defend suits in his own name," etc. (see Exhibit D). The final decree (Exhibit E) of the Subordinate Court was passed on 14th October 1911. It says "that out of the amount collected by the fifth plaintiff as Receiver in realizing the only item of assets of Rs. 2,611-6-3 due from the first defendant, he (the fifth plaintiff) do take, etc." There was an appeal to the District Court and the High Court, and the Subordinate Court's decree was finally confirmed by High Court on 5th February 1917. Meanwhile, there was an attempt to execute the decree of the Subordinate Court in E.P. No. 309 of 1914. The Subordinate Court of Ramnad held that the decree was unexecutable and that it contemplated that the fifth plaintiff as Receiver should sue the first defendant to recover the amounts (Exhibit G, dated 26th October 1914). There was no appeal against this order and the order is now binding on all the parties. The result is that the decree must be construed, in the light of that order, to be a decree declaring or creating rights which are unenforceable in execution and can be enforced only by suit.

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The plaint in the present suit was presented on 4th February 1920 for recovering the said amount. The plaintiff obtained a decree and defendant appeals.

He contends that the suit is not maintainable and is barred by limitation. It is true, as he points out, that a claim to recover a sum of money due from one of the partners must form part of the inquiry in the action for winding-up the partnership and no separate suit will lie after suit for an account is barred by limitation, *Gopala Chetty v. Vijayaraghavachariar*(1). But the respondent contends that the judgment, as construed by the order of 26th October 1914 (Exhibit G) creates fresh rights in the place of the older rights and this suit is an action on the judgment. This is obvious and, provided there is no obstacle in India to a suit on a judgment, when there is no other remedy to enforce the right, the contention ought to prevail.

At common law, actions on judgment lie whether the remedy by execution is available or not [see *Williams v. Jones*(2), *Hutchison v. Gillespie*(3), *Marbella Iron Ore Co. v. Allen*(4) and *Black on Judgment*, Vol. II, section 958]. This is admitted by the appellant. In India it is settled that no action lies on an executable judgment, the only remedy being execution, the principle being embodied in section 47, Civil Procedure Code (section 244 of the Code of 1882). An exception was at one time recognized by which suits were permitted to be brought in the High Court on judgments of a Court of Small Causes in order to obtain execution against immovable property, *Bhavanishankar Shevakram v. Pursadri Kalidas*(5). On the ground that "where an action on the judgment will give a higher or better remedy," the case is different (see

(1) (1923) I.L.R., 45 Mad., 378 (P.C.).

(2) (1845) 18 M. & W., 628.

(4) (1878) 47 L.J., C.P. (N.S.), 601.

(3) (1856) 11 Exch., 798.

(5) (1882) I.L.R., 6 Bom., 292.

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Maneharam Kallindas v. Bakshe Saheb(1). The exception is now obsolete (section 94 of Act XV of 1882). But COUGH, C.J., also says in the case last cited "There are cases in which an action may be the only mode of enforcing a judgment or decree." The present case is such a case. In *Mahommed Ghouse Coorooshee v. Mustan Ally*(2), SCOTLAND, C.J., and BITTLESTON, J., recognized that such a suit would lie and proceeded to discuss the question of limitation. The further remarks in *Bhavanishankar Shevakram v. Pursadri Kalidas*(3) were intended to apply only to executable judgments. The decision in *Merwanji Nowroji v. Ashanabi*(4) is also based on the policy of the Civil Procedure Code and applies only to judgments capable of execution. So also are the remarks in *Periasami Mudaliar v. Seetharama Chettiar*(5):

"As against the judgment-debtor himself or against his legal representatives it has long been held that under the Indian Processual Law the remedy is only by way of execution of the decree and that no suit could be brought upon the judgment."

The decision in *Anmoda Prasad Banerjee v. Nobo Kishore Roy*(6) shows a suit is maintainable on a judgment where no mode of execution (other than proceedings in contempt) is available. SALE, J., says that that was the practice of the Court, referring to *Attermony Dossee v. Hurry Doss Dutt*(7). The case in *Kali Oharan Nath v. Sukhoda Sundari Debi*(8) and those cited in it [*Prosunno Chunder Bhattacharjee v. Kristo Chytunno Pal*(9) and *Ashi Phusan Dasi v. Peleram Mandal*(10)] are not strictly relevant as they are cases where execution against the judgment-debtor on record was useless and it was

sought to obtain a judgment against another person for substantially the same relief. The remarks in *Ramanand v. Jai Ram*(1) apply only where there is another mode of enforcing the judgment.

In our opinion, there is nothing in all the Indian authorities cited before us against the maintainability of the suit. Such a case can occur only very rarely. Ordinarily the Indian Courts pass judgments which are to be enforced in execution and even when they create new relation involving fresh rights and obligations, they provide for working out the rights in execution. Rarely do they create a new obligation without providing for its execution and indicating a suit as the only method of enforcing it. But when they do, as in this case, the suit is maintainable.

We accordingly hold that the suit is maintainable. If so, the only period of limitation that is applicable to it is article 122. There was no old cause of action, on which such a suit could be maintained, nor does it subsist, if it ever existed. The judgments created a new obligation in lieu of the old. The suit, therefore, is within time.

The appeal fails and is dismissed with costs.

K.R.

(1) (1921) I.L.R., 43 All., 170.

(1) (1863) 6 Bom. H.C.R., 231.

(3) (1882) I.L.R., 6 Bom., 292.

(5) (1904) I.L.R., 27 Mad., 243 (F.B.).

(7) (1891) I.L.R., 7 Calc., 74.

(9) (1879) I.L.R., 4 Calc., 342.

(2) (1869) 4 Mad. Jurist, 127.

(4) (1884) I.L.R., 8 Bom., 1.

(6) (1905) 9 C.W.N., 952.

(8) (1915) 20 C.W.N., 58.

(10) (1913) 18 C.L.J., 362.

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APPELLATE CIVIL.

1924,
December 5.*Before Mr. Justice Devadoss and Mr. Justice Wallace.*

KOTHANDARAMA CHETTIYAR AND ANOTHER (PLAINTIFFS)

v.

ANNAMALAI PILLAI AND ANOTHER (DEFENDANTS).*

Provincial Small Causes Courts Act (IX of 1887)—Jurisdiction to attach before judgment immovable property—Order XXXVIII, rule 5, Civil Procedure Code (V of 1908).

Under the present Civil Procedure Code (V of 1908), Order XXXVIII, rule 5, a Court of Small Causes has power to attach immovable property before judgment. *Kedaranath Paramanik v. Hemnath Karamkar* (1922), I.L.R., 49 Cal., 994, followed. *Marthamma v. Kittu Sheregara* (1871) 6 M.H.C.R., 91, explained.

CASE stated under Order XLVI, Rule 1, Civil Procedure Code, by T. R. NARASIMHAMURTI SASTRI, District Munsif of Ariyalur, in Small Cause Suit No. 1258 of 1923.

The facts are given in the judgment.

Government Pleader (C. V. Anantakrishna Ayyar)
amicus curiae.

The JUDGMENT of the Court was delivered by DEVADOSS, J.—The question referred for the opinion of the High Court by the District Munsif of Ariyalur is whether a court exercising the jurisdiction of a Small Cause Court has power to attach immovable property before judgment under Order XXXVIII, rule 5 of the Civil Procedure Code.

The Civil Procedure Code of 1908 is made applicable to all Courts of civil judicature unless the whole or portions of it are declared not applicable to any Court or the jurisdiction of any Court. Section 7 enacts that certain provisions of Civil Procedure Code shall not

* Referred Case No. 8 of 1923.

extend to Courts constituted under the Small Cause Courts Act of 1887 or to Courts exercising jurisdiction of the Court of Small Causes under that Act. Under Order L, it is provided that certain provisions of the Civil Procedure Code shall not extend to Courts constituted under the Provincial Small Cause Courts Act or to courts exercising jurisdiction of the Court of Small Causes under that Act. Order XXXVIII is not one of the orders mentioned in Order L. Order XXXVIII of the Civil Procedure Code is, therefore, applicable to the Court of Small Causes or Court exercising small causes jurisdiction. Under Order XXXVIII a Court is empowered to attach before judgment movable and immovable property. It has also power to arrest the defendant before judgment, if proper cause is shown. So far as this Presidency is concerned, the jurisdiction of a Small Cause Court or a Court exercising small cause jurisdiction to attach before judgment movable property and to arrest before judgment the defendant for proper cause shown, has never been questioned.

The question is whether under the present Code, the Court of Small Causes or a Court exercising small cause jurisdiction has power to attach before judgment immovable property. According to the present Civil Procedure Code, Order XXXVIII is applicable to all Courts, unless the jurisdiction under Order XXXVIII has been specifically taken away by the Civil Procedure Code or any other enactment. There is nothing in the Civil Procedure Code of 1908 to show that Order XXXVIII, rule 5, is not applicable to a Court of Small Causes or Court exercising small cause jurisdiction. Under the Civil Procedure Code, 1882, the Small Cause Court was not given jurisdiction to attach immovable property before judgment. Schedule 2 of

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that Code specifically took away the jurisdiction of the Court of Small Causes to attach immovable property before judgment. It made Chapter XXXIV corresponding to Order XXXVIII applicable to the Court of Small Causes with the reservation that it was not to apply to the attachment of immovable property. Under section 5 of the Code of 1882, only certain specified portions were made applicable to Court of Small Causes constituted under Act XI of 1865 and to all other Courts except the Presidency Towns Small Cause Courts exercising the jurisdiction of a Court of Small Causes. There seems to be a distinct departure in the present Civil Procedure Code from the policy of the Code of 1882. Under the previous Code only certain specified portions of the Civil Procedure Code were made applicable to Small Cause Courts and Courts exercising small cause jurisdiction. The present Code is made applicable to all Courts of Civil Judicature except such portions of the Code as are specifically stated to be not applicable to any Court or to the jurisdiction of any Court.

Where the terms of an enactment are quite clear, it is unnecessary to inquire into the reasons for the change. It cannot be suggested that the legislature overlooked the provisions of the previous Code as to the jurisdiction of the Court of Small Causes or Courts exercising small cause jurisdiction as regards the attachment before judgment of immovable property, when it enacted the present Code.

In the present Civil Procedure Code, the provision in Schedule II of the previous Code as regards the attachment before judgment of immovable property by Courts of Small Causes is deliberately omitted. When the terms of an enactment are quite clear, it is not proper for the Courts to consider what the previous law on the subject was in order to interpret the existing law.

Where it is doubtful as to what the legislature meant by a certain provision of a new enactment, the Court could refer to the previous state of the law in order to interpret what is not clear. But where the law is clear, it is not proper for the Court to consider whether there has been a change in the policy of the law or whether there the legislature overlooked the previous law on the subject, [vide *Bank of England v. Vagliano*(1)].

This point has been decided quite recently by the Calcutta High Court on a reference similar to the present one. In *Keduranath Paramanik v. Hemnath Karamkar*(2) a Bench of the Calcutta High Court held that the Provincial Small Cause Court had power to attach immovable property before judgment. The learned Judges referred to a previous case decided by them as regards the power of the Small Cause Court to attach movable property before judgment. In *Kumud Behary Pal v. Hari Charan Sardar*(3), the same learned Judges held that the Court of Small Causes had power to attach immovable property before judgment. In that case, the District Munsif who referred the question was of opinion that a Small Cause Court had no power to pass interlocutory orders under section 94 of the Civil Procedure Code and that an attachment before judgment was an interlocutory order and therefore such an order could not be passed by the Court of Small Causes. Section 7 (b) does not extend sections 94 and 95 so far as they relate to injunctions and interlocutory orders. If the intention of the legislature was not to extend sections 94 and 95, it could have said so. But only certain orders under sections 94 and 95, i.e., orders coming under section 94 (c) and (e) are exempted from the jurisdiction of the Small Cause Court or Court exercising

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(1) [1891] A.C., 107.

(2) (1922) I.L.R., 49 Cal., 994.

(3) (1919) I.L.R., 46 Cal., 717.

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small cause jurisdiction. That is no reason for saying that the powers given by 94 (a), (b) or (d) could not be exercised by a Court of Small Causes. So far as our Presidency is concerned, as I have already observed, the jurisdiction of the Small Cause Court to attach movable property before judgment and to arrest the defendants before judgment for proper cause shown, was never questioned.

In the case of *Ibrahi Rameethen v. Sangaram Shetty*(1), the power of the Small Cause Court to award compensation under section 491 of the old Code corresponding to section 95 of the present Code was recognized. The Calcutta High Court in this respect has come into line with the Madras High Court.

The District Munsif refers to an old case *Marthamma v. Kittu Sheregara*(2) in which it was held on a reference by the Principal Sadir Amin of Mangalore that a Small Cause Court had no jurisdiction to attach immovable property before judgment. The reason given by the learned Judges is that:

"The Court which cannot attach primarily in execution of a decree cannot attach in anticipation of it."

With due respect to the learned Judges, it is not easy to follow the reasoning. The attachment before judgment is only a preventive remedy so as to enable the plaintiff to reap the fruits of his decree if he is able to obtain one, by preventing the defendants from making away with the property and thereby rendering the decree nugatory. It does not follow that a Court which has the power to attach immovable property before judgment, should necessarily have the power to execute the decree against immovable property; for the attachment before judgment is not in execution of its

(1) (1903) I.L.R., 28 Mad, 504.

(2) (1871) 6 M.H.C.R., 91.

decree, but for preventing the defendants from making away with the property before the Court passes its decree. If the suit is dismissed the attachment will *ipso facto* cease. The decision in *Marthamma v. Kittu Sheregara*(1) cannot be said to be wrong in the state of the law as it then was. Under section 5 of Act X of 1877 certain chapters and sections of the Code specified in the second schedule thereto annexed were extended to Courts of Small Causes constituted under Act XI of 1865. It was specially enacted in that section that

"Nothing herein contained shall be deemed to enlarge the powers which such Courts now possess for the purpose of effecting attachments or executing decrees."

By section 5 the Small Cause Court was not given additional or enlarged powers by reason of the Code of 1877, i.e., the powers which such Court had not, before the Act of 1877 was passed. By the amending Act XII of 1879, the third sentence of section 5 was repealed. The second Schedule was amended by the insertion of the words "except as regards immovable property." This amendment was embodied in the Act of 1872 which put the matter beyond doubt. In 1871 when the decision in *Marthamma v. Kittu Sheregara*(1) was passed the Court of Small Causes had no power to execute its decrees against immovable property. By Act XI of 1865, section 20, it was provided that for the purpose of executing a small cause decree an application had to be made to the Court exercising general jurisdiction in which the immovable property was situate. There is nothing in Act XI of 1865 to show that a Small Cause Court could attach before judgment immovable property. Under Act VIII of 1859 a Civil Court had jurisdiction to attach before judgment both immovable and movable property (vide section 83). Section 388 of

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(1) (1871) 6 M.H.C.R., 91.

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that Code extended the Act to all Civil Courts but there is nothing in the Act itself to show that the Act was extended to Small Cause Courts or Courts exercising small cause jurisdiction. Under the Small Cause Court Act of 1865, therefore, the Small Cause Court had no jurisdiction to attach immovable property. The decision in *Marthamma v. Kittu Sheregara*(1) is, therefore, correct with regard to the law as it then stood.

But as the law stands at present, it cannot be said that the Small Cause Court has no jurisdiction to attach before judgment immovable property. As we have already observed, the present Code is quite clear on the point and therefore the decision in *Marthamma v. Kittu Sheregara*(1) cannot apply to the present state of the law.

We, therefore, answer the question referred to us in the affirmative.

We are very much indebted to the learned Government Pleader for assisting us by arguing the point fully as *amicus curiae*.

N. R.

ORIGINAL CIVIL.

Before Mr. Justice Kumaraswami Sastri.

PERURI SURYAPRACASAM, PLAINTIFF

v.

P. T. MUNUSWAMY CHETTY, DEFENDANT.*

Execution of decree—Power of Court to stay execution—Decisions not reported in authorized series, whether binding on Court.

The Court has power, on an application by the judgment-debtor or his surety, to stay execution of the decree against his person for a reasonable time to enable him to satisfy the decree.

(1) (1871) 6 M.H.C.R., 91.
* Judge's Summons in C.S. No. 545 of 1922.

Held also that the observations of SCHWABE, C.J., to the contrary in *Syed Aga Jan v. Abdul Majid*, O.S.A. No. 16 of 1923, are not binding on the Court, the case not being reported in the authorized reports.

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A. Narasimhachariar for plaintiff.

T. D. Srinivasa Achariyar and T. Chakravarti Ayyangar for defendant and sureties.

JUDGMENT.

This is an application by the sureties praying that they may be given two months' time to pay the amount of the decree which they are liable to pay as sureties and that execution may be stayed for two months in order to enable them to pay the amount.

The suit was filed under Order VI-A of the Original Side Rules against the defendant and leave to defend was given on condition that the defendant gave security. The applicants stood as sureties. A decree was ultimately passed and execution is now sought against the sureties.

The affidavit of Chandrasekhara Chetti (one of the sureties), filed in support of the application, states that the defendant has been promising to settle the claim with the plaintiff and pay up the decree amount, and the sureties therefore did not take any steps to find the money, that ten days before the filing of the present application notice was issued to the sureties to show cause why execution should not be issued against them, that the judgment-debtor is still promising to find the amount due, that the sureties are persons possessing property but that, owing to the suddenness with which the application for execution against them has been made, they are unable to find the money at once.

A counter-affidavit has been filed stating that the application is not sustainable in law, that the defendant got several extensions of time, that the three months' time which was granted to the defendant at the time of

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passing the decree expired on 12th of January 1924, that the sureties are aware of the several attempts of the defendant in trying to get time and that, as the sureties are men possessing property, there is no reason why they should not pay the amount which they have undertaken to pay.

It was not disputed before me at the trial that the sureties are persons who have got immovable property sufficient to pay the amount of the decree nor was it disputed that this was the first application taken out against them for execution. The defendant was a dubash in Messrs. Walker & Co. and the sureties state that as he was promising to pay the decree amount they did not take steps earlier to raise money and pay off the decree amount. I do not think I can stay execution of the decree altogether for two months; but it seems to me that this is a fit case for staying execution of the decree for one month in so far as the decree-holder wants to arrest the sureties, in order to enable them to raise money and pay off the decree amount, and for allowing the decree-holder to proceed at once against immovable properties by attachment and sale. This course, while it would not prejudice the decree-holder, would enable the sureties to pay up the decree amount.

It often happens that, though men have got property, the conditions in the money market may be such that they could not raise a large sum at once but have to negotiate for some time to raise money. The sureties are merchants and it seems to me that a warrant for their arrest would ruin their business.

In cases of applications for execution, whether against the defendant or the sureties, the primary consideration must be the interest of the decree-holder, and where his interests are likely to be jeopardised by the granting of any application for time, courts have no

option but to execute the decree. But where without any detriment to the interests of the decree-holder the granting of time to the judgment-debtor or the sureties to pay would not only enable the decree amount to be paid but would prevent serious loss or ruin, I think the Court ought to have power to stay execution against the person for such time as it thinks reasonable unless there is something in the Code which prohibits such power. A surety may be perfectly solvent and may be able to pay the amount if a few days' time is given to raise the money; and he may, if a merchant, be ruined by the sudden issue of process for arrest and I can see no justice in refusing his request. Of course if the law is otherwise, he cannot be helped; but I see nothing in the Code which prohibits such a course.

Rule 37 (1) of Order XXI empowers the Court, where an application is made to arrest the judgment-debtor, to issue notice to him to show cause why he should not be arrested. Rule 37 (1) runs as follows:—

"Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the Civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court may, instead of issuing a warrant for his arrest, issue a notice calling on him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the Civil prison."

Rule 40 (1) enables a Court for sufficient cause to disallow the application for arrest and detention and to direct his release. So that the combined effect of these two rules is that the Court may, the moment an application for arrest is filed, direct notice notwithstanding any other provisions in the Code and prevent his being arrested if sufficient cause is shown.

It is not denied that, if the sureties in the present case are arrested to-morrow and brought before the

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Court, I can pass the order which I now propose to pass. But it is contended that, though this can be done if the sureties appear on notice or are actually arrested, the Court could not prevent the arrest and pass an order which it would have passed if the sureties were arrested and brought to Court. It seems to me that such a contention ought not to prevail unless there is something in the Code which warrants it. As a matter of fact, such orders have been passed on the Original Side both by myself and Courts Trotter, J., when he was presiding on the Original Side, and I believe that such orders have been usual on the Original Side for several years. I do not think the practice should be lightly disturbed unless there are any compelling reasons, especially when it seems to me to be founded on fair and equitable considerations. What the Court can do after a man is actually arrested and brought before it or after it issues notice to him, I think can be done before the actual arrest. When an application for arrest is made, it is open to the Court to order notice and to disallow arrest if sufficient cause is shown. There is no reason why the sureties should not forestall the issue of notice and, the moment they hear of the application for arrest, come before the Court and lay before it matters which render it just and equitable that the sureties should not be arrested but that some time should be given. To hold that, because there is no express provision for that purpose, the power is by implication withdrawn from the Court is, in my opinion, not warranted.

Section 151 of the Civil Procedure Code has been in my opinion expressly enacted for the purpose of preventing hardship which may exist in certain cases. Section 151 runs as follows:—

“Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders

as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

It is no doubt true that this section would not enable the Court to act against any of the express provisions of the Code or the rules; but where there is no express provision which prohibits a course or where it does not violate any of the rules, there seems to be no reason why section 151 should not be resorted to in order that the Court may do what in its opinion is fair and equitable.

There have been numerous decisions as regards the inherent power of the Court both before and after the passing of the present Civil Procedure Code. The effect of the authorities is that the provisions of the Civil Procedure Code are not exhaustive and that where there is no prohibition in any of the sections the Court has ample power to pass such orders as would effectively do justice between the parties.

It has been held in more cases than one that the Code of Civil Procedure is not exhaustive and that the Court possesses inherent powers to act *ex debito justitiae* in order to do real and substantial justice between the parties. In *Hukum Chand Boid v. Kamalanand Singh*(1), WOODROFFE, J., in an exhaustive judgment dealing with all the authorities held that the Civil Procedure Code is not exhaustive, that it does not affect previously existing powers unless it takes them away and that, in matters with which it does not deal, the Court will exercise an inherent jurisdiction to do that justice between the parties which is warranted under the circumstances and which the necessities of the case require. (See also *Jogendra Chandru Sen v. Waridunmissa Khatum*(2), where costs were awarded on the analogy of section 583

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(1) (1906) I.L.R., 33 Cal., 927.

(2) (1907) I.L.R., 34 Cal., 860.

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of the Code on the ground that the Civil Procedure Code was not exhaustive and in the inherent jurisdiction of the Court.) In *Mungle Chand v. Gopal Ram*(1) it was held that the powers of the High Court to grant temporary injunctions are not confined to the terms of sections 492 and 493 of the Civil Procedure Code. In *Ghuznavi v. The Allahabad Bank, Ltd.*(2) it was held by a Full Bench of the High Court that the inherent power given under section 151 of the Civil Procedure Code can be invoked for the purpose of making a remand which was not covered by section 107 and Order XLI, rule 23 of the Civil Procedure Code. In *Perumbra Nayar v. Subramanian Pattar*(3), which was a case under the Code of 1882, the inherent power of the Court to remand was also recognized. In *Nanda Kishore Singh v. Ram Golam Sahu*(4) it was held, invoking the power conferred by section 151 of the Code, that the High Court is competent to make an order staying proceedings in execution of its decree in view of an application by the judgment-debtor to the Judicial Committee for special leave to appeal to His Majesty in Council, even though there was no direct provision in the Code. In *Rash Behary Dey v. Bhowani Churn Bhose*(5) it was held that the High Court has power under its general equity jurisdiction to grant an injunction, restraining the defendant from proceeding with a suit instituted by him in the Small Cause Court, independently of the Code of Civil Procedure. A similar view was taken in *Uderam Kesaji v. Hyderally*(6), where MACLEOD, J., refers with approval to the observations of WOODROFFE and MOOKERJEE, JJ., in *Hukum Chand Boid v. Kamalanand Singh*(7). Prior to the enactment of section 144 of the

(1) (1907) I.L.R., 34 Cal., 161.

(3) (1900) I.L.R., 23 Mad., 445.

(5) (1907) I.L.R., 34 Cal., 87

(2) (1917) I.L.R., 44 Cal., 929.

(4) (1913) I.L.R., 40 Cal., 955.

(6) (1909) I.L.R., 33 Bom., 469.

(7) (1906) I.L.R., 33 Cal., 927.

Civil Procedure Code it was held in *Mookoond Lal Pal Chowdhry v. Mahomed Sami Meah*(1) that the Court has inherent power to grant restitution where a decree of the lower Court is reversed. A similar view was taken in *Raja Singh v. Kooldip Singh*(2), *Collector of Meerut v. Kalka Prasad*(3) and *Shiam Sunder Lal v. Kaisar Zamani Begam*(4). In *Alagappa Chettiar v. Muthukumara Chettiar*(5) it was held that the Court has inherent power to order a defendant to repay money with interest where he was allowed to draw the money on an undertaking to repay it if the plaintiff succeeded. In *Jai Bahram v. Kedar Nath*(6) their Lordships of the Privy Council referred to the inherent jurisdiction of the Court to do justice between the parties in restitution proceedings.

Reference was made to Order XX, rule 11 of the Civil Procedure Code which states that the Court, when passing a decree, may order that the payment of the amount decreed shall be postponed or shall be made by instalments with or without interest, and that after the passing of the decree such an order can be passed only with the consent of the decree-holder. I do not think that this rule limits the power of the Court in execution proceedings to *postpone* the execution of a warrant for the arrest of the defendant. The Court does not stay execution of the decree *absolutely* but only postpones one mode of relief granted by the Code in execution. As I have already pointed out, Order XXI, rule 40, expressly gives the Court power when the defendant comes before the Court either on notice or after arrest, and the only question is whether there is anything in the Code which prevents the Court from exercising that power when the

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(1) (1887) I.L.R., 14 Cal., 484.

(3) (1906) I.L.R., 28 All., 665.

(5) (1918) I.L.R., 41 Mad., 318.

(2) (1894) I.L.R., 21 Cal., 989.

(4) (1907) I.L.R., 29 All., 143.

(6) (1923) 18 L.W., 802 (P.O.).

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defendant appears and shows cause which would, if the application were filed under the strict terms of Order XXI, rule 40, entitle him to an order preventing his immediate arrest and detention in prison. Unless it can be held that whatever is not provided under Order XXI, rule 40, is prohibited, I think section 151 of the Code gives ample power to the Court. This, as I said before, has been the practice on the Original Side for several years and being eminently just and reasonable, I think it ought to be followed.

My attention has been drawn to the observations of Sir WALTER SCHWABE, C.J., in *Syed Aga Jan v. Abdul Majid*, O.S.A. No. 16 of 1923. This was an appeal against an order of mine which stayed execution of a decree for Rs. 4,000 against the person of the judgment-debtor till execution against the properties was taken out and they were sold. The judgment-creditor stated that the immovable properties were worth nothing. The learned CHIEF JUSTICE observed :

"I can find no power in the Judge to make such an order. It is for the judgment-creditor to elect his remedies in execution subject, of course, to such rules, as there may be, governing a particular case; but our attention has been called to no rule at all which would justify such an order as this."

There is unfortunately no reference to any of the provisions of the Civil Procedure Code nor was the longstanding practice on the Original Side brought to the notice of the Court. I do not think I am bound by this unreported decision. Section 3 of the Law Reports Act XVIII of 1875 was, I think, enacted to meet such cases.

I direct that execution against the persons of the sureties be stayed for one month, from 21st March, the decree-holder being allowed to proceed against the properties.

D.A.B.

APPELLATE CRIMINAL.

Before Mr. Justice Krishnan.

MEENATCHI AMMAL (COUNTER-PETITIONER), PETITIONER,

v.

KARUPPANA PILLAI *alias* MUTHUSWAMI PILLAI
(PETITIONER), RESPONDENT.*

1924,
October 29.

Code of Criminal Procedure (Act V of 1898), sec. 488—Maintenance order in favour of a girl—Girl subsequently married—No proof of ability to maintain herself—Whether maintenance order could be cancelled—Section 489—Magistrate's powers to cancel his order.

An order under section 488 of the Code of Criminal Procedure for the maintenance of a girl cannot be cancelled on her marriage without proof that she has thereby become able to maintain herself and ceased to depend upon the maintenance ordered.

Section 489 empowers a Magistrate to altogether cancel his order awarding maintenance and does not restrict him to merely reducing the amount.

PETITION under sections 435 and 439 of the Code of Criminal Procedure Code, praying the High Court to revise the order of T. B. RUSSELL, Joint Magistrate of Dindigul, in his proceedings, dated 6th February 1924, in M.C. No. 6 of 1924.

The facts necessary for this report are set out in the Judgment.

T. S. Srinivasa Rao for the petitioner.

* T. Nallasivan Pillai for the respondent.

The Public Prosecutor on behalf of the Crown.

JUDGMENT :—

In this case a rather important question has been raised under Chapter 36 of the Criminal Procedure

* Criminal Revision Case No. 226 of 1924.

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Code with reference to the maintenance of a child. The petitioner was the mother of two children, a girl who is now aged about 14, and a boy of 10 years. When they were younger she had obtained from the Magistrate an order for their maintenance from their illegitimate father, the counter-petitioner, at the rate of Rs. 10 a month. The girl has been recently married, but it is not clear whether she has joined her husband or not. On the application of the father the Magistrate has reduced the maintenance given previously to a sum of Rs. 6 for the boy alone, cancelling altogether the maintenance allowed to the girl. He does not give any reasons for his order but merely says "The girl is not now entitled to maintenance."

I take it that his view is, that as the girl is married she is no longer entitled to maintenance. The question is whether this is correct. A similar question arose once before in this Court in the case reported in 2 Weir, 650 ; but their Lordships did not give any definite ruling on it as they were able to rely upon an express undertaking by the husband of the child to maintain his wife, to justify the cancellation of the maintenance. It seems to me that the question really turns upon whether the altered circumstances are such that the child has become able to maintain herself. If she has become able to maintain herself by reason of her marriage and ceased to depend on the original maintenance, I would be prepared to hold that the cancellation under section 489 of the Criminal Procedure Code would be the proper order to make, but if, in spite of her marriage, the girl still remains unable to maintain herself either because her husband is too poor to maintain her or for any other good reason, the father's liability to maintain the child would still exist under section 488. This case, therefore, must be considered

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from that point of view. The Magistrate should enquire and find out whether the husband is able to maintain the girl and whether she has therefore ceased to be under the difficulty of being unable to maintain herself. If she has, then the Magistrate's order would be right. But, if the Magistrate finds that the girl is still unable to maintain herself, the order of cancellation will not be right.

I, therefore, set aside the order of the Magistrate and send the case back to him for passing fresh orders in the light of the above observations.

It was contended that under section 489 the Magistrate could not altogether cancel the order of maintenance but could only alter it or reduce it. I do not think the word "alter" is used in any such restricted meaning. The reduction of the maintenance to nothing would also come within the meaning of the word, "alteration." I therefore reject that argument.

The counter-petitioner will pay the costs of this petition to the petitioner.

D.A.R.

APPELLATE CRIMINAL.

Before Mr. Justice Krishnan.

PANDALAPALLI NARAYANA REDDI AND TWO OTHERS
(ACCUSED), PETITIONERS,

1924,
November
14.

v.

* DYVADEENACHAR (COMPLAINANT), RESPONDENT.*

*Madras Estates Land Act (Madras Act I of 1908), sec. 77 (ii)—
Distrain of cattle—Rescuing them, if an offence under sec.
212 (b).*

A person who rescues cattle distrained under section 77 (ii)
of the Madras Estates Land Act is not guilty of any offence

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under section 212 (b) of the Act. The term "produce" in section 212 (b) means "produce of the land or trees in the defaulter's holding."

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898) praying the High Court to revise the order of K. SATAGOPI RAMANUJA ACHARYA, Subdivisional Magistrate, Gooty, in Criminal Appeal No. 64 of 1923 preferred against the judgment of J. R. SIMON, Taluk Magistrate of Tadpatri, in C.C. No. 3 of 1923.

The facts are given in the judgment.

S. Ranganatha Ayyar for the petitioners.

V. Ramadoss for the respondent.

Public Prosecutor on behalf of the Crown.

JUDGMENT.

This case raises a somewhat novel point under section 212 (b) of the Estates Land Act. The complainant, the shrotriyamdar, distrained some cattle belonging to the petitioners before me for arrears of rent due to him. The cattle were not ploughing cattle but were two she-buffaloes and a calf. The lower Courts have found that the accused forcibly rescued the cattle after they had been distrained and have convicted them under section 212 (b) and sentenced each of them to a fine of Rs. 120.

It is argued before me that section 212 (b) does not deal with the rescue of cattle at all and that such rescue is not an offence under that section. Section 212 (b), leaving out the words inapplicable here, reads as follows:—"forcibly or clandestinely removes any produce duly distrained under this Act." The question to be decided is whether cattle can be brought under the word "produce." I am inclined to think that it cannot. The words of section 212 (b) seem to be taken from the

Bengal Tenancy Act, section 186, but in that Act the word "produce" does not appear, but the word used is "property." The fact that the word "produce" is substituted for the word "property" seems to indicate that it was done advisedly to restrict the scope of the provision. Regarding forcible or clandestine removal of things duly distrained, it seems to me that some light is thrown on this by sections 77 and 90 of the Estates Land Act. Section 77, clause (ii), states what the landholder may distrain, namely, "the movable property of the defaulting ryot or the growing crops, or the produce of the land or trees in the defaulter's holding." That of course includes cattle which are not ploughing cattle which are exempted by clause (b) of the section. Under section 90, clause (b) if a person forcibly or clandestinely takes away movable property once distrained, provision is made for an application by the distrainer to the Collector to pass an order directing that the property be restored or that its value be paid. Then we have got the provision under section 212 (b) which talks about "produce" duly distrained under the Act being forcibly or clandestinely removed. It seems to me, reading all the sections together, that the word "produce" in section 212 (b) really means "produce of the land or trees in the defaulter's holding" dealt with in section 77 (ii). Giving a wide meaning to the word "produce," it may probably include a flock of sheep or other cattle and the Public Prosecutor argues that all cattle other than ploughing cattle would come under the word "produce." I think this is putting too wide a meaning on the section. For some reason which is not apparent, the legislature has thought fit to exclude things other than produce when forcibly or clandestinely removed from the scope of section 212 (b), for they could easily have used the word "property" to cover all items

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of property if they wished. The fact that the word "property" was replaced by the word "produce" suggests that it was intended that a restricted meaning should be given to the word "produce," and I feel therefore satisfied that we should construe the word "produce" in section 212 (b) as meaning "produce of the land or trees in the defaulter's holding." In this view it must be held that the accused have committed no offence which falls under section 212 (b). The distrainer's remedy seems to be under section 90 to ask the Collector to get back the distrained property for him or its value.

The revision petition is therefore allowed and the conviction set aside. The fines, if paid, will be refunded.

D.A.B.

APPELLATE CIVIL.

*Before Sir Murray Coutts Trotter, Chief Justice,
Mr. Justice Phillips and Mr. Justice Kumaraswami
Sastri.*

S. GOPALA AYYANGAR AND ANOTHER (PETITIONERS),
PETITIONERS,

1925,
February 11.

v.

M. K. MAHOMED EBRAHIM ROWTHER, V. N. SESHA
IYENGAR AND ANOTHER (RESPONDENTS), RESPONDENTS.*

*Madras District Municipalities Act (V of 1920), sec. 49, cl. 2 (3)
—Rule 12 of Election Rules—Election of Councillor—
Candidate obtaining majority of votes unseated on ground of
disqualification—Interest in contract with municipality
—Right of candidate having next largest number of votes to
be declared elected—Knowledge of voters as to the disqualifi-
cation, how affects procedure—Fresh election, when ordered—
Election Rules, rule 12, construction of.*

Where a candidate in a municipal election, who obtained the majority of votes, was unseated on the ground that he was interested in a contract with the municipality and so disqualified from being a councillor, the candidate, who got the next highest number of votes, is not entitled as a matter of course to be declared elected under rule 12 of the Election Rules framed under the Madras District Municipalities Act (V of 1920).

It is only if the voters were aware of the disqualification of the candidate and still voted for him and there were enough of such votes to destroy the majority obtained by him, that the candidate next in order of votes is entitled to be declared elected; but if the voters were ignorant of the disqualification, a fresh election should be ordered.

Where there is no allegation in the petition by the second candidate that the voters were aware of the disqualification, no enquiry should be ordered as to the knowledge of the voters, with a view to declare the petitioner as elected. *Hobbs v. Morey*, [1904] 1 K.B., 74, followed.

* Civil Revision Petition No. 115 of 1924.

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REVISION PETITION under section 115, Civil Procedure Code, against the order of T. S. TYAGARAJA AYYAR, District Judge of Trichinopoly, in Original Petition No. 133 of 1923.

In an election held under the Madras District Municipalities Act (V of 1920) for the selection of a councillor of a ward in the municipality of Trichinopoly the first respondent secured the majority of votes, while the second respondent obtained the next largest number of votes. The petitioners, who were two of the electors, filed an application in the District Court, under rules 1, 2, 3, 11 and 12 framed under the Act, to cancel the election of the first respondent on the ground that he was disqualified to be a candidate for election as he was interested in a contract entered into by him with the municipality; the petition also prayed that the second respondent should be declared elected under rule 12 of the Election Rules; the petition did not allege that the voters who cast their votes for the first respondent had knowledge of his disqualification and yet gave him their votes. There was a later application, filed by the second respondent and another councillor under section 51 of the Act, for declaring the election of the first respondent invalid on the same ground and for declaring the second respondent (first petitioner therein) as duly elected. On the latter petition the District Judge passed an order holding the election of first respondent invalid on the ground of the disqualification mentioned. On the former petition, the learned Judge held that the second respondent should not be declared elected and ordered a fresh election. The petitioners preferred this Civil Revision Petition to the High Court.

D. Ramaswami Ayyangar for *C. S. Venkata Achariar* for petitioners.—The election of the first respondent has been held to be void; the second respondent who

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got the next largest number of votes is entitled to be declared elected, if he applies. The provisions of rule 12 expressly require that the candidate who has the next largest number of votes should, if he applies, be declared elected, unless his election is void on any legal ground. See 12 Halsbury, page 1218, and Fraser on Elections, page 227; *Brown v. Benr*(1). If the disqualification is known to such a number of voters for the successful candidate, deducting which number the second man gets a majority over the first, the second is declared elected. Here there is no ground of invalidity for the election of the second respondent. The disqualification of the first respondent was well known to the electors.

A. Krishnaswami Ayyar (*amicus curiae*).—The candidate who has the next largest number of votes does not always get declared elected as a matter of course when the successful candidate is unseated on ground of disqualification. If the disqualification is known to the electors and yet they throw away their votes on him, then if such votes being deducted, the second candidate gets a larger number of votes than the first, the latter is declared elected, *Hobbs v. Morcy*(2) and *Boyce v. White*(3).

If the disqualification is known or obvious to electors (such as being a woman), the next candidate may be declared elected. *Beresford Hope v. Lady Sandhurst*(4), *Pritchard v. Mayor, etc., of Bangor*(5).

JUDGMENT.

In this case the candidate who obtained the greatest number of votes at the election was unseated on the ground that he was interested in a municipal contract and that therefore he was disqualified from sitting. The

(1) (1883) 5 T.L.R., 247.
 (2) [1904] 1 K.B., 74.
 (3) (1905) 92 Law Times, 240.
 (4) (1889) 23 Q.B.D., 79.
 (5) (1888) 13 App. Cas., 241.

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petitioner claimed the seat but he did not allege that the disqualification under which the successful candidate was ultimately found to labour was known to all or any of the voters who cast their votes for him. The first argument on behalf of the second respondent was that rule 12 of the rules for the decision of disputes as to the validity of an election means that if the seat was claimed by the petitioner, the Judge must declare him duly elected and that the option of ordering a second election only applies to cases where the petitioner did not claim the seat. That seems to us a quite untenable view and we do not think that the draftsman of these rules—and it is a matter of common knowledge that both the District Municipalities Act (V of 1920) and the rules drawn under it were very largely based on English precedents and English decisions—could have meant to overlook the fundamental principles which have governed English Electoral Courts for many years. The principles appear to be these and we cannot put them better than they were put in the argument of Mr. Corrie Grant in *Hobbs v. Morey*(1). He says:

“the principle of Election Law is that, when there has been an election, the candidate who is declared to be elected must be shown to have the majority of votes.”

This *prima facie* requirement of the law is subject to a modification. He goes on

“If however a candidate is disqualified by *status* as in the case of woman or felon, the votes given for that candidate will be held to have been thrown away and the opposing candidate although in fact he has received a less number of votes, will be declared to be elected.”

That was the argument which was accepted by the learned Judges, and on which Mr. Justice KENNEDY's judgment is based. There are several authorities which we need not trouble to go into. The effect of those

authorities is that, if a voter throws away a vote by ignoring something which he could have known and which would have told him that he was throwing away his vote because he was giving it for a person who could never succeed in the election, then his vote has to be taken as wiped out of the election and if there are enough of such votes to destroy the majority, the man who has the next highest number of votes can be declared duly elected; but, if the votes were given in ignorance of the disqualification under which the candidate of his choice was in fact labouring, then it would be inequitable to allow the votes to be thrown away for that reason and the only proper course is to order a fresh election. There is a passage in the judgment of KENNEDY, J., which is relied upon to show that in this case it would be a suitable course to have a further inquiry to see whether the second respondent can bring himself within the words of the learned Judge. Those words are these. He sets out the principle that the disqualification should be apparent and says,

“As here the disqualification was not apparent and the petition does not allege that the voters knew of the respondent's disqualification (the only notices being notices to the Mayor and to the opposing candidate) and the petitioner had only a minority of votes, I do not think he can successfully claim the seat.”

We respectfully accept the view put forward by KENNEDY, J., as accurate, though we see the very inconvenient consequence that might arise if such an inquiry as is outlined were ever ordered. But as there is here no allegation of knowledge of the disqualification on the part of the persons who voted for the unseated candidate, we agree that the proper course is the one suggested by the learned Judge and there is no cause to interfere. Both the petitions are dismissed.

K.R.

(1) [1904] 1 K.B., 74.

APPELLATE CIVIL.

Before Charles Gordon Spencer, Officiating Chief Justice
and Mr. Justice Srinivasa Ayyangar.

1924,
November 7

V. A. V. S. FIRM (PETITIONERS), APPELLANTS,

v.

P. S. N. MURUGANATHAN CHETTY AND THE
OFFICIAL ASSIGNEE OF MADRAS (RESPONDENTS) --
RESPONDENTS.*

*Presidency Towns Insolvency Act (III of 1909), sec. 97. Firm --
One of the partners adjudicated insolvent in the High Court
exercising insolvency jurisdiction--Insolvency proceedings
pending before the High Court--Subsequent petition for
adjudication of another partner filed in a District Court --
Application to High Court to transfer latter petition to High
Court--Power and duty of the High Court in insolvency.*

Where an order of adjudication as an insolvent has been made by the High Court, under the Presidency Towns Insolvency Act (III of 1909), against a partner of a firm, a Judge of the High Court exercising insolvency jurisdiction has, under section 97 of the Act, not only the power but is bound to transfer to the High Court any subsequent insolvency petition presented under the Provincial Insolvency Act to a District Court against another partner of the firm.

Srinivasa Aiyangar v. The Official Assignee of Madras (1915) I.L.R., 38 Mad., 472, distinguished; *Muneeckchand, In re.* (1923) I.L.R., 47 Bom., 275, referred to.

APPEAL from an order passed by WALLER, J., in the exercise of the Original Insolvency Jurisdiction of the High Court refusing to transfer I.P. No. 105 of 1924 from the file of the District Court of Coimbatore to that of the High Court and to consolidate the same with I.P. Nos. 33 and 68 of 1921 on the file of the High Court.

This is an appeal from an order passed by WALLER, J., in the exercise of Original Insolvency Jurisdiction refusing to transfer to the High Court an Insolvency

Petition filed in the District Court of Coimbatore. An order of adjudication had been passed against one of the partners of a firm by a Judge of the High Court in the exercise of Insolvency Jurisdiction under the Presidency Towns Insolvency Act, in I.P. Nos. 33 and 68 of 1921 filed in the High Court; and Insolvency Proceedings were pending thereon before the Official Assignee. During the pendency of these proceedings, an Insolvency Petition was filed in the District Court by certain creditors against another partner of the firm under the Provincial Insolvency Act. The petitioners applied to a Judge of the High Court exercising Insolvency Jurisdiction to transfer the said petition to the High Court under section 97 of the Presidency Towns Insolvency Act and to consolidate that petition with the previous petitions pending in the High Court. The learned Judge refused to transfer the petition as prayed. The petitioners preferred this appeal. The respondent took a preliminary objection that no appeal lay as the order was not a judgment.

O. Thanikachalam Chettiyar for appellant.—The learned Judge was wrong in refusing to transfer the petition to the High Court. Section 97 of the Presidency Towns Insolvency Act (III of 1909) is imperative and conclusive. The decisions in *In re Nicholson, Ex-parte Nicholson*(1) relied on by the learned Judge is not applicable to the present case. That decision was under the English Bankruptcy Act of 1883 before rules were made under the Act. After rules were made under that Act, such applications could be made to the Bankruptcy Court. See *In re Williams*(2).

Section 97 of the Presidency Towns Insolvency Act (III of 1909) is general in its terms, and includes subsequent applications under the Provincial Insolvency Act.

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* Original Side Appeal No. 60 of 1924.

(1) (1883) 8 Morrel, 46.

(2) (1883) 5 Morrel, 103.

Under section 126 of the Act, the Court has auxiliary jurisdiction, i.e., both Courts should act so as to aid each other in insolvency matters. Under section 3 of the Act, the High Court has insolvency jurisdiction, and under section 6, the Judge who is deputed to sit in the Insolvency Court has all the powers conferred on the High Court. Appeals from all orders passed in Insolvency Court are provided for by section 8.

Vere Mockett for respondent.—As regards transfer, Courts in India are in the same position as Courts in England were before the Bankruptcy Act of 1883 and rules of 1886 were made. The decision in *In re Nicholson*(1) was passed in February 1886, before rules were made in October 1886. There are no rules in India governing transfers under section 97 of the Presidency Towns Act (III of 1909). The decision in *In re Williams*(2), was given after rules were made in England. Section 18 of the Act (III of 1909) assumes adjudication under Presidency Towns Insolvency Act. In *Sreenivasa Iyengar v. Official Assignee of Madras*(3) it was held that the Judge exercising insolvency jurisdiction in the High Court had no power to transfer a case from the High Court to a District Court. See also *In re Maneckchand*(4). The law applicable to this petition will be the Provincial Insolvency Act. See *Besant v. Narayaniah*(5). Section 126—which provides that Courts are to aid each other in insolvency matters—cannot enable the High Court to call up the whole case from the District Court.

JUDGMENT

This is an appeal against an order of WALLER, J., sitting in the Insolvency Court, in which he refused to transfer

(1) (1886) 3 Morrel, 46.

(2) (1915) I.L.R., 38 Mad., 472.

(5) (1915) I.L.R., 38 Mad., 807 (P.C.).

(2) (1888) 5 Morrel, 108.

(4) (1923) I.L.R., 47 Bom., 275.

an insolvency petition presented to the District Judge of Coimbatore to the file of this Court.

There is a preliminary objection that no appeal lies on the ground that the Judge's order is not a judgment. But this can easily be disposed of by reference to section 8, clause 2(b) of the Presidency Towns Insolvency Act, which provides for an appeal lying to this Court against any order made by a Judge in the exercise of jurisdiction conferred on him by this Act.

The question we have to decide turns upon the interpretation of section 97 of the Presidency Towns Insolvency Act. This section runs thus:— "Where an order of adjudication has been made on an insolvency petition against or by one partner in a firm, any other insolvency petition against or by a partner in the same firm shall be presented in or transferred to the Court in which the first mentioned petition is in course of prosecution; and such Court may give such directions for consolidating the proceedings under the petitions as it thinks just." WALLER, J., declined to pass any orders on the application for transfer on the ground that it was ambiguous whether the Court to which the insolvency petition was presented or the Court in which the earlier proceedings against a partner in the same firm were pending should take action. In the firm to which the respondent belongs there are three partners and insolvency proceedings are still pending before the Official Assignee against Ambalavana Chetty and Narayanaswami Iyer who are the other two partners of the firm. WALLER, J., was impressed by the decision of CAVE, J., in *In re Nicholson*(1). That learned Judge refused to make an order for transfer of bankruptcy proceedings pending before a County Court Judge on the ground that he

(1) (1886) 3 Morrel, 46.

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thought that the application should be made to the County Court Judges. At the date when that case was decided the Bankruptcy Act of 1883 was the Act in force in England and was equally applicable to bankrupts in the County Court and in the High Court, and no rules had been framed providing for making transfers under section 112 which corresponds to section 97 of our Presidency Towns Insolvency Act. After rules had been framed no difficulty was found in another case in *In re Williams*(1) in making an order under this section.

Section 97 of the Presidency Towns Insolvency Act is plain in its terms and imperative. It provides that where insolvency proceedings are pending against one partner in a firm any other insolvency petition shall be presented in or transferred to the Court in which the first mentioned petition is in course of prosecution. There is no limitation of the words "any other insolvency petition" to insolvency petitions presented under the Presidency Towns Insolvency Act. It would therefore appear to be sufficiently wide to cover insolvency petitions presented under the Provincial Insolvency Act to a Court which is subject to the superintendence of this Court. There is no reason why the legislature should have made a provision of this kind in order to provide for transfers of insolvency proceedings only from one High Court to another, if the policy underlying the section is of general application. The section does not declare by whom the order of transfer should be made, but there can be no ambiguity in India because the only Court exercising jurisdiction in insolvency under the Presidency Towns Insolvency Act for the Presidency of Madras is the High Court of Madras. This is declared by section 3 of the Act, and under section 6 the Judge who is deputed to sit in the Court

(1) (1888) 5 Morrel, 108.

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of Insolvency exercises all the powers conferred on the High Court under the section. Our attention has been called to the decision in *Srinivasa Aiyangar v. The Official Assignee of Madras* (1), in which it was held by a Bench of this Court that the Judge exercising insolvency jurisdiction in the High Court had no power to transfer a case pending before him under the Presidency Towns Insolvency Act, to the District Court of Tanjore. The *ratio decidendi* of that case appears to be that the Court to which the Insolvency petition was transferred was not competent to hear and dispose of the same, because the jurisdictions under the Presidency Towns Insolvency Act and the Provincial Insolvency Act were distinct, and therefore the District Judge of Tanjore would have no jurisdiction to proceed under the Presidency Towns Insolvency Act in the insolvency of a debtor who had presented a petition before the High Court of Madras. The decision was one given with special reference to section 24 of the Code of Civil Procedure which is made applicable by section 90, clause I of Act III of 1909 to Insolvency proceedings. No such difficulties confront us in the present case because the words of section 97 confer power on the Court to which the case is to be transferred to deal with the insolvency petition made against or by the same partner in the same firm and permit the Court to consolidate the proceedings. We have also been referred to a decision of MARTEN, J., in *In re Maneckchand*(2) in which he held that the Commissioner in Insolvency had no power to stay Insolvency proceedings in a District Court under section 18 of this Act, the grounds of his decision being that the District Court in its insolvency jurisdiction

(1) (1915) I.L.R., 38 Mad., 472.

(2) (1923) I.L.R., 47 Bom., 275.

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was subject to the superintendence of the High Court on its appellate side and not to the Commissioner in Insolvency, by which term he designated the Judge sitting in the Insolvency Court. It is unnecessary to canvass the correctness of that decision, as the terms of section 97 of the Act are quite independent of the provisions of section 18 and do not contain any reference to the powers of the High Court of superintendence over other Courts subject to its appellate jurisdiction, which it has under section 107 of the Government of India Act. For the purposes of the present case it is unnecessary to invoke the powers conferred on Courts of Insolvency in the Presidency Town and outside by section 126 of the Presidency Towns Insolvency Act and section 77 of the Provincial Insolvency Act (V of 1920) to aid each other. As the terms of section 97 make it obligatory on the Court exercising insolvency powers to transfer any insolvency petition in the circumstances existing in this case, we are of opinion that WALLER, J., had no discretion to refuse to transfer the petition presented to the District Court of Coimbatore, and that as he declined to make that order, we must allow the appeal and make the order ourselves, giving the appellant costs of this appeal payable out of the estate of the insolvent by the Official Assignee. The Court which deals with the petition may give such directions for consolidating the proceedings with the other pending insolvency proceedings as it thinks fit. Taxed costs on the Original side scale here and before WALLER, J., to be paid out of the insolvent's estate. The memorandum of cross objections is dismissed.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Srinivasa Ayyangar.

DIWAN BAHADUR GOVINDAS CHATURBHUJADAS
(PLAINTIFF), APPELLANT,

v.

N. RAMADOS (1ST DEFENDANT), RESPONDENT.*

Presidency Towns Insolvency Act (III of 1909), ss. 17, 21, 23, 30, 45—Adjudication—Annulment—Secured creditor—Debts provable in insolvency—Composition, agreed to by majority of creditors—Order of annulment, effect of—Insolvent, whether discharged or release on annulment—Right of secured creditor, who had not proved for balance uncovered by security—Personal liability of insolvent after annulment—Right of suit—Remedy by application to Insolvency Court—Common law right of action, whether taken away by sec. 30—Composition and rate therein, whether binding on creditors, not parties to composition.

An adjudication in insolvency was annulled by the Court on account of a composition effected between the insolvent and the statutory majority of his creditors under section 30 of the Presidency Towns Insolvency Act (III of 1909); no regular scheme of composition was laid before the Court, but the insolvent filed an affidavit to the effect that the creditors had agreed to a composition of eight annas in the rupee and that all the creditors had been paid at that rate. A secured creditor, who had been included in the insolvent's schedule, had not realized his security or proved for his balance before the annulment was made, and no notice was given to him of the proceedings for annulment. Subsequent to the annulment, the secured creditor instituted a suit on the original side of the High Court for sale of the securities through Court and for recovery of the balance of his debt after crediting the sale-proceeds of his security, from the insolvent personally. The latter contended that the suit was not maintainable against him personally.

Held, that the annulment of an adjudication under section 30 of the Act did not amount to a discharge or release of the insolvent in respect of the debts provable in insolvency;

* Original Side Appeal No. 85 of 1923.

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that the secured creditor's claim for the balance, not covered by the security, was a debt provable in insolvency, though it was not actually proved before the annulment;

that though he was not a party to the composition, he was entitled to, and bound by, the composition in respect of the unsecured balance of his debt;

that the secured creditor was entitled to institute a suit in respect of his provable debt on the basis of the composition and at the rate agreed to in the composition;

that he was not restricted to a remedy by an application in the Insolvency Court, as the provisions of section 30, clause (2) of the Act were only enabling provisions, and did not take away the common law right of action on the basis of the composition;

that, further in this case, an application to the Insolvency Court was futile, as no proceedings were pending therein, no property of the insolvent continued vested in the Official Assignee, and no trustee was appointed to carry out any scheme of composition, and that, consequently, the secured creditor was entitled to recover in this suit half the balance of the debt undischarged by the sale-proceeds of the security, from the insolvent personally.

In re Bestwick, Ex parte Bestwick (1876) 2 Ch.D., 485; *In re Hardy, Hardy v. Farmer* [1896] 1 Ch., 904, followed; *Flint v. Barnard* (1889) 22 Q.B.D., 90, and *Seaton v. Lord Deerhurst* [1895] 1 Q.B., 853, distinguished.

APPEAL from the judgment of Mr. Justice COURTS TROTTER in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 720 of 1922.

The plaintiff sued to recover a sum of money by sale through Court of certain jewels pledged with him by the first defendant, through his agent, the second defendant's deceased husband, and prayed for a personal decree against the first defendant for the balance of his debt remaining undischarged by the sale-proceeds, and also for a decree for the said balance against the second defendant payable out of the assets of her deceased husband in her possession. The first defendant was adjudicated an insolvent on 20th September 1921. The insolvent applied to the Court to have the adjudication

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annulled on the ground that there was a composition effected between him and the majority of his creditors under section 30 of the Presidency Towns Insolvency Act (III of 1909); no notice of the application for annulment was given to the plaintiff, who was a secured creditor; his name was included in the schedule of creditors filed by the debtor; but the plaintiff had not sold the security or proved for the balance in the insolvency proceedings before the order of annulment was passed on 20th February 1922. Subsequent to the annulment, the secured creditor sued for his debt by sale of the pledged jewels and for a personal decree for the deficiency as aforesaid. The learned trial Judge held that the first defendant was discharged and released from personal liability by reason of the annulment, and passed a personal decree against the second defendant for the balance of the plaintiff's debt remaining after realizing the security. The plaintiff preferred this appeal against the first defendant.

C. V. Anantakrishna Ayyar for appellant.—The lower Court had jurisdiction in this suit. The secured creditor was entitled to claim a dividend along with other creditors, though he did not join in the composition deed. Section 30, clause (2) of the Presidency Towns Insolvency Act (III of 1909) is only cumulative in its operation; it does not take away the common law right of action of the creditor on the basis of the composition and at the rate agreed to in it. In English law, under the Bankruptcy Rules of 1869 (Rule 211) and under the later Rules of 1886 (Rule 215), the right of action is expressly taken away. No rules have been made in Madras taking away the right of action under the Act III of 1909. The English Bankruptcy Rules framed under section 132 of the English Act bar a suit, see *In re Hardy, Hardy v.*

Farmer(1). There are no rules in Madras corresponding to the English Rule 215 (Rule 211 of the old Act), though there is such a rule in Bombay. Before the English Bankruptcy Rules were made, even in England there was no bar to a suit by a creditor who did not assent to a composition. The common law right of action was held not to have been taken away. See *Edward v. Coombes*(2), and *Prior, In re, Ex parte Prior*(3). On annulment the property vests in the debtor unless there is a trustee or there is a scheme of composition. The cases holding that no action lay in England on a composition are distinguishable as cases where a trustee had been appointed in whom property was vested and not in the debtor as in this case. Release of the insolvent under the Indian Act is only in cases of discharge under section 45 of the Act (III of 1909), and not in cases of annulment under section 30.

A. Ramachandra Ayyar for respondent.—The plaintiff is not entitled to the benefit of the composition, because he was a secured creditor who did not prove his debt and was no party to, and did not assent to, the composition.

Even assuming that he was entitled to its benefit, he cannot sue but can only apply in the Insolvency Court to enforce the composition, under section 30, clause (2) of the Act (III of 1909), which excludes the right of suit. See *Seaton v. Lord Deerhurst*(1), *Edwards v. Haucher*(5) and *Flint v. Barnard*(6). No suit lies against an insolvent where bankruptcy has been annulled, *Gilbey v. Jeffries*(7) and *Couldery v. Bartrum*(8). Even

(1) [1896] 1 Ch., 904, at 908.

(3) [1921] 3 K.B., 833.

(5) (1875) 1 C.P.D., 111.

(7) (1883) 11 Q.B.D., 552.

(2) (1872) 7 C.P., 519.

(4) [1895] 1 Q.B., 853.

(6) (1889) 22 Q.B.D., 90.

(8) (1881) 19 Ch. D., 394 at 400.

after annulment, Bankruptcy Court has jurisdiction in the insolvency matters; the law of India is the same as in England.

JUDGMENT.

SPENCER, J.—Appellant, Diwan Bahadur Govindoss Chaturbhujadoss, plaintiff in the trial Court, was the secured creditor of the Respondent N. Ramados, first defendant in the trial Court, who pledged with him, through his agent, the second defendant, certain jewels as security for a loan of Rs. 12,000. Respondent was adjudicated insolvent on 20th September 1921. The appellant got no notice from the Official Assignee and before he attempted to prove for the balance of what was due to him, the adjudication was annulled on 20th February 1922. Appellant brought this suit to recover the balance due to him after deducting the value of his security, which he has since realized.

The learned Judge held that he was not entitled to anything and dismissed the suit against this defendant. He acted upon first impressions, as there is no decided case in this country as to the rights of a secured creditor to recover the balance of any debt which he has failed to prove in insolvency when the adjudication has been annulled owing to the debtor having compounded with his other creditors. The learned Judge quoted the case of *Flint v. Barnard*(1), as being an authority for the principle that the effect of a composition between a debtor and his creditors is the same as the effect of a discharge, viz., that it releases a debtor from all debts provable in bankruptcy. If I rightly understand that decision, it only decided what are debts provable in bankruptcy and included among them liabilities which mature into debts due after acceptance of composition.

(1) (1889) 22 Q.B.D., 90.

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In this country the position of an insolvent whose adjudication has been annulled is not the same as that of a discharged insolvent. The Presidency Towns Insolvency Act gives the effect of an order of discharge in section 45. An order of discharge releases an insolvent from all debts provable in insolvency except certain debts of a special nature, such as debts owing to the Crown. An adjudication may be annulled either under section 21 when it is found by the Court that a debtor ought not to have been adjudged insolvent or where it is proved that all his debts have been paid in full, or it may be annulled under section 30 when a proposal of composition has been accepted by a majority of his creditors. The effect of annulment appears in section 23, which states that the property of the debtor shall vest in such person as the Court may appoint, or in default of such an appointment shall revert to the debtor, to the extent of his interest therein. In Bombay there are rules for the vesting of the property in a person appointed by the Court. Here, as there are no such rules and no such appointment has been made, the property must necessarily revert to the debtor.

In the present case there was no regular scheme of composition laid before the Court but the insolvent filed an affidavit in Court affirming that all the creditors had agreed to accept eight annas in the rupee and had been paid at that rate. As there is no provision for composition which can be enforced under section 30, clause (2), no property of the insolvent is in the hands of the Official Assignee, and no proceedings are now pending in the matter of the insolvency of N. Ramados, it would be futile for us to refer the creditor to the Court of Insolvency for his remedy. He has brought this suit for the whole of the balance that is due to him, but, being one of the creditors whose names were entered in

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the schedule (Exhibit J), a majority of whom agreed to accept eight annas in the rupee, he is bound by the result of the composition approved by the Court, for section 30, clause (1), says that upon an order being made annulling the adjudication the composition or scheme shall be binding on all the creditors so far as it relates to any debt due to them from the insolvent and provable in insolvency. The appellant's claim for the unsecured balance was provable in insolvency though not actually proved, as the adjudication was annulled before he got notice and came in to prove for the balance. In *Edwards v. Coombe*(1), the rights of general action of a creditor whose name does not appear in the statement of composition were held not to be taken away by section 126 of the Bankruptcy Act of 1869 which provided as follows:—

“The provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be binding on all the creditors whose names and addresses and the amount of debts due to whom are shown in the statement of the debtor produced to the meetings at which the resolution was passed, but shall not affect or prejudice the rights of any other creditors.”

Under the same Act in *In re Bestwick, Ex-parte Bestwick*(2), creditors who failed to prove their debt in composition proceedings were allowed to come in after realizing their security and claim the balance at the rate at which composition was accepted. In the Bankruptcy Act of 1883 this provision was not repeated, but section 18, clause (8), of that Act provided:

“A composition or scheme accepted and proved in pursuance of this section, shall be binding on all the creditors so far as it relates to any debts due to them from the debtor and provable in bankruptcy.”

(1) (1872) 7 C.P., 519.

(2) (1876) 2 Ch. D., 435.

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Assuming that a creditor might enforce the original agreement or resolution by a summary application to the Court of Bankruptcy, it is clear from these decisions that the jurisdiction of Courts of Common Law has not been ousted thereby. In the last quoted of these decisions it is stated that a creditor may wait till he realizes his security, but in any case the debt will not be discharged until the amount of composition is paid. It was held by the Court of Chancery in *In re Hardy v. Farmer*(1), that secured creditors who had not assented to a scheme of composition could bring an action after the death of an adjudicated bankrupt against his estate for the balance of their debt that remained after valuing their security and that although the Court of Bankruptcy had jurisdiction over such a claim, notwithstanding the bankrupt's death, the secured creditor's right of action was not barred. In India too it is provided that under section 17 of the Presidency Towns Insolvency Act a secured creditor's right of suit is not barred by the making of an order of adjudication.

I think that the plaintiff was clearly entitled to a decree against first defendant for a moiety of the balance that may be found to be due, after deducting from the amount claimed in the plaint, the amount realized by sale of the security, and interest thereon at the contract rate of 1 rupee 3 annas up to the date of the decree (14th August 1923) of the Court of First Instance.

The appeal is accordingly allowed, but without costs, as in this Court the case has been placed upon a new footing, and a decree will be given to the plaintiff (appellant) as I have stated.

The Memorandum of Objections is dismissed.

(1) [1896] 1 Ch., 904.

SRINIVASA AYYANGAR, J.—I agree that the appeal should be allowed. But it must be observed that the point on which the appeal has been argued before us was not only not argued before the learned Judge at the Original Trial but does not seem to have been even hinted at. The plaintiff-appellant instituted the suit against two defendants. The first defendant is the only respondent here in appeal before us. The other defendant was the widow and legal representative of one Oggur Gurusami Chetty. This Gurusami Chetty pledged with the plaintiff two diamond addigais as security for a loan of Rs. 12,000 carrying interest at Rs. 1-3-0 per cent per mensem, and as further security gave his own promissory note therefor to the plaintiff. It is now admitted that the two jewels which were so pledged by Gurusami belonged to the first defendant and that the pledge was made and the loan obtained by Gurusami only for and on behalf of the first defendant.

The learned Judge granted a decree against the second defendant limited to the assets of the said Gurusami in her hands, but dismissed the action so far as the first defendant was concerned.

The ground on which the learned Judge held that the plaintiff was not entitled to a decree against the first defendant is as follows:—The first defendant had subsequent to the pledge been adjudicated an insolvent, but in the course of the insolvency proceedings the statutory majority of his creditors agreed to a composition of 8 annas in the rupee and thereupon the insolvent first defendant applied to the Court for the annulment of his insolvency on the representation that he had paid all his creditors the composition agreed to. The Court sanctioned the compromise and annulled the insolvency. The plaintiff who had not realized his security had not

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proved his debt in insolvency or taken any steps to have it proved in any of the ways indicated by the rules relating to secured creditors before the insolvency was annulled by the Court. And under some practice for which there seems to be no warrant, no notice of the application for annulment was given to the plaintiff or any other secured creditor. Even when the suit was instituted, the plaintiff had not realized his securities, and one of the prayers in the plaint relates to the sale of the securities by or under the directions of the Court.

The learned Judge, referring to the case of *Flint v. Barnard*(1) and the case of *Seaton v. Lord Deerpur*(2), held that the annulment following on the composition had the same effect with regard to the insolvent as an order of discharge and that therefore the first defendant became released from liability to the plaintiff with regard to any balance that might be found due to the creditors after the realization of the securities.

The first question therefore that arises in this appeal is whether the annulment of the insolvency in such circumstances has the operation in law, of discharging the insolvent-debtor entirely from liability and this will have to be determined apart altogether from any question whether by reason of the plaintiff not having proved the debt in insolvency he has become precluded or debarred from enforcing any remedies and whether the appropriate remedy open to such a creditor would be in the Bankruptcy Court or by separate action. The learned vakil for the appellant did not seriously press the claim of the plaintiff for the payment of the whole amount of the deficiency in the debt after crediting the proceeds realized by the sale of the securities but contented only for the recovery of such deficiency at the

(1) (1889) 22 Q.B.D., 90.

(2) [1895] 1 Q.B., 853.

the rate agreed to under the composition, namely, at 8 annas in the rupee. As I understand *Flint v. Barnard*(1) it is only an authority for two propositions; firstly that a composition in the course of the insolvency agreed to by the prescribed statutory majority of the creditors is binding on all creditors of the insolvent whether they were parties to the composition or not; and secondly that a debt accrued subsequent to adjudication but before the composition is a debt provable in insolvency. The plaintiff in the action claimed not to be bound by the composition and not liable to proceed to recover his debt under the scheme framed and approved of by the Court for the payment of the creditors. Lord ESHER, M.R., properly held that such a debt was a debt provable in insolvency and an agreement in composition bound all the creditors whose debts were debts provable in insolvency. No question, therefore, arose or was decided whether a creditor in those circumstances was or was not entitled to be paid even at the rate agreed to under the composition. It seems to me that it was assumed throughout in that case that the creditor had a right at least to be so paid.

In *Seaton v. Deerpur*(2) the question that arose was whether a judgment-creditor whose debt was rejected on its being attempted to be proved before the trustee in bankruptcy was entitled, merely because he had not received any dividend, to proceed to have execution of his decree. The Court held that, being a debt provable in bankruptcy and there being a scheme for the payment of all the creditors whose debts were provable in bankruptcy and the debt due to the judgment-creditor being a debt so provable, the trustee in bankruptcy was entitled to reject it as not binding and that the mere fact that his claim was rejected would

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(1) (1889) 22 Q.B.D., 90.

(2) [1895] 1 Q.B., 853.

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not give him a right to proceed in execution. The *ratio decidendi* in that case obviously was that a judgment-creditor was not in a better position with regard to the liability to prove his claim before the trustee under a composition arrangement than any other ordinary creditor whose debt was similarly provable in insolvency. In that case there was clearly a trustee appointed under the composition arrangement and the creditors who had not been paid were relegated to their remedies against him. In the present case, however, there has been no arrangement whatever made for the payment of any creditors who might be found not to have been paid the composition agreed to, no amount or property was set apart for that purpose either in the hands of the Official Assignee or any other trustee and not even an undertaking was given by the insolvent-debtor to make any payments under the composition. This case, therefore, is not one in which a claim was made by the plaintiff to any trustee in bankruptcy for composition and properly rejected by him. It is clear that no such claim could have been made, for indeed there is no person before whom such a claim could have been preferred. The case of *Seaton v. Lord Deerhurst*(1) is therefore, an authority, only for the position that, if there is a scheme sanctioned, by the Court for the payment of a composition to all the creditors, the creditors have only the remedy given to them for getting what they can get under the scheme and not otherwise.

In *Edwards v. Haucher*(2) there was a composition agreed to of three shillings in the pound for which the insolvent-debtor along with a surety gave a promissory note to the creditor and a receipt was also granted by the creditor purporting to be in discharge of the debt.

(1) [1895] 1 Q.B., 853.

(2) (1876) 1 C.P.D., 111.

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On the note being dishonoured, it was held that the plaintiffs were remitted to their rights to sue on the original debt. Chief Justice Lord COLERIDGE held that the actual payment of the amount arrived at on the basis of the composition is the thing which the creditors resolved to accept and that therefore it is if and when, and only if and when, that amount is actually paid, there is satisfaction of the debt. The Court held that on failure of the payment, the plaintiffs were remitted to their original rights and were entitled to a decree in their action against the defendants. This case was referred to with approval and followed in *In re Bestwick, Ex-parte Bestwick*(1) and it was there held that a secured creditor was in no way bound by a compounding debtor's estimate of the value of his security and that he was entitled to abstain from proving the claim or taking any part in composition proceedings and that when he has realized his security he may claim from the debtor payment of the composition on the balance of the debt which may then remain unsatisfied.

On the authority of these two cases we arrive at the conclusion that though a composition sanctioned by the Court is binding on all the creditors of the insolvent including the creditors who were not parties to the composition, the composition takes effect and operates to discharge the insolvent from his liability on the debt only if the composition agreed to is paid or else a scheme is outstanding under which the creditors are required to proceed and obtain relief. In default of such payment and in the absence of such a scheme, it necessarily follows that the obligation is laid on the insolvent-debtor to pay to all the creditors whose debts are provable in insolvency the amount or the balance

(1) (1876) 2 Ch.D., 485.

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of their debt according to the composition. It is inconceivable that in default of any such payment and in the absence of any such scheme or trust for payment, the insolvent-debtor should be entirely discharged from all liability merely on the Court approving of a composition and annulling the adjudication. But that was the contention put forward by Mr. A. Ramachandra Ayyar, the learned vakil for the respondent, if I understood his argument aright. It seems to me that it can scarcely be the law. There are however two cases which were relied on and which I may here refer to. In the case of *Gilbey v. Jeffries*(1) no doubt BRETT, M.R., held that as the composition was binding on the creditor the debtor became discharged. But that was a case in which under the arrangement of composition all the property of the debtor had been transferred to a trustee and the remedy of the creditor obviously was against such a trustee. The case of *Couldery v. Bartrum*(2) was also relied on, but that was a case merely relating to valuation of securities and to the liability, under the rules relating thereto, of the holder of the security to refund any amount realized by him by the sale of the securities over and above the amount at which he had valued the securities. Thus if the creditor in the circumstances has a remedy, the only question that remains is, what is his remedy? Whether it is by way of application to the Bankruptcy Court or by a separate action? In the English Bankruptcy rules there is a specific rule, rule 215, which provides that no action to enforce payment shall lie but the remedy shall only be by application to the Bankruptcy Courts if default is made in payment under a composition scheme either by the debtor or the trustee. No such rule has been

(1883) 11 Q.B.D., 559.

(2) (1881) 19 Ch.D., 394.

framed in this Court. The only provision of law relating to this matter is contained in clause (2) of section 30 of Act III of 1909. It is as follows :—

“The provisions of the composition or scheme may be enforced by the Court on application by any person interested, and any disobedience of an order of the Court made on the application shall be deemed a contempt of Court.”

This is an exact reproduction of clause (10) of section 18 of the English Bankruptcy Act of the year 1883.

In the case of *Hardy v. Farmer*(1) after the death of the bankrupt a secured creditor valuing his security under the rules applied in an administration action for the recovery of the balance due to him. A trustee had been appointed under the composition and objection was taken that no application would lie except to the Bankruptcy Court. Justice CHITTY, having regard to the terms of rule 211 of the Bankruptcy rules of 1886 which had been passed by that time, which rule was identical in terms with the present rule 215 already referred to, held that the proper remedy was by way of application in the Bankruptcy Court, and the learned Judge apparently adjourned the hearing of the application in the Chancery Court for the purpose of enabling the applicant to move the Bankruptcy Court. In this case two points are clear; firstly that a trustee had been appointed for the purpose of carrying out the composition, and secondly that but for rule 211 referred to by the learned Judge which had the force of law and which laid down that no separate action would lie and that the remedy would be by application to the Bankruptcy Court, the learned Judge would have held he had jurisdiction. In the absence of such a rule in this Court, there is therefore no reason whatever to hold that the right of separate action is precluded or barred.

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(1) [1896], Ch., 904.

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Further clause (2) of section 30 is merely enabling. It is a summary remedy given by the statute. There are no words there excluding the jurisdiction of the ordinary Courts. In the absence of express statutory provision excluding the jurisdiction of the ordinary tribunals no right of action could be deemed to have been taken away. Furthermore clause (2) of section 30 refers obviously only to cases where there is something in the provisions of the composition or scheme which are capable of being enforced in the Bankruptcy Court. In the present case, however, no such provision would seem to exist capable of enforcement on application to the Bankruptcy Court. On that ground also therefore clause (2) of section 30 has no application.

The case of *Edwards v. Coombe* (1) is a decision which throws considerable light on the question now under discussion. That was in the year 1872. There was then no such rule as the present rule 215 or rule 211 of the Bankruptcy rules of the year 1886. Justice WILLES in that case decided that it was competent to a non-assenting creditor notwithstanding a resolution for composition under section 126 of the Bankruptcy Act of 1869 to sue for his original debt where the debtor has failed to pay or tender the composition within the time agreed or within a reasonable time, and that the creditor was not restricted to the summary remedy by application to the Courts of Bankruptcy provided by that section. I may here observe that the provision for summary remedy referred to in that section is in terms identical with clause (2) of section 30 of the Presidency Towns Insolvency Act of 1909. That learned Judge referring to the summary remedy states that a remedy given in Bankruptcy Courts may be very valuable, that a

(1) (1872) 7 C.P., 519.

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creditor may avail himself of the course of proceedings if he thinks fit, but his ordinary Common Law remedy still subsists until he elects to avail himself of the powers of the Court of Bankruptcy. At another place in the same judgment that learned Judge observes that it is the composition that has to be accepted and not a mere agreement of the other creditors and that the non-payment of composition was the failure of a condition going to the root of the arrangement and that the original debt remains and may be resorted to notwithstanding the resolution.

The following sentence, however, from the concluding portion of the judgment of WILLES, J., may have some bearing and may also require to be considered :—

“ We dispose of this case without entering into a consideration as to whether it might be more or less desirable that the equitable summary remedy of the creditor should be enforced rather than the ordinary Common Law remedy.”

In spite of the fact that in our judgment the plaintiff-appellant in this case has got a concurrent remedy by separate action, we should have been disposed to refer him to the summary remedy indicated in clause (2) of section 30 of the Presidency Towns Insolvency Act on the general principle that the parties should as far as possible be relegated to the remedies provided in special enactments, were it not for the circumstance that there appears to be no provision in the composition arrangement in this case which is capable of any summary enforcement. Any other remedy that may be open to the plaintiff under that Act could scarcely be called summary. It therefore follows that there is nothing in the Bankruptcy law which renders the present suit unsustainable. The plaintiff is clearly entitled to be paid a composition in respect of the balance due to him in the amount of the debt with interest thereon at

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Rs. 1-3-0 per cent per mensem from the date of the loan till the date of the decree on the Original Side after giving credit for the sale proceeds of the securities, and the learned Judge erred in dismissing the suit entirely against the first defendant.

The decrees of the Original Court will therefore accordingly be modified and a decree will be passed against the first defendant for the amount of such balance at 8 annas in the rupee or in other words for the moiety of such balance. As the point, on which the appellant has now succeeded, was not argued before the learned Judge in the original Court, there will be no order as to the costs of the appeal. The Memorandum of Objections is also dismissed.

K.B.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Srinivasa Ayyangar.

1924,
November
21,

EDMUND BENDIT AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

EDGAR RAPHAEL PRUDHOMME.*

Contract—Sale of goods—Consignment by ship from Coromandel ports to Marseilles—Commandeering of ship for war purposes—Impossibility of performance—Inability to get other tonnage—'Force majeure' clause—Non-performance—Liability—Exoneration—Indian Contract Act (IX of 1872), sec. 56.

The respondent, a merchant in Madras, agreed on 10th November 1916 with the appellants, a firm in Marseilles to ship groundnuts, H. B. Brand, to Marseilles from certain ports on the Coromandel Coast in the December-January (1916-17) season on a c.i.f. contract, and booked the necessary tonnage on a steamer called "Sea-pool;" but on 14th November 1916, the

ship was commandeered for war purposes and the respondent was unable to get tonnage on any other steamer leaving the above ports within the agreed time, notwithstanding his best endeavours to do so. The contract contained a "force majeure" clause enumerating war, revolution, strikes, epidemics, etc., as exonerating from performance of the contract. On a suit by the appellants for damages for non-performance of the contract, *Held*, that "force majeure" would discharge the defendant from the performance of the contract;

That inability to obtain tonnage was *force majeure*;

That the commandeering of the "Sea-pool," coupled with the total lack of any other ship with available accommodation not already booked by other consignors—amounted to *force majeure* exonerating the defendant from liability for non-performance of his contract; *Matsoukis v. Priestman & Co.* [1915] 1 K.B., 681;

That the respondent was not bound to break his contracts already made with others with a view to perform his contract with the appellants, *Tennants (Lancashire), Ltd. v. C. S. Wilson & Co., Ltd.* [1917] A.C., 495 ;

And that the respondent was not bound to purchase groundnuts in Marseilles or other places and tender the same in performance, as the appellants would not be legally bound to accept such tender, because the contract was a c.i.f. contract by which the defendant was bound to tender bills of lading in respect of groundnuts of a particular brand shipped in a steamer from particular ports to Marseilles. *Hansson v. Hamel and Horley, Ltd.* [1922] 2 A.C., 36.

APPEAL from the judgment of COUTTS TROTTER, J., passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 280 of 1921.

The plaintiffs, who were merchants in Marseilles, entered into a contract on 10th November 1916 with the Defendant who was a merchant in Madras, under which the latter agreed to sell 400 tons of groundnuts to the plaintiffs and ship them in December-January 1916-17 season under a c.i.f. contract from kernel-ports (i.e.), certain ports on the Coromandel Coast to the plaintiffs at Marseilles. Although the defendant had booked the

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* Original Side Appeal No. 80 of 1922.

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FRUDHOMME. necessary tonnage in a steamer called the "Sea-pool," the ship was commandeered on 14th November 1916 for war purposes; and he was unable to find tonnage in any other steamer leaving the "kernel ports" within the contract time, and consequently did not perform his contract with the plaintiffs. The latter instituted this suit for damages for non-performance. The other facts and contentions appear from the judgment. The contract contained a *force majeure* clause, enumerating war, revolution, strikes, epidemics, etc., and other unforeseen causes.

The learned Trial Judge dismissed the suit; the plaintiffs preferred this appeal.

Vere Mockett for appellants.—*Force majeure* is a French doctrine and is different from *vis major*. The defendant must show not merely "*force majeure*" but also that he was unable to get tonnage in other ships or purchase other c.i.f. papers, or get the goods in Marseilles and tender them to the plaintiffs. The test is, what is the reasonable course to pursue? The defendant could have obtained other tonnage or purchased and tendered goods in Marseilles. See *Tennants (Lancashire), Ltd. v. C. S. Wilson & Co., Ltd.* (1), *Tamplin Steamship Company, Ltd. v. Anglo-Mexican Petroleum Products Company, Ltd.* (2), *Matsoukis v. Priestman & Co.* (3), *Lebeaupin v. Crispin* (4), *Gubbay v. Ram Jusroy Golabroy* (5), and *Greenaway Brothers, Ltd. v. S. F. Jones & Co.* (6).

Advocate-General (T. R. Venkatarama Sastri) for respondent.—Purchasing goods at Marseilles will not be fulfilling the contract, even if it were possible. The

bargain was for goods of a special quality, which were to be of H. P. brand. The purchasers (plaintiffs) would not be bound to accept them, but would be justified in refusing to accept them if other goods or document relating to other goods were tendered at Marseilles. C.i.f. contracts ought to be strictly fulfilled. See *The Turul* (1), *Tennants (Lancashire), Ltd. v. C. S. Wilson & Co., Ltd.* (2), *Peter Dixon & Sons, Ltd. v. Henderson, Craig & Co.* (3).

Section 56 of Indian Contract Act is different from the English Law as regards subsequent impossibility of performance.

Vere Mockett, in reply, referred to *Hansson v. Hamel and Horley, Ltd.* (4).

JUDGMENT.

SPENCER, J.—The respondent, a merchant of Madras, contracted on November 10th, 1916, with the appellants who are a firm in Marseilles, to ship 400 tons of ground-nut kernels to Marseilles in the December-January 1916-17 season on a c.i.f. contract, the goods to be of H. P. brand. He booked the necessary tonnage on the S.S. *Seapool*, a vessel chartered by Messrs. Gordon, Woodroffe & Co., but it was commandeered by the Government on November 14th for purposes connected with the war. In spite of his best endeavours the respondent was unable to obtain accommodation for this cargo on any other steamer leaving the "kernel ports," that is, ports on the Coromandel Coast from which kernels are usually shipped, viz., Madras, Pondicherry, Cuddalore, Negapatam and Porto Novo. He, therefore, wrote on December 22nd, 1916, and January 11th, 1917, to the appellants pleading *force majeure* and asking them

(1) [1917] A.C., 495 (508).

(3) [1915] 1 K.B., 681.

(5) (1921) 68 I.C., 267.

(2) [1916] 2 A.C., 397.

(4) (1920) 2 K.B., 714.

(6) (1915) 32 T.L.R., 184.

(1) [1919] A.C., 515.

(3) [1919] 2 K.B., 778.

(2) [1917] A.C., 495.

(4) [1922] 2 A.C., 56.

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SPENCER, J. to consider the contracts as cancelled. The appellants refused to do so, rejecting the plea that this was a case of *force majeure* and suggested trying other lines and other ports. The respondent tried all the shipping agents in vain. He then made a proposal that he should endeavour to work off old contracts by shipping a portion of the goods contracted for under old contracts, along with portions of the goods to be supplied under new contracts, but the appellants only treated this as a virtual admission of his liability and an attempt to diminish his debt. They were unwilling to accept the proposal exactly as it was offered and it fell through. There was no extension of the time for performance for an indefinite period by mutual agreement. In the end they put the respondent into Court in March 1921 and lost their case in the trial Court, on the findings of the Judge (1) that *force majeure* would discharge the defendant from the performance of his original contract, (2) that inability to obtain tonnage is *force majeure* within the meaning of that expression as construed in English Courts.

It may be noted in this connexion that both the standard contract forms in use by the parties (Exhibit A and Exhibit I) contain *force majeure* clauses. Exhibit I, which is respondent's version, is the less definite of the two. It mentions two kinds of *force majeure* which would render the contract null and void except so far as it had already been partly performed. One is prohibition of export of the article from the country, a second is blockade, and there are others not mentioned. Such are cases of *force majeure* preventing the execution of the contract. Exhibit A is more explicit, as it enumerates war, revolution, strikes, epidemics, as other unforeseen circumstances which might prevent the goods from reaching the port of embarkation

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SPENCER, J. or from being shipped or despatched and so would render the contract void. Section 56 of the Indian Contract Act simply says that a contract to do an act which, after the contract is made, becomes impossible or, by reason of some event which the 'promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful; and section 65 provides that in such event any person who has received any advantage under the contract is bound to compensate the person from whom he received it.

The term "*force majeure*" which is borrowed from the Code Napoleon has received interpretation in several decisions of the English Courts in recent years. In *Matsonkis v. Priestman & Co.*(1), BAILHACHE, J., after considering the definition given by an eminent Belgian lawyer of *force majeure* as meaning "causes you cannot prevent and for which you are not responsible"—a definition which would certainly include inability to obtain tonnage owing to war conditions prevailing in the port or ports from which the goods were to be despatched—himself gave it a more restricted meaning. In his opinion *force majeure* would include strikes and breakdown of machinery but not bad weather, or football matches, or a funeral. In *Lebeaupin v. Crispin*(2) McCARDIE, J., observed:

"a *force majeure* clause should be construed in each case with a close attention to the words which precede or follow it, and with due regard to the nature and general terms of the contract. The effect of the clause may vary with each instrument."

In *Peter Dixon & Sons, Ltd. v. Henderson, Craig & Co., Ltd.*(3) the fact that British ships were no longer available by reason of the war for carriage of wood pulp

(1) [1915] 1 K.B., 681.

(2) [1920] 2 K.B., 714.

(3) [1919] 2 K.B., 778.

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from Canada to Grimsby in England was held to be a hindrance to the performance of a contract for delivery of pulp and came within the meaning of the *force majeure* clause in the contract under consideration in that case. If the hindrance was insurmountable, it would amount to prevention, which was another term used in the contract which would relieve the sellers from liability and the Court of Appeal held that the arbitrators were accordingly justified in finding the sellers not liable.

In the present case the matter is simplified by the fact that the expression "*force majeure*" does not stand alone, but the clause in which it occurs in Exhibits A and I contains examples of what was intended to be conveyed by the term. War is one of the examples and the words *et cetera* at the end of the enumeration denote that there are others.

In their letter (Exhibit K) of January 18th, 1917, the appellants admitted that, if shipment by the *Seapool* had been one of the declared terms of the contract between them and the respondent, the latter would be exonerated by the fact of that steamer being subsequently requisitioned by the Government. What however they failed to appreciate was that the respondent was not asking to have the contract considered as cancelled merely on account of the *Seapool* being requisitioned, but that the combination of two circumstances (1) the commandeering of the *Seapool* on which he had already booked accommodation for this consignment of groundnuts, (2) the total lack of any other ships with available accommodation not already booked up by earlier applicants made it impossible for the respondent to fulfil his engagements under Exhibits VII and VII(a) in the season December-January, 1916-1917.

It has been contended both in the trial Court and here that the respondent might have shipped this consignment of groundnuts on the *Jossiphoglu*, or the *Khiva* or the *Griqua*, or the *Voyazides*, or the *Locksley Hall*, or the *City of Florence*; but the evidence on the point to which we have referred makes it clear that all the space on the steamers calling at Marseilles in December or January was already booked before the commandeering of the *Seapool* became known on November 14th, and that the respondent could not have foreseen the fact that he would be prevented from sending the consignment by the ship in which he had booked space, and could not have made other arrangements; also that if he could have booked space in a steamer leaving Madras after January 1917, the consignment would not have reached the consignees within the contract time. On the facts I agree with the conclusion of the learned Judge who heard the evidence

"that it was a physical impossibility for Mr. Prudhomme to get tonnage to take this cargo at any rate of freight however high during the contract period."

But on the *Voyazides* and the *Jossiphoglu* the respondent sent consignments of groundnuts to Chabriers Morel and Compoi of Marseilles on earlier contracts with those consignees. It is suggested by appellant's counsel that the respondent might have kept his contract with the appellants by buying in these consignments or other consignments made by other merchants trading in groundnut and diverting them to his consignees.

But it is not stated that any such consignments of groundnuts were sent except under previous contracts, and in *Tennants (Lancashire), Ltd. v. C. S. Wilson & Co., Ltd.* (1) it was observed by Lord LOREBURN that it would

(1) [1917] A. C., 495 at 510.

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not be reasonable to ask a person, who had entered into a particular contract to supply goods, to break his other contracts or to make others break their contracts in order to perform this contract. If a party to a contract could not perform his part without breaking other contracts in the opinion of their Lordships it might be deemed to hinder or prevent him from performing the contract in question. At considerable expense and loss the respondent might, it is suggested, have bought groundnuts in Marseilles itself and tendered them to appellants in performance of his contract, or he might have sent this consignment to some port from which it might have been transhipped to Marseilles. But if he had adopted either of these courses he would still have been unable to make a good tender which the appellants would have been bound to accept, for the contract between the parties was a *c.i.f.* contract under which he had to tender bills of lading for 400 tons of groundnut kernels of H.P. brand shipped by steamer from a kernel port to Marseilles. A tender of groundnuts of some other brand or of bills of lading from some other port such as Bombay or London would not have been a strict compliance with the terms of the contract such as appellants would have been bound to take up (vide *Hansson v. Hamel and Horley, Ltd.*(1)).

The fact which appears from the judgment in O.S.A. No. 73 of 1921 that in respect of the commandeering of this very steamer *Seapool* a French Court of Arbitration in regard to another contract held that the sellers could not successfully plead "*force majeure*" as a defence on the ground that goods of the proper month's shipment might have been bought up either on the high seas or locally in Marseilles, no doubt at a great

(1) [1922] 2 A.C., 36.

advance in price, is immaterial for the decision of this appeal, because the details of that contract are not before us so as to enable us to judge of the correctness of the view taken by those arbitrators, and their decision is by no means binding upon us.

For these reasons I can come to no other conclusion than that the judgment appealed against is right, and the appeal is therefore dismissed with costs.

SRINIVASA AYYANGAR, J.—I agree that the appeal should be dismissed with costs. I wish only to add a few sentences with regard to the main contentions raised in the argument on behalf of the appellants. It seems to me really unnecessary to canvass for the purpose of this case the meaning or definition of *force majeure*. The only thing that was contended to amount to *force majeure* was the commandeering of the *Seapool* by the Government. I did not understand Mr. Mockett, the learned counsel for the appellants, in his argument to contend that such commandeering would not amount to *force majeure*. But in all such cases, it is not sufficient for the contracting party to point to something in the nature of a *force majeure* and seek to escape liability. It is absolutely necessary to go further and establish by satisfactory evidence that the circumstance or occurrence which is called *force majeure* was the real cause, which, to use the language of the contract in question, prevented the performance of the contract. Now, if the commandeering of the *Seapool* had taken place, say on the 30th or 31st of January, almost at the last moment, so as to upset all the calculations and arrangements of the defendant, there could possibly be no doubt that *force majeure* would have been the immediate cause of the failure of the defendant to ship the goods and perform the contract. But the real difficulty in this case arose by reason of the *Seapool* having been

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commandeered as early as the 14th of November whereas the shipments had to be in December-January. The defendant's plea which was found by the learned Judge in the Court below to have been made good, was, that till the end of January the defendant made every effort to book the cargo and failed, not because the high rate of freight obtaining made his contract commercially impracticable but because he could not get tonnage of the cargo at any price whatever. It may almost seem from this finding that the real or immediate cause for Mr. Prudhomme not performing the contract was not the commandeering of the *Seapool* but his inability to procure tonnage in any vessel. No doubt this inability has been found as a fact by the learned Judge and has not been seriously assailed before us. But the inability to procure the necessary tonnage could not possibly be *force majeure* because the contract itself was during the war and the difficulty of securing space for cargo to be exported must have been in the contemplation of the contracting parties, and the difficulty or even the impossibility as it may be, of procuring tonnage was the result of the extraordinary competition prevailing at the time and could not aptly be described by the expression *force majeure* however elastic and varying its connotation may be accepted to be. In these circumstances, unless the commandeering of the *Seapool* could be found to be the real or immediate cause of Mr. Prudhomme not performing the contract, the *force majeure* clause in the contract will not help him. After giving the matter my very careful consideration, I have come to the conclusion that in this case in spite of the interval of time between the 14th of November and the close of the period fixed for the performance of the contract, the commandeering of the *Seapool* was the real or immediate cause—cause not in any scientific sense nor even in the language of

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ordinary parlance, but in a commercial sense. The fact was that Mr. Prudhomme as a commercial man made certain arrangements for shipping, entered into engagements for the purpose of procuring necessary tonnage and then entered into the suit contracts. Then suddenly on the 14th of November he finds his plans are upset by the vessel being commandeered by which he had arranged to ship the goods. If thereafter he was able to obtain tonnage in any of the ships in such a manner as to enable him to fulfil the contract or indeed if he made no efforts at all to procure any such tonnage the cause of his non-performance of the contract would not have been the commandeering of the *Seapool*. But it is a matter of common experience that what in ordinary circumstances would not have been the cause of any particular effect might become such cause when conjoined with certain other circumstances and then it is none the less the cause or effective cause, though not the sole cause. This was really what the learned Judge found. In this view any examination of the various cases with regard to the meaning of *force majeure* becomes unnecessary.

Two other arguments were addressed to us by Mr. Mockett, the learned counsel for the appellants. It was said that if Mr. Prudhomme was not able to obtain any tonnage in Madras or Pondicherry, there was no evidence that he could not have obtained such tonnage from any of the "kernel ports" on the Coromandel Coast. This aspect of the contention would require him to establish conclusively a negative. It is significant that no evidence whatever has been adduced on behalf of the plaintiffs regarding the possibility of obtaining any such tonnage at any such port. The kind and quantity of evidence that would be required to establish a negative of that nature would obviously vary according to

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circumstances. I have no doubt whatever that the learned Judge who arrived at the finding did so after a consideration of all those circumstances, and the argument before us has failed to satisfy us that that finding of fact has not been arrived at on proper or sufficient material. Further, having regard to the fact that the inability to procure any tonnage after the commandeering of the *Seapool* must be held to have been relied upon not as in itself constituting *force majeure* but merely as a contributing cause to make the *force majeure* of the commandeering the effective cause of non-performance, I cannot help considering that the nature and quantity of evidence required to establish the negative need not be so exhaustive or conclusive as may be required if what was relied upon was solely the impossibility of obtaining tonnage. In such circumstances I am prepared to hold that when a commercial man finds himself face to face with an upsetting of his plans and calculations brought about by *force majeure* he is not bound to prove more than that he made his best endeavours as a man of ordinary prudence would and should, who was anxious to procure some tonnage for himself in such circumstances.

This test at any rate on the evidence on the record on behalf of the defendant as accepted by the learned Judge is amply satisfied in the present case.

The third and last contention on behalf of the appellants was that the defendant finding that the *Seapool* was commandeered and finding himself unable to procure any other tonnage, should still have performed the contract by purchasing at Marseilles goods of the description contracted for and supplying to the plaintiffs such goods or the documents relating to shipments thereof so as to carry out the contract.

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To begin with I must observe that this contention does not appear to have been submitted to the learned Judge in the Court below. In the second place, it is perfectly clear that any purchase of similar goods in the market locally at Marseilles and tendering them in performance of the contract would not have been performance according to the terms and the tenor of the contract and the buyers would have been entitled to refuse to accept the same. I am not also sure whether even the purchase of documents relating to December-January shipments of goods from the ports referred to, would have been proper performance; because there is a stipulation in the contract as regards the brand "H.P." (Hope Prudhomme), and there is no evidence and no facts which would justify me in holding that this stipulation with regard to the brand did not include besides the mark "H.P." (Hope Prudhomme) an implied condition regarding selection of goods by Mr. Hope Prudhomme. There is no evidence whatever that such documents were available in Marseilles which, even if the defendant could have procured them at any price, were such as the plaintiffs would be bound to accept as in performance of the contract.

Mr. Mockett relied upon the case of *Greenway Brothers, Ltd. v. S. F. Jones & Co.*(1). But that was a case of an ordinary contract for sale and delivery of goods and what was held was that the omission to deliver was not due to war or any other cause referred to in the contract. If in a contract for sale and delivery of goods the manner of the performance of the contract is not indicated or included as necessarily being in the contemplation of parties, then it necessarily follows that difficulties or even impossibility in the performance of

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the contract in the manner contemplated by one of the contracting parties would be no excuse for non-performance. But if the manner of performance is really indicated in the contract, or otherwise comes to be included as a term in the contract, then the *force majeure* clause would apply to any case of *force majeure* preventing the performance of the contract in that manner.

On a consideration of the whole contract in this case I have no hesitation in coming to the conclusion that the manner of performance of the contract included a shipment of goods to be selected by the defendant.

I am further of the opinion that whenever the possibility of performance is referred to in commercial contracts, what must be considered and contemplated is the possibility in a commercially reasonable sense and not merely supposititious possibility.

If follows from these considerations that the contract between the parties was that the defendant should purchase and ship goods of the description contracted for and that if the plaintiffs were minded to do so, they would have been entitled to refuse any goods or documents not so proceeding; and it also follows that having regard to the manner in which, commercially speaking, the defendant was expected and required to perform the contract, there was no obligation on his part to proceed to Marseilles and look out for goods or documents of the description which might possibly have satisfied the requirements of the contract.

The decision of the learned Judge therefore to the effect that the defendant had made good his defence is right, and the plaintiffs' action was rightly dismissed.

K.R.

APPELLATE CIVIL.

*Before Sir Murray Coutts Trotter, Chief Justice,
and Mr. Justice Srinivasa Ayyangar.*

PALANIAPPA CHETTIAR AND OTHERS (DEFENDANTS),
APPELLANTS,

1924,
November
21.

v.

SUBRAMANIA CHETTIAR (PETITIONER) AND ANOTHER
(ASSIGNEE OF DECREE), RESPONDENTS.*

*Civil Procedure Code (Act V of 1908), O. XXI, r. 16—
Decree—Execution—Transfer of decree—Assignment in
writing—Transfer to a particular person in his own name—
Transferee being benamidar—Application for execution by
real owner—Application, whether competent—Construction of
Statute (Order XXI, rule 16).*

Where a decree has been transferred to a particular person under an instrument in writing, no other person, claiming that he was the real owner under the transfer and that the transferee named therein was a mere benamidar for him, can apply for execution of the decree, under the terms of Order XXI, rule 16, Civil Procedure Code.

Manikkam v. Tatayya, (1898) I.L.R., 21 Mad., 388, and *Abdul Karim v. Chukkun*, (1879) 5 C.L.R., 253, dissented from.

APPEAL from the order of KUMARASWAMI SASTRI, J., dated 2nd April 1924, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court on an application for execution filed by S. N. Subramania Chetti in Civil Suit No. 98 of 1911.

In this case a decree for a sum of money was passed on 17th January 1912 in favour of the original decree-holder against the appellants. The decree was transferred under an instrument in writing by the

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original decree-holder in favour of one R. M. M. Subramania Chetti personally to his name. One S. N. Subramania Chetti, alleging that he was the principal of the transferee, who was only an agent with a general power from him, that the said assignment of the decree was taken on his behalf with the funds of himself who was the principal, and that R. M. M. Subramania Chetti was only a benamidar for himself, took out a Judge's summons and applied that he should be brought on the record as transferee decree-holder in the place of R. M. M. Subramania Chettiar, that he (appellant) should be given leave to execute the decree, and that the decree should be transmitted to the District Munsif's Court of Devakottah with the usual certificate for execution. Notices were issued to the judgment-debtors and the transferee (R. M. M. Subramania Chetti). The applicant produced a letter signed by the latter, admitting that the transfer of the decree was obtained with the funds of the applicant and that he (R. M. M. Subramania Chetti) would give his signature, etc., to enable the latter to execute the decree. The assignment of the decree was taken in the name of R. M. M. Subramania Chetti and not with the vilasam of the principal prefixed to the former's name. The judgment-debtors disputed the right of the appellant to take out execution as the real transferee and contended that the provisions of Order XXI, rule 16, did not permit an application by the alleged real transferee. The learned Judge allowed the application and granted the prayers in his petition. The judgment-debtors preferred this appeal.

K. Rajah Ayyar and *V. Ramaswami Ayyar* for appellants.—The real owner, whether he is principal of the transferee or the latter is only a benamidar for the former, cannot apply for execution of the decree.

The decision in *Manikkam v. Tatayya*(1) is erroneous. Reference was made to *Jasoda Deyo v. Kirtibash Das*(2), *Khettur Mohan Chuttopadhyaya v. Ishur Chander Surma*(3), *Silla Pedda Yelligadu v. Raja of Pittapur*(4), *Mathurapore Zamindari Co., Ltd. v. Bhasaram Mandal*(5).

E. Vinayaka Rao for respondent:—The system of benami is long established in India and is recognized in Indian law and must be given effect to, unless there is express statutory prohibition. Under Order XXI, rule 16, the expression "transferee" includes real transferee as well as the person named in the transfer. The decision in *Manikkam v. Tatayya*(1) is right. It is cited with approval in *Krishnama Chariar v. Appasami Mudali*(6). Here the benamidar is a party to the proceedings as a respondent and notice has been served on him. He has further executed a varthamanam (Exhibit B) admitting that the transfer was taken with the funds of the applicant (S. N. Subramania Chetti); the decree itself was not obtained benami, but only the assignment was taken in the agent's name. The petitioner is either himself the legal owner as the principal or a beneficial owner, the person named in the transfer being only a benimadar. In either case he is entitled to apply for execution.

JUDGMENT.

COUTTS TROTTER, C.J.—The rule of law that, where a person's name appears on the face of the record as judgment-creditor and execution of the decree is sought by a transferee of the decree, the decree cannot be executed unless he comes within the words of Order XXI.

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(1) (1898) 1 L.R., 21 Mad., 388.
(3) (1869) 11 W.R., 271.
(5) (1924) 28 C.W.N., 626.

(2) (1891) 1 L.R., 18 Cal., 639.
(4) (1915) 29 M.L.J., 623.
(6) (1902) 1 L.R., 25 Mad., 545.

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rule 16, of the Code of Civil Procedure and there has been an assignment in his favour either in writing or by operation of law, seems to me to be no ground for holding that a person otherwise a stranger to the Court can come forward and allege that the decree was not his (the transferee's) and that the latter was only a benamidar for himself. The learned Judge probably felt himself bound by *Manikkam v. Talayya*(1), but I entertain no doubt whatever that that case was wrongly decided and was an unwarranted departure from, and an extension of the words of, the statute. I accordingly come to the conclusion that this appeal must be allowed with costs in this Court as well as in the Court below.

I may add that the circumstances of the case which was allowed to crawl on to the very last day of a long period of limitation are extremely suspicious. But all that we are concerned with is the simple point of law. I ought to add, I think, that it follows from this expression of opinion that we must also dissent from the decision reported in *Abdul Kareem v. Chukkun*(2).

SRINIVASA
AYYANGAR, J.

SRINIVASA AYYANGAR, J.—I agree that the appeal should be allowed with costs. The petitioner applied in the Original Side not only for execution of the decree under Order XXI, rule 16, but also by an independent Judge's summons for bringing his name on the record as a transferee decree-holder. There is no provision in the Procedure Code for any such application. I am not at all sure whether what is called "bringing on the record the transferee decree-holder" is not really a survival from times previous to the Procedure Code. The scheme of the Code is that the transferee by assignment in writing or by operation of law merely

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files his application for execution of the decree setting out, either in it or in an affidavit he has filed in support thereof, that he is the transferee either by operation of law or by any particular instrument in writing and thereupon the Court orders the application for execution or rejects it. Therefore we must treat the present application really as an application under Order XXI, rule 16. The contention of the respondent is that he was entitled to such execution because he was the real owner under the transfer executed to R. M. M. Subramania Chetti who was his agent and who had obtained an instrument in writing transferring the decree to his name. If the case of the petitioner were that the transfer was obtained by the agent in his name but in the *Vilasam* of the firm of which he was the agent then there could have been no objection whatever to execution being granted on the application of the petitioner, because the appearance of the *Vilasam* in the name of the transferee would really be to the firm or person bearing the *Vilasam*, even apart from serving to secure the benefit of the transfer to the firm represented by the *Vilasam*. But in this case the transfer was to the agent personally. The question therefore is whether, if there has been a transfer to a particular person under an instrument in writing, any other person is entitled to come to the Court and say that that transferee was a mere benamidar and that he, the applicant, is the real owner of the benefit secured by the transfer. It seems to me that Order XXI, rule 16, is perfectly clear on the point. It speaks of the decree being transferred by assignment in writing or by operation of law and provides that in such cases the transferee may apply for execution. When the statute speaks of "an assignment in writing" and "the transferee" the proper construction of the words would

(1) (1888) I.L.R., 21 Mad., 388.

(2) (1879) 5 C.L.R., 253.

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necessitate our holding that the transferee referred to is the transferee named as such in the assignment in writing. To hold otherwise would be not to give proper effect to the words of the statute. The learned vakil for the respondent has drawn our attention to *Manikkam v. Tatayya*(1). We are constrained to hold that it is a wrong decision. I am not able to understand what the learned Judge who delivered the main judgment in the case could have meant when he referred to the word "representative" in section 244 of the old Procedure Code as comprising the real owner under the transfer of a decree. If such a person was the representative of the decree-holder or his transferee, then it follows that, under the express terms of section 244, he could have no right of separate suit but in another sentence in the same judgment the learned Judge speaks of two remedies being open to such a person, that is, the real owner under the transfer of a decree, namely, one by way of application to the executing Court and another by way of separate suit, which is obviously opposed to section 244, Civil Procedure Code. However that may be, we have no hesitation in holding that that case was wrongly decided. It is also clear that the Code of Civil Procedure did really intend to prevent *benamidars* coming in and making applications to the Court on the general basis of the law relating to *benami* transactions. In section 66 of the Code express provision is made for Courts not recognizing the *benami* character of purchases made at execution sales held by Court.

We have also no doubt whatever that the express terms of Order XXI, rule 16, exclude any such contention. The earlier case referred to in the argument,

(1) (1898) I.L.R., 21 Mad., 388.

Abdul Kareem v. Chukkun(1), having proceeded on the same basis as the judgment in *Manikkam v. Tatayya*(2), should also be held to have been wrongly decided and we therefore refuse to follow it. It would lead to very serious consequences if we should allow the law of *benami* to have any operation with regard to suits and proceedings and records of Court and if only on that ground, it would be desirable to disallow any such contention. We are, however, fortified in that view by the actual terms of the statute; and therefore it follows that the applicant for execution in this case was wrongly granted execution of the decree.

This appeal should be allowed, and the respondent's petition for execution as well as that for bringing himself on the record as transferee decree-holder should be dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Srinivasa Ayyangar.

R. ARUNACHALA NAIDU, PETITIONER

v.

BALAKRISHNA & Co., RESPONDENTS.*

Civil Procedure Code (V of 1903), O. XLV, r. 7, provides 1 and 2—Order to furnish security other than cash or Government bonds, when to be made—"Grant of certificate" in rule 7, meaning of.

An order to furnish security for the costs of the respondent in an appeal to the Privy Council, in a form other than cash or

(1) (1879) 5 C.L.R., 253.

(2) (1898) I.L.R., 21 Mad., 388.

* Civil Miscellaneous Petition No. 387 of 1924.

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ARUNACHALA NAIDU v. BALAKRISHNA & CO. Government Bonds can be made only at the time of granting the certificate and not afterwards. "Grant of certificate" in rule 7 of Order XLV, Civil Procedure Code, means the judicial order for the issue of a certificate and not the formal issue of the certificate.

PETITION praying that in the circumstance stated in the affidavit filed therewith the High Court will be pleased to issue an order directing that the petitioner herein may be exempted from furnishing security in cash or Government security and that he may be permitted to offer immovable property as security for the costs of the respondents in C.M.Ps. Nos. 2962 and 2964 of 1924 on the file of the High Court for leave to appeal to His Majesty in Council against the decrees of the High Court in Appeals Nos. 5 and 6 of 1921, preferred against the decrees of the Court of the Subordinate Judge of South Malabar at Calicut, in O.S. Nos. 27 and 28 of 1919, respectively (the Privy Council Appeals having been consolidated as per order of this Court, dated 29th September 1924 and made on C.M.P. No. 956 of 1924).

The facts and arguments appear sufficiently from the judgments.

T. R. Ramachandra Ayyar and S. Srinivasa Ayyar for the petitioner.

C. V. Anantakrishna Ayyar for the respondents.

VENKATASUBBA RAO, J.—The petitioner applied for leave to appeal to His Majesty in Council and on the 29th of September 1924, the Court granted a certificate under the first part of rule 3 (1) of Order XLV, Civil Procedure Code. The order granting leave concluded thus:—

"We therefore certify that as regards amount or value and nature, the case fulfils the requirements of section 110."

On the 7th of October 1924, the petitioner made the present application under the first proviso to rule 7 of

Order XLV, Civil Procedure Code, for being permitted to offer immovable property as security in the place of cash or Government bonds.

Proviso 1 runs thus:—

"Provided that the Court at the time of granting the certificate may, after hearing any opposite party who appears, order on the ground of special hardship that some other form of security may be furnished."

Under the proviso such an application can be made only at or before the time of making an order granting the certificate under rule 7 (1). But it was contended on behalf of the petitioner that section 7 (1) refers not to the granting of a certificate but to the actual issue of the document called the certificate. The Court directs its mind judicially to the question when it makes an order for the grant of the certificate but, if the argument which was advanced before us is correct, there is no provision relating to the passing of such an order. It is impossible to believe that the legislature has enacted several rules dealing with a subsidiary matter—the issue of a formal certificate—and has omitted to provide for what is really a matter of great importance, the making of an order. The question is not whether there may not be an instrument called a certificate as distinguished from the order granting a certificate. A formal document called a certificate may be issued, drawn up in conformity with the order made by the Court. But the Court applies its mind judicially to the matter when it makes the order granting the certificate. The necessary words may, with greater formality, be set forth in the instrument of certificate although such words are not present in the order itself. In this sense, there may be some distinction between the order granting the certificate and the formal certificate issued in pursuance of the order. But the real question is, what is it that

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is provided for in these various rules? Is it the order granting the certificate or is it the formal issue of the instrument of certificate? Rule 3 provides that the petition for appeal should state the grounds of appeal and pray for a certificate that either as regards amount or value and nature the case fulfils the requirements of section 110 or that it is otherwise (that is under section 109, sub-section c) a fit case for appeal to His Majesty in Council. What is the certificate that is contemplated here? Surely it cannot be said that it is not a judicial order certifying that the necessary requirements exist or the case is otherwise a fit one for appeal. How can it be contended that a formal certificate can come into existence without an order of the Court? Rule 6 says, when such certificate is refused, the petition shall be dismissed. When is the petition dismissed? It is when the Court refused to make the required order. If the contention pressed upon us is accepted, this rule becomes meaningless. Then rule 7 provides that when the certificate is granted the applicant shall do certain things. The word "granted" in rule 7 is the opposite of the word "refused" in rule 6. The scope of Order XLV is to provide for passing a judicial order granting a certificate or refusing a certificate. The granting of a certificate is treated as equivalent to allowing the petition and the refusal of a certificate, as equivalent to dismissing the petition. The scheme as well as the scope of Order XLV forbids us from upholding the contention of the petitioner's learned vakil. *Radhakrishna Das v. Rai Krishn Chand*(1) which was relied on, does not in the least support this curious contention. When there appeared to be some inconsistency between the order and the certificate, their Lordships considered themselves

(1) (1901) I.L.R., 23 All., 415; 28 I. A., 182.

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bound to act upon the latter as being the more formal document, in the same way as Courts give effect to the terms of the decree as distinguished from the operative part of the judgment when there is a conflict between a judgment and a decree. That it could not have been the intention of the Judicial Committee to ignore or disregard the order, is apparent from their later decision in *Radhakrishna Ayyar v. Sundaraswamier*(1) where contrasting the order with the certificate which followed it, they referred to the former as the order embracing the actual certificate.

The object of the legislature in enacting the proviso in question is that the matter should be disposed of expeditiously. If the Court merely gives leave to appeal and says nothing more, the appellant is bound in the ordinary course to furnish security in cash or Government bonds. If, however, the appellant is desirous of furnishing a different kind of security, he must apply for a special order to that effect and obtain it simultaneously with the order granting the certificate. This ensures that subsequent to the granting of leave to appeal, no further time is taken up by another application being made. Proviso 2 to rule 7 aims also at the same result. It runs thus:—

"Provided further that no adjournment shall be granted to an opposite party to contest the nature of such security."

"Adjournment" referred to in this, is the adjournment of the petition for the grant of a certificate. The word "petition" is used in rule 2, rule 3, rule 5, and rule 7 and the petition that is throughout referred to, is the petition for the grant of a certificate. Rule 7 refers to the person applying by petition as "applicant" and in the two provisos to rule 7 the words "opposite

(1) (1922) I.L.R., 45 Mad., 475 (P.O.).

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party" are used to denote the person opposing the petition. The second proviso thus shows that it is only one hearing that is contemplated and that if a different form of security is to be permitted, it is to be done at the time of the granting of the certificate. For these reasons, I hold that the application before us is clearly incompetent and should be rejected. As my learned brother is of the opinion that the applicant should not be made to pay costs, the application will be dismissed without any order as to costs.

SRINIVASA
Ayyangar, J.

SRINIVASA AYYANGAR, J.—The point that has been argued in connection with this application is somewhat subtle and not altogether free from difficulty. The present petitioner before us applied for leave to appeal to His Majesty in Council from the judgment and decree of this Court in Regular Appeals Nos. 5 and 6 of 1921 and by order, dated the 29th day of September 1924, we granted leave and the order made by us granting such leave contained the necessary certificate as required by sections 109 and 110 of the Procedure Code. No application was made to us at or before the time of our making the said order, under the first proviso to rule 7 of Order XLV of the Procedure Code for leave to the petitioner to furnish instead of cash security the security of immovable property. The present application for that purpose has been made only on the 7th of October 1924. I have no doubt that the omission to apply for such an order at the time when leave was granted to the petitioner to appeal to His Majesty in Council was entirely due to the circumstance that the provisos in rule 7 of Order XLV of the Procedure Code and the other amendments carried out in the said rule by Imperial Act XXVI of 1920 were overlooked as they do not appear to have been incorporated in the editions of the Code of Civil

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Procedure brought out even after 1920. In such a case therefore where the omission to apply for the relief was entirely due to a mistake of that nature, we should have been disposed to consider the application, if under the provisions of the law, we were entitled to do so. The application has been opposed on behalf of the respondent on the ground that under the express terms of the proviso to rule 7 the Court has jurisdiction to make an order changing the form of the security to be furnished, only at the time of granting the certificate. There is no question here of any extension of time limited for making any application. No doubt if an application was contemplated for the purpose of granting such a relief to an intending appellant to His Majesty in Council and if there was any period of limitation fixed for the making of such application and if the principle of section 5 of the Limitation Act could be made applicable to such an application, there would have been no difficulty. But no such separate application is contemplated or referred to in the Procedure Code, and there being no period of limitation prescribed for any such application, there is no room for the application of the principle of section 5 of the Limitation Act. A limitation with reference to time may in form be either by way of prescribing a period of limitation or by way of conferring or limiting the jurisdiction of the Court. It is a matter entirely of form, and the intention of the legislature has to be gathered only from the form adopted. In Order XX, rule 11 of the Procedure Code the Court is authorized at the time of passing the decree to make an order for the payment of the amount of the decree by instalments, and similarly in Order XXI, rule 11 the Court is empowered at the time of the passing of the decree on the oral application of the decree-holder to order

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immediate execution of the decree by the arrest of the judgment-debtor, if he is within the precincts of the Court. The proper construction of such provisions has been held to be that the power granted should be exercised, if at all, by the Court only at the time indicated. It may be that the reason may not be clear or satisfactory for the legislature having laid such limitations. But, however, that may be, the construction being clear, we have no right to seek to get behind the rule by any inquiry into the reason of the rule.

It follows therefore that the Court may make an order with regard to the form of the security to be furnished by the appellant at the time of granting the certificate, and not after the certificate has been granted. But Mr. Ramachandra Ayyar, the learned vakil for the petitioners, has argued that the certificate is a document in writing containing a definite statement to the effect that in the opinion of the High Court the matter is a fit one for appeal to the Privy Council; there is a form prescribed for such certificate and the expression "grant of a certificate" could therefore only mean the actual issue and delivery over of such a document in the prescribed form. He has also in this connection drawn our attention to the decision of the Privy Council in the case of *Radhakrishna Das v. Rai Krishn Chand*(1). In that case their Lordships of the Judicial Committee have undoubtedly drawn a sharp distinction between the certificate and the order for the certificate. The decision of their Lordships in that case undoubtedly lends considerable support to the contention on behalf of the petitioner. On behalf of the respondent we have also been referred to the

(1) (1901) I.L.R., 23 All., 415.

judgments of their Lordships in the case of *Radhakrishna Ayyar v. Sundaraswamier*(1) and also in the case of *Radhakrishna Ayyar v. Swaminatha Ayyar*(2) the same case when it came up before the Privy Council at an earlier stage. In the latter case the emphasis laid on the formal certificate issued by the Court would seem no doubt to support the contention for the petitioner, but the judgment in the former case where their Lordships referred to an order for certificate as a certificate and to there being two orders and to one of the orders embracing the actual certificate and so on, undoubtedly introduces an element of confusion. But it seems to me that in spite of the apparent confusion, it is possible to reconcile the judgment in the later case of *Radhakrishna Ayyar v. Sundaraswamier*(1) with the judgment in *Radhakrishna Das v. Rai Krishn Chand*(3). What the law requires is a certificate by the Court. Being a judicial order, no doubt, it has to be in writing; and there is also no doubt that the granting of a certificate is a judicial act.

The question then resolves itself into this. On a proper construction of rule 7 and the connected rule, when is the granting of the certificate by the Court—Is it at the time when the Court orders the certificate to be issued or is it at the time when the actual document called the certificate is issued by the Court or its officers? The case of *Radhakrishna Das v. Rai Krishn Chand*(3) is no decision on the construction of the expression "granting of the certificate." It merely draws a distinction between the certificate on the one hand and the order for the certificate on the other. That distinction is undoubtedly an important and material distinction. The case, however, of *Radhakrishna*

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(1) (1922) I.L.R., 45 Mad., 475 (P.C.). (2) (1921) I.L.R., 44 Mad., 293 (P.C.).
(3) (1901) I.L.R., 23 All., 415 (P.C.).

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Ayyar v. Sundaraswamier(1), would seem to show that there is a certificate granted whenever there is a document signed by the proper authority in which the judgment of the Court with regard to either the value of the subject-matter or the fitness otherwise of the case for appeal to His Majesty in Council is set out. In the present case, however, the order of this Court, dated the 29th of September 1924 is not only in substance but in form such a certificate, and therefore it would seem to follow that the Court would have had power to make any order as regards the form of the security only at the time when the said certificate was given. But assuming for the sake of argument that in form the order of the Court, dated the 29th of September 1924 was not a certificate but was merely an order for the certificate, then we have to see whether on a proper construction the expression "at the time of granting the certificate" refers to the formal certificate or to the order for the certificate. Rule 2 of Order XLV prescribes a petition to be filed by the person intending to appeal to His Majesty's Council. Sub-clause 1 of rule 3 sets out that the prayer in the petition should be for a certificate either that, as regards the amount or value and nature, the case fulfils the requirements of section 110 or that it is otherwise a fit one for appeal to His Majesty in Council; and sub-clause 2 of rule 3 prescribes notice of the petition to the "opposite party." Rule 6 states that where such certificate is refused, the petition shall be dismissed; and rule 7 proceeds to lay down what the appellant should do where the certificate is granted.

The reference to the refusal of the certificate in rule 6 and the granting of the certificate in the

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opening words of rule 7 would in such juxta-position undoubtedly seem to indicate that the grant or the refusal of the certificate takes place as the result of the disposal of the petition. The granting of the certificate being a judicial act, it ought more appropriately to refer only to the time when the decision of the Court is arrived at with regard to the grant or refusal and not to the time when the formal document is drawn up and issued.

Further on, in the same rule 7, the appellant is required to do and carry out certain matters relating to the appeal to the Privy Council within six weeks from the date of "the grant of the certificate." If the expression "grant of the certificate" means the actual issue of the formal document called a certificate, then the six weeks will have to be computed from such date. But I see no reason in any rule which may be supposed to prescribe that such six weeks should be computed only from the date of the issue of the formal certificate; because if the object of the rule prescribing a period is to avoid delay, then there is no reason whatever why the legislature should be deemed to have postponed the computation of the time from any date other than the date on which the Court to the knowledge of the petitioner grants his application for a certificate.

Further, the second proviso, also newly added to rule 7, lays down that no adjournment should be granted to any opposite party that appears for the purpose of objecting to the nature of the security. The expression "any opposite party that appears" would seem clearly to indicate any such party appearing on the notice to the opposite party referred to in rule 3 of the order, that is to say, in other words it is only any party that appears on the notice to show cause why leave should not be granted to the petitioner to appeal to the Privy

(1) (1922) I.L.R., 45 Mad., 475 (P.C.).

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Council that is allowed to object at the time with regard to the form or the nature of the security. This again would seem to contemplate beyond all doubt that the whole question with regard both to the granting or refusal of the certificate and the form or the nature of the security should be determined finally by orders made at the same time without any further delay.

It therefore follows that in the present case the certificate having already been granted, what the Court could have done if it was moved properly at the time of the granting of the certificate could not now be done. The petition therefore has to be dismissed, but in the circumstances of the case, it will be dismissed without any order as to costs.

N.R.

APPELLATE CIVIL.

*Before Mr. Justice Ayling and Mr. Justice Odgers
(and after finding)*

Before Mr. Justice Phillips and Mr. Justice Odgers.

1924,
December 19.

KRISHNA SASTRI AND 4 OTHERS (DEFENDANTS NOS. 4, 5, 6,
7 AND 8), APPELLANTS

v.

SINGARAVELU MUDALIAR AND 5 OTHERS (PLAINTIFF,
DEFENDANTS NOS. 1 TO 3 AND 1ST DEFENDANT'S LEGAL
REPRESENTATIVE), RESPONDENTS.*

*Service inam, enfranchisement of—Effect of, on title of grantee as
against strangers—Adverse possession by strangers as against
Government for sixty years.*

An enfranchisement by Government of a service inam as distinguished from a personal inam confers a new title on the grantee indefeasible not only by the members of his own family but also by strangers even if the latter had held the office and the inam land before then. But it is open to the latter to prove that the land was not inam at all or that they had before the

enfranchisement acquired the land by adverse possession for 60 years as against the Government and thus deprived it of the power to enfranchise it in favour of any one. Case law on the subject discussed; *Lakshminarasimham v. Venkataratnayamma*, (1922) 30 M.L.T., 334, dissented from.

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SECOND APPEALS against the decrees of R. NARASIMHA AYYANGAR, Subordinate Judge of Chingleput, in A.S. Nos. 105 and 106 of 1919 preferred against the decrees of T. SUNDARAM AYYAR, District Munsif of Tiruvallūr, in O.S. Nos. 267 and 282 of 1918.

The facts are given in the Judgment.

L. A. Govindaraghava Ayyar (with *L. S. Veeraraghava Ayyar*) for appellants.

K. Rajah Ayyar for *S. V. Narayana Ayyar* for respondents.

This case coming on for hearing on the 21st day of March 1923 before AYLING and ODGERS, JJ., their Lordships made the following

ORDER :—

AYLING, J.—The subject-matter of these appeals is a certain karnam's inam (plaint item E) which was enfranchised in 1911 in the name of Krishna Sastri (1st appellant in each of the appeals before us). The registered karnam at that time was one Munia Pillai, who had, six years earlier, sold the inam land to Raghava Sastri, son of Krishna Sastri, by Exhibit IV. The enfranchisement in the name of Krishna Sastri was apparently made to save trouble, and to give effect to a clause in Exhibit IV providing for patta being granted in the vendee's name. Apparently Raghava Sastri was really a benamidar for his father (who was village munsif). This explains why Krishna Sastri's name appears in the title-deed.

The suits were brought by the legal representatives of one Duraiswami Mudaliar for recovery and partition

* Second Appeals Nos. 287 and 288 of 1921.

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between them of the said land. It was not denied that the land was originally karnam service inam; but it was alleged that Duraiswami Mudali and his family had acquired title by prescription (no other title seems to be set up) and were entitled to recover.

The lower Courts have found in favour of these contentions and given decrees in plaintiffs-respondents' favour.

The point argued before us by Mr. Govindaraghava Ayyar on behalf of Krishna Sastri and his sons (appellants) is that, in view of the ruling of the Privy Council in *Venkata Jagannadha v. Veerabhadrayya*(1), the grant of the title-deed to Krishna Sastri on enfranchisement must be held to constitute a fresh root of title in the latter, good against all the world, and that the suits should therefore be dismissed.

The lower Appellate Court has found that Krishna Sastri has been in possession since the date of enfranchisement only; and that prior to 1911 possession was with Duraiswami's family for a long time. How long is not stated, but it must be taken to be more than twelve years, so as to confer title as against private persons.

Our decision must practically turn on the effect to be given to the judgment of the Privy Council in *Venkata Jagannadha v. Veerabhadrayya*(1) and we have had a long argument at the bar as to the meaning which their Lordships intended to convey. I have already referred to the view put forward on appellants' behalf. Mr. Rajah Ayyar, who appears for respondents, has argued that the judgment merely deals with the right of the members of the family of the person in whose name the title-deed is issued to claim an interest in the enfranchised property, that it has no application to claim

(1) (1922) I.L.R. 44 Mad., 643 (P.C.).

put forward by outsiders, and that it does not affect the validity of earlier decisions in so far as these relate to claims by outsiders.

I have given the most careful study I can to the terms of the Privy Council judgment and have come to the conclusion that the interpretation sought to be placed on it by appellants' vakil is substantially correct, and not that argued for on behalf of respondents.

Their Lordships make it quite clear that as regards the effect of enfranchisement on title to the property enfranchised, personal inams and service inams stand on a totally different footing. They refer, without disapproval, and as it seems to me with approval, to the decision in *Narayana v. Chengalamma*(1) to the effect that in the case of a palaiyam (personal inam) the title-deed granted at enfranchisement did not confer any new title and that enfranchisement had no larger operation than as a release granted by the Crown in respect of its reversionary interest and of the obligation of rendering service. They then proceed to dissent in the most emphatic terms to the extension of this doctrine to a karnam's service inam; and to the view expressed by BHASHYAM AYYANGAR, J., in *Gunnaiyan v. Kamakchi Ayyar*(2) that the law laid down as to palaiyams

"is law bearing on the enfranchisement of inams, whether they be personal inams or service inams."

Now the view of BHASHYAM AYYANGAR, J., in that case is summarized in these words at page 344:

"In my opinion the enfranchisement of a service inam does not operate as a resumption and fresh grant by Government subject to the payment of a quit-rent, any more than it is so in the case of a personal inam."

This view of BHASHYAM AYYANGAR, J., is expressly adopted by the Full Bench in *Pingala Lakshmipathi v.*

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(1) (1887) I.L.R., 10 Mad., 1.

(2) (1903) I.L.R., 26 Mad., 339.

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Bommireddipalli Chalamayya(1) regarding which their Lordships of the Privy Council state in the most explicit terms:

"Their Lordships are of opinion that the Full Bench was in error."

On the other hand the decisions of an earlier Full Bench in *Venkata v. Rama*(2) and of a Divisional Bench in *Venkataramayya v. Venkataramayya*(3) are quoted with approval (both being dissented from in *Pingala Laksh-mipathi v. Bommireddipalli Chalamayya*(1)).

The former I shall deal with presently; the latter stated in terms:

"The effect of enfranchisement was to free the lands from their inalienable character and to empower the Government to deal with them as they pleased."

This passage is quoted in the Privy Council judgment.

The case in *Venkata v. Rama*(2), also related to a karnam service inam. The post of karnam was held by the defendant at the time of enfranchisement, and the title-deed was issued in his name. The suit was brought by a person who was not in office at the time of enfranchisement, but who was a member of a family hereditarily entitled to preference in appointment, and who, if personally qualified, could have secured the post and the emoluments (prior to enfranchisement) by a suit before the Collector (vide HUTCHINS, J., in his referring judgment at page 251). The defendant on the other hand lost the post of karnam after enfranchisement, another man being preferred to him. Nevertheless the Full Bench held that having been in office at the time of enfranchisement, and having had the title-deed issued in his name, his title could not be

(1) (1907) I.L.R., 30 Mad., 434 (F.B.).

(2) (1885) I.L.R., 8 Mad., 240 (F.B.).

(3) (1892) I.L.R., 15 Mad., 284.

questioned by plaintiff. Unless the decision was based on the footing of a new title conferred at enfranchisement, it is difficult to see how it could be supported and that, I think, was the effect of the judgment of the majority Judges.

Mr. Rajah Ayyar points to the stress which the learned Judges laid on the fact that the appellant was not in office at the time of enfranchisement, and in particular to the concluding paragraph of the judgment of TURNER, C.J.:

"On the ground that the respondent was not the holder of the office when the lands were enfranchised, I must hold that he has failed to show a title to the lands and that his claim is unfounded. If he had established a title, if he had shown that at the time of the enfranchisement of the inam he had been appointed to the office, the Court, would have had jurisdiction to determine whether the enfranchisement in favour of the appellant could be supported. I would reverse the decrees of the Courts below and dismiss the suits with costs."

It is argued that this is incompatible with the view that the issue of the title-deed conferred a new title. I do not think it is. I think what the learned Judges meant was that if plaintiff had been in office at the time of enfranchisement, it would have been open to the Court to consider whether the enfranchisement in favour of defendant was legal or *ultra vires*. This may be so. It is a point not alluded to in the judgment of the Privy Council, but it is unnecessary to say that the claim before us is not such a contention.

I think the judgment of the Privy Council amounts to stating that the grant of a title-deed at enfranchisement of a service inam (unlike the case of a personal inam) does confer a new title, and that, for this reason, it cannot be questioned by other members of his family. They say in the penultimate paragraph of the judgment:

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"When accordingly, on the 21st March 1906, the title-deed already quoted was granted by way of an inam to the appellant's father and was in express words confirmed to him, his representatives and assigns, to hold or dispose of as he or they think proper, the Board is of opinion that that enfranchisement must be given full effect to, and that it is not subject to be eviscerated or altered by the claim for partition or division put forward in the present suit."

I think this carries with it the implication, that it can no more be questioned by persons unconnected either with the office or with the family of the grantee—as are the plaintiffs in these suits (this is subject to one reservation to which I shall presently allude). The grant of a new title which could be questioned by any outsider who had trespassed on the property would be meaningless.

This is as far as one need go for the purpose of the present case. The reservation to which I have referred is this. It would, I conceive, be open to an outsider claiming an enfranchised service inam to show that either that it was not an inam at all liable to resumption or that he had by prescription acquired a title to the property, good, not only as against the service holder, but also against Government, so that Government's power of disposition was lost. This would, of course, involve adverse possession for 60 years.

I may add that I have not deemed it necessary to discuss earlier rulings of this Court or the effect of the various Madras Acts (discussed by BHASHYAM AYYANGAR, J., in *Gunnaiyan v. Kamakchi Ayyar*(1))—all of which must be deemed to have been within the consideration of their Lordships of the Privy Council. As I understand it, our duty is to understand, as well as we can,

and give effect to the authoritative exposition of the law contained in their judgment in *Venkata Jagannadha v. Veerabhadrayya*(1).

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Our attention was drawn to a recent decision of a Bench of this Court not reported in the Indian Law Report series, *Lakshminarasimham v. Venkataratnayamma*(2). From this, in so far as it deals with the bearing of the Privy Council decision on the effect of a title, I must respectfully dissent. I may incidentally remark that the scope and intent of Madras Act VIII of 1869, referred to therein, may be gathered from the preamble. It would appear to be directed to protect the interests of kudivaramdars where the inam consisted only of the melvaram.

The learned vakil for respondents claims the opportunity of showing that he has acquired a complete title by 60 years adverse possession. I would therefore call for a finding from the lower Appellate Court on the following issue:—

Have plaintiffs acquired a title to the suit properties by adverse possession as against Government?

Fresh evidence may be adduced. Finding will be submitted within four months, and seven days will be allowed for filing objections.

ODGERS, J.—The facts are fully set out in the judgment of my learned brother. I deal with the sole question of law raised in the case as to whether the decision of the Privy Council in *Venkata Jagannadha v. Veerabhadrayya*(1), is to the effect that enfranchisement of a karnam service inam founds a new root of title in favour of the person in whose name the inam is enfranchised; or whether it has a restricted application, i.e., it only extends to extinguish the claims of the

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(1) (1921) I.L.R., 44 Mad., 643 (P.C.).

(2) (1922) 30 M.L.T., 334.

(1) (1908) I.L.R., 26 Mad., 389.

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family of such person, and does not apply to the case of a stranger (as in the appeals before us).

There can be no doubt whatever that the decision in *Venkata Jagannadha v. Veerabhadrayya*(1), has effected a change in the law. Referring to the judgment of the Full Bench in *Pingala Lakshmipathi v. Bommireddipalli Chalamayya*(2), reversing the law as laid down in *Venkata v. Rama*(3), their Lordships say :

"this procedure has been of course full of perplexity and that perplexity must now, if possible, be brought to an end." Again their Lordships are of opinion that the Full Bench ruling in *Pingala Lakshmipathi v. Bommireddipalli Chalamayya*(2), approving and adopting the decision in *Gunnaiyan v. Kamakchi Ayyar*(4), was erroneous, that the case of a karnam inam stands on its own footing and that the principles applicable thereto were properly decided in *Venkata v. Rama*(3), by the Full Court.

The law as stated in *Pingala Lakshmipathi v. Bommireddipalli Chalamayya*(2), was that the effect of enfranchisement was not to confer on the persons named in the title-deed any right in derogation of those possessed by other persons in the inam at the time of the enfranchisement. This was a case of a Hindu widow who (as the Full Bench says) could not have been in any view constituted absolute owner by the grant. That the decision in *Venkata v. Rama*(3), is capable of the construction sought to be attached to it by the appellants here is obvious from the remarks of the Full Bench in *Pingala Lakshmipathi v. Bommireddipalli Chalamayya*(2).

"There are undoubtedly observations in the judgments of the learned Chief Justice and of BRANDT, J., which go strongly to support the view that enfranchisement involved a resumption

of the inam by Government and a fresh grant in favour of the persons named in the title-deed."

The decision however finally adopted as correctly stating the law is *Gunnaiyan v. Kamakchi Ayyar*(1). In that case it was held that the enfranchisement of a service inam does not operate as a resumption and fresh grant by Government subject to the payment of a quit-rent, any more than in the case of a personal inam. The enfranchisement of a village service inam stands on the same footing (i.e., as a personal inam) as far as the family in which the village office is hereditary is concerned.

The Privy Council differs from this view and state that the law as to service and private inams is different and that the error in the law here has crept in owing to these distinctions having been confused as it appeared from *Narayana v. Chengalamma*(2). Their Lordships say (page 654) :

"It is accordingly not to be wondered at that when a case of this nature was brought before the Courts, as in *Narayana v. Chengalamma*(2), already referred to, it should have been held that the inam title-deed which had been granted to the palayagar in that case did not confer any new title and that the enfranchisement had no 'larger operation than as release granted by the Crown in respect of its reversionary interest and of the obligation of rendering service.' The decision forms no authority for the same principle being extended to the case of a karnam."

This seems clearly to imply that in the case of a karnam enfranchisement the title-deed would have conferred a new title.

While thus disapproving the decisions in *Pingala Lakshmipathi v. Bommireddipalli Chalamayya*(3), and *Gunnaiyan v. Kamakchi Ayyar*(1), the Privy Council approve that in *Venkata v. Rama*(4).

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(1) (1921) I.L.R., 44 Mad., 643 (P.C.). (2) (1907) I.L.R., 30 Mad., 434 (F.B.).
(3) (1885) I.L.R., 8 Mad., 240 (F.B.). (4) (1903) I.L.R., 26 Mad., 389.

(1) (1903) I.L.R., 26 Mad., 339. (2) (1887) I.L.R., 10 Mad., 1.
(3) (1907) I.L.R., 30 Mad., 434 (F.B.). (4) (1885) I.L.R., 8 Mad., 240 (F.B.).

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"In the opinion of the Board the law of Madras was thus soundly stated (by COLLINS, C.J., and MUTTUSWAMI AYYAR, J.) and that judgment should not have been disturbed."

The facts of *Venkata v. Rama*(1), are set out in the referring judgment of HUTCHINS, J. Plaintiff's adoptive father held the karnam office, and died in 1870 when plaintiff was a minor. The defendant-appellant was appointed karnam in 1877 and a year or two later the lands were enfranchised in his name as the person at the time in possession. He had no hereditary claim and was therefore a stranger to the family in which the office ordinarily ran. The plaintiff brought a suit to recover the lands which plaintiff alleged belonged to his ancestors as karnam's inam. The plaintiff's claim was decreed by the Munsif and confirmed by the District Judge. On the appeal to this Court by the defendant the decrees below were reversed.

TURNER, C.J., after discussing the regulations as to the mode of selection, disqualification, etc., of holders of such offices says :

"It may be that in some instances the land is not the emolument of the office, but a reduction of the assessment. In such a case the Government could not resume the land, but only deal with the assessment. But in the case before us the orders of the Revenue authorities show that the lands are and were attached to the office and though the respondent's father may have improperly obtained possession of them, the Government was at liberty to resume them and to confer them on the office-holder, and it did so confer them on the appellant through the Collector in 1877."

The learned Chief Justice holds that respondent had failed to show title as he was not the holder of the office when the lands were enfranchised. If he could have shown that at the time of enfranchisement he had been appointed to the office, the Court could have determined whether the enfranchisement in favour of

(1) (1885) I.L.R., 8 Mad., 249 (F.B.).

the appellant could be supported. These observations are not referred to by the Privy Council and in my opinion afford no ground for the suggestion that the only effect of enfranchisement is to bar the claims of the family.

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From MUTTUSWAMI AYYAR, J.'s judgment it is clear that the contention for the appellant was (page 265) that the title-deed gave him a valid title to the land. The following passage of MUTTUSWAMI AYYAR, J.'s judgment was quoted with approval by the Privy Council (page 267) :

"According to the law, therefore, as it stood prior to the enfranchisement of the inam, a right to the land could only be legally acquired through the right to the possession of the office, and neither the respondent's father nor the respondent had then any vested interest in the office to sustain an action in the nature of an ejectment."

Also in the judgment of BRANDT, J., the following passage may be quoted :—

"I think it may be taken that such lands were enfranchised in favour, not of the family generally, but of the office-holder for the time being, in which case they would presumably descend not to all the members of the family, but to the branch or heirs of the person in whose favour it was enfranchised."

The decision in *Venkatarayadu v. Venkataramayya*(1), was quoted and approved by the Privy Council.

"The effect" said COLLINS, C.J., in that case "of enfranchisement was to free the lands from their inalienable character and empower the Government to deal with them as they pleased."

In *Dharanipragada Durgamma v. Kadambari Virazu*(2), the Court said of the Full Bench in *Venkata v. Rama*(3), (page 48)

"that decision proceeded on the broad ground that the plaintiff did not hold the office of karnam at the time of the

(1) (1892) I.L.R., 15 Mad., 284.

(2) (1898) I.L.R., 21 Mad., 47.

(3) (1885) I.L.R., 8 Mad., 249 (F.B.).

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enfranchisement and, therefore, had no title to sue for the lands and that the land when enfranchised was at the disposal of Government and alienable to whomsoever the Government pleased. It regarded the inam title deed as evidence of the grant of the land personally to the grantee, and that was the view followed in the case on which the Subordinate Judge relies, *Venkatarayadu v. Venkataramayya*(1).

So also *Subbaraya Mudali v. Kanna Cheltti*(2); the right of a widow of a deceased manyam service holder was held after enfranchisement (after his death) to confer a right not limited to that of a widow's estate.

This decision is also quoted with approval by the Privy Council, their Lordships saying that it was expressly decided as following the Full Bench decision in *Venkata v. Rama*(3).

As against this line of decisions, Mr. Raja Ayyar contends that on the Madras Acts, IV of 1862, IV of 1866 and VIII of 1869 the only effect of enfranchisement is to remove the service obligation. Act IV of 1866, preamble, states that certain inams have been enfranchised from the condition of service and placed in same position as other descriptions of landed property in regard to their future succession and transmission and by section 2 the title-deed is to be sufficient proof of enfranchisement.

Act IV of 1862 is to the same effect.

Act VIII of 1869 lays down that nothing in the inam deed is to destroy the rights of any description of holders or occupiers of land from which any inam is derived or drawn or affect the interests of any person other than the inam holder. By the preamble the doubt removed is limited to cases where the inam holders do not possess the proprietary right in the soil but only the right of receiving the rent or tax payable

(1) (1892) I.L.R., 15 Mad., 284.

(2) (1900) I.L.R., 23 Mad., 47.

(3) (1885) I.L.R., 8 Mad., 249 (F.B.).

to Government, etc. This seems to me to point to the well-known distinction vested on the owners of the melwaram and kudivaram. None of the Acts appear to me to help the respondent in his contention

There is however a case of this Court *Lakshmi-narasimham v. Venkataratnayamma*(1), wherein it was held by SPENCER, J., on the authority of Act VIII of 1869 that no independent title is created by a grant of title-deeds and that no title arises from the title-deed that was not already inherent in plaintiff or her husband. RAMESAM, J., held that *Venkata Jagannadha v. Veerabhadrayya*(2), did not apply to a case of conflict between the title of an office-holder and that of a person other than an office-holder claiming on the ground that he was named in the title-deed, as the title-deed in that case was issued to the office-holder.

It appears to me from the result of my examination of *Venkata Jagannadha v. Veerabhadrayya*(2), and of *Venkata v. Rama*(3), that the Privy Council judgment went further than that. There are the clear words of COLLINS, C.J., in *Venkatarayadu v. Venkataramayya*(4), as approved by the Privy Council and also in my opinion the inferences to be drawn from the Privy Council judgment itself indicated above to the effect that enfranchisement does confer a title like any other deed of conveyance on the person to whom it is granted, and it is not necessarily confined to grants to persons either holding the office at the time of enfranchisement or those claiming the right to do so; though ordinarily no doubt as the land follows the office, the title would be conferred on the office-holder at the time of enfranchisement; with respect therefore I am unable to concur in the narrow construction placed on the Privy

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(1) (1922) 30 M.L.T., 334.

(2) (1921) I.L.R., 44 Mad., 643 (P.C.).

(3) (1885) I.L.R., 8 Mad., 249 (F.B.).

(4) (1892) I.L.R., 15 Mad., 284.

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Council judgment in *Lakshminarasimham v. Venkataratnayamma*(1). I think their Lordships of the Privy Council meant to lay down a broad general principle and as will be seen from the extracts quoted, their language was by no means limited to the facts of the actual case before them.

I may also add that in my view the decision in *Lakshminarasimham v. Venkataratnayamma*(1) as to the effect of Madras Act VIII of 1869 is for the reasons stated by me erroneous.

I therefore think that the point contended by Mr. Govindaraghava Ayyar for appellants must succeed.

I agree with the order proposed by my learned brother.

In compliance with the order contained in the above judgment the Subordinate Judge of Chingleput submitted the following

FINDING :—

8. Thus on a consideration of the material evidence and the general probabilities, I am of opinion that the plaintiffs and their ancestors had been in possession and enjoyment of the lands for over sixty years prior to 1911 and that such possession not being shown to be permissive was adverse to the Government and the office holder. I accordingly find on the issue remitted that plaintiffs acquired a title to the plaint properties by adverse possession as against the Government.

These second appeals coming on for final hearing after the return of the finding of the lower Appellate Court, the Court (PHILLIPS and ODGERS, JJ.) delivered on the 29th day of October 1924, the following

JUDGMENT :—

The Subordinate Judge has found that plaintiffs were in possession of the suit lands for more than 60

(1) (1922) 30 M.L.T., 384.

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years before 1911, but objection is taken by appellants that there is no evidence to support this finding. The Subordinate Judge relies on oral statements of witnesses that plaintiffs' family were in possession for a very long period, but except for the statement of plaintiffs' witness No. 1 that his family was in possession for 150 years, a fact which is certainly not within his personal knowledge, there is no evidence which fixes the date of possession as early as 1851, and this is essential in order to prove adverse possession for 60 years. It is not sufficient to prove possession for a long period but, as pointed out by the Privy Council in *Secretary of State for India v. Chellikani Rama Rao*(1) possession for the whole period of 60 years must be affirmatively proved. In the present case there is no such evidence, but only evidence of long possession which the Subordinate Judge has held to be for over 60 years on the general probabilities. This he is not justified in doing and we cannot therefore accept his finding. The burden of proof was on plaintiffs' and they have failed to discharge it.

The appeals must therefore be allowed and the suits dismissed with costs throughout, including the costs of the guardian of the 6th respondent in both second appeals.

These second appeals coming on for orders this 19th day of December 1924 on account of the 5th respondent not being served with notice, the Court delivered the following

JUDGMENT :—

The 5th respondent is given up. The second appeals are dismissed as against her.

N.R.

(1) (1916) I.L.R., 39 Mad., 617 (P.C.).

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice
Venkatasubba Rao.

1925,
January 21,

KELU NAIR (PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA (DEFENDANT),
RESPONDENT.*

Ryotwari settlement for thirty years—Enhancement during thirty years, validity of—Section 58, Revenue Recovery Act (Madras Act II of 1864), whether a bar to a suit.

A notification by which the Government makes a settlement of certain ryotwari lands for 30 years fixing for that period the revenue payable by such lands at a certain rate is an engagement with the owners of such lands binding on the Government. The Government is not entitled to enhance such rate during the 30 years. *Prasad Row v. The Secretary of State for India*, (1917) I.L.R., 40 Mad., 886 (P.C.) and *Secretary of State for India v. Ramanujachariar* (1925) I.L.R., 48 Mad., 282 followed. Section 58 of the Revenue Recovery Act is no bar to a suit for a refund of the enhanced revenue paid.

SECOND APPEAL against the decree of K. GOPALAN NAYAR, Subordinate Judge of South Kanara, in Appeal Suit No. 215 of 1921 preferred against the decree of R. BALASUBRAHMANYA AYYAR, Additional District Munsif of Kasaragod, in Original Suit No. 204 of 1920 (O.S. No. 927 of 1919 on the file of the Court of the Principal District Munsif of Kasaragod).

C. V. Anantakrishna Ayyar, for appellant.

Advocate-General (T. R. Venkatarama Sastri) for respondent.

JUDGMENT:—

RAMESAM, J.

RAMESAM, J.—The facts of this Second Appeal are stated by my learned brother whose Judgment I had the advantage of perusing.

* Second Appeal No. 1586 of 1922.

If the question before us is what is the proper rate of assessment on the suit land, we are precluded from entering upon its consideration by section 58 of the Revenue Recovery Act. The civil courts have no jurisdiction to do the work of the Settlement Department, whether that department has come to a correct or incorrect conclusion in respect of a particular plot of land. In my opinion this is the proper scope of section 58. But when the question before us is whether, Government, having entered into a binding engagement, by which the assessment is fixed at a certain rate for a certain period, can alter the rate during that period, to say that section 58 is a bar to our consideration of the question is to say that the section enables the Government to avoid the binding nature of contracts relating to revenue. I do not think the words “any question as to the rate of land revenue payable to Government” were intended to support such a contention.

This leads me to the question—whether there is any binding engagement on the part of the Government. On this point, I see no reason to differ from my learned brother's conclusion, viz., that the notification of the Government, dated 6th November 1902, supplemented by the Government Order, dated 17th April 1903, as understood in the light of declarations of Government Policy, amount to a grant of rights to the ryotwari holders in the district of South Kanara for a period of thirty years. Though there are facts in *Secretary of State for India v. Ramanujachariar* (1), which distinguish that case from the present, it supports our conclusion to this extent.

On the question of limitation, it is true that I have always felt some difficulty in following the reasoning

(1) (1925) I L.R., 48 Mad., 282.

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in *Srinivasa Ayyangar v. Secretary of State* (1). After the recent amendment of the Limitation Act, the matter is not of practical importance. I am therefore content to follow that decision. I agree with the order proposed by my learned brother.

VENKATA-
SUBBA
RAO, J.

VENKATASUBBA RAO, J.—The question of law that has been raised in this Second Appeal is, can Government revise and enhance the land tax during the currency of the 30 years' period of the Settlement contrary to the notification introducing such settlement?

The facts of the case may be shortly set forth. The plaintiff sues for a declaration that the assessment imposed by the Government on the suit kumris at the rate of eight annas per acre was illegal and that the Government could levy the tax only at two annas fixed at the time of the settlement. The kumris in question were 165 and odd acres in extent and the plaintiff claims the recovery of Rs. 493-3-0 being the amount collected in excess of what was actually due. The lands are situate in Kasaragod taluk of the South Kanara district and the Government published on the 6th November 1902 in the District Gazette a notification of the introduction of a new settlement. The notification begins with the statement that the Government had sanctioned the scheme for the revision of the land assessment of the South Kanara district and proceeds to say that the new rates will take effect from fasli 1312 corresponding to July 1902. Then follows the definition and classification of lands and sanctioned rates are set forth along with the data for the calculation. Paragraph 20 is material.

"The settlement will be for a period of thirty years, during which period no extra charge will be made on 'dry' converted into 'wet' or 'garden' or on 'wet' converted

into 'garden' or on 'single' crop wet land converted into "double" crop wet. Unoccupied land will be assessed according to the existing classification when cultivated or brought under occupation. At the end of the settlement period the Government reserve the right to introduce such changes in the classification and assessment of 'wet', 'dry' and 'garden' lands as may then seem proper."

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Kumri lands were by the notification excepted from the settlement and regarding them it was said that separate orders would be issued later. See paragraph 13.

Accordingly a Government Order, dated the 17th of April 1903, was issued approving of a notification fixing a rate of two annas per acre in respect of suit lands. This Government Order is recited in the proceedings of the Board of Revenue, dated 27th April 1903. A patta was issued to the plaintiff (appellant) in respect of certain lands and the kumris in question were then treated as Government kumris and omitted from the patta granted to him. On the 27th of May 1906 he presented a petition to the Collector of South Kanara asking that the said land might be included in his patta but an order was made to the effect that his claim would be disposed of under the dharkast rules. Thereupon, the plaintiff filed two suits against the Secretary of State for India, O.S. No. 352 of 1911 and O.S. No. 3 of 1913 in the District Munsif's Court of Kasaragod asking for a declaration that he was the owner of the kumris in question and that he was entitled to get a patta for them and these suits were ultimately disposed of in his favour. In respect of a portion of these lands, he got a declaration from the District Court of South Kanara in the following terms:—

"There will be a declaration that the plaintiff is the absolute owner and proprietor of the marginally-noted plots falling within the plaint boundaries, and that as such he is entitled to get a patta for the same subject to the payment of the Sovereign's

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share of the produce as assessment and there will be a permanent injunction restraining the defendant from interfering with his lawful possession and enjoyment of these properties."

In respect of the remainder of the lands, he got a similar declaration from the High Court. After the plaintiff was thus declared to be the absolute owner of the kumris the Government issued to him a patta charging an enhanced rate of assessment, namely, eight annas per acre, although the rate fixed in the notification was two annas per acre. The plaintiff first sought redress from the Collector of South Kanara (see Exhibit K) then from the Board of Revenue (See Exhibit M) and then from the Government but met with no success. Thereupon, the present suit was filed. The Government's defence was twofold. First, they denied that the plaintiff was the owner of the kumris in question, secondly, they pleaded that civil courts had no jurisdiction to decide questions relating to rates of assessment and relied on section 5S of the Madras Revenue Recovery Act II of 1864. They generally controverted the position that the Government had no right to vary the rates of assessment during the currency of the settlement period. The first defence in view of the result of the litigation that preceded the suit, is obviously frivolous and was summarily rejected both by the District Munsif and the Subordinate Judge. In regard to the second plea, it must be said that the authority on the point is scanty and the question must be determined mainly with reference to general principles. It is now established that the proprietorship of the ryotwari holder in his holding is subject to the prerogative which the Crown has according to the common law of India of imposing by an executive act, assessment on land and varying it from time to time. The right of the Government to assess land to land revenue and to vary it is not a right created or conferred by any

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Statute but as stated above, the Crown possesses the prerogative of exacting from a subject holding arable land, its share of the produce or the equivalent of such produce. See observations of BHASYAM AYYANGAR, J., in *Bell v. The Municipal Commissioners for the City of Madras* (1) and *Madathapu Ramaya v. The Secretary of State for India* (2) and of SUBRAHMANYA AYYAR, J., in *Madathapu Ramaya v. The Secretary of State for India* (3).

In the actual exercise of the prerogative of the Crown above referred to, the Crown is not supposed to proceed without any regard to definite and well-established principles, such as, that the Crown is not entitled to more than a fixed share of the produce; see SUBRAHMANYA AYYAR, J., in *Madathapu Ramaya v. The Secretary of State for India* (3). The learned Judge also refers to another well-established principle, namely, that the usual settlement period is thirty years. (See *Madathapu Ramaya v. The Secretary of State for India* (3). This feature of ryotwari settlement is referred to over and over again in judgments of the Judicial Committee and of the High Court and in works of authority.

In *Sankarvadivelu Pillai v. The Secretary of State for India in Council* (4) SUBRAHMANYA AYYAR, J., refers to the incident.

In Maclean's Manual of the Administration of the Madras Presidency, Vol. I, the following passage occurs at page 110 :—

"The term of the Madras ryotwari settlement is according to the present intentions of Government 30 years from the date of completion of each particular local settlement at the end of which time not only the commutation money rates but the grain

(1) (1902) I.L.R., 25 Mad., 457 at 482. (2) (1904) I.L.R., 27 Mad., 388 at 395.
(3) (1904) I.L.R., 27 Mad., 388 at 398. (4) (1905) I.L.R., 28 Mad., 72 at 80.

KELU NAIR values themselves now assigned to the land are liable to revision."

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Again at page 121 :—

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"The most important item in the yearly demand, namely, the normal land tax, is fixed in advance and is liable to revision according to present arrangements only once in every thirty years from time of first settlement."

Baden Powell in Vol. III of his Land Tenures at page 75 says :—

"The duration of settlement is thirty years. During that period neither the grain values nor the commutation prices are altered."

The Board's Standing Order on the subject runs thus :—

"At each settlement or re-settlement of a district, Government will fix at their discretion the period for which such settlement or re-settlement shall be in force. The Collector shall then notify the period in the District Gazette and explain to the ryots that the new rates will not be liable to alteration during the currency of the settlement period."

Referring to ryotwari settlements, their Lordships of the Judicial Committee observe in *Prasad Rao v. The Secretary of State for India*(1) :—

"It has, however, long been the practice on Government estates to make periodical settlements with the ryots whereby the Government's share in the produce is commuted for a fixed annual payment in assessing which the wet lands are separately classified. The annual payment is incapable of increase during the period for which the settlement is made."

I have shown that the notification in question contains a definite undertaking that the rate fixed will not be varied during the thirty-year period of the settlement. From the Standing Order referred to above, it is clear that not only was this notification published in the District Gazette but that its clauses were explained by the Collector to the ryots in the taluk.

(1) (1917) I.L.R., 40 Mad., 886 (P.C.).

The reason for imposing a higher rate appears extremely curious. The Government have discreetly refrained from referring to it in their statement. The plaintiff has discovered that a notification, dated 26th January 1913, was published in the District Gazette over the signature of the Revenue Divisional officer, to the effect that the kumri areas, to which claims may be established in Courts of law may be assessed at the full dry rates instead of the kumri rates. The action is thus intended to penalize persons who challenge in Courts of law the Government's decision in regard to the ownership of the land. The Government having wrongfully denied the plaintiff's title, seek to take advantage of their own wrong and to render nugatory the decision of the Court by imposing an arbitrary rate and thus treating the land contrary to the finding, as land belonging to them and at their absolute disposal. That the act of the Government in going back upon their promise is impolitic, oppressive and indefensible can scarcely be denied. It is opposed to repeated declarations of the Government and accepted notions of established usage. The act constitutes a clear breach of faith. The question, however, remains, is the claim of the Government not merely unjust but also illegal and can Courts of law deal with the question and protect the aggrieved party? In *Prasad Rao v. Secretary of State for India*(1) the case referred to above, their Lordships of the Judicial Committee held that the Government could not impose upon a zamindar a cess, for the use of water, the right to use which was appurtenant to the land in respect of which the jama was payable, without increasing the amount of the jama and thus committing a breach of the obligation

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undertaken at the time of the permanent settlement. The Irrigation Cess Act conferred on the Government a right to levy a water-cess and purporting to act under this Act, the Government levied the cess in question. Independent of, and apart from, the Act the Government did not claim any such right, but the Government contended that the settlement with the zamindar did not amount to an engagement within the meaning of the Act and in the absence of it they could exercise the right conferred by the statute. The question in the present case is, is there any such engagement between the Government on the one hand and the ryotwari holders on the other? If there is, the Government's action is illegal, for they do not rely upon any statute in their favour. The observations of their Lordships in this case referring to ryotwari tenure were in a sense obiter, but they are entitled to great weight as an argument based on them was used to support the conclusion at which they arrived with reference to the position of the zamindar which was then directly under consideration.

This case was treated by a bench of this Court as an authority for the position that the assessment is incapable of increase in regard to ryotwari tenures during the period for which the settlement is made, *Secretary of State for India v. Ramanuja Chariar*(1). Incidentally, I may mention that this is the only direct ruling on the point.

On a construction of the notification, I am clearly of the opinion that it amounts to a grant in favour of the ryotwari holders of the taluk. The State was possessed of the right, I shall assume, of levying any assessment it pleased. By the notification it gives up the right to

levy any tax over and above that fixed at the settlement. Its right was indefinite. It was at liberty to fix a high or a low rate. By the notification the right which was indefinite was made definite and whatever right it possessed to fix a rate in excess of what was actually fixed, it released in favour of the ryotwari holders. In other words, assuming that the Government had a right to a share of the produce above what was fixed at the settlement, that right was by the notification, granted by virtue of the settlement, to the holders of the lands. The act of the Government might be described as a release, grant or an engagement, but by whatever word it may be described, the clear effect is that the Government irrevocably undertook not to enhance the assessment during the currency of the settlement.

I have not the slightest doubt that their Lordships of the Judicial Committee in *Prasad Rao v. The Secretary of State for India*(1) understood the position in this sense when they observed, dealing with the ryotwari holders, that the annual payment was incapable of increase during the period for which the settlement was made.

There thus being a grant or release in favour of ryotwari holders, section 58 of the Revenue Recovery Act cannot oust the jurisdiction of the Civil Courts. Section 58 runs thus:—

“No Court of Civil Judicature shall have authority to take into consideration or decide any question as to the rate of land revenue payable to Government or as to the amount of assessment fixed or to be hereafter fixed on the portions of a divided estate.”

The Courts are prohibited from deciding any question as to the rate of revenue or as to the amount of assessment. But they have full jurisdiction to decide whether or not the land or person is at all under liability

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(1) (1925) I.L.R., 48 Mad., 282.

(1) (1917) I.L.R., 40 Mad., 886 (P.C.).

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to be assessed to land revenue. See *Madathapu Ramaya v. The Secretary of State for India*(1). Similarly if there is a binding engagement or a grant or a release, the section does not deprive the Civil Courts of their undoubted jurisdiction to give effect to and enforce its terms. Section 58 therefore is not a bar to the action. As SUBRAHMANYA AYYAR, J., points out in *Madathapu Ramaya v. The Secretary of State for India*(2), although the prerogative of the Crown is to be exercised in accordance with definite and well-established principles, section 58 has been enacted in order to save the Crown from litigation to which but for such a provision it would be exposed, that is to say, the Crown cannot be compelled by Courts of law to act in accordance with those principles, however well settled they may be. The question assumes an entirely different aspect when the matter passes out of the region of ethics and State policy into the domain of law. When the obligations of the State have taken the form of an arrangement which Courts can recognize, the bar of section 58 ceases to have operation.

In my opinion, therefore, the plaintiff is entitled to the declaration that the defendant cannot collect more than two annas per acre in respect of the kumris which are the subject of this suit.

There remains only the question of the recovery of the amounts actually paid. The appellant's learned vakil concedes that the payments made in 1918 are barred by limitation.

In regard to payments of 1919, it is sufficient to say that I am willing to follow *Srinivasa Aiyangar v. The Secretary of State*(3), where it was held that the period

(1) (1904) I.L.R., 27 Mad., 386 at 391 and 386.
(2) (1904) I.L.R., 27 Mad., 386 at 389. (3) (1915) I.L.R., 38 Mad., 92.

of two months (the period of notice) should be deducted in computing limitation. If this period is deducted all the payments of 1919 are in time and the plaintiff will be entitled to a decree to that extent. In the result, the decree of the lower Appellate Court is set aside and the plaintiff's suit is decreed with full costs here and in the Courts below to the extent indicated above.

N.R.

APPELLATE CIVIL.

*Before Sir Murray Coutts Trotter, Chief Justice and
Mr. Justice Krishnan.*

LANKA TULASAMMA (PLAINTIFF), APPELLANT,

v.

GUNTUPALLI VENKATASUBBAYYA AND OTHERS
(DEFENDANTS), RESPONDENTS.*

Hindu Law—Widow—Suit to recover possession of her husband's property—Defendant mixing up his own funds with those of the propositus—Burden of proof as to property belonging to the plaintiff's husband or to defendant—Rule as to Trustee mixing up trust funds with private funds.

Where a trustee, or a person who puts himself in the same position of accountability as a trustee, such as an executor *de son tort* by virtue of his intermeddling with the estate of another, is proved to have amalgamated monies of the testator with his own, and especially if he can be reasonably suspected of having destroyed the evidence which would otherwise be available to separate the two estates, on a suit being instituted by the beneficiary to recover the property from the intermeddler alleging that the property formed part of the estate, the burden of proof is on the intermeddler to show that the property did not belong to the plaintiff's estate but to himself.

* Appeal No. 205 of 1921.

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Lupton v. White, (1808) 15 Ves., 432, applied; *Magaluri Garudiah v. Narayana Rangiah*, (1881) I.L.R., 3 Mad., 359, referred to.

This principle applies to a case where a Hindu widow sued to recover properties alleged to belong to her husband's estate from his son-in-law, who had intermeddled in the management of the properties after her husband's death.

APPEAL against the decree of K. SUNDARAM CHETTIYAR, Additional Subordinate Judge of Guntūr, in Original Suit No. 40 of 1918.

The plaintiff sued, as the widow of one Lanka Narasayya, to recover the properties of her late husband which were taken possession of by the first defendant who was his son-in-law and husband of the second defendant, who was the daughter of the late Narasayya by his first wife. The first defendant had, after Narasayya's death, been in management of his estate on behalf of the plaintiff and in the course of his management had collected outstandings belonging to Narasayya and had got renewals of his pro-notes, bonds, etc., in his own name, and had mixed up his own funds with those of Narasayya. He latterly set up title to them as his illattom son-in-law, and instituted a suit for a declaration of his title as illattom son-in-law of the late Narasayya and therefore entitled to all his properties. The plaintiff consequently brought this suit against him, his wife and his three minor sons, to recover her husband's properties in their hands. The two suits were tried together; the former suit was dismissed, while the widow's suit was decreed in her favour, but some of the items claimed by her were disallowed by the Sub-Judge on the ground that the widow had not proved that those items had belonged to her husband's estate; the widow preferred this appeal.

A. Krishnaswami Ayyar and K. Kameswara Rao for appellant.—The first defendant is in the position of a

trustee *de son tort*. He admittedly mixed up Narasayya's funds with his own. In such a case the burden of proof is on the accounting party to show that the items were his sole property. See *Magaluri Garudiah v. Narayana Rangiah*(1), *Burugapalli Sriramulu v. Nandigam Subbarayudu*(2), *Lupton v. White*(3). Lewin on Trusts, page 332.

T. V. Venkatarama Ayyar and V. Suryanarayana for respondents.—The first defendant is not in the position of a trustee. He was not in a fiduciary relation to the plaintiff. The first defendant had considerable property of his own. The plaintiff should prove that any property which she claims formed part of her husband's estate, and in the absence of specific proof in respect of any specific item, her claim must be dismissed. The plaintiff must first show that the funds belonging to her husband's estate came into the hands of the first defendant, then alone the latter will have to account for such funds and to prove that the items in question were his own property.

COUTTS TROTTER, C.J.—The question that arises in this appeal is that raised by the twelfth paragraph of the Memorandum of Appeal. This was a suit brought by Narasayya's widow to reclaim certain properties and chooses in action as being part of her husband's estate, though actually in the hands of the defendant, the plaintiff in the adoption suit. The son-in-law, to use a term that will cover him in both the suits, has admitted at page 322 of the record that he adopted a course of business which resulted in his mixing up monies which he contends are his own with monies which in some cases he himself says are, and in other cases which are alleged by the other side

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(1) (1881) I.L.R., 3 Mad., 359.

(2) (1911) 10 M.L.T., 313.

(3) (1808) 15 Ves., 432.

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to be, monies belonging to the estate of Narasayya. It also appears from page 316 of the record that there are the gravest reasons to suspect, as the learned Judge suspected, that the son-in-law after the death of his father-in-law had suppressed documentary evidence in the shape of account books which might have thrown light upon the question to whose estate these various suggested items in the account belonged.

The learned Judge appears not to have had his attention drawn to the authorities applicable to a case of this nature. He took the view that the plaintiff having claimed certain specific items of property was bound to give evidence with regard to each item sufficient to make a *prima facie* case that the particular item belonged to the estate of her deceased husband. As we understand the authorities, that is not the law. The law appears to be this, and it has been settled by a long chain of authorities both in England and in this country; where a trustee, or a person who puts himself in the same position of accountability as a trustee, such as an executor *de son tort*, by virtue of his intermeddling with the estate, is proved to have amalgamated monies of the testator with his own and especially if he can reasonably be suspected of having destroyed the evidence which would otherwise be available to separate the two estates, then he is called upon to account for all sums that he alleges to be his own and to prove his ownership in them. That was laid down in the leading case of *Lupton v. White*(1) and the head-note is this: "Agent, or Bailiff confounding his principal's property with his own, charged with the whole except what he can prove to be his own; and, in this instance, the case of a breach of the terms upon which the Court dissolved an injunction, the inquiry was directed with costs." That is clear

(1) (1808) 15 Ves., 482.

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authority for the proposition that, where there has been such an amalgamation, the burden will be passed from the person in the position of a *cestui que trust*. That has been consistently followed in the English Courts of Equity, and a comparatively recent application of it will be found in the case of *In re Outway; Hertslet v. Outway*(1), and the doctrine is by no means unknown to India. It was followed in two cases in this Court which have been cited to us—*Magaluri Garudiah v. Narayana Rungiah*(2) a decision of Sir CHARLES TURNER, C.J. and MUTHUSWAMI AYYAR, J. and more recently in a case decided by BENSON and SUNDARA AYYAR, JJ., *Burugapalli Sriramulu v. Nandigam Subbarayudu and others*(3). In those cases the principle laid down by Lord ELDON has been fully recognized and acted upon, viz., that the onus of proof clearly rests on the person responsible for confounding the two funds and thereby rendering identification difficult on the plaintiff's part.

We therefore think that this case must be referred back for a finding in accordance with the view of the law that we have laid down, namely, that this man must prove that all the items enumerated in paragraph 16, sub-paragraph 4 of the judgment belong to himself, the burden being on him. There is general evidence to lead to a very strong suspicion that he has got into his hands some considerable portion of the deceased man's estate. There is evidence that it was a large estate at one time, and there is evidence that just a few years before his death it amounted to Rs. 40,000. And there are available sources of evidence which are not before us but can be resorted to by the learned Judge in the Court below as to how much of that estate is now left in the hands of

(1) (1903) 2 Ch., 356.

(2) (1881) I.L.R., 3 Mad., 359.

(3) (1911) 10 M.L.T., 313.

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the widow. If there is a deficit after taking into account the sums of money recovered by the receiver, then the burden will lie upon the defendant. The general principle is clear that this man must show that those items which he alleges to be his own monies belong to him. It is no great hardship in this case, because the debts are mostly evidenced by promissory-notes and it cannot be very difficult if his case is a true one to rebut the presumption that they are really notes taken by him in respect of monies due to Narasayya's estate, by proving that he himself lent the money at a particular date, that it was his own money and that the negotiable security was given to him to secure a debt due to himself and to nobody else. The case must go back for a finding with regard to those items with the onus of proving that they are his cast upon the defendant. Both parties can adduce fresh evidence. Finding will be returned in three months. Ten days will be allowed for objections.

KRISHNAN, J. KRISHNAN, J.—I agree.

K.R.

APPELLATE CIVIL—SPECIAL BENCH.

*Sir Murray Coutts Trotter, Chief Justice, and
Mr. Justice Krishnan.*

1925,
February 5.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
REFERRING OFFICER,

v.

THILLAI CHIDAMBARAM NADAR, ASSESSEE.*

*Secs. 23 (2) and 63 (2) of Income-tax Act (XI of 1922)—
Unregistered firm—Service of notice under the Act on one
member of the firm, sufficient service on the firm.*

By virtue of section 63 (2) of the Income-tax Act (XI of 1922) an unregistered firm is validly served with notice

* Referred Case No. 19 of 1924.

mentioned in section 23 (2) of that Act, if it is served on any member of that firm.

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CASE stated under section 66 (2) of the Income-tax Act, 1922 (Act XI of 1922) referring for the decision of the High Court, the question of law, viz., "Whether in the case of an unregistered firm, a notice under section 23 (2) should be served only on the member of the firm who made the return under section 22 (2) or whether under section 63 (2) of the Indian Income-tax Act (Act XI of 1922) it can be served upon any member of the firm."

The facts and arguments are given in the judgment.

M. Patanjali Sastri for Referring Officer.

F. S. Vaz for the assessee.

JUDGMENT:—

COUTTS TROTTER, C.J.—It was with the greatest difficulty that I could extract a question of law of any sort in this case; but, if there is any, I suppose it is this whether under section 23 (2) of the Income-tax Act "the person who made the return" in the case of a firm means the identical person who made the original return. Common sense would indicate that the only requisite is that the firm who made the return should, as a firm, have the notice properly delivered to them. That is a matter of general law and it is obviously a question of fact in most cases whether the notice was such as to reach the legal entity known as the firm. Here it was addressed to one of the partners and by the ordinary law and the specific provision of section 63 (2) of this very Act each partner is an agent for all the others in the firm. The question must be answered in this way. The assessee must pay the costs of this reference, Rs. 150 (Rupees one hundred and fifty).

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TROTTER, C.J.

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KRISHNAN, J.—I agree to the answer proposed by the learned Chief Justice. The question put to us by the referring authority is whether in the case of an unregistered firm a notice under section 23 (2) of the Income-tax Act should be served only on the member of the firm who made the return or whether under section 63 (2) of the Act it can be served on any member of the firm. There can be no doubt about the answer and it must be in the affirmative. Notice can be served on any member as provided for in section 63 (2) and such service is good service. The word "person" as pointed out by the referring officer, clearly includes a firm as provided by the General Clauses Act, 1897, and when the return is made on behalf of the firm by a partner, it is the firm that is the person who makes the return and any proper service on the firm as authorized by section 63 (2) will be a proper service.

I agree to the order proposed as to costs.

N.B.

PRIVY COUNCIL.*

SURA LAKSHMIAH CHETTY AND OTHERS (DEFENDANTS),
APPELLANTS,

1925,
May 22.

v.

KOTHANDARAMA PILLAI (PLAINTIFF), RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
MADRAS.]

Benami transaction—Purchase in name of wife—Alleged antenuptial agreement—Alleged oral agreement—Absence of corroborating evidence in writing.

When it is alleged that a purchase of property in India by an Indian, out of his own money but in the name of his wife, was made in pursuance of an antenuptial agreement, and that consequently it is not to be regarded as a benami transaction by which the beneficial interest vested in the husband, the alleged antenuptial agreement, if oral, must be proved by the clearest and most satisfactory evidence of credible witnesses; it would be unwise to act upon oral evidence unless there was contemporaneous written evidence to corroborate it.

APPEAL (No. 8 of 1924) from a decree (August 15, 1921) of the High Court in its appellate jurisdiction reversing a decree (August 31, 1920) of the same Court in its original civil jurisdiction.

The appeal related to the ownership of two houses in Madras which in 1909 had been purchased by one Chockalingam, the father of the respondent, in the name of his wife Lakshmi Ammal. Chockalingam had been declared an insolvent and his property vested in the Official Assignee.

The suit was brought on behalf of the respondent, a minor, against the Official Assignee and creditors of Chockalingam, it being claimed by the plaint that the houses were the stridhana property of Lakshmi Ammal

* Present :—Lord SUMNER, Lord BLANESBURGH, Sir JOHN EDGE and Mr. AMERU ALI.

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and that upon her death they devolved upon the respondent.

It was contended that, at the time of his marriage in 1900, he orally agreed to settle some house property upon his wife, and that the houses in suit had been bought in pursuance of that agreement.

The trial Judge (PHILLIPS, J.) found against the alleged oral agreement, and held that the purchase was a benami transaction. He accordingly dismissed the suit.

Upon appeal the decree was set aside and a decree made declaring that the houses had vested in the Plaintiff. The learned Judges (SCHWABE, C.J., and WALLACE, J.) found that part of the purchase money belonged to an infant brother of Lakshmi, and placed upon the defendants the onus of proving that the deed of sale of 1909 was not—what it purported to be—an absolute sale to Lakshmi Ammal.

DeGruyther, K.C., and *E. B. Raikes* for the appellants.—The evidence showed that the houses were bought by Chockalingam out of his own money, or at any rate, that no part of it was his wife's. The onus was upon the plaintiff to prove that the transaction was not a benami one. The evidence did not establish the alleged oral agreement. [Reference was made to *Dhurm Das Pandey v. Mussamat Shama Soomtri Dibiah*(1), *Gopeckrist Gosain v. Gungapersaud Gosain*(2), *Moulvie Sayyud Uzhur Ali v. Mussamat Bebee Ultaf Fatima*(3), *Ram Narain v. Muhammad Hadi*(4), *Bilas Kunwar v. Desraj Ranjit Singh*(5), *Kerwick v. Kerwick*(6), and *Mayne's Hindu Law*, paragraph 441.]

(1) (1843) 3 M.I.A., 229.

(2) (1854) 6 M.I.A., 53.

(3) (1869) 13 M.I.A., 232.

(4) (1899) I.L.R., 26 Calc., 227 (P.C.); 28 I.A., 38.

(5) (1915) I.L.R., 37 All., 557 (P.C.); 42 I.A., 202.

(6) (1921) I.L.R., 48 Calc., 260 (P.C.); 47 I.A., 272.

Narasimham for the respondent contended upon the evidence that the alleged antenuptial agreement was proved, and that any onus of proof upon the plaintiff was satisfied.

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The JUDGMENT of their Lordships was delivered by Sir JOHN EDGE.—This is an appeal from a decree, dated August 15, 1922, of the High Court of Madras, which reversed a decree, dated August 31, 1921, of the same Court made in its ordinary original civil jurisdiction, which had dismissed the suit.

Sir JOHN
EDGE.

The suit in which this appeal has arisen was brought in the High Court of Madras on November 19, 1918, by the plaintiff, a minor, by his next friend, against the Official Assignee of Madras and three money-lenders. One of the money-lenders died, and his legal representative was brought on the record as a defendant. The plaintiff is the respondent in this appeal.

The plaintiff is the son of V. S. Chockalingam Pillai, a Hindu of the Vellala caste, by his wife, Lakshmi Ammal, who died before the suit was brought. The plaintiff is the sole heir of his late mother, and he claims the property to which the suit relates as her heir. On September 30, 1918, the plaintiff's father Chockalingam was adjudged insolvent by the High Court of Madras under the Presidency Towns Insolvency Act, 1909, Act III of 1909. The plaintiff claims in his suit, with other reliefs, a declaration that a piece of land with a dwelling-house and buildings thereon, being Nos. 4 and 5, Nainiappa Naick Street, are his exclusive property as the heir of his mother, and that his father Chockalingam had no beneficial or other interest in those properties, which could have vested in the Official Assignee or have been assigned by him in mortgage. Nos. 4 and 5

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Nainiappa Naick Street will, in this judgment, be referred to as the property in question.

The land and buildings then thereon were purchased by Chockalingam on May 12, 1909, and by the sale-deed were conveyed by the vendors to Lakshmi, who had been married to Chockalingam some years previously. The question upon the answer to which this suit depends is whether Chockalingam had purchased that property in 1909 for his wife Lakshmi in performance of an antenuptial agreement alleged to have been made by him to settle a house upon her, or whether the purchase was made in her name as benamidar for Chockalingam. There can be no doubt now that a purchase in India by a native of India of property in India in the name of his wife unexplained by other proved or admitted facts is to be regarded as a benami transaction by which the beneficial interest in the property is in the husband, although the ostensible title is in the wife. The rule of the law of England that such a purchase by a husband in England is to be assumed to be a purchase for the advancement of the wife does not apply in India. See *Gopeekrist Gosain v. Gungapersaud Gosain*(1), *Mandir Sayyud Uzhar Ali v. Mussamat Bebe Ullaf Fatima*(2) and *Bilas Kumwar v. Desraj Ranjit Singh*(3). If the plaintiff failed to prove that antenuptial agreement and that it was in performance of it that the property in question was purchased by Chockalingam in Lakshmi's name, his suit fails.

Chockalingam has not been called by either side to give evidence in the suit, and his absence from the witness box has not been satisfactorily explained.

The facts, so far as they can be ascertained by their Lordships from the record, are as follows:— Chockalingam

(1) (1854) 6 M.I.A., 53.

(2) (1869) 13 M.I.A., 232.

(3) (1915) L.L.R., 37 All., 567 (P.C.) ; L.R., 42 I.A., 202.

and Vinayatheertha Pillai, who died in 1898 or in 1899, were trading as pea merchants in partnership at 6, Mint Street in Madras. When that partnership commenced, their Lordships do not know. It does not appear what the interest of the partners respectively was in the house, 6, Mint Street, or in the partnership. But 6, Mint Street was the property of the partnership. Vinayatheertha left surviving him two young children, a son Vadivelu, who was living when the witnesses were giving their evidence in the suit, and a daughter Lakshmi, and his mother Kathayee, who gave evidence in this suit. After Vinayatheertha died, his mother Kathayee carried on the family business in partnership with Chockalingam at 6, Mint Street, and Kathayee and the two young children of Vinayatheertha continued to live in that house together with Chockalingam. Chockalingam married Lakshmi, according to the plaint, in or about 1907, or, according to the evidence of witnesses who were relations of Lakshmi, in 1909. At the time of the marriage, Chockalingam had two wives living, one of whom was living with him, and he also had a son living. According to the evidence of Kathayee and two relations of Lakshmi, if it may be credited, when Chockalingam asked for Lakshmi in marriage, Kathayee, acting on the advice of relations, said to him that she would give him Lakshmi in marriage if he would make a provision for her but not otherwise and asked him what provision he would make for Lakshmi, and he said that, if the Mint Street house were sold, another house might be purchased and be given to Lakshmi. Thereupon she, Kathayee, gave Lakshmi to Chockalingam in marriage. That was the antenuptial agreement which is alleged by the plaintiff to have been made. A railway company was negotiating for the purchase of the Mint Street house, and

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purchased it for the price of Rs. 10,315-8 from Chockalingam and Kathayee, and paid the price to them. It is to be presumed that the money then paid by the railway company to Kathayee was, or part of it was, received by her for and on behalf of her grandson Vadivelu, who does not appear to have had any other person to look after his interests.

In 1904 Chockalingam had purchased, apparently with his own money, houses 12 and 13, Memorial Hall Street, in Madras, and he, in 1909, mortgaged those houses for Rs. 9,000, and their Lordships consider it probable that Chockalingam, on May 12, 1909, had other property apart from his interest in the pea dealing partnership and in the Mint Street house, and there is no reason shown why all the purchase money of the property in question was not Chockalingam's own money. Certainly none of it is shown to have been Lakshmi's.

PHILLIPS, J., who tried the suit, did not believe the evidence that there had been an antenuptial agreement, and he found that the purchase of the property in question on the May 12, 1909, in the name of Lakshmi was a benami transaction and that she was merely benamidar for her husband Chockalingam. PHILLIPS, J., in his judgment made a statement with which their Lordships agree. He said :—

“We do not know what really happened to Vinayatheertha's property when he died or what share he had in the business or whether really he did leave any property which was undisposed of at the date of Lakshmi's marriage. There is no evidence about these facts on either side though the plaintiff's family ought to know all that can be known about this.”

It will be remembered that Vinayatheertha had died in 1898 or in 1899, and the property in question was purchased in May 1909. PHILLIPS, J., rightly found as

to the money which was invested in the purchase of the property in question that if the purchase money did not belong to Chockalingam it did not belong to Lakshmi, but belonged to her brother Vadivelu. PHILLIPS, J., by his decree dismissed the suit. From that decree the plaintiff appealed under the Letters Patent.

The appeal under the Letters Patent was heard by Sir W. S. SCHWABE, C.J., and WALLACE, J. The CHIEF JUSTICE stated in his judgment :—

“The question to be decided is whether a purchase of property by one Chockalingam, an insolvent, in the name of his wife, Lakshmi, was a settlement on her on her marriage or was a benami transaction, she being benamidar for him. The evidence called was all one way, namely, that the property was purchased out of funds belonging 6/11 (six-elevenths) to Chockalingam and 5/11 (five-elevenths) to Lakshmi's infant brother Vadivelu, as the heir to his father, formerly a partner of Chockalingam.”

If there was such evidence as to the respective shares of Chockalingam and Vadivelu, the attention of their Lordships has not been drawn to it, and if there had been such evidence it would not show that Lakshmi had acquired a beneficial title to the property. Vadivelu was a minor on May 12, 1909, and could not make a present of his property to his sister, Lakshmi. WALLACE, J., agreed with the judgment of the Chief Justice.

They accepted the evidence that the alleged antenuptial agreement had been made and gave the plaintiff the decree which he claimed. From their decree this appeal has been brought.

It would, no doubt, have been prudent on the part of Kathayee and Lakshmi's relations to have insisted before Lakshmi was given in marriage to Chockalingam, who was an old man with two wives and a son living,

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that he should agree to settle some property on her. It is obvious to their Lordships that Lakshmi had no property of her own. She was not the heir to any property and could have had no expectations of succeeding to any property. Possibly, Chockalingam may have been asked to promise to make a settlement on Lakshmi, but the question is: Did he agree to do so? It appears to their Lordships that most probably the story of this alleged agreement to make a settlement was first thought of after Chockalingam's insolvency in order to save for the plaintiff some part of the property of the insolvent. The property in question was purchased in May 1909, and Lakshmi lived until 1912 and if Chockalingam had agreed to settle the property in question there was plenty of time in which he could have executed a proper deed of settlement upon her.

In their Lordships' opinion it would be unwise to accept as proved such an oral agreement as is alleged on the part of the plaintiff except on the clearest and most satisfactory evidence of credible witnesses, and after giving the most careful consideration to the evidence in this suit their Lordships agree with PHILLIPS, J., and find that Chockalingam did not agree to make any settlement upon Lakshmi and that she had no beneficial interest in the property in question and was a mere benamidar for Chockalingam.

If it were necessary in this case to ascertain by evidence whether her position was that of a beneficial owner of the property in question and not that of a mere benamidar for Chockalingam, the transaction which will now be referred to would be material evidence. See *Ram Narain v. Muhammad Hadi*(1) and the cases already cited. The property in question

was purchased on May 12, 1909. On July 25, 1909, Chockalingam and Lakshmi jointly gave what was apparently treated as an equitable mortgage to S. Krishna-swami Ayyangar of the property which had been purchased on May 12, 1909, in her name, which they stated was "in our possession and enjoyment." On March 30, 1910, Chockalingam and Lakshmi jointly granted a lease of the property in question to Sirakalai Pillai. On December 4, 1912, Lakshmi died. On March 18, 1914, Chockalingam on his representation that he "is in possession of and is entitled to" the property in question obtained in the Registration Department the Collector's certificate. On February 21, 1918, Chockalingam mortgaged the property in question to C. Vythialingam Pillai and in the deed of mortgage it was stated that he had purchased the property in question out of his own self-acquired earnings and was absolutely entitled to it. As to these transactions by Chockalingam after May 12, 1909, it is only fair to the plaintiff to bear in mind that his mother was, until she died, under the influence of her husband Chockalingam, and seems to have had no independent advice, and that the plaintiff was a minor of tender years without anyone, except his great-grandmother, an aged woman, to protect the interest, if any, which he may have had. But those transactions show how Chockalingam dealt with the property in question.

Their Lordships do not decide that an antenuptial agreement may not be orally proved in an Indian case, but they consider that it would be unwise of a Judge to act in a disputed Indian case upon oral evidence that there had been an antenuptial agreement, which would in effect be a marriage settlement, unless there was contemporaneous written evidence to corroborate the oral evidence. In this case there was no such evidence.

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(1) (1899) I.L.R., 26 Cal., 227 (P.C.) ; 20 I.A., 38.

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Their Lordships will humbly advise His Majesty that this appeal should be allowed with costs and the decree appealed against should be set aside with costs and the decree of Mr. Justice PHILLIPS be restored.

Solicitor for appellants : *John Jusselyn.*

Solicitor for respondent : *H. S. L. Polak.*

A.M.T.

PRIVY COUNCIL.*

1925,
June 11.

KONDAPALLI VIJAYARATNAM AND ANOTHER (PLAINTIFFS),
APPELLANTS,

v.

MANDAPAKA SUDARSANA RAO AND OTHERS (DEFENDANTS).
RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
MADRAS.]

Registration—Authority to adopt—Authority conferred by invalid will—Registration as will—Absence of registration as authority—Indian Registration Act (III) of 1877, ss. 17, 40, 41.

A Hindu, who had not attained his majority so as to be competent to make a will, executed a document purporting to dispose of his property; it also conferred authority to adopt, which he was of an age to do validly. The document was registered as a will, but it was not presented for registration by any person who was entitled under section 40 of the Indian Registration Act, 1877, to present an authority to adopt. Section 17 of that Act requires an authority to adopt, not conferred by a will, to be registered.

Held, that the document having no legal effect as a will, the authority to adopt could not be treated as one conferred by a will, and that it was ineffectual since it was not duly registered as an authority to adopt.

APPEAL (No. 62 of 1923) from a decree of the High Court (April 16, 1920) affirming a decree of the District

* Present :—Lord SUMNER, Sir JOHN EDGE and Lord SALVESBEN.

Judge of Ganjam. The suit was instituted by the appellants who prayed by their plaint : (1) for a declaration that the will of Mandapaka Appanna was void, (2) that the adoption of the first defendant was illegal and invalid, and for other relief.

The question arising upon the present appeal was whether an authority to adopt conferred by a will which was invalid, but was registered as a will, was ineffectual for want of due registration as an authority to adopt. The facts appear from the judgment of the Judicial Committee.

The District Judge dismissed the suit; upon the question raised in the present appeal he said

“where a document is honestly believed by all parties concerned to be a will and is registered as such, I am inclined to think that the registration should be considered sufficient for the authority to adopt contained in the document.”

Upon appeal to the High Court the decision was affirmed. The learned Judges, WALLIS, C.J., and MOORE, J., were of opinion that the document, even if invalid as a will on account of the minority of the executant, satisfied the definition of a “will” in the General Clauses Act, 1897, section 3 (57) and was therefore a “will” for the purposes of the Indian Registration Act, and that accordingly the authority to adopt was one “conferred by will” within section 17 of that Act and so was not one to which sections 40 and 41 applied.

Hyam and B. N. Srivastava for the appellants.—The document being invalid as a will, the authority to adopt was not one “conferred by a will” within section 17, sub-section (3) of the Indian Registration Act; the Act did not say, as it might have done, “a document purporting to be a will.” The strictness with which the requirements of the Act should be enforced, and the limited operation of section 87 appear from *Majib-Un-Nissa*

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v. *Abdur Rahim*(1), *Jambu Prasad v. Muhammad Aftab Ali Khan* (2), and *Bheema Deo v. Behari Deo*(3). If the authority to adopt is effective it might be exercised in a manner conflicting with the intention appearing by the inoperative will.

W. Ingram for the first and third respondents, relied upon the view of the High Court and upon section 87 of the Act.

Lord
SALVESEN.

The JUDGMENT of their Lordships was delivered by Lord SALVESEN.—The circumstances out of which this suit has arisen, so far as they are material to the judgment, may be very shortly stated.

One Mandapaka Appanna, a sudra in the Ganjam district, who was possessed of a considerable amount of property, died in 1906 leaving a widow and two daughters, the latter being the plaintiffs in the action. When on his death-bed and within an hour or two of his actual death he executed a document, which purported to be a disposition of his property and at the same time conferred a power of adoption on his widow. This document was registered as a will at the instance of a legatee. It was challenged by the plaintiffs (who are still in minority) on the ground among others (1) that it was not genuine and (2) assuming that the signature which it bore to be that of the deceased, that he was incapable, at the time, of understanding its contents owing to the illness from which he shortly afterwards died.

Both Courts have decided, although with much hesitation, that the will was genuine and on the question whether the deceased was in a fit condition to dispose

(1) (1901) I.L.R., 23 All., 233 (P.C.); 28 I.A., 15.

(2) (1915) I.L.R., 37 All., 49 (P.C.); 42 I.A., 22.

(3) (1921) I.L.R., 44 Mad., 733 (P.C.); 43 I.A., 482.

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of his property, the Subordinate Judge held that he was, and the High Court of Judicature at Madras may be presumed to have endorsed his judgment, although they have not expressly dealt with this matter in their reasons. Whether it is competent in these circumstances for their Lordships' Board to entertain an appeal from what may be represented as concurrent judgments on questions of fact, it is unnecessary to consider, for a point of law remains, the decision of which in their Lordships' view, is sufficient for the disposal of the appeal.

At the time of his death Mandapaka Appanna was admittedly only 19 years of age and was under guardianship. Act IX of 1875 provides, by section 2, that nothing therein contained should affect the capacity of any person to act in the following matters, namely :— Marriage, Dower, Divorce, Adoption.

Section 3 provides as follows :—

"Subject as aforesaid, every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, shall, notwithstanding anything contained in the Indian Succession Act (X of 1865) or in any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years and not before.

"Subject as aforesaid, every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before."

It follows, therefore, and indeed is matter of admission, that the document which purported to be a will of Mandapaka Appanna could have no legal effect as such. On the other hand, as Mandapaka Appanna was over 18 years of age an authority to adopt, whether, oral or in writing, was within his legal capacity.

A power to adopt may be embodied in a will and if the document now under consideration can be treated as

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such the judgment under appeal cannot be impugned. "Will" is defined by Act X of 1865 as—

"The legal declaration of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death."

and by section 3 of Act X of 1897—

"'Will' shall include a codicil and every writing making a voluntary posthumous disposition of property."

The learned Judges in the Court below have held that the document in question satisfied these definitions. If the form of the document only is considered no doubt that would be so, but, having regard to the fact that it was executed by a person who was a minor and incapable of making a will, their Lordships are unable to agree with the decision. The so-called will is not a "legal declaration of the intentions of the testator," for it had no legal effect and was not capable of disposing of any of the estates of the deceased. So far as it purported to deal with his property it was a nullity. That a document is called a will although it does not operate to any effect as such, will not give it the effect of a will for any other purposes. This was so held in the case of *Bheema Deo v. Behari Deo*(1) a case which was not before the learned Judges of the High Court as it was not decided till after their judgment had been pronounced.

It does not follow, however, as the learned Subordinate Judge held, that "a person who is incapable of making a will is incapable of conferring an authority to adopt by a will though he may be capable of giving an authority to adopt to be exercised after his death." Their Lordships see no reason to doubt that a document which purported to be a will but was inoperative as such might nevertheless constitute a valid authority to

adopt. Here, however, the respondents are met with a different objection. Act III of 1877 provides by section 40:—

"The donor, or after his death the donee, of any authority to adopt, or the adoptive son, may present it to any registrar or sub-registrar for registration."

and section 41 provides that an authority to adopt shall be registered in the case of the death of the donor on the registry officer being satisfied,

(a) that the authority was executed by the donor,

(b) that the donor is dead, and

(c) that the person presenting the authority is under section 40 entitled to present the same.

In the present case it is not alleged that the donee, who, at the time of the registration of the document as a will, was the only one who could present it for registration, either did so herself or gave authority for the registration. Act III of 1877, section 17, enacts that all authorities to adopt a son executed after the 1st January 1872, shall be registered, and by section 23 that no document other than a will shall be accepted for registration unless presented for that purpose to the proper officer within four months from the date of its execution. As the widow, who was the donee of the authority, failed to register it within this period of four months, the deed which was afterwards executed by her on 24th December 1913, adopting defendant No. 1, cannot receive effect. This indeed was not contested by the respondent's counsel.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed and that the plaintiffs are entitled to a declaration, that the will, dated the 1st October, 1906, alleged to have been executed by the late Mandapaka Appanna is void, and also to a

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(1) (1921) I.L.R., 44 Mad., 738 (P.C.) ; 48 I.A., 482.

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declaration in terms of the 2nd, 3rd, and 4th heads of their prayer with costs of the suit both in the Courts below and before this Board.

Solicitors for appellants: *Barrow Rogers and Nevile.*

Solicitors for respondents: *H. S. L. Polak.*

A.M.T.

APPELLATE CRIMINAL—FULL BENCH.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Spencer, Mr. Justice Kumaraswami Sastri,
Mr. Justice Beasley, and Mr. Justice Srinivasa Ayyangar.*

1924,
December 17.

RAMAKRISHNA IYER (PETITIONER), PETITIONER,

v.

SITHAI AMMAL (COUNTER-PETITIONER), RESPONDENT.*

Criminal Procedure Code (Act V of 1898), sec. 195—Sanction—False charge of dacoity—Sanction granted by Sub-Magistrate—Prosecution in pursuance of sanction instituted before amendment of the Code as to sanction came into force—Application to District Magistrate to revoke sanction—Jurisdiction of District Magistrate to revoke sanction after amendment came into force—Right to apply to revoke sanction, whether mere matter of procedure or substantive right—Amendment of Code, effect of—General Clauses Act (X of 1887), sec. 6.

Where a Sub-Magistrate granted sanction under section 195, Criminal Procedure Code (V of 1898), for prosecuting a person under section 211, Indian Penal Code, for preferring a false charge of dacoity against another, and in pursuance of the sanction a prosecution had been instituted before the amendment of the Code repealing section 195 came into force, the District Magistrate had jurisdiction under section 195 (b) of the Code to revoke the sanction, notwithstanding that the

amendment had come into force before the date of the petition before him to revoke the sanction.

The right of a person to apply to higher authorities to revoke a sanction against him is not a matter of mere procedure, but is a substantive right vested in the party to invoke the aid of a higher tribunal, and it is not affected by a later amending statute in the absence of express words to that effect.

Colonial Sugar Refining Company v. Irving, [1905] A.C., 369, applied; *The Attorney General v. Sillen and others* (1864) 10 H.L.C., 704, referred to.

The same principle is involved and carried out by section 6 of the General Clauses Act (X of 1887).

PETITION under sections 435 and 439, Criminal Procedure Code (Act V of 1898), to revise the order of H. M. HOOD, the District Magistrate of Tanjore, in C.M.P. No. 2 of 1924 preferred against the order of V. SWAMINATHA AYYAR, Stationary Second-class Magistrate of Kumbakonam in M.C. No. 9 of 1923.

In this case the respondent Sithai Ammal preferred a complaint of dacoity against the petitioner (Ramakrishna Iyer) and some others before the Sub-Magistrate of Kumbakonam. Subsequently when the case came up for trial she filed a petition alleging that her witnesses had been tampered with and that the case might be thrown out. The case was dismissed, the accused being discharged. The petitioner applied to the Magistrate in M.C. No. 9 of 1923 for sanction under section 195 (b), Criminal Procedure Code, to prosecute the complainant (respondent) for preferring a false charge of dacoity against him; the Magistrate granted sanction on 4th August 1923. The prosecution of the respondent was instituted before the Court of the First-class Magistrate of Kumbakonam in C.C. No. 61 of 1923 on its file, before the 1st September 1923, when the amendment of the Criminal Procedure Code in respect of section 195 and other provisions came into force. The respondent had

* Criminal Revision Case No. 392 of 1924 (Criminal Revision Petition No. 329 of 1924).

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preferred a petition to the then District Magistrate (Mr. SHIELD) in C.M.P. No. 105 of 1923 on 22nd August 1923, to revoke the sanction; the learned District Magistrate, being under the wrong impression that the complaint was preferred subsequent to the coming into force of the amendment in the Code, held that as under the latter, no prosecution could be instituted under a sanction, but only by the written complaint of the Court, it was useless to go into the merits of the case and disposed of the petition on 11th September 1923 by observing in effect that there was no need to pass orders thereon. Subsequently, the respondent received from the First-class Magistrate of Kumbakonam a notice in the case (C.C. No. 61 of 1923) already instituted against her. Thereupon the respondent filed a Criminal Miscellaneous Petition No. 2 of 1924 before the District Magistrate (Mr. H. M. Hoon) to revoke the sanction granted by the Sub-Magistrate. The learned District Magistrate overruled a preliminary objection raised by the petitioner that this petition was a review of the order of his predecessor (Mr. SHIELD), and was therefore not maintainable under section 369 of the Code, and revoked the sanction. Against this order of revocation, the original petitioner preferred this petition.

S. T. Srinivasagopala Achariyar for petitioner.—The District Magistrate (Mr. Hoon) had no jurisdiction to revoke the sanction under the circumstances of this case. The sanction had been granted and prosecution had been instituted before the amendment of the Criminal Procedure Code, 1898, by Act XVIII of 1923 which came into force on 1st September 1923. When section 195 was repealed by the amending Act, the power to revoke ceased to exist. It is only a procedure as to how sanction can be revoked. After the amendment, a party against whom sanction is given, cannot

adopt the procedure under section 195 to revoke it any more than a party who is refused sanction can apply to higher authorities to grant sanction under the repealed section. A new procedure and remedy have been given under the amending statute (XVIII of 1923), which takes the place of the old procedure. Section 476 (b) after the amendment gives a new right of appeal. If the right to revoke was a vested right of appeal, a repeal may not affect such right but if it is mere procedure, it is affected retrospectively by the repealing statute. A remedy to revoke sanction by recourse to a higher Court is not a right of appeal. It is only procedure. No person has a vested right in procedure. See *Nataraja Pillai v. Rangaswami Pillai*(1), *Sesha Ayyar v. The Public Prosecutor*(2) and *Bapu v. Bapu*(3). The amending Act must be held to have retrospective effect, because an interval is given between the date of its receiving assent of the Governor-General (11th April 1923) and that of its coming into force (1st September 1923). The General Clauses Act (X of 1887) does not affect rights, but it does not create a right in a form of procedure. The general rule is that an Act prescribing procedure has a retrospective effect. See *Craike's Interpretation of Statutes*, pages 324 to 332.

J. C. Adam (*Public Prosecutor*) for the Crown.—Section 6 of the General Clauses Act (X of 1887) was not considered in *Nataraja Pillai v. Rangaswami Pillai*(1). Section 195 (1) (6) is not a matter of mere procedure. It gives a right or remedy in the case of a person against whom sanction has been given, but it is not a right in the case of an applicant for sanction. The latter has an alternative remedy given in the Code

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(1) (1924) I.L.R., 47 Mad., 384. (2) (1924) 19 L.W., 463.
(3) (1916) I.L.R., 39 Mad., 750 (F.B.).

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as amended, but the person against whom sanction is given has no remedy under the new Act.

JUDGMENT.

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COUTTS TROTTER, C.J.—In this case the Sub-Magistrate of Kumbakonam gave leave to the petitioner before us, one Ramakrishna Iyer, to prosecute the respondent, a woman called Sithai Ammal under section 211 of the Indian Penal Code for bringing against him a false charge of dacoity. The respondent thereupon went before Mr. SHIELD who was the then District Magistrate of Tanjore, and he passed an order on the 11th September 1923, the new Code of Criminal Procedure having come into force on the 1st of the month. The learned District Magistrate came to the conclusion that there was nothing for him to do. He was asked to revoke the sanction and he said "I am not going to revoke the sanction, there is nothing in it." It is admitted that the complaint had been filed before the 1st of September 1923. In that view,—we have found from the records it was wrong,—but that being his view and he presumably not being properly instructed on the facts, he supposed that no complaint had been filed before the new statute came into operation. He first outlines the procedure relating to such a complaint and says it would be regulated by the new Code. In point of fact, as we have already said, he was misinformed about that and the complaint had in fact been filed before the operation of the new Code. Mr. SHIELD having done nothing, the matter was brought before his successor as District Magistrate of Tanjore, Mr. HOOD; and Mr. HOOD after pointing out the incorrect assumption on which his predecessor had acted, disallowed the prosecution and revoked the sanction that was granted, rightly holding that he was not revising the order of

his predecessor, Mr. SHIELD, because the petition was not considered by Mr. SHIELD and there was no order of Mr. SHIELD to revise. It is now sought to be said before us that that action of Mr. HOOD was illegal and without jurisdiction and that the sanction granted by the Second-class Magistrate of Kumbakonam must stand. It is best to begin with a citation of the material sections of the old and new Codes. Under the old Code of Criminal Procedure, section 195, the machinery for dealing with certain offences, of which the one in question in this case was one, was that, before the prosecution could be launched, it was an essential condition precedent either that the previous sanction of the Court should have been obtained, obviously by one of the parties, or that the Court should *suo motu* make a complaint. By sub-section (6) it is provided that

"any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate (and no sanction shall remain in force for more than six months from the date on which it was given, provided that the High Court may for good cause shown extend the time)."

The new Code envisages an entirely different state of things and for all practical purposes it abolishes sanction entirely. It provides a substitute, for the condition precedent is not a sanction but a complaint in writing by the Court before which such proceeding as the matter arose out of is tried or by the Court to which that Court is subordinate. The argument put before us is this, that as the complaint in this case was filed before the coming into operation of the new Code and as the sanction required by the old Code was dispensed with and abolished by the new Code, therefore it abolished the power to revoke the sanction which was conferred by the old Code; and it is said that that must be so, because this power to invoke the Court to interfere

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with the sanction of the Court below is not a right vested in anybody but a mere matter of procedure. That undoubtedly was definitely held by a bench of this Court in *Nataraja Pillai v. Rangaswami Pillai*(1). It is said that there is another authority in favour of the present appellant, which is *Sesha Ayyar v. The Public Prosecutor*(2). We do not think that that decision under the circumstances in which it was given really applies to this case at all, because it is quite apparent from the concluding sentences of Mr. Justice KRISHNAN'S judgment, which was the only one that was pronounced in the case, that the Court was under the misapprehension that the prosecution in that case had been launched after the new Code came into force. That is a supposition which we now know to be wrong and we are not prepared to say that we should differ from the decision in the case; but as it was based on an incorrect supposition the decision is not really before us and does not give us any assistance one way or the other.

What are the principles guiding such matters as this? The line of distinction is very clearly laid down in a series of English cases of great authority which we respectfully follow and the distinction drawn is between a matter of substantive right and a matter of mere procedure. The main cases that have been referred to are *Gardner v. Lucas*(3) and *The Attorney-General v. Sillen and others*(4).

Their Lordships in *Gardner v. Lucas*(3) lay down the general principle that rules of procedure are always retrospective in their operation, unless there is good reason why they should not be.

(1) (1924) I.L.R., 47 Mad., 384.
(3) (1878) 3 App. Cas., 582.

(2) (1924) 19 L.W., 463.
(4) (1864) 10 H.L.C., 704.

Lord BLACKBURN says:—"The general rule not merely of England and Scotland but, I believe, of every civilized nation is expressed in the maxim *Nova constitutio futuris formam imponere debet non praeteritis*. *Prima facie* any new law that is made affects future transactions, not past ones. Nevertheless, it is quite clear that the subject matter of an Act might be such that, though there were not any express words to show it, it might be retrospective. For instance, I think, it is perfectly settled that, if the Legislature intended to frame a new procedure that instead of proceeding in this form or that, you should proceed in another and a different way, clearly there by-gone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective unless there is some good reason or other why they should not be. Then, again, I think that, where alterations are made in matters of evidence, certainly upon the reason of the thing, and I think upon the authorities also, those are retrospective, whether civil or criminal.

But where the effect would be to alter a transaction already entered into, where it would be to make that valid which was previously invalid, to make an instrument, which had no effect at all, and from which the party was at liberty to depart as long as he pleased, binding, I think, the *prima facie* construction of the Act is that it is not to be retrospective and it would require strong reasons to show that it is not the case. The Lord President has put instances which show the reason and object for this ruling; we must apply the ordinary rule in considering statutes and say it is not retrospective for such a purpose as this, there being no evidence of an intention upon the face of the language to make it retrospective."

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The other rule is best illustrated by the decision of the Privy Council in *Colonial Sugar Refining Company v. Irving*(1). That was a case in which the opinion of their Lordships was delivered by Lord MACNAGHTEN and he lays down the principle in language so clear that I cannot possibly do better than adopt it:—

“As regards the general principles applicable to the case there was no controversy. On the one hand it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord COKE to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.”

There is one other passage which I should like to quote and it is from a judgment of Lord WESTBURY, in the well-known case of *The Attorney-General v. Sillen and others*(2) and it is quoted in Stroud's Judicial Dictionary, 2nd Edition, Vol. 1, at page 98:—

“The right of appeal is only by statute. It is not in itself a necessary part of the procedure in an action but is the right of entering a Supreme Court and invoking its aid and interposition, to redress the error of the Court below. It seems absurd to denominate this paramount right part of the practice of the inferior tribunal.”

(1) [1905] A.C., 869.

(2) (1884) 10 H.L.C., 704.

Now turning again to the Indian authorities what do we find? The learned Judges in *Nataraja Pillai v. Rangaswami Pillai*(1) seem to me to base their observations on the following passage in the judgment of Sir ARNOLD WHITE, Chief Justice, in *Bapu v. Bapu*(2):—

“We think, however, that the power conferred on this Court by section 195 (6) of the Criminal Procedure Code is not a part of the Appellate and revisional jurisdiction of this Court conferred by chapters 31 and 32 of the Code of Criminal Procedure.”

It follows therefore it was concerned with the question of what was the proper procedure. However, the matter is not directly before us, though Sir ARNOLD WHITE, Chief Justice, was quite right in thinking that the power conferred was not a part of the appellate and revisional jurisdiction under chapters 31 and 32 of the Code. But that is not the question we have to determine. The question we have to decide is whether this was a right of entering the Superior Court and invoking its aid and interposition to redress the error of the Magistrate's Court below and therefore it seems to us that, on principle and those very weighty authorities, we ought to hold that this is not a case of procedure but it is a case of a real right to invoke the aid of a higher tribunal. We are also of opinion that those principles are really involved and carried out by section 6 of the General Clauses Act X of 1887, because what that section says is this:

“Where this Act or any Act of the Governor-General in Council or Regulation made after the commencement of this Act repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(1) (1924) I.L.R., 47 Mad., 384. (2) (1916) I.L.R., 39 Mad., 750 (F.B.).

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(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder: or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed;

(d)

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

That is the shortest method of dealing with this matter, namely to base our decision on the words of that section, but, as in our opinion a very important legal principle is involved, we have thought it better to state that principle with reference to the pronouncements of the very eminent Judges whose judgments we have quoted. Mr. Srinivasagopala Achariyar conceded that, apart from the question of jurisdiction, he could not argue that Mr. Hood's order was not right in other respects.

The result will be that this petition is dismissed.

SPENCER, J.

KUMARASWAMI SASTRI, J.

BEASLEY, J.

SRINIVASA AYYANGAR, J.

} We agree.

K.R.

APPELLATE CIVIL.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
and Mr. Justice Srinivasa Ayyangar.*

P. K. BHIMASENA RAO (FIRST DEFENDANT), APPELLANT,

v.

C. VENUGOPAL MUDALI AND TWO OTHERS (PLAINTIFF
AND SECOND AND THIRD DEFENDANTS), RESPONDENTS.*

Stamp Act (II of 1899), sec. 35, proviso—Unstamped document—Admissibility in evidence—Document, damaged—Stamp duty, not ascertainable by Court owing to damaged condition—Duty of Court to admit—"Subject to all just exceptions" in proviso to sec. 35, meaning of—Original Side Appeal—Memorandum of objections, whether competent in an Original Side Appeal—Civil Procedure Code (V of 1908), Order XLI, rule 22—Applicability of, to Original Side Appeals—Letters Patent, clause 15.

Where an unstamped document, admissible in evidence on payment of stamp duty and penalty, was tendered in evidence with an offer by the party to pay the stamp duty and penalty on the Court determining the same, the Court cannot, under section 35 of the Stamp Act (II of 1899), reject the document on the ground that it cannot determine the amount of stamp duty owing to the damaged condition of the document.

The terms of the proviso to section 35 are mandatory and the Judge is bound to admit the document, unless it is rendered inadmissible by the provisions of any other statute for the time being in force, and the words "subject to all just exceptions" in the proviso to the section do not permit a Court to reject a document on the ground of its inability to determine the proper stamp duty thereon.

A memorandum of cross-objections cannot be filed by a respondent in an appeal preferred under clause 15 of the Letters Patent. The provisions of Order XLI, rule 22, Civil Procedure Code, do not apply to such appeals.

* Memorandum of Objections in Original Side Appeal No. 16 of 1922.

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MEMORANDUM of objections preferred by second and third respondents in Original Side Appeal No. 16 of 1922 presented against the judgment of PHILLIPS, J., passed in the exercise of the ordinary original civil jurisdiction of the High Court in Civil Suit No. 662 of 1920.

In this case an appeal was preferred by the third defendant against the judgment of PHILLIPS, J., who decreed the suit in favour of the plaintiff, who sued as a bandhu entitled to the properties of the last male holder, one Parthasarathy Mudali. The first and second defendants were vendee and mortgagee of portions of the suit properties, and the third defendant (who was subsequently joined as a defendant) claimed as an agnatic relation of the deceased to be his heir in preference to the plaintiff. The learned trial Judge held that the plaintiff was entitled to a decree. He rejected a document, which purported to be a partition-deed of the year 1851, as inadmissible, as it was unstamped and as the amount of stamp duty could not be determined by the Court on account of the damaged condition of the document. The third defendant appealed against the decree and impleaded the other defendants as well as the plaintiff as respondents. The first and second defendants (as respondents) preferred a memorandum of cross-objections under Order XLI, rule 22, Civil Procedure Code, disputing, *inter alia*, the title of the plaintiff as heir to the properties. The appellant, who had been ordered to furnish security for costs, defaulted in furnishing security and the appeal was consequently dismissed for default of prosecution. The first defendant urged his memorandum of objections. The plaintiff raised a preliminary objection that the memorandum of cross objections could not be heard, as the appeal had been dismissed for default.

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Nugent Grant for the first defendant (respondent).—On the preliminary objection: The provisions of Order XLI, rule 22, apply; rule 351 of Original Side Rules contemplate the filing of memorandum of cross-objections. The provisions of Civil Procedure Code are applicable to the High Court on its appellate side. See *Sabitri Thakurain v. Savi*(1). In any event this memorandum should be treated as an independent appeal; the delay should be excused as the party was misled by the rule (rule 351) and the practice of the Court; stamp duty, if any is due, will be paid.

On the merits.—Plaintiff claims as a bandhu; third defendant is a near dayadhi (agnate). If the third defendant's relationship as dayadhi is proved, plaintiff has no title as heir. To prove this, Exhibit IV, an old unstamped partition deed of 1851 was tendered in evidence on payment of stamp duty and penalty. It was wrongly rejected by the learned Judge on the ground that he could not determine the amount of stamp duty as the document was damaged. In 1851, stamp was required under Regulation 13 of 1816, but there was no law of registration. Under the proviso to section 35 the document shall be admitted "subject to all just exceptions" on payment of penalty. Difficulty or impossibility for the Court to determine the amount of stamp duty is not a ground falling under the words "*subject to all just exceptions*," but the expression refers to such objections as are raised by other statutes, such as Registration Act.

V. K. Venugopal Nayudu, for respondent (plaintiff).—Under section 35, proviso, it is discretionary with the Court to admit or reject. The expression "subject to all just objections" is very general and covers the present case. The learned vakil supported the decision on the merits.

(1) (1921) I.L.R., 48 Cal., 481 (P.C.).

JUDGMENT.

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COUTTS TROTTER, C.J.—This is a suit by the plaintiff as a bandhu of one Parthasarathi Mudaliyar to recover the suit property and to have the mortgage and sale of it set aside. There were three defendants and the case which they all relied upon was that the plaintiff was out of Court being a bandhu because there was conclusive evidence to show that the third defendant was an agnatic relation. In support of that, there was tendered before the learned Judge a document dated the 20th October 1851, which, if admissible and genuine, clearly puts the plaintiff out of Court, because it not only shows that the parties to that document were Rangappa Mudaliyar from the one branch and Perumal Mudaliyar from the other but speaks of a certain Kolethi Mudali as being “our senior paternal uncle.” A reference to the tree will show that that would mean that Kolethi was a brother of Venkatachala Mudali and Chinna-thambi Mudali, the sons of the propositus, Perumal Mudali, and that Perumal Mudali, who was a party to this document, and Rangappa Mudali were the grandsons of the original Perumal Mudali. As I said, if this document is genuine, and I see no conceivable suggestion why it should not be, it is conclusive against the plaintiff’s case.

As a matter of fact, the document, as tendered, was unstamped and it seems clear that, under Regulation XIII of 1816, it ought to have been stamped. Thereupon, the third defendant, who tendered it in evidence, offered to pay the penalty, such penalty as the Court should impose, together with the stamp duty. The learned Judge took a very remarkable view of this matter. Before I go to that, I will read the section which I conceive would show what the learned Judge’s

duty was. It arises under the proviso to section 35 of the Indian Stamp Act, II of 1899 :

“Provided that any such instrument shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable, together with a penalty of Rs. 5.”

That appears to me to be quite clear in its effect and to define without any ambiguity the duty of the learned Judge in the case of a document being tendered unstamped, to admit it, subject to all just exceptions, and those words have been universally understood in the statutes in which they occur to mean that the section is mandatory to the Judge, unless the instrument is rendered inadmissible by the provisions of any other statute for the time being in force. Now, what the learned Judge did was this. He seems to have construed these words of the section as giving him a general discretion as to the admission of a document in circumstances where he felt any doubt in his mind as to what the proper stamp duty was; and I will read what he said about the document. The document is a very old one and is in a very dilapidated condition, but it is quite possible clearly to decipher all the material words I have already referred to. What the learned Judge says is this :—

“Plaintiff contends that this is one of the just exceptions and it should not be admitted. (That is this document I am speaking of, Exhibit IV in the case.) There is considerable force in his contention. In the first place the document refers to a house and pangu the values of which are not given. The stamp duty on that part of the document cannot therefore be calculated. Considerable portions of the document are missing which might themselves be liable to further stamp duty and it is impossible to state what duty is leviable.”

That appears to be the main reason why the learned Judge excluded this document. That, because it was difficult for the Court to estimate the amount due by

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way of stamp duty and perhaps impossible to estimate it with absolute certainty, therefore the Court was entitled, finding itself in that difficulty, to exclude the document altogether. That, of course, is an absolutely untenable argument, and we hold that the learned Judge acted under a complete misconception with regard to it. The learned Judge gives certain other reasons for not admitting the document, some of which reasoning is clearly ill-founded, because it is based on matters that are not appearing on the face of the document but relate to the relations of the parties that arose since, about concluding that defendants 1, 2 and 3 were acting in concert. Well, of course they were. The business of each and all of them was to defeat the plaintiff's claim and this document was as available in the hands of any one of them to defeat the plaintiff's claim as in the hands of any other. A suggestion was made by Mr. Venugopal Nayudu, who of course finds himself in a very difficult position, that you can construe out of some observations of the Judge a suggestion that the document was not, within the words section 90 of the Evidence Act, produced from proper custody. It was in fact produced on a subpoena by a man called Janardhana. He was the person who propounded the will of Seethammal, who was the widow of Parthasarathi Mudaliar, a lineal ancestor of the third defendant and he is the descendant of a grandson of Perumal Mudali the younger in favour of whom this document was executed and to whom it will naturally belong. Therefore we think that the suggestion that it was not produced from proper custody entirely fails. It seems idle in those circumstances to neglect the plain words of the statute which says, to use a compendious expression, that a document purporting to be of this age when produced from a custody where it would naturally

be expected to be, proves itself. Of course it is open to anybody to argue that there were circumstances of suspicion either appearing from the look of the document or from any extraneous evidence that can be produced, but it might make the document, which is admissible, liable to be regarded by the Court as being either of no evidentiary value or possibly being fraudulently concocted. There is no suggestion of that kind here at all. The onus would be entirely on the plaintiff to induce the Court to come to such a belief in view of the presumption clearly created by section 90 of the Evidence Act. I am therefore of opinion that the learned Judge was entirely wrong in rejecting this document: and having heard the argument of Mr. Venugopal Nayudu, he has not displaced from my mind the obvious *prima facie* conclusion that once that document is admitted his case was for ever gone. I desire to associate myself with the view that my learned brother is going to express with regard to the actual form in which this appeal comes before us; and I content myself with saying that, in my opinion, there is nothing to prevent us from doing substantial justice to the parties on the materials before this Court. In my opinion, the appeal succeeds and the plaintiff's suit must be dismissed with costs throughout. The second respondent (plaintiff) will pay the appellant (first defendant) his costs both here and in the lower Court. The appellant will pay a penalty of Rs. 5½ and a stamp duty of Rs. 75.

SRINIVASA AYYANGAR, J.—I shall only say a few words with regard to the preliminary objection that was taken to the hearing of the appeal by the learned vakil for the respondent. The third defendant originally filed an appeal and by an order of this Court he was directed to furnish security for the costs of the plaintiff-respondent.

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He failed to do so and in consequence the appeal went off for default. The objection taken by the learned vakil for the respondent is that in form the present appeal preferred by the first defendant was a memorandum of cross objections such as is contemplated under rule 22 of Order XLI of the Civil Procedure Code. His argument was that, when the appeal went off for default and there was no hearing of the appeal, the memorandum of cross objections could not be heard; but assuming that Order XLI of the Civil Procedure Code applies to this case, the legislature itself has provided for it in clause (4) of rule 22 of Order XLI. Before this new Procedure Code there was an expression of judicial opinion to the effect that such cross objections could not be heard if there was no hearing of the appeal itself. It is to provide against such contingencies that clause (4) provides that where, in any case in which any respondent has under this rule filed a memorandum of objections, and the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit. Notice of the memorandum of objections has been served and therefore there is no valid objection to its being heard. But, in my opinion, Order XLI has no application whatever to appeals from the original side. The appeal is provided under clause (15) of the Letters Patent and it is not an appeal from one, the Subordinate Court, to another, the Appellate Court, but from one Judge of the same Court to two or more Judges of the same Court. Now, in such a case, the provision is only for an appeal from a judgment of one Judge. There is no doubt in the rules framed by this Court for original side appeals in rule 351, there is a reference to memorandum of objections, if any. The law of limitation provides 20 days for

appeals from a judgment of one Judge on the original side and any provision for the filing of memorandum of objections by the rules of this Court will have the necessary effect of extending the period prescribed by the law of limitation for original side appeals; but, in this case, apart from any question of limitation, there is absolutely no difficulty in treating what is called the memorandum of objections as a substantive appeal, because an appeal merely means a petition to the proper tribunal for the purpose of reversing or modifying a judgment of the Court or Judge from which or whom the appeal is preferred. This is that in form, and, apart from any nomenclature, there is absolutely no difficulty in dealing with the substance of this appeal and dealing with it as a substantive appeal. However, I think the appellant in this case should under the rules of this Court treating it as a substantive appeal be required to pay another sum of Rs. 75 as and for additional Court fee. There is, however, the question of limitation, and, though this appeal was not filed within 20 days of the judgment appealed against, still there is no doubt whatever that the appellant in this case was misled by the rules of this Court and by the practice of this Court so long, and, therefore, if there is any case in which the provisions of section 5 of the Limitation Act can be invoked, this is such a case. The delay in the presentation of the appeal will therefore be excused, and the appeal is thus rendered competent. For the reasons set forth in his judgment by my Lord the Chief Justice, I agree that the appeal should be allowed as stated by him.

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APPELLATE CRIMINAL.

*Before Mr. Justice Wallace and Mr. Justice
Madhavan Nayar.*

1924,
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GRANDHE VENKATASUBBIAH (ACCUSED), APPELLANT,

v.

KING-EMPEROR.*

Criminal Procedure Code (Act V of 1898) — Sec. 132—Admissibility of oral statements made to the Police—Scope of sec. 162 as amended—Indian Evidence Act (Act I of 1872)—Sec. 157—Corroboration—Statements made in the course of Police investigation, if part of res gestæ of the offence of false complaint—Secs. 6 and 7.

The accused was convicted by the Sessions Judge, under section 211 of the Indian Penal Code for preferring a false complaint of dacoity. The conviction was based upon the testimony of police officers to the effect that the three persons mentioned as eye-witnesses in the complaint of dacoity, had made oral statements, in the course of police investigation denying the occurrence. Two of these persons, when subsequently examined at the trial of the accused, denied ever having made the statements attributed to them and the third was not examined.

Held, that the provisions of section 162 of the Code of Criminal Procedure, either as amended or as it stood before the amendment, were not an absolute bar to the use of such oral statements at the trial for any purpose admissible under the Indian Evidence Act.

Held further, that the statements were not admissible under section 157 of the Indian Evidence Act as they did not corroborate any evidence already given at the trial, nor under sections 6 and 7 as they did not form part of the *res gestæ*, and that the conviction should therefore be set aside.

APPEAL against the order of G. G. SOMAYAJULU, Sessions Judge of Cuddapah, in Case No. 5 of the Calendar for 1924.

The facts necessary for this report are set out in the judgment.

V. L. Eithiraj with *A. S. Sivakaminathan* for the appellant.

Public Prosecutor on behalf of the Crown.

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JUDGMENT.

WALLACE, J.—The appellant has been convicted under WALLACE, J. section 211 of the Indian Penal Code for bringing a false complaint against five persons that they committed dacoity. The case requires detailed scrutiny as the lower Court has in my opinion admitted much evidence which was not admissible in law.

The dacoity was said to be at 3 a.m. on 1st June 1923. Accused's complaint was that six persons waylaid him, his daughter and his son-in-law (P.W. 17), P.W. 16 being also along with them carrying a luggage bundle and that they threatened them with violence and carried off the bundle.

Eighteen witnesses were examined for the prosecution to prove the falsity of this complaint. P.Ws. 1 and 18 are formal witnesses. P.Ws. 2 and 3 are investigating police officers. P.W. 4 is the Village Munsif to whom the accused gave his complaint (Exhibit A). P.W. 5 is a karnam. (I shall refer to these witnesses later). P.W. 6 is a general witness to prior enmity between the present accused and those whom he charged with dacoity. P.Ws. 7 to 11 appear as those who were accused in the accused's complaint, but there is some doubt as to P.W. 11. P.Ws. 12 and 13 are to prove an *alibi* of P.W. 11 at the time of the alleged dacoity. P.Ws. 14 and 15 say that the accused complained to them that he was beaten by Gollas or Ayyavari Setti's men. They do not say that the accused said that there

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was no dacoity. P.Ws. 16 and 17 deposed to the fact of there having been a dacoity and they were treated as hostile by the prosecution. They did not help the prosecution case.

It is clear that on the prosecution side there is no direct evidence of the falsity of the complaint except that of the persons actually accused of the dacoity who deposed to their innocence. Of these P.W. 11 claims to be the person charged in the accused's complaint, Exhibit A, as Podmekala Oosavadu *alias* Chinniah of Obulampet. The accused says P.W. 11 is not the man he charged. P.W. 11 gives his name in the Sessions Court as Podamakala Golla Oosavadu *alias* Chinnavadu of Obulampet. But it appears from the evidence of P.Ws. 12 and 13 that he was an in-patient in Rajampet hospital on 1st June 1923, the day of the alleged dacoity, and that to the medical officer he gave his name of Chinnavadu *tout seul* of Ellampet. He explains now that he gave his village as Ellampet because it adjoins Obulampet but obviously that is no explanation at all. Exhibit A itself clearly distinguishes between the two villages and four persons named in it are said to belong to Ellampet, and the fifth to Obulampet. If it was a wrong description of P.W. 11 to say that he was of Obulampet Exhibit A would hardly have made such a distinction. It is very doubtful to say the least, if P. W. 11 is the man named in Exhibit A. The only reason he can suggest for the accused associating him with the dacoits, Ayyavari Setti's men, is that he sometimes does coolie work for Ayyavari Setti. This is hardly a sufficient reason. I am not prepared to accept this evidence as helping to prove that Exhibit A was false. It is significant that this *alibi* of P. W. 11 was not put forward by the police in any record filed in this case as a reason for referring the case to the Magistrate.

Nor was it put forward by the Magistrate as a reason for dismissing the complaint.

I take up now the evidence of P.Ws. 2 to 5. P.W. 2 is the Head Constable who investigated the dacoity. His evidence was to the effect that he examined the accused's daughter and son-in-law, P.W. 17, and that both of them said that they did not go at all with the accused and knew nothing of any dacoity. P.W. 3 is the Circle Inspector who gives similar evidence. The defence objected that section 162, Criminal Procedure Code, prohibited the admission of this evidence but the Sessions Judge overruled the objections and allowed the statements to go in. It will be observed that the accused's daughter has not been examined at the trial, while the evidence of P.Ws. 2 and 3 as to what P.W. 17 told them was put in in chief examination, long before P.W. 17, the son-in-law was examined, and therefore at a stage when it was impossible to say whether or not P.W. 17 would corroborate what the police officers had stated. As a matter of fact, he did not corroborate what they said. In cross-examination, P.W. 2 added to his previous statements that he enquired "some persons" who stated that "they did not hear that any dacoity took place" and that the accused told them that he had been beaten. P.W. 3 was also allowed by the Sessions Judge in chief examination to depose that he examined P.W. 16 who denied having gone with the accused. This again was elicited before P.W. 16 had been put into the witness-box. When he did go into the witness-box, he did not corroborate what the police officer had stated. P.Ws. 4 and 5 are examined only to corroborate the statement of P.Ws. 2 and 3 that the accused's daughter and son-in-law denied the dacoity. P.W. 5 added that they were saying that the accused was slippered.

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The Sessions Judge has, in his reasons for conviction, strongly relied on his conclusion that "the three persons whom the accused stated as having been eye-witnesses to the dacoity denied all knowledge of it before the police officer." As pointed out already, two of these when examined in Court, supported the accused and the third, his daughter, was not examined by the prosecution at all. As the Sessions Judge has thus used as substantive evidence against the accused statements of witnesses made to the police in the course of the police investigation, when these witnesses have either not been examined by the prosecution at all at the trial or have denied in their evidence at the trial that they made such statements at all, the legal question arises whether these statements taken in the course of the police investigation are admissible for such a purpose.

It is necessary first of all to consider whether the learned Sessions Judge's ruling that section 162 of the Criminal Procedure Code as amended is not an absolute bar to their admission is correct. These are oral statements taken from witnesses in the course of police investigation. The old section 162, Criminal Procedure Code, was not an absolute bar to the admissibility (for certain definite purposes) of such oral statements. It has first to be considered whether the amended section 162 is such a bar, i.e., whether it prohibits the "use" of such oral statements for any purpose at an inquiry or trial. I do not think it does or that it goes any further in that direction than the section before amendment did, i.e., the amended section does not prohibit the use as evidence (for any purposes admissible under the Indian Evidence Act) of such oral statements. It may be answered that the words "such statement" in section 162 (1), are vague enough to include oral as well as

written statements, but I think the whole design of the section implies otherwise. Both the provisos clearly apply only to written statements, so that if oral statements are wholly excluded from use by the first part of the section the provisos do not affect that total exclusion. It would follow that, on such a reading of the section, an accused person would be prohibited from using in his favour oral statements favourable to himself made in the course of police investigation. I cannot reasonably suppose that the section was designed for such a purpose. When the section uses the phrase "such statement," I am clear that "such" means "if reduced into writing." There are other indications to my mind that this must be so. The old section 162 had nothing to do with statements not reduced to writing and was designed to prevent entries in police diaries from being used against an accused person. If the scope of the new section was to be so much wider than the old as to include any statement not reduced to writing, I should have expected, considering the voluminous case law that has endeavoured to interpret the old section [see, e.g., *King-Emperor v. Nilakanta*(1); *Muthukumaraswami Pillai v. King-Emperor*(2); *Fanindra Nath Banerjee v. Emperor*(3); *Emperor v. Hanma Reddi*(4)], that the new section, if it was to cover oral statements also, would have unequivocally stated so.

Again, the second proviso uses the same words "such statement" to mean only a written record, as it is dealing with the copy of a written record to be furnished to the accused, and obviously implies that there is a statement on the record which the Court may first examine for itself before the accused is allowed to look at it. The

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(1) (1912) I.L.R., 35 Mad., 247.
(3) (1909) I.L.R., 36 Calc., 281.

(2) (1912) I.L.R., 35 Mad., 397.
(4) (1915) I.L.R., 39 Bom., 56.

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proviso is meaningless if "such statement" means "oral statements."

Again, if section 162 had been designed now to prohibit the use of oral statements made to police officers in the course of police investigation, I should have expected an amendment of section 27 of the Indian Evidence Act. That section has always been read as a proviso to both sections 25 and 26. But if the above suggested reading of section 162 is correct, clearly section 27 can no longer have any application to section 25, and section 27 ought, therefore, in view of the case law on the subject, to have been amended by making it clear that it no longer applied to section 25. I do not think this argument is met by saying that section 27 will still allow oral statements of the nature contemplated by it to be proved, but section 162, Criminal Procedure Code, will forbid them being used against the accused. There is no point in proving a fact unless it can be used after proof, and to allow facts against accused to be proved which cannot be used against him would be a procedure so fraught with danger to an accused person, especially in a trial by jury, that I cannot imagine the legislature countenancing it in any way.

I conclude therefore that the application of the new section 162 is confined, as that of the old one was, to the written record, that the new section was designed to confer on an accused person a legal right, which the old section did not give, of having a copy of such written statement for the purpose of using it to contradict the witness, and that, as regards proof and use of oral statements, the law is unaltered and is as it was before. All oral statements which are previously admissible under the Indian Evidence Act, the use of which was not prohibited by the Criminal Procedure Code, are still admissible and may be used.

The learned Sessions Judge was therefore, in my view, correct in holding that the amended section 162, Criminal Procedure Code, was not a bar to the admissibility of these statements. But it appears to me that they are not admissible under the Indian Evidence Act at all, a point to which the learned Judge has not directed his attention. They are not admissible under section 157, Indian Evidence Act, as they do not corroborate any evidence given by accused's daughter or by P.Ws. 16 and 17 before the trying Court or any evidence given by these witnesses outside the trying Court, but filed by the trying Court as evidence at the trial. Section 157, Indian Evidence Act, clearly says that the testimony to be corroborated must be testimony at the trial. See also *Emperor v. Akbar Badoo*(1). The Public Prosecutor argues that the statements are admissible as part of the *res gestæ* under sections 6 and 7 of the Indian Evidence Act, but I am not prepared to accede to this contention. The offence in this trial is filing a false complaint. What happened at the subsequent police investigation of the complaint forms no part of the *res gestæ*. That investigation is an occurrence separate in time and place from the crime itself, and the remarks of witnesses at the investigation are not remarks occasioned by the crime and springing spontaneously out of it, but remarks made in answer to police enquiries which may be made long after the crime. If the investigation had never been made, the remarks would never have been made either. All these statements by witnesses in the course of the police investigation, therefore, are neither spontaneous nor simultaneous in time and place with the crime. Different considerations would arise if the statements had been

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(1) (1910) I.L.R., 34 Bom., 599.

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made at or about the time and place of the crime, as, for example, if when the accused made his complaint, his daughter and son-in-law had been present and had then volunteered the information that the complaint was a false one. I am satisfied therefore that the Indian Evidence Act does not permit these statements to be proved or used as evidence against the accused.

I am quite clear on general principles also that these statements are not admissible as substantive evidence for the prosecution against the accused. If this case can be proved by the statements of the police officers that other people at a police investigation told them that there was no dacoity, it would be equally open in another case to prove by similar statements that there was a dacoity or any other fact necessary for conviction. Such a procedure, I am quite clear, is unwarranted either by the Indian Evidence Act or the Criminal Procedure Code. The fact that this is a case of a false complaint does not to my mind alter the general principle that criminal cases cannot be proved by reproducing the contents of the note book of an investigating police officer.

I am satisfied therefore that these statements were wrongly admitted in evidence against the accused. As I have already pointed out, if they are excluded, we are left only with the self-interested statements of the original accused in the complaint which are hardly a strong enough basis for a conviction. I would therefore reverse the conviction and sentence passed on the accused and direct him to be set at liberty, and his bail bond cancelled.

MADHAVAN
NAYAR, J.

MADHAVAN NAYAR, J.—I have had the advantage of reading the judgment just now delivered by my learned brother. As I agree with that judgment, I propose to

deal with the facts and the law arising in the case only very briefly.

The accused has been convicted by the learned Sessions Judge of Cuddapah for the offence of preferring a false charge of dacoity under section 211 of the Indian Penal Code, and has been sentenced by him to suffer rigorous imprisonment for two years.

The accused made a complaint (Exhibit A) that, while he was proceeding on the 1st of June 1923 from Obulampeta to Vontimitta railway station accompanied by his daughter, son-in-law and a servant, six persons assaulted him and carried away the bundle of cloths and jewels kept in the custody of his servant. As this complaint was on investigation found to be false, the case out of which this appeal arises was launched against him under section 211, Indian Penal Code.

It seems to me that the falsity of the complaint made by the accused depends mainly upon the evidence of P.Ws. 2 to 5. P.Ws. 7 to 11 are the persons said to have taken part in the dacoity. All of them state that they were absent from the village at the time of the occurrence. P.Ws. 12 and 13 seek to prove the plea of *alibi* set up by P.W. 11. I agree with my learned brother in holding that it is very doubtful if P.W. 11 is the man named in Exhibit A. P.Ws. 16 and 17, the servant and the son-in-law of the accused, stated before the Sessions Judge that there was a dacoity and that the accused was beaten; and the Public Prosecutor was permitted to treat them as hostile witnesses and cross examine them. In this connection I may point out that the accused's daughter has not been examined at the trial.

The evidence of P.Ws. 2 to 5 is to the following effect: P.W. 2, the head constable who investigated the dacoity case, stated that he examined the accused's daughter and son-in-law and that they told him that the alleged

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dacoity never took place, that they did not lose any jewels or cloths and that they did not accompany the accused to Vontimitta. P.W. 3, the Circle Inspector who also carried on the investigation of the case, stated that the daughter and son-in-law of the accused told him that no dacoity took place. P.Ws. 4 and 5 were examined to corroborate the evidence of P.Ws. 2 and 3 that the accused's son-in-law and daughter stated that there was no dacoity. As already pointed out, P.Ws. 17 and 16, the son-in-law and the servant of the accused, did not corroborate what the police officers stated.

It has been argued by the learned counsel for the appellant (1) that the evidence of P.Ws. 2 and 3 as regards what they were told at the investigation by the daughter, the son-in-law and the servant of the accused should not have been admitted in view of the provisions of the amended section 162 of the Code of Criminal Procedure, and (2) that, even, if section 162 is not a bar to the admissibility of their evidence, the learned Sessions Judge should have excluded the statements as inadmissible under the provisions of the Indian Evidence Act. The first objection was overruled by the learned Sessions Judge and the second was not considered by him.

The evidence of P.Ws. 2 and 3 consist of statements made to the police by witnesses examined in the course of the investigation of the case. Section 162 of the Criminal Procedure Code before its amendment had nothing to do with statements not reduced to writing; the section did not prohibit "the use of such statements" as evidence for any purpose admissible under the Indian Evidence Act. I think, even after the amendment, the application of the section should be considered to be limited to the use of statements reduced to writing as under the old section. If this interpretation

is not accepted, it would mean that the legislature, by amending section 162 of the Code of Criminal Procedure, has virtually repealed section 27 of the Indian Evidence Act. As, in my opinion, such a result would never have been contemplated by the legislature, I hold that the amended section 162, Criminal Procedure Code, is not a bar to the admissibility of statements made to P.Ws. 2 and 3 by the accused's daughter and P.Ws. 16 and 17.

Though section 162, Criminal Procedure Code, does not prohibit the use of the oral statements in question, it seems to me that the statements are not admissible in evidence under the Indian Evidence Act. It has not been argued that these statements are admissible under section 157 of the Evidence Act, as these do not corroborate the statement of the accused's daughter and the evidence of P.Ws. 16 and 17 given at the trial; but what is contended for by the learned Public Prosecutor is this, that these statements are admissible as part of the *res gestæ* under section 6 or 7 of the Indian Evidence Act. It will be observed that these statements were made to P.Ws. 2 and 3 during the police investigation of the case. They were made long after the commission of the offence, viz., the filing of the alleged false complaint. As the statements in question are not the necessary incidents of the offence itself and are not immediately associated with it, I do not think it can be said that they form part of the *res gestæ*. I have, therefore, come to the conclusion that these statements cannot be proved or used as substantive evidence to support the charge brought against the accused.

As the other evidence in the case is not of any value, I allow the appeal and set aside the conviction and sentence passed upon the appellant. The bail bond of the accused will be cancelled.

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APPELLATE CIVIL.

Before Mr. Justice Krishnan.

SEETHAYAMMA (APPELLANT). *

1924,
April 4.

Sec. 7 (5). Court Fees Act (VII of 1870)—Suit to set aside father's alienation—Decree for land on payment of certain sum—Appeal by defendant to exempt land—Court-fee on appeal.

In a suit by a Hindu to recover his share of the family lands alienated by his father a decree was made in favour of the plaintiff for the recovery of his share on his paying a portion of the consideration to the alienee. In an appeal by the defendant to dismiss the suit *in toto*,

Held that the subject-matter in dispute in appeal was the plaintiff's share itself and not the share *minus* the part of the consideration ordered to be refunded and that the Court-fee on appeal was to be calculated on the market value of the share of the alienated lands as provided by section 7 (5) of the Court Fees Act; *Rup Narain v. Bishwa Nath Singh* (1922) I.L.R., 44 All., 629, followed.

CASE referred under section 5 of the Court Fees Act, by the Taxing Officer of the High Court in respect of the amount of Court-fees payable on the memorandum of appeal sought to be preferred to the High Court against the decree of the Court of the Additional Subordinate Judge of Cocanada in Original Suit No. 33 of 1920.

The facts are given in the judgment.

G. Lakshmanna for appellant.

Government Pleader (C. V. Anantakrishna Ayyar) for Government.

JUDGMENT.

This is a reference under the Court Fees Act that has been referred to me for disposal by the learned Chief Justice, the Taxing Officer having referred the matter for the decision of the Court. In this case the plaintiff

obtained a decree so far as the eleventh defendant, the appellant before me, is concerned* for the recovery of possession of a half share of the lands sold to him under Exhibit V by his father on payment of Rs. 12,000. The appellant's appeal asks this Court to hold that the plaintiff is not entitled to the lands at all and that the suit should be dismissed as against the appellant. The question raised is, what is the Court-fee that the appellant has to pay on his appeal. No doubt as KUMARASWAMI SASTRI, J., has remarked in *In re Porkodi Achi*(1)

"the current of authority is clearly in favour of the view that the value of an appeal is not in all cases the value of the suit as originally filed, but the value of the relief granted by the decree which a party wishes to get rid of."

Turning to the Court Fees Act, we find the governing rule applicable to appeals is the one in schedule 1, clause 1 of the Act. It says, leaving out the unnecessary words, the proper fee payable upon a memorandum of appeal, not otherwise provided for in this Act, presented to any Civil Court, except those mentioned in section 3 with which we are not concerned, is to be calculated on the amount or value of the subject-matter in dispute. The way in which the fee is to be fixed is by taking "the amount or value of the subject-matter in dispute." The question before me therefore really turns upon the interpretation to be put upon the expressions "the subject-matter in dispute" and "its value."

Turning to section 7, clause 5, of the Court Fees Act, we find that "in suits for the possession of land, houses, and gardens—the Court-fee is to be calculated according to 'the value of the subject-matter'." The same words "the value of subject-matter" are used there, and it says "such value shall be deemed to be"

* S.R. No. 12004 of 1923.

(1) (1922) I.L.R., 45 Mad., 246.

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in the various cases referred to as mentioned in clauses (a) to (e). In the absence of any guiding rule in the Act itself as to computing the value in appeal, I think it is proper to take the "value of the subject-matter" in schedule 1, clause I, as meaning the same thing as "the value of the subject-matter" as set out in various sub-clauses of clause 5, section 7.

It is contended, however, before me that the subject-matter in dispute in this appeal is not the land but the market value of the land reduced by Rs. 12,000 which has already been declared as payable to the appellant. I am unable to accede to this argument. In my view the subject-matter of the appeal is the land itself, as the appellant is seeking to get rid of a decree against him, which has given the respondent the right to recover the possession of the land from him. He does not seek to get the amount which the lower Court has directed to be paid to him, increased by any sum of money, in which case no doubt the difference between what he claims in appeal, and what the lower Court has granted to him, would be the subject-matter of the appeal. But here what the appellant claims is the land itself, and his contention in appeal is that the land should not be taken away from him under any circumstances. He is not asking in the appeal, that the condition laid down by the lower Court should in any way be varied. But he wants the suit itself to be dismissed as regards the claim for the land in his possession is concerned. Such being his prayer in appeal, I must hold that the land itself is the subject-matter of the appeal and for purposes of valuation the rule laid down in section 7, clause 5, in various clauses as applying to the various immovable properties of lands and houses and gardens should be applied in this case. The lands here are partly inam lands and partly

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jirayati lands, and therefore they will have to be valued under clauses (a) and (b). This view is not in conflict with the views expressed in the cases cited to me. On the other hand, it is supported by the view expressed by Mr. Justice PIGGOT in *Rup Narain v. Bishwa Nath Singh*(1). The learned Judge says at page 632 :

"The position of the appellants is different. Even on the principle suggested by the stamp reporter, the report is unjust to them; for the *ad valorem* fee would require to be calculated on Rs. 10,000, less Rs. 4,000 which the plaintiff has been ordered to pay, i.e., on Rs. 6,000. I think however that they are entitled to appeal against the decree as it stands and to value their appeal for the purposes of the Court Fees Act under section 7 (5) (a) of the said Act."

The appeal there was similar to the appeal here. The suit was brought by a member of a joint family to avoid the sale of a joint property by one of the members of the family and to recover his share from the property. The lower court had granted a decree to the plaintiff, subject to the payment of Rs. 4,000 by him to the defendants who were the alienees. Those defendants, appellants, contended that the decree was not correct, and the suit should be dismissed and they were entitled to keep the lands. The learned Judge held that in such an appeal, the defendants should value their appeal for the purpose of Court-fees, under section 7 (5) (a) of the Act, quite irrespective of the condition imposed by the decree on the plaintiff to recover the land. If the plaintiff in the present case before me had appealed and contended that the amount of Rs. 12,000 was too large, and that it should be reduced by any particular amount no doubt the subject-matter of the dispute in the appeal would be the difference between what he admits is due and what the lower Court has declared to be due. But it is the defendant that appeals in the

(1) (1922) I.L.R., 44 All., 629.

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present case, and he seeks to have the decree of the lower Court which directed the possession of the lands to be given to the other side, set aside. It is clear in such a case that the subject-matter of the appeal is the land and not any money; and therefore as the Court Fees Act directs a certain method of valuation to be adopted in cases where the subject-matter in dispute is land, that method should be adopted in this case. I direct that the Court-fees be paid on such a valuation. The appellant will be given time for one week after the re-opening to pay the extra Court-fees.

N.R.

APPELLATE CIVIL.

*Before Mr. Justice Wallace and Mr. Justice
Madhavan Nayar.*

1924,
August 27.

RAMANATHAN CHETTIAR (PLAINTIFF), APPELLANT,

v.

SUBRAMANIA CHETTIAR AND ANOTHER (RESPONDENTS),
RESPONDENTS.*

Provincial Insolvency Act (V of 1920), sec. 51 (1)—“Assets realized in execution by sale before date of admission of petition”—meaning of.

The words “before the date of admission of the petition” in section 51 (1) of the Provincial Insolvency Act (V of 1920) qualify the words “assets realized” and not the word “sale” occurring in that section. “Assets” are “realized” within the meaning of that section not when the initial deposit of 25 per cent is made but only when the balance, viz., 75 per cent of the auction amount is received. *Arimuthu Chetty v. Vyapuripandaram* (1912) I.L.R., 35 Mad., 588, followed. Hence though an execution sale of a judgment-debtor's properties may have been held and 25 per cent of the sale amount be deposited in Court before the date of the admission of the

petition for adjudicating him an insolvent, yet if the remaining 75 per cent is deposited only after the admission of the petition for insolvency, the whole of the sale-proceeds, including the initial deposit of 25 per cent, vests only in the Official Receiver and no portion goes to the credit of the attaching decree-holder.

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CHETTIAR.

APPEALS against the orders of J. J. COTTON, District Judge of Coimbatore, in I.A. Nos. 312 and 313 of 1922, in I.P. Nos. 58 and 57 of 1922, respectively.

The facts are given in the judgment.

T. M. Krishnaswami Ayyar for appellant.

S. Ranganatha Ayyar for respondent.

The JUDGMENT of the Court was delivered by

MADHAVAN NAYAR, J.—The facts of this case are not disputed. In execution of a decree against the second respondent his properties were brought to sale on the 27th of June 1922 and the auction purchaser deposited 25 per cent of the sale-proceeds in the District Munsif's Court at Tiruppur. On the 1st of July 1922 an insolvency petition was filed against the second respondent and the Official Receiver was appointed interim receiver on the 4th of July 1922. The balance of the purchase money was deposited on the 11th of July 1922 and the second respondent was adjudicated an insolvent on the 15th of September 1922. In the meanwhile, the sale-proceeds of the second respondent's properties were forwarded to the Official Receiver by the District Munsif. On the 26th of July 1922 an application was filed before the District Judge of Coimbatore by the creditor who attached the properties and brought them to sale for the re-transfer to the District Munsif's Court of Tiruppur of the sale-proceeds to be dealt with by him according to law. The petitioning creditor who applied under the insolvency law for the adjudication of the debtor as an insolvent and for the appointment of the interim

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* Civil Miscellaneous Appeals Nos. 23 and 23 of 1923.

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receiver resisted this application and the District Judge rejected it. This appeal is by the creditor against the order of the District Judge refusing to re-transfer to the District Munsif's Court of Tiruppur the sale-proceeds of the second respondent's properties now in the possession of the interim receiver.

The principle of law to be applied to the decision of this appeal is embodied in section 51, clause (1) of the Provincial Insolvency Act which runs as follows:—

"Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realized in the course of the execution by sale or otherwise before the date of the admission of the petition."

It has been argued by Mr. Krishnaswami Ayyar that, according to this section, irrespective of the time of realization, assets realized in the course of execution by a sale which has been held before the date of the admission of the insolvency petition are preserved for the benefit of the execution-creditor, or, in other words, if the sale by means of which the assets are realized is held before the date of the admission of the petition, then the assets, even if they be realized after the date of the admission of the petition, enure to the advantage of the execution-creditor. Shortly stated, this argument makes the "date of the admission of the petition" qualify the "sale" and not "assets realized" in the section. The records in the case do not show the date of the admission of the petition; but for the purposes of this appeal, the date may be taken to be some time between the 1st and 4th July; in any event, it cannot have been later than the 4th of July when the interim receiver was appointed. Since the execution sale in this case was held on the 27th of June 1922, i.e., anterior to the 4th of July, it follows from the argument just stated that

the appellant-creditor is entitled to all the assets as against the interim receiver. We cannot accept this argument. It seems to us that,

"the policy and object of the statute is to secure the even distribution of a debtor's estate among his creditors, and to prevent the more active creditors from getting an undue advantage over those who may be less active." *Bower v. Hett*(1).

This object will obviously be frustrated if we accept the construction put upon the section by the learned vakil for the appellant. We think that the words "date of the admission of the petition" occurring in this section qualify "assets realized"; so that only assets realized before the date of the admission of the petition will enure to the benefit of the execution-creditor. The question then arising for consideration is, were assets realized in the course of execution before the date of the admission of the petition in this case? The words "assets realized" in the course of execution have been interpreted in many decisions in cases which arose under section 295 of the old Civil Procedure Code corresponding to section 73 of the present Code. We think these may be usefully referred to for elucidating the meaning of the words "assets realized" occurring in this section. In *Hafez Mahomed Ali Khan v. Damodar Pramanick*(2), it was held that, when property is sold in execution of a decree, the sale-proceeds may be said to be assets realized only when the balance of the purchase money is paid and not when 25 per cent is deposited in Court. In *Ramanathan Chettiar v. Subramania Sastrial*(3) occur the following observations by Sir ARNOLD WHITE, C.J.:—

"It seems to me that the word "assets" in section 295, Civil Procedure Code, means the proceeds of the sale of the

(1) [1895] 2 Q.B., 51.

(2) (1891) I.L.R., 18 Cal., 242.

(3) (1903) I.L.R., 26 Mad., 179.

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property which is sold in execution of the decree. As far as the present case is concerned, I am of opinion that the assets were realized when the whole of the proceeds were paid into Court."

Though there is no doubt a change in the corresponding provision of section 73 of the present Code, in that it substitutes the word "receipt" for the word "realized" in section 295, still, so far as the question before us is concerned, the decisions under section 73 are also helpful in arriving at a conclusion as to the meaning of the term "assets realized." In *Arimuthu Chetty v. Vyapuripandaram*(1), where the purchaser made the deposit on the 17th of September 1909 and the balance of the purchase money was paid into Court on the 29th of September 1909, it was stated by ABDUR RAHIM, J. :—

"It must be taken, having regard to the decision in *Ramanathan Chettiar v. Subramania Sastrial*(2), that the assets were realized only on the 29th of September 1909 within the meaning of section 295 of the old Code. There is no doubt a change in the corresponding provision of section 73 of the present Code. But so far as the question before me is concerned, the change in the language is immaterial. The purchase money becomes the asset of the judgment-debtor only when the balance is received and not when the deposit is made."

To the same effect is also the decision in *The Maharajah of Burdwan v. Apurba Krishna Roy*(3). Having regard to these decisions, we must hold that in this case the appellant is not entitled to claim either the balance of the purchase money or the initial deposit of 25 per cent as these cannot be considered to be "assets realized" in the course of the execution by sale before the date of the admission of the insolvency petition

(1) (1912) I.L.R., 35 Mad., 588.

(2) (1902) I.L.R., 28 Mad., 179.

(3) (1911) 15 C.W.N., 872.

within the meaning of section 51 of the Provincial Insolvency Act. It follows therefore that the appellant's petition for a re-transfer of the sale-proceeds to the District Munsif's Court of Tiruppur was rightly rejected by the District Judge.

We dismiss this Civil Miscellaneous Appeal with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice
Venkatasubba Rao.

SHANMUGA MUDALI (PLAINTIFF), APPELLANT,

v.

KUMARASWAMI MUDALI (DEFENDANT), RESPONDENT.*

*Chit fund for co-operation, thrift, and prudence among
subscribers, legality of.*

A chit fund, the object of which is the promotion of co-operation, prudence and thrift among its subscribers, whose number is determined beforehand and in which every subscriber is entitled by its rules to get from the promoters of the fund the whole of the capital subscribed for by him before or at the closing of the fund at a fixed time, is a legal transaction and is not a "lottery" or a gambling venture, even though some of the subscribers become by the rules entitled to get much more than they paid and such persons are determined by the drawing of lots. *Iyyanar Kone v. Vidoomada Cone* (1858) Sud. Dec., 53, *Kamakshi Achari v. Appavu Pillai* (1863) 1 M.H.C.R., 448, *Vasudevan Nambudri v. Mammod* (1899) I.L.R., 22 Mad., 212, *Wallingford v. Mutual Society* (1880) 5 App. Cas., 685, followed. *Sykes v. Beadon* (1879) 11 Ch. D., 170, *Sankunni v. Ikkora Kirtti* (1919) M.W.N., 570, and *Nagappa Pillai v. Arunachalam Chetty* (1924) 47 M.L.J., 876, not followed.

* Second Appeal No. 1521 of 1922.

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SECOND APPEAL against the decree of R. A. JENKINS, District Judge of Chingleput, in Appeal Suit No. 324 of 1921 preferred against the decree of G. J. QURAISHI SAHIB, District Munsif of Conjeeveram in Original Suit No. 159 of 1921.

The facts and arguments are given in the judgment of VENKATASUBBA RAO, J.

K. V. Sesha Ayyangar with V. C. Sesha Achariyar for appellants.

P. Somasundaram, K. S. Desikan and C. Narayana-swami for respondents.

RAMESAM, J.—The facts of the case have been stated by my learned brother, whose judgment I had the advantage of perusing and need not be repeated. I will only observe that the suit is not between the subscribers *inter se* or by a subscriber against the stake-holder. The stake-holder of the suit chit fund is a partnership consisting of the plaintiff and defendant and the object of the suit is to recover the moneys due to the plaintiff on the closing of the partnership. Unless the object of the main transaction is to commit an offence made punishable by the Indian Penal Code there can be no objection to enforcing the terms of a contract of this kind which is collateral to another transaction even when the main transaction itself is merely void (as where it amounts to a wager) and cannot be enforced; See *Shibho Mal v. Lachman Das*(1), *Bhola Nath v. Mul Chand*(2), *Chekkia Venkataswamy v. Gajjila Nagabhushanam*(3) which are cases of principal and agent. Cases of partnership are illustrated by *Sharp v. Taylor*(4) (case of fraud on the American law and on the English navigation laws), *Johnson v. Lansley*(5), *Beeston v.*

Beeston(1), *Brookman v. Mather*(2) (AVORY, J.) and several others ending with *Jeffrey v. Bamford*(3). These are mostly cases of betting partnerships.

This leads to the question whether any offence has been committed in the formation and conduct of the main transaction, i.e., the chit fund. If it is an offence it must be one punishable under section 294-A of the Indian Penal Code. This section and Act V of 1844 are both founded on the terms of 42 Geo. III, C. 119 and 4 Geo. IV, C. 60. I agree with my learned brother in thinking that there is nothing to distinguish the present case in principle from *Iyyanar Kone v. Vidoomada Cone*(4), *Kamakshi Achari v. Appavu Pillai*(5) and *Vasudevan Nambudri v. Mammod*(6). *Sankunni v. Ikkora Kirtti*(7) and *Nagappa Pillai v. Arunachalam Chetty*(8) are not of much help as there is not much discussion on the question of what constitutes lottery.

The word "lottery" is not defined either in the Indian Penal Code or Act V of 1844 nor in the English Statutes. A definition has been attempted in Volume XV of Halsbury, section 605, page 299, apparently with reference to the decided cases but, when the cases are examined, we are landed into difficulties. The only decision of the House of Lords available is *Wallingford v. Mutual Society*(9); the facts of which have been fully stated by my learned brother. The observations of the LORD CHANCELLOR (LORD SELBORNE), and Lords BLACKBURN, HATHERLEY and WATSON (vide my learned brother's judgment) on the question whether the transaction was illegal under the Lottery Acts are very brief. In Halsbury, Volume XV, page 300, the case is cited as

(1) (1875) 1 Ex., 13.

(3) [1921] 2 K.B., 351.

(5) (1868) 1 M.H.C.R., 448.

(7) (1919) M.W.N., 570.

(2) (1913) 29 T.L.R., 276.

(4) (1858) Sud. Dec., 53.

(6) (1899) I.L.R., 22 Mad., 212.

(8) (1924) 47 M.L.J., 876.

(9) (1880) 5 App. Cas., 685.

(1) (1901) I.L.R., 28 All., 185.

(3) (1804) 14 M.L.J., 326.

(2) (1903) I.L.R., 25 All., 639.

(4) (1849) 2 Ph., 801; 41 E.R., 1153.

(5) (1852) 12 C.B., 468; 138 E.R., 989.

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authority for the proposition when the scheme has for its object the carrying on of a legitimate business, the fact that it provides for the distribution of its profits in certain events by lots will not vitiate the scheme. If so all chit funds, the main object of which is the promotion of co-operation, prudence and thrift, ought to be regarded as legitimate even though there is an element of chance and this is apparently the ratio decidendi of *Iyyanar Kone v. Vidoomada Cone*(1) and *Kamakshi Achari v. Appavu Pillai*(2). In Chitty on Contracts, the opposite opinion of JESSEL, M.R., in *Sykes v. Beadon*(3) was regarded as overruled by the decision of the House of Lords in *Wallingford v. Mutual Society*(4). It seems to me that Lord SELBORNE's reason for holding that the society was not affected by the Lottery Act is indicated in the sentence

"The other Act relied on had reference to persons who kept lottery offices at which the public were invited to pay for lottery tickets and that Act could have no application to the case."

If by the time a society of this kind becomes known to the public, all its members were ascertained and there is no invitation to any member of the public to join it, it cannot be said that any person keeps a lottery office at which the public were invited to join and to pay, within the meaning of the English Acts or section 294-A of the Indian Penal Code. In other words, it is not that every lottery constitutes an offence, but the keeping of a lottery office which is a standing invitation to the public that constitutes the offence. In *Stoddart v. Sagar*; *Sagar v. Stoddart*(5) a case of "Coupon competition" advertised in a newspaper, the coupons being filled up by purchasers of the newspapers with the names

of the horses likely to come first, second, third and fourth in a race, POLLOCK, B., and WRIGHT, J., held that the facts do not show anything amounting to a lottery. No reasons were given. But the cases cited in the arguments show that it was regarded as a case where the success depended not on mere chance but on some skill. If so, the case does not help us. So also the decisions in *Caminada v. Hulton*(1) and *Hall v. Cox*(2).

In the present case there is nothing to show when and how the 500 subscribers joined the fund, and whether there was any invitation to the public to join it and an office was kept for the purpose. If so, there is no offence under section 294-A of the Penal Code. In the case in *Reg v. Pearson*(3) (the facts of which are stated by my learned brother) the Public Prosecutor conceded that, if the competition was confined to meteorological savants, there might have been no offence. Sir JOHN BRIDGE thought that it was a pure lottery so far as those persons were concerned to whom the scheme was addressed. It is unnecessary for me now to discuss the soundness of the distinction.

In *Taylor v. Smetten*(4) (the facts of which are stated by my learned brother) HAWKINS, J, says :

"although it was admitted by the respondent that the tea was good and worth all the money, it is impossible to suppose that the aggregate prices charged and obtained for the packages did not include the aggregate prices of the tea and the prizes."

In other words, the price paid for each packet included something more than the proper price of the tea. If so, the aggregate of such amount was distributed unequally between the purchasers. There was an invitation to the public to purchase and any indefinite number may purchase. It is certainly a lottery. But,

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(1) (1858) Sud. Dec., 53.

(2) (1879) 11 Ch. D., 170.

(2) (1883) 1 M.H.C.R., 443.

(4) (1880) 5 App. Cas., 686.

(5) [1895] 2 Q.B., 474.

(1) (1891) 64 T.L.R. (N.S.), 572.

(2) [1899] 1 Q.B., 198.

(3) (1893) 37 S.J., 749.

(4) (1883) 11 Q.B.D., 207.

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as it is also not clear that there was anything in the nature of prizes and as it is possible that every purchaser might have been cheated it is worse than a lottery in which at least some get prizes. *Barclay v. Pearson*(1), is also a case where the parties were invited to join in the competition and no limits were placed on the members that might join and the result did not depend on skill. So far it contained the elements of a lottery. But if each competitor paid no more than the proper price of the newspaper (as to the ascertaining of which there can be no difficulty) he paid nothing for the chance and the prizes were paid only out of the large profits realized by the proprietor of the newspaper by the increased circulation. I have some doubts as to why it should be held to be a lottery, as the case falls within the dictum of DARLING, J., in the next case. In *Willis v. Young and Stembridge*(2), Lord ALVERSTONE, Chief Justice, held it was a lottery. DARLING, J., who agreed that if the chances of a prize were obtained wholly gratuitously the scheme could not be a lottery. But, on the facts of the case, it is not necessary that the holders of the medals including the successful ones should be purchasers of the *Telegraph*. It is possible that none of the medal-holders is a purchaser and the actual purchasers of the *Telegraph* who have paid no more than the proper price might have purchased without any knowledge of the medals or the chance of a prize connected with them. The case presents to me some difficulties. The case of *Reg v. Harris*(3), presents to me the same difficulty. Though MONTAGU SMITH, J., begins the judgment by saying :

“ Whether the full value of the shilling was or was not received by the subscribers ”

(1) [1893] 2 Ch., 154.

(2) (1907) 1 K.B., 448.

(3) (1866) 10 Cox's C.C., 352.

the inference is irresistible, as pointed out by HAWKINS, J., in *Taylor v. Smetten*(1) that the shilling included more than the price of the goods sold. If so, it is a lottery. If not, the observation of MONTAGU SMITH, J., would be in conflict with DARLING, J.'s dictum in *Willis v. Young and Stembridge*(2). I am content to follow the decision of the House of Lords in *Wallingford v. Mutual Society*(3) and hold that the chit fund before us is not a lottery and also, even if it is, no offence under section 294-A of the Indian Penal Code has been committed.

That being so, the suit is maintainable. The appeal is allowed, the decrees of the Courts below will be reversed and the suit remanded for disposal according to law. The appellant will be entitled to his costs here and in the lower appellate Court. In the first Court the costs will abide the result.

The appellant will be entitled to a refund of Court-fee.

VENKATASUBBA RAO, J.—The plaintiff has filed this suit for the recovery of a sum of money due to him on the footing of a promissory note executed by the defendant. The suit is resisted on the ground that the plaintiff and the defendant were as partners engaged in a lottery, that the accounts of the partnership were settled, that the note was executed for the amount which was found due by the defendant to the plaintiff and that as lotteries are prohibited by law, the plaintiff should not be permitted to enforce his promissory note. The nature of the transaction may be briefly set forth. The plaintiff and the defendant promoted what is described as a “ Chit Fund.” A capital fund of Rs. 500 a month

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(1) (1883) 11 Q.B.D., 207.

(2) [1907] 1 K.B., 448.

(3) (1880) 5 App. Cas., 685.

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is raised by 500 subscribers subscribing each one rupee per mensem. At the end of the month there is a drawing by lot and the subscriber who draws the ticket is paid Rs. 50 and his connection with the transaction forthwith ceases. This process is repeated month after month till the end of the 49th month. It will be seen that by this time, 49 subscribers will have drawn the tickets and received each a sum of Rs. 50 and that they have consequently severed their connection with the fund. At the close of the 50th month, each of the remaining subscribers is paid Rs. 50 and the stakeholders divide the profit and the fund is dissolved.

Let me now examine what the essential features of this transaction are—

(1) There is no uncertainty in regard to the sum which each subscriber receives. It is clearly understood from the start that every member will be paid Rs. 50. He receives neither more nor less. The sum which each subscriber gets is thus fixed.

(2) No subscriber takes the risk of losing any portion of the amount subscribed. The utmost that any subscriber may be required to contribute is Rs. 50 and each subscriber gets the same back.

(3) The element, therefore, that is generally present in a lottery or a wagering transaction, namely, that loss is occasioned to one or more, does not exist in this transaction.

But it may be asked, so far as the first 49 are concerned, they get more than what they pay, how is this made possible? The fund as it comes in is invested and earns interest. The aggregate amount of interest is utilized in paying the first 49 members the excess over what they contribute and there is still a surplus which leaves to the stake-holders a fair margin of profit.

There is some element of chance in regard to the first 49 subscribers. The member who draws the first lot would in return for the one rupee that he pays in gets Rs. 50. The subscriber who draws the second lot pays Rs. 2 and gets Rs. 50. This goes on until the 49th member who subscribes as much as 49 and receives Rs. 50. Then chance ceases to play any part in regard to the remaining 451 members who receive at the end of the 50th month each a sum of Rs. 50. What the 451 members lose is the interest upon their money and what the first 49 members gain is a portion of the interest thus lost by the other subscribers. The remaining portion of the interest earned is retained by the stake-holders as their profit.

The fact that emerges from this description is that while chance determines the disposal of the interest earned there is absolute certainty with reference to the distribution of the capital fund itself. Though it may be said that it is the small element of chance that tempts some to join the fund, the dominant feature of the transaction is that it enables a large number to gradually lay by money and receive their savings in a lump sum and the scheme is in their case an incentive to thrift.

There is another feature of the scheme to which I may advert. Under rule 8 of the Chit Fund Rules any of the subscribers is entitled to obtain by way of loan, after being subscriber for seven months, an amount not exceeding three-fourths of the total contribution made by him on executing a promissory note agreeing to repay the sum with interest at 12 annas per cent per mensem. If a larger amount is required there is a provision under which it may be advanced under proper safeguards. Rule 6 provides that when the member draws his amount the sum due by him on account of loan is to be deducted and the balance alone is to be paid to him.

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In my opinion there is nothing to distinguish this case in principle from *Iyyanar Kone v. Vidoomada Cone* (1), *Kamakshi Achari v. Appavu Pillai*(2) and *Vasudevan Nambudri v. Mammol*(3).

The transactions in all the three cases were similar and they may thus be described in the form of an illustration. A stake-holder promotes a chit fund with 20 subscribers, each subscriber paying monthly subscription of Rs. 10. The fund lasts for 20 months. The total subscription for one month is thus Rs. 200. Each subscriber in turn is paid the entire sum of Rs. 200, the order in which the members are to get the sum being determined by lot. The subscriber to whom the sum is paid executes a bond in favour of the stake-holder agreeing to pay regularly future subscriptions as they fall due. In the case of *Iyyanar Kone v. Vidoomada Cone* (1) three learned Judges expressed the opinion that the scheme is a provident and beneficial arrangement under which each member derives the advantage of having the use in his turn of a round sum, the only thing determined by lot, being the turn in which that advantage shall be enjoyed. The learned Judges observed that the latter circumstance did not in their opinion bring the case within the scope of Act V of 1844, an Act for the suppression of lotteries.

The material portion of the Act runs thus :—

“All lotteries not authorized by Government shall from and after the 31st March 1844 be deemed and are hereby declared common and public nuisances and against law.”

In *Kamakshi Achari v. Appavu Pillai*(2) SCOTLAND, C.J., and FRERE, J., base their decision on the ground that

“it is not the case of a few out of a number of subscribers obtaining prizes by lot.”

The learned Judges further say that the right of the subscribers to the return of their contribution is not made a matter of risk or speculation. They hold that a transaction is not necessarily a lottery within either the spirit or the letter of the Act, simply because a matter of whatever kind is agreed to be decided by lot. The Act that was in force was still the same Act, V of 1844.

In *Vasudevan Nambudri v. Mammol*(1) SHEPARD, O.C.J., and MOORE, J., upheld the transaction on the ground that the law as laid down in *Kamakshi Achari v. Appavu Pillai*(2) was followed without question for 35 years and the introduction of section 294-A into the Indian Penal Code made no difference.

Wallingford v. Mutual Society(3), a decision of the House of Lords, is a very useful authority. The object of the mutual society was to accumulate capital by means of monthly subscriptions from members, to advance such capital to the members in rotation and ultimately to divide among the members all the profits that had been made. An “appropriation certificate” was issued to every member on his entering the society and certified his title to receive an advance out of the funds of the society and to participate in its profits. “The appropriations” or advances were to be made in the following manner. By article 27 it was declared that “appropriations” shall be allotted in two ways :— the first and every fourth one thereafter, by drawing, free of any premium or interest, while those intermediate shall be allotted to the member or members tendering the highest premium for the same respectively. The appellant took up appropriation certificates and obtained advances and did not make the required repayments.

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(1) (1858) Sud. Dec., 53.

(2) (1863) 1 M.H.C.R., 449.

(3) (1890) I.L.R., 22 Mad., 212.

(1) (1899) I.L.R., 22 Mad., 212.

(2) (1863) 1 M.H.C.R., 448.

(3) (1880) 5 App. Cas., 685.

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In an action against him, he pleaded among other things that the constitution of the society itself was illegal as its promised benefits were to be given to the members by drawings which made the society unlawful under the Lottery Acts. The Lord Chancellor (Lord SELBORNE) observes that one of the Acts relied upon had reference to gambling transactions only and the transaction before the house was not a gambling transaction: the other Act relied on had reference to persons who kept lottery offices at which the public were invited to pay for lottery tickets and that Act could have no application to the case. The learned Lord observes that no case was made worthy of a moment's consideration in support of the contention that the transactions were illegal under the Lottery Acts. Lord BLACKBURN, Lord HATHERLEY, and Lord WATSON were equally emphatic in their opinion that the plea was not in the slightest degree made out.

A contrary opinion was no doubt expressed by JESSELL, M.R., in *Sykes v. Beadon*(1). There was a combination formed on the principle of investing the subscriptions of the members and dividing the capital fund and profits by means of certificates convertible by annual drawings by lot into preference dividend bonds bearing interest with bonus. The learned Master of the Rolls at page 190 observes:

"If that is not a lottery, it is very difficult, at all events, to my mind, to understand what a lottery is. It is called a division by lot which means lottery. It says that the selections of certificates shall be by lot and has to be done in the ordinary way by chance and the benefits as I said before are unequal."

Chitty in his Treatise on Contracts at page 805 (17th edition 1921) seems to suggest that the opinion of JESSELL, M.R., cannot now prevail in view of the later decision of the House of Lords.

(1) (1879) 11 Ch. D., 170.

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A chit fund of the description with which we are called on to deal was held to be illegal by PHILLIPS, J., in *Sankunni v. Ikkora Kirtti*(1) and COLERIDGE, J., was of the opinion that this case required reconsideration and upon a reference by him, KRISHNAN and ODGERS, JJ., held in *Nagappa Pillai v. Arunachalam Chetty*(2) that such a scheme was illegal, although the learned Judges differed on another point.

The cases relied on by the defendant are easily distinguishable.

In *Taylor v. Smetten*(3) each packet of tea sold contained a coupon entitling the purchasers to a prize and although the tea was worth the money paid for it, it was held that the transaction was a lottery. The prizes were of an infinite variety and were not made known before the sale of the tea. The intending purchaser purchased the tea and the coupon together, whatever the value of the coupon might turn out to be. There was no doubt that in buying the tea he also took the chance of getting something of value in the nature of a prize. It might turn out to be anything. The price paid was not merely for the tea but also for the chance. The seller only undertook that he would give away the prize; but the prize might be anything; it might not be worth half a penny. In this case, it is obvious that loss was hazarded by each purchaser of the packet.

Barclay v. Pearson(4) related to a missing word competition and the scheme of it was that the competitors were to cut out coupons in a newspaper and fill in the word missing from a paragraph, the missing word being in the hands of a third party, enclosed in a sealed envelope. The whole of the money received in entrance

(1) (1919) M.W.N., 570.

(3) (1888) 11 Q.B.D., 207.

(2) (1924) 47 M.L.J., 876.

(4) [1893] 2 Ch., 154.

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was to be divided equally amongst those competitors who filled in the missing word correctly. Here the distribution takes place by chance, the fund itself being the contribution of all the competitors.

In *Reg v. Pearson*(1) a newspaper proprietor announced that he intended to carry on a weather forecast competition and people were invited to predict the number of hours of bright sunshine and the number of rainy days. The competitors who most nearly forecasted the weather were to obtain the prizes. Sir JOHN BRIDGE observed that the transaction was purely a lottery so far as those persons were concerned to whom the scheme was addressed. It was a competition of chance and not of skill. If the competition was confined to meteorological savants the case might be different. The competition was held to be quite as mischievous as the missing word competition. It is clear that while many lose, a few win the prizes, and that the fund out of which the prizes come is that contributed by the losing as well as the winning competitors. In *Willis v. Young and Stenbridge*(2) the proprietors of the *Weekly Telegraph* devised a still more ingenious scheme. They caused medals to be distributed gratuitously among the members of the public. Each medal bore the words "Keep this. It may be worth hundred pounds; see the *Weekly Telegraph* to-day." The winning numbers which were arbitrarily selected were published in the newspapers. It was not necessary that the holder of the medal should purchase a copy of the paper as information as to the winning numbers could be obtained without charge at the office of the newspaper. The object of the proprietors was attained and the circulation of the paper increased considerably. The point I am trying to make is thus brought out very clearly by Lord ALVERSTONE, C.J.

(1) (1898) 37 Solicitors' Journal, 749.

(2) [1907] 1 K.B., 448.

"The money for the prizes however comes out of the receipts of the respondents and these in their turn come to a considerable extent from the people who buy the paper although no doubt the advertisements may bring in a considerable sum. The persons who receive the medals, therefore, contribute collectively (though each individual may not contribute) sums of money which constitute the fund from which the profits of the newspaper and also the money for the prize winners in this competition come."

DARLING, J., expresses the same idea very shortly thus :—

"In the present instance, all chances are paid for in the mass by the general body of purchasers of the paper although an individual purchaser may not pay for his chance."

In *Reg v. Harris*(1) the scheme judged by this test is clearly a lottery. The fund out of which the prizes came was contributed by the whole body of subscribers and it is obvious that the ticket-holders did not in all cases obtain full value for the shilling which each purchaser of the ticket was required to pay, even assuming that the entire £ 250 was distributed in "bonuses."

In the present case, however, as I have shown, the prizes paid to the first 49 members are not paid out of the contributions made by the subscribers; the money for the prizes comes out of the interest earned on the capital fund contributed. The cases cited for the defendant are thus clearly distinguishable.

A view different from what I am disposed to take was no doubt taken as I have said in *Sankunni v. Ikkora Kirtti*(2) but the respondent against whom the decision was given was unrepresented and the attention of the Court was not drawn to *Wallingford v. Mutual Society*(3). Nor does it appear that this case was cited before the

(1) (1866) 10 Cox's C., 352.

(2) (1919) M.W.N., 570.

(3) (1880) 5 App. Cas., 685.

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bench that decided *Nagappa Pillai v. Annachalam Chetty*(1).

In my opinion, therefore, the transaction is not a lottery and the plaintiff is entitled to judgment.

In the view I have taken, it is unnecessary to deal with the contention based on the distinction between void and illegal transactions, or to discuss the group of cases of which *Johnson v. Lansley* (2), *Beeston v. Beeston*(3) and *Shibho Mal v. Lachman Das*(4), are examples.

I agree with my learned brother in the order proposed by him.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Wallace.

1925,
January 26.

VEERAPPA CHETTIAR AND 4 OTHERS (LEGAL REPRESENTATIVES OF THE DECEASED COUNTER-PETITIONER, DEFENDANT), PETITIONERS

v.

SUNDARESA SASTRIGAL (PETITIONER-PLAINTIFF),
RESPONDENT.*

Civil Procedure Code (V of 1908) — O. III, r. 4 — R. 277 of Civil Rules of Practice, construction of — Right of legal practitioner to appear for his former client's opponent — Section 115, Civil Procedure Code.

If a legal practitioner has been deprived by a Subordinate Court of his right to appear for a party by a wrong interpretation of rule 277 of the Civil Rules of Practice, the order is one liable to be revised by the High Court under section 115, Civil Procedure Code. Rule 277 is enacted not only in the interests of clients who might find themselves aggrieved by

(1) (1924) 47 M.L.J., 876.

(3) (1875) L. Ex., 13.

(2) (1852) 12 C.B., 468; 138 E.R., 989.

(4) (1901) I.L.R., 28 All., 165.

* Civil Revision Petition No. 547 of 1924.

practitioners wrongly allowing themselves to be engaged by their former client's opponent but also in the interests of practitioners who might be unjustly deprived of engagements by unscrupulous litigants. The prohibition on a practitioner contained in rule 277 ordinarily applies only to cases of further proceedings arising from one and the same suit or matter. It cannot be applied to a subsequent suit arising out of a prior suit unless the right or title and the causes of action and reliefs claimed in both are the same. Order III, rule 4, Civil Procedure Code, does not give an absolute right to any practitioner to appear in any Court in any matter he chooses. It is subject to the rules governing the admission of different classes of practitioners in different Courts and to rules framed by the High Court such as rule 277 which invest Courts with power to regulate the conduct of practitioners.

PETITION under section 115 of Act V of 1908 and under section 107 of the Government of India Act, praying the High Court to revise the order of K. S. V. ROWJE, District Munsif of Srirangam, in C.M.P. No. 315 of 1924 in Original Suit No. 103 of 1924.

The facts and arguments are given in the judgment. Rule 277 of the Civil Rules of Practice is fully set out in the judgment.

K. V. Krishnaswami Ayyar and R. Kesava Ayyangar for petitioners.

T. M. Krishnaswami Ayyar (with K. G. Srinivasa Ayyar) for respondents.

JUDGMENT.

This is an application to revise the order of the District Munsif of Srirangam who directed two pleaders not to appear for the defendants in two suits pending in his Court as the plaintiff objected to their appearance inasmuch as they had appeared for him in previous suits against the defendant in which the subject matter was the same as in the suits now pending. The first contention of Mr. K. V. Krishnaswami Ayyar is that the District Munsif had no jurisdiction to pass such an

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order. It is argued that the pleaders are not parties to the suits and that they have no right of appeal against such an order and therefore the order is without jurisdiction and is not covered by rule 277 of the Civil Rules of Practice.

The District Munsif purported to act under rule 277 which is in these terms :

"Except when specially authorized by the Court, or by consent of the party, a pleader who has advised in connexion with the institution of a suit, appeal or other proceeding, or has drawn pleadings in connexion with any such matter, or has, during the progress of any such suit, appeal or other proceedings, acted for a party, shall not, unless he first gives the party for whom he has advised, drawn pleadings or acted, an opportunity of engaging his services, appear in such suit, appeal or other proceeding, or in any appeal, or application for revision arising therefrom or any matter connected therewith, for any person, whose interest is opposed to that of his former client, provided that the consent of the party shall be presumed if he engages another pleader to appear for him in such suit, appeal or other proceeding without offering an engagement to the pleader whose services he originally engaged."

It is conceded by Mr. K. V. Krishnaswami Ayyar that the Court has jurisdiction either to grant or to refuse such authority when a pleader applies for the same under the rule. But it is urged that when he does not make an application for special authority the Court has no jurisdiction to pass an order against him and that the only course open against a pleader who violates the rule is by a proceeding under the Legal Practitioners Act for unprofessional conduct.

Considerable stress was laid on Order III, rule 4, of the Civil Procedure Code, in support of the argument that a pleader's engagement lasts till the termination of the proceedings and therefore the Court cannot prevent the pleader from appearing for a party after he has filed his vakalat in Court. Order III, rule 4, does not give an absolute right to a pleader to appear in a Court till

the termination of the proceedings, but only provides in what manner should a pleader be appointed and till what time the appointment will be in force. It assumes that a pleader is competent to appear, plead and act in the Court in which he wishes to plead and act. If he is not competent to appear, plead and act in any Court under the rules governing the procedure in that Court, he cannot claim right of audience by virtue of Order III, rule 4. Is it open to a second-grade pleader to claim a right of audience in the District Court by filing a vakalat or for a first-grade pleader to claim a right of audience in the High Court by filing a vakalat in Court for a party? The District Court and the High Court will refuse to receive the vakalat of a pleader not entitled to appear before them and will refuse to allow him to act in that Court by reason of the rules governing their procedure. In *Re the Pleadings of the High Court*(1) it was held that sections 2 and 36 of the Code of Civil Procedure, Act XIV of 1882, did not give the pleaders of the Bombay High Court the right to appear in the Presidency Small Cause Court of Bombay wherein only barristers and attorneys had a right to practise. Rule 277 is intended to regulate the proceedings in Courts and a practitioner of the Court has to conform to the rules governing its procedure. If he does not conform to the rules governing the procedure, he cannot claim a right of audience in that Court. A pleader can appear for a party whose interest is opposed to that of the party for whom he had acted, drawn up pleadings or appeared in the same proceedings either with the latter's consent or when specially authorized by the Court. The rule contains a prohibition against the pleader's appearance unless the conditions therein laid down are satisfied.

(1) (1884) I.L.R., 8 Bom., 105 (F.B.).

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Supposing a pleader is disbarred or struck off the rolls, can he insist upon his right to appear in a Court in which he had filed his vakalat before he was disbarred or struck off the rolls by reason of Order III, rule 4. Rule 4 is only an enabling provision by which a pleader when he accepts an engagement and files his vakalat in Court is entitled to conduct the proceedings till he or his client dies or the termination of the proceedings. But this rule does not override the rules governing the qualifications of various classes of pleaders or the rules governing the procedure of the Courts. If the contention of Mr. K. V. Krishnaswami Ayyar is pushed to its logical conclusion it would mean that a pleader could appear for both the plaintiff and the defendant if the contending parties are foolish enough to engage the same pleader, and the Court would be powerless to prevent the pleader from appearing for both the plaintiff and the contesting defendant in the same suit. It is to prevent such conduct on the part of the pleaders and unreasonable conduct on the part of the clients that rule 277 of the Civil Rules of Practice has been enacted. In *Ramlall Agarwallah v. Moonia Bibee*(1), WILSON, J., held, following the principle of law laid down in the case of *Earl Cholmondeley v. Lord Clinton*(2), that an attorney who has acted for a party to a suit and has discharged himself cannot afterwards act for the opposite party and that the Court had power to restrain him from doing so on an application made for that purpose. The High Court of Madras in their proceedings, dated 8th April 1869, ruled that when a suit is remitted by order of an Appellate Court for rehearing or finding on an issue, the proceedings on such order must be regarded as further proceedings in the trial of the suit and, consequently,

(1) (1881) I.L.R., 6 Calc., 79. (2) (1815) 19 Ves., 261; 34 E.R., 515.

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under section 22 of Regulation XIV of 1816 a vakil cannot change sides and hold a vakalatnamah for the party opponent to the one for whom he appeared at the first hearing. See 4 M.H.C. Reports, Appendix, page 43. The Court has therefore power to refuse to hear practitioners who violate the rules regulating the procedure in Courts.

It is next contended that the special authority required under rule 277 is only for the protection of the pleader against an action for damages by the party for whom he had acted and not for enabling the pleader to appear in Court for his opponent. The rule is no doubt intended both for the protection of the pleader as well as the client but not in the sense in which the appellant wants it to be understood. The object of the rule is not to save the pleader from a suit for damages by the party for whom he acted and against whom he subsequently acted but to prevent an unreasonable conduct on the part of a party who engaged the pleader's services and afterwards gave him up without proper grounds. If a party who gets advice from a pleader does not choose to engage his service for the conduct of the suit but engages another, the pleader is not altogether debarred from accepting an engagement from the opposite party but he could do so by giving the former an opportunity to engage his services and if he refuses to engage his services and unreasonably withholds his consent he may appear for the latter with the special authority of the Court. It is to prevent unfair dealing by the parties that the Court is invested with the power to grant special authority to a pleader to appear against the party for whom he gave advice or acted or appeared at an early stage of the proceedings. But for such power any rich party or an unscrupulous client might prevent all leading pleaders from appearing for his opponent by seeking

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their advice by paying a nominal fee and then engaging the services of one or more of them to conduct the proceedings in Court.

Mr. T. M. Krishnaswami Ayyar for the respondent urges that there is a finding of fact that the suits now pending are connected with previous suits and the High Court should not interfere with the order of the lower Court under section 115 of the Civil Procedure Code. The facts are: The plaintiff filed O.S. No. 525 of 1912 afterwards numbered as 400 of 1914 against the defendant in which he asked for possession of a plot to the west of his house and prayed for a permanent injunction restraining the defendant from interfering with his right to the common lane to the north of the plot. In O.S. No. 860 of 1920 the plaintiff prayed for a mandatory injunction for the removal of a cross-wall put up by the defendant in a portion of the lane. The plaintiff has now brought two suits against the defendant, viz. O.S. No. 103 of 1924, for a mandatory injunction for removal of the balcony wrongly put up by the defendant over a portion of the common lane and for the removal of a portion of the defendant's drain encroaching on the common lane and O.S. No. 104 of 1924 for a mandatory injunction for removal of the arch of the verandah erected by the defendant on the ground that it has interfered with the free access of light and air to his house and for incidental reliefs. The District Munsif finds that the four suits are closely connected with one another. It is difficult to see the connexion. If the same questions are in dispute now as were in dispute in the previous suits, the decision of the previous suits would be *res judicata* in the present case. The connexion contemplated by rule 277 is not the connexion of the parties or of the subject matter. The wording in rule 277 is

"In such suit, appeal or other proceeding, or in any appeal or application for revision arising therefrom, or in any matter connected therewith."

The words "in any matter connected therewith" mean connected with the suit or appeal or other proceeding in which the plender gave the advice and does not refer to a subsequent suit, appeal or proceeding after the termination of the former suit, appeal or proceeding. If a vakil appears for a party in a suit or proceeding, he cannot appear for the opposite party in subsequent proceedings in the same suit or proceeding, but that does not prevent a pleader who appeared for a party from appearing in a subsequent suit for the opposite party when the causes of action in the two are different. The subsequent suit or proceeding or matter can be said to be connected with the previous suit or proceeding or matter only if the former flows from or in consequence of the previous suit or proceeding. Otherwise there is no connexion at all. If a plaintiff sues the defendant for possession of land on his title and succeeds and sometime after brings a suit upon a fresh cause of action against the same defendant, there is no connexion between the two suits though the defendant may raise the question of title of the plaintiff, but that would not be sufficient to establish a connexion between the two. The question involved in the two suits in the District Munsif's Court are the right of the plaintiff to object to the defendant putting up certain structures and that right was not in dispute in the former suits. The causes of action are different, and the reliefs claimed are not the same. The District Munsif's exercise of jurisdiction was owing to a wrong interpretation of the rule and this Court has power to interfere with the order of the District Munsif as he exercised a jurisdiction not given to him by rule 277 of the Civil Rules of Practice.

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The two cases *Ramakrishna Pillai v. Balakrishna Ayyar* and another(1) and *Srinivasa Rau v. Pichai Pillai*(2) relied upon by Mr. T. M. Krishnaswami Ayyar as supporting his contention are distinguishable from the present. In *Ramakrishna Pillai v. Balakrishna Ayyar and another*(1) the petitioner was plaintiff in O.S. No. 8 of 1917 and defendant in O.S. No. 56 of 1920 on the file of the Subordinate Judge's Court of Māyavaram. The respondents were two vakils of the Māyavaram Sub-Court who appeared for him in the former suit and for the plaintiff in the latter suit. The petitioner's application that audience should be refused to the vakil respondents who had filed O.S. No. 56 of 1920 for the plaintiff was rejected by the Subordinate Judge as he was not satisfied that there would be any conflict between their duty in representing the plaintiff in O.S. No. 8 of 1917 and in representing his opponent in O.S. No. 56 of 1920. Both the learned Judges who heard the Civil Revision against the order of the Subordinate Judge were of opinion that the suits were connected with one another. SPENCER, J., observed at page 62 :

"In both suits questions arise as to the validity and binding character upon the petitioner of the indenture and whether he is estopped by reason of it from questioning the title of the defendant in the former suit and the title of the plaintiff in the second suit."

The learned Judges allowed the petition and directed the Subordinate Judge to refuse to allow the respondents to conduct O.S. No. 56 of 1920 for the plaintiff. That case has no application to the present, as in that both the suits were then pending in the Māyavaram Court and as found by the learned Judges they were connected and some of the important questions arising in the suits were common to both suits. It is not the identity of the

(1) (1931) 41 M.L.J., 60.

(2) (1915) I.L.R., 38 Mad., 650.

subject matter that establishes the connexion between the two suits or the identity of the parties, but the identity of the right or title that is asserted or denied and the relief claimed.

In *Srinivasa Rau v. Pichai Pillai*(1), MILLER, J., approved of the order of the District Munsif who prohibited a second-grade pleader from appearing for the plaintiffs in O.S. No. 32 of 1913 on his file. The pleader appeared for the defendant in proceedings under section 145, Criminal Procedure Code, and obtained an order in favour of the defendant and he filed O.S. No. 32 of 1913 for the defeated party. The District Munsif relied on rule 277 of the Civil Rules of Practice prohibiting the pleader from appearing for the plaintiff. In proceedings under section 145, Criminal Procedure Code, the Magistrate decides only the question of possession and his order is to maintain the possession of the party found to be in possession at the time the proceedings are adopted. His order is subject to the result of a civil suit and is good only till the civil court decides which party is entitled to the property in dispute. The civil suit therefore in almost all cases follows the order of the Magistrate and the proceedings in the civil suit are in a sense a continuation of the proceedings before the Magistrate. Though the Magistrate inquires only into the question of possession, yet documents are relied upon by the parties for the purpose of proving their possession and the pleader who appears for a party necessarily acquaints himself with the title to the property and invariably peruses the documents produced by his client. With the knowledge of the strength and weakness of his client's title, if he appears in the civil suit for a party whose interests are opposed to his client's in the proceedings before the Magistrate

(1) (1915) I.L.R., 38 Mad., 1650.

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there is a danger of his using for his client in the civil suit the knowledge gained by him from his client in the proceedings in the Magistrate's Court. There is an intimate connexion between the proceedings under section 145, Criminal Procedure Code, in the Magistrate's Court and the civil suit filed in consequence of the order of the Magistrate.

If a pleader appears for a party in the proceedings in execution, he cannot appear in the suit filed by reason of the order in claim proceedings for a party whose interests are opposed to that of the party for whom he acted in the claim proceedings without his consent or without the authority of the Court in which the suit is pending. The suits now pending in the District Munsif's Court are not the necessary consequence of the previous suits. There is no connexion between the present ones and the former suits. As observed by SPENCER, J., in *Ramakrishna Pillai v. Balakrishna Aiyer and another*(1), the two suits will ordinarily be considered connected if they have any issue in common or involve substantially a determination of the same question of fact or the same mixed question of law and fact.

A few observations as to the duty of pleaders would not be out of place here. The legal profession is a very noble one, and no pleader should by his conduct consciously or unconsciously do anything to lower its high standard of morality, probity and honesty. The pleaders would do well to avoid any conduct on their part which is reasonably capable of being misunderstood. If a pleader advises or acts for a client he should not appear against him in any subsequent proceeding if he feels that he might in such proceeding even unconsciously use the

(1) (1921) 41 M.L.J., 60.

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information gained from his former client against him. Clients should have the fullest confidence in their legal advisers and should not be deterred or hampered in disclosing the strength and weakness of their cases by the fear that their instructions might at some future time be used against them by their legal advisers. It is the duty of legal practitioners to avoid even the suspicion that they might possibly use the information which they received in their professional capacity against the clients from whom they received them. There is no rule, etiquette or code of ethics to govern the conduct of clients. On the other hand, the pleaders who are guided and governed by the etiquette of the profession are not likely to do anything which would incur the censure of the profession, and, in order to prevent an unscrupulous or cantankerous client from depriving his opponent of the services of pleaders, rule 277 of the Civil Rules of Practice gives a discretion to the Court to specially authorize a pleader to appear and act for a party whose interests are opposed to those of the party for whom he at one time acted or appeared or gave advice.

We have no hesitation in holding that the plaintiff has no reason to complain of the conduct of the pleaders. He has only to thank himself if he lost the services of the two prominent pleaders. He could have retained them if he had cared. He engaged other vakils to appear for him and his petition to the District Munsif is evidently not to protect his own interests for they require no protection but to annoy the defendants and pleaders whom he did not care to retain. Perhaps there is some motive at the bottom of the plaintiff's petition. We set aside the order of the District Munsif and allow the petition with costs throughout.

N.B.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Krishnan.

1925,
February 26.

ARUMUGA THAMBIRAN AND OTHERS, (PLAINTIFFS),
APPELLANTS,

v.

NAMASIVAYA PANDARA SANNADHI AND OTHERS (LEGAL
REPRESENTATIVE OF 2ND DEFENDANT AND OTHER
DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 92—Suit for removal of defendant from office of Pandara Sannadhi and for a scheme—Allegations in the plaint as to misconduct of, and breaches of trust by, defendant—Death of defendant before trial of suit—No allegations of any separate ground for a scheme—Suit for scheme, whether abates on death of the defendant.

In a suit instituted under section 92, Civil Procedure Code, for the removal of the defendant from the office of Pandara Sannadhi and for the framing of a scheme in relation to the Mutt, the defendant sought to be removed died pending the suit. It appeared that the main allegations in the plaint related to breaches of trust by the deceased defendant and no separate allegations had been made in the plaint in support of the prayer for a scheme. The succeeding Pandara Sannadhi, who was brought on record as legal representative of the defendant, contended that the suit had abated. Held, that the suit regarding the scheme did not abate on the death of the defendant but that the cause of action for a scheme survived and the suit could be prosecuted.

Raja Anand Rao v. Ramdas Daduram, (1921) I.L.R. 48 Cal., 493 (P.C.). *Sivagnana Desika Gnanasambhanda Pandarasannadhi v. Advocate-General of Madras*, (1915) 28 M.L.J., 174, followed.

APPEAL against the decree of the Court of the Subordinate Judge of Kumbakōnam in Original Suit No. 71 of 1918.

The material facts appear from the judgment.

* Appeal Suit No. 43 of 1921.

S. Srinivasa Ayyangar for appellants.

T. Rangachariar for respondents.

JUDGMENT.

The plaintiffs in this case have brought their suit under section 92 of the Code of Civil Procedure for the removal of the defendant from the office of Pandara Sannadhi and for the framing of a scheme in relation to the Mutt. The Advocate-General has also joined the suit as a supplemental plaintiff. After the institution of the suit and before it was tried, the defendant died, and the Subordinate Judge has held that owing to the defendant's death the suit has abated and cannot be revived, on the ground that it is a personal action against the defendant and that the second relief in the suit, namely, that of the framing of the scheme, is an ancillary relief dependent on the removal of the defendant from his office of trustee. Against this decision the plaintiffs have appealed; and it is contended in the appeal that as two reliefs are claimed, namely the removal of the defendant and the framing of the scheme which are distinct and separate reliefs, the suit may well be prosecuted with reference to the second relief, namely, the framing of the scheme. It is pointed out that, in a very similar case, it was held by the Privy Council that the cause of action did survive—*Raja Anand Rao v. Ramdas Daduram*(1). Apart from this authority we have also a case in this Court, *Sivagnana Desika Gnanasambhanda Pandarasannadhi v. Advocate-General of Madras*(2), in which the same conclusion was arrived at. Although the plaint is mainly taken up with allegations of misconduct on the part of the respondent and the prayer for the scheme is only mentioned at the end of

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(1) (1921) I.L.R., 48 Cal., 493 (P.C.).

(2) (1915) 28 M.L.J., 174.

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the plaint, without giving any special reasons why the scheme is necessary, yet, when we come to read section 92 of the Code of Civil Procedure, it is quite clear that in order to provide a cause of action for a scheme suit there must be an allegation of a breach of trust, or it must "otherwise" be necessary to obtain directions of the Court. In order, therefore, to justify this suit for a scheme it is necessary for the plaintiffs to allege a breach of trust and it is very difficult to see how this second relief can be deemed to be ancillary to the removal of the defendant. It is absurd to suppose that the plaintiffs and the Advocate-General have merely brought this suit to satisfy a vindictive spite against the defendant and that that is their sole cause of action and, consequently, that the rest of the suit must fail as the defendant can no longer be held responsible. The two reliefs are distinct; the second relief is to a certain extent dependent on the first, because it is necessary to allege a breach of trust in order to constitute the necessary cause of action.

Mr. Rangachariar for the respondent has not referred us to any authority against those cited above; and we are satisfied that the cause of action does survive against the representative of the deceased defendant for the purpose of framing a scheme. We may also observe that, in addition to the prayer for the scheme generally, there is a prayer for directions as to the utilization of the surplus funds of the institution, which are alleged to be very large indeed.

A further objection is taken for the respondents that this question is *res judicata* in that it has already been decided by a bench of this Court which disposed of an application for the appointment of a receiver in this suit. No doubt that bench in its judgment says:

"The plaint before us deals only with the misconduct of the deceased Pandara Sannadhi and does not refer to the absence of any means of preventing it,"

and again

"in paragraph 21, where the necessity for a scheme is suggested, it is referred to only in connexion with the removal of the then incumbent, not as independently justifiable on its merits."

It is contended that this judgment has decided the present appeal. This appeal was not before that bench, nor do we think that it purported to decide it. Mr. Rangachariar relies on three decisions of the Privy Council reported in *Ram Kirpal Shukul v. Mussumat Rup Kuari*(1), *Hook v. Administrator-General of Bengal*(2) and *Sir Rameshwar Singh v. Hitendra Singh*(3). In these cases the principle was laid down that section 11 of the Code of Civil Procedure is not exhaustive on the question of *res judicata*; but all these cases can be distinguished from the present one in that the prior decision which was relied upon as binding on the parties in subsequent proceedings between them was with reference to a question which directly arose and had to be decided in the prior proceedings, being directly in issue. In the present case, however, there was no necessity to decide this appeal in an application for the appointment of a receiver; and although the bench expressed an opinion as to the meaning of the plaint in this suit as a reason for refusing to appoint a receiver, it can certainly not amount to *res judicata* in the sense applied by the Privy Council in the above cases. For this proposition we need only refer to *Massam v. Thorley's Cattle Food Company*(4). Apart from this we are not at all clear that that bench of this Court did really decide the point, for they merely said:—

(1) (1883) 11 I.A., 37.

(3) (1924) 47 M.L.J., 286 (P.C.).

(2) (1921) I.L.R., 48 Cal., 499 (P.C.).

(4) (1880) 14 Ch. D., 748.

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"It is not clear that the respondents' claim to a scheme, the only relief for which they can now ask, can be supported separately on the allegations they have made."

That merely amounts to saying that they have not definitely proved in these interlocutory proceedings the question which has now been argued before us. In any case it does not amount to *res judicata*. With all respect for the opinion expressed in that judgment, we have now come to a contrary conclusion.

A further suggestion is made that this suit may be affected by the recently passed Religious Endowments Act; but there is nothing in that Act which gives retrospective effect in respect of proceedings already instituted, and therefore this objection also must fail.

This appeal therefore is allowed with costs and the suit will be remanded to the lower Court for disposal according to law. Court-fee on appeal memorandum will be refunded.

Appeal No. 44 of 1921 is not pressed and is dismissed with costs of the 20th respondent.

These appeals having been set down to be spoken to this day, the Court delivered the following

JUDGMENT.

Appellants 3 and 4 are allowed to withdraw and the judgment in Appeal Nos. 43 and 44 of 1921 will stand as regards appellants 1, 2 and 5.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Jackson.

RAMASAMI AND SEVEN OTHERS (DEFENDANTS NOS. 1, 2, 4 TO 9),
APPELLANTS IN BOTH THE APPEALS,

1924,
August 27.

v.

CHANDRA KOTAYYA (PLAINTIFF), RESPONDENT IN BOTH.*

Contract—Joint promisees—Mere undertaking to pay one of the joint promisees and no actual payment—Effect of, on the debt.

In order that one of several joint promisees could give a valid discharge of a debt so as to bind all the promisees, the promisor must make an actual payment to him of the debt; a mere undertaking to pay him the amount at some future date cannot deprive the other promisees of their right to sue for the debt. *Barber Maran v. Ramana Goundan*, (1897) I.L.R., 20 Mad., 461, and *Annapurnamma v. Akkayya*, (1913) I.L.R., 36 Mad., 544 (F.B.), applied. *Shrinivasdas Bavri v. Meherbai*, (1917) I.L.R., 41 Bom., 300 (P.C.), explained.

SECOND APPEALS against the decrees of B. VENKATESWARA RAO, Subordinate Judge of Masulipatam, in Appeal Suits Nos. 25 and 26 of 1921 preferred against the decrees of A. VENKATARAMA AYYAR, District Munsif of Avanigadda at Masulipatam, in Original Suits Nos. 428 and 429 of 1918.

The facts are given in the judgment. The material portion of Exhibit 1 which was executed in 1906 by defendants Nos. 1 and 2 and their deceased father in favour of the third defendant alone was as follows:—

"Taking into account the mortgage-deed executed by us, dated the 23th January 1902, in favour of yourself and Chandra Kotayya for a sum of Rs. 102 and a mortgage-deed of a prior date for Rs. 100 and also the pro-note due to you and we having settled with you to pay a sum of Rs. 300 as the outstanding balance due to you, we agree to pay you the amount in a

* Second Appeals Nos. 29 and 30 of 1922.

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period of 10 years, from 15th March 1906 to 15th March 1915, a sum of Rs. 30 being payable to you on the 15th March of every year."

The defendants preferred these second appeals.

N. Rama Rao for appellant.—There was a discharge of the debts by means of Exhibit 1 executed in favour of third defendant. A discharge given by one of several promisees binds the others; *Barber Maran v. Ramana Goundan*(1) and *Annapurnamma v. Akkayya*(2). No case of fraud was set by either party in the pleadings or in issues or in the evidence; hence the lower Court was wrong in setting up such a case. The lower Court's conclusion that a fraud was perpetrated on the plaintiff is not supported by the evidence in the case. The suit is barred by limitation as there is no acknowledgment of liability in Exhibit 1; see *Venkata v. Parthasaradhi*(3). Exhibit 1 contains no promise to pay the old debt and no acknowledgment in favour of the plaintiff. Hence plaintiff cannot take advantage of Exhibit 1, even if it contained an acknowledgment of liability by defendants Nos. 1 and 2; see *Mylapore Iyasamy Vyapoory Moodliar v. Yeo Kay*(4). Exhibit 1 contains a new promise to pay a new person.

K. Venkatachalam Ayyar for *C. V. Anantakrishna Ayyar* for Respondent.—*Annapurnamma v. Akkayya*(2) and *Barber Maran v. Ramana Goundan*(1) have held that only actual payment and not undertaking to pay will discharge the debtor. If they are construed to decide otherwise their weight is considerably shaken by *Shrinivasadas Bavri v. Meherbai*(5). Exhibit 1 executed in favour of the third defendant contains an

(1) (1897) I.L.R., 20 Mad., 461.

(3) (1893) I.L.R., 16 Mad., 220.

(2) (1913) I.L.R., 36 Mad., 544 (F.B.).

(4) (1887) I.L.R., 14 Cal., 801 (P.C.).

(5) (1917) I.L.R., 41 Bom., 800 (P.C.).

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acknowledgment of the liability under the two earlier mortgages which are recited in Exhibit 1 to have been executed in favour of the plaintiff also. Hence it is acknowledgment in favour of the plaintiff. A promise to pay the amount due is not necessary under section 19 of Limitation Act.

JUDGMENT.

DEVADOSS, J.

DEVADOSS, J.—These appeals arise out of two suits brought by the plaintiff on mortgage bonds, dated 4th November 1897 and 28th January 1902. The District Munsif dismissed the plaintiff's suits. On appeal the Subordinate Judge passed decrees in favour of the plaintiff. Exhibit A, dated 4th November 1897, was executed by the defendants Nos. 1 and 2 and their deceased father and brother in favour of the plaintiff and the third defendant. Exhibit A-1 was executed on 28th January 1902 by defendants 1 and 2 and their deceased father in favour of the plaintiff and the third defendant. On 28th June 1906 the defendants Nos. 1 and 2 and their father executed Exhibit 1 in favour of the third defendant undertaking to pay the balance due in respect of Exhibit A and Exhibit A-1 during a period of ten years from 15th March 1906. The first point urged for the appellant is that Exhibits A and A-1 were discharged by payment to the third defendant; and reliance is placed upon two decisions of this Court reported in *Barber Maran v. Ramana Goundan*(1) and *Annapurnamma v. Akkayya*(2). The Subordinate Judge has declined to follow these rulings on the ground that the other High Courts have taken a different view and that one of the learned Judges of this Court expressed his disapproval of the Full Bench ruling in *Annapurnamma v. Akkayya*(2). We must express our strong disapproval of

(1) (1897) I.L.R., 20 Mad., 461.

(2) (1913) I.L.R., 36 Mad., 544 (F.B.).

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the Subordinate Judge's conduct in declining to follow the decision of this Court. A Court subordinate to the High Court is bound to follow the ruling of the High Court and is not entitled to rely upon the decisions of the other High Courts and to decline to follow the decision of this Court. The decision in *Annapurnamma v. Akkayya*(1) is a Full Bench ruling and even if it was not, it was not the function of the Subordinate Court to criticise the ruling. Courts TROTTER, J., who expressed the opinion that the decision in *Annapurnamma v. Akkayya*(1) was opposed to the current of authorities in England did nevertheless follow the ruling in *Annapurnamma v. Akkayya*(1). The Subordinate Judge found that there was a gross fraud on the part of the defendants Nos. 1, 2 and 3 and therefore the payment to the third defendant did not bind the plaintiff. The plaintiff did not set up a case of fraud in the pleadings and no evidence was adduced as regards fraud in the first Court, and the Subordinate Judge was not justified in setting up a case of fraud when such a case was not set up by the parties either in the pleadings or in the evidence before the first Court. No issue was taken as regards the question of fraud and no opportunity was given to the defendants to show that there was no fraud. On the other hand it is quite clear from Exhibit 1 that defendants Nos. 1 and 2 and their father did acknowledge their liability not only to the third defendant but also to the plaintiff and therefore at that time there could not have been any intention to defraud the plaintiff. The third defendant and the plaintiff are the adoptive mother and adopted son and the evidence is that they lived together for twenty years till four or five years ago and Exhibit 1 was executed in 1906 evidently

(1) (1918) I.L.R., 36 Mad., 544 (F.B.).

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at the time when the third defendant and the plaintiff were living together and there is no suggestion that at that time there was any intention on the part of the third defendant or of defendants Nos. 1 and 2 to defraud the plaintiff. The Subordinate Judge has therefore erred not only in setting up a new case of fraud not set up in the pleadings but also in coming to the conclusion that there was gross fraud when there was no evidence to support the finding. In his anxiety to get round the decisions in *Barber Maran v. Ramana Goundan*(1) and *Annapurnamma v. Akkayya*(2) he has set up a case of fraud.

It is next urged by the appellants that the suit is barred by limitation. Mr. Rama Rao who appears for the appellants contends that Exhibit 1 does not contain an acknowledgment of the liability of defendants Nos. 1 and 2 under Exhibits A and A-1. From a reading of the document it is quite clear that the executants of the document did acknowledge the liability not only to the third defendant but also to the plaintiff under the two documents. It is not necessary that there should be a promise to pay the amount due. All that is necessary under section 19 of the Limitation Act is there should be an acknowledgment of the present liability before the claim is barred by limitation. There is no substance in this contention and we disallow it.

The Judgment of the lower Appellate Court can be supported on other grounds than that of fraud. Exhibit 1 is a mortgage-deed executed by defendants Nos. 1 and 2 and their father undertaking to pay the balance of the amounts due under Exhibits A and A-1. This document was afterwards sued on and money was realized. Exhibit 1 cannot be taken to be a discharge of Exhibits A and A-1.

(1) (1887) I.L.R., 20 Mad., 461.

(2) (1913) I.L.R., 36 Mad., 544 (F.B.).

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In *Barber Maran v. Ramana Goundan*(1), it was held that a payment made to one of two joint mortgagees was a valid discharge of the mortgage liability. If money had been paid to the third defendant certainly that would have been a valid discharge of the liability under Exhibits A and A-1. But a mere undertaking to pay the amount at some future date is not equivalent to payment. It is quite clear from the decisions in *Barber Maran v. Ramana Goundan*(1) and *Annapurnamma v. Akkayya*(2), that it is only payment made to one of the joint promisees that could give a discharge to the promisors, but where the promisor undertakes to pay the amount at some future date it is not equivalent to a discharge. Supposing in this case the defendants Nos. 1 and 2 had given a promissory note to third defendant for the amounts due under Exhibits A and A-1 and if she had negotiated it to a third person and that third person realized the amount sometime after, could it be said that the third defendant was paid the amount due under Exhibits A and A-1? It is open to the parties to a contract to supersede that contract by another contract. But in order to do so, all the parties to the first contract must be parties to the second contract. Exhibit 1 cannot be considered as a supersession of the contracts evidenced by Exhibits A and A-1. It is only an undertaking by the promisors to pay the amount to one of the promisees. We hold that in order to bring the case within the rulings in *Barber Maran v. Ramana Goundan*(1) and *Annapurnamma v. Akkayya*(2), there ought to be a payment of the amount due to one of the joint promisees in order to effect a discharge of the liability to the joint promisees. Taking this view we hold that Exhibit 1 was not a discharge of Exhibits A and A-1 and the liability under

(1) (1897) I.L.R., 20 Mad., 461.

(2) (1913) I.L.R., 36 Mad., 54 (F.B.).

the two mortgages remained on the date of Exhibit 1, and the plaintiff is therefore entitled to bring a suit for his share of the mortgage amounts. In the view we have taken, it is unnecessary to consider whether the decision in *Annapurnamma v. Akkayya*(1) is good law or not. It was contended on behalf of the respondent that the decision of the Privy Council in *Shrinivasdas Bavri v. Meherbai*(2) has considerably shaken the authority of the decision in *Annapurnamma v. Akkayya*(1). It is unnecessary for us to express any opinion on this point.

In the result the Second Appeals fail and are dismissed with costs.

JACKSON, J.—I agree and will only add that in any case I should feel bound by the Full Bench Ruling in *Annapurnamma v. Akkayya*(1). In *Shrinivasdas Bavri v. Meherbai*(2), it was held that a release-deed purporting to be by one of two mortgagees both in his own right, and also as heir and legal representative of the other mortgagee deceased could only be evidence as against the parties to the deed. The respondent did not thereupon proceed to argue that the discharge by one mortgagee alone would be in itself valid; so the point established by *Annapurnamma v. Akkayya*(1) was never raised in *Shrinivasdas Bavri v. Meherbai*(2).

N.R.

(1) (1913) I.L.R., 36 Mad., 544 (F.B.). (2) (1917) I.L.R., 41 Bom., 300 (P.C.).

APPELLATE CIVIL.

Before Mr. Charles Gordon Spencer, Officiating Chief
Justice, and Mr. Justice Srinivasa Ayyangar.

P. BABA SAH (DEFENDANT), APPELLANT,

v.

V. M. PURUSHOTHAMA SAH (PLAINTIFF), RESPONDENT.*

Letters Patent, cl. 15—Judgment—Application to sue in forma pauperis—Order of a single Judge of High Court permitting petitioner to sue as pauper—Order, whether judgment—Appeal—Statement by Government Solicitor admitting petitioner to be a pauper, whether conclusive—Right of defendant to disprove pauperism, notwithstanding such admission.

The final order of a Judge of the High Court sitting on the Original Side, allowing or refusing to allow a plaintiff to sue as a pauper is a judgment under clause 15 of the Letters Patent and is appealable.

Such an order is neither interlocutory nor made in the exercise of a discretionary power. *Appasami Pillai v. Somasundra Mudaliar* (1903) I.L.R., 26 Mad., 437, doubted; *Tuljaram Row v. Alagappa Chettiar*, (1912) I.L.R., 35 Mad., 1 (F.B.), referred to.

Where the learned Judge allowed a person to sue as a pauper upon the Government Solicitor stating that he had received a report that the plaintiff was a pauper, but the defendant had not been given an opportunity to prove the statements in his counter-affidavit which was not contradicted by the plaintiff by any reply affidavit: Held, that the order should be set aside and evidence should be allowed to be adduced on both sides and a fresh order should be passed.

APPEAL from the order of KUMARASWAMI SASTRI, J., dated 15th April 1924, and passed in the exercise of the ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 275 of 1924. The material facts appear from the judgment.

R. Rajagopala Ayyangar for appellant.

K. Rajah Ayyar for respondent.

JUDGMENT.

This is an appeal against an order of Mr. Justice KUMARASWAMI SASTRI permitting the plaintiff in C.S. No. 275 of 1924 to sue *in forma pauperis*. A preliminary objection has been taken that no appeal lies. In *Appasami Pillai v. Somasundra Mudaliar*(1), it was held that there was no appeal under the Letters Patent against an order of a single Judge refusing to give leave to appeal *in forma pauperis*. Although the Civil Procedure Code does not provide for appeals against orders made under Order XXXIII, rule 7, an appeal lies under clause 15 of the Letters Patent against the judgment of a single Judge sitting on the Original Side, with certain exceptions which do not include the present kind of order. It is argued that the order of the learned Judge was merely an order upon an interlocutory application which was a step towards obtaining a final adjudication and that it does not finally dispose of the plaintiff's right to bring the suit, as it was always open to him to pay the Court fees and proceed. In our opinion the learned Judge's order was not an interlocutory one and we think that the law confers a substantive right on every plaintiff who has a good case at law, but no means to prosecute it, to sue *in forma pauperis*, and we think, with due respect, that the view taken in *Appasami Pillai v. Somasundra Mudaliar*(1), where such an order was treated as made in the exercise of a discretionary power, was not the correct view to take of the order passed upon such applications. Under section 592 of the old Civil Procedure Code the words used are "Any person entitled to prefer an appeal who is unable to pay the fee required . . . may be allowed to appeal as a pauper." The learned

(1) (1903) I.L.R., 26 Mad., 437.

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Judges treated these words "may be allowed" as vesting in the Court a discretionary power. But the principle on which that case was decided has been doubted in the Full Bench decision in *Tuljaram Row v Alagappa Chettiar*(1), and it has now been made quite clear by Order XLIV, rule 1, of the present Code that such applications have to be dealt with in the same manner as applications to sue *in forma pauperis* in the first instance. In Order XXXIII, rule 7, clause 3, the words are "The Court *shall* then either allow or refuse to allow the applicant to sue as a pauper." It can no longer be doubted that it is not open to the discretion of the Court to allow a person to sue as a pauper if, on hearing the evidence, the Court finds that he is not a pauper. The final order of a Judge sitting on the Original Side allowing or refusing to allow a plaintiff to sue as a pauper is in our opinion a judgment under clause 15 of the Letters Patent.

As to the merits of the present appeal, the defendant filed a counter-affidavit denying the plaintiff's allegation that he had no means and giving details as to a number of items of property which belonged to him and as to a fraudulent alienation of property in favour of his nephew shortly before he applied to sue as a pauper. The plaintiff did not file any reply affidavit. After several adjournments, the matter then came before the Court and the learned Judge gave leave to the plaintiff to sue as a pauper upon the Government Solicitor stating that he had received a report that the petitioner was a pauper. The appellant now says in his affidavit that he was prepared to cross-examine the plaintiff and to let in evidence in support of his allegations. We think that, if the Judge was not prepared to act on his uncontradicted

(1) (1912) I.L.R., 35 Mad., 1 (F.B.).

affidavit, the defendant should have been given an opportunity to prove the statements contained in it, notwithstanding that the Government did not choose to dispute the alleged pauperism. Apparently he had not evidence ready at that hearing and he wanted time to produce his witnesses. But it appears that he expected that the other side would ask for an adjournment to file a reply affidavit and that they would not allow his statements to remain uncontradicted. It was reasonable, therefore, to suppose that if he had applied for time to produce his evidence he would have got an adjournment, and we think that now he should be given an opportunity of substantiating his allegations. The learned Judge's order is, therefore, set aside and the case will be remanded for letting in such evidence as the parties may adduce to prove or disprove the plaintiff's pauperism and for making a fresh order after considering such evidence. Costs of this appeal to abide and be provided for in the final order.

K.R.

APPELLATE CIVIL.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
and Mr. Justice Krishnan.*

B. R. SAWMY RAO (RESPONDENT), APPELLANT,

v.

THE OFFICIAL ASSIGNEE OF MADRAS (PETITIONER),
RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. II, r. 2—Mortgage bond—Independent covenant to pay interest—Provision for payment of principal and interest on demand—Suit on independent covenant for payment of interest only—Petition by Official Assignee of mortgagor against mortgagee in

* Original Side Appeal No. 46 of 1924.

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February 6.

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Insolvency Court to declare mortgage defunct by reason of previous suit—Bar by O. II, r. 2, whether applicable in insolvency proceedings—Demand for interest—Notice, whether a demand for principal or only a warning.

Where a mortgage bond contained an independent personal covenant to pay interest every month besides providing for payment of principal with interest on demand, a suit based on the covenant to recover interest personally from the mortgagor does not bar a subsequent suit by the mortgagee for the principal and interest due on the bond, under Order II, rule 2 of the Civil Procedure Code. *Kishen Narain v. Pake Mal* (1923) I.L.R., 4 Lah. 32; 50 I.A., 115, *Muhammad Hafiz v. Muhammad Zakariya* (1922) I.L.R., 44 All. 121 (P.C.), referred to.

Where the mortgagee in his notice demanding payment of interest stated that if interest was not paid he would instruct vakil to sue for principal and interest, the notice did not amount to a demand for principal but only a warning that principal would be demanded if interest was not paid.

The provisions of Order II, rule 2, Civil Procedure Code, do not apply to proceedings by way of a petition filed by Official Assignee against the mortgagee so as to bar the right of the mortgagee under the bond by reason of a previous suit instituted by him for interest.

APPEAL against the order of WALLER, J., passed in the exercise of the ordinary Original Insolvency Jurisdiction of the High Court in I.P. No. 193 of 1923, in the matter of P. Tirumurthi Chetty, an insolvent.

The insolvent Tirumurthi Chetty and two others executed a mortgage-deed in favour of the Appellant (B. R. Sawmy Rao) on the 21st April 1921 for a sum of Rs. 5,000. The material terms of the mortgage-deed were as follows:—

“We and our heirs shall pay severally and jointly the said amount of rupees five thousand with interest at one per cent per mensem to you and to your heirs whenever demanded. We shall pay the interest of the said debt *every month*, within the 5th of that month, commencing from the 5th of the current month May. We and our heirs shall pay the principal amount, rupees five thousand (Rs. 5,000) and the interest due therefor, to you and to your heirs *whenever demanded*. In default of our

paying so, you and your heirs shall legally proceed upon us and on our heirs and on the mortgaged properties, mentioned in schedule A below and on our other properties, and shall realize the amount.”

The mortgagors having defaulted in paying interest for some months, the mortgagee sent a notice, dated 28th December 1921, which, after reciting that interest amounting to Rs. 400 due on the bond up till 21st December 1921 had not been paid even after repeated demands, proceeded as follows:—

“Please take notice therefore that if you do not pay this sum of Rs. 400 due on account of interest on or before the 2nd January 1922, the matter will be placed in the hands of my vakil with instructions to file a suit against you for not only the recovery of interest but also the principal and any expenditure that I may have to incur on this account will have to be borne by you.”

As interest was not paid even after the notice, the mortgagee instituted a suit in the Court of Small Causes at Madras in suit No. 793 of 1922, to recover personally from the mortgagor and his minor son the sum of Rs. 416 and odd being the interest due up to date of plaint, basing the cause of action on the clause providing for monthly payment of interest in the mortgage bond. The plaint contained a clause that “the plaintiff will take separate proceedings to procure the amount of the principal due to him”; the suit was decreed in favour of the plaintiff. Tirumurthi Chetty having been adjudicated insolvent, the Official Assignee of Madras applied in a petition filed by him against the mortgagee in the Insolvency Court at Madras for an order declaring that the mortgagee had lost his right as mortgagee by reason of the fact that he had sued and obtained a decree for interest only at a time when he was entitled to sue both for principal and interest and relied on Order II, rule 2, Civil Procedure Code. The learned Judge, who sat in the Insolvency Court (WALLER, J.), upheld this

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contention and gave a declaration accordingly. The mortgagee preferred this appeal.

Vere Mockett for appellant.—Order II, rule 2, Civil Procedure Code, does not apply to the present proceedings, as this is not a suit by the mortgagee but an application by the Official Assignee against the mortgagee. The Official Assignee can possibly take such an objection, if the mortgagee sued for the principal. Further this is not an objection, which an official, like the Official Assignee, can take.

On a proper construction of the mortgage-deed, this objection is not maintainable. In the deed there are two separate independent covenants, namely, (1) one to pay interest each month without demand; (2) another to pay principal and interest on demand being made. Under the notice given for interest, there was no demand for principal but only an intimation that he might sue for principal, if interest was not paid. In default of payment of interest, it is at the option of the mortgagee whether he will demand payment of interest or of principal as well as interest. If, on default in payment of interest, the whole of the principal and interest should be sued for, then a suit for interest alone will bar a suit for principal, but not where there are separate covenants for payment of interest and principal, as in this case, see *Kishen Narain v. Pala Mal*(1) and *Muhammad Hafiz v. Muhammad Zakariya*(2). Order XXXIV, rule 14, also applies and saves the subsequent suit.

R. N. Aingar for respondent.—Order II, rule 2, applies. The principal became due in default of paying interest. "In default of our paying so" in the deed refers to default in payment of interest under the previous clause, as well as of principal in the later clause.

(1) (1923) I.L.R., 4 Lah., 32; 50 I.A., 115.
(2) (1922) I.L.R., 44 All., 121 (P.C.); s.c., 49 I.A., 9.

Secondly, the letter of notice is a demand for the principal as well as for interest, thirdly, when an amount is payable on demand, no demand is required to be made. The decision in *Perumal Ayyan v. Alagirisami Bhagavathar*(1) applies this rule to a hypothecation bond as in the case of a promissory note. If default is made in payment of interest, no demand for principal is necessary, but if interest is being paid, demand for principal is necessary to afford a cause of action for principal. See *Muhammad Hafiz v. Muhammad Zakariya*(2). The provisions of Order II, rule 2, Civil Procedure Code, apply to proceedings in Insolvency Court; at any rate the principle applies. If the mortgagee cannot sue for principal, he is not entitled to enforce his claim as a mortgagee in insolvency proceedings.

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JUDGMENT.

COUTTS TROTTER, C.J.—This raises a matter of some little interest. The learned Judge came to the conclusion to which he felt himself constrained to come with obvious and natural reluctance. I confess that I do not see any particular difficulty about this case when the documents are looked at carefully.

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C.J.

The case gives rise to a question as to the construction of Order II, rule 2, an enactment peculiar to Indian Law and an enactment the supposed benefit of which I have never been able even to guess at or to make the slightest suggestion of what benefit it would be to anybody at all. The effect of it is said to be that the mortgagee in this suit having sued for an instalment of unpaid interest on his mortgage was to be held thereafter debarred from recovering the principal. That would not carry the respondent all the way because

(1) (1897) I.L.R., 20 Mad., 245.

(2) (1922) I.L.R., 44 All., 121 (P.C.); s.c., 49 I.A., 9.

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what he has done here is not to raise this matter by way of defence to a suit on the mortgage or anything of the kind but to go boldly to the Court of Insolvency and ask for a declaration that the mortgage is dead-canceled. In any event, whatever be the true effect of Order II, rule 2, he cannot go to that length and, if it were necessary to decide on that ground alone, I should be prepared to allow this appeal on the ground that the learned Judge had no jurisdiction, on an application of the Official Assignee, to make any such declaration. However, I think it can be decided on a better ground than that.

The line of demarcation between the two classes of cases that arise is clearly drawn by the judgment of the Privy Council in the case of *Kishen Narain v. Pala Mal*(1), and what the Board says is this :

"If the plaint originally brought came to be properly interpreted as claiming only a personal relief in respect of the unpaid interest, the appellant's case would be on surer ground"; and further

"It does not appear to their Lordships that if the mortgage had provided, as mortgages always do in this country, for an independent obligation to pay the principal and the interest, that in a suit brought to obtain a personal judgment in respect of the interest alone the rule would have prevented a subsequent claim for payment of the principal."

That is the guiding principle that the Board has laid down for us. Now, what of this instrument? It seems to me perfectly clear that there is an independent covenant for the payment of interest and that the principal actually becomes payable not on failure to pay a current instalment of interest but on failure to comply with the demand to pay the interest and principal due together. There is no proviso here, which, I quite agree, might make all the difference, that the

failure to pay an instalment of interest shall make the whole principal amount due. I take it, though it is not necessary to decide the point, that in such a case very likely Order II, rule 2, might apply. But, as I say, here there is an independent covenant to pay interest and it is on that, I have scrutinized the pleading in the Small Cause Court suit very carefully and it is quite obvious, that the suit was brought on a personal covenant and a personal covenant alone to pay interest and the plaintiff carefully abstains from asking for any sort of charge upon or other remedy against the mortgaged property; and the defence was an unsuccessful attempt to force the plaintiff into the position of saying that he was claiming in a matter which involved an adjudication as to immovable property, an attempt which properly failed.

Then the next thing—and it is apparently the ground on which the learned Judge went in making this order—is that the letter of the 28th of December 1921 which demanded the interest was of itself also a demand for the principal. That argument is one that I fail to appreciate. It is no use setting out the letter. These is an unquestioned demand for the interest and what follows is a warning that, if that demand is not complied with, the Vakil will be instructed to recover not only the interest but the principal. Now a threat to make a demand cannot be construed as being in itself a demand. I do not understand and I am free to say on that part of Mr. Aingar's argument that I have been totally unable to follow it.

On these grounds I think that the learned Judge's order is wrong and must be reversed with costs here and below on the Original Side scale.

KRISHNAN, J.—This is an appeal against an order passed by WALLER, J., sitting in the Insolvency Court, on

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(1) (1923) I.L.R., 4 Lah., 32; 50 I.A., 115.

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an application made by the Official Assignee to have a mortgage in favour of the appellant before us, declared invalid.

The learned Judge has passed an order in those terms. The reason given for the order is this: The mortgagee, it seems, brought a suit in the Small Cause Court, Madras, for the interest due under the mortgage bond for some months. It is claimed that because of that circumstance, the mortgagee's right to sue for the principal is barred by Order II, rule 2 of the Code of Civil Procedure, and therefore the Official Assignee is entitled to be given a declaration that the mortgage is defunct. To start with, there is the difficulty in the way of this application, that Order II, rule 2, does not apply unless the mortgagee brings a suit to enforce his mortgage, as the rule merely bars a second suit. The question will arise only in a second suit brought by the mortgagee and not in an application brought by the Official Assignee in the Insolvency Court as representing the insolvent mortgagor. In the second place, if we look at the mortgage bond, it clearly contains separate covenants as regards payment of interest and of principal. It provides that the mortgagors "shall pay the interest of the said debt, every month, within the fifth of that month, commencing from the fifth of the current month May 1921." It then goes on to provide that the mortgagors and their heirs shall pay the principal amount, Rs. 5,000, and the interest due therefor to the mortgagee or his heirs whenever demanded. It is quite clear that here we have two independent covenants; and it leaves it open to the mortgagee to call in his mortgage money whenever he likes or to leave it under mortgage with the mortgagors; but the right to get the interest every month is specifically provided for and requires no demand whatsoever, for interest is payable

independently of demand on the fifth of every month. The sentence that follows these two clauses in this mortgage deed is this:

"In default of our paying so, you and your heirs shall legally proceed upon us and on our heirs and on the mortgaged properties mentioned in the Schedule A below and on our other properties and shall realize the amount."

It is contended that the words "in default of our paying so" should be taken to mean "in default of our paying either the interest in the first clause or the principal amount and interest as in the second clause on demand. I am unable to agree with this contention. I think the words "in default of our paying so" clearly has reference only to the second clause, namely, on the failure to pay the amount of the principal and interest after demand. No demand was necessary to bring a suit for the interest. A suit for interest was brought by the mortgagee in the Small Cause Court not against the property itself but to get a personal decree against the mortgagors. The fact that he brought that suit before demanding the principal cannot prevent a subsequent suit being brought for the principal amount after demand. If, as held by WALLER, J., a demand had already been made for the principal money before the suit in the Small Cause Court had been brought and the principal amount and interest had both become payable by the time, Order II, rule 2, would apply to the second suit by the mortgagee; but that contention fails in this case because I agree with the learned CHIEF JUSTICE that Exhibit B does not amount to a demand for the payment of the principal amount at all. It is as explained by His Lordship only a threat that proceedings would be taken through a vakil for the purpose of recovering the principal as well, if the interest is not paid; the vakil, if he is instructed, will have to take the necessary steps under the bond to realize the money and the first step

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SAWMI RAO v. OFFICIAL ASSIGNEE OF MADRAS. KRISHNAN, J. which he would have to take would be to make the necessary demand under the deed; so that with all respect to WALLER J., Exhibit B cannot be construed, in my opinion, as tantamount to a demand for the principal. In this view, at the date when the Small Cause suit was brought the principal amount of the mortgage money had not become payable, the mortgagee not having exercised his option of calling it in. Order II, rule 2, then would not apply even in the case of a second suit on the mortgage.

The point whether Order XXXIV, rule 14, has not got a bearing on this question has not been argued and, therefore, I do not wish to express any opinion on that point.

The law as to the applicability of Order II, rule 2, has been laid down by the Privy Council in the cases referred to be fore us, namely, *Kishen Narain v. Pala Mal*(1) and *Muhammad Hafiz v. Muhammad Zakariya*(2). In the latter case, as Lord BUCKMASTER explained, where there is a provision in the mortgage deed for the payment of interest different from that as to the payment of the principal, making two independent covenants, if a personal action is brought on the covenant for the payment of interest and a decree is obtained, that would not prevent a subsequent suit being brought for the mortgage money and Order II, rule 2, would have no application. That is exactly the case here. Order II, rule 2, will apply only if at the date of suit both the principal and interest had become payable.

In these circumstances, I agree with the learned CHIEF JUSTICE that this appeal must be allowed with costs against the Official Assignee.

K.R.

(1) (1923) I.L.R., 4 Lab., 32, 50 I.A., 115.
(2) (1922) I.L.R., 44 All., 121 (P.C.); s.c., 49 I.A., 9.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice
Madhavan Nair.

VENKATA RADHAKRISHNA RAO AND ANOTHER
(DEFENDANTS), APPELLANTS,

1924,
July 29.

v.

VENKATA RAO AND TWO OTHERS (PLAINTIFF AND HIS
SUCCESSORS), RESPONDENTS.*

*Appeal, maintainability of—Order of remand not under O. XLI,
r. 23, Civil Procedure Code, but under inherent powers.*

Where after an original Court had disposed of a suit by trying all the issues before it, the Appellate Court allows an amendment of the plaint, and hence remands the suit for trial on the amended plaint, the order of remand is one passed under the inherent powers of the Court and not one under Order XLI, rule 23, Civil Procedure Code. Hence an appeal to the High Court from the order of remand is incompetent. *Athappa Chetty v. Ramanatham Chetty* (1919) 10 L.W., 359, and *Mahmud Shah v. Talab Hussain Shah* (1923) 73 I.C., 915, followed.

APPEAL against the Order of P. RAMA RAO, Subordinate Judge of Masulipatam, in Appeal Suit No. 141 of 1921 preferred against the decree of P. RANJASWAMI AYYANGAR, Principal District Munsif of Gudivāda, in Original Suit No. 177 of 1919.

The facts are given in the judgment.

K. Rajah Ayyar for respondent raised a preliminary objection that no appeal lay as the lower Appellate Court remanded the suit not under Order XLI, rule 23, Civil Procedure Code, but under its inherent powers, as all the issues were tried by the Original Court. See *Athappa Chetty v. Ramanatham Chetty*(1), *Mahmud Shah v. Talab Hussain Shah*(2). He referred to and explained *Raman*

* Civil Miscellaneous Appeal No. 382 of 1922.

(1) (1919) 10 L.W., 359.

(2) (1923) 73 I.C., 915.

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Nayar v. Krishnan Nambudripad(1). When a plaint is allowed to be amended by the Appellate Court, the proper order is one of remand. See *Uzir Ali Sardar v. Savai Behara*(2) and *Narottam Rajaram v. Mohanlal Kahandas*(3).

K. V. Subba Rao for *V. Ramadoss* for appellant.—The order of remand is illegal; the lower Appellate Court should not have allowed an amendment of the plaint when hearing the appeal by the defendants and after the amendment was disallowed by the original Court. If the order of remand is legal, it is one made under Order XLI, rule 23, as in the opinion of the lower Appellate Court the suit had not been properly disposed of by the original Court and had yet to be tried. The principle of *Raman Nayar v. Krishnan Nambudripad*(1) applies; see also *Malayandi Goundan v. Bomman Poosari*(4).

JUDGMENT.

Mr. Rajah Ayyar for respondents raises a preliminary point that no appeal lies.

The first Court heard and decided the case before it fully on all issues. The lower Appellate Court permitted the plaint to be amended before it and remanded the case for trial on the amended plaint to the first Court. This order of remand clearly cannot be brought within Order XLI, rule 23, Civil Procedure Code, even at its widest interpretation as laid down by the Full Bench in *Raman Nayar v. Krishnan Nambudripad*(1). Nevertheless the only course open to an Appellate Court which permits before it an amendment of the plaint is to remand the case for trial to the first Court (vide *Uzir Ali Sardar v. Savai Behara*(2) and *Narottam Rajaram v.*

Mohanlal Kahandas(1). Here then we are confronted with a legal order of remand which does not come within the purview of Order XLI, rule 23, and cannot therefore subscribe to the contention of the appellant that such an order is unjustified in law. Now it is only orders of remand passed under Order XLI, rule 23, which are subject to appeal. The present order which is not passed under that section, but under the inherent power of the Court (see section 151), is not appealable. Our view is supported by a Bench of this Court in the case reported in *Athappa Chetty v. Ramanatham Chetty*(2). Our attention has been called by the appellant to the decision in *Malayandi Goundan v. Bomman Poosari*(3), but we do not consider that case lays down more than this, that the inherent power of the Court to remand, if existent at all, should not be exercised in any case in which another procedure, more definitely laid down by the Code, may be followed. Appellant has also relied on certain observations by the referring Judges in *Raman Nayar v. Krishnan Nambudripad*(4) but, in the judgment in that case, all the Judges were careful to restrict their judgment to the application of Order XLI, rule 23, to the case before them, to which they all agreed it applied. That case does not therefore help the appellant. The case of the Lahore High Court *Mahmud Shah v. Talab Hussain Shah*(5) is exactly in point, and we agree with the views therein expressed.

The Appeal is, therefore, incompetent and is dismissed with costs.

N.R.

(1) (1913) I.L.R., 37 Bom., 284.

(2) (1919) 10 L.W., 359.

(3) (1923) 17 L.W., 159.

(4) (1922) I.L.R., 45 Mad., 900 (F.B.).

(5) (1923) 73 I.C., 915.

(1) (1922) I.L.R., 45 Mad., 900 (F.B.).

(2) (1916) I.L.R., 43 Cal., 938.

(3) (1918) I.L.R., 37 Bom., 289.

(4) (1923) 17 L.W., 159.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Jackson.

1924,
September 3.

MARUTHAVANASWAMI ALIAS DESIKA PANDARA-SANNADHI (COUNTER-PETITIONER IN BOTH), PETITIONER,

v.

SUBRAMANIA THAMBIRAN (PETITIONER IN BOTH),
RESPONDENT.*

Madras (Administration of Estates) Regulation III of 1802, sec. 16 (7)—Intestate succession to personal property—Claim by more than one person—Duty of Judge to refer claimants to a suit—No jurisdiction to decide under Regulation.

If on a person dying intestate, leaving personal property, more than one person claim the same, under Madras (Administration of Estates) Regulation III of 1802, the duty of the Judge under section 16 (7) of the Regulation is to refer the parties to a regular suit; and he has no jurisdiction in such a case to decide the claim under the Regulation.

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 orders of S. NARAYANASWAMI AYYAR, Subordinate Judge of Māyavaram, in O.P. No. 60 of 1923 and in I.A. No. 197 of 1924 in O.P. No. 60 of 1923.

The facts are given in the judgment.

K. S. Jayarama Ayyar and S. Nagaraja Ayyar for petitioner.

The petitions having been filed as original petitions under the Regulation, they ought to be tried as original suits and the witnesses should be examined *viva voce*; cf. rule 94, Civil Rules of Practice. The Subordinate Judge had therefore no jurisdiction to direct the evidence to be by affidavits only. In any case the Judge ought to have allowed the cross-examination of the

deponents to the affidavits under Order XIX, rule 1, Civil Procedure Code. Reference was made to the corresponding provisions in the English Supreme Court Rules in Orders 37 and 38 and the decisions thereunder. The refusal to allow cross-examination was also without jurisdiction and materially irregular.

T. R. Ramachandra Ayyar with S. Muthiah Mudaliyar and K. Narasimha Ayyangar for respondent.

The Regulation in question is self-contained and prescribes its own procedure for the inquiry under it and all that is required is that the Judge should be satisfied. As to by what kind of evidence he has to satisfy himself he is given absolute discretion and he is not controlled to any extent by the Civil Procedure Code or Civil Rules of Practice which were passed long after. Hence he can direct affidavit evidence. Further the scheme of the unrepealed portion is such that where there are contesting claimants in a proceeding under the Regulation they are to be referred to a regular suit, wherein the claims can be gone into fully; which clearly indicates that if proceedings were to go on under the Regulation the inquiry is necessarily of a summary character.

As regards the right to cross-examine the deponents, Order XIX, rule 1, Civil Procedure Code, will not apply and the principle of Order XIX, rule 2, will apply and therein only an option or discretion is given to the Court to summon the deponent for cross-examination. If the Judge exercises his discretion judicially in a particular way the High Court cannot interfere under section 115, Civil Procedure Code. In this case the Judge has found that the application to summon the deponents for cross-examination is *mala fide* and ought not to be allowed. Hence these Revision Petitions should be dismissed.

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* Civil Revision Petitions Nos. 490 and 491 of 1924.

JUDGMENT.

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These Revision Petitions have been filed in respect of two orders of the Subordinate Judge of Mayavaram, dated 29th March and 2nd May 1924. The proceedings before him were under section 16, clause (7) of Madras Regulation III of 1802 and the learned Judge by his first order directed that affidavit evidence should be adduced and by his second order refused permission to the petitioner before us to cross-examine the deponents to the affidavits.

The facts are shortly these. The Pandara Sannadhi of Dharmapuram Mutt died on or about the 28th October 1923. The Sub-Magistrate having jurisdiction over the locality, locked and sealed the rooms containing some movables belonging to the Mutt and sent up a report to the Collector of Tanjore and he directed the Sub-Magistrate to hand over the keys of the rooms to the Subordinate Judge of Mayavaram, who was requested by the Collector to take proceedings under Regulation III of 1802. The present petitioner who is the Pandara Sannadhi of Swargapuri Mutt put in a petition on the 5th November 1923 stating that as the late Pandara Sannadhi died without appointing a successor he as the head of a dependant Mutt was entitled to succeed. The respondent was a rival claimant who also filed a petition claiming that he was the rightful successor on the ground that he was elected Pandara Sannadhi of the Dharmapuram Mutt by the Thambirans of that Mutt. The petition of the petitioner was O.P. No. 58 of 1923 and the petition of the respondent was O.P. No. 60 of 1923.

The learned vakil for the petitioner has contended that his petition is in the nature of an original petition, and that the procedure applicable is that applicable to suits and that therefore he is entitled to ask that

evidence should be taken *viva voce*. The arguments turned on the question to some extent, whether the proceeding was a regular petition or an interlocutory application, but on the view we take of the scope of the Regulation, we are of the opinion that these questions do not arise.

The Regulation in question deals with rules of Civil Procedure and contains also various other provisions. In the early part of the 19th century, this measure was considered quite adequate, but later on, a more elaborate system was devised and practically the whole Regulation has been repealed, its place being taken by the Code of Civil Procedure and the Civil Courts Act. Curiously enough, a few sections have been left unrepealed, although we are unable to discover any ground for the retention at any rate of a large portion of what has not been repealed.

Now, turning to the Regulation, we find that it contained 29 sections and that all of them have been repealed excepting section 16, clauses (2) to (7). Section 2 referred to the filing of a complaint, that word being the equivalent of a plaint, and procedure was laid down in the succeeding sections in regard to trial of suits. Section 16, clause (2) enacts that when a Hindu or a Mussalman dies leaving a will and appointing an executor, Courts of Justice are not to interfere except upon a regular complaint brought against his executors for a breach of trust or otherwise.

The third clause refers to the case of a Hindu or a Mussalman dying intestate but leaving an heir and the Courts are restricted from interference in such cases except upon a regular complaint. The fourth clause enacts that if there are more heirs than one to a person dying intestate and there is no disagreement, the Courts are not to interfere without a regular complaint. But,

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if there are disputes between the several claimants on a regular suit being filed by the party out of possession, the Judge is required to take security from the party in possession and if the latter is unable to give security, the Judge may give possession to the plaintiff himself on his giving security. But this act of the Judge is merely an act of administration for the benefit of the heir who may eventually succeed in the suit. Then follows the fifth clause. The first part of which is merely a continuation of the fourth clause. If neither party is able to give security, an administrator is to be appointed for the management of the estate until the disposal of the suit.

Pausing here for a moment, we fail to see of what use these provisions are at the present day. Nobody would think of resorting to them because under the Civil Procedure Code parties can obtain interim orders in regard to protection of property which is the subject of a suit.

Now, we come to the second part of clause (5). Where there is no person authorized and willing to take charge of the landed estate of a deceased person, the Judge is authorized to appoint an administrator for its management, until the legal heir to the estate or other person entitled shall attend and claim the same. If the Judge is satisfied that the claim is well founded, the administrator shall deliver over the property to him with an account of the administration. This is the effect of clause (5), part II, but we have seen that when there are several claimants, the Regulation specially enacts in clauses (2), (3), (4), (5) that their rights are to be adjudicated on in a regular suit. But clause (5), part II, does not contemplate a suit and is it intended that under that clause if there are several claimants the Court is to give a decision although there is no suit? It seems to us

that this construction would be contrary to the scheme of the Regulation. What is meant by part II, clause (5) seems to be that if there is a single claimant the Judge, on being *prima facie* satisfied as to his title, is to direct the interim administrator to transfer possession to him. It is not intended that if more than one claimant appears, the rights of the several claimants are to be decided without a suit. Under clause (4) and first part of clause (5), if one of the rival claimants is in possession, the title to the estate can be decided only in a suit. But if neither party is in possession (second part of clause (5), applies then) is there anything to suggest that the Court is to decide without there being a suit?

We are not concerned with clause (5), but with clause (7). We have, however, construed the previous clause, because there can be no doubt that the same interpretation in this respect must be placed both upon clauses (5) and (7).

Clause (7) enacts, that the Judge {on receiving information that any person had died intestate leaving personal property and there is no claimant to such property, shall adopt measures for its care and issue an advertisement

“requiring the heir of the deceased or any person entitled to receive charge of his effects”

to attend and should any person attend and satisfy the Judge as to his title to the property, the same is to be delivered up to him. Should no claim be preferred within twelve months, a report is to be transmitted to the Governor in Council. The second part of clause (5) refers to real property and clause (7) refers to personal property. But the scope of both the clauses seems more or less identical. In our opinion, clause (7) (as the second part of clause (5) does) contemplates the case only of a single claimant and the words occurring in the

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clause such as "heir of the deceased" and "any person entitled" also to a certain extent confirm our view.

The duty of a Judge, if more than one claimant appears before him, is to refer the parties to a regular suit. He has no jurisdiction, in our opinion, to give any decision acting under this Regulation when more than one claimant appears and claims property under clause (7) of section 16.

As we have held that the Judge cannot decide the dispute at all, it is obvious we cannot direct him to take evidence *viva voce* or to permit the petitioner to cross-examine the deponents to the affidavits.

The Civil Revision Petitions therefore fail and are dismissed, but in the circumstances without costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Venkatasubba Rao.

1924,
December 15.

PEDDA RAMI REDDI AND THREE OTHERS (DEFENDANTS),
APPELLANTS.

v.

GANGI REDDI (PLAINTIFF), RESPONDENT.*

Hindu Law—Succession—Maternal uncle's son, preferable heir to maternal aunt's son.

Under the Hindu Law, a maternal uncle's son is a preferable heir to a maternal aunt's son; *Ram Charan Lal v. Rahim Baksh*, (1916) I.L.R., 38 All., 416, followed. *Appandai Vathiyar v. Bagubali Mudaliyar*, (1910) I.L.R., 33 Mad., 439, not followed. *Vedachela Mudaliar v. Subramania Mudaliar*, (1921) I.L.R., 44 Mad., 753 (P.C.), applied.

SECOND Appeal against the decree of C. V. SAMPATH AYYANGAR, Temporary Subordinate Judge of Cuddapah, in Appeal Suit No. 40 of 1922 preferred against the

decree of N. S. NARASIMHA ACHARIYAR, District Munsif of Proddatur, in Original Suit No. 691 of 1920.

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v.
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The facts and arguments sufficiently appear from the judgments.

B. Somayya for appellants.

N. Chandrasekhara Ayyar for respondent.

JUDGMENT.

RAMESAM, J.—The only question to be decided in this Second Appeal is one of succession to the properties of one C. Subbayya, who died in 1906 or 1907 leaving a widow Narakka who died in October 1918. The plaintiff is a vendee (under a sale deed, dated 14th October 1919) from A. Venkata Reddi and Bali Reddi, who are the mother's sister's sons of Subbayya. The District Munsif found that Subbayya has also left his mother's brother's sons but held, relying on *Appandai Vathiyar v. Bagubali Mudaliyar*(1) that the plaintiff was entitled to succeed. The Subordinate Judge confirmed his judgment. The defendants file this Second Appeal and contend that the mother's brother's son is entitled to priority over the mother's sister's son under the Hindu Law. They point out that the decision in *Appandai Vathiyar v. Bagubali Mudaliyar*(1) has been dissented from in *Ram Charan Lal v. Rahim Baksh*(2) and it must be regarded as shaken if not overruled by the decision in *Vedachela Mudaliar v. Subramania Mudaliar*(3).

The question is one relating to the succession of bandhus. It is desirable to clear the ground by stating the principles of succession among bandhus, at least such of them as may help to solve the question.

There is no doubt as to the meaning of the term "bandhu" for purposes of succession. Though only

(1) (1910) I.L.R., 33 Mad., 439.

(2) (1916) I.L.R., 38 All., 416.

(3) (1921) I.L.R., 44 Mad., 753 (P.C.).

* Second Appeal No. 1555 of 1922.

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some bandhus are enumerated in the well-known ancient smṛithi text (attributed variously to Vṛidha Satatapa and Baudhayana), it has been laid down that the enumeration is not exhaustive and that it includes all *bhinnagotra sapindas* (see *Gridhari Lal Roy v. The Bengal Government* (1) and *Ramchandra Martand Waikar v. Vinayek Venkatesh Kothekar* (2)).

Relying on this definition, Sarvadhikari (Tagore Law Lectures, 1882) attempts to construct exhaustive tables of bandhus. He restricted the bandhus to four families : (1) the family of the agnates of the propositus, (2) the family of the agnates of his mother's father, (3) the family of the agnates of his father's mother's father, and (4) the family of agnates of his mother's mother's father. Whether the bandhus ought to be limited to these four families, though they otherwise satisfy the definition of *bhinnagotra sapindas*, has not arisen for judicial decision and does not arise in this case. With the said limitation and also excluding the so-called *sapindas* by "frog's leap" (see Sarvadhikari, 2nd edition, pp. 592, 597 and 600) and remembering that sapindaship is mutual he tabulated the possible bandhus in four tables (facing pages 606, 607). Some of his views as to priority of succession (as expounded in the 1st edition) based on the separation into four families were not accepted by the Privy Council in *H. O. Muthusami Mudaliyar v. Simambedu Muthukumaraswami Mudaliyar* (3). All these bandhus can be grouped in one table. Such a table is shown in the ninth edition of Mayne's Hindu Law facing page 852. The table is exhaustive and accurate subject to the limitation mentioned above. The order of succession among the persons in the table has to be determined.

(1) (1868) 12 M.I. A., 448.

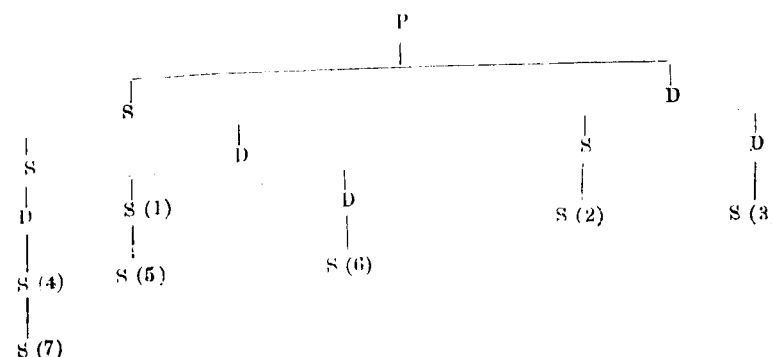
(2) (1915) I.L.R., 42 Cal., 384 (P.C.).

(3) (1896) I.L.R., 19 Mad., 405 (P.C.); 28 I.A., 83.

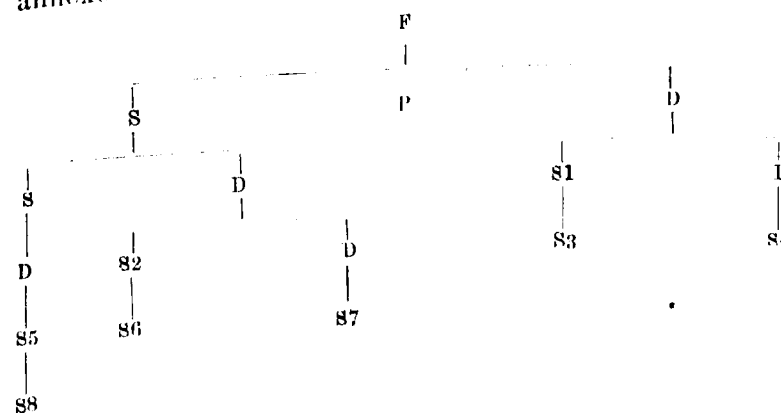
Now, apart from any texts of Hindu Law, the bandhus so enumerated will naturally fall into the following groups depending on the nearness of the ancestor :—

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(1) Descendants of the propositus whom I indicate hereafter by the letter P. They are numbers 1 to 7 in the table in Mayne's Hindu Law and in the annexed table



(2) Descendants of P's father, collateral to P, i.e., excluding group 1. They are numbers 1 to 8 in the annexed table and Nos. 8 to 15 in the table in Mayne.

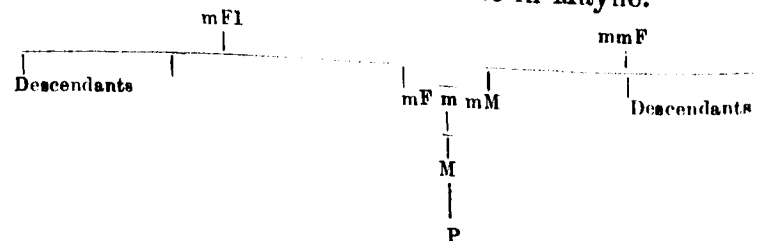


(3) Descendants of P's grandfathers (paternal and maternal) collateral to P's father, i.e., excluding groups 1 and 2. They correspond to Nos. 1 to 20 in the table annexed and are Nos. 16 to 35 in the table in Mayne.

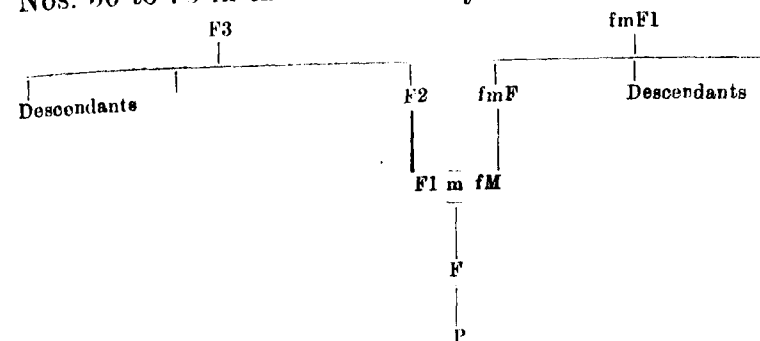
The pedigree chart illustrates the inheritance of the S gene across several generations. The F1 generation consists of an individual labeled 'F1' and another labeled 'mF(1)'. The F1 individual is mated with an individual labeled 'S', resulting in offspring 'S' and 'D'. The 'mF(1)' individual is mated with an individual labeled 'D', resulting in offspring 'F', 'm', 'M', 'S2', and 'D'. The 'S' offspring from the first mating is further mated with an individual labeled 'D', resulting in offspring 'S' and 'D'. The 'D' offspring from the first mating is mated with an individual labeled 'S3', resulting in offspring 'D' and 'S8'. The 'F' offspring from the second mating is mated with an individual labeled 'P', resulting in offspring 'S9'. The 'm' offspring from the second mating is mated with an individual labeled 'S4', resulting in offspring 'D' and 'S10'. The 'M' offspring from the second mating is mated with an individual labeled 'D', resulting in offspring 'S17' and 'S18'. The 'S2' offspring from the second mating is mated with an individual labeled 'D', resulting in offspring 'S19'. The 'D' offspring from the second mating is mated with an individual labeled 'S5', resulting in offspring 'S11' and 'S12'. The 'S' offspring from the third mating is mated with an individual labeled 'D', resulting in offspring 'S13' and 'S14'. The 'D' offspring from the third mating is mated with an individual labeled 'S6', resulting in offspring 'S15' and 'S7'. The 'D' offspring from the fourth mating is mated with an individual labeled 'S8', resulting in offspring 'S16'. The 'S9' offspring from the fifth mating is mated with an individual labeled 'D', resulting in offspring 'S17' and 'S18'. The 'S10' offspring from the sixth mating is mated with an individual labeled 'D', resulting in offspring 'S19' and 'S20'.

The diagram illustrates a genetic cross and its progeny. At the top, two parental genotypes are shown: F_2 and $f_m F$. A horizontal line connects them, representing the cross. Below this line, two groups of offspring are shown. On the left, a group labeled $F_1(u)M$ is shown, with a vertical line extending downwards to a group labeled F , which then branches into two groups labeled P . On the right, a group labeled $f_m F$ is shown, with a vertical line extending downwards to a group labeled F , which then branches into two groups labeled P . The word "Descendants" is written below the $F_1(u)M$ and $f_m F$ groups, indicating the next generation.

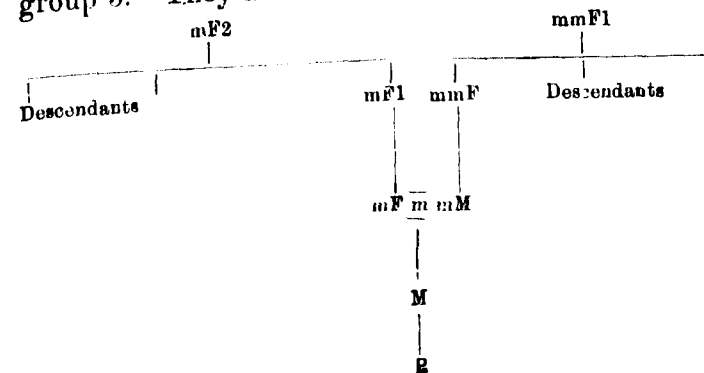
(5) Descendants of P's mother's grandfathers (paternal and maternal) collateral to P's mother's father (i.e., excluding groups 1 and 2 and right of group 3). They are Nos. 81 to 104 in the table in Mayne.



(6a) Descendants of P's paternal grandfather's (F1) paternal grandfather (collateral to P's paternal great grandfather (F2), i.e., excluding groups 1, 2, left half of group 3, and left half of group 4; and descendants of P's paternal grandmother's (fM) paternal grandfather, collateral to her father (fmF), i.e., excluding groups 1, 2 and right half of group 4. These are Nos. 56 to 75 in the table in Mayne.



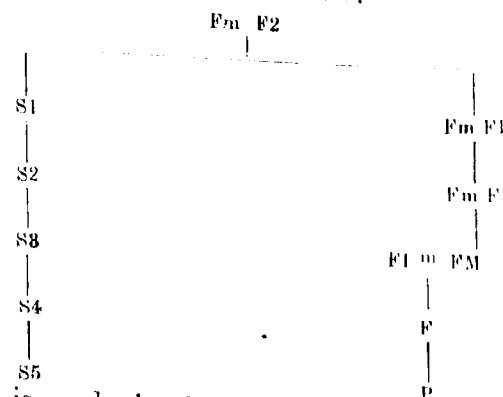
(6b) Descendants of P's mother's father's (mF) paternal grandfather collateral to mother's father's father (mF1), i.e., excluding groups 1, 2, right half of group 3 and left half of group 5; and descendants of P's mother's mother's (mM) paternal grandfather, collateral to mother's mother's father (mmf), i.e., excluding groups 1, 2, right half of group 3 and right half of group 5. They are Nos. 105 to 128 in Mayne.



The descendants are formed as before,

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(7) Descendants of P's paternal grandmother's (fm) great grandfather, collateral to her grandfather (fm F1). These are Nos. 76 to 80 in the table in Mayne and are Nos. 1 to 5 in the annexed table.



There is no doubt that all the persons in the above seven groups are bandhus. Groups 1, 2, left halves of groups 3, 4, 6a constitute Sarvadhikari's Table I (a). Right half of group 3, left half of group 5, and left half of group 6b constitute his Table I (b). Right half of group 4, right half of group 6a and group 7, constitute his Table II. The right half of group 5 and right half of group 6b constitute his Table III.

I now come to the expressions "Atma Bandhus," "Pitru Bandhus" and "Matru Bandhus" used in the ancient Sanskrit Text. It is evident that the word "bandhu" in these expressions has a narrower significance than "bhinna-gotra sapinda." The question that naturally arises is—are bandhus other than those enumerated, included in each of these three expressions and if so, who? The three persons enumerated as atma bandhus are in group 3 being Nos. 18, 19 and 20 in Mayne's Table. The Privy Council held No. 17 to be atma bandhu in *E. O. Muthusami Mudaliyar v. Simambedu Muthukumaraswami Mudaliyar*(1) and *Vedachela Mudaliar v. Subramania Mudaliar*(2), No. 22 to be an

atma bandhu in *Vedachela Mudaliar v. Subramania Mudaliar*(1), and No. 26 to be an atma bandhu in *Adit Narain Singh v. Mahabir Prasad Tiwari*(2). Therefore it follows that Nos. 21, 23 to 25 and 27 who are in the same degree as Nos. 22 and 26 should be regarded as atma bandhus. Similarly, not only Nos. 38, 39 and 40 who are enumerated as pitru bandhus but also Nos. 41 to 47 (on the analogy of *Vedachela Mudaliar v. Subramania Mudaliar*(1) and *Adit Narain Singh v. Mahabir Prasad Tiwari*(2)), should be regarded as pitru bandhus. Similarly not only Nos. 86, 87 and 88 who are expressly enumerated but also 85 who is in the same line and (on the analogy of *E. O. Muthusami Mudaliyar v. Simambedu Muthukumaraswami Mudaliyar*(3) and *Adit Narain Singh v. Mahabir Prasad Tiwari*(2)), Nos. 89 to 96 should be regarded as matru bandhus. But, beyond these, it is not clear to me how the bandhus should be classified. For instance, it is not clear to me how Nos. 36, 81 and 82 who are the ancestors should be classified. I doubt, if the expressions "Atma Bandhu," etc., were ever intended to be the basis for a scientific classification and share in the doubts of MULLICK and JWALA PRASAD, JJ., in *Umashankar Prasad Parasari v. Mussamat Nageswari Koer*(4). If we assume that the expression "Atma Bandhu" includes all the persons in my third group, the expression "Pitru Bandhu" includes all the persons in my fourth group and the expression "Matru Bandhus" includes all the persons in my fifth group, even then the question arises in what class should groups 1, 2, 6 and 7 be placed. That is, the first question is whether there are only these classes or more? If groups 1 and 2 are to be classified

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(1) (1921) I.L.R., 44 Mad., 753 (P.C.).
(2) (1921) 6 Pat. L.J., 140 (P.C.); 48 I.A., 86.
(3) (1896) I.L.R., 19 Mad., 405 (P.C.); 23 I.A., 83.
(4) (1918) 3 Pat. L.J., 863 (F.B.).

(1) (1896) I.L.R., 19 Mad., 405 (P.C.); 23 I.A., 83.
(2) (1921) I.L.R., 44 Mad., 753 (P.C.).

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under the named classes, they should obviously be classed as "Atma Bandhus." For if it is said that the expression "Atma Bandhu" is not quite appropriate for these, the other expressions are still less appropriate. This is the view taken in *Balusami Pandithar v. Narayana Rau*(1), and *Sham Dei v. Birbhadra Prasad*(2), (where persons in group 2 were held to be atma bandhus) and by DAWSON MILLER, C.J., and IMAM, J., in *Umashankar v. Mussamat Nageswari Koer*(3) (as to a person in group 2). But MULLICK and JWALA PRASAD, JJ., doubted the propriety of attempting to class the unnamed bandhus under the expressions "Atma Bandhus, etc." a view which has much to commend itself. In *Ajudhia v. Ram Sumer Misir*(4) and *Ram Phaul Thakur v. Pan Muti Padain*(5), a person in group 1 was regarded as an atma bandhu though no question of priority and hence no question of classification arose in the case. If the connotation of the term "Atma Bandhu" is extended as in *Balusami Pandithar v. Narayana Rau*(1) and *Sham Dei v. Birbhadra Prasad*(2), so as to include group 2 for satisfying the requirement that all bandhus should be divided into three classes, we are landed in anomalies as to the similar connotation of the expressions "Pitru Bandhus" and "Matru Bandhus." Again how should groups 6 and 7 be classified? If they are classed as pitru bandhus, groups 6a and 7 take priority over group 5 and group 7 takes priority over group 6b a result as to the equity of which I have considerable doubts. The doubts indicated by me above do not arise in this case and have not got to be solved by us. Such as relate to groups 6 and 7 have never arisen and may never arise.

(1) (1897) I.L.R., 20 Mad., 342. (2) (1921) I.L.R., 43 All., 463.
(3) (1918) 3 Pat. L.J., 663 (F.B.). (4) (1909) I.L.R., 31 All., 454.
(5) (1910) I.L.R., 32 All., 640.

Confining myself to groups 3, 4 and 5 as to the division of which into three classes, there is no difficulty, the first rule to be applied is that atma bandhus take precedence over the rest; *E. O. Muthusami Mudaliyar v. Simambedu Muthukumarasami Mudaliyar*(1). This rule does not help us in this case as both the claimants are in group 3 and are atma bandhus on any view of the expression. We have to find the rules regulating priority among atma bandhus.

The only decision of the Privy Council dealing with a case of rival claimants who are both atma bandhus is *Vedachela Mudaliar v. Subramania Mudaliar*(2). The passage from the Mitakshara (II-6-1) was quoted at page 758 and again referred to at page 764. At page 765, the Smriti Chandrika (XI, 5, 13 to 15) and Sarasvati Vilasa 595-8 were cited. At page 766, the conclusion is thus stated

"A very small consideration would show that that passage has nothing to do with the members of the same class *inter se*."

After this conclusion of the Privy Council, I think it is unnecessary for me to deal in detail with the arguments of Mr. Chandrasekhara Ayyar based on (1) the sentence बान्धवाः आसन्नान्तरक्रमेणैव स्मृत्यन्तरेदक्षिताः in the Smriti Chandrika and in Sarasvati Vilasa, (2) Jaimini Mimamsa Sutra Adhikaram and Parthasarathi Misra's Sastra Dipika—a commentary on Nyayamala of Madhwa-charya. I may add as to the passage from Smriti Chandrika there are two versions one containing the word वाचनिक and the other not containing it, and the version relied on by Mr. Chandrasekhara Ayyar (*i.e.*, the one containing the word वाचनिक) is the one referred to by their Lordships at page 765. I will only add that

(1) (1896) I.L.R., 19 Mad., 405 (P.C.); 23 I.A., 83.
(2) (1921) I.L.R., 44 Mad., 753 (P.C.).

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Dayavibhaga of Madhwacharya (Dr. Burnell's translation), another Madras authority supplemental to Mitakshara says that the enumerated bandhus take according to nearness. In my opinion the basis of the decision in *Appandai Vathiyar v. Bagubali Mudaliyar*(1), has been destroyed by the reasoning of their Lordships in *Vedachela Mudaliar v. Subramania Mudaliar*(2). It still remains for us to determine the rules that have to be applied to atma bandhus.

At page 762 His Lordship Right Hon'ble Mr. AMIR ALI after referring to the proposition that "each class should be divided into sub-classes according to the side of relationship and that in any case preference should be given to the father's side" observes

"Their Lordships do not think it necessary to express an opinion how far this proposition is in conformity with the express rule that, in each class, propinquity should be the governing factor."

At page 763 the principles laid down by MUTTUSWAMI AYYAR, J., in *Muttusami v. Muttukumarasami*(3) were quoted. The second principle refers to the division into three classes and the third runs thus

"(3) that the examples given therein are intended to show the mode in which nearness of affinity is to be ascertained."

The fourth relates to spiritual benefit. At page 766, His Lordship says

"Among modern writers both Golap Chandra Shastri (page 296) and Raj Coomar Sarvadhikary (page 726) affirm that nearness of blood is the governing principle in the succession of bandhus. The Shastri lays down the rule in the following words: '(1) The nearer in degree on whichever side is to be preferred to one more remote.'"

His Lordship then says that the rules quoted from *Muttusami v. Muttukumarasami*(3), furnish a safer guide (page 767). The conclusion is thus stated

"The appellant is undoubtedly nearer in degree to the deceased than Subramania. He also offers oblations to his father and grandfather to whom the deceased was also bound to offer Pinda."

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Accordingly I infer from *Vedachela Mudaliar v. Subramania Mudaliar*(1), that the rules to be applied to the atma bandhus for determining priority are—

(1) Propinquity should be the governing factor.

(2) If both are equal in degree, the spiritual benefit conferred may be used as a test for preference.

The first of these rules does not help us in the present case, as both the claimants are of the same degree. I am unable to agree with the statement in *Ram Charan Lal v. Rahim Baksh*(2),

"As we hold that the maternal uncle's son is of nearer consanguinity than the maternal aunt's son, the question of funeral oblations need not be considered."

It is not clear whether the expression nearer consanguinity is used in a different sense from "nearness in degree." If the expressions mean the same, I am not able to see how the maternal uncle's son is nearer in degree than maternal aunt's son. To this extent, viz., that both are equal in degree, I agree with the decision in *Rajeppa v. Gangappa*(3).

Mr. Chandrasekhara Ayyar adduced an ingenious argument based on the rules relating to marriage. In Southern India, a man may marry his maternal uncle's daughter but not his mother's sister's daughter. Therefore, he argues, that a maternal aunt's daughter is nearer than maternal uncle's daughter and therefore a maternal aunt's son is nearer than maternal uncle's son for purposes of succession. According to the ancient Sanskrit texts, both maternal uncle's daughter and maternal aunt's daughter are Sapindas and are ineligible

(1) (1910) I.L.R., 33 Mad., 489.

(2) (1921) I.L.R., 44 Mad., 753 (P.O.).

(3) (1928) I.L.R., 16 Mad., 23 at 30.

(1) (1921) I.L.R., 44 Mad., 753 (P.C.).

(2) (1916) I.L.R., 38 All., 41A.

(3) (1923) I.L.R., 47 Bom., 48.

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for marriage. I believe the rule is strictly observed in Bengal and probably in other parts of Northern India. But a custom has grown up in Southern India (probably a Dravidian custom) by which a mother's sister's daughter is regarded equivalent to a sister and ineligible for marriage, while a mother's brother's daughter or a father's sister's daughter is regarded equivalent to a wife or wife's sister and therefore eligible for marriage. This notion has nothing to do with nearness. Even the South Indian ancient Sanskrit texts (e.g. Vyavahara Madhaviya—a commentary on Parasara Smriti by Madhwacharya of which Dayavibhaga translated by Dr. Burnell is a portion) that recognize the marriagiability of a maternal uncle's daughter base the recognition on local custom.

We have therefore to resort to the second test enumerated by their Lordships in *Vedachela Mudaliar v. Subramania Mudaliar*(1), viz., Spiritual Benefit. We have to see which of the two claimants confers higher spiritual benefit on the propositus. There is no doubt both confer some spiritual benefit.

In discussing the question of spiritual benefit, we have to remember,

(1) that a claimant offers oblations to his ancestors in which, the propositus participates through his ancestors.

(2) The offering to a paternal ancestor is superior to the offering to a maternal ancestor.

(3) It follows by the principle of mutuality that the participation through a paternal ancestor is superior to the participation through a maternal ancestor. Thus, as between two persons *P* (propositus) and *C* (claimant), there are four possible cases:—

1. *C* offers to his paternal ancestors and *P* participates through paternal ancestors.

2. *C* offers to maternal ancestors and *P* participates through paternal ancestors.

3. *C* offers to paternal ancestors and *P* participates through maternal ancestors.

4. *C* offers to maternal ancestors and *P* participates through maternal ancestors.

The first case is a case where *C* and *P* are Sagotra Sapindas and does not come under the discussion relating to succession by Bandhus. In the other three cases *C* is a bandhu of *P*. Mr. Chandrasekhara Ayyar concedes that *C* in the second case is superior to *C* in (3) and (4), e.g., a father's sister's son is superior to mother's sister's son or mother's brother's son, i.e., he concedes that the participation through paternal ancestor is superior to participation through maternal ancestors. (Mayne, p. 736, paragraph 508, Rule 4.) But he does not concede that offering to maternal ancestors is inferior to offering to paternal ancestors. If we remember that all Sapindaship and all Bandhuship is mutual, it seems to me that the same inferiority attaches to offering to maternal ancestors in comparison with offering to paternal ancestors as in the case of participation. That offering to maternal ancestors is inferior to offering to paternal ancestors is an *a fortiori* case can be inferred from the following facts:—In all schools of Hindu Law bandhus descended from agnate ancestors are certainly postponed to agnates (subject to a certain exception in Bengal which it is unnecessary to note here). For instance in the four simple cases, mentioned above, a father's brother's son is superior to a father's sister's son. In this case the participation in each case is through paternal ancestors. So far is the rule recognized that agnates, even if remote, are preferred to cognates

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(1) (1921) I.L.R., 41 Mad., 753 (P.C.).

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even if near (except in Bengal in the case of daughter's sons of agnate ancestors and in Mitakshara Law in the case of daughter's son). In fact the principle is the very foundation of the whole system of Hindu Law by which agnates are preferred to cognates. If so, among cognates one degree of cognateness is certainly superior to two degrees of cognateness.

Divested of the religious, spiritual or ceremonial veil, the same principle of religious efficacy or spiritual superiority may be stated as:—

(1) Claimants through father of propositus are superior to claimants through mother of propositus, other circumstances being equal; (2) a claimant through his father is superior to a claimant through his mother. The caution is necessary that these rules should not be applied as they were applied in *Sundrammal v. Rangasami Mudaliar*(1) so as to defeat the rule as to nearness in degree. The case in *Sundrammal v. Rangasami Mudaliar*(1) has been overruled by *Vedachela Mudaliar v. Subramania Mudaliar*(2). They should be applied subject to the rule of nearness in degree [see *Vedachela Mudaliar v. Subramania Mudaliar*(3)].

In the above discussion I have attempted to establish the superior spiritual efficacy of the mother's brother's son to mother's sister's son from general principles. As a particular case, the fact has been recognized in Dharma Sindhu:

“धर्मसिंधु”

तदभावे गोत्रजाः तदभावे माता मह मातुलतत्पुत्रादयः
मातृसर्पिडाः अनुक्रमेण मातृ सर्पिडाभावे स्वपितृ प्वसू मातृ
प्वसू पुत्राः अनुक्रमेण मातृसर्पिडाः

(1) (1895) I.L.R., 18 Mad., 193.

(2) (1921) I.L.R., 44 Mad., 753 (P.C.).

(3) (1921) I.L.R., 44 Mad., 753 at 762 (P.C.).

“Tadabhava gotrajah tadabhava matamaha matula tatputradayah matrusapindah anukramena matrusapindabhava svapitrushvasru matrushvasruputrah anukramena matru sapindah.”

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a book which, though mentioned by West and Buhler as an authority in Western India, is of high authority along with Nirnaya Sindhu, in the Telugu country (the parties in this case are Telugus) being constantly referred to by pandits and purohits (see translation in *Sarvadhikari*, pp. 86-89). It is true that the text shows a mother's brother's son should have priority in the performance of Shradha over even father's sister's son. I do not wish to concede that the order of succession is the same among them. The point does not arise here.

If every step in cognateness, compared to agnateness, denotes a mark of inferiority, it follows that two steps in cognateness are inferior to only one step in cognateness and one in agnateness. The principle has been recognized in this Court in *Tirumalachariar v. Andal Ammal*(1). The decision in *Appandai Vathiyar v. Bagubali Mudaliyar*(2) itself recognizes the superior spiritual efficacy of a maternal uncle's son to mother's sister's son. Finally the Bengal School of Law which depends on spiritual efficacy gives preference to mother's brother's son. (See *Dayakrama Sangraha* Ch. I-x-14-20. Mayne paragraph 584, p. 859.) A text somewhat in conflict with the passage in *Dayakrama Sangraha*, viz., the Commentary of its author (Sri Krishna Tarkalankara) on *Jimutavahana's Dayabhaga* has been cited in Ghose's *Hindu Law*, Vol. II, page 928, but its authenticity is doubtful and it is inconsistent with the main work of the author. This is also the view of *Sarvadhikari*.

(1) (1907) I.L.R., 30 Mad., 406.

(2) (1910) I.L.R., 33 Mad., 439.

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For all the reasons I would agree with the conclusion in *Ram Charan Lal v. Rahim Baksh*(1) and regard *Appandai Vathiyar v. Bagubali Mudaliyar*(2) as overruled by *Vedachela Mudaliar v. Subramania Mudaliar*(3) and allow the appeal and dismiss the suit with costs only in the first Court. Each party will bear his costs in this and in the lower Appellate Court.

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VENKATASUBBA RAO, J.—I agree.

The question to be decided in this case has reference to the priority in regard to succession to a deceased Hindu, the competing claimants being his maternal uncle's son and his maternal aunt's son. The rules respecting the succession of Bandhus are involved in considerable obscurity, and the specific point with which we have to deal has been the subject of great controversy. The case has been fully and ably argued by Mr. B. Somayya whose contention has been that the maternal uncle's son is to be preferred and by Mr. N. Chandrasekhara Ayyar who has maintained that the maternal aunt's son has the preferential right.

I have come to the conclusion that the maternal uncle's son must be preferred. A Bench of this Court held in *Appandai Vathiyar v. Bagubali Mudaliyar*(2) that a mother's sister's son is to be preferred to a maternal uncle's son. But, in my opinion, the reasons given for the decision cannot now be accepted as sound in view of the recent judgment of the Judicial Committee in *Vedachela Mudaliar v. Subramania Mudaliar*(3).

I shall first examine the texts of Hindu Law on this subject and shall then discuss the case referred to above, namely *Appandai Vathiyar v. Bagubali Mudaliyar*(2).

I may preface my remarks on the original texts with the observation that the ancient writers after stating

(1) (1916) I.L.R., 33 All., 418.

(2) (1910) I.L.R., 33 Mad., 439.

(3) (1921) I.L.R., 44 Mad., 753 (P.C.).

that on failure of agnates, cognates succeed, invariably quote a text that is variously attributed to Vridha Satatapa and Baudhayana. That text merely enumerates the bandhus and has no bearing on the question of succession. Though it has been repeatedly quoted by the exponents of the law, there is nothing to show that the text, whatever may be its origin, had any connexion with any discussion of legal questions, and it is more than probable that the author intended to do no more than merely enumerate the bandhus. The text itself is this :

"The sons of a man's own paternal aunt, the sons of his own maternal aunt, and the sons of his own maternal uncle, are recognized as a man's own bandhavas (atma bandhus). The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, are recognized as his father's bandhavas (pitru bandhus). The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle, are recognized as his mother's bandhavas (matru bandhus)".

I shall now proceed to examine the texts.

I. Vignaneswara in his *Mitakshara* says thus :

"(1) On failure of agnates, the cognates are heirs. Cognates are of three kinds, related to the person himself (atma bandhus), to his father (pitru bandhus) or to his mother (matru bandhus) as is declared by the following text".

Here is quoted the famous text attributed to Vridha Satatapa. Then the *Mitakshara* continues

"(2) Here by reason of near affinity the cognate kindred of the deceased himself (atma bandhus) are his successors in the first instance. On failure of them, his father's cognate kindred (pitru bandhus); or if there be none his mother's cognate kindred (matru bandhus). This must be understood to be the order of succession here intended."

See Chapter II, section 6, Setlur's Hindu Law Books on Inheritance.

The *Mitakshara* thus prescribed that the atma bandhus are to be preferred to the pitru bandhus and the pitru to the matru. As regards the order of succession

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among the bandhus of each class, it says nothing. The Mitakshara, therefore, is not an authority for the proposition that the maternal aunt's son is to be preferred to the maternal uncle's son.

II. Sarasvati Vilasa thus deals with the succession of the Bandhus.

"595. The bandhus are exhibited in another Law Code in the order of their greater propinquity

The text of Vridha Satatapa is then quoted.

"596. If there are no Gothrajas the connexion through property belongs to these.

"597. There also the order to be recognized is that a man's own bandhavas first take the property on account of their nearer relationship; if there are none, the father's bandhavas take the property; if there are none the mother's bandhavas."

(See Translation of Sarasvathi Vilasa by Rev. Thomas Foulkes, page 119.)

A reference to the original Sanskrit text will show that the passage in Sarasvati Vilasa, stanza 597, is identical with paragraph 2 of the above quotation from the Mitakshara.

Now turning to the opening words of Sloka 595

"The bandhus are mentioned in another Smriti in the order of their propinquity."

I cannot agree with the contention that the learned author intended in this passage to lay down the order of succession in regard to bandhus mentioned in each of the three categories. Sloka 597 puts the matter beyond doubt, because there it is expressly stated that the order prescribed is only as regards the three classes of the bandhus.

III. Smriti Chandrika after stating that after sapindas, samanodakas take the wealth of a deceased kinsman, says that bandhavas come next in order. Then section 5, sloka 13, continues

"The bandhavas are exhibited in another Law Code in the order of their greater propinquity."

Then follows the text of Vridha Satatapa which is numbered sloka 14. So far it will be seen that Smriti Chandrika is in complete agreement with Sarasvati Vilasa. In the original Sanskrit the same words are used in both the treatises to express the idea conveyed by the words

"Are exhibited in another Law Code in the order of their propinquity".

Then comes sloka 15 which according to one reading is as follows :—

"Of the kinsmen (Gnatayah or sapindas), distant kinsman (Sakulyah or Samanodakas), and cognate kindred (bandhavas), in default of one that stands nearest in the order expressly given, he that may be somehow viewed to stand on a par with him may be selected; it being generally declared by Gautama 'Let those take the inheritance who give the funeral cake (pinda), who are the descendants from the same Gotra or who are sprung from the same Rishi'."

(See Setlur, page 297.)

The other reading is that which is adopted by Ghose and is as follows :—

"Of the agnates, sakulyas and bandhus, on failure of near heirs, those that may be somehow considered near may be considered as heir from what Gautama says generally thus 'Sapindas, Sagotras or those connected by descent from the same Rishi' take the estate".

(See Principles of Hindu Law, Vol. II, page 471 for the Sanskrit text and page 403 for the English rendering.)

In the first place, whichever reading is adopted, sloka 15 is somewhat obscure and in any event it contains no indication that a different rule was intended to be laid down from what was prescribed in the Mitakshara.

IV. Parasara Madhaviya is even less explicit on the point. It does not set out the priority even in regard to the main three classes. This is how the law is stated:

"In default of Gothrajas, bandhavas take the property; and they are of three kinds as has been shown by Baudhayana."

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Here the writer gives as usual the well-known text and then proceeds to say

"But he who is nearest among the bandhavas takes first."

So Brihaspati says

"Where there are many kinsmen Sakulyas and bandhavas, he who is nearest to them should take the property of a man who leaves no issue."

(See sloka 41 in the translation by Mr. A. C. Burnell page 41). As I have observed, on the point at issue, this passage throws little light.

V. Varadaraja's Vyavahara Nirnaya merely states that bandhavas succeed in default of sagotras and then cites the text of Vridha Satatapa. See Burnell's translation of Vyavahara Nirnaya, page 37.

VI. Vyavahara Mayuka enunciates the law thus:

"If no distant kinsmen exist then come the cognate kindred (bandhu) who are thus specified in another Smriti."

The Smriti of Vridha Satatapa is then as usual quoted. Then the author continues

"Here also the order of succession follows the order of the text."

See section 8, verse 22, page 101 of Burnell's translation.

A careful examination of these texts reveals that, so far as the Mitakshara is concerned, it settles priority only in regard to the three main categories of the bandhus and that, excepting a doubtful and obscure passage of the Smriti Chandrika, there is nothing in these authorities which indicates that the order in which the bandhus of each class are enumerated is intended to determine their respective priority.

I shall next deal with *Appandai Vathiyar v. Bagubali Mudaliyar*(1), the case to which I have referred. The reasons for holding that a mother's sister's son is to be

preferred to maternal uncle's son are, according to the judgment in that case, the following:—

(1) "The express authority of the Smriti Chandrika, the Sarasvati Vilasa and the Vyavahara Mayukha must be given effect to." Page 445.

With all respect, in my opinion, as I have shown, this reason is not sound. The translator of the Smriti Chandrika who is referred to in the judgment (Mr. T. Krishnaswami Ayyar) no doubt gives the twenty-fourth place to the son of the mother's sister and the twenty-fifth to the son of the maternal uncle. This is merely the opinion of the translator and it is not correct to say that the Smriti Chandrika itself supports the view. Again Mr. Mandlik in his translation of the Vyavahara Mayukha adds in a footnote that the order applies to the three classes as well as to the several members of those three classes. Whatever may be Mr. Mandlik's opinion it does not receive any support from the original which he has translated. I have sufficiently shown that the texts of the Hindu Law do not support the view which the learned Judges have taken in this case.

(2) The second reason given in support of their judgment may also be stated in the words of the learned Judges:

"There is a rule of Mimamsa that effect should be given to the order in which persons and things are named unless the sense requires a different order. In the absence of any decisive principle dictating a different order, the duty of the interpreter of the law is to accept the order in which they are named as based upon some rule which they may be unable to discover or upon the mere *ipse dixit* of the law-giver."

Jaimini in his Mimamsa Sutrās refers to what are called Kramas. The three chief Kramas are thus defined:

(I) The order of succession is sometimes declared by express Srutis. This is called Sruti Krama.

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(II) In the absence of express Sruti it is in some cases to be determined by the sense of the passage. This is called Artha Krama (determination of order by sense).

(III) It is sometimes indicated by the order in which the texts appear. This is called Patha Krama (succession by reading). See Sircar, Tagore Law Lectures on Mimamsa Rules of Interpretation, page 196.

It is the third rule that is referred to in the passage quoted above from the judgment. The first two Kramas are based on reason. The third Krama is purely arbitrary and cannot be relied on excepting possibly in the last resort. This artificial rule was treated by the learned Judges as the chief canon of construction. The mere accident of enumeration in a certain order was taken as decisive of the point at issue.

Moreover, in the light of decided cases, can any importance be attached to the order of enumeration? In *Sundrammal v. Rangasami Mudaliar*(1), the sons of the daughters of the deceased's paternal uncle were preferred to the deceased's mother's sister's son. Both belonged to the class of atma bandhus, but a cognate not specified in the enumeration was preferred to a cognate specified. In *Balusami Pandithar v. Narayana Rau*(2), the son of the sister's son was preferred to the maternal uncle's son. Here again, the contest was between two atma bandhus and a bandhu not mentioned was preferred to a bandhu mentioned. In *Gunes Chunder Roy v. Nil Komul Roy*(3), a sister's son was given priority over a mother's sister's son and in *Mohandas v. Krishnabai*(4), the maternal uncle was preferred to the mother's sister's son. In each of these two cases again,

(1) (1895) I.L.R., 18 Mad., 193.
(3) (1874) 22 W.R., 264.

(2) (1897) I.L.R., 20 Mad., 342.
(4) (1881) I.L.R., 5 Bom., 597.

a bandhu specified among the atma bandhus was rejected in favour of one not specified. In *Vedachela Mudaliar v. Subramania Mudaliar*(1), the Judicial Committee preferred a maternal uncle (an atma bandhu ex parte materna) to a son of the paternal aunt's son (an atma bandhu ex parte paterna).

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It has been held that the enumeration in the text of Vridha Satatapa is only illustrative and not exhaustive; and if cognates not included in the enumeration of atma bandhus are to be preferred to the first-named pitru bandhu and if similarly pitru bandhus not in the list are to be preferred to the first-mentioned matru bandhu, where then can priority come by virtue of mere enumeration? I am therefore decidedly of the opinion that Patha Krama rule ought not to be applied.

(3) I shall next deal with the third ground on which the judgment in *Appandai Vathiyar v. Bagubali Mudaliyar*(2), is based. Referring to Bhattacharya and Sarvadhikari who give precedence to the maternal uncle's son over the mother's sister's son, the learned Judges observe that the view of those writers is not entitled to weight as it is based on the theory of religious efficacy of oblations which has no place in the Mitakshara scheme of succession. The learned Judges say

"It is difficult to decide the question under consideration on any theory of religious efficacy." Page 444.

Similarly they dispose of the observation of Mr. Justice MUTTUSWAMI AYYAR in *Muttusami v. Muttukumarasami*(3), that the spiritual benefit conferred on a propositus is a ground of preference. A good portion of the judgment is devoted to showing that the Mitakshara

(1) (1921) I.L.R., 44 Mad., 753 (P.C.). (2) (1910) I.L.R., 33 Mad., 439.
(3) (1893) I.L.R., 16 Mad., 23.

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“repudiates the notion of connection by spiritual offerings.”

There can be little doubt that the learned Judges were disposed to take the view that if the question had to be decided with reference to the theory of religious efficacy, the maternal uncle's son ought to be preferred to the maternal aunt's son. A very different view on the question of spiritual benefit has now been taken by the Judicial Committee in *Vedachela Mudaliar v. Subramania Mudaliar*(1), and the value of *Appandai Vathiyar v. Bagubali Mudaliar*(2), as an authority is thus lost.

In *Vedachela Mudaliar v. Subramania Mudaliar*(1), the contest was between the mother's brother and the father's sister's son's son. The Madras High Court (MILLER and SADASIVA AYYAR, JJ.) held that the latter was the preferential heir. In doing so, one of the learned Judges (SADASIVA AYYAR, J.), refused to recognize the fourth rule laid down by Sir T. MUTTUSWAMI AYYAR, J., in *Muttusami v. Muttukumarasami*(3), namely:

“That as between the bandhus of the same class the spiritual benefit they confer upon the propositus is as stated in *Vira Mitrodaya*, a ground of preference.”

Their Lordships of the Judicial Committee point out that the *Vira Mitrodaya* is regarded as a high authority wherever the Law of the Mitakshara is in force and state their conclusion thus:—

“Their Lordships think that in the absence of any express authority varying the rule, the propositions enunciated in *Muttusami v. Muttukumarasami*(3), which on appeal was affirmed by the Judicial Committee, furnish a safe guide.”

The competing claimants, the maternal uncle and the father's sister's son's son, both belong to the class of Atma Bandhus. The maternal uncle was preferred

on the ground (1) that he is undoubtedly nearer in degree to the deceased than the rival claimant; (2) that he offers oblations to his father and grandfather to whom the deceased was also bound to offer pinda, whereas the father's sister's son's son offers no pinda to the deceased's ancestors. In the course of their judgment, their Lordships observe that it is not necessary to express any opinion how far the proposition that preference should be given to cognates *ex parte paterna* over cognates *ex parte materna*, is in conformity with the express rule that in each class propinquity should be the governing factor, but it is noteworthy that the maternal uncle who was preferred by their Lordships is a cognate *ex parte materna* and that the sister's son who was rejected in favour of the maternal uncle, is a cognate *ex parte paterna*.

In *Appandai Vathiyar v. Bagubali Mudaliar*(1), the learned Judges (WHITE, C.J. and KRISHNASWAMI AYYAR, J.), expressed disapproval, as Mr. Justice SADASIVA AYYAR did in the case that went up to the Privy Council, of the fourth principle enunciated by Sir T. MUTHUSWAMI AYYAR, J., in *Muttusami v. Muttukumarasami*(2). It, therefore, follows that *Appandai Vathiyar v. Bagubali Mudaliar*(1), cannot now be regarded as an authority for the proposition that the maternal aunt's son is to be preferred to the maternal uncle's son.

I have so far examined the grounds of the decision in *Appandai Vathiyar v. Bagubali Mudaliar*(1), with a view to show that it cannot be followed. That is the only Madras case that deals with the question of preference between the maternal aunt's son and the maternal uncle's son. The same question arose in two other cases, one of the Allahabad High Court and the

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(3) (1898) I.L.R., 16 Mad., 23.

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other of the Bombay High Court. In *Ram Charan Lal v. Rahim Baksh*(1), BANERJI and PIGGOTT, JJ., held, dissenting from the Madras view, that the maternal uncle's son was the preferential heir. The ground of decision was that precedence was to be determined by propinquity. They quote with approval the passage in *Tirumalachariar v. Andal Ammal*(2), which is to the effect that all other considerations being equal, that claimant between whom and the stem there intervenes only one female link is to be preferred to the claimant who is separated from the stem by two such links. In *Rajappa v. Gangappa*(3), MACLEOD, C.J., and SHAH, J., held that the only test that ought to be applied is propinquity to the deceased, that the argument of relative religious efficacy was not well founded and that the affinity of the maternal uncle's son and the maternal aunt's son is equal and that they being equally near to the propositus they ought to take equally. The peculiar doctrine that prevails in Bombay enabled the learned Judges to treat a female's and a male's descendant as standing on a par and therefore being equally entitled.

We are bound by the decision of the Judicial Committee and giving effect to the view adopted in *Vedachela Mudaliar v. Subramania Mudaliar*(4), we must hold that the maternal uncle's son is the preferential heir on the ground of superior efficacy of oblations. The mother's sister's son as well as the mother's brother's son are both Atma Bandhus and are both expressly mentioned in the Mitakshara. They are both related on the mother's side and they are both equally removed from the propositus. The Allahabad High

(1) (1916) I.L.R., 38 All., 416.
(3) (1923) I.L.R., 47 Bom., 48.

(2) (1907) I.L.R., 30 Mad., 406.
(4) (1921) I.L.R., 44 Mad., 753 (P.C.).

Court held that the maternal uncle's son is nearer to the deceased than the maternal aunt's son but the Bombay High Court was of the opinion that both were equally near to the propositus. In my opinion, it is unnecessary to inquire whether the Allahabad view or the Bombay view is correct. I would prefer to base my judgment on the surer ground referred to by the Privy Council, that of superior religious efficacy.

How then does the question of superior religious efficacy stand?

Sarvadhikari in classifying the heirs according to the Dayabhagha gives the thirty-fifth place to the maternal uncle's son and the thirty-seventh place to the maternal aunt's son. The doctrine of spiritual benefit, which is the foundation of the order given in the Dayabhagha, is discussed by Sarvadhikari at pages 700 to 710 (See Hindu Law of Inheritance by Saravadhikari, 2nd Edition). Daya Krama Sangraha by Sri Krishna Tharkaalankara similarly prefers maternal uncle's son to maternal aunt's son and superior spiritual efficacy is given as the ground. See Ch. I, Section 10, Pl. 14, 15 and 16. Ghose in his Hindu Law observes that in some copies of Sri Krishna's commentary on the Dayabhagha the maternal aunt's son is given a place higher than that accorded to the maternal uncle's son and the learned author points out that this order of succession is not only opposed to the authority of Daya Krama Sangraha, but on principle cannot be accepted.

I do not propose to discuss the theory of the relative superiority of the pindas. It is sufficient to say that Jurists of the Bengal School whose system of the Law of Inheritance is permeated by considerations of religious efficacy, recognize that the maternal uncle's son has precedence over the maternal aunt's son. It is also worthy of note that the learned Judges in *Appandai*

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Vathiyar v. Bagubali Mudaliyar(1), as also in *Ram Charan Lal v. Rahim Baksh*(2), were disposed to take the view that if the question was to be decided with reference to the ground of superior spiritual efficacy the maternal uncle's son would be the preferential heir.

I therefore agree in the order proposed by my learned brother.

N. R.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Wallace.

1925,
January 7.

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APPELLANT,

v.

PALANISWAMI CHETTI AND ANOTHER (RESPONDENTS
1 AND 2), RESPONDENTS.*

Mortgage—Rights of mortgagee unaffected by Provincial Insolvency Act (V of 1920)—Suit on mortgage—Adjudication of mortgagor as insolvent—Section 10, Civil Procedure Code (V of 1908)—No jurisdiction for Insolvency Court to stay mortgage suit under section 10 of Civil Procedure Code—Application by Official Receiver under section 53 of the Act to set aside mortgage as void, not operative to stay suit.

The right of secured creditors to realize their security is not affected by the Provincial Insolvency Act. Hence the adjudication of the mortgagor as an insolvent does not operate as a stay of further proceedings in a suit instituted against him to realize the mortgage amount.

The Court which adjudicated the mortgagor an insolvent, even if it happens to be a superior Court, has no jurisdiction to stay the mortgage suit pending in another Court on an application under section 10 of the Civil Procedure Code. Nor does an application by the Official Receiver under section 53 of the Act to the Insolvency Court to set aside the mortgage as void against the creditors operate as a stay of the suit or enable him

to have the mortgage suit stayed pending the decision of his application under section 53.

Semle—If the application under section 53 to which the mortgagee would be a party eventually succeeds, his mortgage decree will *ipso facto* become unenforceable.

APPEAL against the order of C. G. AUSTIN, the District Judge of Coimbatore, in I.A. No. 161 of 1924 in I.P. No. 102 of 1921.

The facts and arguments sufficiently appear from the judgment.

A. C. Sampath Ayyangar for appellant.

T. M. Krishnaswami Ayyar for respondents.

JUDGMENT.

DEVADOSS, J.—This appeal is by the Official Receiver of Coimbatore against the order of the District Judge refusing to stay proceedings in O.S. No. 11 of 1924 on the file of the Principal Sub-Court, Coimbatore, pending the disposal of I.A. No. 161 of 1924. The respondents who are secured creditors filed O.S. No. 11 of 1924 in the Principal Sub-Court of Coimbatore against the insolvent. The Official Receiver was added as a party inasmuch as the defendant has been adjudicated an insolvent in I.P. No. 102 of 1921. The Official Receiver who had information that the mortgage in favour of the respondents was a voidable transaction under section 53 of the Provincial Insolvency Act moved the District Court for declaring that the mortgage was void against him. Pending the disposal of his application he moved the District Court under section 10 of the Civil Procedure Code for stay of the proceedings in O.S. No. 11 of 1924. The District Judge held that section 10 did not apply to the application and dismissed it. The application was made in the insolvency petition and therefore it was made to the District Court exercising Insolvency Jurisdiction. There is no provision in the

(1) (1910) I.L.R., 33 Mad., 429.

(2) (1916) I.L.R., 38 All., 416.

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Provincial Insolvency Act corresponding to section 18 of the Presidency Towns Insolvency Act empowering the Insolvency Court to stay proceedings pending against the insolvent before that Court or any other Court subject to the superintendence of that Court. Section 29 of the Provincial Insolvency Act gives power to the Court before which a suit or other proceeding is pending against a debtor, to stay the proceeding or to continue it on such terms as the Court may impose on proof that an order of adjudication has been made against the debtor. It is open to the Sub-Court of Coimbatore to stay the proceedings in Original Suit No. 11 of 1924 pending the disposal of the application to the District Court by the Official Receiver under section 53 of the Act. The order of the District Judge therefore is right.

It is contended on behalf of the appellant that, on the making of the application by the Official Receiver under section 53 of the Provincial Insolvency Act, the Civil Court in which the suit is pending against the insolvent ceases to have jurisdiction over the suit; in other words, the jurisdiction of the Civil Court to try the suit is taken away the moment an application is made by the Official Receiver for a declaration under section 53 of the Provincial Insolvency Act. The contention of the appellant is that section 28 is subject to the provisions of section 53 of the Act. Under section 21, clause (6), a secured creditor is exempted from the operation of section 28. It is contended for the appellant that this must be read subject to the provisions of section 53. This contention is on the face of it untenable. Under section 28, clause (2), on the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a Receiver as hereinafter provided . . . and

no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose. In the case of a creditor he cannot commence or prosecute in respect of his debt without the leave of the Court. But clause (6) is clear in its terms:

"Nothing in this section shall affect the power of any secured creditor to realize or otherwise deal with his security, in the same manner as he would have been entitled to realize or deal with it if this section had not been passed."

It would be imputing absurdity to the legislature to hold that clause (6) of section 28, which is so clear in its terms, should be read as meaning that the secured creditor could not file a suit for recovering the amount secured on the property of the insolvent. The word "creditor" in clause (2) means only creditor as defined in section 2 (a) of the Act and does not include secured creditor.

Mr. Sampath Ayyangar's contention is that under clause (6) of section 28 a creditor can only realize his security by private sale or transfer the security to some other person, and he cannot file a suit for recovering the amount secured. This contention is on the face of it untenable, for under section 69 of the Transfer of Property Act the right of private sale can be given to a mortgagee, where the mortgage is an English mortgage to which transaction neither a Hindu, Muhammadan, Buddhist, nor a member of any other race, sect, tribe or class from time to time specified in this behalf by the Local Government with the previous sanction of the Governor-General in Council, in the local Official Gazette is a party; where the mortgagee

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is the Secretary of State for India in Council and where the mortgaged property or any portion thereof is situate within the towns of Calcutta, Madras, Bombay, Karachi and Rangoon, the power of private sale of the mortgage can be exercised by the mortgagee, and in no other case can the power of sale in a mortgage be exercised by the mortgagee; in other words, the provisions of section 69 do not apply to mortgages in the mufassal except in the case of an English mortgage as above described and except in the case of a mortgage in favour of the Secretary of State for India in Council. It therefore follows that section 28, clause (6), which is applicable only to the mufassal, could not be said to refer to the right of a mortgagee to effect private sale of the property. The word "realize" must be understood in the ordinary sense of a secured creditor realizing his security by a suit. The right of a secured creditor to institute a suit or to proceed with the suit already commenced is not taken away by section 28 by reason of the adjudication of the mortgagor as an insolvent. Section 51 of the Act throws light upon this question. Section 51, clause (1) is

"Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the Receiver except in respect of assets realized in the course of the execution by sale or otherwise before the date of the admission of the petition."

Clause (2) says:

"Nothing in this section shall affect the rights of a secured creditor in respect of the property against which the decree is executed."

It therefore follows that in the case of an ordinary creditor, he will be entitled to the assets realized in execution of his decree if the assets are realized before the admission of the insolvency petition. But, in the case of a secured creditor, he could proceed with

the execution of his mortgage decree even after the admission of the insolvency petition and will be entitled to the sale-proceeds of the mortgaged property notwithstanding the pendency of the insolvency proceedings. It is not necessary that the executing creditor, in order to get the fruits of the execution proceedings, should have sold the property before the admission of the insolvency petition. His right to proceed with execution till he realizes the amount due to him is not taken away by the admission of an insolvency petition. It is therefore clear that the right of a secured creditor either to commence a suit or to proceed with the suit and to proceed with the execution of his mortgage decree is not taken away by the admission of an insolvency petition, or by the adjudication of the mortgagor as an insolvent.

The contention for the appellant is that the proper forum for the determination of the questions arising under section 53 is the Insolvency Court, and therefore the Civil Court cannot proceed with the mortgagee's suit against the insolvent. For the determination of questions arising under sections 53 and 54, no doubt the proper forum is the Insolvency Court. In a suit on a mortgage in the Civil Court questions arising under sections 53 and 54 would be out of place. The ordinary Civil Court is only concerned with the question whether the mortgage document was executed by the mortgagor and whether the whole or portion of the consideration passed; and if the Court finds that the mortgage deed was executed by the mortgagor and that consideration passed, it will pass a decree in favour of the mortgagee for the amount of consideration which is proved to have passed; and the onus of proving want of consideration in such cases is upon the mortgagor. In the case of section 53, if the mortgage is within two years of the

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adjudication of the mortgagor as an Insolvent the onus of proving good faith and valuable consideration is on the mortgagee. The Insolvency Court, therefore, is the proper Court for considering whether the transaction is bad under section 53 of the Act—vide *Mariappa Pillai v. Raman Chettiyar*(1).

The question for determination is whether the jurisdiction of the Civil Court to try a mortgage suit is taken away on the presentation of an application to the Insolvency Court under section 53 of the Act. There is nothing in the Insolvency Act itself to support the contention that the jurisdiction of the Civil Court to try the mortgage suit is taken away. The Principal Sub-Court of Coimbatore being seized of Original Suit No. 11 of 1924 has jurisdiction to try the suit. It is urged that if it passed a decree in favour of the plaintiffs, and if afterwards the District Court holds that the transaction in favour of the respondents is void under section 53, there will be a conflict of decisions. The Principal Sub-Court could pass a decree in favour of the plaintiffs if the defendant fails to prove want of consideration. If it finds that the mortgage was executed by the defendant, it is not open to that Court to consider whether the transaction is bad under section 53 of the Provincial Insolvency Act; and the Official Receiver would not be able to put forward such a contention in that Court. No doubt, the ordinary Civil Court would have power to declare a mortgage void under section 53 of the Transfer of Property Act. But it cannot do so under section 53 of the Provincial Insolvency Act. It is urged for the appellant that in order to avoid a conflict, it must be held that the ordinary Civil Court ceases to have jurisdiction to entertain a

suit on a mortgage or to continue the suit the moment an application is made under section 53 of the Provincial Insolvency Act for a declaration that the transaction is void against the Official Receiver. It does not follow that because a transaction is void under section 53, therefore, the mortgagee has no remedy against the mortgagor. The transaction under section 53 is only voidable and not void. It is well settled that till the transaction is set aside it is good against the mortgagor. It is only in the interests of the general body of creditors a transaction which is good against the mortgagor is set aside under section 53. The jurisdiction to set aside a transaction which is good against the mortgagor but not good against the general body of creditors is an exclusive jurisdiction of the Insolvency Court. But that does not take away the jurisdiction of the Civil Court to proceed with the mortgagee's suit to decree. If the mortgaged property is of considerable value and if the transaction is bad under section 53, it is voidable only to the extent of the debts which the mortgagor has to pay. The mortgagee will be entitled to proceed against the mortgaged property after it has satisfied all the creditors of the insolvent; in other words, a mortgage which is voidable under section 53 is only voidable to the extent to which the property transferred is necessary to satisfy the creditors of the insolvent. That being so, it is difficult to understand how the Civil Court is deprived of its jurisdiction by reason of an application under section 53 of the Provincial Insolvency Act. If a declaration is given by the Insolvency Court in favour of the Official Receiver, the property would vest in the Official Receiver, and he could dispose of it for the general body of creditors, and the mortgagee could not bring the property to sale on the strength of his mortgage, for the moment the transaction is declared void

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(1) (1919) I.L.R., 42 Mad., 322.

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under section 53, the property vests in the Official Receiver and he is entitled to deal with it for the general body of creditors. No Court has power to sell the property of an insolvent if it is vested in the Official Receiver excepting the Official Receiver himself— vide *Official Receiver, Timmervelly v. Sankaralinga Mudaliar*(1). But till such a declaration is made by the Insolvency Court under section 53, the transaction is good and the mortgagee could proceed with the suit or with the execution of his decree against the insolvent's property. The Official Receiver's right to proceed under section 53 is not taken away either by the institution of a suit by the mortgagee or the passing of a decree in his favour or even by his realizing the amount due to him by the sale of the property; for the Official Receiver could apply to the Insolvency Court for a declaration that the transaction is void and if he succeeds the property of the insolvent would vest in him before sale in execution of the mortgage decree. If the property is sold to a bona fide purchaser for value, before the Insolvency Court passes an order under section 53, the Official Receiver would be entitled to proceed against the amount realized by the mortgagee in execution of his mortgage decree.

The right of the Official Receiver to proceed against the property of the insolvent is not taken away by reason of any decree of Court. If he could prove that the transfer is without consideration, or is only *benami* for the insolvent, he could recover the property. In the case of section 54, if payment is made to a creditor which payment is bad as being a fraudulent preference, or if a decree is passed, or if a transfer is made which comes within the mischief of section 54, the Official

Receiver is entitled to proceed against such person who has obtained the benefit, and his right is not taken away by the mere fact of a decree having been passed. In the case of a mortgage, therefore, there is no reason to hold that the passing of a decree would stand in the way of the Insolvency Court passing an order under section 53. The order of the Insolvency Court under section 53 would be binding upon the parties; and the ordinary Civil Court would therefore not be able to execute the mortgage decree passed by it. The proper course, in cases where a civil suit is pending on a mortgage and where the Official Receiver applies to the Insolvency Court for a declaration that the mortgage is bad under section 53 would be to have the proceedings in the suit stayed till the disposal of his application by the Insolvency Court. It would save time and trouble if the proceedings in the civil suit are stayed pending the disposal of the application under section 53. But the application must be made either to the Court in which the civil suit is pending, or to a Court which has power to stay the proceedings in that suit. There is no warrant either in law or in practice for the contention that the presentation of an application to the Insolvency Court for an order under section 53 takes away the jurisdiction of the Civil Court to proceed with the suit of a secured creditor.

Under section 4 of the Provincial Insolvency Act, the Court is given wide powers to try all questions which the Court may deem expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property. Though the Insolvency Court has such wide powers, neither section 4 nor any other section of the Insolvency Act takes away the jurisdiction of the ordinary Civil Court to try a suit instituted by a mortgagee against the

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insolvent. The scheme of the Act is to exempt the secured creditors from the operation of the Act unless they choose to come in under section 47. This does not mean that a mortgage cannot be set aside as being void under section 53. Similarly the jurisdiction given to an Insolvency Court under sections 53 and 54 cannot take away the jurisdiction of the Ordinary Civil Court to entertain a suit at the instance of a mortgagee, or proceed with such a suit already instituted by reason of the pendency of the insolvency proceedings.

In the result the appeal fails and is dismissed with costs.

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WALLACE, J.—The point in this case is whether, when a mortgage has been attacked by the Official Receiver in insolvency proceedings under section 53 of the Provincial Insolvency Act as a voidable transfer, the Civil Court, in which the mortgagee is suing his insolvent-mortgagor represented by the Official Receiver to enforce that mortgage, must or should stay proceedings therein and hold that suit as subject to the decision which will be given in the insolvency enquiry. Before us the appellant went so far as to contend that the Civil Court lost jurisdiction to continue the civil suit whenever the Official Receiver had initiated proceedings in the Insolvency Court, which would imply that the proper order is not so much a stay of trial as a dismissal of the suit, since, if the Civil Court lost jurisdiction to go on with the trial, it equally lost jurisdiction to pronounce a judgment in the suit. On the other side it was contended that the scope of the two proceedings is so essentially different that the Civil Court does not lose jurisdiction and that there is no reasonable ground for staying its hand.

The theory that a Court may *pendente lite* be deprived of jurisdiction by some proceeding in some other Court,

is somewhat startling and would require very strong reasons for support. The appellant appeals to section 28, sub-section (2) of the Provincial Insolvency Act, which says :—

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“On the making of an order of adjudication, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose.”

To begin with, this does not in terms prohibit a continuation of a suit already begun, and if the sub-section is to be applied to such a case, then such a continuation must come under the general head of remedy against the property of the insolvent. This I doubt very much. It has been held that the leave here contemplated must be obtained before the suit is filed and cannot be granted after the suit is filed. (See *In re. Dwarkadas Tejchandras*(1). If so, then leave cannot be given to continue a suit already filed. But assuming, without deciding, that the general policy of the Act will support such an interpretation, the creditor who is estopped by the sub-section is one whose debt is provable under the Act, and the sub-section is subject to sub-section (6):—

“Nothing in this section shall affect the power of any secured creditor to realize or otherwise deal with his security, in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.”

Do these two clauses prohibit or permit the secured creditor to continue or commence a suit on his security during the pendency of the insolvency proceedings? As I have said, the point should not be found against the *bona fide* litigant unless it was obviously the intention

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of the statute to deprive him of his ordinary civil remedies.

It will be noted first that the prohibition announced is not absolute but discretionary with the Court. Therefore the leave of the Court may be given to a mortgagee to commence or continue his mortgage suit *pari passu* with the proceedings under section 53 of the Act, which clearly implies that there can be no inherent conflict of jurisdictions. It would be absurd to lay down that the Court may give leave to conduct a proceeding wholly without jurisdiction. The terms of sub-section (6) are quite general and there is no reason to conclude that the section as a whole was intended to deprive a secured creditor from enforcing his security. The general policy of the Act does not deal with the secured creditor. He may or may not choose to come on the schedule of creditors. He has the option (see section 47) of coming in or enforcing his security, and the Official Receiver is in the case of a *bona fide* mortgage bound by it, apart from the insolvency proceedings altogether, because none of the mortgagee's interest really vests in him at all, and the Official Receiver is bound to discharge a *bona fide* mortgage debt even when the mortgagee has not come on the schedule. (See *Shridhar Narayan v. Atmaram Govind*(1), *Shridhar Narayan v. Krishnaji Vithoji*(2), *Sheoraj Singh v. Gauri Sahai*(3) and *Haro Pria Dabia v. Shama Charan Sen*(4). In the last case it was held that a judgment-creditor holding a decree for sale on a mortgage is entitled to enforce that decree whether or not his debt is on the schedule. This is wholly opposed to the appellant's theory that section 28 would bar a secured creditor from such a remedy. The case in *Gauri Datt v.*

(1) (1883) I.L.R., 7 Bom., 455.

(3) (1899) I.L.R., 21 All., 227.

(2) (1888) I.L.R., 12 Bom., 272.

(4) (1889) I.L.R., 16 Cal., 592.

Shankar Lal(1) is not in point as it was not a case of a secured creditor. It is hardly likely that the legislature would intend to prohibit a judgment-creditor from enforcing a right which binds the insolvent and therefore the Official Receiver and all the other creditors.

If, therefore, section 28 does not prohibit a bona fide mortgagee from enforcing his mortgage right during the pendency of the insolvency proceedings, it is difficult to see why the mere fact that the Official Receiver is attacking the bona fides of the mortgage should bring section 28 into operation. Section 28 itself draws no such distinction. If in terms it does not apply to a bona fide mortgagee, it does not apply to any mortgagee. I hold therefore that section 28 (2) is subject to sub-section (6) and that sub-section (2) does not in any way affect the right of a secured creditor to proceed with the suit to enforce his security.

Section 4 of the Provincial Insolvency Act does not help the appellant. It is a section chiefly to settle questions of title to property between the debtor and a third party. Nor does section 41 of the Indian Evidence Act assist in view of the limited nature of the enquiry under section 53. The decision in *Mariappa Pillai v. Raman Chettiar*(2) also does not really help the appellant. I do not think that that decision laid down anything more than that the Civil Court has no jurisdiction to decide a matter which falls to be decided under section 53 of the Provincial Insolvency Act, that is, it cannot annul in favour of creditors a transfer of the nature set out in that section. *Official Receiver, Tinnevely v. Sankaralinga Mudaliar*(3) was not a case of a secured creditor, as specifically found at page 530. It was decided on the footing that the vesting order of

(1) (1892) I.L.R., 14 All., 358. (2) (1919) I.L.R., 42 Mad., 322.

(3) (1921) I.L.R., 44 Mad., 524.

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the Insolvency Court placed the property of the insolvent at once in the hands of the Official Receiver and prohibited any other Court than the Insolvency Court from dealing with it in any way. This has no application to the present case of a secured debt.

The matter will be made clear by considering the nature of the proceedings under section 53 which has been ably put before us by Mr. T. M. Krishnaswami Ayyar to whom I am much indebted. Section 53 implies an attack by the Official Receiver on behalf of the general body of creditors, and the remedy which he is entitled to get on proving his case is that the transfer is voidable against him and may be annulled by the Court; that is, in the case of a mortgage the property mortgaged will be available as the property of the insolvent for the general body of creditors, who are entitled to be repaid their debts out of it. It does not really affect the relationship of the transferor and transferee as mortgagor and mortgagee. For example, if the property is sold by the Official Receiver, and the creditors and costs are fully paid out of the proceeds and there is a surplus remaining, that surplus belongs *prima facie* to the transferee and not to the transferor, and is his unless the transferor has by appropriate proceedings established his right to it. The proceedings under section 53 will not establish that right. Clearly in these proceedings the Official Receiver cannot represent the debtor. Otherwise he would have to admit the transfer unless the debtor could challenge it extra-neously on some such ground as fraud or undue influence. The relationship between the mortgagor and mortgagee remains unaffected by any proceedings under section 53, and the mortgagee is entitled therefore to enforce his mortgage against the mortgagor except so far as proceedings under section 53 may have held the property

mortgaged as assets of the mortgagor at the disposal of the general body of creditors.

There is nothing therefore in these proceedings to interfere with the ordinary suit of the mortgagee to enforce his mortgage. Such a suit only declares and enables him to enforce his right against his mortgagor and has nothing to do with that mortgagor's creditors who are not and could not be proper parties to such a suit. It is in fact not open to the Official Receiver, in the mortgage suit, as the representative of the judgment-debtor, to challenge the validity of the mortgage on any ground which the judgment-debtor himself could not put forward. He is not brought on in such a suit as representative of the creditors at all. Obviously, for example, he could not challenge the passing of the consideration, as that is not a point relevant to that suit, and the frame and scope of the suit cannot have been altered merely because the Official Receiver has been brought on as representative of the judgment-debtor. The Official Receiver does not carry into that representation his character as representative of the creditors. The decree in the mortgage suit, if in favour of the mortgagee, will still be enforceable except so far as the proceedings under section 53 have debarred him from recovering the whole of the proceeds for himself, and, if, for example, in the proceedings under section 53 the Court finds the alienation good to any extent, and upholds it to that extent, or rather does not challenge the mortgage right to that extent, then the mortgagee will become a creditor of the insolvent estate on the foot of his mortgage to that extent. If the mortgagee's suit is dismissed, then the property vests in the Official Receiver who is on record in the suit as representative of the mortgagor. Similarly, if the proceedings under section 53 are dismissed, the mortgage suit

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is unaffected; if they are upheld, the mortgagee's rights against his mortgagor are subject to the result of the order against him under section 53. The two Courts are in fact deciding different questions in relation to different parties and there is therefore no question of concurrent or conflicting jurisdiction on the same point.

There is no reason therefore why the mortgagee's suit should be stayed because proceedings under section 53 are filed or pending. The result of such proceedings would affect only the execution of the decree in the mortgage suit, since the mortgagee cannot be permitted to sell the property for himself if there is an adverse order under section 53. The real conflict in the two proceedings does not materialise until the question arises, who is to sell the property? Then the decision in the proceedings under section 53 will bind the mortgagee by force of section 4 of the Provincial Insolvency Act and the sale will be by the Official Receiver and the proceeds must be primarily held at the disposal of the Official Receiver. As the Official Receiver is already a party *ex-hypothesi* to the mortgage suit, there will be no trouble about that. It would be the duty of the Court executing the mortgage decree to give effect under section 4 of the Provincial Insolvency Act to the decision in the insolvency enquiry. The principle that the interest of the particular creditor must give way to that of the general body of creditors is thus not in danger.

I agree therefore with my learned brother that there is no reason shown for stay of the civil suit and agree in the order proposed by him.

N. R.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Wallace.

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(PETITIONER—FIRST DEFENDANT), APPELLANT,

v.

CHETTIAPPA CHETTY AND SIX OTHERS (RESPONDENTS
1, 2 AND 4 TO 8) RE-PONDENTS.*

Court Sale—Purchase not by decree-holder but by a party to the suit—Subsequent reversal of decree, effect of, on Court sale.

It is only *bona fide* purchases made in Court auction by persons who are not parties either to the suit or to the decree that are saved on a subsequent reversal of the decree under which the sale was held. A purchase made in Court auction by one who though not the decree-holder is yet a party to the suit or decree is liable to be set aside if the decree under which the sale was held is eventually reversed on appeal.

Narandra Chandra v. Jogendra Narain (1914) 20 C.L.J., 469, followed. *Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan* (1888) 1 L.R., 10 All., 166 (P.C.), explained.

APPEAL against the decree of R. A. KRISHNASWAMI AYYAR, Subordinate Judge of Dindigul, in Appeal No. 34 of 1921, preferred against the order of L. NARAYANA AYYAR, District Munsif of Periyakulam, in E.A. No. 1170 of 1919 in O.S. No. 1142 of 1917.

The facts and arguments sufficiently appear from the judgments.

B. Sitarama Rao and S. R. Muthuswami Ayyar for appellant.

T. M. Krishnaswami Ayyar and N. Ramachandra Ayyar for respondents.

DEVADOSS, J.—The appellant was the first defendant DEVADOSS, J. in Original Suit No. 1412 of 1917. The suit was by a

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* Appeal against Appellate Order No. 104 of 1922.

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mortgagee against the mortgagor (first defendant) and the purchaser was impleaded as second defendant as he had a mortgage subsequent to that of the plaintiff. The appellant was ex parte in the District Munsif's Court. A decree was passed in favour of the plaintiff and the hypotheca was sold and was purchased by the second defendant. The ex parte decree was reversed on appeal and the first defendant applied to have the sale set aside. The first defendant having been adjudicated an insolvent, the Official Receiver continued the proceedings before the District Munsif. The District Munsif held that the second defendant was not a decree-holder and therefore the sale was not liable to be set aside. On appeal by the Official Receiver the Subordinate Judge held that the order of the District Munsif was right and dismissed the appeal. The Official Receiver has preferred this appeal.

The contention of the appellant is that the purchase by the second defendant is liable to be set aside as the decree in execution of which he purchased the property was set aside on appeal. It is well settled that, if a decree-holder purchases the property of the judgment-debtor in execution of his decree which is afterwards set aside, his purchase is liable to be set aside at the instance of the judgment-debtor. The contention for the respondent is that the second defendant is not a decree-holder and therefore his purchase is good against the judgment-debtor. In *Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan*(1), it was held that a sale to a bona fide purchaser in execution of a decree was not liable to be set aside if the decree was afterwards reversed on appeal. Their Lordships observed at page 172 :

"It appears to their Lordships that there is a great distinction between the decree-holders who came in and purchased

under their own decree which was afterwards reversed on appeal, and the bona fide purchasers who came in and bought at the sale in execution of the decree to which they were no parties, and at a time when that decree was a valid decree, and when the order for the sale was a valid order."

The question is whether the protection given to bona fide purchasers extends to persons who are parties to the suit in which the decree is passed, but who are not given any relief under the decree. In order that a purchaser may have the benefit of the sale under a decree which is afterwards set aside, he must be a bona fide purchaser. If he is not a bona fide purchaser then the purchase by him is liable to be set aside. A stranger to the decree is not bound to enquire into the merits of the plaintiff's claim or into the validity of the decree ; but a party to the suit is in a different position, and it is his duty to enquire into the nature of the plaintiff's claim and the validity of the decree passed in plaintiff's favour. Supposing the plaintiff asked for relief in the alternative against two defendants, if the second defendant satisfies the trial Court that the first defendant alone is liable and on the strength of that, a decree is passed and his property is brought to sale, and if on appeal the decree is set aside and the second defendant is held liable, can it be said that the second defendant is entitled to keep the property of the first defendant purchased by him in Court auction notwithstanding the reversal of the decree? Supposing a defendant contests the plaintiff's suit on the merits and a decree is passed not against him but against another defendant and if the property of the defendant against whom the decree is passed is brought to sale and if the defendant who put forward the contention that the plaintiff's claim is a fraudulent one purchases the property and if the decree is afterwards set aside can the defendant who purchased the other defendant's property be entitled to

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say that his purchase is good notwithstanding the fact that he was aware of the fraudulent nature of the plaintiff's claim. It may be said in such a case that he is not a bona fide purchaser. The decision in *Zain-ul-Abd in Khan v. Muhammad Asghar Ali Khan*(1) applies only to a bona fide purchaser. In that case, the purchasers, whose purchase was upheld by the Privy Council, were strangers to the decree. It does not appear from the report whether they were, or were not, strangers to the suit. It cannot be assumed that the decision has no application to purchasers who are parties to the suit, but in whose favour no decree has been passed, from the mere fact that Sir Barnes Peacock uses the expression, "bona fide purchasers who are no parties to the decree." A party to a suit cannot be said not to be a party to the decree if he gets no relief under it. If a party to a suit is on record, the decree is bound to make mention of him; and the principle of *res judicata* or of estoppel may apply to him whether he gets, or not, any relief under the decree. The decision, therefore, in my opinion covers the case of a party in whose favour no relief is given under the decree.

The contention of Mr. Krishnaswami Ayyar is that the principle of restitution is applicable only to decree-holders who purchase the property of the judgment-debtor in execution of, or who get some benefit under, their decree, and persons, in whose favour a decree is not passed, are not bound to make restitution of what they have got by purchase in a Court auction. The cases relied upon by him do not support the contention that the defendant, in whose favour there is no decree, is entitled to keep the property which he purchased in execution of the decree against another defendant

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even if the decree be upset either in appeal or in any subsequent proceeding. In *Syed Nathadu Sahib v. Nallu Mudaly*(1) it was held that, where property is purchased at a sale in execution of a decree, the purchase is subject to the final result of the litigation between him and the judgment-debtor. In *Moitheensa Rowthen v. Apsa Bivi*(2), the purchaser was a stranger to the decree. In *Raghavachari v. Pakkiri Mahomed Rowther*(3), the purchaser was not a party to the suit. As observed in *Dorasami Ayyar v. Annasami Ayyar*(4) at page 310,

"the principle of the doctrine of restitution is that on the reversal of a judgment the law raises an obligation in the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost."

It is contended for the respondent that this must be limited to the decree-holder who gets benefit by reason of his decree. But I am unable to accept this view. In this case, if the hypotheca had fetched a very large price and if a balance remained after satisfying the plaintiff, the balance would go to satisfy the second defendant who is a puisne mortgagee. Even though a defendant may not have a decree in his favour, in many cases, he may get ultimately a benefit under the decree. In such cases it cannot be said that he is a stranger to the decree. The decision in *Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan*(5) does not seem to have been brought to the notice of the learned Judges who decided *Doraisami Ayyar v. Annasami Ayyar*(4). The American decision in *Quan Wo Chung Co. v. Laumeister*(6) in laying down,

"all that the one has gained and all that the other has lost is due to the agency of the Court and therefore no injustice is

(1) (1904) I.L.R., 27 Mad., 98.

(2) (1913) I.L.R., 36 Mad., 194.

(3) (1916) 30 M.L.J., 497.

(4) (1900) I.L.R., 28 Mad., 306.

(5) (1888) I.L.R., 10 All., 166.

(6) (1890) 17 American State Reports, 261.

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done in restoring the party wrongfully dispossessed without stopping to investigate the rights of the party who has thereby gained the possession: "

has stated the principle too broadly. I think the correct principle is that a bona fide purchaser who is not a party to the suit or proceeding in which the auction sale is held, is entitled to hold the property even though the decree or order in execution of which the auction sale is held is subsequently reversed or set aside.

In *Yellappa v. Ramachandra*(1), FARRAN, C.J., observes :

"The Privy Council in a case very analogous to the present has decided that where a person, a stranger to the proceedings, purchases property bona fide at an auction sale held in execution of a decree, his sale cannot be set aside on the ground that the existence of a cross decree rendered the sale in execution improper "

If the contention of the respondent is good, then a defendant, in whose favour there is no decree, would be entitled to keep the property which he purchased in Court auction, even though he knew that there was a cross-decree in favour of the defendant whose property was sold in execution. I think the principle of the decisions in *Rewa Mahlon v. Ram Kishen Singh*(2), and in *Yellappa v. Ramachandra*(1) is against the contention of the respondent.

This point was specifically raised and decided by a Bench of the Calcutta High Court in *Narendra Chandra v. Jogendra Narain*(3). In that case MOOKERJEE, J., after an exhaustive examination of English and American cases, observed :

"An examination of these cases shows that protection is afforded to the purchaser only when he is a stranger to the suit "

This principle is not only consonant with equity, but it also saves the Court the trouble of enquiring whether

(1) (1897) I.L.R., 21 Bom., 463. (2) (1887) I.L.R., 14 Cal., 18 (P.C.).
(3) (1914) 20 Cal. L.J., 469.

the defendant, in whose favour there is no decree at the time of the sale, would be entitled to some benefit after the sale. I think the protection which is given to a bona fide purchaser should not be extended to a defendant or a party to the suit even though he gets no benefit directly under the decree ; in other words, it is only a bona fide purchaser, who is not a party to the suit or proceeding that is entitled to keep the property purchased by him. In all other cases the purchase is liable to be defeated on the reversal of the decree in execution of which the sale is effected.

In the result the appeal is allowed and the sale to the second defendant is set aside with costs throughout.

WALLACE, J.—I have had the advantage of perusing the judgment of my learned brother and I am not prepared to differ from his opinion in the case. I was at first inclined to hold that in such a case the principle of restitution, that the restoration to his *status quo ante* of a person wrongfully dispossessed by the agency of the Court, should be enforced only against the party at whose instance the decree has been enforced, but on further consideration I think, as at present advised, that this salutary principle of restitution should be enforced as the rule, and that exceptions to that rule should be allowed only so far as authority by which we are bound has allowed them. The Privy Council in *Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan*(1) has laid down that a bona fide purchaser not a party to the decree forms an exception to the rule, and we are not referred to any case which has definitely extended the exception to auction purchasers who are parties to the suit or decree, but who had not themselves enforced the decree and brought about the auction sale.

I therefore agree in the order proposed by my learned brother.

N.B.

(1) (1888) I.L.R., 10 All., 166 (P.C.).

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APPELLATE CRIMINAL.

Before Mr. Justice Krishnan.

DORASWAMY AYYAR (ACCUSED), PETITIONER,

v.

KING-EMPEROR.*

Indian Penal Code (Act XLV of 1860), sec. 507—Criminal intimidation—Ability to carry out the threat offered, essential—Threat of divine punishment, not criminal intimidation—Ss. 388 and 508, application of—Acquittal on a charge of cheating under sec. 420—No separate charge of attempting to cheat—Conviction under ss. 420 and 511—Criminal Procedure Code (Act V of 1898), sec. 238 (2-A).

For a conviction under section 507 of the Indian Penal Code (Act XLV of 1860) it must be shown that the accused committed criminal intimidation by using threats of injury which he was in a position to put into execution. The injury need not be one to be inflicted by the accused himself personally, but it is enough if he can cause it to be inflicted by another. Hence a person who extorts money by sending anonymous letters as if from God, conveying threats of divine punishment if a specified sum of money be not paid to a certain person identifiable by the description given in the letters, cannot be convicted under section 507 as it does not lie in his power either to inflict the threatened punishment, or cause it to be inflicted. Nor can he be convicted under section 385 of the Indian Penal Code for extortion as the section requires that the injury contemplated must be one which the accused himself can inflict or cause to be inflicted, and a threat of divine punishment is not such.

For the application of section 508, it is necessary that there should be some act contemplated to be done in future by the offender. The words "by some act of the offender" should be read along with the expressions "will become" and "will be rendered" in the section.

The Queen v. Sankara (1883) I.L.R., 6 Mad., 381, followed.

Held that the accused was guilty of attempting to cheat and that his conviction by the lower Court under sections 385 and 508 should be converted into one under sections 420 and 511 of the

Indian Penal Code and that the absence at the trial of a separate charge under section 511 was no bar to such a course as the provisions of section 238 (2-A) of the Code of Criminal Procedure, as amended, allow an accused charged with a substantial offence to be convicted of an attempt to commit the offence without a separate charge and trial.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of I. C. STODART, Sessions Judge of West Tanjore Division, in Criminal Appeal No. 34 of 1913, preferred against the judgment of T. S. JAMBUNATHA AYYAR, Subdivisional First-class Magistrate of Mannargudi, in Calendar Case No. 59 of 1923.

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

T. S. Ramaswami Ayyar, vakil for petitioner.

Public Prosecutor on behalf of the Crown.

JUDGMENT.

In this case accused was convicted by the Subdivisional Magistrate of Mannargudi under sections 420 and 507, Indian Penal Code, and sentenced to rigorous imprisonment for two years. On appeal the Sessions Judge of West Tanjore came to the same findings of fact but altered the conviction to one under sections 385 and 508, Indian Penal Code, holding that sections 420 and 507 were not the proper sections applicable on the facts; he also reduced the sentence to 21 months' rigorous imprisonment. In revision it is argued that on the facts found no offence has been committed by the accused under sections 335 and 50; as all the necessary ingredients of those offences are not made out; and that in any event the Sessions Judge was wrong in convicting the accused under these sections as he had not been charged under them and that the proper order if any would have been one for a re-trial.

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v.
KING-
EMPEROR.

1924,
November 18.

* Criminal Revision Case No. 100 of 1924.

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The facts found are that the accused sent two anonymous letters Exhibits A and B by post to one Abdul Jaffar, a well-to-do Muhammadan of Koothanallur, son of one Natharkanni Rowther, recently deceased, purporting to come from the deity at Nagore (Nagore Andavar) directing him to pay certain sums of money to a person specified in the letters whom he was to seek out and threatening him with ruin and death from divine displeasure if he failed to do so. As reference was made to the recent death of his father, Nathar Kanni, as having resulted from disobeying such warnings, Abdul Jaffar was frightened and he and his brother-in-law, Prosecution Witness 2, went to the place named with Rs. 300 and there met accused. On that occasion for some reason or other accused denied that he was the person they were in search of and ridiculed their taking the anonymous letters seriously. Seeing that Abdul Jaffar went away and did nothing more thereafter, the accused went to Koothanallur and pretended that he had two letters Exhibits C and D from the God at Nagore wherein he was commanded to go to Jaffar and explain the serious situation to him and to receive Rs. 300 from him. He also showed them the identification mark mentioned in Exhibit B, a big mole on his left arm, to convince Jaffar that he was the man referred to. Jaffar was anxious to pay but his brother-in-law, Prosecution Witness 2, dissuaded him from doing so that day; and the accused was not paid then and he went away. Very shortly after, Jaffar received another letter Exhibit E, found by the lower Courts to have been sent by the accused, saying that that was the last communication that he would receive and that dire consequences would follow without further warning. It was signed "Andavan" and purported to come from God himself. On receiving this letter Jaffar got

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alarmed and sent for the accused; in the meanwhile his brother-in-law had informed the police of what had happened. Accused came to Jaffar's house and discussed the matter with him and two others and agreed to receive three currency notes of Rs. 100 each if offered on a silver plate with sugar and fruits. On the offer being so made accused took the notes and put the bundle under his arm-pit and was leaving the house when he was arrested by the police. Jaffar seems to have been satisfied with the transaction as he thought he had thereby averted the threatened danger to him and his family.

It is on the above facts that we have to decide what offence the accused had committed. One of the sections under which the accused was convicted by the first Court is section 507, Indian Penal Code. It is a kind of criminal intimidation. The offence of criminal intimidation is defined in section 503, Indian Penal Code. The Sessions Judge was of opinion that the injury mentioned in it must be an injury to be inflicted by some act of the offender and that as here the threat was in the nature of an intimation of divine displeasure the offence did not fall under criminal intimidation. It seems to me the view that section 507 does not apply here is correct. The threat made in this case may be shortly stated to be this:

"if you don't pay me the money demanded from you, God is going to punish you and your family with ruin and death."

There is here no doubt a threat that an injury will happen to the person threatened but the words of section 503, Indian Penal Code, which defines criminal intimidation, seem to imply that the threat must be one which can be put into execution by the person threatening as the section speaks of avoiding the execution of the threat.

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I do not think it is necessary, as the Sessions Judge seems to think, that the injury should be one to be inflicted by the offender; it is sufficient if he can cause it to be inflicted by another, and the infliction of it could be avoided by some act or omission that the person threatening desires. In the present case the punishment by God is not one the accused could cause to be inflicted or the execution of which he could avoid. I therefore agree with the learned Sessions Judge that the accused's offence does not amount to criminal intimidation and therefore does not fall under section 507, Indian Penal Code.

I am also of opinion, differing from the Sessions Judge on this point, that it cannot be brought under section 508, Indian Penal Code, either. It is a very special section and its words must be carefully scrutinized. As pointed out by the learned Vakil for the accused, the section requires that by some act of the offender the person warned must be led to believe that he will become or will be rendered an object of divine displeasure. I was first inclined to think that the words "by some act of the offender" was to be read only with the words "will be rendered" immediately preceding them and not with the words "will become" but on further consideration I am satisfied that it is not a right view. The former words should be read with both the expressions "will become" and "will be rendered" as otherwise it will unduly enlarge the scope of the section as pointed out by Mr. Mayne in his commentary on the section. That some future act on the part of the offender is necessary to make the section apply is the view taken in *The Queen v. Sankara*(1); the observations of TURNER, C.J., on page 394 are particularly

(1) (1883) I.L.B., 6 Mad., 381.

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clear on the point. Following that ruling I must hold that the offence under section 508, Indian Penal Code, is not made out here for it is not the case that the accused was going to do something in the future to bring divine displeasure on Jaffar.

Section 385 also does not seem to apply for the illustrations to section 383 (which defines extortion) show that the injury contemplated must be one which the accused can himself inflict or cause to be inflicted. The threat that God will punish a man for some act or omission of his is not such an injury as the section refers to.

Section 420, Indian Penal Code, would in my opinion have applied but for the fact that the Sessions Judge finds that Jaffar was not actually deceived. This finding is open to doubt but in revision I must accept it; it does not however exclude the possibility of considering the accused's offence as an attempt to cheat under sections 420 and 511, Indian Penal Code. The accused was not charged under these Sections read together but only under section 420, Indian Penal Code, by itself but the new amendment of section 238, Criminal Procedure Code, clause 2-A, allows an accused charged with a substantial offence to be convicted of an attempt to commit that offence without a separate charge and trial. There can be no doubt on the facts found in the case that the accused attempted to deceive Jaffar by making him believe that the God at Nagore had ordered him to pay money to the accused, and thereby to dishonestly induce Jaffar to pay him Rs. 300. Although on the Sessions Judge's finding that Jaffar was not actually deceived, the offence of cheating is not made out, it is clear that the attempt to cheat Jaffar on the part of the accused was complete. The accused is therefore liable to be convicted under sections 420 and 511, Indian Penal Code.

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It is, however, argued that it is not open to me in revision to convict the accused as above stated as he was acquitted of the offence under section 420, Indian Penal Code, by the Sessions Judge and reliance is placed on clause (4), section 439, Criminal Procedure Code. It was suggested that I should send the case down to the Sessions Judge and direct him to convict. That seems to be a useless prolongation of the case, but if the law requires it it must be done. In this case, however, the Sessions Judge has not considered whether the accused is guilty or not of an attempt to cheat and has not recorded any finding of acquittal on such a charge. The prohibition under clause (4), section 439, does not therefore apply in this case. The case is one in which it was difficult to say what the offence committed by the accused was on the facts proved. In such a case it is doubtful whether the alteration of one section into another can be said to be a case of acquittal under the former section within the meaning of clause (4). It is not however necessary to decide that point in this case for the Sessions Judge has not acquitted the accused of the offence of attempting to cheat. I therefore hold that it is open to this Court to convert the conviction of the accused to one under sections 420 and 511, Indian Penal Code, and I convict accordingly. The sentence of 21 months' rigorous imprisonment seems to be unduly severe. I reduce it to 6 months' rigorous imprisonment.

D.A.R.

APPELLATE CIVIL.

Before Mr. Justice Jackson.

SAHADEVA REDDI (PLAINTIFF) PETITIONER,

v.

LINGAPPA ASARI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Madras Act III of 1895, ss. 13 and 21—Blacksmith's inam—Lessee of inam lands from holder of the inam—Obstruction to enjoyment of lease by defendants—Suit by lessee for damages against obstructors—Suit instituted in a Civil Court—Jurisdiction of Civil or Revenue Court to entertain suit by holder of inam or his alienee.

A lessee from the holder of a blacksmith's unenfranchised inam sued in a Civil Court to recover damages for unlawful obstruction to his enjoyment of the lands during the period of his lease, caused by the defendants; the latter denied the title of the lessor and contended that the Civil Court had no jurisdiction to entertain the suit:

Held, that the Civil Court had jurisdiction to entertain the suit.

In spite of the generality of the language of section 21 of Madras Act III of 1895, the jurisdiction of Civil Courts is taken away only in those cases in which it is conferred on the Revenue Court by section 13 of the Act; *Muvvula Seetham Naidu v. Doddi Rami Naidu* (1910) I.L.R., 33 Mad., 208, relied on;

and section 13 of the Act is confined to persons suing in their own right as holders, to whom the Revenue Court is provided as the forum, while for other persons, including alienees from the holders, the forum is the ordinary Civil Court.

PETITION to revise the order of F. A. COLERIDGE, District Judge of Chingleput, in Miscellaneous Appeal No. 3 of 1922 preferred against the order of O. KUNHIRAMAN, Additional District Munsif of Chingleput, in

1924,
 March 24,

SAHADEVA
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v.
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Original Suit No. 218 of 1919 (Original Suit No. 426 of 1919 on the file of the District Munsif's Court of Tiruvallūr).

The plaintiff was the lessee of certain lands attached to a blacksmith's inam which was at the time of suit unenfranchised. The lease was for faslis 1324 to 1331 and was granted in 1914 by one Muragappa Asari, who was then its holder and died prior to suit. The plaintiff alleged that, during the currency of his lease, certain persons obstructed him in his enjoyment of the lands, prevented him from cultivating them during the years 1917 and 1918 and caused him damage by way of loss of crops during those years to the value of Rupees 210. The plaintiff impleaded the present holders of the inam as defendants 1 and 2, and the tortfeasors as defendants 3 to 8. The plaintiff alleged that the lease, granted by the previous holder of the inam, was continued by the first and second defendants, who were his heirs and present holders of the inam and supported the plaintiff. The other defendants pleaded that the first and second defendants were not the holders of the inam, that the melwaram, and not the lands, formed the emoluments of the inam, that one-half of the inam was carpenter's inam, that the village mirasidars cultivated the lands and paid only paddy to the blacksmith as emoluments, and that the Civil Court had no jurisdiction to entertain the suit. The District Munsif held that the Civil Court had no jurisdiction to entertain the suit and passed an order returning the plaint to be presented to the proper Revenue Court. On appeal, the District Court confirmed the order and dismissed the appeal. The plaintiff preferred this Civil Revision Petition to the High Court.

L. A. Govindaraghava Ayyar and *A. Ramachandra Ayyar* for petitioner.

Rajagopalan and Rajagopalan for respondents.

JUDGMENT.

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In Original Suit No. 426 of 1919, on the file of the Court of the District Munsif of Tiruvallūr, plaintiff sued for Rs. 210 alleging that he held a lease of a blacksmith's inam from the previous holder which had been continued by the present holders, defendants 1 and 2. The other defendants 3 to 8 denied that these holders had title. The District Munsif and District Judge on appeal have held that the jurisdiction vested in the Revenue Court, and plaintiff seeks to revise the order and judgment of the District Court.

This is an unenfranchised inam and a point directly in issue is whether defendants 1 and 2 have any claim to succeed to the office, and whether plaintiff as lessee can recover the emoluments of the office. Section 21, Act III of 1895, would seem therefore to apply. But it has long been settled that section 21 must be read with section 13. In spite of the generality of the language of section 21 the jurisdiction of the Civil Court is taken away only in those cases in which it is conferred on the Revenue Court by section 13: *Muvvula Seetham Naidu v. Doddi Ram Naidu*(1). Under section 13 any person may sue before the Collector for a village office or for its emoluments on the ground that *he is entitled to hold such office and enjoy such emoluments*. The section is clearly confined to persons suing in their own right as holders. On behalf of respondents it is urged that if this be so a holder has only to lease the emoluments and leave it to the lessee to sue on his title in order to carry the suit away from the jurisdiction of the Revenue Courts. The short answer is that he can do this if he so pleases. The question of jurisdiction is merely technical and involves no equities. If a holder

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wants to sue, the legislature has provided the Revenue Court as his forum; if any other person is suing it has provided the ordinary Civil Courts.

The defence has exhibited a certified copy of judgment in an unreported case of this Court. I deprecate the practice. Courts should depend upon reported cases for guidance. In this exhibit it has been ruled that, although the plaintiff is not a holder of the office and is a mere alienee from the office-holder, the suit is still governed by section 21, Act III of 1895, on the authority of *Palamalai Padayachi v. Shanmuga Ausari*(1) and *Veerabadran Achari v. Suppiah Achari*(2). In *Palamalai Padayachi v. Shanmuga Ausari*(1) plaintiff sued on the ground that he was the village carpenter and as such entitled to the lands attached to that office. The question for determination was whether the suit was barred by section 3, Regulation VI of 1831, and a Full Bench found it to be so barred. In *Veerabadran Achari v. Suppiah Achari*(2) plaintiff sued as holder of the office of carpenter, and it was found that the office in this case was not one covered by the special Acts. No reported case has been brought to my notice in which it has been ruled that a mere alienee is barred under section 21, Act III of 1895, and as at present advised I do not see how it could be so ruled.

I must therefore allow this petition, and reverse the judgment and order of the lower Appellate Court. The District Munsif of Tiruvallūr has jurisdiction and must proceed with the suit.

Petitioner will have costs throughout.

K.R.

(1) (1894) I.L.R., 17 Mad., 302 (F.R.).

(2) (1910) I.L.R., 33 Mad., 488.

APPELLATE CIVIL.

Before Mr. Justice Jackson.

MR. CHIDAMBARAM CHETTIAR (PETITIONER),

PETITIONER,

v.

C. K. KADAR MOHIDEEN ROWTHER AND FIVE OTHERS

(RESPONDENTS), RESPONDENTS.*

Civil Procedure Code, O. XXXIII, r. 3—Application to sue in forma pauperis—Presentation to Sarishtadar of Court, proper presentation—Rule 14 of Civil Rules of Practice, not ultra vires.

Presentation of an application to sue *in forma pauperis* to the chief ministerial officer of the Court (e.g.) Sarishtadar, is a proper presentation. It need not be to the Judge himself. Rule 14 of the Civil Rules of Practice is not *ultra vires*.

PETITION under section 115 of Act V of 1908 praying the High Court to revise the order of K. SOWRIRAJULU NAYUDU, Subordinate Judge of Tinnevely, in Original Petition General No. 1084 of 1922.

The plaintiff preferred this Revision Petition.

The facts are given in the judgment.

P. V. Krishnaswami Ayyar for petitioner.—The lower Court wrongly rejected the petition on the ground that the petition should have been presented to the Judge himself. Presentation to the Sarishtadar is valid; see rule 14 of the Civil Rules of Practice which is a valid rule. Emphasis in Order XXXIII, rule 3, Civil Procedure Code, is only on the personal appearance of the pauper for purposes of examining him orally to verify if he is a pauper. Legislature could not have intended that the petition should be handed only into the hands of the presiding Judge. Compare Order VII, rule 10,

* Civil Revision Petition No. 762 of 1922.

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Order XXI, rule 1, Civil Procedure Code, where "Court" is mentioned. The Code mentions "Judge" wherever necessary. *Jairam v. Motilal*(1) is on all fours. Practice in the High Court is to present such petitions only to the officer of the Court.

R. Ganapati Ayyar for respondent.—Rule 14 of the Civil Rules of Practice is *ultra vires*. The Civil Procedure Code purposely mentions presentation of petition direct to the Judge himself. Further, the petitioner has now become an insolvent and the proper person to conduct this and other matters is only the Official Receiver who has not done so.

P. V. Krishnaswami Ayyar in reply.—If the case is now remitted, the Official Receiver will continue the proceedings.

JUDGMENT :—

The petitioner's pauper petition was rejected merely because it was presented in person to the Sarishtadar and not to the Court.

There is no reason to hold that rule 14 of the Civil Rules of Practice is *ultra vires*. "Court" is nowhere defined in the Code of Civil Procedure (1908) and the "Court or such officer as it appoints in this behalf" is the Court for purposes of receiving suits, and, by analogy, applications. The insistence in Order XXXIII, rule 3, Civil Procedure Code, is on "in person" not on "Court" as meaning "Judge himself." If necessary the learned Subordinate Judge may take up the petition again in the light of these remarks; but possibly subsequent circumstances have rendered further action unnecessary.

N.B.

(1) (1920) 58 I.C., 961.

APPELLATE CIVIL.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice, and
Mr. Justice Krishnan.*

B. PARTHASARATHY CHETTY & Co. DEFENDANTS),
APPELLANTS,

1925,
January 21.

v.

T. M. GAJAPATHY NAIDU & Co. (PLAINTIFFS),
RESPONDENTS.*

*Contract for sale of goods—Description of goods as of 3 labels and designs—Rejection by buyer on the ground that invoice did not specify the description of goods as agreed—Rejection on that ground unjustifiable—Goods proved to be of one design and label—Re-sale by vendor under terms of contract—Suit by vendor for damages for loss on resale under the contract—Suit, not for difference between market price and contract price—Delay in resale, effect of—Plea of defendant that goods were not of the kind agreed, if permissible—Rule in *Braithwaite's case*, scope and applicability of.*

The plaintiffs agreed to purchase from foreign merchants in Europe and sell to defendants 30 cases of fireworks, in 3 lots of 10 cases each, each lot, under one label, in all 3 designs; the contract provided that the defendants should accept and pay bills drawn on them for the amount of the invoices, and that on failure to accept and pay for the bills on maturity, the plaintiffs were authorized to sell the goods on defendant's account. The invoices did not contain the specification of goods as comprised of 3 labels of 10 cases each. The defendants refused to accept the goods on that ground. It was proved that the goods were all in one label and of the same design. The plaintiffs sold the goods ten months later and sued the defendants for the difference between the contract price and actual sale price. The latter pleaded non-liability.

Held, that, before the plaintiffs could substantiate a claim for damages on resale of goods under the contract, they must show that the goods which they purported to sell were the goods which the defendant would have been obliged to accept under the contract but failed to do so;

* Original Side Appeal No. 1 of 1923.

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that the plea that the goods were not those agreed to be sold could be taken by the defendants, even though their ground of rejection based on the contents of the invoices was unjustifiable;

and that the rule in *Braithwaite's case* [1905] 2 K.B., 543, was not applicable to this case, as the suit here was not for difference between the market price and the contract price, but was for a wider remedy under the terms of the contract;

Held further, that the delay of the plaintiffs in selling the goods was unreasonable and disentitled them to any damages.

Scope of the rule in *Braithwaite's case* [1905] 2 K.B., 543, explained.

APPEAL from the Judgment of Sir WALTER SALIS SCHWABE, Chief Justice, in the exercise of the Ordinary Original Civil Jurisdiction of the High Court on C.S. No. 162 of 1921.

The material facts appear from the judgment.

Nugent Grant for appellant.—This is a contract for sale of goods. This is an F.O.B. contract. It is open to the seller to get payment by a bill of exchange or in cash from the buyer. The learned CHIEF JUSTICE held that because the defendant refused to accept the bill, he could not prove that the goods sent were not in accord with the indent. This is a case of sale of fireworks by the plaintiff to the defendant. The defendant was not given a reasonable opportunity for inspection. There was a delay of ten months by the plaintiff before he sold the goods. If he had sold them earlier, as he ought to have done, there would be no loss. Defendant is not liable in damages, as the plaintiff ought to have sold without delay. The rule in *Braithwaite's case*(1) is not applicable to this case. The authority of *Braithwaite's case*(1), is much shaken in the House of Lords: See *British and Beningtons, Ltd. v. N. W. Oachar Tea Co. & others*(2). The CHIEF JUSTICE finds that five-eighths of the fireworks were not according to the indent.

(1) [1905] 2 K.B., 543.

(2) [1923] A.C., 48.

Assuming breach by defendant, plaintiff could not get damages unless he sold goods contracted for by defendant.

V. C. Gopalaratnam for respondent.—This is a C.I.F. contract, though it is expressed to be F.O.B. Defendant is to be liable for cost, insurance and freight. In a C.I.F. contract, buyer cannot ask for inspection. Further, plaintiff is only a commission agent and has no control over the goods. Defendant must pay the bill, take the goods, and if he finds goods not of the kind contracted for, he must sue for damages. Even if he accepted the bill, he could not have inspection in a C.I.F. contract before payment. The rule in *Braithwaite's case*(1) is applicable to this case. It has been followed in several cases in this Court.

JUDGMENT.

COUTTS TROTTER, C.J.—If I had not the misfortune to differ from my learned predecessor who tried this case, I should myself have thought this matter to be a reasonably clear one. The plaintiffs are persons who were buying goods from foreign merchants in Europe on the demands of persons in the position of the defendants, and in this case the defendants commissioned the plaintiffs to get them some fireworks from Europe on certain conditions. The contract is a confused document, but the clauses that we are primarily concerned with apparently are reasonably clear. The contract provided for the drawing of bills against invoices and I will take it for purposes of argument that this was in effect a C.I.F. contract. The invoices come to hand with the documents and drafts attached. The terms of payment are these:

“We authorize you to draw upon us for the total amount of invoice at the sight mentioned below at current rate of

(1) [1905] 2 K.B., 543.

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exchange and such bill or bills we hereby bind ourselves to accept on presentation and pay at maturity."

That is the material clause. Then lower down comes this:

"Should we fail to accept or to pay at maturity such bill or bills or to pay cash as before agreed, we hereby authorize you to dispose of the documents or goods either by private sale or by public auction on our account."

The contract was on the 6th May 1920 and the goods came through in about the following October and the specification of the goods provided for by the contract was "30 cases of wonder candles, offer No. 383, each label 10 cases, in all three designs." Then there was a further order for five lots of two cases of different classes of goods and we are only concerned with one of these because the others were not shipped. The contract provides that the plaintiffs are to be at liberty to execute the order in something less than its entirety. The invoices specify the two cases of goods as "wonder candles coloured as per my offer No. 383, 9 cm, burning" and the 30 cases as "wonder candles (electric sparkles) white as per my offer No. 383, 9 cm, burning." The defendants were obviously bound on receipt of the shipping documents, if they were in order, to accept the drafts that were forwarded through the Mercantile Bank. They refused to do so and they justified their refusal on the ground that the invoice was silent as to the provision that the 30 cases should have been divided into three lots of 10 cases each, containing a different design and that that ought to have appeared on the face of the invoice. This case has been discussed on the footing that that was not a reasonable rejection and that there was nothing in the invoice to warrant them in refusing to accept the drafts. Therefore the position was that, on the date when they refused to accept these drafts in October, they were in breach and

the defendants have been sued for the consequences of that breach. The goods were taken over by the plaintiffs and in August 1921 they were sold and sold at a very great drop in value. In the first place, it is very evident that the plaintiffs could not possibly go on indefinitely holding goods of this kind, goods of a perishable nature and goods which are only in vogue at certain seasons in the year, and apparently the season in India is not very different from the season in England, the months of November and December. But there was a much more fundamental flaw in the plaintiffs' goods than that. It was proved on the evidence that satisfied the learned CHIEF JUSTICE, to be a fact that, when the goods were examined, instead of being divided into three lots each with a different label specified in the contract, all the 30 cases were the same. The finding of fact is challenged by the plaintiffs-respondents. But we have gone through the evidence very carefully—Mr. Gopalaratnam has taken us through it, and our opinion is that the only witness who is clear or specific about the matter and who seemed to know what he was talking about is D.W. 6, Govindasami Chetty, who is quite explicit and the more he was cross-examined about it the more clearly did he adhere to the story that he gave that he had seen all these goods and that they were all marked with the same labels. It is suggested that the state of the law about the sale of goods is this, that, if there is a breach of contract which is unwarranted and cannot be supported, the buyer who rejects the goods cannot be heard to say thereafter that in truth and in fact the goods were in such a state as would have justified him in rejecting them on the actual ground of their quality, even though he took and falsely took some other ground of rejection.

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That may or may not be the scope of *Braithwaite's case*(1) and I notice Lord SUMNER in the House of Lords, while confining *Braithwaite's case*(1) strictly to that case, seemed very doubtful as to whether even that was not too wide a proposition to put forward. But I notice that in *Braithwaite's case*(1) when it came to the measurement of damages it is clear that the inferior quality of the timber in that case, though it was not allowed for the defence to say that it entitled them to reject and that therefore there could be no damages, was clearly taken into account, and having ascertained the difference between the market and contract price, allowance was made for the deficiency of the quality of the timber tendered. What is the position in this case? In this case, the plaintiffs claim not damages based on the market price in which case the principle of *Braithwaite's case*(1) might intervene to prevent Mr. Grant saying

"Oh, you cannot get any damages here because your goods were not only not as warranted but there was a complete breach of the condition of description and you were in fact selling other goods."

Let it be assumed that *Braithwaite's case*(1) would carry Mr. Gopalaratnam so far that Mr. Grant could not set up that defence. But here there is no claim for the difference between the market price and the contract price. The claim here is in the terms of the contract. 'We sold the goods and we could debit you with the loss that we suffered, the difference between the actual sale price and the contract price.' What is the clause? The clause is this, and I am quoting only the material words:

"Should we fail to accept the bills we hereby authorize you to dispose of the goods on our account and risk without notice and we bind ourselves to make good any loss or deficiency that may arise from such sale."

(1) [1905] 2 K.B., 543.

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What does that mean? It means that if the defendants default in accepting the bills, the plaintiffs have the power to resell *the goods*. What is meant by *the goods*? Obviously the goods that corresponded to the description in the contract. Supposing that instead of being filled with fireworks the cases were filled with shavings, is it possible for a moment to say that the plaintiffs can go into the market and sell the shavings and then come down on the defendants for the price of the fireworks? We should clearly be exceeding the scope of the doctrine in *Braithwaite's case*(1), if we should give effect to so absurd a contention. The plaintiffs have elected to open their mouth for a wider remedy and they have got to prove that the goods that they sold were goods which they delivered or were prepared to deliver in conformity with the contract. Had they sued for the difference between the market and contract price, I think it would be quite possible to state:

"Yes. You must get that and you need not prove that the goods really corresponded to what was contracted for. But of course you will have to make allowance for any loss of value caused by the breach of condition, although it is not available as a weapon for the rejection of the goods *in toto*."

It is only fair to observe that the learned CHIEF JUSTICE did apparently find as a fact that the goods tendered were just as good as the goods contracted for. In that case it might be that if they had sued for the difference between the market price and the contract price and proved it they would have got some damages. However I do not think they would have got very much because the only evidence that was called in went all to show that if the goods had been resold on the date of breach or shortly afterwards, far from having depreciated in value, they had appreciated. However that was not

(1) [1905] 2 K.B., 543.

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done and we cannot allow the plaintiffs to start a wholly new case on a different basis at this stage. We must therefore hold that the plaintiffs have failed to prove their case, that, in any event, they were not justified in unreasonably delaying before they resold the goods, and that further in law, before they could substantiate a claim of this nature and on this ground, they must show that the goods which they purported to resell and had resold were goods which the defendants would have been obliged to take under the terms of the contract but failed to do so. The appeal must be allowed with costs here and below.

With regard to the two cases, they stand on exactly the same footing as the others because there never was any opportunity given to see whether the goods on the market would have involved any loss at all and the evidence is just the same as with regard to the other cases. The plaintiffs cannot leave their case in a state of nebulous conjecture. On this part of the case also, the plaintiffs fail.

Mr. Grant does not press the counter-claim. The counter-claim will stand dismissed with costs in the appeal.

KRISHNAN, J.

KRISHNAN, J.—I agree and have nothing to add.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Ramesam.

GOKALDOSS GOVARDHANDOSS (3RD RESPONDENT).

APPELLANT,

v.

(1) PARRY & Co., PETITIONER AND (2) THE OFFICIAL
ASSIGNEE OF MADRAS (RESPONDENTS).*

1925,
March 6.

Presidency Towns Insolvency Act (III of 1909), ss. 11 (d), and 99
—Petition for adjudication of a firm as insolvent—"Carrying on business," under section 11 (d), meaning of—So long as its business debts are undischarged, firm carries on business—Receiver appointed in a suit between members of a firm, whether a bar to Court ordering adjudication—Adjudication of a firm as insolvents, whether prohibited by rule 47 of Insolvency Rules—Rule 47, whether ultra vires.

A firm should be deemed to be carrying on business within the meaning of section 11 (d) of the Presidency Towns Insolvency Act, so long as its business debts remain undischarged.

In re Olark, Ex parte Pope and Owles [1914] 3 K.B., 1095,
In re Dagnall, Ex parte Soan and Morley [1895] 2 Q.B., 407;
Insolvency Petition 150 of 1916 (unreported), followed.

Under the Act, a firm, as well as its partners individually, can be adjudicated insolvents. Rule 47 of the Insolvency Rules does not prevent the Court from making an order adjudicating the firm insolvents, but if the rule has that meaning, it is at variance with section 99 of the Act and is ultra vires.

An order adjudicating a firm as insolvents can be made, although a Receiver had been appointed in a suit for partition instituted by one member of the firm against the others.

In re Wenham, Ex parte Battams [1900] 2 Q.B., 698, referred to.

APPEAL from the judgment and order of WALLER, J., passed in the exercise of the Original Insolvency

* Original Side Appeal No. 86 of 1924.

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Jurisdiction of the High Court in Insolvency Petition No. 351 of 1924.

This is an appeal against an order adjudicating the firm of Murlidoss & Co., with two of the partners (the appellant herein and another who is the appellant in connected appeal No. 87 of 1924) as insolvents, and vesting the property in the Official Assignee of Madras. Two other persons who were minors and joined as respondents to the petition were exempted from the proceedings. Parry & Co., who were the petitioners for adjudicating the firm as insolvents, were creditors of the firm for a large amount, while other creditors for large amounts had also obtained decrees and attached the firm's property. The attachment had remained for 21 days, when Parry & Co. gave notice to the appellant (Gokaldoss) of their intention to file a petition to declare the firm insolvents. Previously to this, one of the members of the family had instituted a suit for partition (O.S. No. 622 of 1923) and the plaint was amended so as to contain a prayer for a declaration that the family had been divided in 1890 and that the firm's debts were not binding on the plaintiff. In that suit a Receiver had been appointed more than a year before the petition for adjudication was filed. The appellants in the two appeals contended that an order of adjudication of the firm could not be passed, as the firm had ceased to carry on business more than a year before the petition of Parry & Co.; they also contended that under rule 47 (Insolvency Rules), the firm itself could not be adjudicated, and that, unless the Receiver was discharged, no order of adjudication could be validly made. The learned Judge, who heard the petition, held that business was being carried on so long as debts incurred by the firm had not been paid, that even after the intervention of the Receiver, the business must be said to have been carried on by the firm;

that notice to one of the partners, of the suit and execution therein, in which the attachment was made, was sufficient to impute an act of bankruptcy to the firm. He accordingly adjudicated the firm as insolvent. The first counter-petitioner preferred this appeal.

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T. R. Ramachandra Ayyar for appellants.—Only an active trader, while he was carrying on trade can be adjudicated an insolvent. The firm cannot be adjudicated in this case, as it ceased to carry on the trade more than a year before the petition. More than a year before the petition, the Receiver in the partition suit had been appointed. Even if the Receiver carried on the business, it was not carried on by the firm. The Receiver is not the agent of the parties but he is an officer of the Court: See *Ex parte Salaman, In re Taylor* (1), *Ex parte Blain, In re Sawers* (2), *Orr v. Muthia Chetti* (3), *Woodroffe on Receivers*, page 72, *Kerr on Receivers*, page 10, *Baldwin on Bankruptcy*, page 70.

Attachment is not an act of bankruptcy, as no notice was given either in the suit or execution proceedings to the second respondent. An agent's act of bankruptcy is not an act of the principal unless the agent was specially authorized by the principal. Unless every partner is served with notice of the suit, in which the decree is under execution and attachment is made, it is not an act of bankruptcy, and the partner who has no notice cannot be adjudicated. The Insolvency Rules in rule 47 require service of notice on every partner before he can be adjudicated. When property is vested in a Receiver, action or proceedings should be against Receivers; the others (members of the firm) are not even parties. A Receiver cannot be adjudicated, and so

(1) (1892) 21 Ch. D., 394.

(2) (1879) 12 Ch.D., 522.

(3) (1894) 1 L.R., 17 Mad., 501.

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FARRY & Co. unless and until the Receiver is removed, no adjudication in insolvency can take place. *Dawe v. Vergara* (1), *Ex parte Blain*, *In re Sawers*(2), *In re Flowers & Co.*(3).

The decisions in some English cases to the effect that if debt is unpaid, the firm carries on business, are under the Married Women's Property Act, and not under the Bankruptcy Law.

O. Thanikachelam Chetty for appellant (in the connected appeal).

Reference was made to Presidency Towns Insolvency Act, sections 9, 12, 11 (d). After the Receiver was appointed, it was he and not the partners or the firm who carried on the business. The test as to what is 'carrying on business' is laid down by the Privy Council in *Goswami Shri Girdharji v. Shri Govardhanlalji*(4). It shews that the test is ability to contract debt, to sue and be sued. Here even the Receiver could not contract debt, *a fortiori*, the partners could not. This decision was no doubt on the Letters Patent, but the words in section 11 (d) of the Act are identical: See *Ex parte Schomberg*(5); Williams on Bankruptcy, page 35; Lindley on Partnership, page 731; *Graham v. Lewis* (6).

Nugent Grant for respondent.—An act of insolvency can be committed by one partner, so as to involve the bankruptcy of the whole firm: See section 9, Explanation, of Presidency Towns Insolvency Act (III of 1909).

Carrying on business: The views expressed in English decisions under the English Married Women's Property Act are relevant in interpreting the expression 'carrying on business' in the Indian Act (III of 1909). The expression has been introduced as section 135 in the English

(1) (1883) 11 Q.B.D., 241.

(3) [1897] 1 Q.B., 14.

(5) (1874) 10 Ch. App., 172.

(2) (1879) 12 Ch. D., 522.

(4) (1894) I.L.R., 18 Bom., 295 (P.C.).

(6) (1889) 22 Q.B.D., 1.

Bankruptcy Act, 1914. See section 4 (1) (d) of Act (III of 1909). GOVARDHAN-
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If debt was not paid, the trader carries on business. So long as debts are not paid up and outstandings are being collected, so long is he carrying on trade. It does not matter if a Receiver was appointed and manages the trade. If the English cases be followed, it does not matter if a Receiver was appointed or not. Reference was made to the following cases: *In re Dagnall*, *Ex parte Soan and Morley*(1); *In re Worsey*(2); *In re Clark*, *Ex parte Pope and Owles*(3).

JUDGMENT.

SPENCER, J.—These are appeals against the order of Mr. Justice WALLER adjudicating the firm of Murlidoss Ramdoss & Co., insolvent, and finding that the two brothers Gokuldoss and Dwarkadoss were partners in it. The counter-petitioners 3 and 4, namely, Govindoss Krishnadoss *alias* Babu, who is the son of Krishnadoss Murlidoss, and Ramdoss, son of Dwarkadoss Govardhandoss, being minors, were excluded. O.S. Appeal No. 86 is by the first counter-petitioner Gokuldoss and O.S. Appeal No. 87 is by the second counter-petitioner Dwarkadoss Govardhandoss. As he died after filing the appeal, his son Ramdoss is allowed to continue it. The facts which appear from the affidavits on either side are that the first counter-petitioner Gokuldoss's deceased father Govardhandoss and his deceased uncle Murlidoss Ramdoss were carrying on business in buying and selling houses and lands in Madras under the trade name of Ramdoss Murlidoss & Co., and after their deaths the first counter-petitioner and Krishnadoss Murlidoss, now deceased, carried it

(1) [1896] 2 Q.B., 407.

(2) [1901] 1 Q.B., 309.

(3) [1914] 3 K.B., 1035.

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on. Messrs. Parry & Co. obtained a decree in O.S. No. 1007 of 1922 on the Original Side of this Court for Rs. 49,117 against this firm. Other creditors of the firm obtained a decree for Rs. 75,206 and attached the properties belonging to the firm on the 9th September 1924. The property remained attached for a period of 21 days and notice was given to Gokuldoss of the intention of Messrs. Parry & Co. to file a petition to declare the firm insolvent. Meanwhile Govindoss Krishnados alias Babu, instituted a suit, O.S. No. 622 of 1923, first for partition and later, upon amendment, for a declaration that the family had been divided from 1890 and that the debts incurred by the firm were not binding upon him after his father's death. In this suit a Receiver was appointed in August 1923.

It was contended before Mr. Justice WALLER and again in appeal that, as the business of the firm ceased in April 1923, the Court had no jurisdiction to make an order of adjudication in November 1924. It is also contended that after the appointment of a Receiver any business carried on by the Receiver will not amount to a carrying on of the business by the firm, as the receiver is not an agent of the parties but an officer of Court, and that until he is discharged, no adjudication order can validly be made.

Section 11 (d) of the Presidency Towns Insolvency Act declares:

"The Court shall not have jurisdiction to make an order of adjudication in the case of a petition against a firm of debtors unless the firm has carried on business within a year before the date of the presentation of the insolvency petition within those limits."

Whether a firm has carried on business or not within a year before the date of the filing of the insolvency petition is a question of fact in each case. But it is

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necessary first to determine what is meant by "carrying on business." Is it the same as "being a trader," which is the expression used in section 87 of the English Bankruptcy Act of 1869? Mr. Ramachandra Ayyar quoted the case of *Dawe v. Vergara*(1). That was a case where two persons, Ellery and Festing, traded together as wine merchants. Festing brought a suit for dissolution and himself took service in another company as a book-keeper. A receiver was appointed to carry on the business. It was held that, after the appointment of the receiver who took possession and carried on the business, Festing was no longer a trader at the time when his goods were taken in execution. Mr. Ramachandra Ayyar also relied on the case of *Ex parte Blain, In re Sawers*(2) where it was held that an act of bankruptcy could not be committed by an agent and therefore that two partners of an English firm who were residing permanently in Chili could not be adjudicated bankrupts in an English Court of Bankruptcy. The explanation to section 9 of the Presidency Towns Insolvency Act declares that the act of an agent may be an act of the principal for the purpose of committing acts of insolvency, even though the agent may have no specific authority to commit it. It was pointed out by me in *Kalianji Singji Bhai v. The Bank of Madras*(3) that the law in England was not the same as that in India in this respect.

In *Goswami Shri Girdhariji v. Shri Govardhanlalji*(4) the Privy Council had to consider the meaning of the phrase "carry on business" and they observed that the phrase was an elastic one and almost incapable of definition. It was intended in the Letters Patent, where the phrase was used, to refer to business in

(1) (1883) 11 Q.B.D., 241.
(3) (1915) 29 M.L.J., 788.

(2) (1879) 12 Ch. D., 522.
(4) (1894) I.L.R., 18 Bom., 294 (P.C.).

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which a man might contract debts and become liable to be sued by persons who had business relations with him. I am of opinion that the expression "carry on business" in the Presidency Towns Insolvency Act cannot be interpreted in the light of the Letters Patent or of the wording of the old English Bankruptcy law with reference to traders; so that cases like *Dawe v. Vergara*(1) and *Ex parte Schomberg, In re Schomberg*(2) and *Ex parte Saltman, In re Taylor*(3) do not help us to decide the meaning of the phrase "carry on business" in cases of insolvency. Under the old Bankruptcy Act of 1869, a firm could not be adjudicated insolvent in England, but this was made possible by the Bankruptcy Act of 1893 in which the expression "being a trader" was dropped and the expression "carrying on business" was substituted. As a married woman could not be made bankrupt unless she was carrying on a trade or business after her marriage the question has come up in connexion with the Married Women's Property Act, as to what is the meaning of "carrying on business" under the Bankruptcy Act. In *In re Dagnall, Ex parte Soan and Morley*(4), VAUGHAN WILLIAMS, J., observed that trading was not completed until all the obligations that the fact of trading imposed upon the trader were performed. The learned Judges declined to be bound by the earlier decisions such as *Ex parte Schomberg*(2) as to the meaning of the words in the Bankruptcy Act of 1869 "being a trader." Then in *In re Worsley*(5), Lord ALVERSTONE, C.J., held that a woman who was carrying on business separately from her husband and sold that business must be deemed to be still carrying on the business so long as the debts she had incurred in the business

(1) (1883) 11 Q.B.D., 241.

(3) (1882) 21 Ch. D., 394.

(2) (1874) 10 Ch. App., 172.

(4) [1896] 2 Q.B., 407.

(5) [1901] 1 Q.B., 809.

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remained unpaid. Reference is made by the learned Chief Justice to the case of *Ex parte Bamford*(1), where the Lord Chancellor laid down that so long as a trader did not pay the debts he had contracted while engaged in the trade he was to be regarded as still engaged in the trade. In *In re Clark, Ex parte Pope and Owles*(2) a similar meaning was given by three learned Judges of the Court of Appeal to the words "carrying on business"; and in this Court in petition No. 150 of 1916 our learned Chief Justice took the view that the meaning of "carrying on business" as understood by the Court of Appeal in England was the same in this country and that the language used by the English Court of Appeal was expressed in terms so general as to mean that, so long as there are debts of the business being discharged and assets being got in, a business must be regarded as still being carried on.

As regards the argument that the appointment of a receiver prevented the order of adjudication being made, Mr. Justice POLLOCK in *Dawe v. Vergara*(3) implied that if Festing intended to reconstitute the business or carried it on after the receiver was discharged, he would be a trader. It seems to me that the legislature could not have intended that an insolvent firm should be allowed to evade its responsibilities and obligations by the device of one member of the firm bringing a suit against another member and applying to the Court to appoint a receiver.

It was also argued that Mr. Justice WALLER's order declaring the firm insolvent was contrary to rule 47 of the Insolvency Rules which says that an order of adjudication shall be made against partners individually. I do not understand this rule as meaning that an order

(1) (1809) 15 Ves., 449.

(2) [1914] 3 K.B., 1095.

(3) (1883) 11 Q.B.D., 241.

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of adjudication shall not also be made against the firm. But if it has that meaning, it is at variance with the provisions of section 99 of the Act which speaks of adjudication orders being made against firms, and it may be *ultra vires*, as suggested by Mr. Grant. In *In re Wenham, Ex parte Battams*(1), Lord ALVERSTONE observed that the rule of the Supreme Court in England under which a creditor was enabled to get a separate receiver order against each individual partner could not be held to cut down the rights and liabilities created by sections of the Bankruptcy Act. In the present case there is no question that at the date of the petition, the insolvent firm had business debts undischarged.

The objections taken to the order of Mr. Justice WALLER thus fail, and the appeals of the two members of the firm must be dismissed with costs.

The respondents will get their costs out of the estate.

This order will have the effect of dissolving our order, dated 18th December 1924, as to payment of Rs. 500 per mensem for the maintenance of the insolvents, and they may apply for what is necessary to the Official Assignee or to the Judge sitting in Insolvency.

RAMESAM, J.

RAMESAM, J.—I agree.

K.R.

(1) [1900] 2 Q.B., 698.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Ramesam.

RAMA RAJA THAVAR (THIRD DEFENDANT), APPELLANT,

1925,
February 3.

v.

PAPAMMAL AND ANOTHER (PLAINTIFF AND SECOND DEFENDANT),
RESPONDENTS.*

Hindu Law—Maintenance—Concubine—Right to maintenance—Text of Hindu Law relating thereto—Conditions and limitations as to the right—“Avaruddha Stri,” meaning of.

Under the Hindu Law, a permanently-kept concubine is entitled to maintenance out of the estate of her deceased paramour, in the hands of his heirs or their representatives.

The expression “Avaruddha Stri” found in Mitakshara, Chapter II, section I, placita 27 and 28, includes a permanently-kept concubine.

The decisions of Court have from time to time laid down the conditions and limitations subject to which a concubine is entitled to maintenance, namely, (1) that she must have been permanently and exclusively kept by her paramour, (2) that she must be the mother of illegitimate children by him, and (3) that she should be chaste and keep undefiled the bed of her lord and master.

Panchapagesa Odayar v. Kanaka Ammal, (1917) 33 M.L.J., 455, *Bai Monghibai v. Bai Nagubai* (1923) I.L.R., 47 Bom., 401, *Anandilal Bhagchand v. Chandrabai* (1924) I.L.R., 48 Bom., 203, followed.

APPEAL against the decree of T. M. FRENCH, the Subordinate Judge of Rāmnād, in O.S. No. 30 of 1918.

The plaintiff sues for a declaration that she is entitled to a maintenance of Rs. 150 per mensem out of the estate of one deceased Muthu Doraisami Thevar, in the hands of the first defendant. She claims to be the permanently-kept concubine of the deceased. She had previously instituted two suits, one for being recognized as landholder of certain villages belonging to the deceased and

* Appeal No. 128 of 1922.

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the other claiming the allowance of Rs. 700 per mensem to which the late Muthu Doraisami Thevar was entitled as a rent charge on the Rāmnād Zamindari. Those two suits were dismissed on the ground that she was not the lawful wife of the deceased Thevar. She instituted the present suit for future maintenance at Rs. 150 as stated and for past maintenance for twelve years. The first defendant was the assignee of the rent charge of Rs. 700 per mensem from the reversioner to the estate of Muthu Doraisami Thevar after the death of the latter and his widow Ramamani. During the pendency of this suit the first defendant died and his son was brought on the record as his legal representative and impleaded as the third defendant. The second defendant was the Raja of Rāmnād. The plaintiff claimed also a right of residence in a bungalow of her late paramour in which she was living till ousted by the first defendant and Ramamani, against whom however the plaintiff had instituted a suit under section 9 of the Specific Relief Act and got back possession. It appeared that the plaintiff had a daughter by the deceased Muthu Doraisami Thevar, that she was a permanently-kept concubine of her deceased paramour, and that she was chaste before and after his lifetime. The Subordinate Judge awarded a decree for maintenance at Rs. 100 per mensem and also past maintenance at the same rate for twelve years, and decreed a right of residence in the bungalow as claimed by her.

U. S. Venkata Achariyar and *S. Sundararaja Ayyangar* for appellant.

A concubine is not entitled to maintenance. There is no warrant for it in the ancient texts. The only texts that are relied on are in *Mitakshara*, Chapter II, section I, placita 27 and 28. These placita do not refer to maintenance, the author is dealing there with succession.

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See also *Dayabhaga*, page 78, placitum 48. Having regard to the context, *Narada's* and *Katyayana's* texts which are referred to in placitum 28 (*Mitakshara*) should be confined to cases of escheat. The only decided case on the point is the one reported in *Panchapagesa Odayar v. Kanaka Ammal*(1). The decision in the above case is wrong.

The concubine has no right of residence. See *Behari Lal v. Achraj Kunwar*(2), *Sirkar's Hindu Law*, page 561 (Ed. 5). A concubine is not entitled to the same rate of maintenance as the lawful wife. An illegitimate son was given only a reduced rate of maintenance: See *Gopalsami Chetty v. Arunachelum Chetti*(3). The estate was insufficient to meet the debts contracted by the deceased paramour.

T. R. Ramachandra Ayyar, *B. Sitarama Rao* and *S. R. Muthuswami Ayyar* for respondents.

Mitakshara, Chapter II, section I, placita 27 and 28, *Saraswathi Vilasa* (Setlur's Edition), page 176, section 517 *et seq* and section 531, *Narada* (Sacred Books of the East, Vol. 33, page 96) relate to maintenance of concubines. *Mitakshara*, Chapter I, section II, placita 27 and 28 explain the expression "Avaruddha Stri" as including concubines. If the woman satisfies the conditions included in that expression, she is entitled to maintenance. The text-books and the decided cases have understood these ancient texts in that sense. See *West and Buhler's Hindu Law*, page 164—*Strange's Hindu Law*, Vol. II, page 174; *Mayne's Hindu Law*, paragraph 450. See *Khemkor v. Umiashankar*(4), *Yeshwantrav v. Kashibai*(5), *Ningareddi v. Lakshmawa*(6), *Ramanarasu v. Buchamma*(7), *Panchapagesa Odayar v.*

(1) (1917) 88 M.L.J., 455.

(3) (1904) I.L.R., 27 Mad., 32.

(5) (1888) I.L.R., 12 Bom., 26.

(2) (1922) 68 I.C., 394.

(4) (1878) 10 Bom., H.O.R., 381.

(6) (1902) I.L.R., 26 Bom. 163.

(7) (1900) I.L.R., 23 Mad., 282.

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Kanaka Ammal(1) and *Bai Monghibai v. Bai Nagubai*(2).

As a dependent member an indigent daughter was awarded maintenance in *Mokhoda Dassie v. Nundo Lall Haldar*(3). An illegitimate daughter was awarded maintenance in C.S. No. 615 of 1919 (Madras High Court, Original Side).

Residence is included in the general right of maintenance. In this case the plaintiff (the concubine) lived in the family house, was treated in the same way as the wedded wife by the relations and the paramour and in these castes continuous concubinage was regarded as equivalent to marriage. See *Sundararajan v. Arumachelam Chetty*(4). She is therefore entitled to substantial maintenance. More money was realized out of the assets than would be necessary to pay off the real debts of the deceased paramour.

JUDGMENT.

SPENCER, J.

SPENCER, J.—The plaintiff was the permanent mistress of Muthu Doraisami Thevar, who was in receipt of Rs. 700 per mensem as a rent charge on the estate of the Raja of Rāmnād. This sum of Rs. 700 has been erroneously described in various places as an annuity, perhaps for the reason that the liability to pay it accrues annually, but it is not strictly an annuity as it is not for the duration of any one life, but is a charge on the revenue of the estate of the Raja of Rāmnād in perpetuity. The right to the rent charge was established as against the Raja of Rāmnād in a suit brought by Ramamani Ammal, the mother of Muthu Doraisami Thevar, which went up to the Privy Council [vide

(1) (1917) 33 M.L.J., 455.

(3) (1900) I.L.R., 27 Cal., 555.

(2) (1923) I.L.R., 47 Bom., 401.

(4) (1916) I.L.R., 39 Mad., 136 (F.B.).

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Rajah of Ramnad v. Sundara Pandiyasami Thevar(1).] The right has been mortgaged to a Chetti who is not a party to the present suit. The plaintiff claimed in this suit maintenance against the first defendant who was the assignee from a reversioner of Muthu Doraisami Thevar's estate, and the first defendant having died during suit, the claim was continued against his son, the third defendant. After Muthu Doraisami Thevar's death, the plaintiff was responsible for other litigation before the present suit. There was a suit under the Specific Relief Act for possession of the bungalow in which she lives, and another suit for a declaration that she was a landlord in respect of certain villages which were in the possession of the deceased Muthu Doraisami Thevar. In the first suit she succeeded, but she lost the second suit based on the footing that she was the wife and heir of Muthu Doraisami Thevar.

Two questions have been argued in this appeal. Firstly whether a concubine is entitled to maintenance against the estate of the man who kept her, and secondly whether the rate of maintenance of Rs. 100 per mensem (with 12 years' past maintenance) is a fair rate and one to which the plaintiff is entitled.

On the point of law as to the right of a permanent concubine for maintenance from the family property of her deceased paramour, the leading decision in this Court is *Panchapagesa Odayar v. Kanaka Ammal*(2). But there are a number of decisions in the Bombay High Court, viz., *Khemkor v. Umiashankar*(3), *Vrandavandas Ramdas v. Yamunabai*(4), *Yashwantrao v. Kashibai*(5), *Bai Monghibai v. Bai Nagubai*(6).

(1) (1919) I.L.R., 42 Mad., 581 (P.C.).

(3) (1873) 10 Bom. H.J.R., 381.

(5) (1888) I.L.R., 12 Bom., 26.

(2) (1917) 33 M.L.J., 455.

(4) (1875) 12 Bom. H.C.R., 223.

(6) (1923) I.L.R., 47 Bom., 401.

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—
SPENCER, J.

After hearing arguments on both sides, I see no reason why we should not follow the decision in *Panchapagesa Odayar v. Kanaka Ammal*(1). The basis of the right of a concubine to be maintained is the text of *Milakshara*, Chapter II, section 1, placita 27 and 28. In these placita Vignaneswara refers to the text of Katyayana and Narada, and he states that the word "Stri" includes a concubine. It is true that the purpose with which the definition was made in this passage was in order to show that a wife was entitled to succeed to her husband's property, but it is nevertheless established that the word "women" includes concubines in the ancient texts. The Courts have placed from time to time several limitations and conditions on the right of concubines to be maintained. In *Bai Monghibai v. Bai Nagubai*(2), it was made clear that the rule was not applicable to every kept woman but only to those who are continuously and exclusively kept in a man's family and are in other words what is known as "Avaruddha Stri" in Sanskrit. Another condition that has been put on the right of a concubine to be maintained is that she should be the mother of illegitimate children; see *Khemkor v. Umiashankar*(3), and Strange's Hindu Law, Chapter 8, page 174. Another is that she should be chaste and keep undefiled the bed of her lord and master. See *Yashwantrao v. Kashibai*(4), and *Anandilal Bhagchand v. Chandrabai*(5). In these two latter respects, it cannot be suggested that the plaintiff has lost her right to maintenance. She gave birth to a daughter when she was being kept by the deceased Muthu Doraisami Thevar, and it is not suggested that she has had anything to do with other men. It has been

(1) (1917) 33 M.L.J., 455.

(3) (1873) 10 Bom. H.C.R., 281.

(2) (1923) I.L.R., 47 Bom., 401.

(4) (1888) I.L.R., 12 Bom., 26.

(5) (1924) I.L.R., 48 Bom., 203.

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argued by Mr. Venkata Achariyar that the rule in favour of the maintenance of concubines only applies to cases where there are no other heirs and the property would otherwise escheat to the sovereign, as those are the circumstances spoken of in the text of Katyayana. The argument that the rule is only applicable to cases of escheat was advanced before Mr. Justice ABDUR RAHIM and Mr. Justice SRINIVASA AYYANGAR, in *Panchapagesa Odayar v. Kanaka Ammal*(1), and they rejected any attempt to put such a restrictive interpretation on the texts. It has also been brought to our notice that in the *Saraswati Vilasa* there is no restriction of the rule to cases of escheat only. In *Ramanarasu v. Buchamma*(2), it was held that a discarded concubine was not entitled to claim maintenance. This only amounts to saying that a man is not bound by law to keep a concubine, when he does not want her and so long as he is alive he can put an end to the relationship between himself and a kept woman. If he dies without putting an end to the relationship, the presumption is that he intended the concubinage to be permanent, and, as the learned Judges observed, there is a moral obligation on the part of the man's heirs to see that his concubine should not be left destitute after his death, and it has been imposed as a conditional liability upon those who succeed to his property. The question is not really so much one of the legal relationship between a man and a woman as of equity that a woman who has been kept for a number of years and given a position almost equal to that of a wife should not be left to starve after the death of the man who kept her. Thus it is a matter not of a contract during the lifetime of the parties but of obligations arising out of the personal law of Hindus as

(1) (1917) 33 M.L.J., 455.

(2) (1900) I.L.R., 23 Mad., 282.

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defined by their religious texts. For these reasons, I am of opinion that the lower Court's judgment allowing maintenance to the plaintiff can be maintained.

As for the rate of maintenance, the lower Court fixed it at Rs. 100 a month, although the claim was for Rs. 150. The plaintiff was also given a right to reside in the bungalow where Muthu Doraisami Thevar was living. It appears that there are two bungalows and that she has been given a right of residence in the larger bungalow. It is suggested that the maintenance of Rs. 100 might be reduced on the ground that the plaintiff was letting out a portion of this bungalow which was more than sufficient for her use, and deriving a rent therefrom of Rs. 15 a month. That was only for a time when the bungalow was in good repair. As she is living as a single woman and has got her daughter married, the accommodation of the smaller bungalow would probably be sufficient for her, but as a matter of sentiment, she has been allowed to occupy the larger bungalow. I am of opinion that if she would give up her present residence to the appellant and occupy the smaller bungalow in which he now lives, there would be no reason to decrease her allowance of Rs. 100 per mensem but if she persists in living in the larger bungalow and occupying the whole of it, the allowance of Rs. 100 per mensem, when she has a free right of residence besides, is rather excessive, and the rate of maintenance should be reduced to Rs. 85 per mensem, provided that the third defendant keeps the bungalow in proper repair, and it is stated to be in bad repair now. The plaintiff is willing to repair the big bungalow at her own cost if she is allowed to remain in it and to continue to receive Rs. 100 per mensem. The third defendant will be given three months' time from now to

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put it in complete repair and if he does so the rate of maintenance will be reduced to Rs. 85 per mensem.

Muthu Doraisami Thevar died in 1905. The lower Court has allowed 12 years' past maintenance at the same rate of Rs. 100 till 1912. From July 1907, the plaintiff was in possession of four villages mentioned in the plaint and she has not accounted for her profits by showing how much was spent on the chattram Doraisami Thevar, whose son married the plaintiff's daughter and managed the four chattram villages, admits in Exhibit Q that the chattram was never in his management and he did not pay any quit rent to the Raja. The plaintiff has not accounted for the income of those villages during those five years. Under these circumstances, I am of opinion that she is not entitled to more than seven years' past maintenance, and the decree will be modified accordingly, maintaining the rate of Rs. 100. In the plaint the plaintiff asked that she should be given a charge for her maintenance either on the allowance payable by the Raja of Rāmnād to the third defendant or on the chattram villages. The Subordinate Judge directed that the amounts awarded by him should be a charge on the plaint mentioned villages and on the annuity (sic), payable by the second defendant. On issue 7 he found that the plaintiff was entitled to this charge as the defendants had not placed before the Court any materials for determining what income was required for the charity. There is no finding whether these villages were burdened with the trust or whether the whole income has been dedicated to charity. *Prima facie* the villages themselves cannot be made the subject of this charge, as they are trust properties or burdened with a trust. Unless and until it is found in a regular suit instituted by some one interested in the trust that the whole income is devoted

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to charity, the decree in the present suit must provide that the maintenance should be a charge on the surplus funds, if any, derived from these villages, and the lower Court's decree must be amended in so far as it created a charge on the villages themselves.

The lower Court has further granted a personal decree against the third defendant to pay maintenance. It is not contended that he is personally liable. The decree must therefore be amended by directing him to pay out of the assets of Muthu Doraisami Thevar in his hands and by charging the amounts payable as above stated, viz., Rs. 50, on the annual rent charge as agreed to in the compromise in Sigappa Achi's suit O.S. No. 5 of 1921 and the remainder on the surplus, if any, of the income from the villages after performing the charities.

The lower Court's decree, subject to these modifications, is confirmed. The plaintiff will get proportionate costs throughout and she will be liable for the Court fees due to Government.

RAMESAM, J. RAMESAM, J.—I agree. The expression "Avaruddha Stri" was used by Vignaneswara not only in Mitakshara, Chapter II, section 1, placitum 28, and in chapter I, section 4, placitum 22, but also explained in the commentary on verse 296 of Vyavahara Adhyaya of Yagnavalkya. So long as a woman satisfies this interpretation of the term "Avaruddha Stri" (vide *Bai Monghibai v. Bai Nagubai*(1)) and satisfies the condition that she remains chaste, *Anandilal Bhagchand v. Chandrabai*(2), I do not see any reason why she should be deprived of her maintenance.

I agree with the order proposed by my learned brother.

K.R.

(1) (1923) I.L.R., 47 Bom., 401.

(2) (1924) I.L.R., 48 Bom., 203.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Ramesam.

NILAMBUR THACHARAKAVIL MANAVADAN

THIRUMALPAD (PLAINTIFF'S LEGAL
REPRESENTATIVE), APPELLANT,

v.

MESSRS. PARRY & Co. (DEFENDANT), RESPONDENT.*

Lessor and lessee—Lease of land for coffee cultivation for 91 years—Subsequent lease to same lessee of a portion for goldwashing for 36 years—Effect of later lease—Surrender of prior lease—Suit in ejectment of lessee from lands included in later lease—Suit after expiry of subsequent lease but before expiry of prior lease—Implied surrender—Compatibility of later lease with prior lease—Machinery erected by lessee—Right of lessee to remove same—Right of lessor for its value.

Where during the currency of a lease for a long period of a large extent of land for coffee cultivation, the lessee accepted a second lease of a portion of the land for a shorter period for goldwashing mining purposes and, on the expiry of the latter lease and before the expiry of the first, the lessor sued to eject the lessee from the lands comprised in the second lease and for recovery of the value of the goldmining plant removed by him,

Held, that the rule of English Law that the acceptance of a second lease by the lessee operates as an implied surrender of the prior lease does not apply to cases where the subsequent lease is not incompatible with the prior lease;

that the second lease in this case was not incompatible with the first, as the second lease was of a different kind from the first, as it was made to the same lessee, and as the later lease provided that the rent under the earlier lease should not be reduced by reason of the later lease; and that consequently the lessee was not liable to eviction.

Per RAMESAM, J.—The rule of English Law as to implied surrender of an earlier lease by acceptance of a later lease is based on the view that a lessor must give possession to the lessee, that he cannot deliver possession unless the prior lease had

* Appeal No. 71 of 1922.

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been surrendered, and that the lessee is estopped from disputing the landlord's title to grant the lease. But under the Indian Law, delivery of possession is not necessary for the validity of a lease. The English rule of implied surrender need not therefore be extended to India.

Held also, that the lessee is entitled to remove the gold-washing machinery planted by him, and the landlord is not entitled to its value, whether the lessee had removed it or not from the land.

APPEAL against the decree of C. D. J. PINTO, the Subordinate Judge of Nilgiris, Ootacamund, in Original Suit No. 123 of 1920.

The material facts appear from the judgment.

T. R. Ramachandra Ayyar and *S. Srinivasa Ayyar* for appellant.

T. S. Narayana Ayyar and *T. S. Anantaraman* for respondents.

JUDGMENT.

SPENCER, J.

SPENCER, J.—This suit was brought by Nilambur Raja for recovery of possession together with damages for use and occupation of 20 acres of land and for value of buildings and machinery removed by the defendant upon a certain area which had been granted on lease by the Plaintiff's predecessor on 14th August 1879 to Mr. Minchin for goldwashing for a period of 36 years which expired on 14th August 1915.

In 1862 the plaintiff's predecessor granted a lease of 500 cawnies in the same locality for a rent of Rs. 500 to be paid annually for coffee cultivation to the same Mr. Minchin for a period of 91 years. That lease has not expired and will not expire till 1953. Messrs. Parry & Co., who are the defendants in this suit, obtained an assignment from Mr. Minchin of all his rights in both leases. The contention on the part of the plaintiff, who is the appellant in this Court, is that the grant of a mining lease implied a surrender of

the lease for coffee cultivation for the area over which goldwashing operations were conducted. This contention is based upon the English rule of law that the acceptance of a new lease operates as a surrender of a prior lease. In Woodfall on Landlord and Tenant the learned author explains this rule as being founded upon estoppel. He says that as a lessee is estopped from saying that his lessor has no power to give him the lease and as the lessor cannot grant a new lease during the continuance of the old lease, it follows that the acceptance of the new lease implies a surrender of the first lease. An exception to this rule occurs if what is accepted by the lessee is the grant of a thing collateral to, and consistent with, the lease of the land. Instances are given in which the grant of a new thing does not imply the surrender of the thing first granted. Mr. Ramachandra Ayyar argues that the two operations, coffee planting and goldmining, cannot be carried on simultaneously, as one operation would interfere with the peaceful enjoyment of the other right over the soil. We must therefore see what was the intention of the parties when they gave and received the two lease deeds, Exhibits I and II. In the first place it is noteworthy that the lessee in both the leases is the same person, and therefore the lessee is in a position to make arrangements for the two operations of coffee planting and goldwashing being carried on side by side in such a way as not to interfere with each other. Next it is noticeable that the rent under the two agreements was agreed to be paid simultaneously and that under clause 4 of Exhibit A, which is a counterpart executed by the lessee in favour of the lessor, he agreed that he would not ask for any diminution of the rent due under the lease for cultivation on account of the execution of the gold sifting works in the same area, thus showing that

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the two operations might go on side by side and that the mining lease was not intended to involve a surrender of any portion of the land leased for coffee planting. Taking all the circumstances into consideration I feel clear that the grant of the second lease was not inconsistent with the continuation of the first, and that it is only in cases where there is some such incompatibility between the enjoyment under the new lease and the enjoyment under the prior lease that the second will involve a surrender of the first.

As regards the removal of machinery, etc., under the cultivation lease the lessee is entitled to keep the machinery upon the land leased to him until that lease expires, and the fact that under clause 7 of Exhibit A his landlord was expressly exempted from liability to pay compensation for machinery and buildings left upon the land itself indicates that the property in them was regarded as remaining with tenant who erected them. Thus whether the gold mining plant is removed or left standing, the landlord cannot now demand to be paid anything on that account. In this view the plaintiff has no legal claim against the defendant and his suit was rightly dismissed in the lower Court. The appeal must be dismissed with costs.

RAMESAM, J.

RAMESAM, J.—I agree. The learned vakil who argued the case for the appellant relied in support of his proposition on Woodfall on Landlord and Tenant, page 363, Redman on Landlord and Tenant, page 561, Foa on Landlord and Tenant, page 697, Bacon's Abridgment of the law, Volume IV and Halsbury's laws of England, Volume XVIII, 1061. These references no doubt lay down that when there is a second lease by the same lessor to the same lessee there is an implied surrender of the first lease. In England at one time it was necessary for the validity of the lease that the lessor

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should be in possession of the lands leased. See Woodfall, p. 363, (it has not been changed by the Real Property Act of 1845). It seems to follow from this that when a second lease was made, the lessee admitted that the lessor was in possession, or at any rate, was estopped from questioning that the lessor was in possession. The result is that the surrender of the first lease was implied, but it does not seem to me that this implication is necessary in the law as it stands now in India. Section 105 of the Transfer of Property Act defines a lease as a transfer of the right to enjoy certain property. Section 107 says, that a lease for any term can be made only by a registered instrument and no delivery of possession is necessary. Section 108 A (b) says that the lessor is bound to put the lessee in possession of the property only at the lessee's request; so that delivery of possession is not a necessary part of the transaction of a lease in India. Where the land is in possession of a trespasser, the owner can lease the land to a lessee and the lessee can file a suit to recover it. Section 111 says, "A lease of immovable property determines by implied surrender." But I do not see why where there are two leases to the same person the surrender of the first lease should be implied. Even where the leases are of the same kind, they are overlapping and the terms of the second are somewhat inconsistent with the terms of the first, all that is necessary to imply is a cancellation of the first, only for the period which is overlapped by the second. In the present case even assuming that the mining lease is not totally consistent with coffee plantation, it seems to me that all the necessary implication is a cancellation of the first lease for a period of 36 years and no more. All the passages in the references relied on by the learned vakil for the appellant seem to refer to leases of the same kind and it is admitted by him that

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there is no case available where the second lease is of a different kind from the first. It is an *a fortiori* case where the second lease is of a different kind. On this point I need not deal with the case in detail as it has been discussed by my learned brother with whose conclusion I agree, viz., that the two leases are of an entirely different kind. Clause 54 of the documents, Exhibits A and I, which are practically identical, seem to imply that the 20 acres covered by the second lease are not necessarily excluded from the first lease. Clause 7 relied on by Mr. Ramachandra Ayyar no doubt seems at first to support his contention; but all that it says is that in the case of eviction by the lessor compensation shall not be payable. Under what circumstances such an eviction is going to happen, the clause does not state, and there is nothing to compel us to infer that eviction should necessarily be under the terms of the second lease and irrespective of the conditions of the first lease. I do not think therefore that clause 7 necessarily supports the appellant.

The English Law seems to have been laid down in very wide terms. It is sometimes said that even if the intention of the parties is not to cancel the first lease, the law will imply a surrender. This does not seem to have been adopted in America, and I do not see why such a rule of law should be adopted in India.

For all these reasons I agree to the order proposed by my learned brother.

K.B.

APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, and
Mr. Justice Krishnan.

VENKATACHARYULU AND OTHERS (PLAINTIFFS), APPELLANTS, 1925,
January 2

v.

VENKATASUBBA RAO AND OTHERS (DEFENDANTS),
RESPONDENTS.*

*Transfer of Property Act (IV of 1882), ss. 54, 55 and 105—
Owner of both varams—Grant of kudivaram—Lease in
perpetuity—Lease in consideration of a rent and premium—
Promissory note, executed for the premium—Lessor, whether
entitled to a charge on leasehold interest for the premium—
Grant, whether a sale or lease—Charge, whether created
under the Transfer of Property Act or under the general
common law of India—Rule of English Common Law,
whether applicable to India.*

Where the owner of both the varams in certain lands, granted the kudivaram therein to a certain person on a perpetual lease in consideration of rent as well as a premium, and in respect of the premium the lessee executed a promissory note to the lessor, and the latter sued on the note and claimed to recover the amount as a charge on the leasehold interest in the hands of transferees from the lessee,

Held, that the grant was only a lease falling under section 105, and not a sale under section 54, of the Transfer of Property Act;

that the lessor was not entitled to a charge for the premium payable under the lease, either under the Transfer of Property Act or under the Common Law of India;

that the rule of the English Common Law, laid down in *Shepherd v. Beetham*, (1877) 6 Ch D., 597, should not be followed in India, as the matter is entirely regulated by the Transfer of Property Act, which provides under section 55 for a charge only in the case of sales under section 54;

* Appeal No. 168 of 1922.

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that, consequently, the plaintiff was entitled only to a personal decree against the lessee.

APPEAL against the decree of P. RAMA RAO PANTULU, Subordinate Judge of Masulipatam, in Original Suit No. 26 of 1918.

The plaintiffs were the Agraharamdars of a village, of which the six items appended to the plaint formed art. They were the owners of both the varams and granted the kudivaram in those items to the father of the first defendant, which was a lease in perpetuity in consideration of a rent to be paid as well as a nazarana or premium in respect of the grant. The grantee executed a promissory note to the plaintiffs in respect of the premium. The plaintiffs instituted this suit to recover the premium on the pro-note and claimed a charge in respect thereof on the leasehold property. The first defendant had transferred his interest in the property to defendants 3 to 17; the plaintiffs alleged that they were transferees with notice of his charge, and claimed to enforce his charge as against them. The Subordinate Judge, who originally tried the suit, held on a preliminary issue of law, that the plaintiffs were in law entitled to a charge for the unpaid premium, but when the case came on for trial on the other issues, his successor held that the defendants 3 to 17 were bona fide transferees for value without notice of the charge in favour of the plaintiffs, and that consequently the plaintiffs were not entitled to enforce the charge as against them, and passed a decree against the first defendant and his son (the second defendant) for the suit amount to be paid out of their family property. The plaintiffs preferred this appeal.

K. Bhashyam Ayyangar for appellants.

K. V. Krishnamohan for respondents.

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—
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COUTTS TROTTER, C.J.—In this case the plaintiffs are the owners of an Agraharam village in the sense that they own both the *melvaram* and the *kudivaram* rights. In the year 1909 there was a grant of the kudivaram right to the 1st and 2nd defendants and in consideration for that they promised to pay a rent and they also promised to pay what is described as nazarana to the landlords and that may be roughly described as a premium for the granting of the kudivaram which no doubt was in perpetuity. They gave a promissory note for the amount and the question is whether the debt—because it undoubtedly was a debt—was a mere personal debt affecting the makers of the promissory note or whether it is a charge on the land. In the view that we take of this case the further question, which arose at the trial, viz., whether the 3rd and 4th defendants were bona fide purchasers for value without notice, does not arise. It is no doubt true that there is a direct decision in England, *Shepherd v. Beetham*(1), a decision of MALINS, V.C., which treats a premium as creating a lien upon the leasehold premises. Whether that decision is correct or not, we are not concerned to enquire, although it does seem certainly an astounding result. But, in our opinion, in India the matter is entirely regulated by statute. There is a fundamental distinction under the Transfer of Property Act between a transfer of immovable property and a transfer of the right to the enjoyment of immovable property; and a lease is defined by section 105 of the Transfer of Property Act as a transfer of a right to enjoy immovable property made for a certain time, express or implied, or in perpetuity, in consideration of the price paid or promised

(1) (1877) 6 Ch.D., 597.

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or of money, etc. It is perfectly clear, therefore, that the Transfer of Property Act regards a lease in perpetuity as merely a transfer of the right to enjoy property. Does it or does it not create a charge upon the land? The answer is that the only charge, valid in Indian Law, on landed property, is to be found in the section of the Act which creates such a charge and section 55 is obviously confined to cases which deal not merely with the transfer of the mere right of enjoyment but with the transfer of the property itself, for, for any other lien or charge, the Act makes no provision at all. In our opinion we are bound to hold that we cannot but regard the Act as intended to be exhaustive and that we are not at liberty to follow English Common Law rules. On this ground we think the appeal fails and must be dismissed with costs.

KRISHNAN, J.—The question, that arises for our decision, in this case, is, whether, when the owner of a land grants a perpetual lease of it in consideration of rent to be paid, as well as a premium, he has got a charge on the leasehold right he has so created for the premium so payable.

The promissory note in this case was executed for such a premium and it is now sought in appeal before us to be enforced not against the makers of the note nor against the persons who took the lease but against certain third parties who have now become transferees or assignees of the lease right. Against them the amount of the note could be claimed if at all, only if there is a charge created in favour of the landlord on the property in their hands.

The English Law is apparently that such a lien does exist; but it is not necessary to consider that position here, for, we are concerned only with the Indian Law on the point. The appellant has to show us how he

gets the charge. The document by which the lease was created gives him no charge whatever for the amount. Therefore the charge must be rested by him upon the general law of this country. Now so far as appears, the only lien that is recognized in the Transfer of Property Act in this country is a lien in favour of the vendor. That being so, a strenuous effort was made by the appellant's vakil to persuade us that the grant of a lease like this really amounted to a sale or transfer of a fractional right in the property for a price, namely, the premium payable for the grant and he argued that as vendors of that right the plaintiffs have a charge on the leasehold estate which has been given to defendants 1 and 2. It is impossible to accept this view for the Transfer of Property Act makes a very clear distinction between a sale and a lease. This is a transaction that falls clearly within the definition of a lease in the Transfer of Property Act, section 105. I do not see how then it could be brought under the definition of a sale. The payment of premium is only one of the incidents of the lease, just as payment of rent is. It is certainly not a price paid for the transfer of immovable property as defined in section 54 of the Transfer of Property Act. It is impossible, it seems to me, to hold that the relationship between the plaintiffs and defendants 1 and 2 was anything but that of a lessor and a lessee. Apart from the Transfer of Property Act, it has not been shown that there is any common law in India on which the right of lien claimed could be founded. It is true that in one of the decisions brought to our notice, viz., *Kandasami Pillai v. Ramasami Mannadi* (1), there is an observation by the then learned CHIEF JUSTICE that a lien like that which exists in England

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(1) (1919) I.L.R., 42 Mad., 203.

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may be claimed here. But that observation cannot be treated as authority as it is only an *obiter dictum*, of the learned Judge. When that case came on appeal before three other learned Judges of this Court, those learned Judges held that the principles of equity in England could not be introduced into India for purposes of creating rights of parties like the one in question. The view of the CHIEF JUSTICE cannot be treated as of weight after the expression of opinion by the appellate Judges. There is no other decision which has been brought to our notice where such a lien has been recognized in India.

I am therefore entirely in agreement with the learned CHIEF JUSTICE in holding that whatever the position may be in England, we are not justified in introducing new conceptions of charges in India which are not supported by our Statute Law. When the Estates Land Act was passed, the legislature had to consider what kind of charges should be given to the landholder on a leasehold estate. That was the only instance in which the legislature dealt with a lien of the kind claimed and there we find that the lien was not allowed—see section 25 of the Estates Land Act. It seems quite clear that such a lien as is now set up cannot be supported. In the result, the appeal and all the second appeals must be dismissed with costs.

K.R.

APPELLATE CIVIL.

Before *Mr. Justice Kumaraswami Sastri and
Mr. Justice Krishnan.*

SALAKSHI AMMAL (PLAINTIFF), APPELLANT,

v.

DORAIMANIKKA NADAN AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Hindu Law—Will—Charity—Trustee—Will by father, creating a charity and appointing his undivided sons hereditary trustees—Trustees, whether joint tenants or tenants-in-common—Subsequent partition—Non-division of trusteeship—Right of widow of one of the sons of testator to joint management of charity with surviving son.

Where a Hindu father founded a charity under his will, endowed it with his self-acquired properties, and directed under the will that his two sons, who were members of an undivided family, should “enjoy them hereditarily and conduct the charities,” without alienating or partitioning such properties, and subsequently the latter effected a partition of their estate but in respect of the charity the partition deed provided that they “should act in common as stated in the will,” and after the death of one of the sons leaving a minor son who also died leaving his mother, the latter claimed the right to manage the charity jointly with the surviving son of the testator,

Held, that, under the will, the testator’s sons were in respect of the trusteeship joint tenants and not tenants-in-common;

and that, consequently, the widow of the deceased son of the testator was not entitled to claim joint management of the charity along with the surviving son of the testator.

APPEAL against the decree of A. P. P. SALDANHA, the Subordinate Judge of Tanjore, in Original Suit No. 78 of 1922.

The father of the first defendant and one Kandasami Nadan, the deceased husband of the plaintiff, executed

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* Appeal Suit No. 324 of 1923.

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a will, on 9th January 1899, under which he founded certain charities and endowed it with some of his self-acquired properties; he directed under his will that his two sons, who were members of an undivided family, should manage the charities hereditarily. The material portions of the will were as follows :—

“The lands mentioned herein as relating to the said charities should not in any way be alienated by the above-mentioned two persons (meaning his sons) or their heirs by means of sale, *othi*, hypothecation, security, partition, etc., but they should enjoy them hereditarily and conduct the above-mentioned charities.”

After the death of the testator, the two sons were conducting the charity and subsequently effected a partition of their estates under a deed, dated 23rd October 1913, which provided in respect of the charity properties as follows :—

“In respect of the charity properties mentioned in the D schedule, we shall act in common, as stated in the will.”

One of the sons (Kandasami Nadan) died in 1914 leaving a minor son Rajappa who died in 1917 unmarried leaving the plaintiff (his mother) as his heir. The plaintiff instituted this suit for a declaration that she was entitled to joint management of the charities along with the first defendant and for other reliefs. The Subordinate Judge, who tried the suit, dismissed the suit. The plaintiff preferred this appeal.

T. M. Krishnaswami Ayyar for appellant.

A. Krishnaswami Ayyar and P. S. Chandrasekhara Ayyar for respondents.

JUDGMENT.

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KUMARASWAMI SASTRI, J.—This appeal arises out of a suit which relates to the trusteeship of a charity founded under the will of one Sappanimuthu Nadar who died leaving two sons. The material portion of the

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will so far as it relates to the trust properties runs as follows :—

“The lands mentioned herein as relating to the said charities should not in any way be alienated by the abovementioned two persons or their heirs by means of sale, *othi*, hypothecation, security, partition, etc., but they should enjoy them hereditarily and conduct the abovementioned charities.”

After the death of the testator, his two sons were conducting the charities. One of the sons died leaving a minor son who died leaving the plaintiff, his mother, as his heir. This suit is filed by the plaintiff who was the widow of one of the deceased sons and whose right is as mother of her son for a declaration that she is jointly entitled as trustee to conduct the management of these properties.

The defence is that on the death of her son the first defendant who was the only male member of the undivided family was entitled to the office and that plaintiff has no right to succession.

The Subordinate Judge dismissed the suit on the preliminary ground that the plaintiff had no right as the office was a joint office and that the first defendant was entitled on the death of his brother and brother's son. After the testator's death there was a partition deed executed between the two sons which it is necessary to consider before dealing with the contentions raised. This deed refers to properties which they got under the will and so far as the trust properties are concerned the only reference to them is in clause (6) which runs as follows :—

“In respect of the properties mentioned in the D schedule, we shall act in common as stated in the will.”

The question is, having regard to the terms of the will, whether the two sons of the testator took the trusteeship and the management as members of a joint family or whether each of them took separate interests

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in it as tenants-in-common. So far as gifts by a father of self-acquired property to his sons by will are concerned, the decisions of this Court are to the effect that in the absence of a contrary intention expressed or implied from the terms of the will the sons must be presumed to take the property as joint tenants. The reason is that in the case of a grant to two persons who form members of a joint family, the ordinary presumption is that the grant to them is as co-parceners. I may refer to *Nagalingam Pillai v. Ramachandra Tevar*(1), *Yethirajulu Naidu v. Mukunthu Naidu*(2), *Venkataramaiah Pantulu v. Subramaniam Pillai*(3), *Indoji Jithaji v. Kothapalli Rama Charlu*(4), *Raja of Ramnad v. Sundara Pandiaswami Thevar*(5). There is no doubt a conflict of authority between the various High Courts on this question. The view taken in Allahabad and in Bombay is that where property is given to persons without stating what interest they are to take, they are to take as tenants-in-common. This question as to the presumption to be raised in cases of gifts by a father to his sons recently came before the Privy Council in the case of *Lal Ram Singh v. Deputy Commissioner of Partabgarh*(6) and their Lordships state the rulings of the various High Courts. As regards Madras authorities this is what their Lordships say:

"In Madras, upon the whole, the view seems to be that the father can determine whether the property which he has so bequeathed shall be ancestral or self-acquired on the principle of *huges as dasi Hughes es disponeri* and that, unless there is an expression of his wish that it should be deemed self-acquired, it is ancestral."

The Privy Council summarized the Madras decisions as stating that, where the father does not state that the

(1) (1901) I.L.R., 24 Mad., 429.

(3) (1914) 16 M.L.T., 489.

(5) (1914) 27 M.L.J., 694.

(2) (1905) I.L.R., 28 Mad., 363.

(4) 1919) 10 L.W., 498.

(6) (1923) I.L.R., 45 All., 596 (P.C.).

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sons shall take the property as if it was self-acquired property of the sons, it is to be deemed to be ancestral in their hands; or, in other words, that, unless a tenancy-in-common can be inferred from the grant, the presumption is that they are joint tenants. I do not think that, in this state of the authorities, I can go behind the decisions though my attention has been drawn to a recent decision in O.S.A. No. 56 of 1922 where Mr. Justice RAMESAM seems to doubt the correctness of 24 Madras 429. It was an *obiter dictum* so far as the O.S.A. was concerned and I do not think that so far as Madras is concerned the question can be set at rest except by a decision of the Privy Council. The question is how far the doctrine in these cases which relates to property bequeathed by a father to his sons would apply to cases where the father creates a trust and appoints his sons as trustees with hereditary rights. On principle I can see very little difference between the conferring of the office of trustee as regards a trust founded by the father by dedication of properties and the gift of properties to the sons. No authority has been cited which creates a difference merely by reason of the difference in the powers of the donees. In the case of properties given to them absolutely of course they will have full powers of alienation; in the case of a trust they would have such powers as the law gives the trustee. The nature of the estate taken either in the property or in the trust must in my opinion be the same. And I may also say that in the case of a trust the leaning of English authorities is in favour of joint tenancy. Trustees are treated as joint tenants with rights of survivorship. This is the principle enunciated in the Trust Act. So far as the present will is concerned, reading the will as a whole I find there is nothing to show that the testator intended his sons to take the office of trustee as

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tenants-in-common. On the contrary the words in the will that they should not partition, or sell the properties but they should enjoy them hereditarily suggest that he wanted them to take them with all the incidents of joint family property.

As regards the partition it seems to me that the two brothers when they divided did not intend to divide the office; they expressly leave the office to be controlled by the will and, if they wanted to divide the office to the extent to which the law allows a division, they would certainly have fixed some turns of management, each brother managing it for a turn. The question as to what the rights and liabilities of the brothers or their heirs would have been had there been such a division of management is not free from difficulty. But it is unnecessary for us to go into that question, because in the present case there has not been such a division and we are to look to the will to see what their rights are. Returning to the will, they take the right to management as joint tenants. There has been no partition between the brothers of this office nor is there any suggestion in the pleadings that after the death of one of the brothers there has been such a severance either by conduct or otherwise between the widow and the first defendant, the surviving brother. It is therefore unnecessary to go into the question whether *Meenakshi Achi v. Somasundaram Pillai*(1), which has been referred to by Mr. T. M. Krishnaswami Ayyar, rightly lays down the law if there was a partition. As there has been no partition of the office and as the first defendant is the sole surviving male member of the family, I think the plaintiff has no right to manage the property along with the first defendant. The right survives to him

(1) (1921) I.L.R., 44 Mad., 205.

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alone. In the view I take the learned Subordinate Judge was right in dismissing the suit. The appeal fails and is dismissed with costs.

KRISHNAN, J.—This appeal refers to a charitable trust founded by one Sappanimuthu Nadar. The trust has been created by a will which has been filed in the case as exhibit A. Under that will he made his two sons who were the only other members of the joint family of himself and his sons the trustees of the trust. The words creating the trust are cited in the judgment of my learned brother just now delivered and I need not refer to them again. There is an express provision there that the properties are not to be alienated or even partitioned but that the two brothers were to take the properties jointly and enjoy them jointly and carry out the provisions of the trust which are set out. Subsequent to the death of Sappanimuthu Nadar there was a partition between the two brothers and that partition is evidenced by Exhibit B which has also been filed in the case. One of the brothers, Kandasami Nadar, died subsequently leaving a minor son called Rajappa Nadar. He also died and the plaintiff Salakshi Ammal who is his mother and the widow of Kandasami Nadar succeeded to a woman's estate in the properties which had fallen to the share of Kandasami. She has brought this suit to have it declared that she was entitled jointly with the first defendant, the surviving brother, to manage this trust estate. The Subordinate Judge before whom the case came on for hearing, has dismissed the suit without taking any evidence except the two documents already referred to, Exhibits A and B. He has held that the first defendant is the sole surviving trustee now and that the plaintiff has no right to manage the trust. The plaintiff has appealed to us.

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It has been argued before us very strenuously by Mr. T. M. Krishnaswami Ayyar that this decision is erroneous, that the right of trusteeship was vested in the brothers as tenants-in-common and that on the death of one of the brothers his right passed to his heirs, first to his son and then to that son's mother, the plaintiff. It is that question we have to consider in this appeal.

The partition-deed, Exhibit B, which has been referred to, has really no bearing on the case; because, when partitioning the family properties between the two brothers by Exhibit B, they expressly reserved the trust properties from the partition, for they say in paragraph 6:

"in respect of the charity properties mentioned in the D schedule (that is the charity properties dealt with in the will), we shall act in common as stated in the will."

So that, as far as the partition-deed was concerned, the arrangement in the will was left intact although the parties divided their family estate otherwise. For the disposal of this case therefore we have only to look to the will and see what arrangement has been made under the will for the purpose of carrying on the trust after the death of one of the persons named in the trust. The question therefore whether *Meenakshi Achi v. Somasundaram Pillai*(1) is rightly decided or not is not before us at all. It would have been before us if the two brothers had attempted by their partition-deed to divide the trust office or made some arrangement regarding it between themselves. Such a thing not having been done, we need not consider the question as to whether a trust office is partible at all between the trustees. Turning now to the wording of the will, it seems to me quite clear that on the words of the will the two brothers were constituted trustees of this

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charity as joint tenants and not as tenants-in-common as argued by Mr. T. M. Krishnaswami Ayyar. The ordinary presumption as regards trustees is that they are joint tenants; for, both under the English law and under section 44 of the Indian Trusts Act, on the death of one trustee all the rights of the trustees rest in the surviving trustees. As pointed out by my learned brother, the cases that he has referred to show that in Madras the view is taken that, when a father makes a gift of or bequeaths self-acquired property of his to his children who are members of a joint family, the ordinary presumption is that they take that property as joint tenants and not as tenants-in-common. It was suggested that this view was not a correct view but it has been followed in so many cases that until the Privy Council decide to the contrary I am inclined to think that we should follow that view. It is true that Mr. Justice RAMESAM has expressed a doubt about the correctness of the ruling in *Nagalingam Pillai v. Ramachandra Tenar*(1), in his judgment in O.S.A. No. 56 of 1922, but that is not a sufficient basis for us to refer the question to a Full Bench as, after all, that doubt is expressed as an *obiter dictum*. Assuming then that, in the case of a gift by a Hindu father, who has sons who are members of a joint family, the presumption will be that the property is taken by the sons jointly, the presumption will be all the greater in the case of trust property as trustees are ordinarily to be treated as joint tenants. Here in this will it is clear that the author of the trust (the father) intended that the charity property should be kept intact and be enjoyed jointly by the trustees and their heirs. In these circumstances there is no difficulty in holding that the rule of succession as

(1) (1901) I.L.R. 24 Mad., 429.

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regards joint property in a Hindu family must apply, and that when one trustee dies the members of the joint family will take the trusteeship according to the law of survivorship. That will exclude the claim put forward by the plaintiff who is only a female member of the joint family. I therefore agree with my learned brother in thinking that the Subordinate Judge was right in the view he has taken of this case and that the plaintiff's appeal fails and must be dismissed with costs.

K.R.

APPELLATE CIVIL.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice
and Mr. Justice Krishnan.*

1925,
January 22.

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REFERRING OFFICER

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CHENGALVARAYA CHETTI AND ANOTHER, ASSESSEES.*
*Income-tax Act XI of 1922—Trade gain or loss in each year—
Method of calculation.*

If the market value of certain goods bought by a trader in the beginning of a certain year gradually becomes lower than the cost price during the course of the year and the trader therefore submits an income-tax return showing that his trade had a loss during that year and gets exemption from tax for that year from the authorities who accept the market value as put by him, the value that the trader should put for the opening balance of his remaining stock in trade at the beginning of the next year is not their original cost price but the lower market value accepted by the authorities as ruling at the end of the previous year. If on the basis of such lower valuation there is a profit at the end of the second year, the trader must pay

* Referred Case No. 16 of 1924.

income-tax on such profit, though taking both the years together there might be a net loss in trade at the end of the second year.

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Income-tax for a particular year is calculated upon a proper estimate of profit and loss only of that particular year.

CASE stated under section 66 (3) of the Indian Income-tax Act by D. N. Strathie, Commissioner of Income-tax, Madras, in his letter No. 1414, dated 15th October 1924, in pursuance of the Order of the High Court, dated 15th August 1924, on the Mandamus application of S. Chengalvaraya Chetti and S. Munusami Chetti.

The facts of the case are as follows:—The assessees who were trading in certain piece-goods bought yarn and caused country cloths to be made out of them in the year 1921. For the twelve months ending 12th April 1922 they submitted an Income-tax return in which they put the cost price of each piece of cloth at the beginning of the year at Rs. 13-8-0 and the selling price at the end of the tax year at Rs. 6 a piece. This account was accepted by the income-tax authorities who levied no tax on the assessees in that year as their accounts showed a loss. Then in the return submitted by the assessees for the next twelve months ending 12th April 1923, the assessees calculated the value of the stock in trade remaining on 13th April 1922, at Rs. 13-8-0 a piece, and on that basis showed a loss at the end of the second year also, though the market value of each piece was Rs. 8-8-0 at the end of the second year. The income-tax authorities claimed that the value to be put on the opening balance of the remaining stock in trade at the beginning of the second tax year should be Rs. 6 a piece and not Rs. 13-8-0 and that as the assessees derived a profit on that basis at the end of the second year they should be assessed on that profit. The assessees' answer to this claim was that taking the transactions even of the two years together the trade

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ended in a loss. As the assessee's request to the Income-tax authorities to state a case to the High Court under section 66 of the Income-tax Act, XI of 1922, was not complied with, the assessee filed a petition for a Mandamus in the High Court to call upon the income-tax authorities to state a case to the High Court. On that petition, His Lordship Mr. Justice KUMARASWAMI SASTRI ordered the Income-tax authorities to state a case for the decision of the High Court under section 66 (3) of the Act. While making the order, His Lordship framed the following question of law as arising in the case and asked the Income-tax authorities to submit their opinion on the points arising in the question of law so framed. The question so framed is as follows:—

“Whether where a man has been carrying on one business which is a losing concern and he had not sought to set off loss against any other business he carries on which ended in a profit and no such advantage has been obtained, the mere fact that for the purpose of showing that he has made no profit for the year he gave the market value at the close of that year should be deemed conclusive against him even though he got no advantage by the form in which he has submitted his income-tax return and whether he should be deemed to have made a large profit while as a matter of fact he has incurred a large loss.”

In forwarding their statement of the case and their opinion on the points arising on the question of law, the Income-tax authorities adhered to their opinion that the assessee should value their opening balance of the stock remaining at the beginning of the second year at Rs. 6 a piece and that they were rightly assessed for that year as having made a profit.

M. Patanjali Sastri for the Commissioner of Income-tax.

A. Suryanarayana for the Assessee.

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COUTTS TROTTER, C.J.—This is a case in which my learned brother, KUMARASWAMI SASTRI, J., directed the Commissioner of Income-tax to state a case for the opinion of the High Court under section 66 of the Income-tax Act.

The learned Judge did something further which the section does not provide for; he framed the question which he supposed to arise from the facts as set out in the Commissioner's report. With great respect to the learned Judge, I do not think that the question he framed was the real question raised in the case, and I think that the question as he has framed it is so beset with assumptions and begged questions that it would be impossible to decide fairly what the real point in this case is by any answer that could be given to the highly involved question he formulated.

The facts here are very simple. The assessee are a firm of piece-goods merchants in this City and they keep their books and render their accounts to the income-tax authorities in what is known generally as the mercantile system of accounts. It is obviously a very rough and ready method; but it is the one that they have adopted and the one that the income-tax authorities are prepared to accept (provided they are satisfied with the honesty of the items set out) as giving sufficiently, for practical purposes, an accurate figure on which they can assess income-tax. The method is this: You set out on the debit side your opening stock and add to that the purchase of stock made during the year, you then set out on the contra side of the account the sales during the year and then you add to that the value of the stock on hand at the close of the year. Then, of course, you add to the debit side the establishment charges and the interest, if any,

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paid to creditors and so forth during the year. I should add that the accepted rule is that the assessee in crediting the closing stock figure is to take either the cost price or the market value whichever be the less—a provision obviously intended to be in favour of the trader and which enables him more evenly to distribute his loss.

Now for the year April 1921–22 an account was rendered on that footing and it showed a trading loss during the year of one lakh and accordingly these people were not assessed to income-tax at all. The loss arose in this way; they started their year with 12,570 pieces which were valued at what no doubt was taken to be the cost price, viz., Rs. 13–8–0 a piece, and at the end of the year there was left on their hands a balance of 7,573 pieces, and in accordance with the then market rate, those pieces were valued down to Rs. 6 a piece. The result was a trading loss of just over a lakh and I ought to remark, because it has a bearing on what I am going to say later, that if those goods had been put down at Rs. 13–8–0 a piece, their cost price, there still would have been a trading loss of some Rs. 45,000; so that the assessee really stood to gain nothing if the figure of Rs. 6 was an undervaluation. Now comes the next year. In that year they start off their debit side to stock on the 13th of April 1922, 7,573 pieces at Rs. 13–8–0 a piece by which means they work out a loss of Rs. 15,000 and odd. The contention of the income-tax authorities is that the stock on the opening of the account must be put at the same value as it was put as stock left on hand on the other side of the previous year's account. That seems so obvious that one must scrutinize carefully what is said against it.

The question framed by the learned Judge ends up with the statement

“Whether he should be deemed to have made a large profit, while, as a matter of fact, he has incurred a large loss.”

That begs so many questions that I really hardly know how to deal with it. The question is not whether a man has made a loss from the beginning to the end of his dealings with certain goods, but whether he has made a loss or a profit during the current year's trading, having regard to how he started and how he ended up. Of course, if you had to take it, that he could go on year in and year out writing off all this loss against the cost price, no matter how old the pieces left on hand you might reach almost any result. What he does is this. He writes down at the end of the year his goods at the value at which they stand in the market, as he had to adopt the system of account in vogue. That gives him in certain cases a benefit—there is always a provision, which is intended for his benefit, that his losses in other branches can be set off. The principle, if it can be called a principle, contended for by the assessee would enable him, having cut his loss in one year, to go on claiming to deduct the same loss year in and year out and I cannot illustrate the absurdity of that better than by the hypothetical case that I put in the course of the argument. Supposing in the year 1921–22 the assessee had underwritten his loss with a firm of underwriters—I believe there are underwriters who will guarantee trading losses—and at the end of the year he goes to his underwriters and says:—“I bought at Rs. 13–8–0 a piece; this stock was worth Rs. 13–8–0 a piece at the beginning of the year; it is now worth Rs. 6; Rs. 7–8–0 is my loss; please pay me Rs. 7–8–0; I do not know what defence the underwriters would have to that claim. Suppose that he goes again next year to the underwriters with the same purpose of having his trading loss underwritten, what are the

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underwriters going to say if he says that the value of the same stock is Rs. 13-8-0 a piece? The underwriters would say; we paid you yesterday a partial loss on the footing that these goods had deteriorated to Rs. 6 a piece now you again value them at Rs. 13-8-0; of course, the first observation is that no underwriter would accept such a valuation. If through accident or misapprehension as to the identity of the goods, he got a second policy, and sued upon it, the defence of the underwriters would be "gross over-valuation," and to that defence it seems to me that the assured has no answer. He would be getting more than an indemnity. I cannot see that the principle is in the least different because you are dealing between the trader and the Government instead of between the trader and his underwriters. The question is, what in the proper mercantile sense is his loss or profit in the year? Appeals *ad misericordiam* are beside the point. The question is not so much of law but of business common sense. But there is a principle involved which determines the legal position, and I think the answer is clear that, as the value of the stock on the 13th of April 1922 was in fact and in truth Rs. 6 a piece, the assessee is not entitled to reduce what are truthfully called his profits by putting the fictitious value of Rs. 13-8-0 a piece on the stock-in-trade merely because that was the sum he happened to pay for it before the year of assessment. In my opinion, to allow this to be done would be to let the assessee ascertain not his profit or loss, but to debit himself with the same loss on the same goods *in toto* for perhaps a course of years. That cannot be permitted. If these goods had been valued at Rs. 6 and the market had gone down to say Rs. 4 he would of course be entitled in this trading year to treat the difference between Rs. 6 and Rs. 4, i.e., Rs. 2 as another loss justly debited to this year. But

in the event of the price going up above the market rate at the beginning of the year which we must take as an accurate valuation, the difference is his profit.

In our opinion, the answer that we should return to the question is that the assessee, having elected in the previous year to value his stock at the market price of Rs. 6 a piece for the purpose of showing his trade loss during that year, is not entitled in the succeeding account to revert to the purchase price figure as representing the value of the goods, but is bound by the market price which he has fixed and been assessed on in the previous year unless he can show that he made a mistake as to the market value. Perhaps the simplest way of putting it is to say that the trader made a profit in this year, but it was not a profit sufficient to compensate him for his loss in other years.

Each party will bear his own costs in this Court. Costs in the lower Court will be paid by the assessee to the Government as directed by the learned Judge; Vakil's fee Rs. 50 (Rupees fifty).

KRISHNAN, J.—I agree with what has fallen from my Lord the learned Chief Justice in this case except that I would add that the learned Judge who made the reference was not wrong in stating what in his opinion was the question of law that should be considered in this case, for a reference can be directed only on a point of law. It is difficult, however, to understand what exactly the learned Judge thought should be decided in this case. The question stated by him is put in such a form that, taking the hypothesis involved in it, it is impossible to give any answer except in the negative. That is not a fair way of framing a question. It should be so framed as to leave to the Court which afterwards hears the reference to decide the matter on the facts

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stated by the Commissioner of Income-tax who makes the reference.

The particular case before us is a very simple one. The assessee had a large stock of piece-goods, 12,570 pieces, at the beginning of 1921 which he says he bought at Rs. 13-8-0 per piece. At the end of the year the value of these goods fell in the market to Rs. 6 per piece according to his own statement. In submitting his statement to the income-tax authorities for the year April 1921 to March 1922 (Exhibit A) he has taken into account the falling price in the market for the whole stock in calculating his loss for the year though he had not sold all the stock. He has treated the remaining stock in his hand at the end of the year, 7,573 pieces, as being worth only Rs. 6 a piece and on that footing he has estimated his loss. In the next year instead of taking that stock as being worth Rs. 6 at which he valued it the day previous to the beginning of the year he valued it at Rs. 13-8-0 again and on that footing he has estimated his loss. He contends before us that, in fact, he made no profit over the transaction taken as a whole, that is, out of the 12,570 pieces he purchased, if the total selling value which he realized is taken into consideration, he has really lost money. That may be so. The question is whether we ought to take that into consideration and hold that though he had in his statement of account for the previous year elected to treat his loss on the whole of the 12,000 and odd pieces by the fall in the market price as a loss that occurred that year he should be allowed again to say the next year that the real loss occurred on the balance stock when that stock was sold that year. I do not think he can be allowed to do so. The learned vakil argues that if the loss which his clients had incurred on the sale of the goods be split up and only the loss incurred on the stock which

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he sold in the year 1921 had been taken for the purposes of the statement for that year, he would still have made a loss for that year and the income-tax authorities would not have been able to levy any tax on him. That may be so, but we cannot take it into consideration at all. Having elected to treat his loss as having occurred in the year 1921-22, he cannot be allowed to treat it again as a loss in the next year also. It will not do to allow him to re-open the previous return and newly distribute the loss between the two years. It may be an advantage to do so in this case, but it would more often be a disadvantage to the assessee to do so. Having been allowed to treat his loss as one on the stock in hand the previous year, he cannot be allowed again to treat it as a loss on the sales in respect of the same stock the next year. That is the only point that really arises in this case. I entirely agree with the learned Chief Justice in the answer that he has proposed to give to the income-tax authorities that we consider that they were right in treating the second year's statement as erroneous in putting Rs. 13-8-0 as the initial value of the stock he had on hand and that he was only entitled to put Rs. 6 as the value of that stock. This is not a case really of the assessee having made no profit for the second year, for that entirely depends upon how the calculation is made. If he starts the second year with stock worth Rs. 6, the value he has put on it at the end of the previous year and if he sell it at Rs. 8-8-0 as he seems to have done, there is manifestly a profit.

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APPELLATE CIVIL.

Before Mr. Justice Phillips.

[On a difference of opinion between DEVADOSS and
WALLACE, J.J.]1925,
April 29.NAWAB SHUJA-UL-MULK BAHADUR (1ST RESPONDENT—
1ST DEFENDANT), APPELLANT,

v.

UMIR-UL-UMRA BAHADUR AND OTHERS, PETITIONERS 1, 2
AND 4—(PLAINTIFFS 1, 2 AND 4), RESPONDENTS.**Civil Procedure Code—(V of 1908), Section 48—Decree for
money—Decree to recover money from A in the first instance
and in case of failure, to recover from B—Limitation—Appli-
cation for execution against B after twelve years after decree.**Held, by Phillips, J. (on a reference under section 98, Civil
Procedure Code, owing to a difference of opinion between DEVA-
DOSS and WALLACE, J.J.) that where a decree directs that money
be recoverable from a party only on failure to recover from
another party, execution of the decree becomes barred against
the former after twelve years from the date of the decree, as
provided by section 48, Civil Procedure Code. *Khulna Loan
Company v. Jnanendra Nath Bose*, (1917) 22 C.W.N., 145 (P.C.),
followed. *Aiyasamier v. Venkatachela Mudali* (1917) I.L.R., 40
Mad., 989 (F.B.), not followed.*APPEAL against the order of J. C. H. FOWLER, District
Judge of Kurnool, in E.P. No. 12 of 1922 in O.S. No. 17
of 1901.

The facts and arguments are given in the Judgment.

L. S. Viraraghava Ayyar for appellant.

N. Swaminatha Ayyar for K. V. Krishnaswami Ayyar
for respondents.DEVADOSS, J. DEVADOSS, J.—The main question argued in this
appeal is whether the execution of the decree in plaintiffs'
favour is barred by reason of section 48 of the Code of

* Appeal against Order No. 413 of 1923.

Civil Procedure. The District Judge has held that the execution application is not barred by limitation and the 1st respondent in the lower Court has preferred this appeal. The decree in O.S. No. 17 of 1901 was passed by the District Court of Kurnool on 30th March 1904. It was confirmed by the High Court on 17th January 1907. The defendants in that suit were the trustees of a religious and charitable institution. The defendants were removed from the office of trustees, and the 1st defendant was directed to pay the plaintiff's costs and in case the plaintiff was unable to obtain the costs from the 1st defendant, he was to recover them from the income of the trust property. Attempts were made by the plaintiff to recover the costs from the 1st defendant, and he recovered only a portion and a considerable amount now remains to be recovered. The plaintiff's legal representatives have now applied for execution against the income of the religious and charitable institution, namely, the Darga. The contention of Mr. Viraraghava Ayyar for the appellant is that the decree being more than twelve years old is incapable of execution by reason of section 48, of the Code of Civil Procedure. Section 48, clause (1), is in these terms:—

“Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from (a) the date of the decree sought to be executed, or (b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the appellant seeks to execute the decree.”

The decree in this case being a decree for money, and there being no time fixed after which the plaintiff was to proceed against the Darga property, it is urged, the application after twelve years from the date of the decree

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is barred under section 48. The District Judge following *Aiyasamier v. Venkatachela Mudali*(1) and *Narayana Aiyar v. Singaravelu Vannian*(2), held that the remedy against the income of the Darga was available to the plaintiff only after he exhausted his remedies against the 1st defendant, and therefore the plaintiff had twelve years' time from 1915 when he failed to get the amount from the 1st defendant.

Under the Civil Procedure Code of 1882, section 230 a decree for payment of money became barred after twelve years from

(a) "the date of the decree sought to be enforced or of the decree on appeal affirming the same, or (b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date—the date of the default in making the payment or delivering the property in respect of which the applicant seeks to enforce the decree."

Under the old Civil Procedure Code attempts were made to get over the twelve years' period by showing that the decree was not a decree merely for money. In *Vaidhinadasamy Ayyar v. Somasundram Pillai* (3), it was held that

"a decree directing the sale of mortgaged properties in default of payment of money is a decree for money, whether there is a direction to pay personally or not and whether the remedy against the property is exhausted or not. Such decrees will be money decrees under sections 230, 258 and 295 of the Civil Procedure Code although they will not be so under sections 220 and 222 of the Code."

Under the present Code there is no distinction made between a decree for money and any other decree. Section 48 is clear in its terms, and no distinction therefore could be made between a decree for money and any other decree. The section provides for decrees whereby money is made payable on or after a certain date or

money is payable by instalments and for cases of recurring liability as in the case of decrees for maintenance, etc. The question, therefore, is whether a decree which does not come within one of the exceptions to the twelve years' rule in section 48 can be executed after the expiry of twelve years from the date on which it was passed or affirmed by the Appellate Court. The argument advanced for the respondent and which has found favour with the lower Court is that the decree against the income of the Darga was unexecutable till the remedy against the 1st defendant was exhausted. The terms of the decree are against such a construction. All that the decree says is

"in case of failure to recover the costs from the 1st defendant, the same shall be recovered from the income of the trust property."

Can it be said in this case that the plaintiff has 12 years from the date of the decree for pursuing his remedy against the first defendant, and, on failure to realize the amount from him, he could proceed against the income of the Darga for another twelve years? Where the decree does not specifically mention the period after which the decree becomes executable against a particular individual or institution, the decree is deemed executable from the date on which it is passed: supposing a decree directs the principal debtor to pay the decree amount and that on the failure of the plaintiff to recover it from the principal debtor, he should be entitled to proceed against the surety, it cannot be said that the creditor has twelve years' limitation against the principal debtor and another twelve years against the surety. The decision in *Aiyasamier v. Venkatachela Mudali*(1), which was followed in *Narayana Aiyar v. Singaravelu Vannian*(2), no doubt,

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(1) (1917) I.L.R., 40 Mad., 989 (F.B.).

(2) (1917) 33 M.L.J., 543.

(3) (1905) I.L.R., 28 Mad., 473 (F.B.).

(1) (1917) I.L.R., 40 Mad., 989 (F.B.).

(2) (1917) 33 M.L.J., 543.

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supports the contention of the plaintiff to some extent. In *Aiyasamier v. Venkatachela Mudali*(1) a Full Bench held that

"where a mortgage decree provides for recovery of any balance from the other properties of the mortgagor in case the sale-proceeds of the mortgaged properties are found insufficient to satisfy the entire decree amount, the decree holder has, under section 48 of the Civil Procedure Code, twelve years for the recovery of such balance reckoned from the time when it is ascertained to be due."

ABDUR RAHIM, Officiating Chief Justice, observed at page 997 :

"When the reliefs given in respect of those rights are distinct and enforceable at different periods of time, then, for purposes of execution, there is in fact, more than one decree, though embodied in one document. In such cases, it is only reasonable to hold that the date of the decree sought to be executed within the meaning of section 48, clause (a) of the Code of Civil Procedure, may not be what it bears on its face. It is the date when the particular adjudication sought to be enforced becomes ripe for execution according to the terms of the decree."

This observation is as regards a mortgage decree whereby the other properties of the mortgagor could be proceeded against only after exhausting the remedy against the mortgaged properties. In the present case who is to determine whether all the remedies against the 1st defendant have been exhausted? The decree simply says that in case of failure to recover the costs from the 1st defendant, the same be recovered from the income of the trust property. It is not a condition precedent in this decree that all the remedies against the 1st defendant should be exhausted before the income of the property could be proceeded against. This case on the facts is distinguishable from the decision in *Aiyasamier v. Venkatachela Mudali*(1). But the authority of the Full Bench decision in *Aiyasamier v. Venkatachela*

(1) (1917) I.L.R., 40 Mad., 989 (F.B.).

Mudali(1) has been considerably shaken by the decision of the Privy Council in *Khulna Loan Company v. Jnanendra Nath Bose*(2). There the same point as was under consideration in *Aiyasamier v. Venkatachela Mudali*(1) was the subject of decision. The Calcutta High Court disallowed the contention that the decree should be read as directing the payment of money at a certain date, that is, after the mortgaged properties had been sold. The learned Judges observed :

"The terms of section 48 seem to us to be perfectly clear, and according to that section time runs from the date of the decree. The date of the decree is fixed by Order XX, rule 6, and we cannot understand how there can be any other date of the decree from which limitation should run. It has been suggested that this case may be regarded as one in which the decree directed the payment of money to be made at a certain date, namely, after the mortgaged property had been sold. It appears to us that a direction of such a kind would, certainly, not be a direction to pay money at a certain date. The date would not be certain."

On appeal to the Privy Council, the judgment of the Calcutta High Court was affirmed. In the course of the argument the learned counsel for the appellant urged the very same argument that was put forward in *Aiyasamier v. Venkatachela Mudali*(1). He submitted it was not an effective decree as it could not be enforced until all the mortgaged properties had been sold, and time therefore did not begin to run against the appellant from the date of the decree. The law required that two decrees ought to be made :

"The appellants are entitled to twelve years from each decree, that is, from the decree for sale as well as the decree under section 90."

Lord DUNEDIN, in delivering the judgment of their Lordships, simply stated :

(1) (1917) I.L.R., 40 Mad., 989 (F.B.).

(2) (1917) 22 C.W.N., 145 (P.C.)

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"Their Lordships did not see any reason to differ from the judgment of the High Court in this case."

It is suggested for the respondents that this decision has not been reported in the Indian Law Reports and therefore it is not binding on us. The Indian Law Reports Act, Act XVIII of 1875, section 3, is in these terms :

"No Court shall be bound to hear cited, or shall receive or treat as an authority binding on it, the report of any case decided by any of the said High Courts on or after the said day, other than a report, published under the authority of the Governor-General in Council."

This Act has no application to a decision of the Privy Council, and, therefore, we are at liberty to refer to an unauthorized report of the decision of the Privy Council and, if we are satisfied that it is a correct report, we are bound to follow it. The point was specifically raised before the Privy Council, and their Lordships overruled the contention of the appellant. This decision of the Privy Council was followed in *Baranashi Koer v. Bhabadeb Chatterjee* (1). In *Ramshvar Singh v. Homeshvar Singh* (2) there was no executable decree against Ekra-deshvar on the date it was passed. As observed by their Lordships :

"The decree against Ekra-deshvar could not have been executed without a further application. This application could not have been made till Ekra-deshvar had come into possession of the property of Janeshvar, and by article 191 in the schedule to the Limitation Act, the period of limitation for making an application is three years from the time when the right to apply accrues."

In the present case no fresh decree need be passed against the Darga as the decree of 1904 enables the plaintiff to proceed against its income on his failure to recover the decree amount from the first defendant.

(1) (1922) 68 I.C., 758.

(2) (1921) 40 M.L.J., 1 (P.C.).

It is contended by Mr. K. V. Krishnaswami Ayyar for the respondents that there was no executable decree against the income of the Darga till the remedy against the first defendant was exhausted. He contends that the Privy Council case, even if it be an authority, cannot apply to the present case, as the mortgagor was only one person against whom the decree was passed, though the mortgaged property was to be proceeded against in the first instance and afterwards his other properties were to be proceeded against. I do not think the Privy Council decision can be explained away on this basis. Whether the decree is against one person or more than one person, unless a time is fixed for proceeding against any particular person, limitation under section 48 would begin to run from the date of the decree and not from any other date.

It is also contended that time should be calculated only from the date of the decree which is sought to be executed, namely, the decree against the Darga, in other words that the decree consists of two decrees, one against the first defendant and the other against the Darga. Whether the remedy is against one or more persons is immaterial so long as no time is fixed for the execution of the decree against the particular individual. The mere fact that, in the first instance, the first defendant should be proceeded against and on failure to recover the amount from him the income of the Darga property should be proceeded against is not tantamount to fixing a particular date, after which alone the decree against the Darga could be executed. If such a contention is tenable the question would arise: When was the failure to recover the costs from the first defendant? and what amounts to a failure to recover costs from the first defendant? I do not think such a contention is tenable in the absence of a specific date in the decree after which

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alone it is to be executed against the particular individual or institution.

In *Gopaldas v. Tribhawan*(1) it was held that the application for execution of a mortgage decree more than twelve years after the passing of the decree absolute was barred by section 43 of the Civil Procedure Code. In that case the main argument was that the decree was under the Code of 1882 and that section 48 did not apply to a decree passed under the old Code. A bench consisting of the learned CHIEF JUSTICE and FAWCETT, J., held that that contention was untenable. MACLEOD, C.J., observed at page 376 :

"It would have been better if the attention of holders of mortgage decrees had been drawn to the alteration made by section 48 of the Code of 1908, so that they might have been able to realize that no fresh application for execution could be entertained after the expiry of twelve years from the date of their decrees."

In that case the defendant's counsel did not raise the contention that the mortgage decree-holder had twelve years' limitation from the time the mortgaged property was sold for proceeding against the other properties of the mortgagor.

The case in *Aiyasamier v. Venkatachela Mudali*(2) was decided in August 1916 and the decision of the Privy Council in *Khulna Loan Company v. Jnanendra Nath Bose*(3) was on 21st June 1917. The decision of the Madras High Court does not seem to have been brought to the notice of their Lordships ; but that is no ground for holding that the decision in *Aiyasamier v. Venkatachela Mudali*(2) is a proper enunciation of the law on the subject. I therefore hold that the plaintiffs' application for execution is barred under section 48 of the Civil Procedure Code.

(1) (1921) I.L.R., 45 Bom. 365.

(2) (1917) I.L.R., 40 Mad., 989 (F.B.).

(3) (1917) 22 C.W.N., 145 (P.C.).

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The next contention on behalf of the respondents is that the order was made on 3rd March 1916 for payment of the amount due in three instalments and the application therefore is in time. Under Order XX, rule 11, the application is to be made to the Court which passed the decree within six months and the order could be made only with the consent of the decree-holder. But the application to pay in instalments was made long after the passing of the decree ; and from the order of the District Judge it does not appear that the plaintiffs consented to receive the amount in three instalments. It is not necessary to consider this in detail.

WALLACE, J.—I regret that in this case I have not WALLACE, J.
been able to agree with my learned brother.

It is clear that a narrow interpretation of the strict terms of section 48, Civil Procedure Code, places great difficulties in the application of the section to particular cases. If the decree is not executable except on the happening of certain contingency and that contingency does not happen until after twelve years, is the decree a waste paper ? Or to take an illustration given by SADASIVA AYYAR, J., in *Aiyasamier v. Venkatachela Mudali*(1), when a compromise decree is passed making a certain sum payable to a minor girl on her marriage and she does not marry until after twelve years from the date of decree, is the decree a waste paper ? In the case of such decrees, it is clear that the decree itself implies that there shall be a subsequent order or direction by the Court that the time for executing the decree has arrived and that from that date the decree is executable and time will begin to run. Such an order need not perhaps be explicit, although it will be better if it were so ; but it certainly is implicit.

(1) (1917) I.L.R., 40 Mad., 989 (F.B.).

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The Court in deciding whether such a decree was time-barred, would enquire first, whether twelve years had run from the date when the decree became executable; that is, it would decide as on what date the decree became executable and then begin to compute the twelve years from that date. This is on the well-known principle that a decree which cannot be executed cannot be time-barred. The Courts would stultify themselves if they administered justice on the theory that a party will be barred from a relief because he did not seek it during a period when it was not open to him to seek it.

In order to reconcile this principle with the strict wording of section 48, Civil Procedure Code, some learned Judges have at times held that the phrase "sought to be executed" in clause 1 (a) indicates that the date has to be ascertained with reference to the time when the decree becomes capable of execution. Other learned Judges have held that the word "certain" in clause 1 (d) means "that which may be rendered certain." I would suggest that the difficulty may be resolved by giving a liberal interpretation to the words "or any subsequent order" in clause 1 (b). Clearly such subsequent order must be one contemplated by the decree. But if the decree requires such subsequent order to be made before the date on which the money is to be paid or the property is to be delivered becomes certain, and if that date is not certain without such order, then limitation will begin to run from the date of such order. The order becomes in a sense a decree within a decree. It would be passed naturally by the Court which passed the decree acting as such and not by the Court executing the decree (see *Jurwan Pasi v. Mahabir Dhar Dube*(1)). Such an order, as instanced in that case, would be an order under Order

XX, rule 11, Civil Procedure Code. But I can see no reason why the phrase should be confined to such orders. In the case of a decree on the face of it not immediately executable, there ought to be a subsequent order declaring it to be now executable.

If the decree directs payment on a certain contingency happening, there ought to be a subsequent order declaring that that contingency has happened. If the decree is not executable against a certain person until and unless a certain contingency happens, there ought to be a subsequent order declaring that that contingency has happened and fixing the date of its occurrence. Such subsequent order will direct the payment of money or delivery of property to be made at a certain date, and clause 1 (b) will then apply in terms.

The decree now before us declared that the trust was only liable if and when the first defendant failed to satisfy the decree personally and to the extent to which he so failed. This implies that, before the trust can be made liable, there must be a further order of the Court, implicit if not explicit, that the first defendant has failed by some particular date to satisfy the decree, and laying down to what extent he has failed. Only then has the right to execute the decree against the trust accrued, and only then, on the general principle laid down above, does the decree become executable against the trust and limitation begins to run against the decree-holder in respect of that relief. This principle is clearly not affected by the fact that the decree was immediately executable in some other form or against some other person. When the decree-holder has been prevented by the decree itself from seeking his remedy in the form in which, or against the person against whom, he now wishes to seek it, then the decree itself implies that there must be a subsequent order removing this bar to execution in the desired form, before

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(1) (1918) I.L.R., 40 All., 198.

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the decree-holder can have the right to execute it in that form or against that person. The decree-holder, when he comes to execute against the trust is in substance, although perhaps not in form, asking for an order that his remedy against the trust has opened, and it is the duty of the Court to consider whether it has so opened, that is, whether there is a failure of the first party to satisfy the decree, before it allows the decree-holder to pursue his remedy against the trust.

It is clear also, I hold, that in the case of a decree like the one now before us, it must be the Court and no one else who is to be the Judge when the second remedy provided for in the decree has opened, that is, in this case, when the failure of the first party to satisfy the decree occurred. It cannot be the decree-holder because it would be always open to the second party against whom execution was sought to contend that the decree-holder had not exhausted his remedies against the principal party or that the principal party was colluding with the decree-holder against him and therefore it was impossible to say that there had been as yet any failure to satisfy the decree, and an executing Court would certainly not permit the decree-holder to execute against the second party until he has satisfied the Court that the principal party has failed to satisfy the decree, and that there is no further reasonable hope of his being able to satisfy it. Therefore it must be left to the Court to decide between these conflicting views. That is only to say that the subsequent order of the Court which the decree implies must be a judicial order. The Court will further enquire whether the decree-holder has been diligent in coming forward to enforce his remedy against the second party, diligent both in enforcing his remedy against the first party and diligent in coming forward to obtain an order, implicit or explicit, that his remedy

against the second party has now opened. Unless the decree-holder at once diligently executes his decree against the principal party, his remedy against the second will not accrue, and the ordinary twelve years' rule will apply. But if owing to circumstances not under his control—some obstruction to execution which he has to surmount—he is unable, say for some years, to pursue to the end his remedy against the principal party, so that his diligent and *bona fide* pursuit of his remedy against the principal party occupies, say, twelve years, from the date of the decree, then, unless the view I indicate prevails, he is deprived of the very remedy against the second party which he obtained by his decree.

I would hold therefore that in a case like the present the decree-holder's remedy against the second party accrued not on the date of the decree but on the date of the failure of the first party to satisfy the decree, which date must be fixed by an order of Court, and that limitation begins to run in respect of that remedy from the date of that order. Such order would, in my view, have the effect of a fresh decree directing the payment of money by the second party to be made from the date of its order, and section 48 would apply to it as such; that is, twelve years' limitation for the relief against the second party will run from the date of such an order.

An analogous case would be that of a mortgage decree which provides for recovery of any balance from the other property of the mortgagor in case the sale-proceeds of the mortgaged property are insufficient to satisfy the entire decree amount. In such a case a Full Bench of this Court has held that when the reliefs given in respect of rights under a decree are distinct and enforceable at different periods of time, then for purpose of execution there is in fact more than one decree although embodied in one document, and that the

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decree-holder has, under section 48, twelve years from the time when such balance is ascertained to be due, thus implying a subsequent order of the Court declaring on what date that sum was ascertained to be due. It must be admitted that the authority of this decision has been shaken by a later Privy Council case, *Khulna Loan Company v. Jnanendra Nath Bose*(1), a case reported with disconcerting brevity but it would appear that the Subordinate Judge in that case dated the twelve years from an order under section 90 of the Transfer of Property Act. This was an appeal from the Calcutta High Court which had followed the view that if the decree originally provided for realization of the balance from the other property of the judgment-debtor, an order under section 90 of the Transfer of Property Act was not necessary, (see *Lalla Tirhini Sahai v. Lalla Hurrak Narain*(2),) and in any case it was an order in execution and not an order in the suit. It may be that the High Court in that case held that the *terminus a quo* of section 48 could not be an order *in execution*, and therefore held the application for execution barred, and that their Lordships of the Privy Council who give no reasons for their judgment followed that line of reasoning. I do not think that report is full enough for us to conclude that that ruling has reversed the principle of our Full Bench ruling. It may be noted that another Privy Council ruling in *Rameshvar Singh v. Homeshvar Singh*(3), holds with reference to an interpretation of article 182 of the Limitation Act that in the case of a decree not executable except on the happening of a particular contingency, time will not begin to run until that contingency occurs. If the ruling in *Khulna Loan Company v. Jnanendra Nath Bose*(1), really means that in all cases of

(1) (1917) 22 C.W.N., 145 (P.C.).

(2) (1894) I.L.R., 21 Calc., 26.
(3) (1921) 40 M.L.J., 1 (P.C.).

decrees, whether immediately executable or not, the decree is to run from its date, that will conflict with the principle of this ruling, since in that case the decree may become time-barred before it ever becomes capable of being executed. *Narayan v. Timmayya*(1), a case of a decree against a principal and a surety does not assist. The decision there turned on the question whether where the decree-holder might proceed either against the principal or against the surety, execution proceedings against the former will avail to save the bar of time against the latter. *Narhar Raghunath v. Krishnaji Gevind*(2), is somewhat analogous to the present case as the personal remedy against the judgment-debtor only came into force on the happening of a certain contingency and the Court held that limitation began to run from the happening of that contingency. The decision in *Maharaja of Benares v. Lalji Singh*(3), does not seem to me to assist and I do not think it necessary to dwell on other cases cited before us.

My general conclusion then is that what is essentially required before limitation begins to run in a case of this kind is an order of the Court stating that the decree-holder's right to execute against the second party has either accrued from a fixed date from which time will begin to run against him in the matter of that supplemental execution or that it has not accrued at all. In the present case there is no such order and I think it is essential that there should be such an order. The lower Court has not adopted the proper principle in deciding that the right accrued in 1915. It fixes that date merely because the decree-holder chose then to abandon his remedy against the first defendant, and to seek his remedy against the trust, that is, it has allowed

(1) (1907) I.L.R., 31 Bom., 50. (2) (1912) I.L.R., 36 Bom., 368.
(3) (1912) I.L.R., 34 All., 636.

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the decree-holder himself to decide when his right to proceed against the trust began. I am clear that that is not the proper way in which the case should be decided. I would hold therefore that the lower Court's order is not correct and that the case will have to go back to the lower Court being the Court which passed the decree for a fresh decision on the principle laid down above (1) as to whether the plaintiff's right to execute the decree against the trust has accrued, (2) if so, on what date it accrued and (3) whether calculating limitation from that date the decree is, or is not, time-barred.

By Court.—In view of the difference of opinion, for a disposal of the appeal, we think that the preliminary point should be referred to another Judge under section 98, Civil Procedure Code.

"Where a decree directs that money be recoverable from a party only on failure to recover from another party, does the execution of the decree become barred against the former after twelve years from the date of the decree?"

PHILLIPS, J. This appeal coming on for hearing before PHILLIPS, J., the Court delivered the following

OPINION.

The question

"Where a decree directs that money be recoverable from a party only on failure to recover from another party, does the execution of the decree become barred against the former after twelve years from the date of the decree?"

has been referred to me under section 98 of the Code of Civil Procedure owing to a difference of opinion between two learned Judges of this Court. The material portion of the decree in this case is,

"that first defendant do pay to plaintiff his costs of the suit Rs. 1,129; that in case of failure to recover these costs from first defendant the same be recovered from the income of the trust property."

The question put in the above form has not been definitely answered in any reported decisions, but a very similar question is the subject of conflicting decisions. That similar question is whether when there is a decree directing sale of mortgage property and, in default of the decree amount being realized, directing payment by the mortgagor, the decree is capable of execution more than twelve years after its date. It was held by a Full Bench of this Court by a majority of the Judges that the twelve years for enforcing the personal remedy against the mortgagor will run from the date of the sale of the mortgage property—*Aiyasamier v. Venkatchela Mudali*(1). The same point was considered by the Calcutta High Court and it was held that the twelve years ran from the date of the decree—*Jnanendranath Bose v. Khulna Loan Company, Ltd.*(2). The Calcutta case went up to the Privy Council on appeal and the decision of the High Court was affirmed—*Khulna Loan Company v. Jnanendra Nath Bose*(3). In the present case the two referring Judges do not appear to agree as to whether the decision of the Privy Council has the effect of overruling the Full Bench ruling of this Court, DEVADOSS, J., holding that it does do so and WALLACE, J., concluding that it does not do so. The reason given by WALLACE, J., is that the report is not full enough to enable him to decide that the principle of the Madras Full Bench ruling has been reversed, but I must observe that, although the judgment of the Privy Council is very brief, it states that their Lordships do not see any reason to differ from the judgment of the High Court. As they use the word "Judgment" and not "Decree" I think it is clear that they adopt the reasoning contained in the judgment of the Calcutta High Court,

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(1) (1917) I.L.R., 40 Mad., 989 (F.B.). (2) (1913) 18 C.W.N., 492.
(3) (1917) 22 C.W.N., 145 (P.C.).

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and consequently we must accept the principle there laid down. The decision is based on the terms of section 48 of the Code of the Civil Procedure, and on the fact that the date of the decree being fixed by Order XX, rule 7, there can be no other date for the decree. This was one of the main points relied upon by me in my dissenting judgment in *Aiyasamier v. Venkatachela Mudali*(1), where I held that a decree can only bear one date and that therefore under section 48, twelve years must be calculated from that date. It is argued that the decision of the Privy Council on this point is considerably affected by a later judgment (*Rameshvar Singh v. Homeshvar Singh*(2)) where it was held that in the case of a decree not executable, except on the happening of a particular contingency, time will not begin to run until that contingency occurs. This decision has reference to Article 182 of the Limitation Act and not to section 48 of the Code of Civil Procedure, but I think it can be distinguished on another ground, namely, that it deals with a decree which was wholly unexecutable on the date it was passed. In the present case, and in the case of mortgage decrees, the decree is undoubtedly executable, at least in part, on the date of the decree, and consequently so far as that part is concerned, the twelve years under section 48 must undoubtedly run from the date of the decree itself. If the legislature had intended that in such a case a further period of limitation should commence from the date when the second portion of the decree became executable, I think it would have said so, for there is a provision in section 48, 1 (b), that where a decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring

(1) (1917) I.L.R., 40 Mad., 589 (F.B.). (2) (1921) 40 M.L.J., 1 (P.C.).

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periods, the date of the default in making payments or delivery in respect of which the applicant seeks to execute the decree is to be the date from which the twelve years is to run. Therefore in a mortgage decree and other decrees like the present it may well be open to the Court to pass a subsequent order declaring that the second portion of the decree had become executable, and directing execution to proceed, and such an order would come within the meaning of the subsequent order referred to in section 48, 1 (b). In the present case, the decree directs payment of the costs by the first defendant, and that in case of failure to recover these costs from the first defendant, the same be recovered from the income of the trust property. It would therefore have been open to the plaintiff to ask the Court for a declaration that the costs could not be recovered from the first defendant and for an order directing payment out of the trust property, in which case undoubtedly a further period of limitation would begin under section 48, 1 (b). It is pointed out with some force by DEVANOSS, J., in his order of reference that it cannot be said that under the decree the plaintiff has twelve years to pursue his remedy against the first defendant and a further twelve years against the trust property. Section 48 provides an unqualified prohibition of the execution of the decree after twelve years from its date, unless certain specified circumstances exist, and consequently I do not think that it is open to Courts to extend that period, which after all is a very long period, unless the provisions of section 48 are strictly complied with.

The other cases cited for and against the proposition do not materially further the determination of the question before me. In *Ramana v. Babu*(1), it was held

(1) (1914) I.L.R., 37 Mad., 186.

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that, in executing a decree which had left the question of mesne profits to be determined in execution, an application to determine the profits, made after twelve years from the date of the decree was barred under section 48. In *Venkata Perumal v. Prayag Dossjee*(1), a bench of this Court followed the Calcutta ruling in *Jnanendranath Bose v. Khulna Loan Company, Ltd.*(2), in preference to the ruling in *Narhar Raghunath v. Krishnaji Govind*(3). The case in Bombay was not one of mortgage decree, but was determined on the principle that the twelve years' period under section 48 runs only from the date when the decree became in all its parts ripe for execution. This was the view taken by the majority of the Full Bench in *Aiyasamier v. Venkatachela Mudali*(4). As I have pointed out above, this is not in accordance with the judgment of the Privy Council and appears to contemplate the proposition that a decree can bear two separate dates, the first being the date of the decree, on which it can be partially executed, and the second date being the date on which the right to apply for execution of the latter portion falls due. This latter principle is not at all supported by the ruling in *Khulna Loan Company v. Jnanendra Nath Bose*(5).

In view of all these circumstances I must answer the question referred to me in the affirmative.

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(1) (1915) 29 I.C. 556.

(3) (1912) I.L.R., 36 Bom., 388.

(2) (1918) 18 C.W.N., 492.

(4) (1917) I.L.R., 40 Mad., 989 (F.B.).

(5) (1917) 22 C.W.N., 145 (P.O.).

APPELLATE CRIMINAL.

Before Mr. Justice Wallace and Mr. Justice Madhavan Nair.

THE PUBLIC PROSECUTOR, MADRAS,
APPELLANT.

v.

KIMIDI ANNAN NAYUDU AND OTHERS (ACCUSED),
RESPONDENTS.*

Penal Code (Act XLV of 1860), sec. 353—P.W.D. lascar, if a public servant.

A P.W.D. lascar is a public servant within the meaning of section 353 of the Indian Penal Code and persons guilty of assaulting him, while engaged in distributing water from an irrigation channel, are liable to be convicted under this section.

APPEAL under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by P. NARASINGA RAO, Stationary Sub-Magistrate of Palakonda, in Calendar Case No. 348 of 1923 on his file.

The facts necessary for this report are set out in the judgment.

Public Prosecutor for the appellant.

B. Jagannadha Das for respondents.

The judgment of the Court was delivered by

WALLACE, J.—This is an appeal by Government against WALLACE, J. the acquittal of five accused persons who were charged with offences under sections 186 and 353 of the Indian Penal Code. The appeal as regards the former charge is not pressed, and we are concerned only with the offence under section 353, Indian Penal Code.

The prosecution case was that P.W. 6, a P.W.D. lascar, went to enforce an agreement regarding the

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* Criminal Appeal No. 326 of 1924.

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distribution of water for irrigation between the two villages of Gattamangalapuram and Chinnamangalapuram, which both take water from the Venkamma channel; that, on a complaint from Gattamangalapuram people that Chinnamangalapuram people had deprived them of their agreed turn, he went to open the sluices for Gattamangalapuram, but when he went and got into the channel to open the doors,—apparently the sluices were plank sluices,—the accused set upon him and pushed him down into the channel and threatened to beat him and take away his life. The accused were tried by the Stationary Sub-Magistrate of Palakonda and acquitted. The grounds of acquittal are: first that a P.W.D. lascar is not a public servant within the meaning of section 353, Indian Penal Code; secondly, that, even if he is, this lascar was not discharging the duties of his office at the time of the assault; and thirdly, that the Gattamangalapuram people were not entitled to water that morning. The Public Prosecutor challenges each of these three points.

As to the first point, we think the lower Court is clearly wrong. The definition of a public servant in section 21 of the Indian Penal Code, in which sense of course the words are used in section 353, includes every officer in the service or pay of Government. A P.W.D. lascar, it is clear from G.O. No. 840 W., dated the 28th March 1893, is a person carried on the regular establishment of the Public Works Department. His duties are various, he taking his orders generally from the local overseer. The accused contend that, even so, he is not an officer, and referred us to a case in *Reg. v. Ramajirav Jivbajirav*(1) which restricts the meaning of the word "Officer" to a person employed to exercise

(1) (1875) 12 Bom. H.C.R., 1.

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to some extent a delegated function of Government. But even that ruling extends the definition to one whose duties are immediately auxiliary to those of some one armed with authority from Government. The case, *The Queen v. Nachimuthu*(1), does not help the accused, as that was a case of a carter temporarily employed by the Public Works Department. In *Nazamuddin v. Queen Empress*(2), a Bench held that the dictum in 12 Bombay High Court Reports is too narrow and that a salt peon, whose duties were not defined but whose general duty was to carry out the orders of his superior officer, was a public servant. If then the lascar in the course of his duties was carrying out a function of Government, namely, the distribution of water from public irrigation channels—and we think he clearly was—undoubtedly he is Government for the purposes of that particular function, and is therefore a "public servant."

[Their lordships then proceed to discuss the evidence bearing on the question, whether the lascar was acting within the scope of his duties at the time of the alleged assault, and come to the conclusion that he was:—]

The prosecution witnesses are agreed that accused 1 and 2 pushed the lascar down and that accused 3, 4 and 5 threatened him with sticks. There is no reason to disbelieve these witnesses, especially the independent evidence of the lascar, who has no motive for complaining falsely against the accused. Accused 1 and 2 have attempted to prove an *alibi* but the evidence is much too vague for proof. We are satisfied that all these accused did use criminal force to the lascar who is a public servant while he was acting in the discharge of his duties. They have therefore committed an offence

(1) (1884) 1 L.R., 7 Mad., 18.

(2) (1901) 1 L.R., 28 Cal., 344.

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under section 353 of the Indian Penal Code. We therefore reverse the acquittal of these accused and convict them of an offence under section 353 of the Indian Penal Code.

As regards the sentence, in view of the long delay in presenting the prosecution case, and the time which has now elapsed since the offence, a heavy sentence is not called for, particularly as this case had been brought up chiefly as a test case in order to obtain a ruling as to the legal position of P.W.D. lascars. We think it is sufficient to impose a fine of Rs. 20 each on the accused; and do so accordingly, and we direct further that, in default of payment, they will undergo simple imprisonment for two weeks.

Two weeks time after receipt by the lower Court of this judgment will be granted to the respondents within which to pay the fine in the lower Court.

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APPELLATE CRIMINAL.

Before Mr. Justice Srinivasa Ayyangar.

B. R. RAMANUJA CHARARIAR (ACCUSED), PETITIONER,

v.

T. V. KAILASAM IYER (COMPLAINANT), RESPONDENT.*

Local Boards Act (Madras Act XIV of 1920), ss. 159 and 207—Encroachment—Notice to remove—Non-compliance—Limitation for prosecution—Non-compliance with fresh requisition, whether constitutes a fresh offence—Plea of previous acquittal.

A prosecution under section 159, read with section 207 of the Local Boards Act (Madras Act XIV of 1920), for non-compliance with a requisition of the local authority to remove an obstruction must be instituted within three months of such

* Criminal Revision Case No. 605 of 1924.

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non-compliance as provided by section 223 and this period cannot be extended by making a fresh requisition upon the defaulting party.

A fresh offence is not committed in respect of the same subject-matter every time the local authority repeats the requisition and the accused fails to comply with it, and therefore the accused can set up the plea that he had been previously prosecuted and acquitted in respect of the same offence, as a bar to the prosecution.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of R. NANJUNDA AYYAR, Stationary Second-class Magistrate of Mannargudi, dated 11th August 1924, and made in C.C. No. 166 of 1924, and to quash all proceedings in the said C.C. No. 166 of 1924.

The facts are set out in the judgment.

V. L. Ethiraj for the petitioner.

C. Kunkhiraman for the respondent.

JUDGMENT.

The petitioner in this case was charged before the Stationary Second-class Magistrate of Mannargudi with an offence under section 159 read with section 207 of the Local Boards Act (Madras Act 14 of 1920). He raised a plea in bar of the prosecution on the ground that for the same offence he was previously charged in C.C. No. 215 of 1923 on the file of the same Court, that the complaint was then withdrawn by the local authority and that the order of acquittal then passed by the Magistrate under section 248 of the Criminal Procedure Code was a bar to the present prosecution. The learned counsel for the District Board of Tanjore has contended before me that according to the scheme of the Act the offence consisted not in the encroachment alleged to have been made by the accused but in his failing to comply with any direction lawfully given to

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him within the terms of clause (c) of section 207 of that Act and that therefore the local authority was entitled again and again to give notice under section 159 and every time the conditions in the notice were not complied with there would be an offence committed by the person to whom such notice is given. There is a very fatal objection to the maintainability of such a contention. Under section 223 of the same Act it is provided that

"No person shall be tried for any offence against the provisions of this Act or of any rule or by-law made under it unless complaint is made by the police or the president of a local board, or by a person expressly authorized in this behalf by the local board or its president within three months of the commission of the offence."

The contention of the learned counsel for the District Board of Tanjore comes to this; that it is within the powers of the local board to extend the period of limitation prescribed by section 223 by giving fresh notice and construing the disobedience of each of such fresh notices as amounting to an offence under section 207. To construe it in that manner would obviously be to defeat the principle underlying the provisions of section 223. I take it that the real principle underlying that section is that it should not be within the power or province of a local authority to molest and annoy persons by prosecutions which are not promptly undertaken by the local authority. If this view is correct it follows that the original offence was at any rate committed on the expiry of the first notice given by the local authority to the accused. The prosecution therefore was liable to be launched within three months of that date, and, as the present prosecution is undertaken long after the expiry of three months from that date, the present complaint is not sustainable.

Even apart from this, there is another objection to the maintainability of the present prosecution. There

has been an acquittal by a competent Court in respect of the offence charged against the accused in the year 1923. If it was an offence not to comply with and carry out the directions of the notice issued by the local authority in the year 1923 and if of that offence the accused was acquitted, he cannot possibly be tried again for the same offence, and I cannot read the sections of this Act as contemplating different offences being committed in respect of the same subject-matter every time the local authority chooses to give a fresh notice and launch a prosecution. My attention has been drawn to the second clause of section 207 which provides for enhanced sentence in the case of persistent or old offenders. That has, however, nothing to do with the question what is the offence that is contemplated by the Act for which a penalty is provided. It is no doubt true that section 159 of the Act is not very happily worded. Taking a common sense view of the provisions of section 159, it seems to be clear that the real offence in such cases is the wrongful encroachment that is committed by the person. The notice referred to in the section is in a sense merely in the nature of a condition precedent to the prosecution and all that the Act says is that no one should be prosecuted straight away simply because he has committed or is deemed to have committed an act of encroachment, but the Act requires that some notice should be given to him and that he should be prosecuted if, even after such notice, he fails to remove the encroachment. No doubt, the contention that it is merely a failure to comply with the direction contained in the notice can be advanced, having regard to the terms of section 207 of the Act; and having regard to those terms, it is impossible to say that the offence is complete even before any notice is given, because the legislature clearly treats as an offence only a failure to

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comply with the terms of the notice. But, taking the real nature of the acts said to constitute the offence and the terms of all the sections, it is clear that an offence within the meaning of the Act comes to be committed at any rate on the expiry of the notice by which the person is called upon to remove the encroachment and fails to do so within the time limited in the notice. It will be against all principle to hold that, even though a person commits an offence by thus disobeying the terms of the notice, he should be deemed to commit a fresh offence every time the local authority chooses to give a fresh notice calling upon him to remove the obstruction. In any view, therefore, the present prosecution cannot possibly be sustained, and I must therefore hold that the Sub-Magistrate was wrong in the view taken by him that the plea in bar was not valid. In my judgment the plea is not only valid but sound and in that view the complaint should be dismissed and I direct accordingly.

D.A.R.

APPELLATE CRIMINAL.

Before Mr. Justice Srinivasa Ayyangar.

1926,
January 15.

MANIKKA PADAYACHI AND OTHERS (ACCUSED), PETITIONERS,

v.

KING EMPEROR.*

Criminal Procedure Code (Act V of 1898)—Sec. 436—Revision against order of discharge—Some of the accused not made parties to the revision petition—District Magistrate setting aside order of discharge and committing all the accused to the Sessions—Legality—Grounds for committing to the Sessions—Sec. 209 (1).

* Criminal Revision Case No. 241 of 1924.

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Where, upon a revision petition, filed by the complainant under section 436 of the Code of Criminal Procedure, against an order of discharge, making only some of the accused respondents, the District Magistrate set aside the order of discharge and committed to the Sessions all the accused including even those who were not parties to the revision petition and had no notice of it,

Held, that the order so far as it related to the accused who were not parties to the revision petition was irregular and should be set aside.

Held further, that whenever the evidence is of such a nature that the guilt of the accused can be held to be proved or disproved only as the result of the valuing and weighing it by him, the Magistrate must commit the accused to the Sessions; but if the evidence be of such a nature that no reasonable person would ever on that evidence hold the accused guilty he must be discharged under section 209 (1).

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of P. MAQUEEN, District Magistrate of Trichinopoly, dated 29th January 1924, in Criminal Revision Case No. 28 of 1923 preferred against the order of S. KUPPA RAO, First-class Magistrate of Udaiyarpalaiyam taluk, dated 5th November 1923, in P.R. Case No. 1 of 1923.

The facts necessary for this report are set out in the judgment.

V. L. Ethiraj and K. P. Raman Menon for the petitioners.

Public Prosecutor on behalf of the Crown.

JUDGMENT.

I am asked in this Criminal Revision Case to revise the order of the District Magistrate of Trichinopoly by which under the provisions, as I take it, of section 437 of the Criminal Procedure Code (and not 436 as it appears in the papers) he directed, setting aside the

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order of discharge passed by the First-class Magistrate of Udaiyarpalaiyam, that all the accused in the case be committed for trial to the Sessions Court of Trichinopoly.

The order of the First-class Magistrate of Udaiyarpalaiyam was passed as the result of the inquiry into the case which was triable by a Court of Session and under the provisions of section 209, clause 1 of the Criminal Procedure Code. The learned District Magistrate has in his order set out as follows:—

“I direct that under section 136, Criminal Procedure Code, the accused be committed for trial for the offences, for which they have been charged. Warrants will issue for the arrest of the accused and their production before the Court of Session.”

This order was made by him on a Criminal Revision Petition filed on behalf of the first prosecution witness and the only persons who were made respondents to the petition were accused 1 to 13 and accused 18 and the prayer was that those respondents should be arrested and ordered to be committed for trial before the Sessions Judge of Trichinopoly. The other accused in the case, namely, accused 14 to 17 and 19 to 23, were not made respondents to that petition, and no notice appears also to have been ordered to or served upon them. In these circumstances, it must be fairly clear that the order of the District Magistrate to the effect that all the accused should be arrested and committed for trial to the Sessions Court without excluding accused 14 to 17 and 19 to 23 from the scope and operation of the order was due merely to a mistake, but none the less serious, so far as those accused were concerned. As those accused, namely, accused 14 to 17 and 19 to 23 were not respondents to the Criminal Revision Case and were not required to be committed for trial under the petition the District Magistrate was considering and as in any

case they have had no opportunity of showing cause why an order of commitment should not be made against them also, the order of the District Magistrate so worded as to include them also is clearly wrong. The order therefore will be modified by substituting in the operative portion for the word “accused” the words “accused 1 to 13 and accused 18.” The other accused, namely, 14 to 17 and 19 to 23, if already arrested under the order of the District Magistrate, will be forthwith released and set at liberty. The order of commitment so far as the said accused 14 to 17 and 19 to 23 are concerned is also set aside. As regards the other accused, however, there is no such irregularity in the order of the District Magistrate and they were, further, parties—respondents to the Criminal Revision Case filed before him and it was after hearing them that the learned District Magistrate has passed the order in question.

The learned counsel here Mr. Ethiraj has contended before me that the order of the District Magistrate directing their commitment also was wrong and should be set aside. He based his contention on two grounds, firstly, that the District Magistrate erred in his view of the law regarding the duty and function of the committing Magistrate conducting the preliminary inquiry and, secondly, that in any case it was not on the merits a proper case in which the order of commitment should have been made.

It was thus argued before me on behalf of the petitioners that a Magistrate, conducting an inquiry under Chapter 18 of the Criminal Procedure Code, was bound to commit the accused for trial before the Court of Session only if in his judgment the evidence before him was such that if nothing else or nothing more were proved the accused should be convicted of the charge, or in other words that the Magistrate was entitled to discharge the

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accused if in his judgment the evidence produced before him was not conclusive of the guilt of the accused. The result of such a contention would undoubtedly make the inquiry before the Magistrate the first trial, and the proceedings before the Sessions Court the second trial of the accused. It was said that such was, however, the intention of the legislature because there was provision made in the chapter not only for the examination-in-chief of the prosecution witnesses but for their cross-examination, and re-examination, for the accused calling any witnesses they might choose, for the Court citing any witnesses of its own motion and so forth. This position was also sought to be supported by the learned counsel for the petitioners by reference to a number of decided cases, mostly of this Court.

It is clear from the Procedure Code that only one trial is contemplated and that the inquiry before the Magistrate in cases triable by a Court of Session is only in the nature of a preliminary inquiry. Sections 209 and 210 of the Criminal Procedure Code speak only of there being or not being sufficient grounds for committing the accused for trial. When the legislature speaks of sufficient grounds for committing for trial, it should not be supposed to have spoken of sufficient grounds for conviction, and similarly when the legislature speaks of there not being sufficient grounds for committing for trial, it should not be supposed to have spoken of there not being sufficient grounds for conviction.

It follows from this that the intention of the legislature clearly is to make a distinction between grounds for conviction and grounds for committing for trial. Satisfactory proof of the guilt of the accused is the ground for conviction. What then is the ground for committing for trial? Satisfactory evidence to go to trial must be regarded as the ground for committing for

trial. In fact, the expression in clause 2 of section 209 "considers the charge to be groundless" furnishes us with a clue as to the true meaning of the legislature. If the inquiring Magistrate on the evidence before him comes to the conclusion that the charge is groundless, then it is indicated that he should discharge and not commit for trial. For a charge being groundless, it is not necessary that there should be no evidence at all of the charge. That will be a case of there being no evidence of the charge at all and not a case of the charge being groundless. For all practical purposes it may be stated that a charge may be said to be groundless when the evidence adduced at the inquiry is such that no tribunal, judge or jury would ever on that evidence convict the accused. If no reasonable man, taking into consideration the evidence adduced in the case, could possibly on such evidence conclude that the accused was guilty, then it must be taken that the charge is groundless, and in such a case the duty of the inquiring Magistrate is clear to discharge the accused. From this therefore it follows that except in cases where the charge is found to be groundless that is to say, in other words where the evidence on the record is such that no tribunal, Judge or jury, would ever convict the accused on that evidence, the enquiring Magistrate is bound to commit for trial. I do not really understand that in any of the decided cases which were referred to before me in argument a substantially different view was really taken by any learned Judge. In the case of *In re Damappa Palai*(1), Justice SADASIVA AYYAR says that "where most of the important witnesses are totally unworthy of credit according to the Magistrate and where the case itself bristles with improbabilities, the Magistrate would be right in discharging the accused." And

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later on in the same judgment, the learned Judge refers to the Sessions trial in such cases being practically foredoomed to failure. I take it that the learned Judge was merely referring in other words to a case in which no tribunal would convict the accused on the evidence.

Again in the case of *Narasappayya v. Narasayya Shanbogüe*(1) Justice TYABJI states that what the Magistrate has to see is whether the prosecution has adduced such evidence as is not on the face of it absolutely incredible in regard to every ingredient of the offence that is charged. This differs, if at all, only in form from what I have said.

The case of *Karuppachakkili v. Palanisami Goundar*(2) does not relate to a case triable by a Court of Session and has therefore no bearing on the present question.

In the case of *In re Ponniah Tirumali Vardaya*(3) Justice KUMARASWAMI SASTRIYAR speaks of there being a *prima facie* case and the discretion of the Magistrate and his power to weigh the evidence. I cannot agree that the learned Judge intended to lay down anything more than that the inquiring Magistrate may discharge if he is of the opinion that the evidence relating to the guilt of the accused is most untrustworthy. It is significant that that learned Judge while speaking of a *prima facie* case also adds that it is not the business of the committing Magistrate to usurp the function of the Sessions Judge or the jury and in that respect that learned Judge speaks as in agreement with the observations of Justice BAKERWELL in the case of *The National Bank of India, Ltd. v. Kothandarama Chetty*(4).

(1) (1915) 13 Cr.L.J., 307.

(3) (1923) 23 Cr.L.J., 209.

(2) (1919) 20 Cr.L.J., 817.

(4) (1913) M.W.N., 728.

On the one side there is of course the extreme suggestion that the committing Magistrate is bound to commit if there should be any evidence whatsoever in support of the charge whatever the quantity or quality of such evidence may be. Equally there is the contention on the other extreme that the committing Magistrate is not bound to commit unless a *prima facie* case is made out. On the authorities and on the reason of the thing I have no hesitation in stating that both these extreme contentions are untenable. If it should be conceded that the committing Magistrate has no right to usurp the function of the Judge or Jury, that is, the function of trying the case itself and deciding whether or not the accused is guilty, it follows that what the enquiring Magistrate has got to try and determine is not whether the case has been made out but only whether there is a case for trial. It must be held that there is always a case for trial when the evidence is of such a nature that the guilt of the accused can be held to be proved or disproved only as the result of the valuing and the weighing of the evidence. But on the other hand if the evidence be of such a nature that no reasonable person and no tribunal Judge or Jury would ever on that evidence hold the accused guilty, it follows that there is no case for trial and it is then a case for the enquiring Magistrate to discharge.

Now in the case before me the enquiring Magistrate has no doubt written a long and considered judgment, but at the same time it is abundantly clear that he has really mistaken his function. If he had said that the evidence was of such a nature that no Court could possibly on that evidence regard the accused as guilty, I should not have hesitated to give effect to that opinion, more especially having regard to the fact that the Magistrate saw the witnesses and had an opportunity of

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judging of their credibility. But what he set himself to decide was not whether there was a case for trial or in other words whether there was any reasonable ground for the charge but whether the prosecution had made out the case set up. In paragraph 24 of his order he states thus :

"Some of the evidence on the side of the defence appears to be more probable. In the end I consider that the case against the accused has not been made out and accordingly discharge them under section 209, clause (1) of the Criminal Procedure Code."

It was not his province to decide whether the case had been made out by the evidence or not. All that he had to do was to find if the charge was groundless and if it was not, to commit the accused for trial. It is not merely a case in which the learned enquiring Magistrate has failed to appreciate his proper function in the case but the whole of his judgment and order would seem to be vitiated by a belief that he was there and then to decide, having regard to the credibility of the witnesses, their statements, etc., whether the case laid had been made out. I cannot consider that this was a proper course for him to take.

The order of discharge therefore being improper it follows that the District Magistrate was justified in interfering in revision. If I should, at the present stage, seek to go into the merits and express my opinion on the evidence, it may operate to the prejudice of the accused. If the order of discharge was wrong as having been the result of proceeding on a wrong principle, it follows that the District Magistrate was not only competent but justified in interfering and all that I am now concerned is to see whether the order of the District Magistrate is so clearly wrong as to call for my intervention. So far as the order of commitment made by the District Magistrate related to accused 14 to 17 and 19 to 23, I have

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already decided that the order was wrong and should therefore be set aside. As regards the other accused 1 to 13 and 18, not being satisfied that the order of the District Magistrate was clearly wrong, I do not feel called upon to interfere and with regard to those accused therefore the petition is rejected.

The accused 1 to 13 and 18 who have been committed for trial will be released on bail on their furnishing security to the satisfaction of the Subdivisional Magistrate of Udaiyarpalaiyam each in his own bond for Rs. 500 with two sureties for Rs. 250 each.

D.A.R.

PRIVY COUNCIL.*

VAITHIALINGA MUDALIAR AND OTHERS (PLAINTIFFS),

1925,
April 2.

v.

SRIRANGATH ANNI AND OTHERS (DEFENDANTS).

[And connected appeals.]

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
MADRAS.]

*Limitation—Suit for possession—Displacing apparent adoption—
Indian Limitation Act (IX of 1871), Schedule II, art.
129—Hindu Law—Widow's estate—Res judicata—Decree
against widow.*

In 1905, the reversionary heirs of a Hindu, who died in 1849 leaving a widow who survived until 1902, sued for possession of his estate. The widow had made an adoption in 1862 by virtue of which the defendants were in possession. In a suit brought against the widow in 1887 by a plaintiff who claimed the property under the adoption, a final decree was made in 1892 on

* *Present*:—Lord SHAW, Lord CARSON, Lord BLANESBURGH, Sir JOHN EDGE and Mr. AMEEB ALI.

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findings that the adoption was invalid but that the then plaintiff had obtained a title by adverse possession.

Held that, whether the invalidity of the adoption was *res judicata* or not, the present suit was barred by the Indian Limitation Act, 1871, Schedule II, article 129, since the claim depended upon displacing the apparent adoption and the suit had not been brought within 12 years of its being made; article 141 of the Act of 1877 did not apply as that Act did not come into operation until after the suit was barred under article 129.

Jagadamba Chaodhrain v. Dakhina Mohun Roy Chaodhrain (1886) I.L.R., 13 Cal., 308 (P.C.); 13 I.A., 84, followed.

Semble that the suit also failed since the decree of 1892 as to adverse possession was binding upon the estate. Review of the authorities showing that the Judicial Committee has invariably applied the rule laid down in the *Shivagunga case* (1863) 9 M.I.A., 539, namely, that, in the absence of fraud or collusion, a decree against a Hindu widow with regard to the estate of her deceased husband is binding upon his reversionary heirs.

Runchordas v. Parvatibai (1899) I.L.R., 23 Bom., 725 (P.C.); 26 I.A., 71, explained.

CONSOLIDATED APPEALS (Nos. 122 to 130 of 1923) from a decree of the High Court (November 16, 1916) varying a decree of the Subordinate Judge of Negapatam (September 4, 1908).

The suit was instituted in 1905 by the plaintiffs as the reversioners of one Arunachala, the last male holder of the Kulikarai estate, who died in 1849, claiming possession of the estate on the death of his widow Chokkamma in 1902.

The defendants were in possession of various parts of the estate and relied mainly upon the defences that the suit was barred by *res judicata* and limitation.

The consolidated appeal No. 122 gave rise to a wholly separate question, but the parties entered into a compromise and it is not necessary further to refer to that appeal. The questions dealt with in the present

judgment and report arose between the plaintiffs and defendants Nos. 7 and 8.

Both the Courts in India held that the suit was not barred by *res judicata* under the decree made in the suit of 1887.

But the High Court (WALLIS, C.J., and BURN, J.) held that the suit was barred by limitation. The learned Judges were of opinion that the decision of the Judicial Committee in *Tirbhuvan Bahadur Singh v. Rameshar Baksh Singh*(1), was not applicable. They distinguished it on the ground that in the present case the heirs of the adopted son were in possession at the time when the right to sue to set aside the adoption became barred under the Indian Limitation Act, 1871, and they accordingly held that the defendants Nos. 7 and 8 had acquired a good title against the plaintiffs under section 2 of the Indian Limitation Act, 1877.

Sir George Lowndes, K.C., Wallach and M. R. Pillai for the appellants.—The High Court was wrong in holding that the suit was barred by limitation. The plaintiffs date their cause of action from the death of Chokkammal in 1902, and under article 141 of Schedule of the Limitation Act, 1877, the suit was in time. Article 129 did not apply as it was not necessary for the plaintiffs to set aside the adoption, since it had already been held invalid in the suit of 1887. The alleged adverse possession was under a transfer which the widow was not competent to make. There was adverse possession for twelve years against the widow, which, under the Limitation Act, 1859, was good against her; *Nobin Chunder Chukerbutty v. Issur Chunder Chukerbutty*(2). But there was not adverse possession for twelve years

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(1) (1906) I.L.R., 28 All., 727 (P.C.); 33 I.A., 156.
(2) (1868) 9 W.R., 505.

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before April 1, 1873, when the Act of 1871 came into effect (see sections 1, 2) and that Act by Schedule 2, article 145, introduced a new provision; *Srinath Kur v. Prosunno Kumar Ghose*(1), *Ram Kali v. Kedar Nath*(2), *Vundravandas v. Cursondas*(3), *Sreeramulu v. Kristamma*(4), *Runchordas v. Parvatibai*(5), and *Hari Nath Chatterjee v. Mothurmohun Goswami*(6) is distinguishable, as the Limitation Act of 18 9 applied there. The case was discussed in *Vundravandas v. Cursondas*(3), and it was on the remarks there made that the judgment of the Board in *Runchordas' case*(5) was based.

This was not a case of adverse possession by a transfer but of an incompetent alienation by a Hindu widow: Mayne's Hindu Law, section 634, note, and cases there cited. The plaintiffs are entitled to the benefit of the decision that the adoption was invalid: *Jagadamba Chaodhrain v. Dakhina Mohun Roy Chaodhrain*(7), *Kalyanadappa v. Chanbasappa*(8). On the death of the widow the plaintiffs were entitled to sue as reversioners; the legislature now imposes no bar: *Tirbhuvan Bahadur Singh v. Rameshar Bakhsh Singh*(9).

De Gruyther, K.C., and *Narasimham* for the respondents.—The decision of 1887 that the right of Chokkammal was barred by adverse possession was *res judicata* against the present plaintiffs. The principle of the *Shivagunga case*(10) that a decree against a Hindu widow binds the estate cannot be limited to decisions

- (1) (1883) I.L.R., 9 Cal., 934 (F.B.).
 (2) (1892) I.L.R., 14 All., 156 (F.B.).
 (3) (1897) I.L.R., 21 Bom., 646. (4) (1903) I.L.R., 26 Mad., 143.
 (5) (1899) I.L.R., 23 Bom., 725 (P.C.); 26 I.A., 71.
 (6) (1894) I.L.R., 21 Cal., 8 (P.C.); 20 I.A., 183.
 (7) (1886) I.L.R., 13 Cal., 308 (P.C.); 13 I.A., 84.
 (8) (1924) I.L.R., 48 Bom., 411 (P.C.); 51 I.A., 220.
 (9) (1906) I.L.R., 28 All., 727 (P.C.); 33 I.A., 156.
 (10) (1863) 9 M.I.A., 539.

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based solely upon title, *Hari Nath Chatterjee v. Mothurmohun Goswami*(1), *Risal Singh v. Balwant Singh*(2). The decision in *Runchordas' case*(3) is distinguishable; moreover, there no question of an earlier decree arose. The suit of 1887 was one which touched the reversioners, as the plaintiff in it claimed by inheritance from her husband the adopted son. Further, the High Court rightly held that the suit was barred by limitation. The suit was one "to set aside an adoption" within the Act of 1871, schedule 2, article 129, and was barred; the Act of 1877 did not revive the right of suit, having regard to section 28 of the Act of 1871: *Jagadamba Chaodhrain v. Dakhina Mohun Roy Chaodhrain*(4), *Mohesh Narain Munshi v. Taruck Nath Moitra*(5), *Tirbhuvan Bahadur Singh v. Rameshar Bakhsh Singh*(6). The recent decision of the Board in *Kalyanadappa v. Chanbasappa*(7) was as to the Act of 1903 and therefore is distinguishable.

Sir George Lowndes, K.C., in reply.—Every case in which the principle of the *Shivagunga case*(8) has been applied, has been a pure question of title. The adverse possession here was personal to the widow, not to the reversioner. The recent decision of the Board shows a clear distinction between the Acts of 1871 and 1877. No title was acquired under section 29 of the Act of 1871 because until the widow died no suit for possession could be brought: *Runchordas' case*(3).

Parikh for respondent No. 1 in Appeal No. 122.

- (1) (1894) I.L.R., 21 Cal., 8 (P.C.); 20 I.A., 183.
 (2) (1915) I.L.R., 37 All., 496.
 (3) (1899) I.L.R., 23 Bom., 725 (P.C.); 26 I.A., 71.
 (4) (1886) I.L.R., 13 Cal., 308 (P.C.); 13 I.A., 84.
 (5) (1893) I.L.R., 20 Cal., 487 (P.C.); 20 I.A., 80.
 (6) (1906) I.L.R., 28 All., 727 (P.C.); 33 I.A., 156.
 (7) (1924) I.L.R., 48 Bom., 411 (P.C.); 51 I.A., 220.
 (8) (1863) 9 M.I.A., 539.

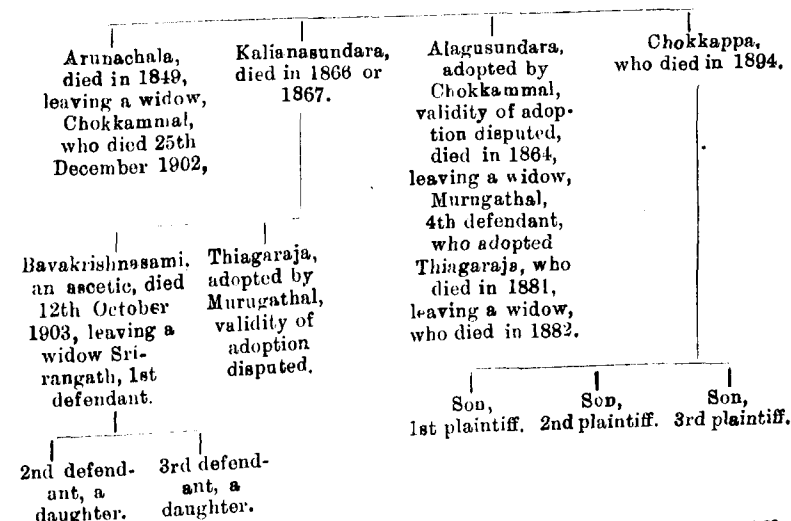
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The JUDGMENT of their Lordships was delivered by Sir JOHN EDGE.—These are nine consolidated appeals from a decree, dated the 15th November 1916, of the High Court at Madras, which varied a decree, dated the 4th September 1908, of the Subordinate Judge of Negapatam.

The suit in which these appeals have arisen was brought in the Court of the Subordinate Judge on the 2nd July 1905 by three plaintiffs, who were reversioners of Arunachala Mudaliar, against thirty-eight defendants for the possession of lands which were alleged by the plaintiffs to be lands of the Kulikara estate in the district of Tanjore and for mesne profits. The title of the plaintiffs to sue was denied by the defendants on various grounds, of which those which are now important and have to be considered are whether the suit was not barred by the result of a litigation which began in 1887 and ended with a final decree in 1892 and whether the suit was not otherwise barred by the law of limitation.

The Kulikara estate admittedly belonged to Arunachala when he died in 1849. He was then about twenty-two years of age. The family to which he belonged were Hindus of the Sudra caste. He had been adopted by Vaithialinga Mudaliar, a relation, who was descended from an ancestor from whom Arunachala also was descended. The plaintiffs are the three sons of Chokkappa Mudaliar, who was the youngest of three brothers by birth, that is, natural brothers of Arunachala. Arunachala died childless, leaving a widow, Chokkammal, who died on the 25th December 1902 within twelve years before this suit was instituted. She was a defendant to the suit with which the litigation of 1887 commenced. It will be necessary to refer at some length to that litigation.

The following pedigree will show Arunachala and his natural brothers and some other persons :—



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Arunachala, as whose reversioners the plaintiffs claim to be, had before his death directed his wife Chokkammal to adopt as a son to him his natural brother Alagusundara. In 1862 Chokkammal did as a fact adopt Alagusundara as a son to her late husband. Alagusundara was a younger natural brother of Arunachala, and at the time of the adoption there was no one living who could give him in adoption. As a matter of Hindu law the adoption was invalid.

In 1862 Chokkammal, having adopted Alagusundara, put him in possession of the immovable property now in question, reserving to herself for her maintenance some of the immovable property to which she was entitled as the widow of Arunachala. With the property which she reserved for her maintenance this suit is not concerned. There can be no doubt that in 1862 Chokkammal did put Alagusundara in possession of the property now in question. In March 1862, she presented an undated petition to the Tahsildar of Nannilam, the Revenue Officer, in which she stated that,

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with the consent of her husband, she had adopted Alagusundara, his natural younger brother, and, with the exception of certain villages which she named, she had made him proprietor of all the land and other properties, etc., standing in her name, and prayed that, with the exception of the three villages, "the miras" (ownership) might be transferred to him and all the sircar proceedings might be passed in his name.

Alagusundara continued to be in possession of the property of which Chokkammal had put him in possession in 1862 until he died in 1864, and had dealt with the property which had been transferred to him as an absolute owner would have done. Upon his death in 1864 his elder brother Kalianasundara, on the 18th July 1864, presented a deed of consent to the Tahsildar of Nannilam praying for the transfer to the name of Thiagaraja of the property which stood in the name of Alagusundara, and the miras was transferred to him. Thiagaraja was by birth a son of Kalianasundara and had been adopted by Alagusundara. He was in 1864 about two years of age.

From the 18th July 1864, Kalianasundara, until he died in September 1867, was referred to in all documents relating to the property as the guardian of Thiagaraja, who was in possession of the property in question from 1864 until he died in 1881, and during that time the management of the affairs of the family was carried on solely in his name. Upon the death of Thiagaraja in 1881 the miras which had stood in his name was altered to the name of his widow Kamalath, a girl of about twelve years of age, who died in 1882. Upon the death of Kamalath in 1882, Murugathal, the mother by adoption of Thiagaraja, took possession of the property in question for a Hindu widow's interest and held it until 1884, when Chokkammal forcibly ejected her.

On the 9th February, 1887, Murugathal brought a suit in the Court of the Subordinate Judge of Negapatam against Chokkammal and others, in which she claimed a decree for the possession of the properties now in question, alleging in her plaint that her husband Alagusundara had been the adopted son of Arunachala, and that the properties which she claimed belonged to him as such adopted son, and had been enjoyed by him from 1862 until he died in 1864; that after his death her adopted son Thiagaraja had enjoyed them until he died in 1881, and after him his widow, Kamalath, got them according to Hindu law and she died childless in 1882, and since her death she, Murugathal, got them under Hindu law and enjoyed them until 1884, when Chokkammal forcibly took possession of them and enjoyed them adversely to her. Chokkammal in her written statement in that suit denied Murugathal's title, alleged that she Chokkammal had been in possession of the property in question for 38 years from the death of her husband Arunachala in 1849, and denied that Alagusundara had been adopted. Several issues were framed by the Subordinate Judge in that suit, who found that Alagusundara was adopted as a son to Arunachala in 1862 by Chokkammal, who had the authority of her husband to make the adoption, that the adoption was invalid according to Hindu law, that Thiagaraja was adopted by Murugathal under the authority of her husband, but that the course of conduct of Chokkammal and the change of position of Alagusundara as the result of his adoption made it inequitable to hold that he had not title to the property, and that the putting him in possession of the property in question and allowing him to manage it for his own purposes substantially operated as a gift of the property to him. The Subordinate Judge in that suit also held that

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Murugathal's claim of adverse possession of the miras for twelve years was established, and on the 18th December, 1889, he gave her a decree for possession of the property which she claimed. From that decree of the Subordinate Judge the suit of 1887 went on appeal by Chokkammal to the High Court at Madras. The learned Judges of the High Court held that Alagusundara's adoption was invalid, but holding that Murugathal's claim of adverse possession for twelve years was established, by their decree of the 17th August, 1892, dismissed Chokkammal's appeal. Chokkammal did not appeal from that decree of the High Court, and it became final.

It is necessary to consider what was Chokkammal's position as a Hindu widow and how far her acts could, according to Hindu law, bind the reversioners to her husband. On Arunachala's death in 1849 she became entitled to the full beneficial enjoyment of the estate which had been his at the time of his death. As Mr. Mayne, in paragraph 605 of his "Hindu Law and Usage," correctly, in their Lordships' opinion, said:—

"It was at one time common to speak of a widow's estate as being one for life. But this is wholly incorrect. It would be just as untrue to speak of the estate of a father under the Mitakshara law as being one for life. Hindu law knows nothing of estates for life, or in tail, or in fee. It measures estates, not by duration, but by use. The restrictions upon the use of an estate inherited by a woman are similar in kind to those which limit the powers of a male holder, but different in degree."

The Hindu widow has not power to make a gift of the estate. Handing over the possession of the estate to a son whom she has validly adopted to her deceased husband is not making a gift of the estate to him. The estate became his on his adoption if he was validly adopted. She has no power to sell or assign the estate except for necessity, so as to bind her husband's

reversioners after her death. But she represents the estate in suits brought by her or against her for possession of the estate or any part of it, and she and the reversioners are equally bound by any final decree which a Court makes in such a suit provided that the suit was fought out according to law and was not collusive or fraudulent.

In the suit of 1887, Chokkammal was no doubt personally interested to defeat Murugathal's claim for the possession of lands which had been in her own possession as the widow of Arunachala from 1849 until 1862, but although her object in resisting Murugathal's claim was probably a purely personal and selfish object, she did, in fact and in law in that suit, represent the estate as well as her own interests as a Hindu widow. The suit of 1887 was not a collusive suit; it was regularly and according to due procedure at law fought out in the Court of the Subordinate Judge and in the High Court.

A protracted argument was submitted to the Board on the question whether under Hindu law adverse possession against a widow in possession of an estate for a Hindu widow's interest bars the reversioner. While it is not necessary in the view which will later be announced by the Board on the question of limitation in this case to make any formal pronouncement upon this point, it may be convenient to say that the authorities referred to were as follows:—In *Goluckmonee Dabee v. Degumber Dey* which was decided in 1852, Sir LAWRENCE PEEL, who was the Chief Justice of the Supreme Court at Calcutta, said:—"It has been invariably considered for many years that the widow" (speaking of the widow as heir) "fully represents the estate, and it is also settled law that adverse possession which bars her bars the heir after her, which would not be the case if she were a mere tenant for life, as known to the English law."

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(See the judgment of Sir BARNES PEACOCK, C.J., in *Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty*(1), citing the above passage.

In *Katama Natchier v. Rajah of Shivagunga*(2), which was decided by the Board in 1863, the Board, consisting of KNIGHT BRUCE, L.J., Sir EDWARD RYAN, and TURNER, L.J., the assessors being Sir LAWRENCE PEEL and Sir JAMES W. COLVILLE, all being eminent lawyers, and three of them having had judicial experience in India, TURNER, L.J., delivered the considered judgment of the Board, and in it said (3) as follows:—

“It seems, however, to be necessary, in order to determine the mode in which this appeal ought to be disposed of, to consider the question whether the decree of 1847, if it had become final in Anga Moothoo Natchier's lifetime, would have bound those claiming the Zamindari in succession to her. And their Lordships are of opinion that, unless it could be shown that there had not been a fair trial of the right in that suit—or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit in the Zillah Court by any person claiming in succession to *Anga Moothoo Natchier*. For assuming her to be entitled to the Zamindari at all, the whole estate would for the time be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance would seem to apply to the case of a Hindu widow, and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow.”

The declaration as to Hindu law which their Lordships have quoted from the considered judgment of the Board, which was delivered by Lord Justice TURNER in

(1) (1868) 9 W.R., 505.

(2) (1863) 9 M.J.A., 539.

(3) *Ib.* at 603.

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1863, has in the present appeal been objected to on the ground that it was *obiter*. The following cases, however, were referred to as showing that the doctrine there set forth was in accord with the course of judicial decisions.

Their Lordships will first refer to the case *Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty*(1) which came before a Full Bench of the Calcutta High Court, 1867, in which the declaration of the Board in the *Shivagunga case*(2) to which their Lordships have referred was accepted as a correct statement of the Hindu law to which it related and was applied to the case before the Full Bench. The facts of the case before the Full Bench are not fully stated in the order of reference to the Full Bench, but they were as follows: One Ramdoollub Chuckerbutty died possessed of an estate consisting of lands leaving two sons, two daughters and his widow, Dhone Mala. The two sons died without issue in the lifetime of the widow, and upon their death the widow, Dhone Mala, became entitled to the possession of the respective estates of the sons, but the defendant in that suit, a stranger, and as a trespasser, took possession of the estate more than twelve years before the suit, and the widow never obtained possession. Upon the death of the widow sons of the daughters, who were the reversioners to their uncle's estate, brought the suit for possession, which was before the Full Bench in second appeal. The first Appellate Court had dismissed the suit as not brought within time, that is, within twelve years from the time when the defendant had wrongfully taken possession, and the question before the Full Bench was whether the suit was barred by limitation or whether the reversioners could sue upon the death of the widow,

(1) (1868) 9 W.R., 505.

(2) (1863) 9 M. I.A., 539, 603.

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Dhone Mala. The Full Bench held that the cause of action arose when the defendant had taken possession and that the suit was time barred. The Full Bench was an exceptionally strong Bench of Judges, who had much experience in cases involving considerations of Hindu law. Their Lordships will give extracts from the judgments which were delivered in the Full Bench, as those judgments appear to their Lordships to confirm the declaration as to Hindu Law which they have quoted from the judgment of the Board in the *Shivagunga* case and to have a direct bearing on the appeal before the Board, and are very instructive.

In delivering his judgment in that Full Bench case with which SETON-KARR, J., concurred, Sir BARNES PEACOCK, C.J., after referring to Sir LAWRENCE PEELE'S judgment already mentioned, said :

"It was also held by the Privy Council in the *Shivagunga* case that in the absence of fraud or collusion a decision against a widow, with regard to her deceased husband's estate, would be binding upon the reversionary heirs. . . . If the female heir in the present case had sued the wrong doer, and without fraud or collusion had failed to make out her case to turn him out of possession, the reversionary heirs would have been bound by the decision. I am assuming that they are not claiming through the female heir."

Further on Sir BARNES PEACOCK said :

"It is said that the reversionary heirs could not sue (for possession) during the lifetime of the widow, and that therefore they ought not to be barred by any adverse holding against the widow at a time when they could not sue. But when we look at the widow as a representative, and see that the reversionary heirs are bound by decrees relating to her husband's estate which are obtained against her without fraud or collusion, we are of opinion that they are also bound by limitation, by which she, without fraud or collusion, is barred."

JACKSON, J., in his judgment, said :

"I entirely concur in the opinion of the CHIEF JUSTICE that the plaintiff (the reversionary heir) was barred in the present

case . . . It has been distinctly held by the Privy Council in the *Shivagunga* case that a decision fairly arrived at without fraud or collusion in the presence of a Hindu widow in possession of the estate will bind reversionary heirs. That being so decided, it appears to me impossible to escape the conclusion that an adverse possession which barred the widow will also bar the heirs, and in that opinion we are fully and strongly supported by the decisions of the late Supreme Court in the cases to which His Lordship the CHIEF JUSTICE has referred."

PHEAR, J., in his judgment, said :

"I too desire to avoid pledging myself to all the illustrations which have fallen from the CHIEF JUSTICE; but with this exception, I concur entirely in the reasoning which he has given in support of his conclusions, and I concur also in the remarks which have been made by Mr. Justice JACKSON. I will add that it seems to me that when a reversionary (Hindu) heir succeeds to the property of his ancestor on the death of an intervening female heir, he takes substantially the same proprietary right as she enjoyed, and no more, though doubtless she was fettered in a way that he is not, with regard to the dealings with the property, viz., her alienations are often liable to be avoided by him when he succeeds to the right of succession."

MAOPHERSON, J., in his judgment, said :

"I also concur in the proposed answer. But a very great difference exists between the case immediately before us and the case in which a mother or other Hindu female having an estate similar to that of a childless widow has herself alienated property belonging to the estate which she has taken as heiress, without sufficient reason for making such alienation. In the latter case, alienation is good as against her, and so far as her own life interest is concerned. Therefore, in fact, no cause of action necessarily arises at all with respect to her alienation so long as she lives. The cause of action does not arise until her death, when the reversioner's cause of action for the first time accrues. In the case before us, the property having never reached the hands of the mother (the Hindu widow) at all, having been throughout held adversely to her, the cause of action (of the reversioner) accrued in the mother's lifetime, and therefore a suit to recover possession, by whomsoever it may be brought, is barred unless instituted within twelve years from the commencement of the adverse possession."

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In *Aumirtolall Bose v. Rajoneekant Mittler*(1) in 1875, the decision of the Full Bench at Calcutta in *Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty*(2) was cited in argument, and Sir BARNES PEACOCK, in delivering the judgment of the Board, affirmed that decision.

In *Jugul Kishore v. Jotindro Mohun Tagore*(3) which was before the Board in 1884, where a Hindu widow's right, title and interest in property had been sold in execution of a money decree, the Board, without a suggestion of dissent from the ruling, said :

"It was held in the *Shivagunga* case that although a widow has for some purposes only a partial interest, she has for other purposes the whole estate vested in her; and that in a suit against a widow in respect of the estate the decision is binding upon the reversionary heir."

The Board also said :

"If the suit is simply for a personal claim against the widow, then merely the widow's qualified interest is sold (in execution of the decree) and the reversionary interest is not bound by it (the sale). If, on the other hand, the suit is against the widow in respect of the estate, or for a cause which is not a mere personal cause of action against the widow, then the whole estate passes."

In *Pertabnarain Singh v. Trilokinath Singh*(4) which was before the Board in 1884, the Board said :

"It is sufficient for the present purpose to hold that, until she had appointed another to be owner and representative, the Maharanee's estate in the taluk was sufficient to constitute her the full representative of it in the former suit. Her estate was at least as large as that of a Hindu widow in her husband's property. What was said by this Board of the widow's estate in the *Shivagunga* case is applicable to hers."

In *Hari Nath Chatterjee v. Mothurmohan Goswami*(5) which came before the Board in 1893, it was held that

(1) (1875) 2 I.A., 113.

(2) (1868) 9 W.R., 505.

(3) (1884) I.L.R., 10 Cal., 985 (P.C.); 11 I.A., 66.

(4) (1885) I.L.R., 11 Cal., 186 (P.C.); 11 I.A., 197.

(5) (1894) I.L.R., 21 Cal., 8 (P.C.); 20 I.A., 182.

the rule in the *Shivagunga* case to the effect that an adverse decree against a Hindu widow binds those claiming in succession applies equally to the case of the daughter. It had been argued in that case that the adverse title alleged was founded on something which was independent of limitation, and that the Limitation Act XV of 1877 let the reversionary heir sue within twelve years from the time when his right to possession accrued. With reference to that argument, Lord WATSON said :—

"But you must show that the new law gives a right of action to a reversioner notwithstanding that the widow's right of possession had been extinguished by decree."

Owing to the fact that it did not appear from the judgment of the Board when Pearimoni, who was the second wife of Ramahundun Goswami, had died, beyond the fact that she was living when he died in 1847, there was some hesitation in referring to that case in the argument of this appeal. Mr. De Gruyther has, however, shown from the appeal record of that case, which is preserved in the Privy Council Office, that Pearimoni died in 1855.

In *Risal Singh v. Bulwant Singh*(1) which was before the Board in 1915, Chaudhari Risal Singh, alleging that he was the reversionary heir of Jagat Prakash Singh, brought a suit against Bulwant Singh for possession of immovable property known as the Landhaura estate. The property there claimed had belonged to Raja Raghubir Singh until he died childless in 1868. Raghubir Singh left a widow, Rani Dharam Kunwar, who bore to him a posthumous son, Jagat Prahash Singh, who died in 1870. Rani Dharam Kunwar had the authority of her husband to make successive adoptions. In 1877 she adopted to her husband a boy

(1) (1918) I.L.R., 40 All., 593 (P.C.); 45 I.A., 168.

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who died within three years after he had been adopted, and then she adopted another boy, who died in 1885, and in 1890 she adopted Bulwant Singh, the defendant to the suit. She continued in possession of the property, alleging that her husband Raghubir Singh had by his will left it to her for her life. After a time Rani Dharam Kunwar and Bulwant Singh quarrelled. She was claiming a right to manage the property during her life; he was claiming his full rights as an adopted son. The result was that, on the 7th January 1905, Rani Dharam Kunwar brought a suit in the Court of the Subordinate Judge of Sharanpur against Bulwant Singh, in which she claimed to have it declared that she had no power to adopt Bulwant Singh and had never validly adopted him, and to have her registered deed of adoption, in accordance with which she had adopted him, declared void and ineffectual against her. He alleged that Rani Dharam Kunwar had power to adopt him, and had validly adopted him. The Subordinate Judge, holding that Rani Dharam Kunwar was estopped from denying that she had validly adopted Bulwant Singh, dismissed her suit. She appealed to the High Court at Allahabad, and the High Court, also holding that Rani Dharam Kunwar was estopped, dismissed her appeal. Thereupon she appealed to His Majesty in Council. The Board in that appeal considered the evidence in that suit, and having come to the conclusion that Rani Dharam Kunwar had validly adopted Bulwant Singh and that her appeal should be dismissed, advised His Majesty accordingly. In the judgment the Board said:

"There can be no doubt in their Lordships' opinion that Rani Dharam Kunwar in her suit against Bulwant Singh did, notwithstanding the personal estoppel under which she laboured, represent the estate on the question of fact as to whether Bulwant Singh had or had not been validly adopted, and that she represented the estate within the meaning of the rule in

Katama Natchier v. Raja of Shivagunga(1). The principle of law to be applied in such cases was, their Lordships consider, correctly summarized by BANERJI, J., in his judgment in this case, thus: 'Where the estate of a deceased Hindu has vested in a female heir, a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heir.' It cannot be said that there had not been a fair trial by the Board in 1912 of the right in the suit of Rani Dharam Kunwar against Bulwant Singh. The right in that suit was his right to the estate as a son validly adopted to Raja Raghubir Singh."

Upon the other side, it was asserted the principle of the *Shivagunga* case might have been applied and had not been applied in the case of *Runchordas v. Parvatibai*(2) which came before the Board in 1899. The suit in that case was brought on the 21st December 1888, against Vandrawandar and the Advocate-General of Bombay by Cursondas Govindjee as the heir-at-law of Kallianji Sewji, who had died on the 6th January 1869, leaving two widows—Cooverbai, who died in 1871, and Nenavahoo, who died in 1888. Kallianji Sewji had made a will, which was proved on the 2nd March 1869, by three executors, who were trustees, of whom the first defendant to the suit was at the date of the suit the sole survivor. The three trustees were appointed by the testator as trustees for dharam—that is, to make gifts for charitable or religious purposes. The will contained the following clause:

"As to the estates which have been given by me to my wives, they are to enjoy the rent of the said estates during their natural lives, and on the death of my wives the said estates are to revert to my dharam, and whatsoever income may be derivable from the said estates is to be expended for my dharam."

The main question in the suit was whether the gift for charitable or religious purposes was void for

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(1) (1863) 9 M.L.A., 539. (2) (1889) I.L.R., 23 Bom., 725 (P.C.); 26 I.A., 71.

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vagueness and uncertainty, and the High Court at Bombay and the Board in appeal held that it was void and that the trustees took no interest under the will. The suit was brought after the death of Nenavahoo.

It appears to their Lordships that part of the property claimed by the reversioner had been property of the respective widows as their stridhan, as to which there was some question as to the "rights of the heir" and that other parts of the property claimed was property which had been in the possession of the widows, to which the reversionary heir, the plaintiff, in the ordinary course, was clearly entitled, and that the Board was considering how an account, which the courts below had ordered to be prepared, should be worded so as to show those two classes of property.

The defence of limitation was raised, but the Board held that it did not apply, saying:

"It is not necessary to consider what might be the case if the widows or the survivor of them were suing, as the plaintiff does not derive his right from or through them, and the extinguishment of their right would not extinguish his."

It has been maintained that the Board was not intending to discredit the rule in the *Shivagunga* case. What the Board was considering was the wording of an account which the Appellate Court and the first Court had ordered to be prepared. The judgment of the Board was delivered by Sir RICHARD COUCH in 1899, who in 1893 had delivered the judgment of the Board in *Hari Nath Chatterjee v. Mothurmohun Goswami*(1), which expressly approved of and applied as sound Hindu law the rule in the *Shivagunga* case. What was said by the Board in 1899 at the conclusion of the

judgment makes it plain what the Board was considering. It is there said:

"The decree of the first Court, dated the 27th July 1896, should not have been varied as it has been. It is for an account of the movable property left by Cooverbai and Nenavahoo at the time of their deaths distinguishing between such of it as was their stridhan and 'as such' formed part of the estate of the testator. 'As such' appears to be an error for 'such as.' With this alteration their Lordships think the decree will be right."

As altered by the Board the account which was to be taken was an account of the movable property left by Cooverbai and Nenavahoo, the widows of the said testator respectively at the time of their deaths distinguishing between such of the said property as was the stridhan of the said Cooverbai and Nenavahoo and such as formed part of the estate of the said testator.

It does not appear to their Lordships how the rule in the *Shivagunga* case could have been applied in the case then before the Board. What the Board, at the stage of the suit which was then before the Board, the Board having decided against the trust to the trustees, was considering was what was the account which was to be taken, and the Board directed that the account should separately show what had been the stridhan of the widows, and what was the property to which the heir might ordinarily be entitled. Their Lordships are unable to see what was the estate, within the meaning of the *Shivagunga* case, which the widows had represented, or to what the rule in the *Shivagunga* case could have been applied. The title of the trustees to the property devised or bequeathed to them for charitable or religious purposes by Kallianji Sewji was not questioned until the survivor of the two widows died in 1888, and that property had never been represented by the widows or either of them. It had been in the exclusive possession of the trustees under the will of

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(1) (1894) I.L.R., 21 Cal., 8 (P.C.); 20 I. A., 183.

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Kallianji Sewji from 1869 until the Court in the suit which was brought on the 21st December 1888, after the death of the last surviving widow, had decided that the gift for charitable or religious purposes was void.

The result of the cases to which their Lordships have referred shows, in their opinion, that the Board has invariably applied the rules of the *Shivagunga case* as sound Hindu law where that rule was applicable.

It also appears to their Lordships that the suit is barred by limitation. The plaintiffs could not be entitled to a decree for possession without displacing the adoption of 1862 of Alagusundara by Chokkammal. It was held by the Board in *Jagadamba Chaothrani v. Dakhina Mohun Roy Chaothrani* (1), that article 129 of the second schedule of Act IX of 1871 relates to all suits in which the plaintiff cannot succeed without displacing an apparent adoption by virtue of which the defendant is in possession. That article prescribed twelve years as the period of time within which a suit "to establish or set aside an adoption" might be brought, and that such period of twelve years should begin to run from "the date of the adoption or (at the option of the plaintiff) from date of the adoptive father's death."

Act IX of 1871 did not give to a reversioner whose right to sue for possession accrued upon the death of a Hindu widow any further time than the twelve years given by article 129 to any plaintiff. That Act was in force until the 19th July 1877, when Act XV of 1877, the Indian Limitation Act, 1877, came into force, and by article 141 of the second schedule of Act XV of 1877 a Hindu entitled to the possession of immovable property on the death of a Hindu female might bring his suit for possession within twelve years from the

time when the female dies. In the present case the period of limitation allowed by article 129 of Act IX of 1871 expired in 1874.

The person who at the date of the adoption in 1862 was entitled to sue to set aside the adoption must have been a reversioner to Arunachala, and looking at the pedigrees he must have been either Kaliasundara or Chokkappa, and it has not been pleaded or otherwise alleged that they were at the time of the adoption under the age of 18 years so as to entitle them to an extension of the period allowable to a minor under section 7, Act IX of 1871, to bring a suit. It is obvious, looking at the facts and dates in the present case, that Kaliasundara and Chokkappa must have arrived at full age long before Act IX of 1871 expired and that that Act applied.

In the present suit the Subordinate Judge found that the question as to the adoption of Arunachala was *res judicata*, but Sir JOHN WALLIS, C. J., and Mr. Justice BURN, in the appeal to the High Court, decided that the principle of *res judicata* did not apply. On that subject their Lordships do not consider it necessary to express an opinion.

It has been arranged by the parties through their respective Counsel and their respective solicitors in the best interests of their clients that the plaintiffs' appeal, No. 124 of 1923, and the first defendant's appeal, No. 128 of 1923, which relates to the village of Enkan, should be dismissed, and that there should be no order as to costs in either of these appeals in which other respondents have not appeared. It has also been arranged by the parties through their respective counsel and their respective solicitors in the best interests of their clients that the plaintiffs' appeal, No. 125 of 1923,

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should be dismissed without costs on either side, the plaintiffs having admitted that the late husband of the first defendant was not disqualified from inheriting along with the plaintiffs. Except as above arranged by the parties it appears to their Lordships that all the appeals should be dismissed with costs, and their Lordships will so accordingly humbly advise His Majesty.

Since the hearing of these appeals some of the parties, their Lordships understand, have entered into compromises. On production of the proper evidence, effect to these compromises will be given in the Order in Council confirming this report.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondent: *Douglas Grant; Chapman Walker and Shephard.*

A.M.T.

PRIVY COUNCIL.*

1925,
July 16.

SOUNDARA RAJAN AND OTHERS (PLAINTIFFS),

v.

NATARAJAN AND OTHERS (DEFENDANTS).

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE
AT MADRAS.]

Will—Will of a Hindu—Perpetuity—Time at which test to be applied—Invalid gift over—Construction—Absence of previous absolute gift—Indian Succession Act (X of 1865), ss. 101, 102, 126.

A Hindu died in 1904 being survived by his three daughters: the first daughter had four children, three born before and one after 1904, the third daughter had six children, all born after 1904, the second daughter had one child, a son T.

* PRESENT:—Viscount HALDANE, Lord WALLENBURY and Lord BLANESBURGH.

born after 1904, and as a guardian of property was appointed in 1910 he did not attain his majority under section 3 of the Indian Majority Act, 1875, until he was 21 years of age instead of at 18. The deceased by his will directed the trustees thereby appointed to "apportion" his residuary trust fund into as many equal shares as there were daughters who should survive him or had predeceased him leaving issue, to pay the income from each of such shares to the daughters for life respectively, and after the death of each daughter to hold the share "so appropriated to such daughter as aforesaid upon trust for the children of such daughter who shall attain the age of 21 years."

Held (1) that the bequests to the children of daughters were invalid under section 101 of the Indian Succession Act, 1865. The test of perpetuity laid down by section 101 was to be applied at the testator's death, and at that date it was not certain whether the gift to some of the children would vest within the lifetime of persons then existing and the minority, ending at 18; it was not material that T. did not attain his majority until he was 21. The bequests being to a class and being invalid as to some members failed also as to the children born before the death of the testator under section 102.

(2) That the will read as a whole did not show an intention that the daughters should take an absolute estate in the shares, and that consequently section 126 of the Act did not apply.

(3) That therefore there was an intestacy as to the residuary trust fund, subject to the life interests of the daughters.

Having regard to Act VIII of 1921 it was not necessary to consider whether Madras Act I of 1914 was *ultra vires* of the Provincial Legislature.

APPEAL (No. 14 of 1923) from a decree of the High Court in its Appellate Jurisdiction (December 16, 1920) affirming a decree of the Court in its Ordinary Jurisdiction (November 16, 1919).

The litigation related to the construction and effect of the will, dated April 24, 1897, of C. Ratna Mudaliar, a Hindu domiciled in the City of Madras, who died in December 1904. He was survived by a widow and three daughters. The first daughter had four children, three of whom were born before the death of the

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testator, and one after that date; the second daughter had one child, a son Tirugnanasambandam (respondent No. 4) born after 1904; the third daughter had six children, all born after 1904. By an order of the Court made in 1910 upon petition, a guardian of the person and property of respondent No. 4 had been appointed.

The terms of the will appear from the judgment of the Judicial Committee.

The suit was brought in the High Court by the appellants, the minor sons of the testator's third daughter, against the respondents, the other grandchildren of the testator. The plaintiffs claimed construction of the will, administration of the estate and ancillary relief.

At the hearing of the suit, which took place before COUTTS TROTTER, J., the argument was confined to the construction and effect of the will, the parties intimating that a decision on that question probably would determine all matters between the parties; upon appeal the argument and decision were similarly limited. The plaintiffs contended that the trusts declared by the said will in favour of the testator's grandchildren were invalid and that there was an intestacy as to the residuary trust fund. COUTTS TROTTER, J., made a decree declaring, by paragraph 1, as follows:

"1. That, having regard to the Madras Act I of 1914 and the effect of the Indian Majority Act, IX of 1875, which is to retain a single age of majority for purposes of section 101 of the Indian Succession Act and section 5 of the Madras Act I of 1914, and according to the true construction of the will of the said C. Ratna Mudaliar, deceased, dated April 24, 1897, all the bequests contained in the said will are valid."

The decree also declared when the legacies to the grandchildren vested, and ordered that the further hearing be adjourned.

Upon appeal the defendants, alternatively to the contention that the bequests were valid, relied upon section 126 of the Indian Succession Act, 1865, which provides,

"Where a testator absolutely bequeaths a fund, so as to sever it from his own estate, but directs that the mode of enjoyment of it by the legatee shall be restricted so as to secure a specified benefit to the legatee, if that benefit cannot be obtained by the legatee, the fund belongs to him as if the will had contained no such direction."

The learned Judges (WALLIS, C.J., and RAMESAM, J.) did not agree with the view of the trial Judge as to the effect of the Indian Majority Act, 1875, and of Madras Act I of 1914 (which Act they held to be *ultra vires* of the Provincial Legislature), and were of opinion that the dispositions in favour of the grandchildren failed as the result of section 101 and section 102 of the Indian Succession Act, 1865. They held, however, that upon the true construction of the will the intention of the testator was to make an absolute gift in favour of each of his three daughters, the provisions which followed being a mere settlement of the gift, and that consequently, under section 126 of the Indian Succession Act, 1865 (which was made applicable by the Hindu Wills Act, 1870), the daughters of the testator took absolutely.

The learned Judges made a decree which in terms confirmed the decree of COUTTS TROTTER, J., though the effect of the judgments delivered was to vary that decree. The case is reported at I.L.R., 44 Mad., 446.

Olauson, K.O., and Narasimham for the appellants.— Upon the true construction of the will the testator's daughters took only life interests; there was no gift of the corpus to the daughters. Reference was made to *Lassence*

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v. *Tierney*(1) and to Jarman on Wills (6th edn.), vol. 2, page 1459. The Appellate Court rightly held that the bequests were invalid under Hindu Law and having regard to section 101 and section 102 of the Indian Succession Act, 1865. Section 101 invalidates a bequest when the vesting "may be delayed" beyond the period stated. The test must be applied at the death of the testator. It is therefore not material that owing to events which afterwards occurred the minority of respondent No. 4 was extended. There was an intestacy as to the fund subject to life interests of the daughters.

Upjohn, K.C., Sir Walter Schwabe, K.C., and A. M. Talbot for the respondents.—If the gifts to the grandchildren are invalid, then under section 126 of the Indian Succession Act, 1865, the daughters each take a third share of the fund absolutely. The will, read as a whole, shows an intention that they should do so; the provisions in favour of the grandchildren are in the nature of a settlement: *Hulme v. Hulme*(2), *Ring v. Hardwick*(3), *In re Mercer's Trusts, Davies v. Mercer*(4), *Whitehead v. Rennett*(5). But the bequests to the grandchildren were valid. Under Act VIII of 1921, enacted since the hearing below, the gifts to grandchildren not born at the death of the testator were not invalid by Hindu Law. That Act gives retrospective validity to Madras Act I of 1914, and therefore it is not necessary to consider whether the Madras Act was *ultra vires*. Section 101 of the Indian Succession Act, 1865, is re-enacted both by Madras Act I of 1914 and Act VIII of 1921, as to Madras Hindus. The intention was that section 102 should not apply to them. Apart from section 102,

(1) (1849) 1 Mac. & G., 551.

(3) (1840) 2 Beav., 352.

(2) (1889) 9 Sim., 644, 649, 650.

(4) (1876) 4 Ch.D., 182.

(5) (1853) 22 L.J., Ch., 1020.

the principle embodied in that section does not apply in India: *Bhagabati Barmanya v. Kalicharan Singh*(1). Further, under Indian decisions, neither section 101 nor section 102 applies to a Hindu: *Cally Nath Naugh Chowdhry v. Chunder Nath Naugh Chowdhry*(2), *Alangamonjori Dabee v. Sonamoni Dabee*(3). In any case the bequest to respondent No. 4 was valid. As a guardian had been appointed he did not attain his majority, under section 3 of the Indian Majority Act, 1875, until he was twenty-one. He being the only child of the second daughter was the sole member of his class, consequently section 102 has no operation as to him.

Clauson, K.C., replied.

The JUDGMENT of their Lordships was delivered by Viscount HALDANE.—The questions which arise for decision on this appeal relate to the construction and validity of the provisions of a will, dated 27th April 1897, and made by a Hindu, C. Ratna Mudaliar, who died in 1904. He left a widow and three daughters. One of these daughters, Yasodammal, died in 1907; another, Rajammal, in 1908; and the third, Nilayathatchi Ammal, in 1918. Yasodammal had four children, three of them, two sons and a daughter, born before the death of the testator in 1904, and one of them, born afterwards in 1907. Rajammal, the second daughter, had a son Tirug-nanasambandam, who was born in 1907. This child was constituted a Ward of Court in 1910. Nilayathatchi Ammal, the third daughter, had six children, three sons and three daughters, all born after 1904. Of these various families the three sons of the third daughter were plaintiffs in the suit and are appellants to-day. The others were defendants and are now respondents.

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(1) (1911) I.L.R., 38 Cal., 468 (P.C.); 38 I.A., 54.

(2) (1882) I.L.R., 8 Cal., 378.

(3) (1882) I.L.R., 8 Cal., 157.

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It will be convenient first of all to set out the material portions of the will : —

"I give devise and bequeath all my estate and effects immovable and movable unto my Trustees Upon Trust that my Trustees shall sell, call in and convert into money the same or such part thereof as shall not consist of money and shall with and out of the proceeds of such sale calling in and conversion and with and out of my ready money pay my funeral and testamentary expenses and debts and shall stand possessed of the residue of such proceeds Upon Trust to set apart thereout and invest in promissory notes of the Government of India such a sum or sums of money as when so invested as aforesaid will produce by the income thereof a monthly sum of rupees one hundred and to pay such income monthly to my wife C. Andalammal during her life and from and after her decease to stand possessed of the said sum and the investments for the time being representing the same Upon the Trusts hereinafter declared concerning the residue of my estate. And as to the residue of my estate I direct that my Trustees shall at their discretion invest the same in any of the modes of investment in which trustees are by law authorized to invest trust funds and shall stand possessed of the said residuary trust monies and the investments for the time being representing same (thereinafter called "the residuary trust funds"). In Trust to apportion the residuary trust funds into as many equal parts or shares as there may be daughters of mine living at the time of my decease or who having predeceased me shall have left issue her or them and me surviving and to pay the income of each of such equal parts of shares to my said daughters respectively during their respective lives. And from and after the decease of each of my said daughters to stand possessed of the share of the residuary trust funds so appropriated as aforesaid to such daughter Upon Trust for all the children of such daughter who shall attain the age of twenty-one years in equal shares and if there shall be only one such child the whole to be in trust for that one child and in the event of any of my said daughters dying without leaving lawful issue her or them surviving I direct that my trustees shall stand possessed of the share or shares so appropriated to her or them as aforesaid Upon Trust for all the children of the other or others of my said daughters who shall attain the age of twenty-one years as tenants-in-common in equal shares *per stirpes*. Provided always and I hereby declare that if any daughter of mine shall die in

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my lifetime leaving lawful issue at the time of my death such issue as shall attain the age of twenty-one years shall take and if more than one as tenants-in-common in equal shares *per stirpes* the share which would have been so appropriated as aforesaid to such daughter of mine and her issue if she had survived me."

The suit was instituted in the High Court of Madras for a due construction of the will and for administration. The plaintiffs, the present appellants, were, as already stated, grandsons of the testator and children of his third daughter. Their case is that they, along with the sons of the other two daughters, are entitled to succeed to the testator's residuary estate subject to an annuity to the widow and to mere life estates given to the three daughters, who are all now dead. For they contend that the trusts in favour of grandchildren, following in the will on those for the daughters for life, are void by the law of India. The case of the respondents, on the other hand, is that the trusts introduced in favour of grandchildren were validly created by the will, or alternatively, that the three daughters of the testator in the result took his residue absolutely.

The case was tried before COUTTS TROTTER, J., who decided in substance (1) that the testator gave only a life estate to each of his three daughters, and not an absolute estate, remarking "It seems to me clear that what the testator wished to do was to divide the income of his estate into three shares for the benefit of his three daughters respectively during their lifetime, and thereafter the corpus of each share should belong to such of the children of each daughter as should attain the age of twenty-one years"; (2) that under the provisions of section 3 of the Hindu Wills Act, 1870, and the rules laid down by the Lords of the Judicial Committee in the case of *Tagore v. Tagore*(1), and other

(1) (1872) L.R.I.A., Sup., 47

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decisions, the gifts to the grandchildren of the testator born after his death were void; but that the provisions of the Madras Act I of 1914, which were not in his opinion *ultra vires* of a Provincial Legislative Council, validated the bequest in this respect. The learned Judge was further of opinion that the testator's will did not, for reasons which he gave, contravene the Indian rule against perpetuities in view of the provisions of Act IX of 1875, as amended by the Guardians and Wards Act, 1890.

There was an appeal to the Appellate Civil Jurisdiction of the High Court of Judicature at Madras. Before judgment on that appeal was delivered certain compromises were made between certain of the parties, for the division between them of what might be the fruits of this litigation. Into the terms of the compromise it is not, however, necessary, at this stage of the suit, to enter.

The appeal was heard by the Chief Justice (Sir JOHN WALLIS) and RAMESAM, J. These learned Judges did not agree with the view of the trial Judge as to the effect of the Indian Majority Act, 1875, and of the Madras Act I of 1914 (which they held to have been *ultra vires* of the Provincial Legislature). They were accordingly of opinion that the disposition of the will could not take effect as regards beneficiaries born after the death of the testator, and, as the provisions in favour of issue of daughters were obnoxious to section 101 of the Indian Succession Act, 1865, they thought that the whole disposition in favour of the daughters' children failed as a result of section 102 of that Act. They held, however, that upon the true construction of the will the intention of the testator was, in the first instance, to make an absolute gift in favour of each of his three daughters, the provisions which followed being a mere settlement

of the gift thus absolutely made, and that consequently under section 126 of the Indian Succession Act, 1865, the daughters of the testator took absolutely, when these provisions failed of effect. That section, made applicable to the testator's will by the Hindu Wills Act (XXI of 1870), is as follows:—

“Where a testator absolutely bequeaths a fund, so as to sever it from his own estate, but directs that the mode of enjoyment of it by the legatee shall be restricted so as to secure a specified benefit for the legatee; if that benefit cannot be obtained for the legatee, the fund belongs to him, as if the will had contained no such direction.”

This is an enactment in statutory form of a principle which was already familiar to English lawyers. The case of *Lassence v. Tierney*(1), shows that where, reading the will as a whole, the intention to confer an absolute estate in the first instance is expressed or implied, and following on that absolute estate there is a provision for settlement which in the event cannot be operative, then the words of prior intention prevail and the absolute estate takes effect notwithstanding the failure of the provision for settlement that follows. In India the words in section 126 must be followed as laying down the principle, but the principle is not substantially different from what was expressed in *Lassence v. Tierney*(1). Their Lordships have given consideration to the terms of the will in the present case. The material directions are those to the trustees

“to apportion the residuary trust funds into as many equal parts or shares as there may be daughters of mine living at the time of my decease or who having predeceased me shall have left issue her or them or me surviving.”

The trustees are then to

“pay the income of each of such equal parts or shares to my said daughters respectively during their respective lives. And from and after the decease of each of my said daughters to

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(1) (1849) 1 Mac. & G., 551.

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stand possessed of the share of the residuary trust funds so appropriated as aforesaid to such daughter upon trust for the children of such daughter who shall attain the age of 21 years."

The testator then directs that in the event of any of the daughters dying without leaving lawful issue the trustees are to

"stand possessed of the share or shares so appropriated to her or them as aforesaid"

on trust for her children who shall attain twenty-one. He goes on to introduce a proviso under which, if a daughter dies in his lifetime leaving lawful issue, such issue as shall attain 21 years are to take the share

"which would have been so appropriated as aforesaid to such daughter of mine and her issue if she had survived me."

Reading the will as a whole their Lordships are unable to agree with the conclusion about the construction of these clauses come to by the appellate Court. They think that the first trust for apportionment directs merely division of the fund into as many equal parts or shares as there are daughters living at the testator's death, or sets of issue then living of daughters then dead.

The words of apportionment are introduced for merely arithmetical purposes and so far do not dispose of property. In order to find the interest given under the will it is necessary to proceed to the further words, and these, in the case of a daughter, confine her interest to a right to income for life. They are followed by words of disposition in favour of the children and issue. This view of what may be called the apportionment clause is even more apparent as regards the suggested gift to issue of a deceased daughter. There is no unqualified gift to them by the apportionment clause. The effective gift in the later words of the will is to such of a deceased daughter's children as attain 21. And if, of this will it could be said that the testator had

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used the words "issue" and "children" interchangeably then the limitation to such children only as attained 21 would, if there were a prior gift to them without that qualification, be merely otiose. If so much cannot be said then there is no room for the operation of the rule. Their Lordships are, therefore, unable to find in this will the absolute bequests required by section 126. They think that the three daughters took only for life, and that it must remain to be seen whether the later gifts in favour of their children or other issue are validly made under Hindu Law.

Turning to this question, the first observation to be made is that the will has apparently been drawn by some one familiar with English Law, but not with the Indian statutes which apply. If it were only a question of the English rule against perpetuities, there would be no objection to the will. But there comes in section 101 of the Indian Succession Act of 1865. Under this section no bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease, and the minority (ending at 18) of some person who shall be in existence at the expiration of that period and to whom, if he attains full age, the thing bequeathed is to belong. The validity of the gifts now in question must be scrutinized as at the death of the testator, i.e., 1904, and if section 101 then applied the disposition subsequent to the lifetime of the testator's daughters was invalid, for the children of the daughters take only in classes, and by section 102 of the Succession Act, if a bequest is made to a class of persons, with regard to some of whom it is inoperative by reason of the rules contained in section 101, the bequest is wholly void. It being plain that this bequest, tested as at the testator's death, made delay beyond the lifetime of the daughters and the minority of some of

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their children possible, the bequest in favour of the children was inoperative. It was suggested, however, that this section had no application to the will of a Hindu by reason of the fact that, as is shown by the *Tagore* case(1), any disposition in such a will is invalid if the donee is an unborn person at the testator's death. The section, it was said, is only applicable to dispositions which are not otherwise ineffective. One answer to this was that in 1914 the Madras Act above referred to was passed which purported to get rid of the difficulty caused by the *Tagore* case(1), decision. This Act provides by section 3 that a disposition shall not be invalid by reason only that the transferee or legatee is an unborn person at the date of the transfer, or the death of the testator. Questions were raised, as has already been observed, in the Courts below as to the validity of the Madras Act, but these questions are now superseded by the Act of the Indian Legislature, Act VIII of 1921, which has validated the law contained in the Madras Act, and repeats in section 5 a provision identical with section 101 of the Succession Act, 1865. The result is to make that section applicable to this will, upon a view which was not contested before their Lordships if the Madras Act or the Act of 1921 were treated as operative. Now in that section, as has been already said, a "minor" means any person who shall not have completed the age of eighteen years. It was however, pointed out by the respondents that, by the Majority Act, 1875, every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, shall, notwithstanding anything contained in the Indian Succession Act or in any other enactment, be deemed to have attained his

(1) (1872) L.R., I.A., Sup., 47.

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majority when he shall have completed his age of 21 years and not before; and this is accompanied by a provision that every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of 18 years and not earlier. These provisions do not, however, in the opinion of their Lordships, help the respondents. At the testator's death—for this purpose the relevant date—it was not clear, and could not be certain, whether all or any of the members of the classes in whose favour the disposition was made would ever have guardians appointed. The provision of the will fixing 21 in every case as the age of vesting was, therefore, in contravention of section 101, and the whole gift is invalid under section 102. Their Lordships are unable to agree with the views expressed in some detail on this point by the learned Trial Judge.

Their Lordships are of opinion, for the reasons they have given, that the appeal must succeed. There will be a declaration that the appellants are entitled to their respective shares in the property in suit as upon an intestacy, subject to the life estates (now at an end) in favour of the testator's daughters. This will be without prejudice to the compromises referred to in the decree appealed from, and to the sanction given to them by that decree. The case must go back to the High Court for further inquiry on that footing. Their Lordships do not think it necessary to interfere with the orders as to costs made in the Courts below. They think that the costs of this appeal should, in the same way, be payable out of the estate.

They will humbly advise His Majesty accordingly.

Solicitor for appellants: *H. S. L. Polak.*

Solicitor for respondents: *Douglas Grant.*

APPELLATE CIVIL.

*Before Mr. Justice Kumaraswami Sastri and
Mr. Justice Krishnan.*

1925,
March 23.

ANGAMUTHU MUDALIAR (PLAINTIFF) APPELLANT

v.

RATNA MUDALIAR AND OTHERS (DEFENDANTS)
RESPONDENTS.

Partition Act (IV of 1893), ss. 2 and 3. Party by whom an application for sale at a valuation can be made. Time when an application under sec. 3 can be made. Order for sale by consent of both parties passed. Competency of an application under sec. 3 by either party. Sale under sec. 2, nature of.

In a partition suit, a consent decree was passed embodying a direction by consent of parties that the Official Referee should divide the property by metes and bounds and that, if it could not be so divided, he should sell the property under the Partition Act (IV of 1893); on the Official Referee deciding to sell the property, the plaintiff applied under section 3 of the Act for leave to purchase it at a valuation to be fixed by the Referee; the defendants also applied later on to buy at the valuation or else that the house should be sold to the shareholder who offered the highest price above the valuation:

Held, that, under the Partition Act (IV of 1893), an application under section 3 for a sale at a valuation to be fixed by the Court, can be made only by a shareholder other than the shareholder who had applied for sale under section 2;

that the proper time to apply under section 3 is after the request had been made by one of the parties that the property should be sold under section 2 and before the Court makes an order under that section;

that, in this case, as the Court had already ordered the sale, by consent of both parties, an application under section 3 could not be made;

that only the shareholder, who applied to buy at a valuation and at whose instance the valuation was made by the Court, is the person who is entitled to buy at the valuation;

that the original order for sale in this case, by consent of parties, should be deemed to be one under section 2, and as that order was not set aside, the sale should be held by public auction in which the parties as well as the public could bid.

APPEAL from the judgment of COURTS TROTTER, J., passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 750 of 1919.

The plaintiff sued for partition of a house and ground against defendants 1 to 3 who were his co-sharers, and a decree dated 1st April 1921 was passed by consent declaring that plaintiff was entitled to a half share, and the decree embodied an order that the Official Referee should effect a division by metes and bounds and, if division was found impossible, that the Official Referee should sell the property under the Partition Act (IV of 1893). The plaintiff made an application to the Court on the 29th April 1921, praying for an order to fix the price of the shares of the defendants and to allow the plaintiff to buy their shares at that valuation. The learned Judge (COURTS TROTTER, J.), dismissed the petition. On appeal this order was reversed on 24th July 1922 by SCHWABE, C.J., and WALLACE, J., who held that the original order did not specify whether the sale directed was to be held under section 2 or 3, and that the parties were not deprived of the right to proceed under section 3, and their Lordships referred the case back to the Official Referee for disposal according to law. Subsequently the defendants applied under section 3 of the Act, that they should be allowed to purchase the house at the valuation fixed by the Official Referee or that the house should be sold to the shareholders who offered the highest price and that, for that purpose, the sale should be held by the Official Referee as between the shareholders. This petition came on for disposal before COURTS TROTTER, J.,

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who held that the defendants were competent as shareholders within the meaning of section 3 (2) to make this application, and directed "that the defendants shall have the liberty of offering a price in competition with the plaintiff over and above the valuation made by the Court". Against this order the plaintiff preferred this appeal.

Section 3 of the Partition Act is quoted in the judgment at page 923.

K. Jagannadha Ayyar for appellant.

V. S. Govinda Achariyar for respondents.

THE JUDGMENT of the Court was delivered by KRISHNAN, J.—This is an appeal against an order passed under the Partition Act (IV of 1893). The plaintiff, who is the appellant before us, was one of the coparceners of a family consisting of three coparceners, brought a partition suit for his share. When the decree was passed in that suit, we find an order passed by the learned trial judge, by consent of parties, that the property in suit, a house, should be sold under the Partition Act unless the Official Referee found it convenient to divide it by metes and bounds. This was a consent order. "The Official Referee afterwards found that it was not convenient to divide the house into two halves and give one half share to the plaintiff and the other half to the defendants. It was therefore decided to sell the property under the Partition Act, but in the order made for this purpose, the learned Judge, COTTIS TROTTER, J., did not make it clear under what section of the Partition Act the sale was to take place. An application was subsequently made by the plaintiff under section 3 of the Partition Act claiming to buy the property at a valuation fixed by the Court. This was disallowed by COTTIS TROTTER, J., but on appeal to the Appellate Court, the late learned Chief Justice, Sir

WALTER SCHWABE, and WALLACE J., reversed that order and sent the case back to be disposed of according to law. In remanding the case they did not order that action should be taken under section 3 of the Partition Act but simply directed that the case must be disposed of according to law.

It is clear to our minds that section 3 of the Partition Act cannot be applied after the Court had already directed a sale and in this case the sale was with the consent of all parties. The sale which was directed was a sale under section 2 of the Partition Act. Section 3 begins by saying, "If, in any case where the Court is requested under the last foregoing section to direct a sale, any other shareholder applies for leave to buy at a valuation the share or the shares of the party asking for a sale, the Court shall order a valuation". It seems to us therefore that the proper time to apply under section 3 is before a Court makes an order under section 2, and after the request had been made by one of the parties that the property should be sold. Unless we construe the two sections in this manner there will be much difficulty in applying them. Once a final order is made as between the parties that the property should be sold under section 2, and that means a sale open to the public when anybody might bid for the property unless it is expressly restricted to be between the parties only, no order can be made under section 3, as it is too late then to apply under that section. Section 3 contemplates that, when the application is made by one of the parties to direct a sale of the property and before the Court makes the order, any other party who is entitled to a share in the property may at once apply for leave to buy at a valuation and when such an application is made, the Court is bound under the section to direct a valuation of the shares of the party asking for sale to find out what

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its proper value is, and the party who has offered to buy is entitled to buy that share at that valuation. If he fails to do so, his application would be dismissed and he will be made responsible for costs under clause (3) of section 3. Clause (2) provides for more than one party applying at the same time for leave to buy as provided in sub-section (1) of clause (3). There is no difficulty in construing the section in this manner. We are not able to agree with the construction put on section 3 by Courts Trotter, J., where he says that when an application is made for buying by one of the shareholders, any shareholder can ask that the property should be sold to him at the valuation arrived at; if that view is taken, there will be no end of trouble between competing shareholders. It is clear that the shareholder who offers to buy and at whose instance the valuation is made by the Court is the person who is entitled to buy. The words "such shareholder" occurring in the latter part of clause (1) of the section must necessarily mean the shareholder who applied for leave to buy. In this case section 3 does not apply. The parties have already agreed that the properties should be sold under section 2 and that consent has not been set aside by any order and is still in force.

One further difficulty in applying section 3 in this case is that it is not shown that the defendant applied for the sale, for it is only then that his share can be valued and dealt with under section 3. The fact seems to be that both parties were present at the time when the decree was passed and agreed to the sale being ordered and neither party actually made the application for sale. In these circumstances, we direct that the property be sold by public auction under section 2 of the Partition Act. Both parties will be at liberty to bid and set off

their respective shares if they become purchasers. The public will also have a right to bid at the auction.

It was argued that the plaintiff should be compelled to adhere to the bid that he made once before to the Official Referee of Rs. 10,000 for this property; but we think that that cannot be insisted upon, because the bid was made when it was not clear as to what the rights of the parties were.

The decree will be modified as above stated and the case will go back to the Official Referee for disposal in the light of the above observations. The appellant will pay to the respondent half of the taxed costs.

K.R.

APPELLATE CIVIL.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
and Mr. Justice Krishnan.*

P. RAMIAH & CO. (DEFENDANTS), APPELLANTS

v.

T. R. SADASIVA MUDALIAR & BROTHERS (PLAINTIFFS),
RESPONDENTS.*

Contract—Sale of goods—Shortage in delivery—Suit by vendee for damages—Plea that defendant had fully paid his vendor who had become insolvent before plaintiff made his claim for shortage—Plea, whether sustainable—Bar of limitation—Limitation Act (IX of 1908), art. 62 or 96—Mistake—Knowledge of plaintiff as to shortage—Money had and received.

The defendants, who had purchased eight bales of grey shirtings from a person, sold them to the plaintiff in August 1918, representing that each bale contained sixty pieces. The latter sold the bales to others who found that each bale contained only fifty pieces; the plaintiff became aware of the shortage in April 1919, and, after sending a notice of demand to the defendants, sued them in February 1922 for

* Original Side Appeal No. 118 of 1923.

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damages for short delivery. The defendants pleaded non-liability on the ground that they had paid full price to their vendor who had become insolvent before the plaintiff made his claim on him, and also pleaded that the suit was barred by limitation under article 62 of the Limitation Act:

Held, that the plea of the defendants on the merits was not sustainable in law:

that article 96 of the Limitation Act which was a specific article for suits for relief on the ground of mistake, applied to the facts of this case;

that article 62 which was a general article did not apply;

and that the suit, instituted within three years from the date on which the mistake became known to the plaintiff, was not barred by limitation.

APPEAL from the Judgment of Sir WALTER SCHWABE, Chief Justice, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 174 of 1922.

The material facts appear from the Judgment.

V. Rathakrishnayya for appellant.—The suit is for damages for short delivery. There was delay in giving notice and making a claim on the defendants. This is a case of equitable restitution. The vendee must examine in a reasonable time and give notice to the vendor. There was here a delay of nearly eight months. The principle is not estoppel but of equitable restitution. The principle is not merely applicable to cases of agency but is applicable in all cases. The principle of the decision in *K.M.P.R. Firm v. The Official Assignee of Madras*(1) is applicable to this case.

Next as to limitation, article 62 applies to the case. From the date of short delivery, the cause of action arises: see *Ramanatha Iyer v. Ozhapoor Pathiriseri*(2).

K. S. Krishnaswami Ayyangar for respondent.—The proposition in *K.M.P.R. Firm v. The Official Assignee*

(1) (1922) 43 M.L.J., 142.

(2) (1913) 14 M.L.T., 524.

of *Madras*(1) is too broadly stated: see *Baylis v. Bishop of London*(2), and *Newall v. Tomlinson*(3). Article 96 is a specific article, which is applicable to cases of relief on the ground of mistake. See *Viraragava v. Krishnasami*(4) and *Mathuranath Kundu v. Debendranath Kundu*(5).

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JUDGMENT.

COUTTS TROTTER, C.J.—In this case the appellants bought some bales of grey shirtings from one Krishnaji Kesari Mull, a Bombay merchant. They sold them to the plaintiffs and then the goods went through a long chain of changing hands and, in the end, some 7 or 8 months after the bales had been sold; it turned out that some of them were short by 10 pieces; that is to say, whereas they purported to contain 60 pieces they in fact contained only 50.

The learned CHIEF JUSTICE, my predecessor, who tried this case, found on the evidence before him that, although only 3 bales had been opened, the reasonable conclusion of fact was that the shortage extended to the other 5 bales which were exactly of the same size, appearance and description and with that finding, which the learned Judge was entitled to come to, we do not desire to interfere. There was evidence to support it and one knows that to rip up a bale for the purpose of counting the contents has a most damaging effect upon its value in the market.

There are only two points really argued and they are both points of law. It appears that the defendants were unable, when the mistake was found out, to have recourse to their sellers, because the sellers had gone bankrupt. They may not be able to get a dividend. That being so, reliance was placed on a judgment of this

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(1) (1922) 43 M.L.J., 142.

(3) (1871) 6 O.P., 405.

(5) (1886) 1 L.R., 12 Cal., 538.

(2) [1913] 1 Ch., 127.

(4) (1883) 1 L.R., 6 Mad., 344.

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Court to which I was a party, *K.M.P.R. Pirum v. The Official Assignee of Madras*(1) in which the facts were the converse. There, there had been an over delivery of 14 pieces, a delivery which was thought to be one of 7,000 pieces, but really turned out to be of 7,014 pieces. We there held that one of the persons in the chain was not accountable to his immediate seller because, he, in good faith, had passed all the 7,014 pieces to his immediate buyer, all parties being of the belief that they really were only 7,000. Rightly or wrongly we held there, and it may be we expressed the proposition in too general terms, that in such cases redress could be had by the plaintiff only if he was able to show that the goods which were not covered by the contract, namely, 14 extra pieces were in the possession of the defendant or that the defendant had had the benefit of them. But in *Standish v. Ross*(2) it was held that it was unnecessary to plead any such circumstance.

"It is quite true I had your money in my hands but unfortunately you paid them thinking you owed the money. I have gone and spent it on a luxury."

That was held in *Standish v. Ross*(2) not to be an answer to the claim. But it seems to us that that case has no application whatever to a case like the present where the converse is the fact, where the seller has failed to deliver to the buyer that which he contracted to deliver; and it is unaffected by the fact that the unfortunate buyer has been held liable to a third person and the still more lamentable fact that the unfortunate seller has got a remedy over only against an insolvent person—a risk to which every commercial man is liable.

Then a point is raised about limitation. It is said that this case falls within article 62 of the Limitation

(1) (1922) 43 M.L.J., 142.

(2) (1840) 3 Ex. Rep., 527.

Act, because it is a case of money had and received to the use of the plaintiff. No doubt, if one were drawing a pleading in an English Court in the approved Bullen and Leake style, after setting out the facts which, after all, is the real function of a pleading, one would end up by saying

"the plaintiff's claim is for money had and received to the use of the plaintiff."

But it does not follow that that article is exhaustive, because a later article, article 96, provides for a special case of money had and received to the plaintiff's use. It runs as follows:

"For relief on the ground of mistake	3 years	When the mistake becomes known to the plaintiff"
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It specifies that the time when limitation begins to run in such a case is when the mistake becomes known to the plaintiff. It seems to me that that special article must override the general provisions of article 62 and that it fixes a time when the plaintiff's cause of action depends upon the fact that he was mistaken as different from the time when the mistake was ascertained; or, I suppose, in certain cases it may be that you would have to qualify that by saying

"the time when the plaintiff ought to have discovered his mistake if he used reasonable diligence."

However, we are not concerned with that here; because, having regard to the known habits and customs of the piece-goods market here, I do not think any judge would venture to say that 9 months was too long a time for the goods to be passing from hand to hand in their wholesale state as bales. It is a well-settled principle on which the English Courts have acted for centuries that, in all cases where something turns upon a mistake or concealment of fact by the fraud or

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deceit of the other side, the time from which limitation must be taken to run is always the time when it was brought to the plaintiff's knowledge that there had been a mistake or a fraud. We, therefore, think that the learned trial judge was right on all the points in this case and that the appeal must be dismissed with costs; but there will be this modification of the decree and Mr. K. S. Krishnaswami Ayyangar has very wisely accepted it because, after all, it is apparently rather a hard case, that is, the time from which interest is to be taken to run is not the initial short delivery but the time when the demand was made upon the defendants by the plaintiffs, i.e., the 24th April 1919. The decree will be modified to that extent; otherwise the appeal will stand dismissed with costs.

KRISHNAN, J. — I agree with the learned Chief Justice that this appeal fails. The first point taken on the facts of the case is that it has not been proved that all the 8 bales in each of which a shortage of 10 pieces is claimed by the plaintiff, contained only 50 pieces each and not 60. It is said that it is only as regards 3 bales the shortage has been properly proved as they were opened and the pieces actually counted; but as regards the other bales there is no doubt whatever that the late learned CHIEF JUSTICE is right in the view he took that they should be taken as shown to have contained only 50 pieces each. One of the bales opened for the purpose of finding out whether the 6 bales left in the hands of Motilal contained only 50 pieces each or 60, was taken at random as a sample bale from the lot and it was found to contain only 50 pieces. That evidence is quite sufficient to justify the finding as regards all the 8 bales. The fact of the shortage is thus established.

The next question is one of law based on the ruling of the learned CHIEF JUSTICE, then Mr. Justice COURTS

TROTTER, and Mr. Justice RAMESAM in *K.M.P.R. Firm v. The Official Assignee of Madras*(1). That case has now been explained by the CHIEF JUSTICE; it does not really apply to the facts of the present case and it is, therefore, unnecessary to consider how far that case overstated the law. I should, however, not be taken as agreeing to the statement of the law in that case; for I am inclined to think there is a little overstatement in it.

Reference has been made to *Baylis v. Bishop of London*(2) and *Newall v. Tomlinson*(3). It is, however, unnecessary to pursue this matter further as the facts of this case are quite different from the facts of those cases. It is said that, because the seller from whom the defendant purchased the goods became insolvent, the defendant has lost his chance of getting his money from the seller and, therefore he should not be called upon to pay for shortage to his buyer. There is no authority cited to show that this doctrine is correct. It was the misfortune of the defendants that their seller has become insolvent. Whether he became an insolvent after the defendants got notice that a claim was going to be made against them by the plaintiffs or not is not very clear. For, if the insolvency happened only afterwards, it will be clearly defendant's own fault if they did not take steps in time to recover what they would have been entitled to claim from their seller. However that may be, we are not concerned with the question. It is clear that the defendants are bound to return the price which they received for the 10 pieces in each of the 8 bales in which there was a shortage.

The last question argued is one of limitation and it is one of some difficulty. It is contended that article

(1) (1922) 43 M.L.J., 142.

(2) [1913] 1 Ch., 127.

(3) (1871) 6 C.P., 405.

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62 applies to the case. I do not see how that article can be applied, for it refers to money had and received by the defendant for the plaintiff's use. It does not refer to a case like this where money had been paid under a mistake of fact and is now sought to be recovered on the ground that it was so paid. Both the parties believed that the bales contained 60 pieces each and the price was paid and received on that footing; it was subsequently found out that there was a mistake, there being only 50 pieces in each of the 8 bales. The excess price paid is clearly money paid by mistake and article 96 applies as the late learned CHIEF JUSTICE has held. I agree, therefore, that the bar by limitation does not arise on the facts of this case. The appeal will be dismissed with the modification of the decree proposed as regards interest.

The CHIEF JUSTICE again.—I should just like to add that, at the time I and my brother RAMESAM decided *K.M.P.R. Firm v. The Official Assignee of Madras*(1), *Baylis v. Bishop of London*(2) was not cited to us and I should like to consider that case further before expressing any final opinion as to the correctness of our decision in that case.

K.R.

(1) (1922) 43 M.L.J., 142.

(2) [1913] 1 Ch., 127.

APPELLATE CIVIL.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
and Mr. Justice Krishnan.*

NELAKANTI SUNDARASIVA RAO AND OTHERS
(PLAINTIFFS), APPELLANTS,

1925,
April 1.

v.

IVATURY VIYYAMMA AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Hindu Law—Surrender—Daughter's estate—Inheritance by two daughters—Partition by daughters extinguish so as to rights of survivorship inter se—Death of one of them after alienating portions of her share—Surrender by the surviving daughter to nearest reversioner—Right of surrenderee to question alienations before surrenderer died—Analogy of adopted son's right to question, immediately on adoption, alienations of adoptive mother, whether applicable.

Where the two daughters of a deceased Hindu succeeded as heirs to his estate and partitioned it between themselves so as to extinguish their rights of survivorship to each other, and after the death of one of them who alienated most of her properties, the survivor purported to surrender the entire estate to the nearest reversioner, the latter is not entitled to question the alienations made by the deceased daughter until the surrenderer dies.

Subbamma v. Subramanyam, (1916) I.L.R., 39 Mad., 1035, followed; the authority of the decision in the above case has not been shaken by the ruling of the Full Bench in *Vaidyanatha Sastri v. Savithri Ammal*, (1918) I.L.R., 41 Mad., 75 (F.B.), affirming the right of an adopted son to question the alienations of his adoptive mother immediately on his adoption and before her death, but the former decision has been followed in cases later than the Full Bench decision: *Singaram Chettiar v. Kalyanasundaram Pillai*, (1914) M.W.N., 735; and *Sri Raja Suryarao Bahadur Garu v. Sri Raja Suryanarayana Jagapathi Bahadur Garu*, (1921) 41 M.L.J., 208, referred to.

* Appeal No. 173 of 1923

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In recognizing the right of surrender, the Courts are justified in imposing conditions on her power based on considerations of justice, equity and good conscience, and where the surrender is effected for the purpose of defeating alienees for consideration, the rule that till surrenderer dies her alienations cannot be questioned is a just and equitable rule—*Vaidyanatha Sastri v. Savithri Ammal*, (1918) I.L.R., 41 Mad., 75 (F.B.), referred to.

APPEAL against the decree of C. RANGANAYAKULU NAYUDU Garu, the Subordinate Judge of Cocanada, in O.S. No. 28 of 1921.

One Perayya died intestate, leaving a widow and two daughters Viyyamma and Peramma. After the widow's death, the daughters inherited their father's estate, and subsequently effected an oral partition of the same so as to extinguish their rights of survivorship to each other. Peramma alienated most of her properties with or without the consent of her son and both of them died; after their death Viyyamma executed a deed of surrender in favour of her son, who was the nearest reversioner to the estate. The surrender deed purported to be a surrender of the entire estate inherited by both the daughters including the share of the deceased daughter Peramma which was claimed to have devolved on Viyyamma by right of survivorship. The surrenderee (who is the second defendant) executed a sale deed, in favour of the plaintiffs, of all the properties purported to be surrendered to him by his mother. The vendees instituted this suit to recover the properties from the possession of the alienees of Peramma and her son and impleaded Viyyamma and her son, as the first and second defendants, the daughter and son of Peramma's son as well as the alienees of Peramma and her son, as the other defendants to the suit. The Subordinate Judge, who tried the suit, held that there was a partition by the daughters of their estate so as to extinguish their

rights of survivorship *inter se*, that the surrender in respect of Peramma's share was invalid, that some of the alienations of Peramma were assented to by Viyyamma and her son, that the alienations by Viyyamma and her son were binding on the latter, and eventually dismissed the entire suit. The plaintiffs preferred this appeal.

B. Satyanarayana for appellants.

D. Appa Rao and *C. Rama Rao* for respondents.

The JUDGMENT of the Court was delivered by

KRISHNAN, J.—Two points are raised for decision in this appeal. The first question we have to decide is whether when the two sisters Viyyamma (the first defendant) and the deceased Peramma divided their women's estate, they did so merely with a view to convenient enjoyment, retaining the right of the survivor to take the whole on the death of one of them or whether such right of survivorship was expressly excluded by agreement between the parties. It is not denied that it was open to the sisters to do either in a manner binding between themselves. The question is one of fact and the learned Subordinate Judge has held that the right of survivorship was expressly excluded.

The properties originally belonged to one Perayya. He died without male issue and he had no co-parceners. His estate therefore passed to his widow Rajamma. She died 25 years ago and the estate then passed to Perayya's two daughters, Viyyamma and Peramma, they taking a joint daughter's estate for life. It was these ladies that divided the estate. There is no partition deed, but the division is admitted by all parties, the only dispute being whether the right of survivorship between themselves was retained or expressly given up. The Subordinate Judge has accepted the evidence for the

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defence on the point, in preference to the contrary evidence for the plaintiff. The documents he has referred to, though not very conclusive, support the defence version so far as they go, as pointed out by him. No reason has been shown for us to take a different view of the evidence in appeal. It was, however, elicited from one of the witnesses that two lists were drawn up for the properties as divided and mention was made in them of the right of survivorship having been extinguished. Now it is contended that these lists not being produced, oral evidence cannot be allowed in proof of the transaction. The partition and the arrangement to extinguish the right of survivorship were both made orally and the list, if any, will only be one of the pieces of evidence in favour of it. Non-production of it may go to the weight of the evidence, but does not prevent other evidence being given. It is not a case to which section 92 of the Evidence Act applies. We accept the finding of the Subordinate Judge that the right of survivorship was expressly extinguished when the partition was made.

The second question raised is one of law. The plaintiff claims the suit properties through the second defendant who is the nearest reversioner to Perayya, to whom the surviving daughter Viyyamma has executed a deed of surrender Exhibit XVI. He contends that by virtue of the surrender the second defendant has become entitled to the whole of Perayya's estate and that he is not bound by any arrangement made between the two sisters. This is a question on which we are concluded by authority in this Court and unless we differ from it and refer the question to a Full Bench, we are bound to follow it. The ruling in *Subbamma v. Subramanyam*(1)

(1) (1916) I.L.R., 39 Mad., 1035.

is exactly in point and lays down that when a reversioner obtains the estate through the surrender by the life-estate holder of her estate, he is not entitled to question her alienations during her life time but must wait till her death to do so. It was urged for the appellant that this case is no longer good law after the ruling of the Full Bench in *Vaidyanatha Sastri v. Savithri Ammal*(1) which held that in the case of an adoption by a widow the right of the adopted son to question the widow's alienations accrued at once, over-ruling the decision in *Sreeramulu v. Kristamma*(2), which was relied on as an authority in *Subbamma v. Subramanyam*(3). The ruling in *Vaidyanatha Sastri v. Savithri Ammal*(1) cannot however be taken as shaking the authority of the 39 Mad. Case, when we find two of the learned Judges on the Full Bench, the late Chief Justice WALLIS and KUMARASWAMI SASTRI, J., expressly referring to and approving of that ruling and distinguishing it. The Chief Justice had affirmed the same proposition in *Singaram Chettiar v. Kalyanasundaram Pillai*(4). A ruling to the contrary in C.M.A. 322 of 1919 was cited to us in an unreported decision of OLDFIELD and SESHAGIRI AYYAR, JJ., where it was held that a reversioner claiming by surrender from a widow was in the same position as a person adopted by a widow and could at once challenge the widow's alienations; but this case, besides being unreported, was not followed by WALLIS, C.J., and OLDFIELD, J., himself, when it was cited to them in *Sri Raja Suryarao Bahadur Garu v. Sri Raja Suryanarayana Jagapathi Bahadur Garu*(5). OLDFIELD, J., practically went back on his former judgment. In this state of authority I am not prepared to differ from the

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(1) (1918) I.L.R., 41 Mad., 75 (F.B.). (2) (1903) I.L.R., 26 Mad., 148.
(3) (1916) I.L.R., 39 Mad., 1035. (4) (1914) M.W.N., 735.
(5) (1921) 41 M.L.J., 208.

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ruling in *Subbamma v. Subramanyam*(1) above referred to, on a supposed analogy between the case of a son adopted by a widow and a reversioner claiming by virtue of a surrender by the widow on the ground that both of them claim from the last male holder and not from the widow.

AS KUMARASWAMI SASTRI, J., points out in *Vaidyanatha Sastri v. Savithri Ammal*(2) the Courts are justified, in recognizing the right of surrender by the widow, to impose conditions on her power based on considerations of justice, equity, and good conscience. Where, as in this case the surrender was effected for the purpose of defeating alienees for consideration the rule that till the surrenderer dies her acts cannot be questioned by the surrenderee seems to be a just and equitable rule. I would therefore follow the ruling in *Subbamma v. Subramanyam*(1) and hold that the plaintiff is not entitled by virtue of the surrender deed, Exhibit XVI, to question the alienations of Peramma in favour of the defendants till Viyyamma dies and the joint life estate comes to an end.

In this view, it is not necessary to consider whether the surrender is an invalid transaction in the circumstances of this case. Both the points taken by the appellant failing, the appeal must be dismissed with costs of respondents 5 to 20.

K.R.

(1) (1916) I.L.R., 39 Mad., 1035. (2) (1918) I.L.R., 41 Mad., 75 (F.B.).

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Wallace.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL,
PETITIONER IN ALL S.Rs.*

1925,
April 16.

Leave to appeal to Privy Council—Sec. 12 (3), Limitation Act (IX of 1908)—Whether time requisite for obtaining copy of judgment can be deducted.

In the case of an application for leave to appeal to the Privy Council the time requisite for obtaining a copy of the judgment appealed against, can, under section 12 (3) of the Limitation Act, be excluded in calculating limitation. *Mahabir Prasad Tewari v. Jumuna Singh* (1922) I.L.R., 1 Pat., 429, followed.

PETITIONS under Order XLV, rule 2, and under section 109, clauses (b) and (c), and section 110, Civil Procedure Code, sought to be presented to the High Court, praying that the High Court will be pleased to grant certificates enabling the petitioner herein to appeal to His Majesty in Council against the judgment of the High Court in Second Appeals Nos. 1356, 1355, 1354 and 1357 of 1921 preferred against the decrees of the District Court of Chingleput in Appeal Suits Nos. 400, 399, 398 and 401 of 1919, against Original Suits Nos. 504, 503, 470 and 505 of 1918 on the file of the Court of the District Munsif of Poonamallee.

Section 12 (2) and (3) of the Limitation Act is as follows:—

(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of, was pronounced, and the time requisite for obtaining a copy of the decree, sentence, or order appealed from or sought to be reviewed, shall be excluded.

* Stamp Register Nos. 1226 to 1228 and 1231 of 1925.

(3) Where a decree is appealed from or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded.

The facts are given in the judgment.

K. S. Sankara Ayyar for Advocate-General for the petitioner.

JUDGMENT.

The question for decision is whether, in the case of an application for leave to appeal to the Privy Council, the time requisite for obtaining a copy of the judgment appealed against may be excluded in calculating limitation.

Section 12 of the Indian Limitation Act is now made applicable by the Privy Council Rules to such applications, but the difficulty is that, while sub-section (2) applies in terms to "an application for leave to appeal," sub-section (3) does not. But we think that, though sub-section (3) does not in terms apply, the language used in it really covers the present case. Under sub-section (2) when an application for leave to appeal is put in, the time requisite for obtaining "a copy of the decree appealed from" may be deducted. Here the phrase quoted really implies "a copy of the decree sought to be appealed from" as the decree cannot strictly be "appealed from" until leave to appeal has been given. There is no reason why the phrase "decree appealed from" when used in sub-section (3) should be given any different interpretation. Sub-section (3) therefore in the case of an application for leave to appeal really means "when a decree is sought to be appealed from . . ." That is the present case and time requisite for obtaining a copy of the judgment may therefore be excluded.

That position is also very reasonable, since a proper application for leave to appeal cannot be drawn up unless

the party or his pleader has before him a copy of the judgment.

Authority on the point is scant. *Mahabir Prasad Tewari v. Jamuna Singh*(1) is direct authority, though the reasons given are not those we have given. *Anderson v. Periasami*(2) was under the old section 12 in which "applications were limited to applications to appeal in *forma pauperis* and therefore section 12 could not be then called in aid at all.

We rule that time requisite for obtaining copy of judgment should be excluded.

N.B.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Ramesam.

PETA NAGAYYA (THIRD WITNESS FOR DEFENDANTS),
APPELLANT.*

Order XVI, rules 10, 11, 12, Civil Procedure Code—Imposition of fine on refractory witness without previous proclamation or attachment of his property, validity of.

Neither the issue of a proclamation nor an order for attachment of property under rules 10 and 11 of Order XVI of the Code of Civil Procedure is a condition precedent to the imposition of a fine on a refractory witness, under rule 12. *Ashutosh Mullick v. Secretary of State for India* (1920) 57 I.C., 302, and *Ram Gopal v. Secretary of State for India* (1920) 55 I.C., 425, dissented from.

APPEAL against the order of the Additional Subordinate Judge of Masulipatam in Original Suit No. 47 of 1923.

The facts are given in the judgment.

A. Venkatachalam for appellant.

The Government Pleader for respondent.

(1) (1922) I.L.R., 1 Pat., 429.

(2) (1892) I.L.R., 15 Mad., 169.

* Appeal against order No. 360 of 1924.

JUDGMENT.

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SPENCER, J.

SPENCER, J.—The Appellant was summoned on 28th January 1924 to appear as a witness on 8th February. He did not appear and a warrant was issued and he was fined Rs. 40 for disobedience of summons. His explanation was that, as he was going to Court, after arriving at the place where the Court was held, he was met by the plaintiff and defendants who told him that the case had been adjourned. We have no means of testing whether this statement was true. The parties were not examined to corroborate him; but the Judge did not accept the explanation. He only gave him five days' time to pay the fine.

It is argued that the Subordinate Judge acted without jurisdiction inasmuch as there was no issue of a proclamation or attachment of property before the fine was imposed. This argument is based on the decisions in *Ashutosh Mullick v. Secretary of State for India*(1) and *Ram Gopal v. Secretary of State for India*(2). I regret that I must express dissent from the opinion of two learned Judges of the Calcutta High Court who decided those cases. I am unable to construe the provisions of rules 10 to 12 of Order XVI of the Civil Procedure Code as meaning that the issue of a proclamation or an order for attachment of property are conditions precedent to the imposition of a fine for non-attendance of a person who has been summoned to attend a Civil Court. BEACHROFF, J., treats rule 12 as an alternative to rule 11 and he understands the words, "such person" in rule 12 as meaning a person against whom a proclamation has been issued or whose property has been attached. In my opinion "such person" means a person to whom a summons has been issued and who

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fails to attend under rule 10 (1). Rule 12 itself provides both for cases where an attachment has been made and for cases where an attachment has not been already made but is made in enforcement of the order of fine. It seems to me that to say that a Judge cannot fine a witness for disobedience of summons unless the preliminaries are first gone through of attaching his property or issuing a proclamation against him is to put a great and unnecessary limitation on the powers of Courts to deal with refractory witnesses. The Subordinate Judge's order was thus passed in the exercise of his jurisdiction.

There is nothing to show that the witness had ever previously disobeyed a summons of Court. He did not prove that he was told by the parties that the case had been adjourned; and, even assuming that story were true, it would not legally be sufficient excuse for non-attendance. The fine of Rs. 40 is rather excessive, and is in contrast with the fact that all the other witnesses who were fined in the case were excused when they appeared before the Court and represented their reasons for non-appearance. I reduce the fine imposed by the lower Court from Rs. 40 to Rs. 5 (Rs. five). The excess will be refunded. In other respects the appeal is dismissed. No costs.

RAMESAM, J.—I entirely agree.

RAMESAM, J.

The case in *Ashutosh Mullick v. Secretary of State for India*(1) merely follows the earlier case in *Ram Gopal v. Secretary of State for India*(2) and contains no additional reasoning. It seems to me that the argument addressed to BEACHROFF, J., in *Ram Gopal v. Secretary of State for India*(2) and which was rejected by him, namely, that Order XVI, rule 12, should be construed independently of rule 11 and should be taken to refer to rule 10 is sound and might

(1) (1920) 57 I.C., 302.

(2) (1920) 55 I.C., 425.

(1) (1920) 57 I.C., 302.

(2) (1920) 55 I.C., 425.

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have been accepted by him. I am of opinion that Order XVI, rule 12, deals with all cases of disobedience not covered by rule 11, whether there has been attachment or not. If it were not so, there would be cases of flagrant disobedience with which Courts would have no power of dealing; but, apart from such considerations, Order XVI, rule 12, contains clear indications that it deals also with cases where there has been no attachment. It provides for a fresh attachment of property where the witness has failed to give a satisfactory explanation, if there has been no attachment of property, and if there has been an attachment already, for sale. Both cases being expressly referred to in the section, it is difficult to construe Order XVI, rule 12, as being confined to cases in which there has been an attachment.

I agree with the order passed by my learned brother.

N.B.

APPELLATE CIVIL.

1925,
February 12.

Before Mr. Justice Devadoss and Mr. Justice Wallace.

VISWANATHA MUDALI AND ANOTHER (2ND AND 3RD
DEFENDANTS), APPELLANTS

v.

DORAISWAMI MUDALI AND ANOTHER (PLAINTIFFS 1 AND 2),
RESPONDENTS.*

*Hindu Law—Legitimate descendants of a Hindu dancing
woman—Right of succession inter se.*

The legitimate descendants of two sons of a Hindu dancing woman are under the Hindu Law entitled to succeed to each other. *Mayna Bai v. Uttaram*, (1864) 2 M.H.C.R., 196, applied.

APPEAL against the order of P. SUBBAYYA MUDALIYAR,
District Judge of North Arcot at Vellore, in Appeal

* Appeal against Order No. 39 of 1924.

Suit, No. 244 of 1922 preferred against the decree of
T. ANANTHA ACHARIAR, District Munsif of Vellore, in
O.S. No. 257 of 1921.

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The facts and arguments are given in the judgment.

L. A. Govindaraghava Ayyar for appellants.

A. C. Sampath Ayyangar for respondents.

JUDGMENT.

DEVADOSS, J.—The plaintiffs sue for a declaration DEVADOSS, J.
that the sale of the plaint property in favour of defend-
ants 1 and 2 is not binding on them as they are the
reversioners of one Murugesu Mudali. They claim to be
the grandsons of Muthusami Mudali, the divided brother
of Kachi Muniappa Mudali, whose great grandson was
the deceased Murugesu Mudali. The District Munsif
held that Muthusami Mudali and Kachi Muniappa
Mudali being the sons of a prostitute there was no herit-
able blood between them and the plaintiffs had not
reversionary right to the estate of Murugesu Mudali
and dismissed the suit. The Subordinate Judge has
reversed the decree of the District Munsif holding that
the plaintiffs are reversionary heirs to Murugesu Mudali
and has remanded the suit for disposal on the merits.
Defendants 1 and 2 have preferred this appeal.

Muthusami Mudali and Kachi Muniappa Mudali were
the sons of a dancing woman called Thanji Ammal. It
is admitted that the plaintiffs are the legitimate grand-
sons of Muthusami Mudali and that Murugesu Mudali
was the legitimate great grandson of Kachi Muniappa
Mudali. The question for decision is, does the rule
of collateral succession obtain among the legitimate
descendants of the two sons of a dancing woman,
whose paternity is unknown. There is no authority on
the point in the Hindu Law books. We have not
been referred to any decision in which the question was

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raised or decided. The principle applicable to the present case has to be deduced from the texts of the Hindu Law books and some of the decided cases.

A good deal of the arguments in this case was with reference to the rights and disabilities of the illegitimate sons of Sudras. It is well settled that the illegitimate son of a man belonging to the twice born class cannot inherit to his putative father; he has only a right to maintenance but in the case of Sudras, the illegitimate son inherits to his father, his share being half of that of the legitimate son, and he takes the whole in certain circumstances. West and Buhler, 82, 194, 3rd Edition. Courts have gone the length of holding that a man's legitimate grandson by an illegitimate son succeeds to him in preference to a divided brother on the theory of Representation, see *Ramalinga Muppan v. Parudai Goundan*(1). It is unnecessary to consider in detail all the decisions that have been quoted at the bar with regard to the rights of illegitimate sons. It is a misnomer to call the son of a dancing woman, whose paternity is unknown an illegitimate son. The illegitimate son is one born out of wed-lock, i.e., no marriage was solemnized between the father and the mother. In the case of sons of prostitutes or dancing woman the paternity is unknown and it is only an euphemism to call them illegitimate sons. In Roman Law they are called *Nullius Filius*. Dancing women have their peculiar customs. Their status is recognized in Hindu Society. Their customs have received the sanction of judicial decisions and the adoption of girls by them is recognized by law, and the daughters of dancing women inherit in preference to their sons.

The question in this case is what is the law which is applicable to the descendants of the sons of a dancing

(1) (1902) I.L.R., 25 Mad., 519.

woman assuming that the parentage of the sons is unknown and that they are not the sons of one individual. In *Subbaratna Mudali v. Balakrishnaswami Naidu*(1) a bench of this Court held that the male members of the dancing girl caste are Hindus and are usually governed by the Hindu Law and usage. At page 208 the learned Judges observe:—

“All the women appear to have followed the profession of a prostitute. That members of this caste are Hindus is certain, though the ancient writers and their modern exponents find some difficulty in fixing them in one of the four castes; but whether they belong to the Sudra or fourth caste or to a separate fifth caste is immaterial. That male members of this caste are usually governed by the Hindu Law and usage does not seem to have been questioned; so also when female members marry and have children, as they sometimes do, their family relation is governed by the Hindu Law and presumably the ordinary Hindu Law of Inheritance will govern succession to their properties. At the same time their female children may remain unmarried and become professional *dasis* without any degradation or stigma attaching to them so long as they observe the caste customs.”

This decision is consonant with reason.

The plaintiffs and the defendants in this case are Hindus, Hindus by religion, as well as by their customs and manners. If the Hindu Law is not applicable to them, what other law is applicable? Though the Sruthis and Smrithis are applicable only to the Aryans, yet the text-writers have extended the law to all the residents of India, and the Courts have applied the Hindu Law to all the races inhabiting this vast country in the absence of proof of any special or local custom. The Dravidians of Southern India who are of Turanian origin had settled in India long before the Aryans entered it. They had their own laws and customs which are prevelant even to-day. The Aryans when they

(1) (1917) 33 M.L.J., 267.

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settled in this part of India attempted to introduce their customs and laws but they were never completely successful. The laws relating to family relations and succession and inheritance laid down by Manu and the commentators like Yagnavalkya and Vignaneswara were never accepted as binding by all the people. It was the East India Company's Courts that held for the first time that the laws contained in the ancient Sruthis and Smrithis were applicable to all Hindus in Southern India in the absence of any custom or customary law governing any class of people. Manu in order to extend the influence of the Aryans compendiously uses the term "Sudras" to the people of this country who are not Aryans in the same way as the Europeans use the word "native" to all those who are not of European descent, and postulates that they are all Sudras who have fallen away from the high place once occupied by them in the Aryan polity, as the following verses show: Chapter X, verse 43 :—

The following races of Kshatriyas by their omission of holy rites and by seeing no Brahmins have gradually sunk among men to the lowest of the four classes :—

Verse 44 :—

"Paundrakas, Oodras, Draviras, Kambojas, Yavanas and Sakas, Paradas, Pahlavas, Chinas, Kiratas, Derudas and Chasas".

Verse 45 :—

All those tribes of men who sprang from the mouth, the arm, the thigh and the foot of *Brahma* but who became out castes by having neglected their duties are called *Dasyus* or plunderers, whether they speak the language of the *Mlechch*' has or that of A'ryas.

This attempt on the part of the law-giver, Manu, to extend the influence of the Aryans among the races who inhabited this land was always pushed in the direction of influencing their religion and the rules of succession. When the East India Company's Courts

were established, the Judges took the law from the Pandits who naturally relied upon the texts of the ancient law-givers and commentators as authority for their opinion. In course of time the Courts have come to regard Manu and the commentators as authoritative exponents of the law applicable to all the inhabitants of this country who do not profess any distinctive faith like Muhammadanism or Christianity. The customary law was considered as an exception to that contained in the Sruthis and Smrithis. Under the loose term "Hindu" all classes of people are brought within the pale of "Hindu Law" as expounded in the texts of the various Sruthis and Smrithis and their commentators. It therefore follows that people who have been born in India and who are of the Hindu faith and whose customs and manners are those of Hindus are governed by the Hindu Law.

In the case of a dancing woman or a Hindu prostitute her religion is Hindu and her customs, manners and observances are Hindu, and her sons are Hindus and the Hindu Law therefore is applicable to them.

The caste and persuasion of the mother determine the rights of her son, if illegitimate. In *Lingappa Gounden v. Esudasan*(1), it was held that the illegitimate son of a Hindu by a Christian woman was not entitled to maintenance from the estate of his Hindu father. BENSON and BHASHYAM AYYANGAR, JJ., observe at page 14,

"The Hindu Law lays down certain rules for determining the caste of offspring of unions between parents belonging to different castes (amongst the four recognized main castes) and give separate names to the mixed castes to which such offspring will belong. In all these cases the dharma or religious rites applicable to the offspring are those prescribed for the mother's

(1) (1904) I.L.R., 27 Mad., 13.

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caste; *Brindavana v. Radhamani*(1). The plaintiff, therefore, cannot be regarded as a Hindu by birth, and he is therefore beyond the pale of, and not governed by, the Hindu Law. There is no text of Hindu Law under which an illegitimate son of a Hindu, by a woman who is not a Hindu, can claim maintenance, and in none of the reported cases has maintenance been ever awarded to an illegitimate son who was not a Hindu by birth."

With all due respect it is difficult to see why the illegitimate son of a Hindu is not a Hindu when he follows the Hindu customs and manners. It is the Hindu father who is bound to support his illegitimate son and the mother's religion has nothing to do with his liability to maintain him. It is unnecessary to question the soundness of this decision in this case. The principle of the decision is the mother's religion determines the rights of her children. If the mother is a Hindu, the children are Hindus, and the Hindu Law therefore is applicable to them. In *Myna Boyce v. Ootaram*(2), the facts briefly are: one Hughes kept two married women as his concubines; one of them was a Gowda Brahman. Two sons were born to the Brahman woman and he bequeathed his property to the sons. One of the sons died and the other son claimed to succeed to him. The Privy Council held that the illegitimate children of a Brahman married woman born to a European father were to be considered as Hindus and their rights governed by that law. On remand, the Madras High Court held [see *Mayna Bai v. Uttaram* (3)], that the sons of an Englishman by a Brahman woman living apart from her husband were Hindus and their rights were to be determined by the rights of the class of Hindus to which they belonged; and they also held that they were to be regarded as Sudras or a class still lower, and in the absence of preferable heirs the two

(1) (1889) 1 L.R., 12 Mad., 72.

(2) (1861) 8 M.I.A., 400.

(3) (1864) 2 M.H.C.R., 196.

sons inherit the property of the mother and of one another. It was not possible to plead any custom in support of the claim. The learned Judges observed at page 203,

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"Our reasoning, therefore, is that there is no authority against the existence of heritable blood between the woman and her illegitimate offspring. Toukuram and his brother are decided to be Hindus. They are the Hindu sons of a woman who was either a woman of a class lower than the fourth of Manu's classes, and in this case the sons are cognate to her and to one another, as the children of a class not twice-born out of wed-lock, and entitled to inherit to their mother, and only not capable of inheriting to their father because he is not a Hindu at all. If not so, she is a mere prostitute, and of the cognation between her and her offspring there exists no doubt whatever."

They relied upon the Roman Law which recognized the relationship between an erring mother and her sons and of the sons towards one another. It was the influence of Christianity in the west that stood in the way of the claim of an illegitimate son on his putative father. The principle deducible from these decisions is that if the mother is a Hindu and the children follow the Hindu religion and adopt Hindu manners and customs, the law applicable to them is the Hindu Law and it does not matter whether the father is a Christian or Muhammadan, European or an Indian. It necessarily follows that persons whose paternity is unknown and who are the descendants of Hindu mothers are governed by the Hindu Law.

In a recent case the Patna High Court held that the sons of the daughters of Hindus of the Naick caste who were converted to Muhammadanism but who lived with their Hindu grandparents and were brought up as Hindus are governed by the Hindu Law and the daughters of the family are governed by the Hindu Law even though they have adopted the profession of dancing and have become prostitutes. JWALAPRASAD, J.,

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after an exhaustive consideration of the texts contained in the Sruthis and Smrithis relating to the point and the decided cases bearing on the point, has come to the conclusion that the sons of the prostitutes converted to Muhammadanism who were brought up by the Hindu grandparents as Hindus are governed by the Hindu Law. It follows from this decision that the Hindu Law is the proper law which governs the relations and the inheritance of persons who are Hindus in faith and in customs and manners. Though it is stated that a Hindu is born and not made, yet when the question is what is the law applicable to persons who are Hindus in fact, the only answer is that the ordinary Hindu Law is applicable and if the ordinary Hindu Law is applicable, unless there is some prohibition, statutory or otherwise, the whole of that law is applicable. In this case supposing Muniappa Mudali had died without issue and the widow alienated his property improperly would not Muthuswami Mudali, if he survived Muniappa, be entitled to bring a suit that the alienation was not binding on him as reversioner? If Muthuswami Mudali could bring such a suit, could not his son bring such a suit? and if he could, his legitimate descendants can certainly bring such a suit. It is consonant with reason and principle that, when a particular system of law is made applicable to a set of persons, the whole of that system should be applied and not portions of it, unless any custom valid and binding is proved to the contrary, or else, the application of that system is modified either by statute or by anything contained in the rules of that system.

From the decisions in *Myna Boyee v. Ootaram*(1) and *Mayna Bai v. Uttaram*(2), it is clear that Muthuswami Mudali and Kachi Muniappa Mudali had heritable

blood between them. This is not seriously disputed by the appellant. The question is whether their descendants can inherit to one another, in other words, whether the principle of collateral succession applies to the descendants of these two persons. The contention of Mr. Govindaraghava Ayyar for the appellant is that collateral relationship is traceable only through the father, in other words, it is only in the case of agnatic relations that the principle of collateral succession is applicable, that an illegitimate son cannot inherit to his father's collateral relations and that in the case of Muniappa Mudali and Muthuswami Mudali the father being unknown agnatic relationship does not exist and therefore there can be no collateral succession among their descendants. Reliance is placed on the following cases in support of the appellant's contention. Amongst the Sudras governed by Mitakshara, an illegitimate son cannot inherit collaterally in preference to legitimate heirs. *Ravji Valad Mahadu v. Sakuji Valad Kaloji*(1). Amongst Sudras governed by Mitakshara an illegitimate son does not inherit collaterally to the legitimate son by the same father. *Shome Shankar Rajendra Varere v. Rajesar Swami Jangam*(2). The illegitimate son is under Hindu Law excluded from all collateral succession, *Dharma Lakshman v. Sakharam Ramjirao*(3). The son of the legitimate son of a Sudra could not inherit to his illegitimate son; *Zipru v. Bomtya*(4). It is well settled that an illegitimate son cannot claim to inherit to his father's collaterals. He cannot claim to succeed to the legitimate son of his father but can succeed only to his father and the father can succeed to him. The relationship is therefore only between an illegitimate son and his

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(1) (1910) I.L.R., 34 Bom., 321.
(3) (1920) I.L.R., 44 Bom., 185.

(2) (1899) I.L.R., 21 All., 99.
(4) (1922) I.L.R., 46 Bom., 424.

(1) (1861) 8 M.I.A., 400.

(2) (1864) 2 M.H.C.R., 196.

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father. In *Subramania Ayyar v. Rathnavelu Chetty*(1) it was held that the father was entitled to succeed to his illegitimate son who left no issue, widow or mother. In all the cases where the illegitimate son was denied the right to succeed to his father's collateral relations, the following text of Manu was relied upon:—

“The son of a young woman unmarried, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son by a Sudra are the six kinsmen but no heirs to collaterals,” *Manu, Chapter IX, verse 160.*

But for this text, the illegitimate son would have the right to succeed to his father's collaterals. The question of succession to the putative father's collaterals does not arise here and the cases noticed above have therefore no application to the present case.

In the time of Manu a woman was allowed to marry more than once as is clear from Manu, Chapter IX, verse 191. The sons of a mother though by different fathers were considered to have heritable blood between them for Nanda Panditha gives the order of precedence among brothers and sisters of whole blood and half blood thus: (1) Brothers of the whole blood, (2) sisters of the whole blood, (3) sons of the same father and (4) sons of the same mother. The existence of heritable blood between sons of the same mother by different fathers cannot therefore be through the father and is attributable only to their being sons of the same mother. It is not therefore necessary that in order to have heritable blood, inheritance should be traced through the father. It logically follows that the sons of a dancing woman or a prostitute have heritable blood between them.

If A can succeed to B in the absence of preferable heirs why should not A's legitimate son succeed to B if A predeceases B, in the absence of law or custom to the

contrary? If two men are sons of the same mother they have heritable blood between them; and if they have heritable blood between them, their descendants also have heritable blood between them unless such a principle is opposed to any distinct text either in Manu or in the Mitakshara or in any one of the various commentaries. There is no text of Manu or any of his commentators against the descendants of the sons of a prostitute having heritable blood between them. Both Muthuswami Mudali and Kachi Muniappa Mudali were brothers and their descendants are all legitimate, i.e., the plaintiffs are the legitimate sons of the legitimate son of Muthuswami Mudali, similarly Murugesu Mudali was legitimate in descent from Kachi Muniappa Mudali. There was no *bar sinister* so far as he, or his father, or grandfather was concerned. Seeing that there was heritable blood between Muthuswami Mudali and Muniappa Mudali did the tie cease to exist between Muthuswami's son and Muniappa's son? If there was heritable blood between the fathers, it is difficult to understand why that should not continue in the case of the sons. If Muthuswami Mudali could succeed to Kachi Muniappa it is difficult to see why the legitimate son of Muthuswami should not succeed to Kachi Muniappa. The principle of representation as enunciated in *Ramalinga Muppan v. Pavadai Goundan*(1) is against the appellant's contention. In that case it was held that the legitimate son of an illegitimate son was entitled to succeed to a man in preference to his divided brother. BHASHYAM AYYANGAR, J., who delivered the judgment in the case observed with regard to *Krishnayyan v. Muthusami*(2), *Ranoji v. Kandoji*(3) and *Parvathi v. Thirumalai*(4),

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(1) (1902) I.L.R., 25 Mad., 519.
(3) (1885) I.L.R., 8 Mad., 587.

(2) (1884) I.L.R., 7 Mad., 407.
(4) (1887) I.L.R., 10 Mad., 334.

(1) (1918) I.L.R., 41 Mad., 44 (F.B.).

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"The effect of these decisions is that it is only when the father dies a separated house holder that an illegitimate son is entitled to inherit to his separate estate, but that when the father dies an *avibhakta* (undivided from his brothers or other collaterals) he is entitled only to maintenance. The principle of these decisions is explained as follows in *Thangam Pillai v. Suppa Pillai*(1). 'But these decisions proceeded on the view that he had no claim by survivorship against his father's co-parceners by *jus representationis*, and that he was neither a co-heir with his father nor a sapinda in relation to the father's co-parceners.'"

The learned Judge goes on to observe at page 523 :

"Assuming, as explained in *Thangam Pillai v. Suppa Pillai*(1), that by reason of his illegitimacy, an illegitimate son cannot claim his father's share as against his father's co-parcener by *jus representationis*, that principle will not be applicable to a legitimate son representing his father though the father was the illegitimate son of the grandfather. If a Sudra dies, leaving a legitimate son and a grandson or greatgrandson by a predeceased illegitimate son, can it be contended that the legitimate son is not bound to allow half a share to the son or grandson of his deceased illegitimate brother just as he would be if the illegitimate son did not predecease the father? If the grandson as representing his father though not claiming under him, would be entitled as against his uncle to claim his father's share, it can hardly be maintained though his father predeceased the grandfather, that he cannot claim the grandfather's estate as against the grandfather's divided brother. An illegitimate son's right of inheritance to his father's property, or at least to a part of it, is not contingent but absolute, as in the case of a legitimate son, since if he has legitimate half-brothers or other heirs of his father down to a daughter's son he gets a half share and in the absence of such heir, the whole estate. The Sudra's illegitimate son is therefore in a position more analogous to that of a legitimate son than to that of other relations whose right of inheritance is liable to obstruction. The principles, therefore, applicable to the succession of sons and grandsons of legitimate

(1) (1889) I.L.R., 12 Mad., 401.

sons may by analogy be applied to the sons and grandsons of an illegitimate son, viz., that they should be considered capable of representing the illegitimate son and in case he dies before his father, of taking the share which would have fallen to him if he had not so died."

The learned Judge relies for his opinion upon West and Buhler, III Edition, pages 72, 82, 83 and 390, and Mr. Jolly's work on Hindu Law, pages 185 and 186. I respectfully adopt the reasoning of that very learned Judge, and I am of opinion that the legitimate descendants of Muthuswami Mudali represent Muthuswami Mudali and the legitimate descendants of Muniappa Mudali represent Muniappa.

If Muniappa Mudali's son had died without issue, would not Muthuswami Mudali, if he was alive, have succeeded to the property of that son? and if it is once granted that Muthuswami's son represents him and Muniappa's represents him, then it is difficult to understand how their sons could not represent Muthuswami and Muniappa, respectively. If that is so, then there is heritable blood between them and one line can succeed to the other line according to the principle of collateral succession. It is immaterial to consider whether Thanji was a dancing woman or only a prostitute. Whether the mother be a dancing woman or an ordinary prostitute the legitimate descendants of her sons have heritable blood between them and this decision does not turn upon any custom or law peculiar to dancing woman.

On a careful consideration of the cases quoted at the bar and the various passages in the Hindu Law books touching on this point I have come to the conclusion that the plaintiffs are the reversionary heirs to Murugesu Mudali.

The appeal is dismissed with costs.

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WALLACE, J.—I am of the same opinion.

It appears to me that on the plaintiffs' own case the mother of the two brothers was of the dancing girl caste. Both plaintiffs' witnesses 1 and 3 state that this woman was a dancing girl and had no fixed husband. She was not therefore a married woman who had fallen from lawful wed-lock. The law first of all to be applied is then the law founded on usage which governs inheritance to women of the dancing girl caste, the paternity of whose children is unknown and is not a fact for consideration at all.

So far as appears further from the evidence, these two brothers lived in caste, married wives according to the Hindu caste customs and had legitimate offspring.

Authority regarding the law of succession of *natural* offspring of a dancing girl, there is, so far as I can find, none. Though a recent case, *Guddati Reddi Obala v. Ganapati Kandanna*(1), lays down that the degraded married woman is not for purposes of the law of succession in the position of a dancing girl, I do not think it is incorrect to say that, if the natural sons of such women take their place in Hindu Society as respectable members of such and live as caste Hindus following the laws and customs of such, they must be taken as having adopted the usages and customs of the Hindu people with whom they associate. It does not appear to have been pleaded in this case that the law of succession of male offspring of a dancing girl differed in essence from the law of succession of the male offspring of a degraded married woman and in fact both sides proceeded on the footing that the law was much the same. I may take it then, without wasting time by further remand of the case, that the usage and customs

(1) (1912) 23 M.L.J., 493.

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of succession to their mother and *inter se* of male offspring of a dancing girl are those of such succession of the male illegitimate offspring of a degraded married woman. It may also be taken as not in question that such male offspring will not belong to any of the three higher castes, whatever their paternity may have been, and that if they are in caste at all, they must be in the Sudra caste.

I do not think that the *placita* from various ancient texts really assist this case, because they are not in my opinion dealing with the rights of succession of inheritance in favour of *illegitimate* children at all, except in the case of the illegitimate son of a Sudra; that is, in these texts "Son" means a legitimate son and "Daughter" means a legitimate daughter. This applies even to the passage from Nanda Panditha quoted at page 207 of Jolly's Hindu Law (1835 Edition). Illegitimate children have no place in Hindu Law when there are legitimate heirs except in the special case already referred to (see *Meenakshi v. Muniandi Panikkan*(1)). I also find very few of the cases cited before us of any real help since this is not a contest between an illegitimate offspring and a legitimate or a case of a claim by an illegitimate offspring to succeed to his putative father's collaterals. The question is purely whether two illegitimate sons of the same mother have between them heritable blood. The rule laid down in *Mayna Bai v. Uttaram*(2), that the children of a prostitute, when the contest is purely between themselves, succeed to the property of their mother and to one another is, I think, the rule to be followed in this case. As I read that case, the principle did not in slightest degree depend either on the fact that the father was known or on the

(1) (1915) I.L.B., 38 Mad., 1144 at 1151.

(2) (1864) 2 M. H.C.R., 106.

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fact that the father of both illegitimate sons was the same person. It rested not on the common paternity, but on the common maternity of illegitimate sons. (Compare also the *ratio decidendi* of *Lingappa Goundan v. Esudasan*(1)). That principle in this narrow form has never, so far as I can ascertain, been challenged in succeeding cases, and it is also in my opinion reasonable and equitable and in consonance with the general spirit, though not prescribed by the letter, of the law of the Mitakshara, wherein heritability follows propinquity of blood and Sapinda relationship is determined by the possession of particles of the same body, whether father's or mother's (see Mitakshara quoted by Setlur in his Hindu Texts, 1911 Edition, Appendix A, page 543, and the view of SADASIVA AYYAR, J., in his order of reference in *Subrahmanya Ayyar v. Ratnavelu Chetty*(2)). I do not think that there is any authority in Madras for the proposition that Sapinda relationship cannot exist without a father.

The only reported cases which I can find of contest between illegitimate children *inter se* are *Mayna Bai v. Uttaram*(3), which I have already dealt with, and *Arunagiri Mudali v. Ranganayaki Ammal*(4), in which latter case neither side appears to have raised any general contention that the Hindu Law principle which gives preference to daughters over sons as heirs of their mother could not be applied because Hindu Law generally could not be applied to the case.

I think the net result of the authorities and the case law is this, that Hindu Law texts have no application to illegitimate children except in the case of the illegitimate son of a known Sudra father, that so far as the

(1) (1904) I.L.R., 27 Mad., 13.
(3) (1884) 2 M. H.C.R., 186.

(2) (1918) I.L.R., 41 Mad., 44 at 50.
(4) (1898) I.L.R., 21 Mad., 40.

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Hindu Law cannon goes, illegitimate children have no right of succession to either parent, but that the general principles of Hindu Law will be applied to such a case unless such application would violate equity and good conscience and that applying these, the Courts will hold that illegitimate children *inter se* when there is no contest between them and legitimate children, inherit to their mother and to one another.

The next step is more difficult; if the Court holds that outside Hindu Law there is heritable blood between any two illegitimate children, will that heritability carry with it all the adjuncts of heritability under Hindu Law, so that the legitimate male descendents of one branch can claim as reversioners to oust the legitimate widows and legitimate descendants of the other branch? That is the point now before us. In essence *Arunagiri Mudali v. Ranganayaki Ammal*(1), has approved of that principle, although the general question does not appear to have been then argued at all. But it was there taken for granted that Hindu Law principles would be extended to the illegitimate children of a Hindu woman. In *Mayna Bai v. Uttaram*(2), as I read it, it was clearly laid down that the illegitimate children of a Hindu mother are to be considered to be Hindus to whom Hindu Law, so far as it can be analogically applied, will be applied and it is not open, unless and until special custom to the contrary is proved, for persons who are in the eye of the law Hindus to plead that the ordinary adjunct of the principle of Hindu Law, for example, that of the restricted nature of an estate taken by a widow from the last male owner, do not apply, or that they are entitled to set up new rights of succession and inheritance not known to Hindu Law. I cannot see that such an analogical application of Hindu

(1) (1898) I.L.R., 21 Mad., 40.

(2) (1884) 2 M. H.C.R., 186.

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Law to persons living as Hindus and following Hindu customs and usages can in any way offend the general principles of equity and good conscience. I hold therefore that the legal principles to be applied are those set out above.

It is not denied before us that these parties are, so far as they can, conforming to the Hindu Law governing their neighbours, that for example, their wives were legitimately married to them according to the forms of Hindu Law, and that their wives derive their status as lawful wives and their children their status as lawful children from the fact that their families are conforming to the general usages and customs of Hindus. No special custom derogating from the applicability of Hindu Law principles to the descendants of these two illegitimate brothers has been pleaded or proved in the case. It follows in my view that the ordinary principles of Hindu Law should be applied to them. That the Lower Court has done. My opinion therefore is that the decision of the Lower Court is correct and I agree that this appeal must be dismissed with costs.

N.A.

