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THE INDIAN LAW REPORTS

MADRAS SERIES

CONTAINING

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

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JUDGES OF THE HIGH COURT.

1929

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(1929) I.L.R., 52 Mad.

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<i>Rajah of Kalahasti v. Venkatappa Nayanam Bahadur</i> , (1928) 27 L.W., 544, distinguished	460
<i>Ramanadhan Chetty v. Subramanian Chetty</i> , (1926) 51 M.L.J., 295, distinguished	522
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CHARGE—Alteration—Recalling prosecution witnesses:—See CRIMINAL PROCEDURE CODE (V OF 1898), SEC. 231 846

CITY MUNICIPAL (MADRAS) ACT (IV OF 1919), SEC. 111, EXPL. II—Whether political pension is a "pension" within—Profession tax, a half-yearly tax—Right to levy retrospectively—Limitation Act (IX of 1909), art. 120.] Not merely pensions ordinarily paid to retired officials in consideration of their past services, but political pensions also (i.e., the pension paid, as in this case, by the Government to the Prince of Arcot) come within the meaning of the word "pension" in explanation II to section 111 of the Madras City Municipal Act (IV of 1919). Under the provisions of the Act and the rules framed thereunder, profession tax becomes "due" by a person liable to pay it, only after he has been assessed to a particular amount by the Commissioner. Such assessment must be made in each respective half-year, and hence, profession tax for any half-year prior to the current half-year cannot be levied unless it had been assessed in that half-year.

Prince of Arcot v. Corporation of Madras... .. (1929) I.L.R., 52 Mad., 866

SEC. 267—If licence fee could be imposed under, for purposes of taxation—If must be reasonable—Fixing amount of fee—If Court can assume power conferred on Corporation—Licence fee for storing foreign liquor raised from Rs. 25 to Rs. 200—Expenses of supervising practically nil—Enhanced fee if unreasonable.] A licence fee imposed by the Corporation of Madras under section 287 of the Madras City Municipal Act cannot be imposed for the purpose of taxation. It must be a reasonable fee. The Court will not take upon itself the power conferred by statute on the Corporation to fix the amount of the fee. Where the Corporation of Madras raised the licence fee for storing foreign liquor from Rs. 25 to Rs. 200, and it appeared on the evidence that the expenses of supervising the places where the foreign liquor was stored, were practically nil, held, that the levy of the enhanced fee was unreasonable. *Kruse v. Johnson*, [1898] 2 Q.B., 91, *Municipal Corporation of Rangoon v. The Soorattee Bara Bazaar Co., Ltd.*, (1927) I.L.R., 5 Rang., 212, followed. *Institute of Patent Agents v. Lockwood*, [1894] A.C., 347, referred to.

Corporation of Madras v. Spencer & Co., Ltd. ... (1929) I.L.R., 52 Mad., 764

CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 13—Suit on a foreign judgment—Judgment of Foreign Court passed after defendant filed written statement and issues taken—Trial, adjourned by consent with a view to settlement—Decree passed on non-appearance of defendants on adjourned date, as per consent order already passed—Suit on judgment in a British Indian Court, whether maintainable—Res judicata—Estoppel—Judgment,

whether on merits—Assignment of foreign decree to a co-plaintiff, not recognized in foreign Court—Suit in British Indian Court by assignee, whether maintainable without such recognition.] In a suit in a foreign Court, the defendants appeared, filed their written statement raising their plea, and an issue was framed according to their plea; but when the suit came on for trial, both the parties filed a joint petition to the effect that the trial of the suit might be adjourned for three months with a view to settlement and that, if the suit was not settled, judgment might be entered for the plaintiffs as prayed for with costs and that the property mortgaged with the plaintiffs might be sold by certain auctioneers forthwith. The Court passed an order accordingly; on the adjourned date the plaintiffs appeared and reported that the case was not settled; the defendants did not appear and the Court passed judgment in terms of the previous order. One of the plaintiffs therein assigned his interest in the foreign decree to the others who are the present plaintiffs, but no steps had been taken in the foreign Court to have the assignment recognized by that Court. On a suit brought in a British Indian Court by the assignees on the foreign judgment, the defendants pleaded that the suit was not maintainable: *Held*, (1) that the foreign judgment, in this case, was not one passed on a non-appearance of the defendants nor was it one passed on account of the failure of the defendants to comply with a provision of law; and that, consequently, the suit based on the foreign judgment was maintainable in the British Indian Court under section 13 (b), Civil Procedure Code; (2) that the judgment of a foreign Court creates a debt and is *prima facie* assignable; that the circumstance, that the assignment had not been recognized by the foreign Court, did not prevent the British Indian Court from recognizing the assignment in the suit brought on the foreign judgment.

Muhammad Moideen v. Chinthamani Chettiar ... (1929) I.L.R., 52 Mad., 503

CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 73 AND O. XXI, R. 11—Rateable distribution—Application for execution, defective—Fund deposited in Court to the credit of defendant's suit—Application for attachment of the fund—Attachment ordered on the defective application of decree-holder—Right to rateable distribution on such application.] Where a decree-holder applied to the Court which passed the decree for the attachment of a fund which had been paid into the Court to the credit of a suit filed by the defendant in the same Court against the same judgment-debtors, but the petition was defective in not containing some of the particulars required for an execution petition by Order XXI, rule 11, of the Civil Procedure Code, and yet the Court ordered the attachment of the fund, such an application, though defective in form, was sufficient for purposes of section 73 of the Code, and the decree-holder was entitled to rateable distribution under the section.

Abdul Salam v. Veerabhadra Raju ... (1929) I.L.R., 52 Mad., 760

..., SEC. 98—*Letters Patent, 1862, as amended in 1865—Appeal preferred to the High Court under Civil Procedure Code—Equal division of opinion between the Judges who heard the Appeal—Procedure to be adopted, whether under cl. 38 of the Letters Patent or sec. 98 of the Civil Procedure Code—Amendment of sec. 98 of the Code—Amending Act XVIII of 1928, effect of—Practice.*] In the case of an equal division of opinion between the judges of the High Court, in an appeal preferred to it under the Civil Procedure Code, the procedure to be adopted by the High Court is governed by clause 38 of the Letters Patent, and not by sec. 98 of the Code of Civil Procedure.

Dhanaraju v. Balakissendas Motilal ... (1929) I.L.R., 52 Mad. (F.B.), 568

..., SS. 109 AND 110—*Appeal and Memorandum of Objections before High Court—Common ground of disposal of both—Valuation of appeal to Privy Council.*] In a suit for a general account against a trustee which charged him also with specific items of malversation, the Court of first instance trying the items on the merits, decreed only some of them. On an appeal and a memorandum of objections, the

High Court dismissed the whole suit on a new ground common to both, viz., the non-liability of the defendant to account, on account of his prior accounting and handing over of account books. In a petition for leave to appeal to the Privy Council on the subject-matter of both the appeal and the memorandum of objections, whose aggregate value was above Rs. 10,000, but the separate values less than Rs. 10,000, *Held* granting the petition, that as the subject-matter of both, as newly determined by the High Court was the same (viz., liability or otherwise to account) the decree of the High Court cannot be construed as two decrees, one in respect of each but was a single decree on a single subject-matter, which did not "affirm" the decree of the first Court within the meaning of section 110 of the Civil Procedure Code, *Held*, further that in a suit for a general account each of the items of malversation was not a distinct subject-matter. *Ramanathan Chetty v. Subramanian Chetty*, (1926) 51 M.L.J., 295, distinguished.

Sundara Mudaliar v. Ratnavelu Mudaliar ... (1929) I.L.R., 52 Mad., 521

CIVIL PROCEDURE CODE (ACT V OF 1908), OS. IX AND XXI, RR. 97 AND 100—Execution of decree—Sale—Purchase by decree-holder—Possession by latter—Dispossession of third party—Application by latter complaining of dispossession—Application dismissed for default—Application by latter to set aside order—Order IX, Civil Procedure Code, whether applicable—Inherent jurisdiction of Court, whether exists. *Held*, by the Full Bench—(1) that proceedings under rule 97 or rule 100 of Order XXI of the Code of Civil Procedure are proceedings in execution, and section 141 of the Code is, therefore, not applicable to such proceedings, unless they also fall within section 47; and in consequence the provisions of Order XXI do not apply to them; and (2) that the Court has no inherent power to set aside an order of dismissal for default or an order passed *ex parte*, in such proceedings on sufficient cause being shown.

Alagasundaram Pillai v. Pichuvier ... (1929) I.L.R., 52 Mad. (F.B.), 899

..., O. XXI, R. 50—*Death of partner before institution of suit against partnership—Decree in firm name alone—Execution of decree—If private estate of deceased partner liable in—O. XXI, r. 50 (2)—Applicability of—Plaintiff not aware of death of partner before institution of suit—If would entitle him to obtain leave to execute against legal representatives under O. XXI, r. 50.*] Where a partner dies before the institution of a suit against the partnership, and a decree is obtained against the firm alone in the firm name, the private estate of the deceased partner is not liable to be proceeded against in execution of such decree. Order XXI, rule 50 (2), of the Code of Civil Procedure in terms applies only to a person who is alleged to be a partner, and does not apply to legal representatives of a partner who was dead at the time the plaint was filed. The circumstance that the plaintiff had no knowledge of the death of a partner before the institution of the suit would not make any difference on the question. *Ellis v. Wadson*, [1899] 1 Q.B., 714, and *Mathurdas Canji v. Ebrahim Fazilbhai*, (1927) I.L.R., 51 Bom., 986, followed.

Mahomed Yusuf v. Badsha Sahib ... (1929) I.L.R., 52 Mad. (F.B.), 885

..., O. XXI, RR. 89 AND 92—*Petition to set aside sale within 30 days—Omission to include auction-purchaser, effect of.*] In an application to set aside a sale under Order XXI, rule 92, Civil Procedure Code, coupled with rule 89, which is otherwise in order and in time, the omission to include the auction-purchaser till after the expiry of the 30 days allowed for the application is not fatal to it.

Narayana Saha v. Pentumma ... (1929) I.L.R., 52 Mad., 861

..., O. XXII, R. 6—*Death of respondent before hearing of a civil revision petition—Legal representatives not brought on record—Case heard and judgment pronounced after death of respondent—Judgment, validity of—Right of petitioner to apply to bring on legal representatives and retain the judgment—Right to bring legal representatives within three months of the death, and have case re-argued.*] Where, after the death of the respondent in a civil revision petition in the High Court and without his legal representatives on the record, the case came on

for hearing, arguments were heard on both sides and judgment was pronounced in favour of the petitioner, the judgment had no validity in law; the petitioner was entitled to apply, within three months of the respondents' death, to bring his legal representatives on the record and to have the case re-argued, but he was not entitled to have the former judgment retained without a re-hearing by merely adding the legal representatives on the record.

Balaramier v. Vasudevan ... (1929) I.L.R., 52 Mad., 933

CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXII, R. 3—Minor—Guardian-ad-litem, appointment of—*Suit on a promissory note executed by mother as guardian of her minor adopted son—Suit on the note against minor—Mother, appointed as guardian-ad-litem—Decree passed—Objection to attachment in execution, by minor represented by another person as guardian—Objection to validity of decree—Appointment of executant as guardian-ad-litem, whether renders decree, etc., void as a matter of law in every case, or voidable.* When a person has executed a document or entered into a transaction on behalf of a minor as his guardian, the question, whether that same person can be validly appointed guardian-ad-litem of the minor in a suit brought against him on the document or transaction in question, is not a pure question of law, but is one of fact governed by no hard and fast rule of law, and there is nothing, either in the Civil Procedure Code or in any of the authorities, to lay down not merely that such a person should not as a rule be appointed but cannot in any circumstances be validly appointed. The question, whether the appointment of such a person as guardian-ad-litem renders the decree void against the minor or only voidable by him, cannot be answered as involving a pure question of law, in the absence of a finding whether the appointment of the guardian was, in the circumstances, proper or improper. Nor can the question, whether objection could be taken in execution that the decree is void, be answered without a determination of the two previous questions which depend upon decisions of fact.

Venkatasomeswara Rao v. Lakshmanaswami ... (1929) I.L.R., 52 Mad. (F.B.), 275

O. XL, R. 1—Simple mortgage—

Jurisdiction of Court to appoint receiver to take possession of mortgaged property—Impossibility of laying down hard and fast rule. Though, ordinarily, a Court will not deprive the mortgagor of the possession of his property which is subject to a simple mortgage, yet where on account of circumstances created either by the conduct of the mortgagor or connected with the state of the property, the mortgagee is likely to sustain a loss not foreseen by him at the time he took a simple mortgage, a Court will have jurisdiction to appoint a receiver to take possession of the property for the benefit of the mortgagee. It is impossible to lay down a hard and fast rule enumerating the circumstances under which alone a Court will appoint a receiver in respect of property subject to a simple mortgage.

Ethirajulu Chetti v. Rajagopalachariyar ... (1929) I.L.R., 52 Mad., 979

COMPANIES ACT (INDIAN) (VII OF 1913)—Nidhi—Memorandum of Association—Object, to advance money to help shareholders to acquire property—Articles of Association—Shares of Rs. 100 each—Shareholders enabled to sever connexion with company and end liability on payment of Rs. 84 per share—If intra vires of the Act—If such shareholders liable as contributories on liquidation. Where the effect of the Articles of Association of a Nidhi, started, as set out in the Memorandum of Association, with the object of helping shareholders to acquire property, was to enable persons, who had subscribed for shares of Rs. 100 each, to sever their connexion with the company and end all their liability with regard to it, when they had paid up Rs. 84 per share, held, that such a course would be *ultra vires* the Memorandum of Association, and would constitute a reduction of capital without the assent of Court, and thus directly contravene the provisions of the Indian Companies Act, and that those persons will on liquidation, be liable as contributories.

Madras Native Permanent Fund, Ltd. v. Natesa Sastri. (1929) I.L.R., 52 Mad., 915

CONTRACT ACT (INDIAN) (IX OF 1872), SEC. 33—Creditor refusing to entertain idea of payment by debtor and putting it out of the power of tenderor to offer payment in manner acceptable to creditor—Offer of performance, by person able to carry out promise in entirety—Form of performance, not legal tender—If valid—Tender by cheque—Validity of. Where a creditor refuses to entertain the idea of payment by his debtor or by some one acting on his behalf, and puts it out of the power of the tenderor to offer payment in a manner acceptable to the creditor, the offer of performance by a person then able to carry out the promise in its entirety is a valid tender, in spite of the form of it being itself not legal tender and under section 84 of the Transfer of Property Act, interest ceases to run from the date of such tender. A tender by a cheque is a valid tender unless the creditor refused the form of it. *Jones v. Arthur*, (1840) 8 Dowl. Pr. Cas., 442; 59 R.R., 833, *Polglass v. Oliver*, (1831) 2 C. & J., 15; 149 E.R., 7 and *Mahomed Mosaffer Ali v. Asraf Ali*, (1914) 25 I.C., 93, followed.

Venkatarama Ayyar v. Gopalakrishna Pillai ... (1929) I.L.R., 52 Mad., 322

SS. 240 AND 241 :—See PARTNERSHIP ... 672

CO-OPERATIVE SOCIETIES—Liability to income-tax:—See INDIAN INCOME-TAX ACT, SS. 6, 8 AND 10 ... 640

COSTS—Decree for costs against Official Receiver—Personal liability. Where a decree dismissing an Official Receiver's appeal directed him to pay the costs of the respondents, without stating that the costs should be paid out of the insolvent's estate, the costs are executable personally against the then Receiver, though he had ceased to hold office at the time of execution.

Balakrishna Menon v. Uma ... (1929) I.L.R., 52 Mad., 263

COURT FEES ACT (VII OF 1870), SCH. II, CL. 17 (B)—Suit by tenant in a Revenue Court under sec. 112 of the Madras Estates Lands Act (I of 1908)—Appeal to District Court—Second Appeal by tenant—Court-fee payable on the memorandum of, whether ad valorem or fixed fee under sch. II, cl. 17 (b)—Government Notification, No. 1245, dated 15th April 1926. A suit instituted in a Revenue Court by a tenant under section 112 of the Madras Estates Land Act is not a case where it is possible to estimate at a money value the subject-matter in dispute; consequently it falls under article 17 (b) of the Second Schedule of the Court Fees Act; a memorandum of second appeal against a decree passed on appeal from the decision of the Revenue Court in such a suit should bear a court-fee stamp of rupees fifteen, under the Government Notification No. 1245, dated 15th April 1926.

Aiyasami Aiyar v. District Board, Tanjore ... (1929) I.L.R., 52 Mad., 972

AS AMENDED BY MADRAS ACT

(V OF 1922), ART. 17 (a) (iii) OF THE SECOND SCHEDULE—Suit to set aside an adoption—Valuation. Article 17 (a) (iii) of the second schedule of the Court Fees Act, as amended by Madras Act V of 1922 enacts that the Court-fee to be paid in suits to set aside an adoption is "hundred rupees, if the value for purposes of jurisdiction is less than rupees ten thousand, and five hundred, if the value is ten thousand rupees or upwards." Held, and construing the above article, (a) that the plaintiff in such a suit is not entitled to put his own valuation upon the relief claimed and, (b) that the market value of such interest and not the value thereof as in a suit for possession is the proper valuation; *Keshava v. Lakshminarayana*, (1892) I.L.R., 6 Mad., 192, followed.

Ramaswami Asari, In re ... (1929) I.L.R., 52 Mad., 310

ART. 17 (1) OF SCHEDULE—The Madras Hindu Religious Endowments Act (II of 1927), sec. 84 (2)—Application under. The Court-fee payable on an application under section 84 (2) of the Madras Religious Endowments Act [II of 1927], to set aside an order of the Endowments Board under section 84 [1], is according to article 17,

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and not article 17-A, or 17-B of the Court Fees Act; and under article 17, it is 17 (1) alone that is applicable; hence the fee is rupees fifteen only and not rupees fifty; <i>Godasankara Valia Rajah v. Board of Commissioners, H.R.E., Madras</i> , [1928] M.W.N., 509, dissented from.	
<i>Sundara Ayyar v. Commissioners, H.R.E. Board</i> ... (1929) I.L.R., 52 Mad., 388	
CRIMINAL COURT—Jurisdiction:—See PENAL CODE, INDIAN (ACT XLV OF 1860), s. 407 426	
Question of title to Property:—See SURVEY AND BOUNDARIES ACT (MADRAS) [VIII of 1928], ss. 13 and 14 610	
CRIMINAL PROCEDURE CODE, SEC. 144—Order under—Revision against, to High Court—If competent. [An order of a Magistrate acting under section 144 of the Code of Criminal Procedure is not the order of a Court, and against such an order no revision lies to the High Court under section 435 of the Code. <i>Nataraja Pillai v. Rangaswami Pillai</i> , (1923) 17 L.W., 409, followed.	
<i>Vedappan Servai v. Perianann Servai</i> (1920) I.L.R., 52 Mad., 69	
SEC. 145—Limitation:—See LIMITATION ACT (IX OF 1908), ART. 47 787	
SEC. 145—Application made in respect of forcible dispossession—Preliminary order not passed within two months—Applicant in no way responsible for the delay—If to operate to his prejudice—Intent and object of section.] When an application is made to a Magistrate under section 145 of the Code of Criminal Procedure by a person complaining of forcible dispossession, if, for no reason or fault of the applicant, the Magistrate is not able to pass a preliminary order within two months of the dispossession, the party complaining, should not, on a proper construction of the first proviso to clause (4) of section 145, be made to suffer by reason of such delay on the part of the Magistrate, and is entitled to an order under that section. Though the words of the proviso are capable of the interpretation, that the dispossession must be within two months of the preliminary order, yet the intent and object of the section must be taken into consideration before such an interpretation is put upon it.	
<i>Srinivasa Reddy v. Dasaratha Rama Reddy</i> ... (1929) I.L.R., 52 Mad., 66	
SEC. 145 (1)—Order under—Magistrate's local jurisdiction over land or water in dispute essential.] An order under section 145 (1) of the Criminal Procedure Code can be made only by a Magistrate having local jurisdiction over the land or water in dispute. Where a petition was presented to a District Magistrate praying for action under section 145 of the Code in respect of certain land, and he transferred it for disposal to a Subdivisional Magistrate, the limits of whose jurisdiction did not include the land in question, and the latter passed an order first under section 145 (1) and then under 145 (6), held, that the whole proceedings were illegal.	
<i>Challapathi Naidu v. Subba Naidu</i> (1929) I.L.R., 52 Mad., 241	
SEC. 197—Prosecution of public servant for offence alleged to have been committed while actually engaged or purporting to be engaged in official duty—Sanction—If a pre-requisite.] Sanction under section 197 of the Code of Criminal Procedure is an essential pre-requisite to the prosecution of a public servant in respect of an offence alleged to have been committed by him, while he was actually engaged in or purported to be engaged in the discharge of his official duty. The question is not as to the nature of the offence, such as, whether the alleged offence contained "an element necessarily dependent upon the offender being a public servant," but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official	

duty. <i>Sivaramakrishna Aiyar v. Seshappa Naidu</i> , (1928) I.L.R., 52 Mad., 347, referred to.	
<i>Ganga Raju v. Venki</i> (1929) I.L.R., 52 Mad., 602	
CRIMINAL PROCEDURE CODE (V OF 1898), SEC. 231—Right of accused under, to recall prosecution witnesses, after alteration of charge, such alteration not affecting his defence—If section applicable to cases under sec. 228.] Under section 231 of the Code of Criminal Procedure, the accused has a right to recall prosecution witnesses after the alteration of the charge, even if such alteration does not affect his defence; and that section applies to cases falling under section 228 of the Code.	
<i>Ramalinga Odayar, In re</i> (1929) I.L.R., 52 Mad., 346	
SEC. 239—Jurisdiction—If governs sec. 239—Abetment of offence outside territorial jurisdiction of Court—If Court can try abetment with principal offence under sec. 239.] Jurisdiction being the foundation of the charge in a criminal case, it is to be imported or understood as being present in all the procedure set out in the Code of Criminal Procedure, and therefore must clearly govern section 239 of the Code. Unless the abetment of an offence took place within its territorial jurisdiction a Court cannot avail itself of the provisions of section 239 to try such abetment along with the principal offence. <i>Bisweswar v. Emperor</i> , (1924) 83 I.C., 911, referred to.	
<i>Sachidanandam v. Gopala Ayyangar</i> (1929) I.L.R., 52 Mad., 991	
SEC. 253—"Groundless"—Meaning of—Sec. 253 (2)—Magistrate taking action under—If bound to examine all witnesses tendered or available before taking action.] The term "groundless" in section 253 of the Code of Criminal Procedure means that the evidence is such that no conviction could be rested on it, and not that the evidence discloses no offence whatever. A magistrate is not bound to examine all the witnesses that may be tendered or available before taking action under section 253 (2) of the Code.	
<i>Kasinatha Pillai v. Shanmugam Pillai</i> (1929) I.L.R., 52 Mad., 98	
SEC. 347—Commitment under—If can be made only after compliance with provisions of Chap. XVIII of the Code.] A commitment under section 347 of the Code of Criminal Procedure can be made only after compliance with the provisions of Chapter XVIII of the Code. <i>In re Chinnavan</i> , (1914) 32 I.C., 734, followed.	
<i>Damodaran, In re</i> (1929) I.L.R., 52 Mad., 995	
SS. 263, 264 AND 265—Bench of Magistrates—Judgment prepared by presiding officer—Not necessary others should sign—All to be present when judgment is prepared—Judgment reserved—Must be read to all before being pronounced—Judgment prepared and delivered by one in absence of others—Illegality—New trial.] Where the judgment of a Bench of Magistrates is prepared by the presiding officer, it is sufficient if he alone signs it and it is not necessary that the other members should also sign it. All the members of a Bench of Magistrates must be present, when a judgment is prepared. If judgment is reserved, it must be read to them before it is delivered. Where a judgment was prepared and delivered by one member of a Bench in the absence of the other members, held, in revision, that the procedure was illegal and that there should be a new trial.	
<i>Rama Kothiah v. Subba Rao</i> (1929) I.L.R., 52 Mad., 237	
SS. 439 AND 423—Improper discharge—Jurisdiction of High Court to set aside the discharge in revision and order retrial.] The High Court has under sections 423 and 439 of the Criminal Procedure Code (V of 1898) jurisdiction to set aside an improper order of discharge and direct that the person so discharged be committed for trial.	
<i>Public Prosecutor v. Ponnuswami Nayak</i> ... (1929) I.L.R., 52 Mad., 156	

CRIMINAL PROCEDURE CODE (V OF 1898), sec. 488—Maintenance order under—Person made liable to pay residing outside jurisdiction of Court passing order—If such Court competent to enforce order.] A Magistrate making an order for maintenance under section 488 of the Criminal Procedure Code is competent to enforce it against the person made liable for the payment of such maintenance, even though such a person resides outside the jurisdiction of his Court.

Gnanambal, In re ... (1929) I.L.R., 52 Mad., 77

... sec. 526—"Trial"—Meaning of—Application for adjournment under sec. 526 when judgment about to be pronounced—Application dismissed and judgment pronounced—If sec. 526 (8) contravened.] A trial, as that word is used in the Criminal Procedure Code, is completed before the judgment is pronounced. Where an application for an adjournment was made under section 526 of the Code just when the judgment was about to be pronounced and the application was dismissed and the Court pronounced judgment, held, that the dismissal of the application was proper and that the provisions of section 526 (8) were not contravened.

Public Prosecutor v. Chockalinga Ambalam ... (1929) I.L.R., 52 Mad., 855

CROWN—Prerogative right:—See LAND REVENUE

CUSTOMARY AND NATURAL RIGHT—Letting off agricultural and ruin water by means of vents, on to lower land.] In India, the right of an agriculturist to drain off into the neighbouring lower lands the water brought into his land for agricultural operations is a customary right, and the right to drain off ruin water is a natural one. He can exercise these rights even by opening vents in a bund erected on his land so long as no damage is caused to the lower proprietor by such a course.

Kasia Pillai v. Kumaranwami Pillai ... (1929) I.L.R., 52 Mad., 423

DISTRICT MUNICIPALITIES ACT (MADRAS) (V OF 1920)—Chairman of municipality—If a municipal officer—Prosecution under sec. 52 (2)—Sustainability of—Complaint against under sec. 54 (a) and (b)—Sanction of Government under sec. 197 of the Criminal Procedure Code—If a pre-requisite.] The Chairman of a municipality is not a municipal officer within the meaning of the provisions of the Madras District Municipalities Act, and therefore cannot be prosecuted under section 52 (2) of the said Act on allegations of wilfully making or procuring an improper entry in the electoral roll or an improper omission therefrom. *Palaniappa Chettiyyar v. Krishnaswami Chettiyyar*, (1925) 22 L.W., 429, followed. No sanction under section 197 of the Code of Criminal Procedure is necessary in respect of a complaint under section 54 (a) and (b) of the District Municipalities Act against the chairman of a municipality, as the alleged wrongful acts cannot be said to have been committed by the chairman in his capacity of a public servant as such.

Panakalu v. Subba Rao ... (1929) I.L.R., 52 Mad., 695

51, ELECTION RULES I AND II (c)—Election petition, scope of—Disqualification of a candidate under sec. 49 of the Act, whether can be ground of objection in an election petition under the Election Rules—Sec. 51, remedy under, whether, excludes election petition by elector.] A disqualification under section 49 of the Madras District Municipalities Act, 1920, can be made a ground for a petition, before an Election Court, impugning the election under rules I and II (c) of the rules for the decision of disputes as to the validity of elections held under the Act and there is nothing in section 51 to preclude such a course being taken.

Selvaranga Raju v. Doraiswami Mudaliyar ... (1929) I.L.R., 52 Mad., 782

... sec. 81—Property tax—If railway administration liable to, in absence of notification under sec. 135, Indian Railways Act (IX of 1900)—Notification empowering local authority functioning under Madras Act IV of 1884 to levy taxes in

respect of "Houses, land and water"—If will entitle to imposition of "property tax," under Madras Act V of 1920.] A notification of the Government of India issued under section 135 of the Indian Railways Act, empowering a local authority, functioning under the Madras District Municipalities Act (IV of 1884), to levy taxes in respect of "Houses, land and water," will not entitle that local authority, functioning under the Madras District Municipalities Act (V of 1920), which repealed the earlier enactment, to impose "Property tax" under section 81 of the later enactment, as the taxes in respect of which the notification was issued are substantially different from the "property tax" mentioned in Act V of 1920.

Municipal Council, Cuddapah v. M. & S.M. Ry. Co., Ltd. ... (1929) I.L.R., 52 Mad., 779

DISTRICT MUNICIPALITIES ACT (MADRAS) (V OF 1920), ss. 92 AND 350, cl. (2)—"Transacting business"—Meaning of—Company—Agent employed in a municipality to do some work—Effective control vested elsewhere—Tax under sec. 92—Company if liable—Suit by company—Recovery of sum wrongfully collected under sec. 92—Action for "money had and received"—Not "damages or compensation"—Sec. 350, cl. (2)—No bar.] In section 92 of the Madras District Municipalities Act (V of 1920), the expression "transacting business" means "carrying on business." The mere employment by a company of an agent to do some work in a municipality will not make the company liable to a tax under section 92, so long as the effective management, administration and control are vested elsewhere. *Olan Line Steamers, Ltd. v. Municipal Council of Cocanada*, (1917) 34 M.L.J., 145, approved and followed. A suit by a company for the recovery of a sum wrongfully collected by a municipality under section 92 is essentially an equitable action for "money had and received" and not a suit for "damages and compensation," and the bar of limitation prescribed by section 350, clause (2) of the Act will not apply to such an action. *John v. Dodwell & Co.*, (1918) A.C., 563, followed.

Municipal Council, Dindigul v. Bombay Company, Ltd. ... (1929) I.L.R., 52 Mad., 207

... sec. 345, RR. 8 AND 15 OF SCH. IV—Provisional assessment of property tax—Amendment by Chairman, retrospective effect and validity of.] Property tax imposed provisionally by a District Municipality can be amended by the Chairman, by virtue of section 345, rules 8 and 15 of schedule IV of the District Municipalities Act (V of 1920) within three years of the provisional assessment, and the amendment will act retrospectively for the period for which the assessment was provisionally made.

Municipal Council, Kumbakonam v. South Indian Railway Co., Ltd. (1929) I.L.R., 52 Mad., 792

ELECTION—Mortgage substituted for bonds—Mortgage held invalid—Right to sue on bonds—Sec. 6 (d), Transfer of Property Act (IV of 1882)—Puisne mortgagee—Remedies open to—Suit under Order XXI, Rule 63, after dismissal of claim petition, continuation of claim petition—Sec. 25, Indian Contract Act (IX of 1872).] A person who was absolute owner of an impartible zamindari and certain movables, such as jewels, furniture, etc., pledged some of his jewels with the fourth defendant in consideration of a debt. Then the zamindar who had become heavily indebted to various persons made a settlement of all his other properties in order to secure the zamindari for his son and heir and also to provide for the payment of his debts and the maintenance of himself and his dependants. He constituted the third defendant as the trustee under the settlement, whom he also directed to redeem the jewels and hand them over to him. After the execution of the settlement, the zamindar borrowed certain sums from the plaintiffs for which he hypothecated his equity of redemption in the jewels and a part of his monthly allowances due to him under the settlement. Thereafter the trustee with the consent of the zamindar executed in favour of the plaintiff a mortgage of the zamindari

for all debts incurred by the zamindari both prior and subsequent to the settlement. In suits, after the zamindar's death, between the zamindar's son and heir, the trustee and plaintiff, the mortgage executed by the trustee was held to be void as regards post-settlement debts of the zamindar. Thereafter the plaintiff, brought this suit against the trustees, the son and heir of the zamindar, and the fourth defendant, claiming the amount due to him on the original hypothecation. *Held* (1) that on the mortgage, which was a new transaction substituted for the hypothecation, being declared void, the plaintiff was entitled to fall back and sue on the hypothecation, *Har Chandi Lal v. Sheorai Singh*, (1918) I.L.R., 39 All., 178 (P.C.), followed, (2) that the allowances being only reservations out of the income of the estate to which the settlor was fully entitled were his "property" and were not in the nature of maintenance grants personal to and inalienable by the holder of the allowances; *Raja of Kalahasti v. Venkatappa Nayanam Bahadur*, (1928) 27 L.W., 544 (F.B.), followed; *Subraya v. Krishna*, (1923) I.L.R., 46 Mad., 659 (F.B.), distinguished, (3) that under section 25 of the Indian Contract Act a person can validly bind himself to pay a time-barred debt even of his deceased father which the father would have been bound to pay out of his estate, (4) that as the late zamindar could have compelled the trustee to redeem for his benefit the jewels pledged with the fourth defendant, the plaintiff, as a later encumbrancer, stood in the shoes of the zamindar and was entitled to a decree both as against the trustee and the zamindar's son and heir, compelling them to redeem for his benefit the fourth defendant and in default of their so redeeming, to a decree authorizing himself to pay the fourth defendant the amount due to him on the jewels and add the same to his decree amount; *Ascherson v. Tredegar Dry Dock and Wharf Co., Ltd.*, [1909] 2 Ch., 401, followed, (5) that though a transfer of a part of a debt was not good at English Common Law, it was good at equity and in Indian Law, and (6) that though a suit against a minor under the Court of Wards would be bad for want of notice under section 49 (1) of the Madras Court of Wards Act, yet no such notice need be given, if the suit be one under Order XXI, rule 63, Civil Procedure Code, after the allowance or even dismissal of claim petition to which the minor was a party.

Rajah of Ramnad v. Subrahmanyam Chettiay ... (1929) I.L.R., 52 Mad., 465

ELECTION—Retiring partner:—See PARTNERSHIP ... 672

ENFRANCHISEMENT OF SERVICE INAM IN FAVOUR OF WIDOW AND DAUGHTER OF DECEASED HOLDER—Effect of.] A grant by Government enfranchising certain karnam service inam lands in favour of the widow and daughter of a deceased karnam imposing quit rent on the lands, and giving them an absolute estate therein, makes the grantees absolute owners thereof; *Venkata Jagannadha v. Veerabhadrayya*, (1921) I.L.R., 44 Mad., 643 (P.C.), followed. Neither the fact that the grant was in favour of people who would otherwise ordinarily take only a limited estate in law, nor the fact that it was in favour of two persons such as a widow and daughter, militates against the absolute character of the grant. An alienee from such persons takes an absolute estate.

Palaniyandi v. Velayudam Pillai ... (1929) I.L.R., 52 Mad., 6

ENGLISH PARTNERSHIP ACT (1890), SEC. 42:—See "PARTNERSHIP" ... 672

EQUITY OF REDEMPTION:—See MORTGAGE ... 800

ESTATES LAND (MADRAS) ACT (I OF 1908), SEC. 3 (2) (D)—INDIAN EVIDENCE ACT (I OF 1872), SS. 65, 90—Shrotriyam grant—Construction of grant—Whether grant of land or revenue only—Grant by Deshpandya—"Manje"—Secondary evidence of grant—Copy more than 3 years old—Authentication by indorsement.] In 1689 an agraharam village was granted as shrotriyam at six pagodas, the grant stating "as we have granted the said agraharam you should enjoy the same from son to grandson paying the shrotriyam thereon and be happy." The grant was by Deshpandya, revenue officers or farmers of revenue under the paramount authority, to Brahmins, who did not reside in the village granted, but about two miles away. The

village was described in the grant as a "manje" a Telugu form of "manza." The grant had been recognized by the British Government, and it was admitted that the grantees had not owned the *kudivaram*. *Held*, that having regard to the terms of the grant and to the circumstances above stated the grant was of the land revenue only; consequently by the Madras Estates Land Act, 1908, section 3 (2) (d) the village was an estate under that Act, and suits to eject ryots could not be brought in the Civil Court. A shrotriyam grant may grant the *kudivaram* as well as the *melvaram*: the statement to the contrary in Wilson's Glossary was based upon decisions which have since been questioned. The word "manje" in a Telugu document indicates a village in which there were peasant proprietors owning cultivable lands. Observation of SADASIVA AYYAR, J., in *Venkata Sastrulu v. Sitaramudu*, (1912) I.L.R., 38 Mad., 891, 892, to that effect accepted as correct. The original grant was lost, but there was produced from the custody of respondents, successors to the grantees, a document in Telugu purporting to be a copy of the grant and of a translation of a Persian Dumbala of 1765. The document bore the following indorsement, signed by three predecessors of the respondents "Originals have been retained by us and copies have been filed, 1858"; *Held*, that the document was properly admitted under the Indian Evidence Act, sections 65, 96, as secondary evidence of the terms of the grant, the statement in the indorsement authenticating the copy being evidence as a statement by a deceased person in a document relating to a relevant fact, also as an admission by the respondents' predecessors.

Seethayya v. Somayajulu ... (1929) I.L.R., 52 Mad. (P.O.), 453

ESTATES LAND (MADRAS) ACT (I OF 1908), SS. 3 (5), 26 (3) AND 46 (5)—Civil Procedure Code (Act V of 1908), O. XL, r. I (1). (d)—Receiver, appointed by Court in a suit for ejectment, for management of a village—Suit by Receiver against tenant for enforcement of patta—Appeal by Receiver, after suit in which he was appointed was dismissed, but before he was discharged—Competency of Receiver to appeal—Rates of rent agreed to by a former owner whether binding on Receiver under sec. 26 (3) of the Act.] A Receiver, appointed by the Court for the management of an estate and authorized to institute suits for the acceptance of pattas, is competent to file an appeal in a suit instituted by him for acceptance of pattas, after the suit in which he was appointed Receiver was finally dismissed by the Privy Council on appeal, but before he was discharged from his office as Receiver. Under section 26 (3) of the Madras Estates Land Act, a Receiver was a person entitled to the rent, having regard to the definition of landholder in section 3 (5) of the Act and having regard to the fact that the Court granted permission to the Receiver under Order XL, rule I (d) of the Civil Procedure Code, to file suits for acceptance of pattas; consequently, the rates of rent fixed by one of several legal representatives of a former landholder were not binding on the Receiver, who represented the proprietor of the village. The decision in *Swaminatha Odayar v. Sundaram Aiyar*, (1920) I.L.R., 44 Mad., 274, turns on the special language of section 46, sub-section (5) of the Act, which refers to the landholder who is the owner of the estate.

Rami Reddi v. Subbaramiah ... (1929) I.L.R., 52 Mad., 967

before Act—Reservation of trees—Effect and duration of reservation—Dry pasturage waste—Covenant to pay increased rent on cultivation—Right to inclusion in patta.] Where land subject to the Madras Estates Land Act, 1908, was leased before the Act to a ryot who executed a contract by which all rights in trees on the land were reserved to the landholder, the effect of section 12 of the Act is that the reservation continues as to trees on the land at the passing of the Act during the occupancy rendered permanent by the Act, and not merely during the term of the lease, the ryot having the right to use, enjoy and cut down only trees which after the passing of the Act are planted by him or grow naturally. There is no provision in the Act enabling a landholder to claim an enhancement of rent or any additional payment for trees the right to which he has lost by

the operation of the Act. Where a lease to a ryot before the Act describes part of the land leased as "dry pasture waste" but provides that if any part of it is cultivated the rent thereon shall be increased to that provided for "cultivation" land, there is not thereby a reservation of that part as pasturage, and, subject to the exceptions in section 8 (16) it is ryoti land which the ryot is entitled to have included in his patta, even though it has never been cultivated. *Sreemantharaja Yarlaga Mallikarjuna Prasada Naidu v. Subbiah* (1919) 39 M.L.J., 277, distinguished.

Naganna Naidu v. Pitchayya ... (1929) I.L.R., 52 Mad., 797

ESTATES LAND ACT (MADRAS) (I OF 1908), ss. 55 TO 57 AND 189 (3)—*Suit in a Revenue Court under sec. 55 of the Act—Dismissal of suit on the ground that plaintiff was not a tenant—Subsequent suit by same person in a Civil Court to recover possession on the ground of occupancy right—Bar—Res judicata—Exclusive jurisdiction of Revenue Court—Issue as to title, necessary and not incidental for decision under sec. 55.* The decision of a Revenue Court in a suit by a tenant under section 55 of the Madras Estates Land Act, dismissing the suit on the ground that the plaintiff was not entitled to demand a patta, is *res judicata*, under the provisions of section 189 (3) of the Act, in a suit instituted by the tenant in a Civil Court to recover possession of the land on the ground that he was the occupancy tenant. *Appa Rao v. Gurraju*, (1920) I.L.R., 43 Mad., 859, distinguished.

Raja Rajeswara Sethupathi v. Muthudayan ... (1929) I.L.R., 52 Mad., 332

EVIDENCE (INDIAN) ACT (I OF 1872), sec. 54—*Criminal Court passing sentence—If precluded from considering evidence of bad character including previous conviction even where exercise of powers under sec. 75 of the Indian Penal Code not intended.* Section 54 of the Indian Evidence Act does not preclude a Criminal Court from considering evidence of bad character including previous convictions in passing sentence on an accused, even in cases where it is not intended to exercise the powers conferred by section 75 of the Indian Penal Code. *Emperor v. Ismail Ali Bhai*, (1914) I.L.R., 39 Bom., 326, followed.

Sudan Sahib, In re ... (1929) I.L.R., 52 Mad., 368

EXECUTION OF DECREE—Sale—Dispossession of third party:—See CIVIL PROCEDURE CODE, Os. IX AND XXI, RR. 97 AND 100 ... 899

FOREIGN DECREE—Assignment of—Recognition in British Indian Court:—See CIVIL PROCEDURE CODE (V OF 1908), SEC. 13 ... 503

FOREIGN JUDGMENT—Res judicata:—See CIVIL PROCEDURE CODE (V OF 1908), SEC. 13 ... 503

GENERAL CLAUSES ACT (X OF 1897)—"Magistrate" Definition of—*If confined to Magistrates exercising jurisdiction under Criminal Procedure Code—Intention of legislature—Confession to a Juge d'Instruction—If admissible under sec. 28 of Indian Evidence Act.* Under section 28 of the Indian Evidence Act, British Indian Courts are not precluded from taking into consideration confessions made by prisoners in police custody to Magistrates in England or in a foreign country, the definition of "Magistrate" in the General Clauses Act not being confined to Magistrates exercising jurisdiction under the Code of Criminal Procedure. A confession made by a prisoner in police custody to a *Juge d'Instruction* in French India, if otherwise proper, is admissible in evidence. *Queen-Emress v. Nagla Kala*, (1896) I.L.R., 22 Bom., 235, referred to.

Panchanatham Pillai, In re ... (1929) I.L.R., 52 Mad., 529

GIFT BY WIDOW—Estoppel of reversioner:—See HINDU LAW ... 556

GOVERNMENT—Power of:—See: LOCAL BOARDS ACT (XIV OF 1920) (MADRAS), SEC. 16 ... 446

GUARDIAN-AD-LITEM—Appointment of:—See CIVIL PROCEDURE CODE (V OF 1908), O. XXXII, R. 3 ... 275

HIGH COURT—Jurisdiction—Improper order of discharge:—See CRIMINAL PROCEDURE CODE, ss. 439 AND 423 ... (1929) I.L.R., 52 Mad., 156

Power to pass interim orders—Plaint, which ought to be filed in a mufassal Court but could not be so filed owing to the closing of the Court for summer recess—Jurisdiction of High Court to receive plaint and pass interim orders—Suit pending in a mufassal Court, closed for the vacation—Jurisdiction of the High Court to pass interim orders—Procedure of retransfer—Power, when exercised—Letters Patent, cl. 13. In cases where a plaint cannot be filed in an inferior Court in the mufassal of the Presidency on account of its being closed for the summer recess there is no provision of law by which the High Court can, in the first instance, receive the plaint which ought to be filed in such inferior Court, and pass interim orders pending the disposal of the suit. But the matter may be different in cases where the High Court has concurrent Original Civil Jurisdiction with the City Civil Court and the Presidency Small Cause Courts within the limits of its ordinary Original Civil Jurisdiction, in respect of suits arising within that area. In cases where a suit is pending in a mufassal Court, which is closed for the summer recess, the High Court can transfer the case to itself under clause 13 of the Letters Patent and pass interim orders in the case; but the application for such transfer must be made on the Original Side of the High Court, and ask for an injunction or other interlocutory relief, and then apply for the retransfer of the whole proceedings to the original Court; but this procedure will be allowed only in special case of urgency.

Jamna Bai v. Ramanathan Chetti ... (1929) I.L.R., 52 Mad., 52

HINDU—Conversion to Hinduism:—See THE INDIAN SUCCESSION ACT ... 160

HINDU LAW—Adoption—Assent of the son to adoption by his mother—Adoption made after son's death—Validity of assent—Validity of adoption. The assent of a son to an adoption by his mother, in the event of his death, is sufficient assent under the Hindu Law to validate the adoption, where there has been no change in the circumstances and there are no other grounds for the next presumptive reversioner to object to the adoption, when actually made.

Annapurnamma v. Appayya Sastri ... (1929) I.L.R., 52 Mad. (F.B.), 620

Adoption by widow—Ante-adoption agreement by natural father giving absolute estate in a reasonable portion of the estate to the widow—Binding nature of the agreement on the adopted son. An agreement by which a Hindu widow proposing to adopt a son stipulates with the boy's natural father for a portion of her husband's estate being settled upon her for her absolute use and enjoyment with powers of alienation is valid and binding on the son on adoption, if the agreement is fair, reasonable and beneficial to him. *Krishnamurthy Ayyar v. Krishnamurthy Ayyar*, (1927) I.L.R., 50 Mad., 508 (P.C.), explained and applied.

Raju v. Nagammal ... (1929) I.L.R., 52 Mad., 128

Authority to adopt given to two widows—Participation of both widows in adoption—Validity of adoption—Trusteeship of charity—Adopted son's right to trusteeship vested in adoptive father. Where a Hindu died leaving two widows to both of whom he gave a joint authority to adopt, an adoption made by them jointly is not invalid, though the son adopted would in law be the son only of the senior widow who alone has the preferential right to adopt, the junior widow being considered only as his step-mother. In the absence of any rule regulating the succession to the office of trusteeship of a charity held by a person, the office descends to his heirs just like his private property and when an adoption is made to him

by his widow, the son on adoption divests her not only of her husband's private properties but also of the trusteeship which she was having as his widow.

Tiruvengalam v. Butchayya ... (1929) I.L.R., 52 Mad., 995

HINDU LAW—*Gift by widow with the consent of next reversioner—Personal estoppel.* If the next presumptive male reversioner consents, though for no consideration, to an alienation without necessity by a Hindu widow (e.g., a gift as in this case), the transaction will be binding on him when he actually succeeds to the estate; *Fateh Singh v. Thakur Rukmini Ramamji Maharaj*, (1928) I.L.R., 45 All., 339 (F.B.) and *Akkaw v. Sayadkhan Mithekhan*, (1927) I.L.R., 51 Bom., 475 (F.B.), followed; *Rangasami Gounden v. Nachiappa Gounden*, (1918) I.L.R., 42 Mad., 528 (P.O.), applied.

Ramakottayya v. Viraraghavayya ... (1929) I.L.R., 52 Mad. (F.B.), 556

Joint family—*One member dying, giving his widow power to adopt—Right of sole surviving coparcener to alienate entire family property before adoption—Inapplicability of theory of adopted son's rights relating back.* The last surviving male member of a joint Hindu family is the full owner of all the family properties in spite of an unexercised power of adoption possessed by the widow of a deceased member; such survivor can alienate all or any of the family properties absolutely (e.g., even by gift) without the son adopted after the alienation, being able to question the same. The theory that, on an adoption, the adopted son's rights to property ordinarily relate back to the date of his adoptive father's death, does not apply to such a case.

Veeranna v. Sayamma ... (1929) I.L.R., 52 Mad., 398

Partition—*Property of person outside joint family—Alleged agreement to treat property as joint—Purchases out of combined properties—Onus of proof.* Three brothers formed a joint Hindu family. A sister married a Christian who was in better circumstances than they were. He died in 1887 leaving a son (the appellant) then four years old. The appellant with his mother then went to live with his uncles, and from that time the uncles treated the property which the appellant inherited from his father, and the produce of it, in the same way as their own family property. In 1908 an outstanding half share in the ancestral property of the appellant's father was bought in the name of the appellant out of the produce of the combined properties, which was also applied from time to time to the purchase of other properties, movable and immovable. In 1917 one of the three brothers sued for partition claiming a fourth share of the whole combined property. The suit was decreed on the ground that there was an implied agreement between the parties to share all the properties equally. Held, that the plaintiff was not entitled to share either in the property which the appellant inherited, or in that bought in his name. As to the former property the onus was upon the plaintiff to prove that he was entitled to share in it, and he had not discharged that onus. Any presumption arising by reason of the source of the money with which the latter property was bought was rebutted by the circumstances.

Jogi Reddi v. Chinna Reddi ... (1929) I.L.R., 52 Mad. (P.O.), 83

Partition—*Suit by two sons, one of whom was a minor, against his father and his alienees for partition of their shares—Death of minor plaintiff before decree—Share of major plaintiff, quantum of—Sale by father for an antecedent mortgage debt—Sale, whether binding on son, in the absence of pressure by creditor.* In a suit for partition, instituted by a Hindu for himself and his minor brother, against their father and his alienees, the minor brother died before the decree. The father had sold some property to discharge an antecedent mortgage debt but there was no pressure by the mortgagees for payment at the time of the sale. The major plaintiff claimed a two-thirds or at least a half share in the property on the ground that his minor brother's share had accrued to him. He also contended that the sale was not binding on him. Held, that the major plaintiff was

only entitled to a third share in the family property, as the share of the minor who died before the decree vested in the father by survivorship; and that the sale by the father for an antecedent mortgage debt was binding on the plaintiff, even though there was no pressure for payment of the debt at the time of the sale: *Bandhu Ram v. Ram Kishun Sonar*, (1923) 21 All. L.J., 354, dissented from.

Rama Rao v. Hanumantha Rao ... (1929) I.L.R., 52 Mad., 856

HINDU LAW—*Suit for partition by a Hindu father and his minor sons against his father and brother, and others—Death of grandfather and father pending suit—Election by major son to continue suit for himself and his minor brother—Application by mother of minor plaintiff not to have partition—Minor plaintiff transposed as defendant—Status of minor, whether divided.* A Hindu father, on behalf of himself and his two minor sons, instituted a suit for partition against his father, his brother and his sons. Before a decree was passed, the grandfather, and subsequently, the father died. One of the sons, having become a major, elected to continue the suit on behalf of himself and his minor brother. The mother of the minor plaintiff applied to the Court to be made his guardian ad litem and stated that a partition was not in the interest of the minor and that she did not want a partition for him, and the minor was accordingly transposed as a defendant. The defendants, who were members of the family, thereupon stated that they did not wish to remain united with the minor plaintiff. A decree was passed by the lower Court, awarding one-third share to the major son on behalf of himself and his minor brother. On appeal by the minor son, Held, that, in a litigation in which a minor is concerned, the Court is bound to look after his interest, and this rule applies where the minor was a co-plaintiff as well as where he was the sole plaintiff; that the filing of a plaint for partition by the father on behalf of himself and his minor sons, did not necessarily effect a severance in status, as regards the minors, from the defendants who were members of the joint family, until a decree was passed; that the election of the major son to continue the suit, on his and the minor's behalf, did not effect a division of status as regards the minor; that it was obviously not in the interest of the minor to become divided from the defendants, as his share would be enhanced by the death of the grandfather; that, as the minor continued to be joint with the defendants, at any rate, until the refusal of the defendants after the grandfather's death to remain joint with him his share was not affected by such refusal; and that a decree should be given to the major plaintiff only for his own share in the joint family property.

Ganapathy v. Subramanyam Chetty ... (1929) I.L.R., 52 Mad., 845

Trade, started by the father in a joint family composed of himself and his sons, one of whom was a minor—Mortgage deed, executed by the father—Amount borrowed for trade purposes—Trade, not inherited by the father—Ancestral trade—Liability of sons for such debts—Mortgage, whether binding on sons. A Hindu father, governed by the Mitakshara law, can start a new trade with the aid of family funds and make that a family business binding on his sons. In such a case, an alienation made by the father for raising funds for carrying on that business is binding on the sons, on the ground that it was for legal necessity. It would make no difference whether the moneys are borrowed for starting a new trade or for carrying on a trade which had been already so started.

Venkateswami Naicker v. Palaniappa Chettiar ... (1929) I.L.R., 52 Mad., 227

HIRE-PURCHASE AGREEMENT—*Motor bus delivered under—Hirer to pay initially by way of hire without demand a certain sum and subsequently instalments of smaller sum—Hirer to hold vehicle as bailee till whole amount paid—Owner to be entitled to terminate contract and recover vehicle in case of default in instalment—Breach by hirer—If hirer entitled to return of balance of initial payment after deducting a month's hire on basis of subsequent payments.* A motor bus was delivered under a hire-purchase agreement, containing the following amongst other terms:—(a) The hirer shall

pay at Madras by way of hire without demand the sum of Rs. 1,140 and thereafter a sum of Rs. 226 on the twelfth day of every calendar month beginning with the month next after the date herein until eleven monthly instalments have been made, unless he shall have terminated this agreement as hereinafter provided, (b) The hirer acknowledges that he holds the vehicle as a bailee of the owner and shall not have any property or interest as purchaser therein until he shall have exercised his option of purchase as hereinbefore provided, and shall have paid the whole amount due under this agreement, (c) The owners may terminate the contract of hiring and forthwith recover possession of the vehicle if any monthly hire is in arrear and left unpaid for seven days after the date fixed for its payment. The hirer committed default in the payment of the monthly instalments, and the owner terminated the hiring and claimed delivery of the bus with payment of arrears then accrued. *Held*, that the initial payment of Rs. 1,140 was not by way of advance of rent, but only the first instalment of rent, and that the hirer, on the termination of the agreement, was not entitled to the return of the balance of that sum after the appropriation out of it by the owner of Rs. 226 as being rent for the first month. *Helby v. Mathews*. [1895] A.C., 471, followed. *Per ANANTA-KRISHNA AYYAR, J.*—Even if the initial payment be regarded as a premium for granting the hire, the hirer who broke the contract was not entitled to its return.

Auto Supply Co., Ltd. v. Raghunatha Chetty ... (1929) I.L.R., 52 Mad., 829

INDIAN CONTRACT ACT, SEC. 25:—*See* ELECTION ... 465

INDIAN EVIDENCE ACT, SEC. 26:—*See* GENERAL CLAUSES ACT (XI OF 1897). 529

SEC. 3 (2) (D) ... ss. 65 AND 90:—*See* ESTATES LAND ACT (MADRAS), ... 463

SEC. 132:—*See* STATEMENTS BY WITNESS ... 432

INDIAN INCOME-TAX ACT (XI OF 1922), SEC. 2 (1)—*Agricultural income.* The fact that a certain pecuniary legacy bequeathed by a Zamindar has to be paid by his executor out of agricultural income, does not make the legacy an "agricultural income" within section 2 (i) of the Indian Income-tax Act (XI of 1922).

Zamindaris of Tiruvur v. Commissioner of Income-tax ... (1929) I.L.R., 52 Mad. (S.B.), 847

SEC. 2 (14) AND RR. 2, 3 AND 4 OF PART I—*Registration of a firm—Deed of partnership not in force at the time of application for registration—Continuance of partnership.* A firm can be treated as a "registered firm" within the meaning of section 2 (14) of the Indian Income-tax Act (XI of 1922), only if the deed constituting the partnership is registered in accordance with rule 2 framed under the Act. The deed, for registering which an application under rule 2 has to be made in the year of assessment, cannot be registered, if it is not operative at the time of the application, though it might have been operative during the whole or a portion of the year of the account. A firm constituted by a deed of partnership for a specified time is dissolved by the efflux of the time; and if thereafter the partners tacitly or orally agree to continue as before, the continuance is, not under the deed which is spent, but under the new agreement which cannot be registered.

Krishna Aiyar & Sons v. Commissioner of Income-tax ... (1929) I.L.R., 52 Mad. (S.B.), 867

SEC. 8, 8, 10 AND 60—*Co-operative Society—Profits exempted from income-tax—Optional investment of surplus funds in Government securities—Liability to pay tax on interest from securities.* A notification under section 60 of the Indian Income-tax Act (XI of 1922) exempted from assessment to income-tax "profits of any co-operative society registered under the Co-operative Societies Act, 1912." A society so registered was by an order of Government required to keep

40 per cent of its total liability under call deposits in a liquid or fluid form and instead of keeping the necessary cash with itself, the society invested it in Government securities which produced interest. *Held*, that in the absence of proof that such investments are obligatory on the society or are a part of its usual business, the interest on the securities was not part of the "profits" of the "business" of the society within the meaning of the notification and section 10 of the Income-tax Act, but that it was chargeable to income-tax as "interest on securities" under section 8 of the Act.

Madras Central Urban Bank, Limited v. Commissioner of Income-tax ... (1929) I.L.R., 52 Mad. (S.B.), 640

INDIAN INCOME-TAX ACT (XI OF 1922), SEC. 10 (2) (iii)—*Trader carrying on two businesses, each with borrowed capital—Loss in one and closing of that business—Payment of interest on capital lost in closed business, in year of assessment—Right of assessee to claim deduction for interest.* A trader having two branches in his trade (viz., a cloth business and a banking business) carried on both, each with borrowed capital; and as the cloth business ended in a loss, had to close it in 1924; and all that portion of the borrowed capital which was sunk in the cloth business was lost before 1924. The trader having had to pay interest on that lost capital in 1924-25, the year of assessment, claimed deduction therefor from the assessable profits of his remaining banking business for the year 1924-25. *Held*, that though the branches were distinct, the trade was one and though the lost capital was not available for use in the trade, viz., the banking business, in the year of assessment, the interest paid on it should be deducted under section 10 (2) (iii) of the Indian Income-tax Act.

Arunachalam Chetty v. Commissioner of Income-tax ... (1929) I.L.R., 52 Mad. (S.B.), 296

SEC. 22 (4) AND 23 (2) AND (4)—*Notice calling for accounts after submission of return, legality of.* Even after an assessee has submitted a return of his income and has complied with the terms of the notice issued to him under section 23 (2) of the Indian Income-tax Act (XI of 1922), the Income-tax Officer has power to call for accounts under section 22 (4) and if they are not produced, to make an assessment under section 23 (4) of the Act.

Ramaswami Chettiar v. Commissioner of Income-tax ... (1929) I.L.R., 52 Mad. (S.B.), 194

SEC. 52—*Tax paid for an unassessable income, under mistake of law—Right of suit for refund—Tax, whether paid under duress.* In a suit for a refund of income-tax paid, *held* that an income-tax paid by an assessee under a mistake of law in respect of an income which on the date of payment was not assessable in law (e.g., income from forests and fisheries in a permanently settled zamindari), cannot be recovered by the assessee from the Government. Payment by an assessee on a demand based upon the return submitted by him is not a payment made under duress but is a voluntary payment. *Obiter*.—Section 52 of the Indian Income-tax Act (XI of 1922) bars a suit for refund of income-tax paid, only in cases where the tax is legally payable in respect of the income and not where the income is exempt from assessment.

Raja of Ramnad v. Secretary of State for India ... (1929) I.L.R., 52 Mad., 12

INDIAN RAILWAYS ACT:—*See* INDIAN PENAL CODE, SEC. 149 ... 882

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JOINT HINDU TRADING FAMILY—Power of manager:—*See* PROVINCIAL INSOLVENCY ACT (V OF 1920), ss. 2 AND 29 ... 24

JUDGMENT —Bench of Magistrates:—6th CODE OF CRIMINAL PROCEDURE, ss. 263 AND 264, ETC. ...	2
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LAND ACQUISITION ACT (I OF 1894) , ss. 30 AND 54—Reference to the Court of a Subordinate Judge under section 30 of the Act—Decision by Court as to person entitled to claim compensation—Subject-matter below Rs. 5,000—Decision, whether an award under Part III of the Act—Decree—Appeal, whether lies to High Court as from an award or to District Court as from a decree. [The decision of the Court of a Subordinate Judge upon a reference made to it under section 30 of the Land Acquisition Act, is not an award under Part III of the Act, but is a decree, and, if the subject-matter of the lie is below Rs. 5,000, an appeal from the decision lies to the District Court and not to the High Court under section 54 of the Act. <i>Ramachandra Rao v. Ramachandra Rao</i> , (1922) I.L.R., 45 Mad., 320 (P.O.), applied.	
<i>Venkataramani v. Adinarayana Rao</i> ... (1929) I.L.R., 52 Mad., 141	
LANDLORD AND TENANT —Right of permanent occupancy—Burden of proof—Long continued possession at uniform rent—Alienations—Purchase of <i>kudiraram</i> . [It is well established that those claiming a right of permanent occupancy must prove that it exists by custom, contract or title, or possibly by other means. In a suit by a ryotwari pattadar claiming partition of his undivided half share in an estate, the defendants contended that they had a right of permanent occupancy as to certain well-irrigated lands and palmyra trees, and that consequently they should be excluded from the partition. Held, that the defendants, who proved that they had been in undisturbed possession of some of the land for a long period at a more or less uniform rent, and that at a comparatively recent date they had made alienations not of such a kind as ordinarily would be brought to the notice of the pattadar, had not discharged the burden of proof upon them; the fact that some of the defendants had purchased the <i>kudiraram</i> militated against their claim. <i>Seturathnam Aiyer v. Venkatachela Goundan</i> (1919) I.L.R., 43 Mad., 587; I.L.R., 47 I.A., 79 and <i>Sivaprakasam Pandara v. Veerama Reddi</i> , (1922) I.L.R., 45 Mad., 586; I.L.R., 49 I.A., 286, distinguished on the facts.	
<i>Subramanya Chettiar v. Subrahmanya Mudaliyar</i> , (1929) I.L.R., 52 Mad. (P.O.), 549	
LAND REVENUE —Land classed as "temple poramboke" in settlement register, meaning of—Prerogative right of the Crown to assess lands to revenue. [In the absence of a statute or agreement to the contrary, the Government has a prerogative right to levy land revenue on all lands in the country. The description of a land as "temple poramboke" in a settlement register without describing the temple as its owner does not connote either that the temple is its owner or that the Government impliedly agreed not to levy any land revenue thereon for all time.	
<i>Secretary of State for India v. Trustees of Sri Kuttalanathaswami Temple</i> , (1929) I.L.R., 52 Mad., 35	
LETTERS PATENT (MADRAS) , art. 12—Contract in Madras for sale of land situate outside Madras—Parties resident in Madras—Suit by purchaser for specific performance—If "suit for land," and not cognisable by High Court on Original Side. [A suit by a purchaser of lands situate outside Madras for specific performance of a contract to sell, made in Madras, by parties resident therein, is not a suit for land within the meaning of clause (12) of the Letters Patent (Madras), and such a suit is cognisable by the High Court in its Ordinary Original Civil Jurisdiction. <i>Ramdhane Shew v. Nabumoney Dossee</i> , (1885) 1 Bourke, 218, <i>Hatimbhai Hassanally v. Framroz Eduljee</i> , (1927) I.L.R., 51 Bom., 516 (F.B.), followed.	
<i>Velliappa Chettiar v. Govinda Dass</i> ... (1929) I.L.R., 52 Mad. (F.B.), 809	
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LETTERS PATENT (MADRAS), CLS. 13 AND 18:—See PROVINCIAL INSOLVENCY ACT (V of 1920), ss. 3 and 5 (2) ...

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CL. 15—Judgment—Appeal—Amendment of cl. 15 of the Letters Patent, taking effect on 31st January 1928—Suit filed before amendment—Second Appeal filed before, but judgment of single Judge after amendment—Appeal under Letters Patent, filed without obtaining Leave from the learned Judge—Appeal, whether competent—Amendment, whether retrospective. [In a suit instituted on the 30th July 1919, a Second Appeal was presented on the 15th July 1924 and was finally disposed of by a single Judge of the High Court on the 9th February 1928. On an appeal being preferred against the judgment, under the Letters Patent on the 24th April 1928, without leave to appeal having been obtained from the learned Judge, objection was taken to the maintainability of the appeal by reason of the amendment of the Letters Patent requiring such leave, which had come into force on the 31st January 1928. Held, that the institution of a suit carries with it the implication that all appeals then in force are preserved to it through the rest of its career, unless the legislature has either abolished the Court to which an appeal then lay, or has expressly or by necessary implication given the Act a retrospective effect; and that the words of the amended Letters Patent do not admit of such an interpretation; and that, consequently, the appeal under the Letters Patent was competent. *Sheikh Sadar Ali v. Sheikh Doleluddin*, (1928) 48 Cal. L.J., 150, followed; *Colonial Sugar Refining Co. v. Irving*, [1905] A.C., 369, applied; *Canada Cement Co. (Ltd.) v. East Montreal (Town of)*, [1922] 1 A.C., 249, distinguished; *Badrudin v. Sitaram*, (1928) 30 Bom. L.R., 942, dissented from.

Vasudeva Samiar, In re ... (1929) I.L.R., 52 Mad. (F.B.), 361

CL. 15 (AMENDED)—Decision of single Judge in Second Appeal—Refusal of leave to appeal—No appeal against refusal. [When after the amendment of clause 15 of the Letters Patent a single Judge of the High Court decides a second appeal and refuses leave to appeal, not only does no appeal lie from the judgment on the merits, but also no appeal lies from his refusal. *Lane v. Esdaile* (1891) A.C., 210, followed.

Ramanayya v. Kolayya ... (1922) I.L.R., 62 Mad., 952

CL. 36, AS AMENDED—Amendment coming into force on 1st February 1928—Letters Patent appeal, pending when amendment came into force—Effect of amendment, whether applicable to pending appeal—Procedure to be followed on difference of opinion, whether procedure of the amended, cl. 36. [Clause 36 of the Letters Patent, as amended, applies to an appeal which was pending at the time the amendment came into force.

Guruswami Pillai v. Veerabhadra ... (1929) I.L.R., 52 Mad. (F.B.), 584

CL. 36—Amendment of sec. 98 of the Civil Procedure Code—Effect of:—See CIVIL PROCEDURE CODE (ACT V OF 1908), sec. 98. 568

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LICENCE FEE—Reasonableness of:—See CITY MUNICIPAL ACT (MADRAS, IV OF 1919), sec. 287 ... 764

LIFE INSURANCE—Policy by Hindus:—See MARRIED WOMENS PROPERTY ACT, sec. 6 ... 936

LIMITATION ACT (IX OF 1908), ART. 47, SEC. 145—Criminal Procedure Code (V of 1898)—Adverse order, under section, on Manager of joint Hindu family—Effect of, on the other members. [An adverse order passed with jurisdiction in proceedings under section 145, Criminal Procedure Code (V of 1898) against a father of a joint Hindu family in his capacity as the representative of the family, binds the other members of the family (viz., his sons), though they were not *eo nomine* parties to the proceedings. Hence a suit by the sons for possession of the properties concerned

brought more than three years after the adverse order, is barred under article 47 of the Indian Limitation Act (IX of 1908).

Venkatasamaraju v. Varahalaraju ... (1929) I.L.R., 52 Mad., 787

LIMITATION ACT (IX OF 1908), ARTS. 66, 67 AND 116—*Registered mortgage—Execution sale under decree on the mortgage—Insufficiency of sale proceeds to meet decree amount—Claim for balance on the covenant to pay—Limitation.* Held, by the Full Bench that where a mortgage deed containing a personal covenant to pay the mortgage money is registered, the article of the Limitation Act (IX of 1908) applicable to a claim, based on the personal covenant, to recover the balance due to the mortgagee after the sale of the mortgage property, is article 116 of the Act which provides a period of six years from the due date and not article 66 or 67 of the Act. *Tricomdas Cooverji Bhoja v. Gopinath Jin Thakur*, (1916) I.L.R., 44 Cal., 759 (P.C.), applied; *Ganesh Lal Pandit v. Khetra Mohan Mohapatra*, (1926) I.L.R., 5 Patna, 585 (P.C.) and *Ram Din v. Kalka Prasad*, (1884) I.L.R., 7 All., 502 (P.C.), explained and distinguished.

Ramasabapathi Chettiar v. Devasigamony Pillai ... (1929) I.L.R., 52 Mad. (F.B.), 105

... ART. 183—*Transferee decree holder—Application by, to have execution proceedings under decree transferred to another Court—Order passed recognizing him as transferee decree-holder and transmitting decree for execution to the other Court—If such order operates as revivor within the meaning of art. 183—Order qua order of transmission—If creates a new starting point of limitation.* Where the transferee of a decree passed on the Original Side applied to have the decree transferred to another Court, on the ground that the judgment-debtors resided within the jurisdiction of that Court and had immovable properties situated there and an order was made by the Deputy Registrar recognizing him as transferee decree-holder and transmitting the decree for execution to that Court, held, that such an order effected a revivor within the meaning of Article 183 of the Indian Limitation Act, and therefore gave a new starting point of limitation; held further, that an order transferring the decree for execution to another Court, qua order of transmission, did not give a new starting point of limitation.

Palanappa Chettiay v. Velliammi Achi ... (1929) I.L.R., 52 Mad., 590

LOCAL BOARDS ACT (MADRAS) (XIV OF 1920), SEC. 16—*President of Taluk Board—Communication to individual members tendering his resignation—If proper—Power of Government to decide question—President—If public servant—Sec. 197, Criminal Procedure Code—Applicability of.* A communication by a President of a Taluk Board tendering his resignation of his office as such President addressed to each member of the Board separately is not a proper resignation within the meaning of section 16 of the Madras Local Boards Act. The Act contains no provision empowering the Government to decide a question of this character and any order that Government may issue on the matter will not be binding upon a Court of Law. A President of a Taluk Board is a public servant and under section 197 of the Code of Criminal Procedure the sanction of the Local Government is necessary to prosecute him for any offence alleged to have been committed by him as such public servant.

Sivasankaram Pillai, In re ... (1929) I.L.R., 52 Mad., 446

... SS. 104 (2), (3) (c) AND 106—*“Licensed” in sec. 104 (3) (c), meaning of—Motor vehicles, licensed under sec. 106, whether exempt from tolls under sec. 104.* The word “licensed” in section 104 (3) (c), of the Madras Local Boards Act, 1920, means licensed under clause 2 of the same section, and is not used in the wider sense of “licensed for any purpose whatever”. Consequently although a licence was granted under section 106 of the Act to use a motor vehicle to ply for hire or to take passengers or goods at certain rates still such a vehicle is liable to pay tolls under section 104 of the Act.

Sivapatha Mudaliar v. Sikandar Bowther ... (1929) I.L.R., 52 Mad., 260

LOCAL BOARDS ACT (XIV OF 1920), SEC. 221—*Proceeding under—If party entitled to prove fees not due—Sec. 184—If includes omnibus stand—Union Board—If can levy fee on such stand.* A party appearing before a Magistrate under section 221 of the Local Boards Act (Madras) is entitled to allege and prove that the fee claimed is not due from him or under or by virtue of the Act. *Ramachendran Servai v. President, Union Board, Karai-kudi*, (1925) I.L.R., 49 Mad., 888, dissented from. Section 184 of the Act does not include a stand for omnibuses, and a Union Board cannot levy a fee in respect of such a stand.

Rahim Sahib, In re ... (1929) I.L.R., 52 Mad., 714

MAGISTRATE—*Definition of:—See GENERAL CLAUSES ACT (X OF 1897)* ... 529

MARRIED WOMEN'S PROPERTY ACT (III OF 1874), SEC. 6—*Amending Act (XIII of 1923), sec. 2—Applicability of sec. 6 to policies effected by Hindus in Madras before 31st December 1913—Effect of sec. 2 of Act XIII of 1923.* Section 2 of Act XIII of 1923, which declares that section 6 of the Married Women's Property Act, 1874, shall apply to any policy effected by any Hindu in Madras after the 31st December 1913, does not take away the applicability of that section to similar policies effected before that date, as held by the Full Bench in *Balambal v. Krishnayya*, (1914) I.L.R., 37 Mad., 483.

Rama Rao v. Krishnamma ... (1929) I.L.R., 52 Mad., 936

MINERALS—*Unenfranchised service inam—Finding that estate held under grant from zamindar—Second appeal—Absence of proof of grant of minerals—Code of Civil Procedure (Act V of 1908), sec. 100.* The owner, by a purchase in 1879, of 27 villages in the Northern Circars claimed that he was entitled to the underlying minerals. The villages had formed part of an estate held by the vendor's forefathers as Mansabdars. In or about 1735 the Mansabdar had been paying a fixed annual sum to a neighbouring Zamindar and was under an obligation to provide him with 700 peons. In 1802 the zamindari was permanently settled, the annual payment being treated as among the assets upon which the peshkash was fixed. In 1847 the Government acquired the zamindari, and in 1859 commuted the services for an annual payment. There had been no enfranchisement of the inam. The Subordinate Judge (on appeal from the Munsif) found that the estate was originally held under a grant from the Zamindar subject to a fixed rent and an obligation to provide a military force. Upon appeal it was contended that the Mansabdars had been independent chieftains and did not take under any grant. Held, that the above contention was inadmissible as there was evidence upon which the finding of the Subordinate Judge could have been based, and that it was therefore binding under the Code of Civil Procedure, 1908, in the second appeal; and as it was not established that the grant by the Zamindar included the minerals, the suit failed, *Sashi Bhushan Misra v. Jyoti Prasad Singh Deo*, (1916) I.L.R., 44 Cal., 585; L.R., 44 I.A., 46, followed.

Raja of Pittapur v. Secretary of State for India ... (1929) I.L.R., 52 Mad. (P.C.), 538

MISTAKE OF LAW—*Tax paid under:—See INDIAN INCOME-TAX ACT (XI OF 1922), SEC. 52* ... 12

MORTGAGE—*Agreement to sell to mortgagee at a concession rate, six days after mortgage—Agreement, whether part of the same transaction—Subsequent agreement to sell to another with notice of prior agreement—Sale to Mortgagee—Suit by former for specific performance of his agreement—Agreement to sell to mortgagee, whether void as a clog on equity of redemption—Contract of redemption—Indefiniteness of contract.* A executed a mortgage to B, and six days thereafter executed an agreement to him that, in case A should happen to sell the property, he would sell it to B at a concession rate; in pursuance of the agreement A sold the lands to B under a registered sale deed. A few days prior to the sale, A had executed an unregistered agreement to sell the lands to C, who had notice of the prior

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agreement to sell to B, and received a part of the consideration. On a suit instituted by C against A and B for specific performance of the agreement and for recovery of possession of the lands, <i>Held</i> , that the agreement to sell executed by A to B, being at a concession rate, was void for indefiniteness; that the agreement by A to sell to B, who was the mortgagee, was part of the same transaction as the mortgage, and was a clog on the equity of redemption and was void in law, whether the agreement to sell was to have effect before or after redemption of the mortgage; that the agreement was not a contract of pre-emption; and that, consequently, C was entitled to a decree for specific performance of his agreement and for recovery of possession, against A and B, even though C had notice of the prior agreement to B.	
<i>Rangayya Chetti v. Raghava Charlu</i> ... (1929) I.L.R., 52 Mad., 300	
MORTGAGE —Registered—Covenant to pay—Limitation:—See LIMITATION ACT (IX OF 1908), ARTS. 66, 67 AND 116 ...	101
MORTGAGE-BOND —Attestation—Transfer of Property Act (IV of 1882), sec. 59, Acts XXVII of 1926, X of 1927 and XII of 1927—Retrospective effect—Indian Registration Act (XVI of 1908), ss. 58 and 59—Endorsement by Sub-Registrar—Signature of Sub-Registrar and identifying witnesses, whether sufficient attestation under the above Acts—Construction of the Acts.] Acts XXVII of 1926, X of 1927 and XII of 1927, relating to the attestation of certain documents, are retrospective in their nature, so as to apply to documents executed on a date prior to their coming into force. The signatures of the Registering Officer and of the identifying witnesses, affixed to the registration endorsement under sections 58 and 59 of the Registration Act (XVI of 1908), are a sufficient attestation within the meaning of section 59 of the Transfer of Property Act and its subsequent amending Acts.	
<i>Veerappa Chettiyar v. Subramaniya Ayyar</i> ... (1929) I.L.R., 52 Mad. (F.B.), 12	
MOTOR VEHICLES :—See LOCAL BOARDS ACT (MADRAS) (XIV of 1920), ss. 104 (2), (3) (c) AND 186 ...	26
MUHAMMADAN LAW —Marriage—Adult virgin of Shafi sect—Necessity of consent for marriage.] The consent of an adult virgin among the Shafi sect of Sunnis is essential for the validity of her marriage.	
<i>Hussan Kutti Beary v. Jainabha</i> ...	1
NIDHI :—See COMPANIES ACT (INDIAN) ...	9
NUISANCE :—See INDIAN PENAL CODE, SEC. 268 ...	1
OFFICIAL RECEIVER —Personal liability:—See COSTS ...	2
OLD OFFENDER —Enhanced Sentence:—See ACCUSED ...	7
OMNIBUS STAND :—See LOCAL BOARDS ACT (MADRAS) (XIV of 1920), SEC. 221.	7
ORIGINAL SIDE RULES (HIGH COURT, MADRAS), O. VI, R. 4 —Suit dismissed for default under—Application to restore after period prescribed by proviso to rule 4—If Court has discretion to revive.] Where a suit on the Original Side of the High Court appeared, under Order VI, rule 4 of the Original Side Rules, in the list of default cases for three weeks and stood dismissed at the end of that period, and the plaintiff applied by a Master's summons to have the suit restored after the expiry of the thirty days prescribed under the proviso to rule 4, <i>held</i> , that the Original Side Rules gave a discretion to the Court to revive a suit even after the expiration of the time delimited for the taking of a particular step in it and that that discretion should be exercised on a consideration of the merits of the	

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application unfettered by any supposed rule of law. <i>Bradshaw v. Warlow</i> , (1888) 32 Ch.D., 403; <i>Schafer v. Blyth</i> , [1920] 3 K.B., 140, followed.	
<i>Narayanaswami Naicker v. Sakharan Rao</i> ... (1926) I.L.R., 52 Mad. (F.B.), 186	
PARTITION —Purchases out of combined properties:—See HINDU LAW (PARTITION) ...	83
PARTITION SUIT FOR TRANSPOSITION OF PARTIES :—See HINDU LAW ...	845
Death of minor plaintiff before decree:—See HINDU LAW.	856
PARTNER —Death of—Before institution of suit—Decree:—See CIVIL PROCEDURE CODE, XXI, R. 10 ...	885
PARTNERSHIP —Assignment by a partner of his interest—Dissolution—Settlement of accounts of partnership, after assignment—Rights of assignee—Settlement of account, behind the back of assignee, whether binding on assignee, in the absence of fraud—Conversion of dollars into British Indian Currency—Rate of exchange on what date to be taken—Indian Contract Act (IX of 1872), sec. 263—English Partnership Act, sec. 31 (2).] The assignee of the interest of a partner, is not bound by a settlement of account, of the partnership, made behind his back, after the date of the assignment. <i>Hugh Stevenson & Sons v. Aktiengesellschaft, etc.</i> , [1918] A.C., 289, followed. Though, under section 263 of the Indian Contract Act, the rights and obligations of the partners continue for the purpose of its winding up, yet as against the assignee of a partner, a settlement of account behind his back, after the assignment, is not binding on him, and the Court will re-open the account at his instance. As regards the rate of conversion of dollars into British Indian Currency, to which the assignee was entitled, the rate prevailing at the date on which the winding up of the partnership was completed and the assets were realized, is the proper rate to be allowed to the assignee. <i>S. S. Celia v. S. S. Volturro</i> [1921] 2 A.C., 544, followed.	
<i>Veerappa Chetty v. Muthiah Chetty</i> ... (1929) I.L.R., 52 Mad., 509	
Dissolution of—Rights of a retiring partner—Partnership carried on by surviving partners with share of assets of retired partner—Right of retiring partner to profit or interest on his share of assets after the dissolution of partnership—Option to retiring partner to claim either profits or interest—Election by him—Indian Trusts Act (II of 1882), ss. 88, 90 and 95—English Partnership Act, 1890, sec. 42—Indian Contract Act (IX of 1872), ss. 240 and 241—Election, when should be made by retiring partner.] Where a partner retires from a business, which is not wound up but is continued by the surviving partners, he is entitled, at his option, either to interest on his share of the assets of the partnership at the date of its dissolution, or to a share in the profits which have been obtained by the use of his share after dissolution. It is not necessary that the whole of the partnership assets should be used in making the subsequent profits, for, if any portion of the assets is so used, the retiring partner, who has a share in every portion of the assets, is entitled to a similar share in the profits, <i>Bhagavandas v. Rivett Carnac</i> , (1898) I.L.R., 23 Bom., 544 (P.C.), relied on. A retired partner is not to make his election between a share of profits and interest on his share of assets, as regards profits made subsequent to the dissolution, until accounts have been taken and his share of profits has been ascertained; and, if the business ended in loss after dissolution, the retired partner can claim interest on his share of assets at the dissolution. If it is difficult to ascertain the exact share in the profits, it would be proper, in such cases, to award interest on his share of the assets at the date of the dissolution of the partnership. In taking an account of the profits, the surviving partners will be entitled to be credited with a sum sufficient to recompense them for the skill and labour employed in the conduct of the business after dissolution; and it will be open to them to prove that any portion of the profits	

was obtained, not by reason of the use of the partnership assets, but in some other manner. The term "partnership assets" must be deemed to include "the goodwill" of the business.

Ramakrishna Ayyar v. Muthuswami Ayyar ... (1929) I.L.R., 53 Mad., 672

PENAL CODE, (INDIAN), SEC. 149—"Offence"—Meaning of—If extends to offences under the Indian Railways Act.] The word "offence" in section 149 of the Indian Penal Code is confined to offences under the Code, and does not include within its meaning, offences under the Indian Railways Act. *Aydoos v. Emperor* (1922) 17 L.W., 21, *In re Puvanur Athamu*, (1924) 20 L.W., 911, followed.

In re Vasudeva Mudali ... (1929) I.L.R., 52 Mad., 826

(ACT XLV OF 1860), SEC. 216—Constituents of offence under—Subsequent acquittal of person harboured—If affects conviction under sec. 216.] To constitute an offence under section 216 of the Indian Penal Code, it is sufficient to show that against the person harboured, orders of apprehension had issued for an offence, alleged against him, and the subsequent acquittal of the person harboured cannot affect the legality of a conviction under the section.

Rangasami Goundar, In re ... (1929) I.L.R., 52 Mad., 78

, SEC. 268—Allowing prickly-pear to spread on to road used by public—If a public nuisance—Enactment of certain procedure in section 162 of the Madras Local Boards Act—If impliedly deprives right to proceed under Indian Penal Code—Local Fund Overseer whether can complain as member of the public—Sworn statement from complainant—Failure to record—Not an illegality.] The allowing of prickly-pear to spread on to a road used by the public is a public nuisance within the meaning of section 268 of the Indian Penal Code. The enactment of a certain procedure under section 162 of the Madras Local Boards Act for the removal of prickly-pear spreading from private property on to public roads does not impliedly deprive Local Boards and their servants of the right to prosecute under the Indian Penal Code. A Local Fund Overseer has the ordinary right of any member of the public to complain of a criminal offence and that right is not taken away because he did not profess to complain as a member of the public but as a Local Fund Overseer. The omission to take a sworn statement from the complainant is, under the law in this Presidency, an irregularity and not an illegality. *Queen-Empress v. Momu*, (1888) I.L.R., 11 Mad., 443; *Ambaraya Goundan v. Pachamuthu Goundan*, (1921) 19 L.W., 61, followed.

Malappa Goundan, In re ... (1929) I.L.R., 52 Mad., 79

, SEC. 407—Accused entrusted with carriage of coffee from one place to another—Portion abstracted—No evidence as to where or when—Trial of accused under sec. 407 in a Criminal Court in the place of delivery—If such Court has jurisdiction.] When the accused was entrusted with the carriage of a quantity of coffee from an estate in Mysore to a firm of merchants in Mangalore, and a portion of the goods was abstracted and there was no evidence as to when or where such abstraction took place, held, that the Subdivisional Magistrate at Mangalore had jurisdiction to try the accused on a charge of criminal breach of trust, as there was a failure to deliver the goods at Mangalore in accordance with the terms of the entrustment. *In re Rambilas*, (1915) I.L.R., 38 Mad., 639; *Krishnamachari v. Shaw, Wallace & Co.*, (1916) I.L.R., 39 Mad., 576; *Hupu Dadi v. The Queen*, (1882) I.L.R., 5 Mad., 23, distinguished.

Public Prosecutor v. Podimou Beary ... (1929) I.L.R., 52 Mad., 61

, SEC. 425—"Destruction of any property"—Such change in any property or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously—Implication of—Goats allowed to graze in mitla forest—Grazing rights reserved to permit holders—If "mischief."] The expressions "destruction of any property"

and "such change in any property or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously" in section 425 of the Indian Penal Code carry the implication that something should be done contrary to the natural use and serviceableness of such property. The offence of mischief is not committed where a person unauthorisedly allows goats to graze in forest, the grazing rights in which are restricted to holders of permits, as by such an act the grass is only put to its normal use.

Ragupathi Ayyar v. Narayana Goundan ... (1929) I.L.R., 52 Mad., 151

PENAL CODE (INDIAN) (ACT XLV OF 1860), SS. 466 AND 474—Judge—Pending suit—Fabricates record or dishonestly exceeds powers—If in discharge of official duty—Writing record of imaginary suit—Essence of offence—Prosecution—Previous sanction of Government, if necessary.] Where a Judge in a pending case fabricates any record or dishonestly exceeds his powers, the offence is committed by him, while acting or purporting to act in the discharge of his official duty, and he is no less doing so in writing up the record of an imaginary suit, the essence of the offence in both cases being, that an officer having as part of his official duty the correct maintenance of judicial records fraudulently falsifies them. Where a complaint alleged the commission of offences under sections 466 and 474 of the Indian Penal Code against a village munsif, in that the accused fabricated an entire record of the whole of a proceeding purporting to have been tried and decided by him under the Village Courts Act (I of 1889), held, the previous sanction of the Local Government under section 197 of the Code of Criminal Procedure, was necessary before a Court could take cognizance of the offences alleged.

Sivaramakrishna Ayyar v. Seshappa Naidu ... (1929) I.L.R., 52 Mad., 347

, SEC. 471—Scope of—Person forges document and uses it as genuine—If can be sentenced for both the offences.] Section 471 of the Indian Penal Code only lays down, that the sentence that can be imposed for the offence of using a forged document as genuine, is the same, as the sentence that can be imposed for the offence of forgery, and a person who both forged a document and used it as genuine can be sentenced for both the offences. *Queen-Empress v. Umrao Lal*, (1900) I.L.R., 23 All., 84, dissented from.

Sriramulu Naidu, In re ... (1929) I.L.R., 52 Mad., 532

PERMANENT OCCUPANCY:—See LANDLORD AND TENANT ... 549

POLITICAL PENSION:—See CITY MUNICIPAL ACT (MADRAS) (IV OF 1919), SEC. 111, EXPL. II ... 866

POST OFFICE (INDIAN) ACT (VI OF 1898)—Postal employee prosecuted under sec. 55—Sanction under sec. 72, if to be obtained before or after Court takes cognizance.] Sanction under section 72 of the Post Office Act to prosecute a postal employee, for an offence under section 55 of the said Act, may be obtained either before or after the Court takes cognizance of the offence.

Sankaran Pillai, In re ... (1929) I.L.R., 52 Mad., 534

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), SEC. 7—Operation of—If limited to matters in which official Assignee claims a higher title than insolvent—Money claim against stranger—If Official Assignee entitled to proceed under sec. 7—Limitation of right where witness summoned under sec. 56—Official Assignee in no higher position than insolvent—Seeking to recover debt not admitted—Matter of discretion for Court in each case whether such claim be dealt with in Insolvency Court or not.] Section 7 of the Presidency Towns Insolvency Act is not limited in its scope to matters in which the Official Assignee by the operation of the Insolvency Law claims a higher title than what the insolvent himself would have had, and the Official Assignee is entitled to proceed by way of motion under section 7 in cases where he has a money claim against strangers to the insolvency, the only limitation placed on the jurisdiction of the Insolvency Court being, that when once the Official Assignee has summoned a witness under

section 36 of the Act, and that witness disputes his indebtedness, the Official Assignee has no option but to proceed by way of suit. Where the Official Assignee, standing in no higher position by reason of the special provisions of the Insolvency Law than the bankrupt himself, seeks to recover a debt which is not admitted, it is a matter of discretion for the Judge sitting in Insolvency whether in any given case he should deal with such a claim in the insolvency Court, or refer it to the machinery of the ordinary Courts. *Ex parte Brown*, in re *Yates*, (1879) 11 Ch. D., 148, *Ellis v. Silber*, (1872) 8 Ch. App. Cas., 83, *Jnanendra Bala Debi v. The Official Assignee of Calcutta*, (1925) I.L.R., 54 Cal., 251, followed.

Official Assignee, Madras v. Narasimha Mudaliar ... (1929) I.L.R., 52 Mad., 717

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), SEC. 52—
Debtor's property taken possession by receiver—Debtor subsequently adjudicated insolvent—If section 52 applicable to property in receiver's possession—Property in possession of receiver appointed by Court—Legality of possession—If can be questioned by third parties while order appointing receiver remains in force.] Where the property of a debtor is taken possession of by a receiver appointed by the Court, and the debtor is subsequently adjudicated an insolvent, section 52 of the Presidency Towns Insolvency Act does not apply, and the property cannot, during the continuance of the possession by the receiver, be held to be in the possession, order and disposition of the debtor. When an order is made by Court appointing a receiver, and the receiver takes possession of property, it is not open to third parties to question the legality of the possession of the receiver so long as the order appointing the receiver remains in force.

Nedungadi Bank Ltd. v. Official Assignee, Madras ... (1929) I.L.R., 52 Mad., 938

PRIVILEGE:—See STATEMENTS BY WITNESS ... 432

PROFESSION TAX:—See CITY MUNICIPAL ACT (MADRAS) (IV OF 1919), SEC. 111, EXPL. II ... 866

PROPERTY TAX—Railway administration—Liability of:—See DISTRICT MUNICIPALITIES ACT (MADRAS) SEC. 81 ... 779

PROVINCIAL INSOLVENCY ACT (V OF 1920), SS. 2 AND 28—Joint Hindu trading family—Manager, not being father, and adult members, adjudicated insolvents—Power of Official Receiver to sell minor's share for a family trade-debt—Power of manager, whether becomes vested in the Official Receiver.] In a Hindu joint trading family, where there are one or more minor members and the manager is not the father, and the adult members including the manager have been adjudicated insolvents, the power of the manager to dispose of joint family property for debts incurred for trading purposes, passes to, and becomes exercisable by, the Official Receiver so as to bind the minors' shares. *Rangayya Chetti v. Thanikachala Mudali*, (1895) I.L.R., 19 Mad., 74; and A.A.O. No. 31 of 1925, followed.

Official Receiver, Anantapur v. Ramachandruppa ... (1929) I.L.R., 52 Mad., 246

... SS. 3 AND 5 (2)—Civil Procedure Code (Act V of 1908), sec. 24 (1) (b)—Letters Patent, cls. 13 and 18—Insolvency application filed in a mufassal Court—Application to the High Court to transfer it to its own Original Insolvency Jurisdiction—Power of the High Court to transfer—Competency of High Court to administer Provincial Insolvency Act—What Insolvency Law applicable to the case.] The High Court in its Appellate Jurisdiction has no power, under section 24 (1) (b) of the Civil Procedure Code, to transfer an insolvency petition pending in a Subordinate Court in the mufassal to the Original Side of the High Court, on its original insolvency jurisdiction, for trial and disposal, because, firstly, the Original Side of the High Court is not a Court subordinate to the High Court in its Appellate Jurisdiction within the terms of the section, and secondly because the Original Side of the High Court in the exercise of its original insolvency jurisdiction, is not competent to administer the Provincial Insolvency Act, which is the law applicable to the case. Nor does

clause 13 of the Letters Patent enable the High Court to transfer such a petition to the Original Side of the High Court in the exercise of its extraordinary original jurisdiction, because, under clause 18 of the Letters Patent and the provisions of the Provincial Insolvency Act, the High Court, if the case is transferred, is not competent to administer the Provincial Insolvency Act, which is the law applicable to the case.

Goculdooss Jumnadoos & Co. v. Sadasivier ... (1929) I.L.R., 52 Mad., 57

PROVINCIAL INSOLVENCY ACT (V OF 1920), SS. 27, 37 AND 43—Failure to apply for discharge—Annulment of adjudication, effect of—Official Receiver's petition under sec. 54 before annulment—Effect of annulment on petition.] On an annulment of adjudication under section 43 of the Provincial Insolvency Act (V of 1920) owing to the insolvent's failure to apply for his discharge, the insolvency proceedings do not necessarily come to an end and his property does not *ipso facto* revert to the insolvent. The Court may, in proper cases, vest it in the official Receiver or other person as provided by section 37 of the Act. And, if before the annulment, the Official Receiver had applied to set aside a mortgage under section 54 of the Act, as an act of fraudulent preference, he can prosecute the application after the annulment. *Quære*, whether section 43 is mandatory?

Jethaji Peraji Firm v. Krishnayya ... (1929) I.L.R., 52 Mad., 648

... SS. 41, 27 (2), 75 (1) (2)—Order extending time to apply for discharge, by Subordinate Court—Appeal to District Court—No second appeal to High Court.] From an order of a District Court on appeal from an order of a Subordinate Court which extended under section 27 (2) of the Provincial Insolvency Act, the time for an insolvent applying for his discharge, a second appeal to the High Court is incompetent according to section 75 (2) of the Act. Such an order is not one under section 4 of the Act so as to give rise to a second appeal under Schedule I of the Act.

Sambamurthi Ayyar v. Ramakrishna Ayyar ... (1929) I.L.R., 52 Mad., 337

PUBLIC SERVANT—Prosecution—Sanction:—See CODE OF CRIMINAL PROCEDURE (V OF 1898), SEC. 197 ... 602

RATEABLE DISTRIBUTION—Defective application:—See CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 78 AND O. XXI, R. 11 ... 760

RECEIVER—Possession of—Legality:—See PRESIDENCY TOWNS INSOLVENCY ACT, SEC. 52 ... 938

... Jurisdiction of Court to appoint in respect of property subject to simple mortgage:—See CIVIL PROCEDURE CODE, O. XL, R. 1 ... 979

REGISTERED FIRM:—See INDIAN INCOME-TAX ACT (XI OF 1922), SEC. 2 (14). 367

REGISTRATION—Authority to adopt—Presentation for registration—Representative of adoptive son—Guardian—Natural father—Indian Registration Act (III of 1877), ss. 332, 40 and 41.] The provision in section 40 of the Indian Registration Act, 1877, that an authority to adopt may be presented for registration after the donor's death, by the donee or the adoptive son, does not exclude the authority, under section 32, of the representative of the adoptive son to present the document. The definition of the representative of a minor in section 3 does not preclude a person who is not his appointed guardian from being his representative. An authority to adopt was presented for registration by the adoptive son's natural father, who was then his nearest male agnate, treating the son as having passed into the adoptive family. Registration was effected, the registering officer having satisfied himself, as required by section 41, that the person presenting was entitled to do so according to section 40, and it not having been objected that he was not so entitled. Held, that the document was duly registered, since the natural father, as the adoptive son's nearest male agnate, was the proper person to act as his natural guardian in the absence of any guardian judicially appointed; further, that any doubt upon the facts was

removed by the certificate of the registering officer. *Quære* whether in the case of an adoptive son of tender years residing with his natural father, the natural father is not, in the absence of a guardian, his representative, even when he is not his nearest male agnate in Hindu Law.

Venkatappayya v. Venkata Ranga Rao ... (1929) I.L.R., 52 Mad. (P.C.), 175

RELIGIOUS ENDOWMENTS ACT (XX OF 1868), SEC. 3—"Any public officer," meaning of—Temple subject to superintendence of Mysore Government at the time of passing of the Act—Jurisdiction of Temple Committee over the temple.] The words "any public officer" in section 3 of the Religious Endowments Act (XX of 1868) mean a public officer under the Government of Madras; hence a temple committee constituted under the Act cannot claim superintendence over a temple, the nomination of the trustee whereof was vested in the officials of the Government of Mysore at the time of the passing of the Act.

Raghavendra Rao v. Vobiah ... (1929) I.L.R., 52 Mad., 945

REVENUE COURT—Dismissal of suit in—Res judicata:—See ESTATES LAND ACT (MADRAS), SS. 55 TO 57, ETC. ... 332

REVIVOR:—See LIMITATION ACT (IX OF 1908), ART. 183 ... 591

SCHEDULED DISTRICTS—Agency Tracts—Indian Stamp Act (II of 1899), whether applicable to Agency Tracts—Scheduled Districts Act (XIV of 1874)—Laws Local Extent Act (XV of 1874).] The Indian Stamp Act (II of 1899) applies to the Agency Tracts. All Acts of the Indian Legislature passed after the Scheduled Districts Act (XIV of 1874) apply to the Scheduled Districts also; unless otherwise declared either by those Acts or by the Laws Local Extent Act (XV of 1874).

Krishnachandra v. President, Agency District Board ... (1929) I.L.R., 52 Mad. (S.B.), 1

SECOND APPEAL:—See PROVINCIAL INSOLVENCY ACT (V OF 1920), SS. 41, 27 (2), 75 (1) (2) ... 337

Decision of single judge—Refusal of leave:—See LETTERS PATENT, CL. 15—AMENDED ... 952

Judgment—Appeal:—See LETTERS PATENT (MADRAS), CL. 15 ... 361

SENTENCE OF DEATH—Number of persons banding together for taking a man's life—Found guilty of murder—Court unable to find which accused delivered fatal blow—Appropriate sentence.] Where two or more persons band themselves together for the express purpose of taking a man's life and are found guilty of murder, the Court is not justified in refraining from passing a sentence of death, which would otherwise be proper, merely on the ground that it cannot find definitely which of the accused delivered the blow which is to be regarded as fatal.

Tirumaligadu, In re ... (1929) I.L.R., 52 Mad., 147

SERVICE INAM:—See ENFRANCHISEMENT OF SERVICE INAM IN FAVOUR OF WIDOW, ETC. ... 6

SPECIFIC PERFORMANCE:—See LETTERS PATENT (MADRAS), CL. 12 ... 809

STATEMENTS BY WITNESS—Privilege—If absolute—Witness answering counsel's question—Protection of sec. 132 of Indian Evidence Act not sought—Effect of.] In India the statements made by a witness are entitled not to an absolute but only to a qualified privilege. *Manjaya v. Sesha Setti*, (1888) I.L.R., 11 Mad., 477, dissented from. A witness who answers a question or questions put to him by counsel without seeking the protection of section 132 of the Indian Evidence Act is not entitled to that protection. *The Queen v. Gopal Dass*, (1881) I.L.R., 3 Mad., 271 (F.B.), followed.

Peddabba Reddi v. Farada Reddi ... (1929) I.L.R., 52 Mad., 432

SUCCESSION ACT, THE INDIAN (XXXIX OF 1925)—"Hindu"—In what sense used—Person of non-Hindu origin—Conversion to Hinduism—If permissible—Membership of caste—If a pre requisite to being a Hindu—Question if a given person is a Hindu—One of fact in each case—European convert to Hinduism—Hindu Law—If subject to—Test applicable—Bhatia male—European woman convert to Hinduism—Marriage between—If valid.] In the Indian Succession Act (XXXIX of 1925) the term "Hindu" is used in a theological as distinguished from a national or racial sense. A person of non-Hindu origin can become a Hindu by conversion. Membership of a caste is not a necessary pre requisite, for being a Hindu. It is a question of fact in each case whether a given person is a Hindu or not. A European does not become a Hindu merely because he professes a theoretical allegiance to the Hindu faith, or is an ardent admirer and advocate of Hinduism, and its practices; but if he resides long in India, abdicates his religion by a clear act of renunciation, and adopts Hinduism by undergoing formal conversion, gives up along with Christianity his Christian name and deliberately assumes a Hindu name, marries in accordance with Hindu religious rites a person who is a Hindu by race and religion and cuts himself off from his old environment and takes to the Hindu mode of life, in such a case the Court may justly come to the conclusion that he is a Hindu within the meaning of the Indian Succession Act. A European who becomes a Hindu is governed by Hindu Law, the test in such a case being not domicile but religion. A marriage between a Bhatia male claiming to be a Vaisya and a European woman converted Hinduism is valid.

Morarji v. Administrator-General, Madras ... (1921) I.L.R., 52 Mad., 160

SURVEY AND BOUNDARIES ACT (MADRAS) (VIII OF 1923), SS. 13 AND 14—Dispute between Union Board and private individual in respect of certain property—Survey held and marked as belonging to union—Notification under sec. 13—Notice to remove encroachment on property—Non-compliance

—Prosecution within three years from decision of Survey Officer—If Criminal Court competent to go into question of title to property.] Where, in respect of a property under dispute between a Union Board and a private individual, a survey was held and the property was marked off as belonging to the Union Board, and a notification under section 13 of the Madras Survey and Boundaries Act was published in the District Gazette, and in consequence of the failure of the other party to comply with a notice calling upon him to remove an encroachment on the said property, a prosecution was instituted within three years from the decision of the Survey Officer, held, that as the decision of the Survey Officer was subject to the result of a suit in a Civil Court to set aside the order and to be filed within three years from the date of such order, a Criminal Court was not precluded from going into the question of title to the property in dispute and to decide the question on the evidence before it.

Palimuthu v. President, Union Board, Kattuputtur ... (1929) I.L.R., 52 Mad., 609

TEMPLE COMMITTEE—Jurisdiction of:—See RELIGIOUS ENDOWMENTS ACT, SEC. 3 ... 945

TEMPLE PORAMBOKE:—See LAND REVENUE ... 25

TRANSFER OF PROPERTY ACT, SEC. 6 (d):—See ELECTION ... 465

TRANSFeree DECREE-HOLDER:—See LIMITATION ACT (IX OF 1908), ART. 183, 591

TRUSTEESHIP—Adopted Son's right:—See HINDU LAW ... 378

TRUSTS ACT (INDIAN) (II OF 1882), SEC. 66—Trustee wrongfully mingles trust property with his own—If beneficiary entitled to charge on whole fund for amount due—Trustee of endowed school—Money belonging to endowment entrusted to him by co-trustees—Money put into his own business without the knowledge or consent of co-trustees—Trustee adjudicated insolvent—If co-trustees entitled to charge on whole estate in priority to other creditors.] Where a

trustee wrongfully mingles trust property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him. Where a banker who was one of the trustees of an endowed school, had a sum of money belonging to the endowment entrusted to him by his co-trustees, and he put that sum into his own business without the knowledge or consent of his co-trustees, and his business came to a standstill, and he was adjudicated an insolvent, *held*, that the bankrupt's co-trustees were entitled to a charge on the whole estate in the hands of the Official Assignee in priority to other creditors, on the basis of following moneys which have been misappropriated to the fund in which they must be supposed to have been sunk. *In re Hallett's Estate, Knatchbull v. Hallett*, (1879) 13 Ch D., 698, *Sinclair v. Brougham*, [1914] A.C., 398 and *Pennell v. Doffell*, (1853) 4 De G.M. and G., 372, followed.

Official Assignee, Madras v. Minakshi Vidyasalai Sangam (1929) I.L.R., 52 Mad., 919

TRUSTS ACT (INDIA) (II OF 1882), ss. 88, 90 AND 95:—*See* PARTNERSHIP. 673

UNENFRANCHISED SERVICE INAM:—*See* MINERALS ... 538

VILLAGE COURTS (MADRAS) ACT (I OF 1889), ss. 51 AND 68—*Decree of Village Court—Execution by District Munsif on Original Side, validity of.* The combined effect of sections 51 and 68 of the Madras Village Courts Act (I of 1889) the latter of which enacts that a District Munsif to whom a Village Court's decree (which is only a decree of Small Cause nature) is transmitted for execution can execute it "as if it were a decree passed by himself" is to enable him to execute it not merely on the Small Cause side as if it were a Small Cause decree passed by himself but also to execute it on the Original Side by attachment and sale of immovable property.

Amirtha Nadan v. Muthu Nadan ... (1929) I.L.R., 52 Mad., 981

WORKMEN'S COMPENSATION ACT (VIII OF 1923), sec. 2 (1) (n) AND sch. II (V)—"Employed for the purpose of loading"—*Meaning of—Persons employed in receiving goods let down by a crane in a warehouse from its upper to its lower floor—Warehouse at a distance of a quarter of a mile from quay—Workmen injured by falling of bale—If entitled to compensation for injury.* Where a person, who was employed at a warehouse in receiving goods lowered down by a crane from the upper floor of the godown to its lower floor, which were to be there put into carts and carried to the quay by other workmen for loading in a ship at a distance of a quarter of a mile from the warehouse, was injured by a falling of a bale so lowered down, and applied to the Commissioner for compensation under the Workmen's Compensation Act (VIII of 1923) against his employers, *held*, that the applicant was not a workman "employed for the purpose of loading a ship," within the meaning of clause 5, schedule II of the Workmen's Compensation Act (VIII of 1923), and was not entitled to compensation under the Act. *Grant & Co. v. Coverdale Todd & Co.*, (1884) 9 A.C., 470, relied on.

Ralli Brothers, Madras v. Perumal ... (1929) I.L.R., 52 Mad. (F.B.) 747

THE INDIAN LAW REPORTS

(MADRAS SERIES)

APPELLATE CIVIL—SPECIAL BENCH.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Ramesam and Mr. Justice Pakenham Walsh.*

KRISHNACHANDRA KHARASUDHA PATNAIK AND
FIVE OTHERS, CLAIM-PETITIONERS,

1928,
August 2.

v.

PRESIDENT, AGENCY DISTRICT BOARD AND ANOTHER,
COUNTER-PETITIONERS (DECREE-HOLDER AND JUDGMENT-
DEBTOR).*

Scheduled Districts—Agency Tracts—Indian Stamp Act (II of 1899), whether applicable to Agency Tracts—Scheduled Districts Act (XIV of 1874)—Laws Local Extent Act (XV of 1874).

The Indian Stamp Act (II of 1899) applies to the Agency Tracts.

All Acts of the Indian Legislature passed after the Scheduled Districts Act (XIV of 1874) apply to the Scheduled Districts also, unless otherwise declared either by those Acts or by the Laws Local Extent Act (XV of 1874).

CASE stated under section 61 of the Indian Stamp Act (II of 1899) by the Collector of Vizagapatam in his letter R.C. No. 456-25-Gl., dated 2nd March 1927, for declaring the stamp duty payable on an unstamped award filed in E.A. Nos. 83, 115 and 116 of 1926 in E.P. No. 9 of 1924 in O.S. No. 15 of 1923 on the file of the Court of the Agency Additional District Judge of Vizagapatam.

* Referred Case No. 10 of 1927.

KRISHNA-
CHANDRA
v.
PRESIDENT,
AGENCY
DISTRICT
BOARD.

The facts and the question of law arising in the case sufficiently appear from the following letter of reference to the High Court by the Collector of Vizagapatam :—

“ In O.S. No. 15 of 1923 on the file of the Agency Additional District Judge, Vizagapatam, the President, Agency District Board, Vizagapatam, got a decree for Rs. 19,000 against one Nilakanta Kharasuda Patnaik of Jeypore. In connexion with the execution of the decree, the wife and children of the judgment-debtor filed some claim-petitions and in support of their petitions they filed an unstamped award of 1921 purporting to partition properties worth about Rs. 80,000. On behalf of the decree-holder objection was taken to the admission of the document unless proper stamp duty and penalty were paid. The claim-petitioners contended that the Indian Stamp Act was not extended to or declared to be in force in the Vizagapatam Agency by a notification under section 3 of the Scheduled Districts Act (XIV of 1874). The Additional District Judge also held that unless there is a notification under the Scheduled Districts Act, the Indian Stamp Act cannot be considered to be in force in the Agency. He ordered the District Board to produce the notification if it has been published. In the preamble to the Indian Stamp Act (II of 1899) it is stated that it extends to the whole of the British India. In G.O. No. 2870, Judicial, dated 7th November 1879, it was held that the Indian Stamp Act is in force throughout British India including the Scheduled Districts. The then Advocate-General was of opinion that in regard to Acts which extend to the whole of British India, a notification under section 3 of the Scheduled Districts Act is necessary only when the Scheduled Districts are to be exempted from the operation of those Acts and that in the case of Acts which expressly exempt the Scheduled Districts from their operation, a notification is necessary only when those Acts are required to operate in the Scheduled Districts. This aspect of the question also was advanced before the Agency Additional Sessions Judge, but he did not agree with this view. He passed a judicial order, in which he held that the Indian Stamp Act will have no force in the Scheduled Districts unless it is extended to those areas under section 3 of the Scheduled Districts Act. As no notification under the Scheduled Districts Act is forthcoming his order has become final, and the unstamped document was admitted. The Additional District

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Judge's finding being a judicial order is binding unless it is upset by a higher tribunal. But in this case there is no appeal as it is a claim-petition in connexion with an execution proceeding. The Government in the Revenue Department have since addressed the Government of India for sanction to issue a notification declaring that the Stamp Act has always been and is in force in the Agency Tracts. They have directed me to move the High Court under section 61 of the Stamp Act to declare the stamp duty payable on the document. I accordingly request that the High Court may be pleased to take action under section 61 of the Stamp Act.”

B. Satyanarayana for judgment-debtor.—No Act of the legislature applies to the Scheduled Districts unless a notification by the Government is issued declaring the applicability of any particular Act to those districts as provided by section 3 (a) of the Scheduled Districts Act. There has been no notification extending the Stamp Act to these districts.

Government Pleader (P. Venkatarumana Rao) for the Government.—Every Act of the Imperial legislature applies to the whole of British India unless any portion is expressly excepted. “British India” includes “Scheduled Districts”; see section 3 (7) of the General Clauses Act. The object of the Scheduled Districts Act was to remove doubts regarding the applicability to those districts of Acts of Indian Legislature passed prior to the passing of that Act. All doubts as to the applicability of Acts of Indian Legislature to those districts were sought to be removed (1) by the Laws Local Extent Act, and (2) by notifications to be issued under sections 3 (a) and 3 (b) of the Scheduled Districts Act declaring what Acts are to be in force in those districts and what not. The Scheduled Districts Act does not apply to Acts of Indian Legislature passed after its date. Generally, all Acts passed after 1874 declare whether they apply to the whole of British India, or exclude the Scheduled Districts. The Stamp Act applies to the whole of British India and no notification extending it to the Scheduled Districts is therefore necessary; see *Chakrapani v. Varahalamma*(1).

The JUDGMENT of the Court was delivered by

RAMESAM, J.—The first question arising in this Reference is whether the Indian Stamp Act of 1899 applies

(1) (1895) I.L.R., 18 Mad., 227.

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to the Agency Tracts. The Act itself purports to apply to the whole of British India and there is no doubt that "British India" includes the Agency Tracts of Vizagapatam District; see section 3 (7) of the General Clauses Act X of 1897. The argument before the Additional District Judge of the Agency seems to be that, because there was no notification under the Scheduled Districts Act XIV of 1874, section 3, therefore the Stamp Act does not apply to the Agency Tracts. But this argument seems to rest on a misunderstanding of the object and scope of the Scheduled Districts Act of 1874. The object of that Act was to remove doubts regarding the applicability of Acts of the Indian Legislature prior to that date and they were sought to be removed generally by the Laws Local Extent Act and secondly, by notifications either under section 3 (a) or 3 (b) of the Act either declaring certain Acts to be in force or declaring certain Acts not to be in force. But the Scheduled Districts Act does not apply to Acts of the Indian Legislature passed after that Act which are very clear as to the local extent. The practice since 1874 has been for an Act to say that the Act applies to the whole of British India or it applies to the whole of British India excluding the Scheduled Districts as the case may be. There are examples of several Acts in which the Acts are said to apply to the whole of British India excepting the Scheduled Districts; for example, the Specific Relief Act, 1877, and the Provincial Insolvency Act. In the case of the Stamp Act it extends to the whole of British India and there is no doubt as to its applicability to the Agency Tracts. The decision in *Chakrapani v. Varahamma*(1) also makes this point clear.

(1) (1895) I.L.R., 18 Mad., 227.

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The second question arising in this Reference is what is the stamp duty payable on the award before us. The Stamp Act, section 2 (15) defines an instrument of partition as including an award directing a partition. The award, therefore, in this case is governed by Article 45 in the schedule to the Stamp Act. The duty payable according to the second column of that article is the stamp duty as on a bond for the amount of the value of a separated share or shares of the property. Then a note explains that the largest share remaining after the property is partitioned, shall be deemed to be that from which the other shares are separated. Here the whole property dealt with by the award is divided into four shares, one of the shares being in the proportion of 2 to each of the other three shares. The largest share after the property is partitioned is this share which is double the value of the shares. The value of the property being Rs. 80,000, the value of two-fifths of it which is the property from which the others' shares are deemed to be separated is Rs. 32,000 and the stamp duty payable on the award is as on a bond for Rs. 48,000, which is the value of the separated shares. Under Article 15 the duty for a bond of Rs. 48,000 is Rs. 240. This, we hold, is the proper stamp duty payable on the award. Having regard to the uncertainty existing as to the law applicable to the Agency Tracts, we do not think this is a proper case in which the penalty ought to be levied. The Court having acted upon this document, it is enough in the interests of justice to require the claimant who is relying on the award to pay the stamp duty itself and to give effect to the document if the document is otherwise found valid. We make no order as to costs.

N.B.

APPELLATE CIVIL.

*Before Mr. Justice Kumaraswami Sastri and
Mr. Justice Reilly.*

1928,
February 3.

PALANIYANDI AND ANOTHER, MINORS BY THEIR MOTHER
AND GUARDIAN VELAMMAL (PLAINTIFFS
2 AND 3), APPELLANTS,

v.

VELAYUDAM PILLAI AND 26 OTHERS (DEFENDANTS
5, 6, 8 TO 22, 25 TO 32, 37 AND 38), RESPONDENTS.*

*Enfranchisement of service inam in favour of widow and
daughter of deceased holder—Effect of.*

A grant by Government enfranchising certain karnam service inam lands in favour of the widow and daughter of a deceased karnam, imposing quit-rent on the lands, and giving them an absolute estate therein, makes the grantees absolute owners thereof; *Venkata Jagannadha v. Veerabhadrayya*, (1921) I.L.R., 44 Mad., 643 (P.C.), followed. Neither the fact that the grant was in favour of people who would otherwise ordinarily take only a limited estate in law, nor the fact that it was in favour of two persons such as a widow and daughter, militates against the absolute character of the grant. An alienee from such persons takes an absolute estate.

APPEAL against the decree of the Court of the First Additional Subordinate Judge of Madura in O.S. No. 45 of 1910.

The following facts are taken from the judgment of KUMARASWAMI SASTRI, J. :—

“This appeal arises out of a suit filed by the plaintiffs as the reversioners of one Sankaralingam Pillai who died in 1872. Sankaralingam Pillai left a widow Kanthimathi Ammal and a daughter Thangammal. Thangammal died in 1902 and Kanthimathi Ammal died on the 29th December 1911. The reversioner, according to the plaintiffs, at the date of the death of Kanthimathi Ammal when the reversion opened

was one Subbiah Pillai, who died on the 1st October 1917 leaving three sons, the first, second and third plaintiffs. The second and third plaintiffs were minors and the first plaintiff was a major at the date of the suit. The first plaintiff died in 1913 and the second and third plaintiffs continued the suit. It is not disputed that the suit was to declare the plaintiffs as reversioners and set aside the alienations made by the widow and daughter or the widow alone. It is not disputed that these lands which form the subject-matter of the appeal form part of a karnam inam. Sankaralingam Pillai was removed from the office of karnam about a year before he died, but he managed to remain in possession of the lands and on his death his widow continued to be in possession. Subbiah Pillai claimed the lands and the office of karnam and wanted possession of those lands. The Revenue authorities, however, declined to interfere and referred Subbiah Pillai to a Civil Court. Afterwards Subbiah Pillai released all the lands which formed the karnam emoluments and another item of property which is the subject-matter of Appeal No. 455 of 1924 which we already disposed of. He released his rights to those properties—both the present rights which he had and the rights which he would have as reversioner. He got Rs. 600 as consideration for this release out of the sale of item No. 1 which the widow sold absolutely to a stranger. Exhibit IV (the release deed) recites that the widow and the daughter began to alienate properties and create mortgages and *othis* over them and evidently Exhibit IV was taken in order to see that there was no trouble caused by the claims of the executant Subbiah Pillai and the various alienees and also to give the widow a right to dispose of property as she pleased. It is admitted that the inam lands were enfranchised by the Government by Exhibit D in the year 1891. Exhibit D

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is granted to both Thangammal, the daughter and Kanthimathi Ammal, the widow. The material portion of the deed is as follows :—

“This inam, being held for karnam service now otherwise provided for, will be subject to the payment of an annual quit-rent of Rs. 11 which is hereby imposed upon it in commutation both of the service and the reversionary interest possessed by the Government in the inam. The inam is now confirmed to you in freehold, in other words the inam will be your own absolute property to hold or dispose of as you think proper subject only to the payment of the abovementioned quit-rent.”

Upholding the plea of the defendants who were alienees from the widow and the daughter that Exhibit IV gave the grantees an absolute estate, the Subordinate Judge dismissed the suit. The plaintiffs preferred this appeal.

S. Varadachari for appellants.

N. Kunjithapadam and *K. S. Venkataramani* for respondents.

JUDGMENT.

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After stating the facts as above extracted, KUMARASWAMI SASTRI, J., continued :—

So far as Exhibit D, which forms the root of the title of the widow and the daughter, is concerned, it is an absolute title conferred by the Government, giving them the property absolutely to hold or dispose of it as they thought proper, the only covenant being that they should pay the quit-rent which the Government imposed upon the land. We think that the effect of the decision of their Lordships of the Privy Council in *Venkata Jagannadha v. Veerabhadrayya*(1) is clear. Their Lordships of the Privy Council dissented from the view taken in *Pingala Lakshimipathi v. Bom-mireddipalli Chalamayya*(2) which in its turn overruled

the previous decisions of this court in *Venkata v. Rama*(1) and *Venkatarayadu v. Venkataramayya*(2) and the previous cases on the subject. The effect of the decision of the Privy Council in our opinion is that Exhibit D confers upon the widow and the daughter an absolute right to the property and their interests were not merely that of a Hindu widow or daughter succeeding to the property of her husband or father having only a limited right therein. Mr. Varadachari for the appellants attempts to draw a distinction and argues that the joinder of two persons as donees makes a difference as regards the construction of the grant and the interest conferred, that the point has not been touched by the decision of their Lordships of the Privy Council and that in the present case the grant being to two persons, the widow and the daughter, Courts can presume notwithstanding the decision in 44 Madras that the Government intended to confer an estate limited by Hindu law. We are unable to follow this argument. All that the Privy Council decided was that the grant by the Government conferred an estate upon the widow which had no reference to any provisions of Hindu law, that the grant has to be considered according to its own tenor and where a grant is an absolute grant it cannot be cut down by any considerations as to the status of the family and the position of the members (grantees) at the date of the grant. The fact that other donees are mentioned in our opinion would not make any difference as regards the construction of the grant. This view has been taken in *Venkatasubba Rao v. Adinarayana Rao*(3) where an inam title-deed was in favour of five persons and a similar argument was repelled. We think that the effect of an inam title-deed is tantamount to a

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(1) (1835) I.L.R., 8 Mad., 249 (F.B.).

(2) (1892) I.L.R., 15 Mad., 284.

(3) (1925) 50 M.L.J., 46.

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resumption by the Government and a regrant to the persons mentioned in the inam title-deed and that what the widow got in the case was the absolute title which was the estate conferred by the grant. If it confers an absolute estate, we do not think we will be justified in cutting down the estate with reference to any other consideration. Another argument was advanced by Mr. Varadachariar, namely, that as the widow who sold the properties purported to convey only the widow's estate, we must take the intention of the parties as to the estate which was intended to be granted to be regulated by the law in force at that time and that as the law after 30 Madras was that in such cases notwithstanding the absolute terms of the inam grant, the widow took only a limited estate it was that estate which was bargained for and sold. He refers to the decision in the Kannivadi case *Abdul Aziz Khan v. Appayasami Naicker*(1) as supporting his contention. I do not think that these considerations apply to the present case. It is clear that what was sold by the widow and what was intended to be purchased by the vendees was the full title to the property. The consideration was fixed with reference to the passing of an absolute title. That absolute title, if the property was property held by the vendor in a limited estate which is provided for by Hindu law in the case of widows or daughter, can only be conferred in cases of necessity which would in Hindu law justify an alienation. For that purpose the necessity was recited in the document. But if in fact the vendor had an absolute estate granted by the Government, it is difficult to see why the purchaser should not take an absolute estate because that was the estate which the vendor and the vendee agreed to pass. In the one

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

case, it would be necessary to prove facts justifying the widow in giving an absolute title and in the latter case to prove a grant giving her such title. We are clearly of the opinion that in cases where a widow or daughter has an absolute estate and where she purports to sell the property absolutely, the purchaser is entitled to rely upon the title she had and there is no reason to cut down the estate intended to be sold by presuming that the parties intended only to have a widow's estate in spite of the fact that the sale-deed purports to be an absolute sale-deed conferring full title, necessity being set out only as enabling the widow to confer such title. It is unnecessary in the view we take on these two points to consider whether the release Exhibit IV was, as regards the properties covered by the karnam inam, merely a release of the then existing rights claimed by the executant or the reversionary rights also. The appeal fails and is dismissed with costs. One set of costs for the contesting respondents.

REILLY, J.—I agree. In connection with Mr. Varadachari's suggestion that the vendees in this case may have intended only to buy the interests of the widow and daughter (the sale-deeds with which we are concerned, I understand, were executed by both Kanthimathi Ammal and her daughter Thangammal) it is not only to be noticed that the sale-deeds purport to convey an absolute title but that the principle that the vendees can get only the benefit of some lesser estate, which according to their appreciation or supposed appreciation of the law at the time was available for them, does not apply. From the statement given by the plaintiffs on the 4th November 1918 it appears that all these alienations were made before 1907, that is before the date of the Full Bench decision in *Pingala Lakshimipathi v.*

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Bommireddipalle Chalamayya(1), on the basis of which Mr. Varadachari suggests that they could have supposed only that they were buying the widow's and daughter's interests. Mr. Varadachari suggested that that statement of the plaintiffs was not to be taken too strictly in the matter of dates because there is some indication in it that they wished to contend that some of these alienations were not real but were merely benami transactions, by which Kanthimathi Ammal and Thangammal were to retain their interest in the property. In regard to that it is only necessary to say that it is quite clear that at the trial the suggestion was not pressed and there is no issue about it. I agree that the appeal must be dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Mackay.

1928,
July 31.

RAJA OF RAMNAD (PLAINTIFF), APPELLANT,

v.

SECRETARY OF STATE FOR INDIA (DEFENDANT),
RESPONDENT.*

Income-tax Act (XI of 1922), sec. 52—Tax paid for an un-assessable income, under mistake of law—Right of suit for refund—Tax, whether paid under duress.

In a suit for a refund of income-tax paid,

Held that income-tax paid by an assessee under a mistake of law in respect of an income which on the date of payment was not assessable in law (e.g.) income from forests and fisheries in a permanently-settled zamindari, cannot be recovered by the assessee from the Government. Payment by an assessee on

(1) (1907) I.L.R., 30 Mad., 434.

* Appeal No. 95 of 1927.

a demand based upon the return submitted by him is not a payment made under duress but is a voluntary payment.

Obiter.—Section 52 of the Indian Income-tax Act (XI of 1922) bars a suit for refund of income-tax paid, only in cases where the tax is legally payable in respect of the income and not where the income is exempt from assessment.

APPEAL against the decree of the Court of the Subordinate Judge of Rāmnād in Original Suit No. 38 of 1925.

The following facts are taken from the judgment:—

“This appeal is by the Raja of Rāmnād against the decree of the Additional Subordinate Judge of Rāmnād at Madura dismissing his suit for the recovery of certain amounts paid by him as income-tax for three years. The Raja of Rāmnād was asked by the Income-tax Officer to make a return of his income, taxable under the Income-tax Act (VII of 1918) under section 17 (2) read with section 2, clause 13. He submitted a return for the years 1919–20, 1920–21, and 1921–22 in which he showed the income derived by him from forests and fisheries. The Income-tax Officer, on the basis of the return, proceeded to assess the income from forests and fisheries, under section 18 of the Act. The Raja paid the tax on 5th July 1920, 25th April 1921, and 21st April 1922. He brought the suit on 22nd June 1925 for the recovery of the three sums paid on the dates abovementioned on the ground that the income from forests and fisheries derived from his permanently-settled zamindari was not taxable under the Income-tax Act.”

The defendant pleaded *inter alia* that the income was taxable, that the tax was levied on the return made by the plaintiff himself, that the payment of the tax was voluntary, that the mistake, if any, on the point of law, viz., whether the income was taxable or not did not entitle him to a refund, that the suit for a refund was

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barred by section 52 of the Income-tax Act, and that the suit was barred by limitation. Upholding the defendant's pleas the Subordinate Judge dismissed the suit. The plaintiff preferred this appeal.

A. Krishnaswami Ayyar for appellant.—Income from forests and fisheries is not taxable; *Chief Commissioner of Income-tax v. Zamindar of Singampatti*(1). As the assessment is *ultra vires*, a suit lies for its refund, the bar of section 52 of the Income-tax Act being applicable only when the assessment is *intra vires*; compare *Fischer v. Twigg*(2), *Nundo Lal Bose v. The Corporation for the Town of Calcutta*(3), *Kameshwar Pershad v. The Chairman of the Bhabua Municipality*(4), *Secretary of State for India in Council v. Fahamidannissa Begum*(5), *Haji Rehemtulla v. Secretary of State*(6), *Chairman of Giridih Municipality v. Srish Chandra Mozumdar*(7), *Alcock, Ashdown & Co., Ltd. v. Chief Revenue Authority of Bombay*(8). The payment is not voluntary but must be considered to have been made under coercion; for a notice was first sent, then the assessment was imposed; and if the tax is not paid it can be recovered by coercive processes. The tax has been recovered under colour of office and can be recovered even when it has been paid under a mistake of law; *Hooper v. Mayor and Corporation of Exeter*(9), *Steele v. Williams*(10).

Government Pleader (P. Venkataramana Rao) for the respondent.—Section 52 of the Income-tax Act is a bar to the suit. The Act is a special Act and is self-contained and for any refund for any tax paid under whatever circumstances the remedy must be sought for only under the four corners of the Act. There are provisions in the Act for refund in certain cases but not for this. No suit lies for a refund of tax paid; compare *Ramachandra v. The Secretary of State*(11), *Messrs. Best & Co., Ltd. v. The Collector of Madras*(12), *Rex v. Bloomsbury Income-tax Commissioners*(13), *Rex v. Swansea Income-tax Commissioners*(14), *The Queen v. Commissioners for the Special*

(1) (1922) I.L.R., 45 Mad., 518 (F.B.). (2) (1896) I.L.R., 21 Mad., 367.
(3) (1885) I.L.R., 11 Calc., 275. (4) (1900) I.L.R., 27 Calc., 849.
(5) (1890) I.L.R., 17 Calc., 590 (P.C.) (6) (1926) A.I.R. (Bom.), 50.
(7) (1908) I.L.R., 35 Calc., 859. (8) (1928) I.L.R., 47 Bom., 742 (P.C.).
(9) (1887) 56 L.J.Q.B. (N.S.), 457. (10) (1853) 8 Ex. 625; 155 E.R., 1502.
(11) (1889) I.L.R., 12 Mad., 105. (12) (1918) 35 M.L.J., 23.
(13) [1915] 3 K.B., 768. (14) [1925] 2 K.B., 350.

Purposes of the Income-tax(1). If any source of income is to be exempt from income-tax, it must be specified in the Act; *In the matter of Shib Lal Ganga Ram*(2), *Chief Commissioner of Income-tax v. Zamindar of Singampatti*(3), is not good law and requires consideration. *Emperor v. Probhat Chandra Barua*(4), *Emperor v. Probhat Chandra Barua*(5), *Emperor v. Indu Bhusan Sarkar*(6), *Maharajadhiraj of Darbhanga v. Commissioner of Income-tax*(7). The assessee voluntarily included the income from forests and fisheries in his return and paid the tax thereon without protest, when a demand was made. This is a voluntary payment and cannot be considered to have been made under compulsion. Money paid under a mistake of law cannot be recovered; *William Whiteley, Ltd. v. The King*(8), *Slater v. Mayor, &c., of Burnley*(9), *Sinclair v. Brougham*(10) and *C.R.P. No. 535 of 1926 (unreported)*.

JUDGMENT.

After stating the facts contained in the extract quoted in page 13 their Lordships continued:—

The first point urged by Mr. Krishnaswami Ayyar for the appellant is that the income derived from a permanently-settled estate is outside the scope of the Income-tax Act by reason of the Permanent Settlement Regulation XXV of 1802 and the sanad issued under the Act, and the act of the Income-tax Officer being *ultra vires*, he is entitled to a refund of the amount paid by him. In the view we take of the next point, it is unnecessary to discuss all the authorities bearing on this point in detail. In *The Chief Commissioner of Income-tax v. Zamindar of Singampatti*(3) a Full Bench of this Court held that, where the peshkash of a permanently-settled estate was fixed in commutation, not only of the rentals of the cultivated lands but also of all income which might be

(1) (1888) 21 Q.B.D., 318. (2) (1927) 103 I.C., 477.
(3) (1922) I.L.R., 45 Mad., 518 (F.B.). (4) (1927) I.L.R., 54 Calc., 833 (F.B.).
(5) (1924) I.L.R., 51 Calc., 504. (6) (1926) I.L.R., 53 Calc., 524.
(7) (1924) I.L.R., 3 Pat., 470. (8) (1809) 101 L.T., 741.
(9) (1888) 59 L.T., 636. (10) [1914] A.C., 898.

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derived from forests or fisheries, both under the terms of the sanad and of section 1 of Regulation XXV of 1802, these incomes were exempt from further taxation by the Government, and section 3 of the Income-tax Act did not abrogate this exemption. The learned Judges considered the effect of the Permanent Settlement Regulation of 1802 and the terms of the grant to which the grant in the present case is similar and came to the conclusion that the income derived from forests and fisheries, in the permanently-settled estate was not liable to be taxed under the Income-tax Act. The learned Government Pleader attacks the correctness of this decision and contends that income from forests and fisheries is taxable unless it comes within the exceptions provided in the Income-tax Act. He urges that there must be specific legislation exempting such income and that it cannot be exempted by implication. Sitting as a Division Bench, we are bound by the decision of the Full Bench. We may observe that we entirely concur with the reasoning and conclusion of the learned Judges who were members of the Full Bench. Reliance is placed by the learned Government Pleader on *Emperor v. Probhat Chandra Barua*(1), *Emperor v. Indu Bhusan Sarkar*(2), *Emperor v. Probhat Chandra Barua*(3), and *Maharajadhiraj of Darbanga v. The Commissioner of Income-tax*(4) as supporting his contention that *Chief Commissioner of Income-tax v. Zamindar of Singampatti*(5) was not correctly decided. In *Emperor v. Probhat Chandra Barua*(1) there was a difference of opinion between RANKIN, J., and PAGE, J.; PAGE, J., approving of the decision in *Chief Commissioner of Income-tax v. Zamindar of Singampatti*(5). In *Emperor v. Indu*

(1) (1921) I.L.R., 51 Cal., 504. (2) (1926) I.L.R., 53 Cal., 524.
(3) (1927) I.L.R., 54 Cal., 863 (F.B.). (4) (1921) I.L.R., 8 Pat., 470.
(5) (1922) I.L.R., 45 Mad., 518 (F.B.).

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Bhusan Sarkar(1), *Chief Commissioner of Income-tax v. Zamindar of Singampatti*(2) and *Maharajadhiraj of Darbanga v. The Commissioner of Income-tax*(3) were followed by a Bench of the Calcutta High Court. In *Emperor v. Probhat Chandra Barua*(4) there was a difference of opinion, two Judges approving the Madras view and three Judges following the view of RANKIN, J., in *Emperor v. Probhat Chandra Barua*(5). In *Maharajadhiraj of Darbanga v. The Commissioner of Income-tax*(3) DAWSON MILLER, C.J., after an exhaustive examination of the Permanent Settlement Regulation and its effect observed :

"I see no reason to take a different view from that held by the Madras High Court," while MULLICK, J., took a different view. We find this point in favour of the appellant.

It is contended by the learned Government Pleader that no civil suit would lie to recover an amount paid as income-tax. A civil suit is barred under section 52 of the Income-tax Act of 1918. If the tax was levied under the Act, no doubt, a suit would be barred, but if the assessment was made in respect of an item of income which is not assessable under the Act, a civil suit would lie to recover it, inasmuch as the officer making the assessment had no jurisdiction to make it. In cases in which the Income-tax Officer has to decide whether a certain item of income is assessable or not, his decision cannot be said to be *ultra vires* even if it is illegal. But, where a certain income is outside the scope of the Act, such as agricultural income or income not earned in or brought into British India, any assessment in respect of such income would be outside the scope of the

(1) (1926) I.L.R., 53 Cal., 524. (2) (1922) I.L.R., 45 Mad., 518 (F.B.).
(3) (1924) I.L.R., 3 Pat., 470. (4) (1927) I.L.R., 54 Cal., 863 (F.B.).
(5) (1924) I.L.R., 51 Cal., 504.

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Act and a civil suit to recover it would not be barred by reason of section 52. We do not discuss this point at length as we find the next point against the appellant.

The next point is whether the appellant is entitled to recover the money paid under a mistake of law. As already observed, three payments were made on 5th July 1920, 25th April 1921, and 21st April 1922 and the suit was brought on 22nd June 1925. The suit in respect of the first two payments is clearly barred as it was brought more than 3 years after the date of payment. As the Court of institution closed on 20th April 1925 and re-opened on 22nd June 1925, the last payment was within the period of limitation. Granting that section 14 does not apply to the case, the question is whether the amount paid on 21st April 1922 could be recovered in the circumstances of the case. It is well established that a payment made under a mistake of law cannot be recovered, but it is urged for the appellant that the payment was made under duress or coercion and therefore the amount is recoverable. The decision in 45 Mad., 518 was on 21st February 1922. The assessment notice was dated 31st March 1922 and payment was made on 21st April 1922. The Raja of Ramnad in his return of taxable income made in pursuance of the Income-tax Act included wrongly the items of income derived from forests and fisheries; he says this return was made owing to a mistake, and on the figures submitted by the Raja, the Income-tax Officer assessed the income under the Income-tax Act. The question is whether the payment was made under duress in order to take it out of the principle that payments under mistake of law cannot be recovered. It is contended for the appellant that the sending of notice by the taxing authority and his assessment amount to duress or coercion in law. The Raja, of his

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own accord, and, it may be, owing to ignorance of law, included, in the items shown as taxable under the Income-tax Act, the income from fisheries and forests and the Income-tax Officer on the basis of that return made the assessment under the Act. There is no evidence that the Income-tax Officer required the appellant to make a return of the income from forests and fisheries. The appellant like all other assesseees was required to make a return of his income for purpose of Income-tax Act and if he chose to include in the return an item of income which was not assessable under the Act and if on the basis of that return the Income-tax Officer assessed the income, and, on notice being given, the assessee paid the tax, it cannot be said that it was paid under duress. In *William Whiteley, Ltd. v. The King*(1), the facts were: William Whiteley, Ltd., who carried on a large business in which they employed a large number of assistants who had all their meals on the premises and for the service of whose meals they employed a large number of men as cooks, and waiters, on the suggestion of the Inland Revenue authorities that the waiters were "male servants" in respect of whom duties were payable, paid for a number of years the duties in respect of such waiters. From 1903, they paid the duties with a protest that the waiters were not "male servants" within the meaning of the Act. In 1906 they refused to pay and upon proceedings being taken for penalties, the Divisional Court held that the waiters were not "male servants" and that the duties were not payable. They then preferred a petition of right to recover back the moneys so paid. WALTON, J., held that the moneys having been paid under a mistake, not of fact, but of

(1) (1909) 101 L.T., 741.

law, could not be recovered back either on the ground that they were paid under duress or compulsion or on the ground that they were paid in discharge of a demand illegally made under colour of an office. At page 745 he observes :

"The suppliants knew all the facts. They had present to their minds plainly, when these payments were made, that there was a question as to whether upon such servants as those in question, duty was payable. They themselves raised that question and they paid the duties. They could have resisted payment. They must have known that if proceedings were taken for penalties, it would be open to them in such proceedings to raise the question as to whether the duties were payable or not as they did in fact in 1903 . . . I think the most that took place was this, that the Officer of Inland Revenue told the suppliants that in his opinion and in the opinion of the Commissioners of Inland Revenue the duties were payable."

With regard to the cases of duress, the learned Judge observes after referring to certain passages in *Leake on Contracts* :

"In all those cases, in order to have that done which the person making the payment was entitled to have done without a payment, he had to make the payment and someone, who was bound to do something which the person paying the money desired to have done, refused to do his duty unless he was paid the money. If in those circumstances money was paid, then it can be recovered back. There is there an element of duress."

The appellant made the return thinking that he was liable. Whatever might have been the state of the law, before 21st February 1922, after the decision in *Chief Commissioner of Income-tax v. Zamindar of Singampatti*(1) it could not be said that there was any doubt as to the non-liability of income from forests and fisheries arising out of permanently-settled estates. The notice of assessment was on 31st March 1922. The appellant could have preferred an objection to the assessment

(1) (1922) I.L.R., 45 Mad., 518 (F.B.).

on the strength of *Chief Commissioner of Income-tax v. Zamindar of Singampatti*(1) and could have refused to pay the amount, even if he was unsuccessful in his representation to the Income-tax authorities that the income from forests and fisheries was not liable to be assessed under the Income-tax Act, and he chose to do none of these things but paid the amount on 21st April 1922, i.e., two months after the decision in *Chief Commissioner of Income-tax v. Zamindar of Singampatti*(1). In *Slater v. Mayor, etc., of Burnley*(2), the facts were :— A water rate £8-15-4 for one-quarter's rate in respect of certain houses, was demanded by the defendants, the sanitary authority, and paid by the plaintiff, such sum being 5 per cent, on the gross rental of the houses. After this payment, the defendants altered their basis of assessment, from gross rental to rateable value as the proper basis of assessment, they being entitled to charge 5 per cent on the annual value. If the rate had been calculated on the rateable value it would have been £7-3-10. The plaintiff brought an action in a County Court to recover the overcharge of £1-11-6, the difference between the two sums, as being money paid under compulsion. There was no power to distrain for these rates (except when they did not exceed £1 a quarter which did not apply to the present case), but the defendants had the power to cut off the water-supply on non-payment of the rate. The County Court Judges held the payment to be a compulsory one, as the defendants had the power to cut off water and gave judgment for the plaintiff. CAVE and WILLS, JJ., held that the payment was a voluntary payment and could not be recovered back. CAVE, J., observed at page 639 :

(1) (1922) I.L.R., 45 Mad., 518 (F.B.).

(2) (1888) 59 L.T., 636.

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"There is no case which lays it down that a payment under these circumstances is a compulsory payment. If it were so, the consequences would be very far-reaching. If that were so, no payment of rent to a landlord would be a voluntary payment."

WILLS, J., observed :

"It seems to me, in these circumstances, that it is idle to say that there is anything like duress ; there was nothing in the nature of a threat used ; it is simply the ordinary case of a person raising a contention when a demand is made, upon him. There is not sufficient to constitute duress so as to prevent a payment being a voluntary one."

The case would be different if for the purpose of getting an official act done a person pays something more than what is proper, for in order to get the act done he must pay the amount demanded, otherwise, the act would not be done. In such cases it can be said that the payment is not a voluntary payment nor is it a payment made under a mistake of law. The case in *Hooper v. Mayor and Corporation of Exeter*(1), and the case in *Steele v. Williams*(2), are cases where, in order to get a certain thing done, the plaintiff had to pay the amount demanded. In *Hooper v. Mayor and Corporation of Exeter*(1), the Corporation of Exeter exacted harbour dues from the plaintiff in respect of exempted articles. The plaintiff paid in ignorance of the exemption. It was held that the plaintiff was entitled to recover back the money so paid. Lord COLERIDGE, C.J., observed at page 458 :

"From the case cited in the course of the argument it is shown that the principle has been laid down that where one exacts money from another and it turns out that, although acquiesced in for years, such exaction is illegal, the money may be recovered as money had and received, since such payment could not be considered as voluntary so as to preclude its recovery."

(1) (1887) 5 Q.L.J., Q.B. (N.S.), 467. (2) (1868) 8 Ex., 625; 155 E.R., 1502.

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The plaintiff in this case could not have landed his limestone, the article exempted, without paying harbour dues. In *Steele v. Williams*(1), the facts were that the plaintiff's clerk applied to the defendant, a parish clerk, for liberty to search the register book of burials and baptisms. He told the defendant that he did not want certificates, but only to make extracts. The defendant said the charge would be the same whether he made extracts or had certificates. The clerk searched through four years and made 25 extracts, for which the defendant charged him 3s. 6d. each and he accordingly paid the defendant £4-7-6. It was held first that the charge for extracts was illegal, since 6 and 7 Will., 4, Ch. 86, sec. 35, only authorizes a charge for a search and for a certified copy and secondly that the payment was not voluntary, so as to preclude the plaintiff from recovering back the excess. PARKE, B., observed :

"In the first place, I think that there is evidence that this payment was not voluntary but necessary for the exercise of a legal right, and further, I, by no means pledge myself to say that the defendant would not have been guilty of extortion in insisting upon it, even without that species of duress, viz., the refusal to allow the party to exercise his legal right, but *colore officii*."

MARTIN, B., observed :

"It is the duty of a person to whom an act of Parliament gives fees, to receive what is allowed and nothing more. This is more like the case of money paid without consideration ; to call it a voluntary payment is an abuse of language."

In both these cases the plaintiff could not have got what he wanted without the payment, and therefore his payment could not be said to be voluntary, but a payment under duress. This point was the subject of decision by a Bench of this Court in a recent case.

(1) (1858) 8 Ex., 625; 155 E.R., 1502.

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RAMESAM and JACKSON, JJ., held in C.R.P. No. 535 of 1926 as follows:—

"The Indian Law seems to be clear, namely, that a mistake, in the sense that it is a pure mistake as to law in India, resulting in the payment by one person to another and making it inequitable that the payee should retain the money is no ground for relief."

They refer to an observation of Lord SUMNER in *Sinclair v. Brougham*(1). The learned Lord observes:

"There is now no ground left for suggestion as a recognizable "equity" the right to recover money *in personam* merely because it would be the right and fair thing that it should be refunded to the payer."

We hold that the amount paid on 21st April 1922 which is not barred under the three years' rule was made under a mistake of law and of the general law of British India, applicable to all persons in appellants' position holding permanently-settled estates, and therefore cannot be recovered. In the result the appeal fails and is dismissed with costs.

The respondent has preferred a memorandum of objections against the order of the Subordinate Judge disallowing his costs. Having regard to all the circumstances in which these payments were made, we think that the plaintiff was rightly held not liable for the costs of the suit. The memorandum of objections is also dismissed.

N.R.

(1) [1914] A.C., 398.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Odgers.

THE SECRETARY OF STATE FOR INDIA
IN COUNCIL (DEFENDANT), APPELLANT,

1928,
March 21.

v.

TRUSTEES OF SRI KUTTALANATHASWAMI TEMPLE
(PLAINTIFFS), RESPONDENTS.*

Land revenue—Land classed as "temple poramboke" in settlement register, meaning of—Prerogative right of the Crown to assess lands to revenue.

In the absence of a statute or agreement to the contrary, the Government has a prerogative right to levy land revenue on all lands in the country. The description of a land as "temple poramboke" in a settlement register without describing the temple as its owner does not connote either that the temple is its owner or that the Government impliedly agreed not to levy any land revenue thereon for all time.

APPEAL against the decree of the Court of the Additional Subordinate Judge of Tinnevely in Original Suit No. 20 of 1919.

In this case, the plaintiffs, trustees of Sri Kuttalanathaswami Temple, in Kuttalam, Tinnevely District, sued the Government for a declaration that they were the absolute owners of several plots of land comprising Survey No. 482, free of assessment, for an injunction to restrain the Government from levying any assessment on any of them and for the refund of Rs. 48-15-5 alleged to have been illegally levied and collected from the plaintiffs in 1916 and 1917. The defendant, the

* Appeal No. 181 of 1924.

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Secretary of State, pleaded that the plaintiff temple was not the absolute owner of the survey number, that the survey number was temple poramboke, that the Government was entitled to issue inam pattas therefor, and to transfer the same to ayan and to levy assessment, when the inam pattas were tendered to and refused by the plaintiffs in 1908, and that the suit was barred by limitation. The Subordinate Judge held that the plaintiff temple was the absolute owner of all occupied land in the survey number and that as regards the rest of it, viz., a river and a road, though the plaintiffs were not the owners, they were entitled to the trees in the river bed and to certain customary rights of easement. He held that the suit for refund was barred under article 16 (2) of the Limitation Act. He accordingly restrained the defendant from interfering with the plaintiffs' absolute rights. The defendant preferred this appeal. Further facts appear from the Judgment.

The Government Pleader (*C. V. Ananthakrishna Ayyar*) for the appellant.—The suit being one for a declaration that the plaintiffs are entitled to the suit lands free from any liability to be assessed to land revenue, the plaintiffs have to show some statute or agreement to that effect between them and the Government, otherwise the suit lands are, like any other land in the country, subject to the prerogative right of the Crown to assess them to revenue. *Maharaja Dheeraj Raja Mahatab Chund Bahadoor v. The Bengal Government*(1), *Secretary of State for India v. Bai Rajbai*(2), *Vajesingji v. Secretary of State for India*(3), *Hanumanlu v. Secretary of State*(4), *Kelu Nair v. Secretary of State for India*(5), *Collector of Krishna v. Venkata-pathi Razu*(6). Baden-Powell's Land Tenures, page 54; Madras Act III of 1905. The fact that the suit lands were classed as "temple poramboke" does not show that they are for all time free from liability to be assessed to land revenue. "Poramboke" does not mean that, but it means that for the reasons existing at

(1) (1849) 4 M.I.A., 466.

(3) (1924) I.L.R., 48 Bom., 618 (P.C.).

(5) (1925) I.L.R., 48 Mad., 586.

(2) (1915) I.L.R., 89 Bom., 625 (P.C.).

(4) (1913) I.L.R., 36 Mad., 378.

(6) (1912) M.W.N., 1242.

the time of the classification they are not fit to be assessed; see Wilson's Glossary for the meaning of the term and *Seshachala Chetty v. Chinnasami*(1) and *Secretary of State for India v. Raghunatha Tathachariar*(2). On a change of circumstances they can be transferred to "ayan" and be assessed. These lands are not now in the occupation of the temple but are in the occupation of others. Further the suit brought after six years after the levy of the assessment is barred by limitation, under article 120 of the Limitation Act; *Kodoth Ambu Nayar v. Secretary of State for India*(3). Fugitive acts of ownership do not give any prescriptive right; *The Taluk Board, Dindigul v. Venkataramier*(4). Plaintiffs who have been claiming ownership cannot be given any right of easement as the lower Court has done; *Subba Rao v. Lakshmana Rao*(5).

T. Ranga Acharya (with *P. N. Marthandam* and *N. Rama Ayyar*).—The suit lands have been classified as "temple poramboke" which shows that the temple is the owner and that they are not assessable to revenue at all—see Fifth Report for the meaning of "poramboke" and *Theiru Pandithan v. Secretary of State for India*(6). This classification is evidence of an implied agreement between the plaintiffs and the Government not to assess the lands to revenue at any time, in accordance with ancient usages and rights. Once they are classed as poramboke they cannot thereafter be transferred to "ayan" and assessed; see Revenue Board's Standing Orders 15 (1), (2) and (23). The Inam Commissioner did not and could not issue inam title-deeds in cases of unassessable porambokes, such as temple porambokes; see rules 22 and 32 of Inam Commission Rules. Moreover, there is an admission of the Secretary of State in a previous litigation between these parties that these lands belong to the plaintiffs. This admission is binding, unless explained otherwise; *Chandra Kunwar v. Chaudhri Narpal Singh*(7).

The Government Pleader in reply.—The previous suit did not concern these lands and there is no admission that they were not liable to be assessed at any time. Porambokes also can be assigned and assessed; only they have to be transferred to "ayan" before assessment is levied; *Seshachala Chetty v. Chinnasami*(1); Board's Standing Orders, page 37; *Secretary of State for India v. Raghunatha Tathachariar*(2).

(1) (1917) I.L.R., 40 Mad., 410 (F.B.).

(2) (1915) I.L.R., 38 Mad., 108.

(3) (1924) I.L.R., 47 Mad., 572, 585 (P.C.).

(4) (1928) I.L.R., 46 Mad., 866.

(5) (1926) I.L.R., 49 Mad., 820 (F.B.).

(6) (1898) I.L.R., 21 Mad., 428 (F.B.).

(7) (1907) I.L.R., 29 All., 184 (P.C.).

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JUDGMENT.

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PHILLIPS, J.—This appeal relates to the Kuttalanathaswami temple at Kuttalam of which the plaintiffs (respondents) are the trustees. The suit is brought for a declaration that the plaint property belongs to the plaint temple and the Government has no right to levy any assessment on the same. The plaint property is Survey No. 482 of Kuttalam and the temple itself stands in this survey number. In 1874 the field was undivided and in the settlement register, Exhibit V, it is classed as poramboke while in the remarks column, is the word “pagoda”. The field itself is about 27 acres in extent. In the Re-survey of 1908, the field has been subdivided into 51 subdivisions. The sites of the temple and of some mantapams and other buildings intimately connected with the temple have been left as poramboke, but in respect of the other subdivisions the Government (defendant) issued inam pattas, but these pattas were refused and accordingly ordinary assessment has been levied on these items. The respondents’ contention is that the Government has no right to alter the classification of the land or to levy any assessment thereon, and this contention has been upheld by the lower Court. The temple claims the whole property as its own absolute property, but has no title-deed for the same. It is not easy to understand on what ground the Subordinate Judge has found ownership in the temple. The finding appears to be based on evidence of acts of ownership on the plaint property, but it is evidently not intended to be a finding that the plaintiffs have acquired a prescriptive right, for there is in the Judgment no reference to these acts having been continued for over 60 years. In this Court Mr. Rangachari for the respondents has not attempted to make out any prescriptive right, but

has based his argument on the ownership of the plaintiffs. It has long been recognized that the sovereign power is entitled to levy assessment on all lands within its territory. So long ago as 1850 in *Maharaja Dheeraj Raja Mahatab Chund Bahadoor v. The Bengal Government*(1), the principle was enunciated as being that

“The ruling power is interested in a certain proportion of the produce of every beegah, except so far as it shall have transferred, relinquished or compounded its right thereto, and all persons claiming the benefit of such exemptions being bound to establish their respective claims and titles.”

The same principle was affirmed in *Secretary of State for India v. Bai Rajbai*(2), where at page 646 it was observed with reference to inhabitants in some territory ceded to the Bombay Government that

“The only legal enforceable rights they could have as against their new sovereign, were those, and only those, which that new sovereign, by agreement expressed or implied or by legislation, chose to confer upon them”

We therefore start in the case with an assumption that the defendant has a right to levy assessment on all lands within his jurisdiction, including the plaint property, unless it can be proved that either by statute or by agreement, the plaint property is exempt from liability. This principle was not disputed, and cannot be disputed, by the respondents, but it is contended that the evidence in the case is sufficient to prove an implied agreement between the Government and the plaintiffs (respondents) that the suit property is exempt from taxation. When we come to examine this evidence, it appears to be based upon the entry in the settlement register of 1874 in which Survey No. 482 is classed as poramboke and is said in the remarks column to be “pagoda poramboke.” This seems to be a very slender basis for finding an

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(1) (1849) 4 M.I.A., 466 at 497.

(2) (1915) I.L.R., 39 Bom., 626 (P.C.).

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implied agreement not to levy assessment. Reliance is placed on a single observation in *Theivu Pandithan v. Secretary of State for India*(1), where "poramboke" is referred to as follows:

PHILLIPS, J. "Poramboke . . . is land, which the Revenue officers at the settlement considered, was required for these public purposes and which should not therefore, at any time, be granted on patta, and on which it was for this reason useless to fix any assessment."

This observation merely relates to the opinion of the Revenue officers and is no authority for holding that by classifying a land as poramboke the Government relinquishes the right to levy assessment on it for all time. "Poramboke" is defined in Wilson's Glossary thus:

"Such portions of an estate or village lands liable to revenue as do not admit of cultivation and are therefore exempt from assessment."

a definition which was accepted by this Court in *Seshachala Chetty v. Chinnasami*(2). That definition shows clearly that poramboke is liable to revenue, but that the right to levy assessment on it is given up by the Government for certain reasons; but it does not follow that, if those reasons cease to exist, or are held to be inadequate, the Government cannot levy assessment if it so chooses. It was sought to support this alleged prohibition of assessment by Board's Standing Order No. 15 which, while restricting the grant of poramboke land, recognizes that it may be assigned in certain cases. In the present case a large portion of Survey No. 482 has been occupied by private individuals unconnected with the temple, and has been utilized for purposes not intended to benefit the pagoda. Apparently in 1874 the Government considered that the whole of Survey No. 482 should be reserved for pagoda purposes, and in 1903, finding that this reservation of

the whole extent was either impossible or undesirable, decided to convert the land from "poramboke" to "ayan" and grant inam pattas in respect thereof. Pattas were offered to the temple trustees free of assessment, and consequently re-vested in them rights, which possibly they had lost by adverse possession, and it appears that the action taken by the Government was wholly in the interests of the temple itself. This appears from Exhibit II, Board's Proceedings, dated 15th June 1907. The trustees, however, refused this generous offer and now sue to enforce their supposed rights.

The question then remains, can any agreement to forego assessment for all time be implied by the mere classification of the suit land as poramboke in 1874? The suggestion that the entry of the word "pagoda" in the remarks column means that the pagoda was the absolute owner of the poramboke must be rejected *in limine*. For instance, village site is classified as poramboke and also roads, channels, tanks, etc., and we get these words entered in the remarks column, which shows that the words are merely descriptive and confer no title. So far as village site is concerned, it was held in *The Taluk Board, Dindigul v. Venkataramier*(1), that such site was not vested in the villagers and that the Government could assign the same to other persons. That there was no agreement in 1874, or prior to it, is also clear from the inam settlement in 1864-65. A large extent of land (about 50 acres in extent) was confirmed as inam in favour of the plaint temple, but Survey No. 482 was not dealt with at that inam settlement. It appears from Exhibit II (paragraph 7 of Mr. Murdoch's letter, dated 30th March 1907) that a small portion of Survey No. 482 was classified as inam in

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(1) (1898) I.L.R., 21 Mad., 438 F.B. (2) (1917) I.L.R., 40 Mad., 410 (F.B.).

* (1) (1923) I.L.R., 46 Mad., 806.

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1814 and this was not confirmed in the Inam Settlement of 1864-65. If, as contended, there really had been a grant of this Survey No. 482, whether before or after the advent of British rule, it is clear from the proceedings at the inam settlement that such grant was not recognized by the Inam Commissioner. That being so, it is impossible to presume from the classification of the land as poramboke in 1874 that there was an agreement by Government not to levy assessment on the land.

The only other evidence relied on by the respondents is Exhibit Q (1) and this is a written statement filed by the appellants in Original Suit No. 8 of 1902 in the Sub-Court of Tinnevely in a suit between the present parties in respect of a certain land adjoining Survey No. 482, a dispute which was eventually compromised. The alleged admission is as follows:—

“The only property to which the plaint temple is entitled is Survey No. 482, in Kuttalam village and the properties in dispute are situated outside the said survey number.”

It is contended that this amounts to a clear admission that Survey No. 482 was the absolute property of the present plaintiffs. When the nature of the suit in which this written statement was filed is considered, it is evident that this so-called admission was merely a pleading that the suit properties were not the property of the temple and that the temple's rights were confined to Survey No. 482 which had been classed as temple poramboke at the previous settlement. There is no admission that the Government had given up its rights over Survey No. 482. There is only a mere pleading that the plaint property in that suit was distinct from Survey No. 482, to which the plaint temple was entitled. There is no admission that the temple was entitled to the whole of Survey No. 482, nor is there any admission that the manner in which it was entitled was such as to

deprive the Government of its prerogative of levying assessment. On this statement it is impossible to hold that the plaintiffs have established their ownership or any agreement by the Government not to levy assessment. That being so, the plaintiffs' whole suit must fail. It is therefore unnecessary to consider the argument put forward by the learned Government Pleader that the easement allowed by the lower Court for items 6, 7, 38, 50 and 51 must in any case be disallowed as the plaintiffs had not pleaded any easement right but only ownership, and it is conceded for the respondents that in view of the Full Bench ruling in *Subba Rao v. Lakshmana Rao*(1) this finding as to easement cannot be supported. The further question of limitation need not be discussed as, whether the suit is or is not within time, it must fail on its merits.

The result is that the appeal must be allowed and the plaintiffs' suit dismissed with costs throughout.

The memorandum of objection which relates to items 6, 7, 38, 50 and 51 must also be dismissed with costs.

ODGERS, J.—This is a suit by two trustees of the Sri Kuttalanathaswami temple against the Secretary of State for a declaration that the plaint temple is entitled absolutely to certain properties free from assessment. The cause of action is said to have arisen in April 1916 when the Government began to set up a title to the sites in question.

The survey number in dispute is 482 and its extent is 27 acres and odd. This is seen in Exhibit V which is the survey and settlement register of the village of Kuttalam of 1874 where the survey number is described as poramboke of 27.67 acres in extent, no pattadar's name, but the word “pagoda” appears in the remarks

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(1) (1926) I.L.B., 43 Mad., 320 (F.B.).

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column. In 1905-06 as shown by Exhibit VI this number was subdivided into a number of smaller plots consisting for our present purpose of (1) poramboke which is the site of the temple buildings and (2) inams with regard to the temple curtilage. (See Exhibit VI, the Re-survey Register, pages 90 to 94.) In the remarks column, the subdivisions are very variously given as road, temple channel, matam, etc. With regard to the temple properties, the trustee of the temple is entered as the pattadar or inamdar. Inam deeds were offered to the trustees (Exhibit XVI) and refused (Exhibit III); the inam was cancelled by Government (Exhibit IV) and ordinary dry assessment was levied (Exhibit XX). It is contended for the temple that there is an implied lost grant whereby some Government or ruler at some time beyond the memory of man granted to this temple these 27 and odd acres to be held free of assessment. It is said that in 1874 by Exhibit V the whole acreage is included as temple poramboke and this constitutes a kind of agreement or contract by Government that they will waive assessment on the whole extent of 482 for ever. It is of course not contended that Government has levied any assessment on the lands actually occupied by the temple building or those used in connexion therewith. But it is said that as Exhibit V refers to the whole extent as temple poramboke, Government has no right to treat any part of No. 482 as assessable. As has been remarked, the entry in Exhibit V does not show any owner's name under the column headed "pattadar's name and number," but in column 15, the remarks column, appears the word "pagoda."

"Poramboke" is defined in Wilson's Glossary as

"Such portions of an estate or village lands liable to revenue as do not admit of cultivation, and are therefore exempt from assessment, as sterile or waste land, etc."

This has been adopted judicially in *Seshachala Chetty v. Chinnasami*(1), which *inter alia* decided that excess nattam may be transferred to "ayan." As long ago as 1850 in *Maharaja Dheeraj Raja Mahatab Chund Bahadoor v. The Bengal Government*(2), it was held that exemption from assessment must be strictly proved and in *Sam v. Ramalinga Mudaliar*(3), it is said that

"all lands are liable to pay land revenue unless they are exempted by statute or by any binding engagement between the Government and the landowner. The British Government were not bound to recognize the revenue-free grants of the previous Governments, though in practice they did recognize them."

The same point of view is emphasized by the Privy Council in *Secretary of State for India v. Bai Rajbai*(4), where their Lordships say:

"The only legal enforceable rights they (i.e., ancestors of the plaintiffs) could have as against their new sovereign were those, and only those, which that new sovereign, by agreement expressed or implied or by legislation, chose to confer upon them."

See also *Vajesingji v. Secretary of State for India*(5), also a decision of the Privy Council, to the same effect and a decision of our own Court in *Hanumanlu v. Secretary of State*(6), where the learned Judges say

"If the plaintiff claims to hold the land free from the payment of such assessment as the Government may fix, he must show some grant exempting him from the payment of the ordinary assessment."

Section 2 (1) of Madras Act III of 1905 (The Madras Land Encroachment Act) declares that

"as to lands save also in so far as they are temple-site or owned as house-site or backyard they are and are hereby declared to be the property of Government."

(1) (1917) I.L.R., 40 Mad., 410 (F.B.). (2) (1849) 4 M.I.A., 466 at 497.

(3) (1917) I.L.R., 40 Mad., 664 at 667.

(4) (1915) I.L.R., 39 Bom., 625 (P.O.). (5) (1924) I.L.R., 43 B.N., 313 (P.O.).

(6) (1918) I.L.R., 36 Mad., 373.

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"the right of the Government to assess land to land revenue and to vary it is a prerogative right of the Crown to exact from a subject holding arable land, its share of the produce or the equivalent of such produce."

Kelu Nair v. Secretary of State for India(1). It seems therefore that the proceeding of Government under Exhibit VI was perfectly justified especially as Baden-Powell points out in his "Land Tenures", page 75, that the duration of a settlement is 30 years unless it can be said that the entry in the remarks column in Exhibit V is to be taken to establish either the recognition of a lost grant, i.e., a grant by some former ruler which has been lost or to evidence a contract or engagement by Government that it will always regard the whole extent of No. 482 as temple poramboke and therefore free from assessment. The remark "pagoda" seems to me merely to be a description of the poramboke just as one can have road or channel or cart-track poramboke and not to afford evidence of either a recognition of a lost grant or a present engagement on the part of Government. Reference has been made to *Theivu Pandithan v. Secretary of State for India*(2), to show the classification of land in Tinnevely. The fourth division is "poramboke", i.e., unoccupied waste that is not cultivable or assessed. BENSON, J., then goes on to say:

"The poramboke is land required for village-site, threshing floors, roads, banks of tanks, channels, etc. This is land which the Revenue officers at the settlement considered was required for these public purposes, and which should not, therefore, at any time be granted on patta, and on which it was for this reason useless to fix any assessment."

The learned Judge therefore does not say that this decision of the Revenue officers was binding for all time

and could not be reconsidered at the next settlement. Reference was made to *Secretary of State v. Ragunatha Tathachariar*(1), where SADASIVA AYYAR, J., points out that "poramboke" is often loosely used to mean whatever land does not yield revenue to Government and that a grant of poramboke must include unassessed waste which is not communal property. For the respondents much reliance has been placed on Exhibit Q-1 which is said to be an admission by Government of the absolute ownership of the temple in these lands. Exhibit Q-1 is a written statement of the Secretary of State in O.S. No. 8 of 1902 in the Court of the Additional Subordinate Judge at Tinnevely. Paragraph 2 begins as follows:

"The only property to which the plaint temple is entitled is Survey No. 482 in Kuttalam village and the properties in dispute are situated outside the said survey number and have always been at the disposal of Government."

It is said that that litigation concerned the claim of the temple to the exclusive possession of the well-known Kuttalam Falls. The question is, can these words be said to admit the absolute title of the plaintiffs to the whole of the extent of No. 482? In my opinion, they cannot. 482 was not in dispute in O.S. No. 8 and all that the words quoted can fairly be taken to mean is that any title which the defendants had in the lands adjoining the temple is confined to No. 482. In my opinion it only means that the rights of the plaintiffs are confined within the four corners of 482 which is a very different thing from meaning that they are entitled to the whole extent of 482. The learned Additional Subordinate Judge has taken a curious view. He relies on the admission in Exhibit Q-1 and the entry in Exhibit V and considers the subdivisions one by one and comes to

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(1) (1915) I.L.R., 38 Mad., 108.

(1) (1925) I.L.R., 48 Mad., 596. (2) (1938) I.L.R., 21 Mad., 433 (F.B.).

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the conclusion that with regard to the lands the temple has been exercising certain acts of ownership thereon and that they are therefore temple property. With regard to certain of the subdivisions representing a road, the learned Judge somewhat curiously holds that the road does not belong to the temple but that the trustees are entitled to a "special right" of holding booths, etc., on festive occasions. With regard to the river (subdivision 50) he holds that the bed of the river belongs to Government but that the temple has the right to the trees in the river bed and also the ownership of the revetment on the western bank, and the customary rights of worship and approach at the river. These he describes as peculiar rights. With regard to these so-called special particular rights, there can be no argument. Admittedly the temple has been doing certain acts with regard to the road and river in their assertions of their alleged right as owners. The rights reserved to them by the learned Additional Subordinate Judge can only be rights of easement. There is no issue as to any rights of easement and in the view I take on the main question, this discussion really does not arise. On that ground alone no such rights could be reserved to the plaintiffs on the facts and *Subba Rao v. Lakshmana Rao*(1) makes it perfectly clear that where a man exercises acts of ownership he cannot have the *animus* necessary for acquiring an easement by the doing of those acts. Again the acts of ownership attributed to the plaintiffs seem to me to be merely fugitive or intermittent and would not be such as to establish any effective possession as against the rights of Government. See *The Taluk Board, Dindigul v. Venkataramier*(2). It therefore seems to me that the

(1) (1926) I.L.R., 49 Mad., 820 (F.B.).

(2) (1923) I.L.R., 46 Mad., 863

judgment of the learned Subordinate Judge is wrong and must be reversed.

A memorandum of objections has been put in but was not argued by Mr. Rangachari who stated that it stood or fell with the decision in the main case. The appeal must therefore be allowed with costs here and below and the memorandum of objections dismissed with costs.

N.R.

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APPELLATE CIVIL.

*Before Mr. Justice Odgers and Mr. Justice
Madhavan Nair.*

HASSAN KUTTI BEARY (DEFENDANT), APPELLANT,

v.

JAINABHA (PLAINTIFF), RESPONDENT.*

*Muhammadan Law—Marriage—Adult virgin of Shafi sect—
Necessity of consent for marriage.*

The consent of an adult virgin among the Shafi sect of Sunnis is essential for the validity of her marriage.

SECOND APPEAL against the decree of the District Court of South Kanara in Appeal Suit No. 396 of 1925 preferred against the decree of the Court of the District Munsif of Kasaragod in Original Suit No. 204 of 1925.

The following statement of facts is taken from the judgment of MADHAVAN NAIR, J:—

"This Second Appeal arises out of a suit instituted by the plaintiff for a declaration that she is not the properly wedded wife of the defendant and for an injunction restraining the latter from asserting his rights as her husband.

* Second Appeal No. 984 of 1926.

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The parties are Sunnis and they belong to the Shafi sect. The lower Courts have found that the plaintiff had attained puberty at the time of the marriage, that no consummation ceremony was performed and that her consent had not been obtained by her father for the performance of the nika. It was contended on her behalf that, she being an adult virgin, the nika performed without her knowledge and consent is invalid under the Shafi law. This contention has been upheld by the lower Courts."

The defendant (husband) preferred this Second Appeal.

B. Sitarama Rao for appellant.—The parties belong to the Shafi school. According to that school, the consent of the bride, though an adult, is not necessary for her marriage; see *Wilson's Anglo-Muhammadan law*, 5th Edition, page 68, quoting *Minhaj-at-Talibin*, which is a work of great authority. The contrary opinion of *Amir Ali* in his *Muhammadan law*, Vol. II, 3rd Edition, 350, does not refer to any authorities. Reference was made to *Sir Abdur Rahim's Muhammadan Jurisprudence*, page 330, and *Muhammad Ibrahim v. Gulam Ahmed*(1).

K. S. Krishnaswami Ayyangar for respondent.—In such a case as this, the consent of the adult virgin is necessary. All the modern text-writers on Muhammadan law are in favour of this view; *Amir Ali*, Vol. II, page 350; *Sir Abdur Rahim*, page 330; *Tyabji*, sections 17 (B) and 29. Even *Minhaj-at-Talibin* says that to obtain the consent is commendable. The appellant's contention is opposed to the spirit of Muhammadan law under which system marriage is a matter of civil contract, for which consent is necessary; see *Hamilton's Hedaya*, Vol. I, page 96, and *Asgur Ali Chowdhry v. Muhubbut Ali*(2).

JUDGMENT.

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ODGERS, J.—This is a Second Appeal from the decree of the learned District Judge of South Kanara confirming

that of the District Munsif, and the question is—has the father of the plaintiff the right to marry her to the defendant without her consent? The parties are Mappillas and Sunni Muhammadans. The case has been argued on the assumption that they belong to the Shafi sect of the Sunnis. Nika was performed by the father of the plaintiff in the Talangere Mosque, and the question is—Is this an irrevocable marriage? The plaintiff is an adult virgin and it is not proved that she has been consulted or that her consent has been obtained. Another important sect of the Sunnis is the Hanafis. There is no doubt that a woman cannot be married in that sect without her consent. The learned Advocates on each side have been at pains to bring to our notice every possible authority which exists in the text-books. There are practically no cases on the point, and therefore the text-writers must be shortly examined.

Wilson in his *Anglo-Muhammadan law*, Fifth Edition, page 68, points out as one of the chief variations of the Shafi creed that women have less freedom of choice in the matter of marriage. He says:

"Not only female minors, but adult women who are virgins, may be disposed of in marriage by the father or paternal grandfather without their consent and though widows and divorced women cannot be given in marriage against their will, even they remarry without the intervention of a guardian or wali,"

and in the same book (Chapter 13) dealing with the peculiarities of the Shafi school of Sunni Muhammadans and quoting from the *Minhaj*, a work dating from the 13th century of the Christian era he says:

"Not only female minors, but adult women who are virgins, may be disposed of irrevocably in marriage by the father or failing him by the paternal grandfather with or without their consent; but their consent is nevertheless considered desirable" (page 407).

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(1) (1864) 1 Bom. H.C.R., 286.

(2) (1874) 22 W.R., 403.

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Minhaj-at-Talibin which has been translated apparently under the authority of the Dutch Government for use among Shafi Muhammadans of Java says at page 284 :

"If his daughter is a virgin, the father can dispose as he pleases or remarry."

And it adds,

"It is, however, always commendable to consult her as to her future husband, and her formal consent to the marriage is necessary if she has already lost her virginity."

In the prefatory note, the Editor says :

"It is not always possible to decide the question by reference to Minhaj alone."

But the two other treatises to which he refers as the two standard works in the whole modern literature on the school of Shafi, are unfortunately not available to us here. The late Syed Amir Ali in his introduction to Muhammadan law cites Minhaj as a Shafi work of repute, but is himself definite as he remarks

"Among Shafis and Malikis, although the consent of the adult virgin is as essential as among Hanafis and Shiahis to the validity of a contract of marriage entered into on her behalf, she cannot contract herself in marriage without the intervention of a wali."

If that is to be taken as the modern view on the subject, it seems to me that there is no more to be said.

A good deal of the learning on this part of the subject is concerned with the competence to contract marriage. According to Mr. F. B. Tyabji at page 91 of his book,

"A Shafi thayyaba is competent to contract marriage, i.e., to enter into a contract of marriage but not a woman who is a virgin."

At page 97 the learned author says that the consent to the marriage of a person not competent to enter into a contract of marriage, must be expressed by his or her guardian for marriage who is a wali. This would also seem to point to the conclusion arrived at by Syed Amir

Ali to the effect that consent was necessary. The answer to that argument put forward is that the consent has been given on her behalf by the father as her wali. That of course cannot be, because the lower Courts have found as a fact that she was never asked and she had never even seen her future husband. So that her consent was never expressed either personally or through a wali at all. Hedaya in Chapter 2 on Guardianship and Equity mentions the Shafi assertion that a woman can by no means contract herself in marriage in any circumstance whether with or without the consent of her guardian. That must simply mean the mode of expressing consent. Further at page 96, Hedaya says :

"It is not lawful for a guardian to force into marriage an adult virgin against her consent. This is contrary to the doctrine of Shafi who accounts an adult virgin the same as an infant."

And the argument of the Shafi is refuted by the argument of "Our Doctors," i.e., Hanafis. Sir Abdur Rahim says as follows at pages 330 and 331 :—

"According to the Hanafis, every person who is not a minor whether male or female, maiden or thayyaba (that is, a girl who has had sexual intercourse), is competent to contract marriage and cannot be given in marriage without his or her consent whether by the father or any other relative. The Shafis and Malikis agree with the Hanafis so far as boys and thayyabas who have attained majority are concerned ; the former, however, hold that a minor thayyaba is competent to contract marriage and a maiden even if she has attained majority cannot marry without the consent of the guardian, while the Hanafis in each of these two cases hold the contrary view. Thus with the Hanafis so far as the females are concerned, minority is the test whether the intervention of a guardian is necessary or not and with the Shafis the test is whether a girl is a maiden or thayyaba. The difference between the two sects on this point, though not perhaps of much practical significance, involves a question of principle. The Hanafis allege that the Shafis' refusal to acknowledge the right of a maiden of full age to

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contract marriage of her own will amounts to a breach of a cardinal principle of Muhammadan law, namely, that the legal status of a grown up female is as complete as that of a male."

Even in that passage the learned author is concerned with the capacity to enter into the marriage contract, i.e., as to whether the intervention of a wali is necessary or not. In the Muhammadan law, marriage would appear to be nothing more nor less than a contract and therefore there must be consent. How that consent is to be expressed is a matter on which as already stated there appears to be much learning and some confusion appears to exist as will be apparent from the quotations already given between the necessity of such consent and the mode of its expression. In Amir Ali, page 343, it is said that

"A woman who is sane, free and adult can marry herself to an equal, with or without the consent of any person who might be her wali."

"Shafi and Malik hold a contrary opinion."

Says the Radd-ul-Muhtar

"but there is no authentic *hadis* in support of their views. At the same time it is recommended as more consistent with decorum that an adult virgin should entrust the negotiations of her marriage to a wali in whom she has trust."

In the recapitulation at page 350 the learned author says :

"Under the Maliki and Shafi law the marriage of an adult girl is not valid unless her consent is obtained to it. But such consent must be given through a legally authorized wali who would act as her representative."

In *Muhammad Ibrahim v. Gulam Ahmed*(1) it was held that according to the doctrine of Shafi a virgin whether before or after puberty cannot give herself in marriage without the consent of her father. That of course is not this case at all.

(1) (1864) 1 Bom. H.C.R., 236.

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Giving the best consideration I can to these various authorities it seems to me that the only view against the position taken up by the lower Courts is that of Wilson, and even he says that consent is commendable. There is further the evidence in this case of a Musaliar, defence witness 2, who says he is a teacher of sastras by which I suppose he means the Koran. He says that among Shafis, consent of the girl is not necessary for the first marriage, but that all the books state that it is better to get it. It would have been interesting if a body of evidence had been given in the first Court as to the ideas obtaining among the best opinions of the community of the present day on this subject. I do not imagine that these opinions have retrogressed and become more conservative as time has gone on; and it may be that the better opinion among the Shafis on the West Coast is that no adult virgin should be married without her consent. However that may be, the question is here whether enough has been shown to enable us to say in Second Appeal that the view taken by both the lower Courts is manifestly wrong in law. I am by no means persuaded that it is. I think therefore that the decree of the lower Appellate Court should be confirmed and this Second Appeal dismissed with costs.

MADHAVAN NAIR, J.—After stating the facts continued :—The question for consideration is whether the marriage of a Muhammadan woman who is an adult virgin is under the Shafi law invalid owing to want of consent on her part. There are no decisions directly bearing on the question; *Muhammad Ibrahim v. Gulam Ahmed*(1) does no more than point out the difference between the Hanafi and the Shafi law on this point.

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The evidence of defence witness 2, the Kaliff of Puttur, the only witness who speaks on this question, is not much helpful as he does not refer to instances of marriages declared invalid by the Court or held so by the community owing to want of consent on the woman's part. The case has therefore to be decided on the statements of the law contained in the various recognized text-books of authority on Muhammadan law.

The appellant's contention that want of consent on the part of the woman does not invalidate her marriage under the Shafi law is supported by the statement of the law contained in Wilson's Anglo-Muhammadan law, Hamilton's Hedaya and Minhaj-at-Talibin. In Wilson's book, the law with regard to Shafi Muhammadans is stated as follows :—

"Not only female minors, but adult women who are virgins, may be disposed of irrevocably in marriage by the father with or without their consent; but their consent is nevertheless desirable." (See page 407, paragraph 392.)

In Hamilton's Hedaya, Vol. I, page 96, the law is thus stated :

"It is not lawful for a guardian to force into marriage an adult virgin against her consent. This is contrary to the doctrine of Shafi, who accounts an adult virgin the same as an infant, with respect to marriage, since the former cannot be acquainted with the nature of the marriage any more than the latter, as being equally uninformed with respect to the matrimonial state, whence it is that the father of such an one is empowered to make seizure of her dower without her consent."

Minhaj-at-Talibin (guide of the earnest enquirer), a book dating from the 13th century of the Christian era and which is exclusively devoted to a statement of the principles of Shafi Law, also supports the contentions of the appellant. It is stated in that book that

"a father can dispose, as he pleases, of the hand of his daughter without asking her consent, whatever her age may be, provided she is still a virgin. It is, however, always

commendable to consult her as to her future husband." See page 284, section 4, paragraph 3.

Though this is a book exclusively devoted to a statement of the Shafi law, it is difficult to say to what extent it can be relied on in deciding questions arising under the Shafi law. Though the translator says that "the book occupies the first rank for deciding legal cases," he later on modifies the effect of his statement by saying, "It is not always possible to decide a question by reference to Minhaj alone and in such a case a Muhammadan jurist . . . has recourse principally to the Tohfa and the Nihaya, which Dr. Th. Juynboll in his Handbuch Des Islamischen Gesetzes, 1910," calls "the two standard works in the whole modern Fikh literature of the school of Shafi." We have not been able to refer to these two books. Even according to Minhaj-at-Talibin it is always commendable to consult a woman as to her future husband; and we have already noticed that Mr. Wilson also says that the woman's "consent is nevertheless desirable."

Against this authority the respondent relies mainly on the statements of the Shafi law contained in Mr. Amir Ali's Muhammadan law, Third Edition, Vol. II, at page 350, and Mr. Tyabji's Text-book of Muhammadan law. In the former book it is stated

"To recapitulate. Under the Maliki and Shafi law, the marriage of an adult girl is not valid unless her consent is obtained to it, but such consent must be given through a legally authorized wali, who would act as her representative. Under the Hanafi and Shiah law, the woman can consent to her own marriage either with or without a wali."

Speaking of the competence of a female to enter into a contract of marriage, Mr. Tyabji states in section 17-B of his "Principles of Muhammadan law" that

"(a) According to the Hanafi law she becomes competent when, being of sound mind, she attains puberty. (b) According

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to the Shafi and Maliki law, a thayyaba is competent so to contract but not a woman who is a virgin";

and after thus dealing with the capacity of parties to enter into a contract of marriage, the law with regard to the consent of parties is thus stated:

"(1) The consent to the marriage of a person competent, under section 17-B above, to enter into a contract of marriage, must be expressed whether by himself or his duly authorized agent or proxy. (2) The consent to the marriage of a person not competent to enter into a contract of marriage under section 17-B must, subject to the said section, be expressed by his or her guardian for marriage or by the duly authorized agent or proxy of such guardian." (See paragraph 20, page 97.)

It would seem that, in the opinion of this writer, though an adult virgin cannot, owing to her incapacity to enter into a contract, express her consent except through her guardian for marriage or by the duly authorized agent or proxy of such a guardian, nevertheless, her consent is necessary to render the contract of marriage valid. This is what we can gather impliedly, by reading the two paragraphs 17 and 29 together. Nowhere does the learned author say explicitly that a Shafi woman can be married with or without her consent by her father if she is an adult virgin; but his opinion seems to be, as I have indicated above, in favour of the view that the consent of an adult virgin is necessary to render her marriage valid under the Shafi law.

It will thus be obvious that the authorities on the question are very much divided and except Mr. Amir Ali and Mr. Tyabji—the former expressly and the latter impliedly—all the other text-writers that we have thus far examined point out that the marriage of an adult virgin under the Shafi law will not be invalidated by want of her consent, whereas, under the Hanafi law, the woman's consent is necessary to render the marriage valid. The opinion of Sir Abdur Rahim has been

referred to by both the appellant and the respondent. In page 330 of his book on "Muhammadan Jurisprudence" the learned writer stated his view as follows:—

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"According to the Hanafis, every person who is not a minor, whether male or female, maiden or Thayyaba (that is, a girl who has had sexual intercourse), is competent to contract marriage and cannot be given in marriage without his or her consent whether by the father or any other relative. The Shafis and the Malikis agree with the Hanafis so far as boys and Thayyabas who have attained majority are concerned; the former, however, hold that a minor Thayyaba is competent to contract marriage and a maiden, even if she has attained majority, cannot marry without the consent of the guardian, while the Hanafis in each of these two cases hold the contrary view. Thus with the Hanafis, so far as the females are concerned, minority is the test whether the intervention of a guardian is necessary or not and with the Shafis the test is whether a girl is a maiden or Thayyaba. The difference between the two schools on this point, though not perhaps of much practical significance, involves a question of principle. The Hanafis allege that the Shafis' refusal to acknowledge the right of a maiden of full age to contract marriage of her own will amounts to a breach of a cardinal principle of Muhammadan law, namely, that the legal status of a grown-up female is as complete as that of a male."

Having regard to the marginal heading of the paragraph, "The capacity to enter into a marriage contract," it is possible to argue, as contended for by the respondent, that, in the opinion of this learned writer also, under the Shafi law the consent of the woman who is an adult virgin is as essential as under the Hanafi law to validate her marriage though she is not competent to express that consent except through a Wali. •

It seems to me that, having regard to the nature of the marriage relationship as understood in Muhammadan law, the difference between the two schools, the Hanafi and the Shafi, on the point under consideration, is not so very fundamental as is made to appear from the

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text-books. Marriage in Muhammadan law is purely a civil contract, and if so, the consent must be considered a necessary element to give validity to the marriage. In the opening paragraph of the judgment in *Asgur Ali Chowdhry v. Muhubbut Ali*(1) which was a case in which the husband of a Muhammadan woman sued his father-in-law for damages when the marriage was found invalid, MARKBY, J., says :

“After the marriage the plaintiff instituted a suit for the purpose of compelling the girl to live with him but failed by reason of it being established that the girl was of full age and that she has not given her consent.”

We do not know what law governed the parties and there is no further reference in the judgment to this question of consent as the case dealt with quite a different matter. After stating,

“No contract can be said to be complete unless the contracting parties understand its nature and mutually consent to it”

Mr. Amir Ali points out the distinction between the Hanafi and the Shafi law thus :

“Among the Shafis and the Malikis, although the consent of the adult virgin woman is as essential as among the Hanafis and the Shiahis to the validity of a contract of marriage entered into on her behalf, she cannot contract herself in marriage without the intervention of a Wali. Among the Shafis, a woman cannot personally consent to the marriage. The presence of the Wali or guardian is essentially necessary to give validity to the contract. The Wali's intervention is required by the Shafis and the Malikis to supplement the presumed incapacity of the woman to understand the nature of the contract, to settle the terms and other matters of similar import, and to guard the girl from being victimized by an unscrupulous adventurer or from marrying a person morally or socially unfitted for her.”

It appears to me therefore that the consent of an adult virgin even among the Shafi sect is essential for the validity of a marriage and that the only difference

between the Hanafi law and the Shafi law on this point is that under the Shafi law the consent must be expressed through a Wali and not direct. Even according to the “Minhaj”, which has been strongly relied upon by the appellant as being a book upon Shafi law, it is always commendable to consult the woman as to her future husband. The desirability of adopting this course is suggested by Wilson also. Having regard to the conception of marriage as a contract in the Muhammadan law, I think Mr. Amir Ali's explanation of the difference between the Hanafi and the Shafi law should be accepted as correct ; and therefore it follows that, in this case, the marriage of the plaintiff with the defendant should be held invalid as her father had not secured her consent for it. This view is certainly more equitable and more suitable to modern times.

I would therefore dismiss this Second Appeal with costs.

N.R.

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—
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NAIR, J.

APPELLATE CIVIL.

Before Mr. Justice Ramesam.

JUMNA BAI (4TH PLAINTIFF), PETITIONER,

1928,
June 5.

v.

S. RM. M. RM. RAMANATHAN CHETTI AND ANOTHER
(16TH AND 17TH DEFENDANTS), RESPONDENTS.*

High Court—Power to pass interim orders—Plaint, which ought to be filed in a mufassal Court but could not be so filed owing to the closing of the Court for summer recess—Jurisdiction of High Court to receive plaint and pass interim orders—Suit pending in a mufassal Court, closed for the vacation—Jurisdiction of High Court to pass interim orders—Procedure of retransfer—Power, when exercised—Letters Patent, cl. 13.

In cases where a plaint cannot be filed in an inferior Court in the mufassal of the Presidency on account of its being closed for the summer recess, there is no provision of law by which the High Court can, in the first instance, receive the plaint which ought to be filed in such inferior Court, and pass interim orders pending the disposal of the suit.

But the matter may be different in cases where the High Court has concurrent Original Civil Jurisdiction with the City Civil Court and the Presidency Small Cause Courts within the limits of its ordinary Original Civil Jurisdiction, in respect of suits arising within that area.

In cases where a suit is pending in a mufassal Court, which is closed for the summer recess, the High Court can transfer the case to itself under clause 13 of the Letters Patent and pass interim orders in the case; but the application for such transfer must be made on the original side of the High Court, and ask for an injunction or other interlocutory relief, and then apply for the re-transfer of the whole proceedings to the original Court; but this procedure will be allowed only in special cases of urgency.

* Civil Miscellaneous Petition No. 2106 of 1928.

PETITION praying that the High Court will be pleased to issue an interim injunction in O.S. No. 101 of 1925 on the file of the Court of the Subordinate Judge of Trichinopoly pending disposal of the suit.

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CHETTI.

This petition came on for hearing before the vacation Judge (RAMESAM, J.), who delivered the following order.

T. R. Venkatarama Sastri for *K. S. Sankara Ayyar*, for petitioner.

T. M. Krishnaswami Ayyar for *M. Subbaraya Ayyar*, for the first respondent.

JUDGMENT.

This and several petitions of similar nature have come up before me as vacation Judge. In all these I raised the question of jurisdiction. The matters that have so come up before me and in which I entertain doubts as to jurisdiction may be divided into two groups: (1) cases in which there is no pending proceeding anywhere in the Presidency. For the first time a plaint which ought to be filed in a mufassal Court—a District Munsif's Court, Subordinate Judge's Court or District Court, or an appeal or an Original Petition but which could not be filed there as that Court is closed, is sought to be filed here and an order is sought from the High Court in the nature of an injunction restraining the defendant from doing something. The High Court is expected to transmit the plaint and the other papers to the Court where it ought to have been filed on the expiry of its vacation. (2) Cases in which there is a proceeding pending in some of the lower Courts, either an original suit or an appeal pending in an Appellate Court (not the High Court), and a party wishes to obtain an interlocutory order. In either case, pending the main proceeding the party desiring to obtain an interlocutory order finds that he cannot

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obtain such an order because the Court is closed and therefore seeks to obtain it in the High Court. I may observe that in both the above cases there is no main proceeding pending in the High Court. The question is whether the High Court has got jurisdiction to pass any orders in those cases.

One of the provisions of law, referred to by the learned vakil for the petitioner, who argued the matter before me, is clause 13 of the Letters Patent. That clause enables the High Court to remove any suit pending in any Court within the Presidency to its own file. This clause does not help the first group of cases. How far it will help the second group will be discussed later on. Clause 17 of the Letters Patent gives to the High Court the Jurisdiction which the Supreme Court possessed over the persons and estates of infants, idiots, and lunatics within the whole Presidency. This clause does not help the two groups of cases under discussion. Clause 34 relates to testamentary and intestate jurisdiction within the whole Presidency. That also does not help the two groups of cases now under discussion. Similarly clause 35 relates to matrimonial jurisdiction in the whole Presidency. The result is I do not find any provision of law by which the High Court can in the first instance receive a plaint which ought to be filed in some inferior Court within the Presidency and pass orders pending the disposal of the suit. It may be that the High Court has concurrent jurisdiction along with the City Civil Court and the Small Cause Courts within the limits of the ordinary Original Civil Jurisdiction, and in respect of suits arising within that area the matter may be different. But I am now dealing with matters that have arisen outside the ordinary Original Civil Jurisdiction of the High Court. This is the view taken by SESHAGIRI AYYAR, J., in

C.M.P. No. 1498 of 1919. In that case, the petitioner JUMNA BAI v. RAMANATHAN CHETTI. sought to file in the High Court a plaint which ought to have been filed ordinarily in the District Munsif's Court of Dindigul and prayed for a temporary injunction. His Lordship held that neither rule 2 (4) of the Appellate Side Rules nor clause 13 of the Letters Patent nor section 107 of the Government of India Act can help the plaintiff in the matter. He also pointed out, and I agree with his observation, that section 498 of the Criminal Procedure Code gives power to the High Court to grant bail in cases pending anywhere in the Presidency and the analogy based on that consideration cannot help the petitioner. This disposes of the first group of cases mentioned above. In all those cases my order is that the plaints and petitions shall be returned to be presented to the proper Courts.

I now come to the second group of cases. C.M.P. No. 2105 falls under this group. As a suit had been filed in the Sub-Court of Trichinopoly and as the Sub-Court is closed, an application is made to the High Court for an injunction. In this group it may be that the High Court can get seisin over the whole case pending before a subordinate Court by transferring the case to itself under clause 13 of the Letters Patent and can then deal with the matter. In so doing the High Court can pass an interlocutory order either granting injunction or some other relief. But it has been held in *Srinivasa Aiyar v. Balakrishna Devai*(1) that the application for the transfer of a suit in a mufassal Court to the High Court must be made in the Original Side and therefore the procedure taken by the petitioner for obtaining an urgent order in the High Court must conform to this principle, i.e., it must involve

(1) (1912) 22 M.L.J., 137.

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as a part of the steps taken an application to transfer the suit itself to the Original Side of the High Court. It may be that, at the termination of the proceedings in the High Court, the suit is intended to be retransferred and the process of transfer and retransfer is not actually intended to be gone through, but even then the step taken must on the face of it necessarily conform to the form of going through these two steps. The Petition in the High Court must on the face of it apply for a transfer of a suit in the mufassal Court temporarily to this Court, then ask for an injunction and then apply for re-transfer of the whole proceedings to the original Court. In respect of Court fees and other matters it must comply with the provisions of law dealing with all such prayers and even then it is a question whether the urgency is such that the above-mentioned form of procedure should be gone through. In the present case I do not think that the matter is so urgent as to make it necessary for me to go through the above forms. The result is the petition is dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Curgenvven.

GOCULDOSS JUMNADOSS & Co. AND ANOTHER
(RESPONDENTS 12 AND 2), PETITIONERS,

1928,
July 30.

v.

N. M. SADASIVIER AND OTHERS (PETITIONERS),
RESPONDENTS.*

Provincial Insolvency Act (V of 1920), ss. 3 and 5 (2)—Civil Procedure Code (Act V of 1908), sec. 24 (1) (b)—Letters Patent, cls. 13 and 18—Insolvency application filed in a mufassal Court—Application to the High Court to transfer it to its own original insolvency jurisdiction—Power of the High Court to transfer—Competency of High Court to administer Provincial Insolvency Act—What Insolvency Law applicable to the case.

The High Court in its Appellate Jurisdiction has no power, under section 24 (1) (b) of the Civil Procedure Code, to transfer an insolvency petition pending in a Subordinate Court in the mufassal to the Original Side of the High Court, on its original insolvency jurisdiction, for trial and disposal, because, firstly, the Original Side of the High Court is not a Court subordinate to the High Court in its Appellate Jurisdiction within the terms of the section, and secondly because the Original Side of the High Court, in the exercise of its original insolvency jurisdiction, is not competent to administer the Provincial Insolvency Act, which is the law applicable to the case.

Nor does clause 13 of the Letters Patent enable the High Court to transfer such a petition to the Original Side of the High Court in the exercise of its extraordinary original jurisdiction, because, under clause 18 of the Letters Patent and the provisions of the Provincial Insolvency Act, the High Court, if the case is transferred, is not competent to administer the Provincial Insolvency Act, which is the law applicable to the case.

PETITION praying that the High Court will be pleased to withdraw I.P. No. 100 of 1927 on the file of the Court of the Subordinate Judge of Madura and transfer the

* Civil Miscellaneous Petition No. 1214 of 1928.

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same for trial and disposal by the High Court into its Insolvency Jurisdiction.

O. Thanikachala Chettiyar for petitioner.

Ponnuswami Ayyar and *Narayanaswami Ayyar* for second respondent.

G. T. Ramanuja Achariyar for respondents 4 to 9.

R. Krishna Ayyar for tenth respondent.

JUDGMENT.

This is an application to withdraw I.P. No. 100 of 1927 from the file of the Subordinate Judge of Madura and transfer it for trial and disposal to the Original Side of the High Court. The preliminary objection is raised that such an application will not lie. The provision of law under which the application is made is section 24 of the Civil Procedure Code and I propose first to consider its maintainability under that section, referring subsequently to some clauses of the Letters Patent which have alternatively been relied upon.

Under section 5 (2) of the Provincial Insolvency Act, the High Court has the same power in regard to proceedings under the Act as it has in regard to civil suits; and under section 24 (1) (b), Civil Procedure Code, it may, at any stage, withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and (i) try or dispose of the same; or (ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same.

It will be convenient to follow the course taken by the argument and consider in the first place whether the transfer may be ordered under part (ii) above. This requires that the Original Side of the High Court sitting in Insolvency should be a Court subordinate to the High Court in its Appellate Jurisdiction and competent to try the cause. As pointed out by TYABJI, J., in *Hindustan*

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Assurance and Mutual Benefit Society, Limited v. Rail Mulraj(1), section 3 of the Civil Procedure Code, which defines which Courts are subordinate to the High Court, does not include the High Court in the exercise of its original civil jurisdiction; nor, with reference to the definition of "district" in section 2 (4) can it be said that the Original Side of the High Court is a "District Court" and for that reason subordinate to the High Court under section 3.

There are also difficulties in the way of holding that the Original Side of the High Court would be competent to try and dispose of the insolvency petition if it were transferred to it. It is evident that, in order to do so, the High Court would have to exercise the powers which, but for the transfer, would have been exercisable by a District Court, that is to say, the Insolvency Law which it would have to apply would be the Provincial Insolvency Act. But under section 3 of that Act, the only Courts having jurisdiction are District Courts and such Courts subordinate to a District Court as the Local Government may invest with powers. My attention has been drawn to the case in *Srinivasa Aiyangar v. The Official Assignee of Madras*(2), in which the question arose whether a transfer in the reverse direction, from the High Court to the District Court of Tanjore, could be ordered, and it was held that it could not for the reason that the two jurisdictions were distinct. This case, while deciding that a District Court cannot administer the Presidency Towns Insolvency Act, does not of course settle the question whether the High Court in the exercise of its Original Insolvency Jurisdiction can apply the Provincial Insolvency Act, but I think it is clear that, so far as the Civil Procedure Code and the

(1) (1914) 27 M.L.J., 645.

(2) (1913) 25 M.L.J., 299.

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two Insolvency Acts are concerned, no such power exists. Accordingly whether it is proposed that the transfer should be made under part (ii) of section 24 (1) (b) or under part (i), which enables the High Court to withdraw any proceeding and try or dispose of the same, it appears to me that the same objection exists that competence is lacking; because a necessary condition of the application of part (i) must surely be that the proceeding must be of such a nature that the High Court has jurisdiction to try or dispose of it. I do not think that the provision itself is intended to confer a jurisdiction which would not otherwise exist.

Nor, I think, is this objection removed by any provision to be found in the Letters Patent. Clause 13 enables the High Court to remove, and to try and determine, as a Court of Extraordinary Original Jurisdiction, any suit within the jurisdiction of any Court subject to its superintendence; and this clause read with section 5 (2) of the Provincial Insolvency Act no doubt would apply to insolvency proceedings. We have, however, to look at clause 18 to see whether, upon such transfer being made, a Judge sitting in Insolvency could try the case. Such a Judge is to "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." These laws, namely, the Presidency Towns, and Provincial Insolvency Acts, do not confer upon a Judge sitting in Insolvency the power which he would need to exercise, if this transfer were ordered, to deal with the case under the latter Act.

My conclusion accordingly is that the application is not maintainable and I dismiss it with costs.

R. Ramachandra Chetti, Attorney for petitioner.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Wallace.

THE PUBLIC PROSECUTOR, APPELLANT,

v.

PODIMONU BEARY, ACCUSED.*

1928,
February 15.

Indian Penal Code, sec. 407—Accused entrusted with carriage of coffee from one place to another—Portion abstracted—No evidence as to where or when—Trial of accused under sec. 407 in a Criminal Court in the place of delivery—If such Court has jurisdiction.

When the accused was entrusted with the carriage of a quantity of coffee from an estate in Mysore to a firm of merchants in Mangalore, and a portion of the goods was abstracted and there was no evidence as to when or where such abstraction took place, *held*, that the Subdivisional Magistrate at Mangalore had jurisdiction to try the accused on a charge of criminal breach of trust, as there was a failure to deliver the goods at Mangalore in accordance with the terms of the entrustment.

In *re Rambilas*, (1915) I.L.R., 38 Mad., 639, *Krishnamachari v. Shaw Wallace & Co.*, (1916) I.L.R., 39 Mad., 576, *Bapu Daldi v. The Queen*, (1882) I.L.R., 5 Mad., 23, distinguished.

APPEAL under section 417 of the case of Criminal Procedure, 1898, against the acquittal of the accused by the Court of the Subdivisional Magistrate, Mangalore, in C. C. No. 45 of 1927 on his file.

Public Prosecutor for appellant.

D. A. Krishna Variar for accused.

JUDGMENT.

This appeal is by Government against the acquittal of an accused by the Subdivisional Magistrate, Mangalore. The facts of the case, so far as are necessary for

* Criminal Appeal No. 650 of 1927.

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BEARY.

the decision of this appeal, may be taken to be as follows: On 29th January 1927 the accused as a carrier was entrusted by P.W. 3, the proprietor of Mosanalla coffee estate, Mysore, with 225 bushels of parchment coffee to be carried by him from the estate to Mangalore for delivery there to Volkart Brothers' Coffee Works. When the consignment was handed over in Mangalore, it was found that, from 27 bags, coffee had been abstracted and tailings of no value substituted. There was no evidence as to where or when the coffee was abstracted. On these facts the police charge-sheeted the accused under section 407 of the Indian Penal Code. Part of the defence was that the magistrate had no local jurisdiction to try the offence. This contention has found favour with the magistrate who held that as there was no evidence that the offence took place in British India and not in Mysore territory it could not be held that the offence was committed within his jurisdiction. For this view he relied on a certain ruling of the Lahore High Court in *Nadar v. Emperor*(1), and in the result acquitted the accused, and Government has appealed.

Now it is obvious that on such a view of the case as the magistrate has taken the result will follow that in all such cases a theft will never be brought to book at all when it is impossible to get evidence as to the exact locality of the theft, and that would be so in almost every such case. The British Court will refuse jurisdiction because it is not proved that the offence occurred in British India, and the Mysore Court, which follows practically the same Code of Criminal Procedure, will refuse jurisdiction because it is not proved that the offence occurred in Mysore. The offence will therefore

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go wholly unpunished, because it cannot be decided which Court has jurisdiction. That is a result so opposed to justice and common sense that I should refuse to adopt it unless the processual law absolutely compels such a view.

The Public Prosecutor has relied upon section 185 of the Criminal Procedure Code, but I do not think that section assists here. It only applies if the place of offence is in British India. It would not give jurisdiction to a Court in British India to try an offence committed outside British India merely because the offence was committed in the course of a journey. This is the effect of the ruling in *Bapu Dalai v. The Queen*(1). It appears to me that the real solution of the difficulty lies in an examination of the offence committed. The offence is criminal breach of trust by a carrier. The ingredients of a criminal breach of trust so far as it is necessary to set them out here are, first, entrustment of property, and second, either a dishonest misappropriation of property or a dishonest disposal of that property in violation of any contract which the accused has made touching the discharge of such trust, or wilfully suffering any other person so to do. If the accused had taken dishonestly the coffee entrusted to him at some place on the journey between the estate and Mangalore, he would undoubtedly have misappropriated dishonestly the property entrusted to him, and could be convicted thereof by any Court which has jurisdiction over the locality where the misappropriation occurred. But apart from this, it appears to me reasonable to hold that, when he did not deliver the coffee at Mangalore, he violated the contract under which he was entrusted with it, and that such violation would, if dishonest, make

(1) (1882) 1 L.R., 5 Mad., 23.

(1) (1923) 24 Cr. L.J., 579; 73 I.C., 223.

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him equally guilty of a criminal breach of trust; that is, the offence of criminal breach of trust was committed in Mangalore itself by such failure to deliver, provided the failure was found due to dishonest disposal of that property or wilfully suffering any other person so to dispose of it.

The accused argues that this view is not in conformance with the rulings in *In re Rambilas*(1), *Krishnamachari v. Messrs. Shaw, Wallace & Co.*(2) and *Bapu Daldi v. The Queen*(3). I do not think this is so. In *re Rambilas*(1), the property misappropriated was the proceeds of hundis entrusted by a Dharapuram merchant to accused for encashment in Bombay. The accused cashed these at Bombay and misappropriated the proceeds there. It was clear that the misappropriation was at Bombay, even though there apparently was an undertaking that the money was to be remitted to Dharapuram. So far as the facts in that case went it was clear to the Bench that the misappropriation was complete when the cash was dishonestly taken in Bombay. The learned Judge no doubt goes on to say that it is only the intention which is essential, but that dictum was doubted in *Krishnamachari v. Messrs. Shaw, Wallace & Co.*(2), and further, that whether wrongful gain or loss results is immaterial. The argument that the contract broken by failure to deliver the money was not accepted because first, the charge was not of use and disposal in violation of a contract, and secondly, because the offence would be committed where the dishonest use or disposal took place. The essential distinction between that case and the present is that the time and place of the actual misappropriation were known and these were fixed at

(1) (1915) I.L.R., 38 Mad., 639. (2) (1916) I.L.R., 39 Mad., 576.
(3) (1832) I.L.R., 5 Mad., 23.

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BEARY.

Bombay and therefore it could not have been at Dharapuram. In *Krishnamachari v. Messrs. Shaw, Wallace & Co.*(1), a mufassal agent of a Madras firm misappropriated sale-proceeds of his firm's goods. It was held that the magistrate in Madras had no jurisdiction to try the case because the loss had actually occurred in the mufassal—really a very similar case to the above. *Bapu Daldi v. The Queen*(2), is called in aid more for what it does not say than for what it does. There a carrier entrusted with rice to be conveyed from Mangalore to Calicut took it into Goa and sold it there. The Court held that the misappropriation occurred at Goa and therefore the Mangalore Court had no jurisdiction. It is argued that if the offence could have been constituted by the non-delivery at Calicut, the Bench might have held that the case was triable at Calicut, but that was not the point before the bench which was merely whether the Mangalore Court had jurisdiction. The *ratio decidendi* is that the conversion did not take place until Goa was reached.

Now in all these three cases the time and the place of the dishonest conversion or disposal are definite, and the Court could therefore very definitely hold that it occurred at such and such a place and it was not necessary to go further and consider whether the contention that it occurred elsewhere was valid. The contention that the offence occurred at the place and time of the failure to deliver was negatived and rendered untenable by proof that it had occurred elsewhere. But in the present case the failure to deliver is the only evidence of the misappropriation and it is sufficient evidence of the time and place, in the absence of evidence to the contrary, to establish that there was a disposal in

(1) (1916) I.L.R., 39 Mad., 576.

(2) (1832) I.L.R., 5 Mad., 23.

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violation of the contract at least at the place of delivery. If the accused wishes to contend that the disposal was not there, it is for him to show it. It is not a question of giving the benefit of the doubt to the accused. He has committed *prima facie* a violation of the contract at Mangalore by non-delivery. If he pleads that the violation was not at Mangalore, the onus of proving that rests upon him. I am not prepared to follow the Lahore ruling of a single Judge relied on by the lower Court. I hold therefore that the lower Court had jurisdiction to try the case.

I allow the appeal, reverse the acquittal and direct that the accused be now tried.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Devadoss.

1928,
March 15.

R. SRINIVASA REDDY (PETITIONER), PETITIONER,

v.

M. DASARATHA RAMA REDDY (RESPONDENT),
COUNTER-PETITIONER.*

Criminal Procedure Code (V of 1898), sec. 145—Application made in respect of forcible dispossession—Preliminary order not passed within two months—Applicant in no way responsible for the delay—If to operate to his prejudice—Intent and object of section.

When an application is made to a Magistrate under section 145 of the Code of Criminal Procedure by a person complaining

* Criminal Revision Case No. 963 of 1927.

of forcible dispossession, if, for no reason or fault of the applicant, the Magistrate is not able to pass a preliminary order within two months of the dispossession, the party complaining should not, on a proper construction of the first proviso to clause (4) of section 145, be made to suffer by reason of such delay on the part of the Magistrate, and is entitled to an order under that section.

Though the words of the proviso are capable of the interpretation, that the dispossession must be within two months of the preliminary order, yet the intent and object of the section must be taken into consideration before such an interpretation is put upon it.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, paying the High Court to revise the order of the Court of Sub-Divisional Magistrate of Saidapet, dated 4th November 1927 in Miscellaneous Case No. 47 of 1927.

V. L. Ethiraj for petitioner.

Muhammad Askar Ali for respondent.

Public Prosecutor for the Crown.

JUDGMENT.

The point raised in this case is that there was forcible dispossession, according to the petitioner on the 1st June 1927 and according to the Sub-Divisional Magistrate that there was dispossession early in May within two months of the presentation of his petition; but the Magistrate has found against the petitioner on the ground that the forcible dispossession was more than two months before the date of his preliminary order. He has not definitely found whether there was or there was not forcible dispossession. The counter-petitioner's title to the property was under a sale deed obtained by him on 31st May 1927. He could not have had possession before that. If the Magistrate finds there was forcible dispossession, then he would have to see whether

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the first proviso to clause (4) of section 145 is applicable to the case. The question he has to consider is this; when a person complains to the Magistrate of forcible dispossession, within a few days after the dispossession, and asks him to take proceedings under section 145, if the Magistrate either by reason of his sending the petition to the Police for enquiry or owing to pressure of work is not able to pass a preliminary order within two months, whether the opposite party should have the benefit of the delay caused in the Magistrate's Court. Though the words of the proviso are capable of the interpretation that the forcible dispossession must be within two months of the order yet the intent and the object of the section must be taken into consideration before a literal interpretation is put upon it. Where a person who is entitled to complain of forcible dispossession goes before a Magistrate and complains of forcible dispossession if for no reason or any fault of his, the Magistrate does not pass a preliminary order at once, but delays the passing of the order though it may be *bona fide* the person who complained to him of forcible dispossession should not be deprived of the benefit of section 145 by reason of the delay caused in the Magistrate's Court. I am supported in this view by my brother WALLACE, J., who in Criminal Revision Case No. 539 of 1926 observes: "I am not prepared at present to subscribe to the proposition that a party taking possession by force must be retained in possession if, owing to delay after the dispossessed party has asked the Court to take action, on the part of the Court taking action, over two months have elapsed before the Court finally makes up its mind to issue the preliminary order." I think a reasonable interpretation ought to be placed upon the proviso and not a literal interpretation which would defeat the very object of section 145 (4) which relates to

dispossession of immovable property. I set aside the order of the Magistrate and direct him to restore the application to file and dispose of it in the light of the observations made above.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Ramesam

VEDAPPAN SERVAI AND FOUR OTHERS
(PETITIONERS), PETITIONERS,

1928,
May 16.

v.

M. PERIANNAN SERVAI AND SIX OTHERS,
(RESPONDENTS), COUNTER-PETITIONERS*

*Criminal Procedure Code (V of 1898), sec. 144—Order under—
Revision against, to High Court—If competent.*

An order of a Magistrate acting under section 144 of the Code of Criminal Procedure is not the order of a Court, and against such an order no revision lies to the High Court under section 435 of the Code.

Nataraja Pillai v. Rangasami Pillai, (1923) 17 L.W., 409, followed.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order, dated 12th April 1928, of the Court of the Taluk First Class Magistrate of Tiruppattur (Ramnad District) in M.P. No. 145 of 1928.

S. Swaminathan, P. N. Marthandam Pillai and A. Sri Rangachariar for petitioners.

K. S. Jayarama Ayyar for respondents 1 and 2.

* Criminal Revision Case No. 400 of 1928.

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K. S. Venkatarama Ayyar for respondents 5, 6 and 7.
Respondents 3 and 4 were not served.

K. N. Ganpati for *Public Prosecutor* for the Crown.

JUDGMENT.

This is a revision petition filed against the order of the Taluk First Class Magistrate of Tiruppattur, dated 12th April 1928, under section 144 of the Criminal Procedure Code. A preliminary objection is taken by the learned vakil for the respondent that this petition does not lie. He argues that the High Court acting under section 435 of the Criminal Procedure Code can call for and examine the record of any proceeding only before any inferior Criminal Court and that, in the present case, the order of the Magistrate acting under section 144 is not the order of a Court. In support of this argument he relies on the case *Nataraja Pillai v. Rangasami Pillai*(1), which was a judgment of AYLING, J., and myself. That decision was passed prior to the amendment of section 435 by the omission of clause (3). It is true that Mr. Ranganatha Ayyar in his Criminal Procedure Code expresses the opinion that the decision in *Nataraja Pillai v. Rangasami Pillai*(1), is no longer law on account of the amendment, but the correctness of this opinion is questioned by the learned vakil for the respondent and I have to consider the point.

It is true that, so far as section 145 of the Code is concerned, the omission of clause (3) of section 435 permits a revision to the High Court. But it is clear that, but for clause (3) an order under section 145 is an order by a Court operating between the two contending parties. The words, "to attend his court in person" in

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section 145 clearly show that the Magistrate acting under section 145 is a Court; but the old clause (3) of section 435 laid down that it was not a proceeding within the meaning of section 435. Now that the clause is omitted—the section certainly operates.

Now, are the consequences exactly the same in the case of section 144? At first sight one may think it is so; but it seems to me that as to section 144, clause (3), of section 435 was somewhat redundant and only made matters clear. Even without it, it is doubtful whether section 435 applies. There is nothing in section 144 to indicate that the Magistrate acting under that section is a Court as in the case of section 145. Dr. Swaminathan, appearing for the petitioner, argues that the decision in *Nataraja Pillai v. Rangasami Pillai*(1), purports to follow the Full Bench decision in *Sundram v. The Queen*(2), and another Full Bench decision in *Abbas Ali Chowdhry v. Illim Meah*(3), that the Madras case was decided on the Code of 1872 and the Calcutta case was on the Code of 1861. Section 518 of the Code of 1872 corresponds to section 144 of the present Code and section 520 of that Code corresponds to clause (3) of section 435 and he argues that section 520 was not referred to in *Sundram v. The Queen*(2), and now that section 435 (3), is omitted the decision does not apply; but it seems to me that AYLING, J., and myself carefully considered the fact that those decisions were on the earlier Codes and we observed:

"We find nothing in the changes which would render less applicable the considered opinions of the learned Judges in that case."

(1) (1923) 17 L.W., 409.

(2) (1883) I.L.R., 6 Mad., 203 (F.B.).

(3) (1870) 14 W.R. (Cr.), 46.

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I am not convinced by this argument of Dr. Swaminathan.

Another argument urged by him is that, under section 6 of the Code, the Criminal Courts in British India are divided into five groups and the third, fourth and fifth groups are Magistrates of the first, second and third classes, but this does not mean that a Magistrate is always a Court whatever he is doing. The section only means that among the Criminal Courts in British India are Magistrates but this does not necessarily mean that the Magistrates are always Courts. It can only mean that when they act judicially they are Criminal Courts. Section 6 is not inconsistent with the idea that Magistrates may sometimes act in an executive and administrative capacity and not as a Court. It is unnecessary to refer to cases prior to *Nataraja Pillai v. Rangasami Pillai*(1). The decision of the Privy Council in *Clarke v. Brajendra Kishore Roy Chowdhury*(2), does not help the petitioner. It only shows that in some parts of the Code the words "Courts and Magistrates" are used interchangeably and that under section 96 a Magistrate issuing search warrants was acting as a Court; but this does not conclude the matter as to section 144. Some of the decisions brought to my notice are decisions in which no objection was raised and the point was not considered and therefore they are of no value. A decision of the Patna High Court in *Dhanraj Bhagat v. Bharat Narain Singh*(3), is also relied on. There also this point has not been considered, but I am not able to follow the reasoning of that judgment. It is said that the final order under section 144 was passed without any preliminary notice

(1) (1923) 17 L.W., 409.

(2) (1912) I.L.R., 39 Cal., 953 (P.C.).

(3) (1924) 84 I.C., 324.

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to the petitioner. No preliminary notice is necessary. The only argument that suggests itself to me against the view I am now taking is this: cases occasionally arise in which the powers under section 144 are abused by Magistrates. Sometimes orders are passed under section 144 repeatedly, that is, as each order expires by the lapse of two months a further order is made for a like period and so on. It has been observed that such a procedure is an abuse of powers given under the Code and ought to be set aside. The question arises how is an order to be set aside where it is an abuse of the power conferred by the Code. I can only say that probably in such cases the power under section 107 of the Government of India Act will have to be invoked. Anyhow I do not see enough reasons to doubt the correctness of the decision in *Nataraja Pillai v. Rangasami Pillai*(1), and until doubt is thrown upon it by a more authoritative decision, I am bound to follow it. I hold that no revision lies in this case and the revision petition is dismissed.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Curgenvven.

RANGASAMI GOUNDAR (ACCUSED), PETITIONER.*

1928,
July 20.

*Indian Penal Code, sec. 216—Constituents of offence under—
Subsequent acquittal of person harboured—If affects conviction under sec. 216.*

To constitute an offence under section 216 of the Indian Penal Code it is sufficient to show that against the person

(1) (1923) 17 L.W., 409.

* Criminal Revision Case No. 952 of 1927.

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harboured, orders of apprehension had issued for an offence alleged against him, and the subsequent acquittal of the person harboured cannot affect the legality of a conviction under the section.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of Coimbatore Division in Criminal Appeal No. 119 of 1927, preferred against the judgment of the Subdivisional Magistrate of Pollachi in Calendar Case No. 333 of 1926.

V. Balasundaram Ayyar for petitioner.

K. N. Ganpati for Public Prosecutor for the Crown.

JUDGMENT.

The petitioner who prefers this Criminal Revision Petition has been convicted under section 216, Indian Penal Code of harbouring a person, for whose apprehension orders had been issued, knowing of those orders and intending to prevent his being apprehended. The person in question Marappa Goundan, was himself convicted under section 215, Indian Penal Code, but was acquitted on appeal. The main argument now addressed to me is that when the person harboured has been found to be not guilty, an essential ingredient of the offence under section 216 is lacking and accordingly that the conviction is bad. In order to support this argument a number of cases relating to other sections have been cited. I do not consider that it is necessary for me to examine them in detail, as it will be found in each instance that it was held to be implicit if not expressed in the terms of the section dealt with that the person in respect of whom the offence was committed was himself an offender, i.e., found guilty of an offence. For instance,

in *Empress of India v. Abdul Kadir*(1), which dealt with section 201, Indian Penal Code, it was considered not to be sufficient to show that there was reason to believe that an offence has been committed but that it must be shown that an offence had actually been committed, and that this is so is, I think clear from the opening words of that section. The same remark applies *mutatis mutandis* to the cases of *The Queen v. Joynarain Patro*(2), dealing with section 203, *Queen Empress v. Fateh Singh*(3), dealing with section 212, *Girish Myte v. Queen Empress*(4), and *Emperor v. Sanalal Lallubhai*(5), dealing with section 213 and *Queen Empress v. Saminatha*(6), dealing with section 214. In the case of each of these sections, the nature of the offence, rightly construed, requires that the person in respect of whom it was committed had himself committed an offence. The same principle holds good, of course, with section 214, Indian Penal Code, which renders punishable the screening of a person from legal punishment for any offence. It is clear that no person can be screened from legal punishment for an offence, if he has not rendered himself liable to it by his conduct. I can however discover no such necessary component in section 216. It is enough in my view to show that against the person harboured orders of apprehension had issued for an offence, that is to say, for an offence alleged against him. That this is the meaning to attach to the word "offence" occurring in the section is, I think, clear from the explanation of the word, as applied to acts committed outside British India, given in the sixth paragraph of the section. The purpose of the provision appears to me to penalise acts designed to obstruct or

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(1) (1880) I.L.R., 8 All., 279 (F.B.). (2) (1873) 20 W.R. (Cr.), 66.
(3) (1889) I.L.R., 12 All., 432. (4) (1896) I.L.R., 23 Cal., 420.
(5) (1913) I.L.R., 37 Bom., 658. (6) (1891) I.L.R., 14 Mad., 400.

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defeat the course of justice which requires that suspected persons should be arrested whether they may prove eventually to be guilty or innocent, and that it is not necessary to show that the offence in respect of which orders of apprehension were issued was actually committed. I am unable, therefore, to accept this as a ground for revision.

It is then said that the trial Magistrate, although he conceded to the accused his demand for a *de novo* trial, acted upon some of the materials recorded in the earlier proceedings. I do not think it necessary to decide here whether the effect of a *de novo* trial is to wipe out all previous proceedings, because with one very small exception, it is clear that the conviction is based exclusively upon the evidence recorded at the new trial. That exception consists in a remark by the Court that the accused had not stated before the previous Magistrate that he was not present in the village on the day in question. I do not think that that consideration can have had any material effect in securing his conviction, nor do I find any substance in the objection that in putting his first question to the accused the Subdivisional Magistrate said "Do you wish to state anything more?" because, in point of fact, the accused seems not to have been misled into supposing that his earlier statement would be taken into consideration, but proceeded to repeat in substance what he had then stated.

It is then said that the appellate judgment deals inadequately with the defence evidence. It is true that it has dismissed it with some brevity, but the evidence has been very fully discussed by the Subdivisional Magistrate and I think it received as much consideration from the learned Sessions Judge as its importance merited.

Although I hold that the acquittal of the person harboured cannot affect the legality of the conviction, I think it may well be taken into consideration in awarding sentence. The petitioner has been sentenced to rigorous imprisonment for six months and it appears that the circumstance that the person harboured had received a sentence of two years was weighed in awarding that sentence. Since the latter has subsequently been acquitted, it will, I think, meet the ends of justice if the term of imprisonment awarded be limited to the period already undergone. To this extent, I allow this Criminal Revision Petition.

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B.C.S.

APPELLATE CRIMINAL.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice
and Mr. Justice Pakenham Walsh.*

GNANAMBAL (PETITIONER), PETITIONER.*

1928,
July 31.

*Criminal Procedure Code, sec. 448—Maintenance order under—
Person made liable to pay residing outside jurisdiction of
Court passing order—If such Court competent to enforce
order.*

A Magistrate making an order for maintenance under section 488 of the Criminal Procedure Code is competent to enforce it against the person made liable for the payment of such maintenance, even though such a person resides outside the jurisdiction of his Court.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to

* Criminal Revision Case No. 451 of 1928.

GNANAMBAL,
In re. revise the order of the Court of the First Class Sub-divisional Magistrate of Mayavaram, N. Dis. No. 42 of 1928, dated 17th April 1928, returning the application of the petitioner for the collection of arrears of maintenance due to her from the respondent under the order of the High Court, dated 24th September 1924 and passed in Criminal Revision Case No. 862 of 1923 (M.C. No. 15 of 1922 on the file of the Court of the Subdivisional Magistrate).

K. Sankara Sastri for petitioner.

Public Prosecutor for the Crown.

JUDGMENT.

This woman got an order for maintenance against her husband from the Court of Mayavaram. Her husband fell into arrears as they generally do and she then went to the Mayavaram Court to get the order enforced. The Magistrate for some reason which it is difficult to fathom said he was not going to enforce the order although it was made in his own Court but she must get it enforced by the Court within whose jurisdiction the husband then resided. It would be intolerable that such a burden should be put upon holders of maintenance orders. They would have to rush about the country pursuing the absconding husband, it may be, to wherever he chooses to go before the order could be enforced. We upset the order of the Magistrate and direct that a warrant for the amount issue.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Wallace.

MOLAIPPA GOUNDAN (PETITIONER), ACCUSED.*

1928,
August 15.

Indian Penal Code, sec. 268—Allowing prickly-pear to spread on to road used by public—If a public nuisance—Enactment of certain procedure in sec. 162 of the Madras Local Boards Act—If impliedly deprives right to proceed under Indian Penal Code—Local Fund Overseer, whether can complain as member of the public—Sworn statement from complainant—Failure to record—Not an illegality.

The allowing of prickly-pear to spread on to a road used by the public is a public nuisance within the meaning of section 268 of the Indian Penal Code.

The enactment of a certain procedure under section 162 of the Madras Local Boards Act for the removal of prickly-pear spreading from private property on to public roads does not impliedly deprive Local Boards and their servants of the right to prosecute under the Indian Penal Code.

A Local Fund Overseer has the ordinary right of any member of the public to complain of a criminal offence and that right is not taken away because he did not profess to complain as a member of the public but as a Local Fund Overseer.

The omission to take a sworn statement from the complainant is, under the law in this Presidency, an irregularity and not an illegality. *Queen-Empress v. Monu*, (1888) I.L.R., 11 Mad., 443; *Ambaraya Goundan v. Pachamuthu Goundan*, (1924) 419 L.W., 461, followed.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, and section 107 of the Government of India Act, 1915, praying the High Court to revise the judgment of the Court of the First Class

* Criminal Revision Case No. 214 of 1928.

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Bench of Magistrates, Dharapuram, in Summary Trial
No. 1309 of 1927.

Watrapp S. Subramania Aiyar for petitioner.

Public Prosecutor for the Crown.

JUDGMENT.

Several points of law have been raised in this Criminal Revision Case. The petitioner was charged on the complaint of the Local Fund Overseer, Dharapuram, with an offence under section 290 of the Indian Penal Code of causing a public nuisance by allowing prickly-pear to spread from his own property on to the public road. He was convicted and fined, and now applies for revision of the conviction.

The first point argued was that the property from which the prickly-pear spread is not his but his brother's. It is clear from the evidence including that of the defence witness that, although the property is in the actual enjoyment of his brother, both he and his brother are undivided and therefore both are still joint owners. A joint owner is responsible in law for nuisances caused by his property.

The next point is that the act or omission is not a public nuisance, the argument being that it is the duty of the Local Board and not of the owner of the adjoining property to keep prickly-pear from spreading on the road. No ruling in point is cited to me in support of that view. The principle governing the case seems to me to be the general principle that no man shall so use his property as to injure his neighbour, and it makes no difference that the neighbour is the public and not an individual. Under section 268 of the Indian Penal Code, a person is guilty of a public nuisance who does any act or is guilty of an illegal omission which . . . must necessarily cause obstruction to persons who may

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have occasion to use any public road, and "illegal," under section 43 applies to everything which is an offence or is prohibited by law or which furnishes ground for a civil action. I am of opinion that allowing prickly-pear to spread on to a road used by the public is a public nuisance within this definition.

The next point is whether the Local Fund Officer had any legal authority to launch a prosecution against the petitioner under the Indian Penal Code. It is pointed out that section 162 of the Local Boards Act provides a detailed procedure designed *ad hoc* for the removal of prickly-pear spreading from private property on to public roads, and it is contended that the enactment of that procedure impliedly deprives Local Boards and their servants of the right to prosecute under the Indian Penal Code. I am clear that such a right, if it existed, cannot be impliedly taken away by the provisions of another Statute, nor is any ruling cited which goes so far. The case in *Chandi Pershad v. Evans*(1) is not really in point. There a party was being prosecuted under section 182 or section 199, Indian Penal Code, for making a false statement of the number of carriages and ponies possessed by him in an application for licence for vehicles and animals. The High Court held that the Indian Penal Code had no application as the Municipal Act was complete in itself and attached no penalty to the making of a false statement in such an application and that therefore the party was under no obligation of law to make a true statement. That ruling has no application to an act or omission which does itself come under the definition of a specific offence set out in the Indian Penal Code.

(1) (1895) I.L.R., 22 Cal., 123.

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The question therefore is whether the Local Fund Overseer who launched the prosecution had legal authority to do so. It seems to me that he had the ordinary right of any person to complain of a criminal offence. Nor is that right taken away because he did not profess to complain as an ordinary person but as a Local Fund Overseer. For purposes of this complaint his official position may be neglected. He is a member of the public entitled to go on those portions of the road which had been encroached upon by the prickly-pear and as such is entitled to complain.

It is then argued that since he was not examined on oath as a private complainant should be, the proceedings are illegal. Again I am not referred to any authority which goes so far. Omission to take a sworn statement from the complainant is under the law in this Presidency an irregularity and not an illegality—see *Queen-Empress v. Monu*(1) and *Ambaraya Goundan v. Pachamuthu Goundan*(2). I am unable to see how that omission in this case had prejudiced the petitioner.

I therefore see no reason to interfere in this case and dismiss the petition. I should however add that I think it would be better that all such cases be dealt with under the relevant sections of the Local Boards Act which ensures that the Local Board as a whole considers the case one which should be prosecuted, and I recommend the Board to follow that practice in future.

B.C.S.

(1) (1888) I.L.R., 11 Mad., 443.

(2) (1924) 19 L.W., 461.

PRIVY COUNCIL.*

JOGI REDDI (DEFENDANT NO. 3), APPELLANT,

1928,
November
15.

CHINNABBI REDDI (PLAINTIFF) AND OTHERS, RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Hindu Law (Partition)—Property of person outside joint family—Alleged agreement to treat property as joint—Purchases out of combined properties—Onus of proof.

Three brothers formed a joint Hindu family. A sister married a Christian who was in better circumstances than they were. He died in 1887 leaving a son (the appellant) then four years old. The appellant with his mother then went to live with his uncles, and from that time the uncles treated the property which the appellant inherited from his father, and the produce of it, in the same way as their own family property. In 1906 an outstanding half share in the ancestral property of the appellant's father was bought in the name of the appellant out of the produce of the combined properties, which was also applied from time to time to the purchase of other properties, movable and immovable. In 1917 one of the three brothers sued for partition claiming a fourth share of the whole combined property. The suit was decreed on the ground that there was an implied agreement between the parties to share all the properties equally.

Held, that the plaintiff was not entitled to share either in the property which the appellant inherited, or in that bought in his name. As to the former property the onus was upon the plaintiff to prove that he was entitled to share in it, and he had not discharged that onus. Any presumption arising by reason of the source of the money with which the latter property was bought was rebutted by the circumstances.

* Present:—LORD PHILLIMORE, LORD ATKIN, SIR LANCELOT SANDERSON.

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APPEAL (No. 108 of 1926) from a judgment of the High Court (PHILLIPS and MADHAVAN NAIR, JJ.) (April 17, 1924) affirming a decree of the Subordinate Judge of Cuddapah, which affirmed a decree of the District Munsif.

The suit giving rise to the appeal was brought in 1917 by the first respondent against his undivided brothers and his sister's son, the appellant. The plaintiff claimed a declaration that he and each of the defendants were entitled to a fourth share of properties which, in addition to properties of the joint family, included property which the appellant when a minor had inherited, and properties (one of which had been bought in the name of the appellant) bought out of the produce of the combined properties; he claimed a partition on that basis.

The facts appear from the judgment of the Judicial Committee.

The Courts in India found in effect that there was an implied agreement that the whole property should be treated as the common property of all the four parties, and upon that basis decreed the suit.

Dunne, K.C., and *Narasimham* for the appellant.—The onus was upon the plaintiff to prove that the appellant's property had ceased to be his exclusively. There cannot be implied from the circumstances an agreement to treat the whole property as if the four parties formed a joint Hindu family. The terms of section 49 of the Indian Registration Act did not make the karar inadmissible for the collateral purpose of negating any such agreement. But in any case no agreement by the appellant to give up his exclusive right to his ancestral property can be inferred from the facts. As to the property bought in his name, the true inference is that it was intended to represent the produce derived from his property.

DeGruyther, K.C., and *Subba Rao* for the first respondent.—The karar was inadmissible for any purpose in the suit. There is nothing to prevent persons, even if Christians, from agreeing that they shall mutually have the same rights as if they formed a joint family: *Francis Ghosal v. Gabri Ghosal*(1). From the circumstances such an agreement is to be inferred. The appellant came of age in 1901, and had since continued to live with his uncles as though a member of the joint family; he never demanded any account. The Courts in India have concurrently found that the facts showed an agreement to treat the whole property as the common property of the parties. The Board should regard those findings as conclusive. If there was no such agreement, the rights of the parties are governed by section 253 of the Indian Contract Act.

Narasimham replied.

The JUDGMENT of their Lordships was delivered by

LORD ATKIN.—This is an appeal from a judgment of the High Court of Madras affirming a judgment of the temporary Subordinate Judge of Cuddapah who affirmed a judgment of the District Munsif of Proddatur. The suit is brought by the plaintiff, a member of a joint undivided Hindu family, for partition. The defendants, so far as is relevant to the present issues, are his two brothers and the appellant Jogi Reddi. The question at issue is whether certain properties are, as the plaintiff affirms, joint family properties, or, as the appellant affirms, the separate property of the appellant.

Chinnabbi Reddi, the plaintiff, Munir Reddi, and Chinnabali Reddi were brothers forming a joint Hindu family. They owned some 17 acres of land of poor quality and were poor folk. They had a sister, Sanjamma,

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(1) (1906) I.L.R., 81 Bom., 25.

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who married Chinnaya, a Christian. The appellant, Jogi Reddi, is the only son of the marriage. Chinnaya was in better circumstances than his wife's family. He owned 24 acres of land apparently of good quality: part of it being represented by an undivided half interest in land of which the other half interest was owned by his brother. After his marriage, Chinnaya came to live in his wife's village. He died in 1887, when Jogi Reddi, the appellant, was about 4 years old, leaving the appellant the heir to his property. After his death, the mother and child went to live with the child's uncles. From that time onwards, the uncles treated the minor's property in the same way as their own family property; they cultivated it and treated the produce as joint property. With their resources so reinforced, they rose to comparative affluence. In 1901, Jogi Reddi attained his majority. The position remained unchanged; the family fortunes increased: individual members adventured in road repairs, indigo, nut-crushing, the proceeds going to a common fund. In 1906 the outstanding half interest in Chinnaya's ancestral property was bought for Rs. 760 from his brother's son. It was, as the appellant affirms, bought for him out of his share of the proceeds of his land. It was certainly taken in his name. The purchase price was paid for out of the common fund: there appears to have been no other fund out of which it could be paid. In 1916, Chinnabbi Reddi became dissatisfied with the administration of the family affairs and claimed partition. In July, 1916, an agreement was come to between the parties and reduced into writing, whereby a partition was arranged. In that division, the lands claimed by Jogi Reddi as his own were excluded from division, and a grant of further lands was also made to him exclusively. The agreement was, unfortunately, not registered, and is, therefore, under the terms of

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the Registration Act, not available as evidence of the transaction. It has properly been rejected by all the Courts. The argument has been addressed to the Board that it is admissible as collateral evidence of the conduct of the parties. In the view their Lordships take of the case, they have found it unnecessary to express an opinion upon this point, and for the purposes of their decision have ignored the document.

What then are the rights of the plaintiff in respect of the property which Jogi Reddi as a minor inherited from his father? The subsequent acquisition of the undivided half can be dealt with separately.

In the first place, it is to be observed that the onus is upon the plaintiff to establish that the property is partible and that he has an interest. In the second place, it is agreed that the property in question is not, and never was, in the full sense, family property. It was originally the separate property of the Christian brother-in-law and afterwards of the Christian nephew of the plaintiff. Neither of them ever was or could become a member of a joint Hindu family. The rights of the Hindu family over the property must depend on some cession by the owner. Formal grant there was none, and the case turns, as the Courts below held, upon the contractual relations of the parties, to be inferred from all the circumstances. The peculiar circumstances have naturally caused some difficulty in formulating the plaintiff's case. The plaintiff in his plaint claims the property as part of the family property, undistinguishable from the original family ancestral property. The learned District Munsif points out that it may not be quite legal and correct to describe the suit as a suit for partition of family properties. "In one sense," he says, "it is such a suit and in another sense it partakes of the character of a suit for dissolution

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of partnership." He proceeds to point out that Jogi Reddi could not have acquired the ordinary joint interest in the joint family property carrying with it the right of survivorship. He concludes, therefore, that he and the members of the joint family constituted a sort of partnership though not as joint owners, but as tenants in common. But obviously, this situation conflicts with the position of the brothers as members of the Hindu family. The learned Munsif solves the difficulty by concluding that "while Jogi Reddi was a tenant in common with the family as a separate entity, his rights being regulated by express or implied contract so far as the brothers were concerned, they were certainly joint tenants." The learned Subordinate Judge seems, however, to have treated the property as having become in the full sense family property. A convert, he says, "though not bound by the Hindu law may by his course of conduct show by what law he intends to be governed regarding his rights and interests and his powers over property. In the present case I have no doubt that the third defendant (the appellant) lived with his maternal uncles as a member of a Hindu family." The learned Judges of the High Court, rejecting the suggestion of partnership, think that the combination of the family cannot be said to have gone beyond the mere stage of co-ownership; but they accept the finding of the lower Courts which they state to be that all the properties were treated as the common property of the whole family, which necessarily implied an agreement between the members that they were all to share the properties alike. This seems to ignore the difficulties pointed out by the learned Munsif as to the difference between the family relations as to the original family properties and the properties which descended from Chinnaya.

Their Lordships would further observe that all the Courts below seem to have thrown the onus upon the appellant of proving that the properties he claimed were his own, instead of placing it as it should be upon the plaintiff. It therefore appears to their Lordships that there is no question of fact so found that can be binding upon an Appellate Court on a second appeal; and that it is necessary for them to consider what is the true position. They have come to the conclusion that the plaintiff has failed to make out that he is entitled to a share in the property, which the appellant inherited from his father. Admittedly, if the plaintiff acquired any interest in such property he did so by reason of some implied contract. For the first twelve or thirteen years of the association of uncles and nephew from which the contract is sought to be implied, the nephew was not of disposing capacity, and their Lordships see no reason for assuming that after he reached his majority, all other circumstances remaining the same, the necessary inference is that he made a gift to his uncles. The difficulties so clearly pointed out by the learned Munsif, of the difference between the tenure of the family ancestral property with the right of survivorship and the interest in Jogi Reddi's property with no right of survivorship, make the alleged gift the less likely. Their Lordships are not prepared to accept the view adopted apparently by the learned Munsif alone, in the Courts below, of a tenancy in common between the uncles as a family on the one side and the nephew on the other. The facts that the property was jointly cultivated and the proceeds of the produce pooled appear to be entirely consistent with the land itself remaining as it certainly did during the minority of Jogi Reddi his separate property. In the circumstances the purchase of the second half interest in the name of Jogi

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Reddi appears to bear out the notion of the original half interest being his ; though if the property had otherwise been proved already to have become family property, no particular importance would be attached to a purchase in this form. This is not the case of an original member of a Hindu family becoming a convert, but electing to retain his interest in the family property on the old footing. Here a definite cession to a Hindu family of property which originally did not belong to the family by a non-member of the family who was a Christian has to be proved. And in their Lordships' opinion the plaintiff has not discharged the onus of proof.

This disposes of the plaintiff's claim to share in the property which descended to Jogi Reddi from his father. As has been intimated above, their Lordships are of opinion that the undivided half share purchased from Jogi Reddi's cousin and taken into his own name is not shown to be property of the joint family. The learned District Munsif took the view that as the source from which the consideration proceeded was joint income, the purchase must also be imprinted with that character. The argument undoubtedly deserves consideration, but the circumstance mentioned is not conclusive ; and the facts that during Jogi Reddi's minority the rest of the family had undoubtedly received proportionately greater advantage from the minor's separate property, and the evidence that they desired to recognize this by acquiring the second half for Jogi Reddi himself appear to displace any such presumption as is relied on by the learned Munsif.

As to the balance of the immovable property and as to the movables, it is admitted that as the karar is unenforceable, the plaintiff is entitled to a fourth share. This is consistent with the view, which their Lordships conceive to be correct, that the produce of the properties

and services of the members of the family and Jogi Reddi was treated by all the parties as joint. Their Lordships were not asked to adjust any distribution that has already been decreed in this respect. Their Lordships are of opinion that the original decree should be varied on the footing that the properties included in list 1 of the third defendant's written statement filed on August 29, 1917, should be excluded from the properties in which the plaintiff is entitled to one-fourth share ; and that the plaintiff is entitled, excluding Jogi Reddi, to one-third of the ancestral property of the three brothers ; and that the suit should be remitted to the High Court to give effect to their Lordships' judgment ; and they will humbly advise His Majesty accordingly. The appellant should receive his costs from the plaintiff here and in the Courts below.

Solicitor for appellant : *H. S. L. Polak.*

Solicitors for respondent No. 1 : *Douglas Grant and Dold.*

A.M.T.

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ORIGINAL SIDE—FULL BENCH.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Kumaraswami Sastri and Mr. Justice
Pakenham Walsh.*

1928,
September 6.

In re THE POWERS OF THE ADVOCATES UNDER
THE INDIAN BAR COUNCILS ACT ON THE
INSOLVENCY SIDE OF THE HIGH COURT.*

*Indian Bar Councils Act (I of 1926), ss. 2 (a), 8, 14 and 19—
Right of Advocates enrolled in the High Court of Madras,
under the Act, to act in the Insolvency jurisdiction—Rule
128 of the Insolvency Rules—" Practise ", meaning of.*

Advocates enrolled in the High Court of Madras under the Indian Bar Councils Act (I of 1926) are by virtue of sections 2 (a), 8 and 14 of the Act entitled not only to appear and plead but also to " act " in the Insolvency jurisdiction of the High Court. Rule 128 of the Insolvency Rules of the High Court which allowed Advocates only to appear and plead in that jurisdiction is no longer in force.

" Practise " in sections 8 and 14 (1) of the Act includes " acting ". *Laurentius Ekka v. Dhuki Koeri*, (1925) I.L.R., 4 Pat., 766, followed.

CASE referred by Mr. Justice KUMARASWAMI SASTRI for the Opinion of the Full Bench under the following circumstances:—Mr. V. V. Devanadhan, a Vakil enrolled as an Advocate of the Madras High Court, on 16th July 1928, under the Indian Bar Councils Act (I of 1926), presented at the end of July 1928 a vakalat and papers on behalf of a party in a cause before the Insolvency Court. The presiding Judge, Mr. Justice KUMARASWAMI SASTRI, being of opinion that under the Insolvency Rules of the High Court (Rules 128 and 129) as they stood, an

* *In re* the Powers of Statutory Advocates.

Advocate was entitled only to " appear and plead " and not " to act " in the Insolvency jurisdiction, directed the return of the vakalat and the papers to the Advocate but referred the question to the CHIEF JUSTICE for the expression of an Opinion by a Full Bench. His Lordship the CHIEF JUSTICE accordingly referred the matter for disposal by a Full Bench constituted as above.

Rules 128 and 129 of the Insolvency Rules are given in the judgment.

A. Krishnaswami Ayyar for the Advocates' Association, urged the arguments stated in paragraph 2 of Mr. Justice KUMARASWAMI SASTRI's judgment and argued that the Bar Councils Act was a consolidating and amending Act as regards the powers of Advocates and that the object of the Act was to unify the different classes of practitioners till now obtaining by repealing the powers of the High Court under the Letters Patent in the matter of enrolling practitioners for the High Court and investing the same powers in the Bar Council. The Act gives Advocates wide powers and they cannot be curtailed by the Rules. Section 19 (4) repeals all Rules till now obtaining which are repugnant to the Bar Councils Act; Rule 128 of the Insolvency Rules being repugnant to the Act must be deemed to have been repealed by the Act. " Practise " in sections 8 and 14 (1) of the Act means not only to appear and plead but also to " act ": see *Laurentius Ekka v. Dhuki Koeri*(1) and *Bakhtawar Singh v. Sant Lal*(2). The Insolvency jurisdiction is part of the Original jurisdiction of the High Court; see *In the matter of Candas Narrondas Navivahu v. C. A. Turner*(3). The provisions of the Civil Procedure Code are applicable to the Insolvency proceedings and under that Code a litigant can authorize a practitioner to act for him in any cause therein. If the High Court was so minded, it could have framed rules, enabling Advocates to act on the Insolvency Side; there was nothing to prevent its doing so under any of the Charters or Letters Patent issued since 1800.

F. S. Vaz for the Bar Association adopted the above arguments and argued that under Rule 4 of the Original Side Rules a " Pleader " was defined to include an Attorney.

(1) (1925) I.L.R., 4 Pat., 766. (2) (1887) I.L.R., 9 All., 617.
(3) (1889) I.L.R., 13 Bom., 590 (P.C.).

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V. V. Srinivasa Ayyangar for the Attorneys' Association, urged the arguments stated in paragraph 3 of Mr. Justice KUMARASWAMI SASTRI's judgment. He quoted, *Blackpool Corporation v. Star Estate Co.*(1), and *The London and Blackwall Railway Co. v. The Limehouse District Board of Works*(2) for the position that a general Act, like the Bar Councils Act, cannot be deemed to control or affect a special Act such as the Presidency Towns Insolvency Act unless it expressly so enacts, and argued that an Advocate who is not allowed to act but is only allowed to plead cannot be said to have his right to practise, in any way curtailed.

JUDGMENT.

COUTTS
TROTTER, C.J.

COUTTS TROTTER, C.J.—I have had the advantage of reading the judgment about to be delivered by my brother KUMARASWAMI SASTRI and I entirely agree with it. It is clear that the object of the Act must be taken to have been to put all classes of practitioners on the same footing and if the Insolvency jurisdiction of the Original Side were to be held to be on a different footing as regards the right of audience from the rest of its jurisdiction, it would obviously have been an anomaly left outstanding by the Act *per incuriam*. I confess that such a result would not have surprised me in so ill-considered and ill-drafted a measure as the Bar Councils Act. Moreover, with the mass of evidence collected by the Bar Committee in 1923-24 it is remarkable that those responsible for the Bar Councils Act made no attempt whatever to provide for the peculiar state of things obtaining in the Madras High Court which has no parallel in any other High Court in India. But I agree with my learned brother that we are not driven to hold that this anomaly still persists and I therefore concur in his judgment.

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KUMARASWAMI SASTRI, J.—The question for determination is whether Advocates enrolled under the Indian

Bar Councils Act of 1926 are entitled to act in the Insolvency jurisdiction of the High Court. Under the rules as they now stand they are only entitled to plead.

The contention of the Advocates is that having regard to sections 8 and 14 and the definition of "Advocates" in section 2 (a), they are as a matter of right entitled to practise in the High Court, that the word "practise" in its ordinary meaning carries with it the right to appear, act and plead and that there being no differentiation of jurisdiction so far as the Bar Councils Act is concerned and no limitation placed on the word "practise" in the Act, the rules hitherto in force which prevent Advocates from acting in the Insolvency jurisdiction can no longer prevent them from acting after the Act has come into force.

For the Attorneys it is argued that the Insolvency jurisdiction of the High Court is a separate jurisdiction which had its inception in the Indian Insolvency Act, 11 and 12 Vic., Ch. 21, which was repealed by the Presidency Towns Insolvency Act of 1909 which transferred the jurisdiction to the High Court, that under the Indian Insolvency Act, Advocates were only entitled to plead and Attorneys were only entitled to act in the Insolvency jurisdiction, that section 121 of the Presidency Towns Insolvency Act expressly reserves to Advocates and Attorneys the rights they had under the Indian Insolvency Act and that the Bar Councils Act which does not purport to deal with Insolvency jurisdiction cannot be invoked to give Advocates a larger right of audience than that which existed at the date of the passing of the Act, and that the Indian Insolvency Act and the Presidency Towns Insolvency Act being special enactments dealing with special jurisdiction, they cannot be controlled or affected by the Bar Councils Act, which is a general enactment. It is also argued that even if

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(1) [1922] 1 A.C., 27, 34.

(2) (1856) 3 K and J., 123; 69 E.R., 1048.

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the Bar Councils Act should apply, section 19 (4) saves all rules in force which are not inconsistent with the Act and that the rules framed by the High Court under the Letters Patent which confine the Advocates to plead only in the Insolvency Court are not inconsistent with the Act and cannot therefore be said to be impliedly repealed.

Before dealing with these contentions it is necessary to refer to the rules and orders which were in force at the date when the Bar Councils Act came into force in so far as they relate to the Insolvency jurisdiction of the High Court.

The history of the legislation as regards the rights of Advocates, Attorneys and Vakils in so far as it relates to the Original Side of the High Court has been traced with great clearness in *Namberumal Chetty v. Narasimhachari*(1) where the question as to the rights of Vakils and Attorneys was raised. So far as Advocates and Attorneys are concerned the rules framed by the High Court as regards the Original Civil jurisdiction are the same as those framed as regards the Insolvency jurisdiction. The power of the High Court to frame rules in respect of the Insolvency jurisdiction is derived from the Charter Act and the Letters Patent constituting the Madras High Court.

Section 17 of the Charter Act of 1800 empowered the Supreme Court

"to approve, admit and enrol such and so many of the persons being *bona fide* practitioners of the Law in the said Court of Recorder of Madras or having been admitted Barristers 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, which persons so approved, admitted and enrolled as aforesaid, shall be and are hereby authorized to appear and plead and act for the suitors in the said Court."

And it declares

"that no other person 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."

Under the Charter Act it is therefore clear that the Supreme Court had power to enrol Advocates who could be authorized by the rules both to act and plead in the Supreme Court, though as a matter of fact no such rules were made and so far as the Supreme Court was concerned, the Advocates were only empowered to plead and not to act.

The Letters Patent constituting the High Court at Madras abolished the Supreme Court and transferred its jurisdiction to the High Court. The Advocates and Attorneys who were enrolled by the Supreme Court were enrolled as Advocates of the High Court.

Clause 9 of the Letters Patent gave the High Court power

"to approve, admit and enrol such and so many Advocates, Vakils and Attorneys, as to the said High Court shall seem meet; and such Advocates, Vakils and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions."

Clause 10 gives the High Court power to frame rules for the qualification and admission of proper persons to be Advocates, Vakils and Attorneys-at-Law.

As regards Insolvency jurisdiction, clause 18 directs that the Court for the Relief of Insolvent Debtors shall be held before one of the Judges of the said High Court

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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.

So far as the power to make rules empowering Vakils to appear, act and plead on the Original Side of the High Court, it has been held that such power was within the competence of the High Court, by a Full Bench as early as 1875 (*In the matter of the Petition of the Attorneys*)(1). The question was again raised, but the rules were held to have been validly framed. (See *Namberumal Chetty v. Narasimhachari*(2).)

As regards the Insolvency Court however, the rules framed by the Madras High Court did not authorize Vakils to appear in the Insolvency Court or Advocates to act.

Rules 128 and 129 of the Insolvency Rules run as follows:—

128. An Advocate may appear and plead upon any hearing in Court or in Chambers; provided that the Taxing Officer shall not, as between party and party, allow any fee in respect of his attendance at Chambers, unless the Judge certifies that the case is a proper one for the attendance of an Advocate.

129. An attorney may appear, plead and act upon all proceedings; provided that he shall not be allowed to appear or plead upon a hearing in Court.

So far as the Bombay High Court is concerned, rule 36 states that

“Advocates may appear and plead for suitors on any side of this Court and in the Insolvent Court but not (except for an insolvent in the Insolvent Court or for a prisoner in the Criminal Court) unless instructed by an Attorney or in the Appellate Side of the Court by a Pleader.”

(1) (1875) I.L.R., 1 Mad., 24.

(2) (1916) 31 M.L.J., 698.

In Calcutta only Barristers enrolled as Advocates instructed by Attorneys could appear in the Insolvency jurisdiction.

After the passing of the Presidency Towns Insolvency Act the question as to the right of Vakils to practise in the Insolvency Side was raised but a Full Bench of this Court negatived the right. (See *Krishnaswami Ayyar v. Swaminatha Ayyar*(1)).

Having regard to the provisions of the Charter Act and the Letters Patent which I have already referred to, it seems to me that the High Court had power to frame rules allowing Advocates to act in the Insolvency jurisdiction though it did not do so. The Legislature has power to legislate on the matter without any necessity to repeal any enactment relating to insolvency.

I am unable to agree with the contention of Mr. Srinivasa Ayyangar that there is anything in the Indian Insolvency Act (11 and 12 Vic., Ch. 21) which curtails the power of the High Court conferred on it by the Charter Act and the Letters Patent to entitle Advocates to act as well as to plead in the Insolvent Court.

The material portion of section 3 of the Indian Insolvency Act is as follows:—

“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 Courts for the relief of insolvent debtors.”

It is no doubt true that when the Act was passed it was only the Attorneys that were entitled to act in Court and Advocates were only entitled to plead. It should be remembered that when this Act was passed the Supreme Court which was constituted under the

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(1) (1924) I.L.R., 48 Mad., 331.

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Charter Act of 1800 had under section 17 power to enrol Advocates with powers to appear, act and plead. The Supreme Court Charter was repealed by the Letters Patent which, as I pointed out before, empowers the High Court to frame rules and the High Court as the Successor of the Supreme Court and the possessor of the powers conferred on it by the Letters Patent was in my opinion competent to enrol Advocates who could act as well as plead.

The power of the High Court as regards Vakils was affirmed in I.L.R., 1 Mad., 24 and 31 M.L.J., 698, already referred to and unless it can be shown that there is anything in the Indian Insolvency Act (11 and 12 Vic., Ch. 21) which curtails the power to frame rules permitting Advocates to act and plead on the Insolvency Side the same reasoning would apply to the rules framed under the Insolvency Act. The words "shall be entitled to practise in the way of his profession" in section 3 of the Indian Insolvency Act simply mean "shall be entitled to practise as Advocates or Attorneys as he was doing before" and does not amount to a statutory bar to Advocates acting in the Court constituted by the Act; nor does it override the powers given to the High Court under the Charter Act and the Letters Patent.

Section 121 of the Presidency Towns Insolvency Act confers no fresh right. It runs as follows:—

"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."

All that this section says is that no fresh rights are conferred on any person by reason of the transfer of jurisdiction and it cannot be said that this Act curtailed the powers of the High Court to frame rules defining

the functions of Advocates if it was authorized to do so under the Letters Patent.

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In my view, at the date of the passing of the Bar Councils Act, the High Court had power to frame rules enabling Advocates to act and plead in the Insolvency jurisdiction though it did not exercise that power.

There being no statutory bar to Advocates acting and pleading in the Insolvency jurisdiction, I think there is no necessity for the amendment or repeal of section 3 of the Indian Insolvency Act or section 121 of the Presidency Towns Insolvency Act before Advocates can be allowed to act. It was within the competence of the High Court to give the power by rules and it follows that the legislature can do so by an Act without the necessity of repealing anything in any previous enactment or any special reference to the Insolvency jurisdiction.

In the view I take it is unnecessary to consider the cases referred to by Mr. Srinivasa Ayyangar as regards general later Acts not controlling or affecting earlier special enactments.

The next point for consideration is whether the Bar Councils Act confers the power to act and plead on Advocates in all the jurisdictions of the High Court so far as Madras is concerned and whether rules 128 and 129 of the Insolvency Rules referred to must be taken to be no longer in force as they have been superseded by the provisions of the Bar Councils Act.

Section 2 (a) of the Bar Councils Act defines an "Advocate" as meaning an Advocate entered in the roll of Advocates of a High Court under the provisions of the Act.

Section 8 runs as follows:—

"(1) No person shall be entitled as of right to practise in any High Court, unless his name is entered in the roll of the Advocates of the High Court maintained under this Act.

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Provided that nothing in this sub-section shall apply to any attorney of the High Court."

Then follow the provisions as to the persons who are to be enrolled.

Section 14 runs as follows :—

"(1) An Advocate shall be entitled as of right to practise (a) subject to the provisions of sub-section (4) of section 9, in the High Court of which he is an Advocate, and

(b) save as otherwise provided by sub-section (2) or by or under any other law for the time being in force in any other Court in British India and before any other Tribunal or person legally authorized to take evidence, and

(c) before any other authority or person before whom such Advocate is by or under the law for the time being in force entitled to practise."

Section 14 (3) gives the High Courts of Bombay and Calcutta power to frame rules regulating the rights of Advocates on the Original Side.

Section 9 (1) empowers the Bar Council with the previous sanction of the High Court to make rules to regulate the admission of persons to be Advocates of the High Court.

Section 9 (4) saves the rule-making powers of the High Courts of Bombay and Calcutta as regards the practitioners on the Original Side.

Section 19 (4) which is the saving clause as regards the rules in force runs as follows :—

"When this Act has come into force in respect of any High Court, any provision of any other enactment or any order, scheme, rule, form or by-law made thereunder, which was before that date applicable to Advocates, Vakils or Pleaders entitled to practise in such High Court shall, unless such a construction is repugnant to the context or to any provision made by or under this Act, be construed as applying to Advocates of the High Court enrolled under this Act."

The Bar Councils Act by section 19 (2) repeals the Letters Patent in so far as it refers to the powers of

the High Court to enrol Advocates and Vakils. It seems to me to be clear from the provisions above referred to that the Bar Councils Act so far as Madras is concerned makes no distinction as regards the different jurisdictions of the High Court, gives the High Court no power to frame rules, so far as the Original and Insolvency Sides are concerned, to limit the functions of Advocates only to plead, and prevent them from acting, and keeps alive only such rules as the Madras High Court has already framed if they are consistent with the provisions of the Act.

It is to be noted that while the rule-making powers of the Bombay and Calcutta High Courts, so far as the Original Side is concerned are saved, no such saving clauses are enacted so far as the Madras High Court is concerned. It was evidently thought that as the Madras Vakils were authorized to appear, act and plead on the Original Side, the Madras High Court offered a fair field for trying the experiment of unifying the Bar which was the policy underlying the Act.

The word "practise" ordinarily means "appear, act and plead", unless there is anything in the subject or context to limit its meaning. The word "practise" is used in section 4 of the Legal Practitioners Act of 1879 and it was held by JWALA PRASAD, J., in *Laurentius Ekka v. Dhuki Koeri* (1) that the word "practise" includes the right to appear, plead and act. I may in this connection refer to *Bakhtawar Singh v. Sant Lal* (2), where it was held that Advocates can act and plead unless there is anything in the rules framed by the High Court restricting their power.

I think that sections 8 and 14 of the Bar Councils Act which entitle an Advocate as of right to practise

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(1) (1925) I.L.R., 4 Pat., 766.

(2) (1887) I.L.R., 9 All., 6:7.

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in the High Court entitle an Advocate of the Madras High Court to appear, act, and plead in all the jurisdictions of the Madras High Court. If this view is correct, it follows that any rules which cut down that right to plead alone would be repugnant to the provisions of sections 8 and 14.

I do not think it makes any difference whether the Court for the Relief of Insolvent Debtors is a separate Court or is only a part of the High Court's Original Civil Jurisdiction. If the Court is a separate Court, it will be a Court falling under clause (b) of section 14. As appeals lie to the High Court, it will be a Court subordinate to the High Court and section 4 of the Legal Practitioners Act will also apply. If Insolvency jurisdiction is part of the High Court's Original Side Jurisdiction, section 14, clause (a) will apply.

I am unable to agree with the contention of Mr. Srinivasa Ayyangar that as an advocate is allowed to practise in the High Court even if he is prevented from acting in the Insolvent Court, there is no repugnancy. I am of opinion that where an Act confers rights to a party in general terms and entitles him to perform more than one function, the cutting down of those rights by a rule would make that rule repugnant to the provisions of the Act. The following observations of WILLS, J., in *Reg v. Bird, Needes, ex parte*(1), are in point.

"I desire in my judgment to adopt a broad principle which is too clear to need cases to be cited for its justification—the principle that evolves where a power to make regulations is given to a public body by statute, no regulations made under it can abridge a right conferred by the statute itself."

I may also refer to the *Municipal Corporation of the City of Toronto v. Virgo*(2).

(1) [1898] 2 Q.B., 340.

(2) [1896] A.C., 88.

I am of opinion that Advocates enrolled in the Madras High Court under the provisions of the Bar Councils Act are entitled to act and plead in the insolvency jurisdiction of the High Court.

PAKENHAM WALSH, J.—I agree and have nothing to add.

N.R.

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ORIGINAL CIVIL—FULL BENCH.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Kumaraswami Sastri and Mr. Justice
Pakenham Walsh.*

RATNASABAPATHY CHETTIAR AND OTHERS, PLAINTIFFS

1928,
November 2.

v.

DEVASIGAMONY PILLAI, DEFENDANT.*

Limitation Act (IX of 1908), arts. 66, 67, 116—Registered mortgage—Execution sale under decree on the mortgage—Insufficiency of sale-proceeds to meet decree amount—Claim for balance on the covenant to pay—Limitation.

Held, by the Full Bench that where a mortgage deed containing a personal covenant to pay the mortgage money is registered, the article of the Limitation Act (IX of 1908) applicable to a claim, based on the personal covenant, to recover the balance due to the mortgagee after the sale of the mortgage property, is article 116 of the Act which provides a period of six years from the due date and not article 66 or 67 of the Act; *Tricomdas Cooverji Bhoja v. Gopinath Jin Thakur* (1916) I.L.R., 44 Cal., 759 (P.C.), applied; *Ganesh Lal Pandit v. Khetra Mohan Mahapatra* (1926) I.L.R., 5 Pat., 585 (P.C.) and *Ram Din v. Kalka Prasad* (1884) I.L.R., 7 All., 502 (P.C.), explained and distinguished.

Civil suit filed in the original civil jurisdiction of the High Court.

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The facts and the question of law appear from the following Order of Reference to a Full Bench by the Hon'ble Mr. Justice BEASLEY :—

"In view of the decision of the Privy Council in *Ganesh Lal Pandit v. Khetra Mohan Mahapatra*(1), and also in view of the numerous decisions in the Indian Courts which take a view contrary to what appears to have been taken in the Privy Council, I am referring the following question to a Full Bench: 'Where upon a sale of the mortgaged property under a mortgage decree obtained in a suit on a registered mortgage deed, there is a deficiency, what is the period of limitation to recover the same under a personal covenant in the said deed?' My reason for referring this question is that, it is extremely doubtful whether the Privy Council in *Ganesh Lal Pandit v. Khetra Mohan Mahapatra*(1) really had to decide this question which seems to have been unnecessary for the purposes of that decision."

ON THIS REFERENCE

K. S. Krishnaswami Ayyangar (with *P. S. Ramaswami Ayyangar*) for the plaintiffs.—The period of limitation is six years as provided by article 116 of the Limitation Act. The Act treats differently contracts registered and not registered. The wording of article 115 is different from that of article 116. Article 115 is a residuary article and contains the words "not herein specially provided for" whereas there are no such words in article 116. Hence though articles 66 and 67 refer to single bonds, article 116 alone governs them when they are registered as well as all other registered bonds. Hence article 116 was held by the Privy Council to apply to a suit for rent due under a registered lease, in *Tricomdas Cooverji Bhoja v. Gopinath Jin Thakur*(2), though article 110 specifically provides for a suit for arrears of rent. Similarly in this case. According to this decision, the words "compensation for breach of a contract" apply even to cases of liquidated damages; see also *Beti Maharani v. The Collector of Etawah*(3). The question is *stare decisis*.

(1) (1926) I.L.R., 5 Pat., 515 (P.C.). (2) (1910) I.L.R., 44 Cal., 759 (P.C.).
(3) (1894) I.L.R., 17 All., 198 (P.C.).

As the suit in *Ganesh Lal Pandit v. Khetra Mohan Mahapatra*(1), was brought after six years, it was not necessary to decide this point in that case. Though that decision contains a mistake as to what was decided in *Ram Din v. Kalka Prasad*(2), it approves of *Miller v. Runga Nath Moulick*(3), which held that article 116 applied to such cases. *Ram Din v. Kalka Prasad*(2), was also a case in which the suit was brought after six years. [He was stopped.]

V. V. Srinivasa Ayyangar (with *Masikamony Pillai* and *T. N. Seshachalam Ayyar*) for defendant.—I rely on *Ganesh Lal Pandit v. Khetra Mohan Mahapatra*(1) as an express decision that the three years' rule applies to such cases under article 66 which is a specific article for bonds. On the facts of that case it was necessary to decide this very question.

[CHIEF JUSTICE.—The actual decision in that case and in some prior cases before the Privy Council was that the 12 years' limitation did not apply to such a case but that article 116 applied. The reference to article 66 in that case and in the other cases was *obiter*.]

Article 116 speaks of "compensation" which term is inapplicable to a liquidated money claim like this. This article 116 was article 117 in the Limitation Act of 1871 whose wording was "on a promise or contract" which words contemplated only liquidated damages. The change effected in the wording of article 116 in the Acts of 1877 and 1908 connotes that a suit for unliquidated damages alone is meant. *Tricomdas Cooverji Bhoja v. Gopinath Jin Thakur*(4), is a case of unliquidated damages.

[CHIEF JUSTICE.—*Kameshwar Prasad v. Rajkumari Ruttan Koer*(5) is in favour of 6 years.]

JUDGMENT.

KUMARASWAMI SASTRI, J.—The question referred to us for decision is what is the period of limitation applicable for the recovery of money due under a personal covenant contained in a registered deed of mortgage where the mortgage property has been sold and the claim is for the deficiency—whether the proper article to

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(1) (1923) I.L.R., 5 Pat., 535 (P.C.). (2) (1884) I.L.R., 7 All., 502 (P.C.).
(3) (1885) I.L.R., 12 Cal., 339. (4) (1916) I.L.R., 44 Cal., 759 (P.C.).
(5) (1892) I.L.R., 20 Cal., 79 (P.C.).

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be applied is article 66 or article 67 as the case may be of the first schedule of the Limitation Act or article 116 of the same schedule. Article 66 applies to cases on a single bond where a day is specified for payment and the period of limitation is three years computed from the day so specified. Article 67 applies to cases on a single bond where no such day is specified, the period of limitation being three years computed from the date of the execution of the bond.

A single or simple bond is a bond merely for the payment of a certain sum of money without any condition in or annexed to it (HALSBURY, Vol. 3, page 80). In *In re Dixon, Henyes v. Dixon*(1), the distinction between single and double or double or conditional bond is pointed out by COLLINS, L.J. (at page 582).

Article 116 provides for cases of compensation for the breach of a contract in writing registered, the period of limitation being six years commencing from the time when the period of limitation would begin to run against a suit brought on a similar contract not registered. It is necessary therefore in order to ascertain the period of limitation to refer to the corresponding articles applicable to unregistered documents evidencing contracts.

It is contended by Mr. Krishnaswami Ayyangar for the plaintiff mortgagee that where a contract between the parties whether for payment of a fixed or an ascertained sum or not is reduced to writing and registered, article 116 is applicable even though the case may fall under article 66 or article 67 and that the words "compensation for the breach of a contract" include a claim for an ascertained sum of money payable under a contract.

(1) [1900] 2 Ch.D., 561.

Mr. Srinivasa Ayyangar for the defendant contends that article 116 has no application to suits for the recovery of an ascertained sum of money due on a bond, that even if it did, the article could only apply to cases not provided for specifically by any of the other articles, that where the question is as to which of two articles of the Limitation Act is to be applied, the more particular and specific article should be regarded as the article which has to be applied and that as articles 66 and 67 make specific provision for the recovery of money due on a single bond, there is no scope for the application of article 116.

I am of opinion that article 116 is the proper article to be applied. Article 115 refers to suits for compensation for the breach of any contract, expressed or implied, not in writing registered and not herein specially provided for: and the period of limitation is three years to run from the time when the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases.

In the next article, article 116, the words "and not herein specially provided for" are omitted and the starting period is to be taken as the period when time will begin to run if the contract was not registered. The omission of the words "and not herein specially provided for" in article 116 is, I think significant.

The contentions of Mr. Srinivasa Ayyangar have been negatived in a series of decisions of all the High Courts in India and article 116 has been applied to suits for payment of rent under registered rental agreements, to suits on registered deeds of partnership, to suits on registered simple bonds, to suits on registered agreements to pay dower and to suits for the recovery

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of the balance due on registered mortgage bonds after the sale of the mortgage properties.

In *Vythilinga Pillai v. Thetchanamurthi Pillai*(1), it was held by KINDERSLEY and MUTHUSWAMI AYYAR, JJ., that article 116 of the second schedule of the Limitation Act governs a suit to recover arrears of rent payable on a registered contract. After pointing out that the words "not otherwise provided for" which occur in article 115 do not occur in article 116 and that the period of limitation is to commence when the period of limitation would begin to run against a suit brought on a similar contract not registered, the learned Judges observe:

"These terms appear to us large enough to cover contract for payment of rent, as well as other contracts when in writing registered. It was argued that a suit for arrears of rent was not a suit for 'compensation' for breach of contract. But 'compensation' is the general term used also in the Indian Contract Act, section 73, to denote payment which a party is entitled to claim on account of the loss or damage arising from breach of contract. The effect in this place is to exclude suits for specific performance."

In *Magahuri Garudiah v. Narayana Rungiah*(2), it was held by Sir CHARLES TURNER, C.J. and MUTHUSWAMI AYYAR, J., that article 116 applies to a suit on a registered bond to pay a certain sum of money in instalments. The learned Judges overruled the plea of limitation on the ground that the bond was registered. They observe:

"The plea of limitation cannot be sustained; the bond was registered, and the ruling of the Judge as to the article in the Limitation Act which governs suits for the recovery of moneys payable under such instruments is supported by the decision of this and the other High Courts."

In *Renga Reddi v. Chinna Reddi*(3), MUTHUSWAMI AYYAR and SHEPPERD, JJ., held that a suit to recover an

amount due in respect of covenants in a registered deed of partnership was governed by article 116 and not by article 64. After referring to the fact that the contract of partnership contained an express stipulation as to the payment of losses and that the origin of the obligation in the suit was the registered contract, the learned Judges observe:

"It was argued that article 64, the article relating to suits on accounts stated, should be applied. That would be so if the partnership contract had not been registered, but that circumstance renders 116 applicable, as in the case of a suit against an agent it was held that the general articles 88 and 89 would not govern the suit, because the agreement with the agent was registered. (*Harenler Kishore Singh v. The Administrator-General of Bengal*(1). It was also held in *Vythilinga Pillai v. Thetchanamurthi Pillai*(2), that in a suit for rent founded on a registered agreement the same article 116 and not article 64 should be applied. The intention was to extend the period in favour of suits to enforce obligations based on registered instruments."

In *Nobocoomar Mookho Padhya v. Siru Mullick*(3), it was held by Sir RICHARD GARTH, C.J., and MITTAR, J., that a suit to recover money due on a registered bond is a suit for compensation for breach of contract in writing registered and fell within the meaning of article 116 of the Limitation Act. In *Umesh Chunder Mundul v. Adarmoni Dasi*(4), it was held that a suit to recover arrears of rent due under a registered rental agreement is governed by article 116, though GHOSE, J., felt some doubt on the question whether a suit for the recovery of arrears of rent on an agreement in writing registered is a suit for compensation for breach of a contract within the meaning of article 116, but he felt bound by the various rulings of the different High Courts as to the construction to be put upon article 116.

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(1) (1880) I.L.R., 8 Mad., 76.

(2) (1881) I.L.R., 3 Mad., 359.

(3) (1891) I.L.R., 14 Mad., 465.

(1) (1885) I.L.R., 12 Cal., 357.
(3) (1887) I.L.R., 6 Cal., 94.

(2) (1884) I.L.R., 3 Mad., 76.
(4) (1887) I.L.R., 15 Cal., 321.

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In *Din Doyal Singh v. Gopal Sarun Narain Singh*(1), it was held by TREVELYAN and BANERJEE, JJ., that article 116 of the Limitation Act applied to a suit on a registered instalment bond and not article 74 which in express terms makes provision for instalment bonds. The learned Judges observe :

" We think that article 116 is intended to apply to all contracts in writing registered, whether there is or is not an express provision in the Limitation Act for similar contracts not registered, and this view seems confirmed by the distinction between the terms of this article and of article 115 in which the words ' not herein specially provided for ' occur".

In *Asiatulla v. Dannis Mohamed*(2), it was held that a suit to recover dower fixed by a registered instrument was governed by article 116 of the limitation Act. In *Mahamad Mazaharal Ahad v. Mahamad Azinuddin Bhuvian*(3), the question as to whether a dower debt under a registered instrument is governed by article 116 or by articles 103 and 104 is discussed at great length and all the authorities on the subject have been reviewed, and it was held by MOOKERJEE and RANKIN, JJ., that article 116 applied to such suits and that articles 103 and 104 would not apply when there is a registered instrument.

In *Husain Ali Khan v. Hafiz Ali Khan*(4), it was held by a Full Bench of the Allahabad High Court that a suit on a registered bond for the payment of money was governed by article 116. This view is followed in *Khunni v. Nasir-ud-din Ahmad*(5), and the subsequent decisions of the Allahabad High Court. A similar view was taken in *Ganesh Krishn v. Madhararar Ravji*(6), where it was held that a suit to recover a specific sum of money due on a registered bond or other written

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contract was a suit for compensation for breach of contract and fell within the meaning of article 116. In *Lalchand Nan Chand v. Narayan Hari*(1), it was held that article 116 applied to suits for debts or sums due on registered documents and *Ram Narain v. Kamta Singh*(2), was not followed. The same view was taken in *Dinkar Hari v. Chhaganlal Narsidas*(3). There the suit was to recover money on a registered document which was invalid as a mortgage for want of proper attestation and had therefore to be treated as a bond for the recovery of money on personal covenant. It was held that the case was governed by article 116 and not by article 66.

A contrary view was taken in *Ram Narain v. Kamta Singh*(2), and this case was followed in *Jaggi Lall v. Sri Ram*(4), but this view was not approved by their Lordships of the Privy Council in *Tricomdas Cooverji Bhoja v. Gopinath Jin Thakur*(5).

The decision of their Lordships of the Privy Council in *Tricomdas Cooverji Bhoja v. Gopinath Jin Thakur*(5), puts the applicability of article 116 to cases of registered bonds for payment of ascertained sums of money beyond controversy. The suit arose out of a registered lease deed in respect of certain coal lands which provided that the lessee should pay a minimum royalty of Rs. 4,000 per annum by four equal instalments subject to certain conditions which it is unnecessary to refer to. A suit was filed to recover the royalties due under this document. The plea of limitation was raised as the claim covered the rent due for more than three years. The High Court held that the whole amount claimed was recoverable as the case fell within article 116 of

(1) (1891) I.L.R., 18 Cal., 506.

(3) (1922) 27 C.W.N., 210.

(5) (1881) I.L.R., 4 All., 255.

(2) (1922) I.L.R., 50 Cal., 258.

(4) (1881) I.L.R., 3 All., 600.

(6) (1891) I.L.R., 6 Bom., 75.

(1) (1913) I.L.R., 37 Bom., 656.

(2) (1903) I.L.R., 26 All., 189.

(3) (1913) I.L.R., 38 Bom., 177.

(4) (1912) I.L.R., 34 All., 434.

(5) (1916) I.L.R., 44 Cal., 759.

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the second schedule of the Limitation Act. On appeal to the Privy Council, their Lordships upheld the decision of the High Court. Lord SUMNER after referring to the Limitation Acts of 1859, 1871 and 1877 observes:

"Both these Acts draw, as the Act of 1859 had drawn, a broad distinction between unregistered and registered instruments much to the advantage of the latter. The question eventually arose whether a suit for rent on a registered contract in writing came under the longer or the shorter period. On the one hand it has been contended that the provision as to rent is plain and unambiguous, and ought to be applied, and that in any case 'compensation for the breach of a contract' points rather to a claim for unliquidated damages than to a claim for payment of a sum certain. On the other hand, it has been pointed out that 'compensation' is used in the Indian Contract Act in a very wide sense, and that the omission from article 116 of the words, which occur in article 115, 'and not herein specially provided for' is critical. Article 116 is such a special provision, and it is not limited, and therefore, especially in view of the distinction long established by these Acts in favour of registered instruments, it must prevail. There is a series of Indian decisions on the point, several of them in suits for rent, though most of them are in suits on bonds. They begin in 1880, and are to be found in all the Indian High Courts. In spite of some doubts, once only was it held in 1903, *Ram Narain v. Kamta Singh*(1), that in such a suit article 110 and not article 116 applied. Then in 1908, and in this state of the decisions, Act IX of 1903 replaced the Limitation Act of 1877 without altering the language or arrangement of the articles and in 1913, in *Lalchand Nan Chind v. Narayan Hari*(2) the High Court of Bombay held that, especially in view of this re-enactment, the current of decisions must be followed, and *Ram Narain's case*(1) must be disapproved. In the present case the High Court treated the matter as settled law in the same sense.

"Where the terms of a statute or ordinance are clear, their Lordships have decided that even a long and uniform course of judicial interpretation of it may be overruled, if it is contrary to the meaning of the enactment. *Pate v. Pate*(3). Such is

(1) (1903) I.L.R., 28 AL., 138.

(2) (1913) I.L.R., 37 Bom., 656.

(3) (1915) A.C., 1100.

not the case here. However arguable the construction of Act XV of 1877 may have been when the matter was one of first impression, it certainly cannot be said that the construction, for which the appellant argues, was ever clearly right. On the contrary, their Lordships accept the interpretation so often and so long put upon the statute by the Courts in India, and think that the decisions cannot now be disturbed."

Turning to mortgages, it is difficult to see how if a claim for arrears of rent on a registered bond can fall within article 116, a claim for money due on a personal covenant in a mortgage document would not equally be governed by article 116.

On this question again there has been a uniform course of decisions. It has been held by all the High Courts that where article 132 applies to a claim to enforce payment of money charged on immovable property by a sale of that property, article 116 governs a case where the suit is to recover the deficiency arising out of such sale. In *Rama Rao v. Veda Ayyar*(1), it was held that a registered mortgage-deed which was inoperative as against the land comprised in the mortgage was good as regards the personal covenant to pay the mortgage money and enabled the mortgagee to sue for it within six years as provided by article 116 of the Limitation Act. I may also refer to *Chengalamma Garu v. Veeraraghava Naidu*(2), where a similar view was taken by myself and REILLY, J., and to *Rathnasami v. Subramania*(3), where it was held that article 116 applies to a suit to recover a mortgage debt due on a registered bond (see the observations of Sir ARTHUR COLLINS, C.J., and MUTHUSWAMI AYYAR, J., at page 59). In *Unichaman v. Ahmad Kutti Kayi*(4), it was held by SUBRAHMANYA AYYAR and BENSON, JJ., that a suit to recover money lent on a kanom which they treated as

(1) (1922) I.L.R., 48 Mad., 435.

(3) (1887) I.L.R., 11 Mad., 56.

(2) (1928) 55 M.L.J., 508.

(4) (1897) I.L.R., 21 Mad., 242.

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usufructuary mortgage owing to the mortgagor's failure to put the mortgagee in possession, was governed by article 116.

The same view has been taken by the Calcutta High Court in a series of cases. In *Miller v. Runganath Moulick*(1) it was held that a claim to recover money due on a personal covenant in a mortgage bond was not governed by article 132 but by article 116. This case was referred to with approval by their Lordships of the Privy Council in *Ganesh Lal Pandit v. Khetra Mohan Mahapatra*(2), which I shall refer to later on. In *Joginee Mohun Chatterjee v. Bhoot Nath Ghosal*(3), it was held by AMEER ALI, J., that where a deed of mortgage is ineffectual owing to registration by a Registrar having no jurisdiction over the property, the liability on the personal covenant is governed by article 116. The learned Judge, after finding that the Sub-Registrar had no jurisdiction over the property observes,

"If I am right in that conclusion, it follows that the document cannot take effect as a mortgage deed; but, as it is registered, although the suit has been brought more than three years after the date of the execution, the claim is not barred as was contended for by the defendant's counsel.

"In fact there is a uniform course of decisions in all the High Courts that article 116 of the Limitation Act would be applicable to a mere money claim based on a registered bond, and not the general article 120."

In *Rahmat Karim v. Abdul Karim*(4), it was held by Sir FRANCIS MACLEAN, C.J., and HOLMWOOD, J., that article 116 applies to personal covenant to pay under a registered deed of mortgage. A similar view was taken in *Raja Ram Narain Singh v. Odindra Nath Mukerjee*(5).

(1) (1885) I.L.R., 12 Cal., 389.

(3) (1902) I.L.R., 29 Cal., 654.

(2) (1926) I.L.R., 5 Pat., 585.

(4) (1907) I.L.R., 34 Cal., 672.

(5) (1913) 17 C.W.N., 369.

The Allahabad High Court has also taken the same view in a series of cases. In *Naubat Singh v. Indar Singh*(1), it was held that a suit by a mortgagee to recover money due on a registered mortgage bond is governed by article 116 of the Limitation Act. The observations of the learned Judges at page 204 are clear. In *Collector of Mirzapur v. Dewan Singh*(2), a suit to recover money due on a registered mortgage bond payable in instalments was held to be governed by article 116. In *Shib Dayal v. Meharban*(3), a Full Bench of the Allahabad High Court accepted the view that a suit on a personal covenant in a registered mortgage bond was governed by article 116. The learned Judges observe at page 36,

"In fact there is a uniform course of decisions in all the High Courts that article 116 of the Limitation Act would be applicable to a mere money claim based on a registered bond, and not the general article 120."

It thus appears that all the High Courts have held that article 116 of the Limitation Act governs suits to recover money on a personal covenant in a registered bond or deed of mortgage. I have referred to the decisions in detail and to the views of the eminent judges of the various High Courts as it is argued that these decisions have been overruled by the decisions of their Lordships of the Privy Council in *Ram Din v. Kalka Prasad*(4) and *Ganesh Lal Pandit v. Khetra Mohan Mahapatra*(5), which compel us to hold that, notwithstanding the current of authority, the three years' rule applies even in cases of registered mortgage documents. I am of opinion that neither of these cases is authority for the view contended for.

(1) (1890) I.L.R., 13 All., 200.

(3) (1922) I.L.R., 45 All., 27.

(2) (1908) I.L.R., 30 All., 400.

(4) (1884) I.L.R., 7 All., 502.

(5) (1926) I.L.R., 5 Pat., 585.

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In *Ram Din v. Kalka Prasad*(1), the contention was that article 132 applied even to cases where the claim was on the personal remedy. In that case the mortgage deed was dated the 25th of January 1870 and the amount was repayable on the 13th of June of the same year. There was another mortgage for Rs. 900 and both the deeds contained a personal covenant to pay. Suits were instituted on the 21st and the 23rd of August 1880 on the two mortgage deeds. In both the suits the contention was that no decree can be passed against the defendant personally as more than six years had elapsed from the date of the execution of the bonds. The Subordinate Judge upheld the contention and passed a decree only for the sale of the mortgage property which was governed by article 132 of the Limitation Act. The District Judge reversed the decision of the Subordinate Judge and held that article 132 applied both to the remedy by sale and the personal remedy. But the High Court reversed the decision of the District Judge and upheld the decision of the Subordinate Judge. The argument in the Privy Council was that article 132 applied to both the remedies, and this was negatived by their Lordships of the Privy Council. Their Lordships at page 505 observe,

"A period of nearly ten years elapsed from the time at which the mortgage money with interest became payable before the suit was instituted. The question submitted for their Lordship's consideration is whether the lesser period of limitation, three or six years as the case may be, has barred the personal remedy against the mortgagor even though the mortgage remains in full force against the mortgage property."

It is significant that their Lordships use the expression "three or six years as the case may be" which obviously has reference as to whether the document is registered or not. Then their Lordships go on

(1) (1884) I.L.R., 7 All., 502.

to consider the effect of article 132. Later on their Lordships refer to six years' limitation with regard to suits on foreign judgments and some compound registered securities. Their Lordships were dealing with the Limitation Act IX of 1871 and I can see nothing in this decision which is authority for the view that even as regards registered mortgages the period of limitation is three years. The suit was filed 10 years after the cause of action arose and the only contention was that article 132 applied and gave the plaintiff a period of 12 years even as regards personal remedy. And it was this argument that was repelled by their Lordships.

Ganesh Lal Pandit v. Khetra Mohan Mahapatra(1), was also a case where a suit on a mortgage was instituted 10 years after the debt became payable, and there was no question as to whether the three or six years rule applied as in either view the claim was over six years. The contention there also was that article 132 applied. The judgment was delivered by Mr. AMEER ALI and the statement in the judgment that

"In the case of *Ramdin v. Kalka Prasad*(2), it was held by the Judicial Committee that when a mortgagee sues on a personal covenant to make the mortgagor responsible for any deficiency in the realization of the mortgage debt out of the mortgaged properties, the claim would be barred in three years" is with all respect too wide if it is taken to include both unregistered and registered mortgages. As I pointed out, their Lordships in *Ram Din v. Kalka Prasad*(2), used the expression "three or six years as the case may be".

I may also point out that their Lordships of the Privy Council refer to with approval *Miller v. Runga Nath Moulick*(3), and the concluding portion of the passage which they cite from the judgment of the

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(1) (1926) I.L.R., 5 Pat., 585.

(2) (1884) I.L.R., 7 All., 502.

(3) (1885) I.L.R., 12 Cal., 389.

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Calcutta High Court is to the effect that the personal liability has become barred as the suit was commenced more than six years after the accrual of the cause of action. The question was not whether article 66 or article 116 applied but whether article 132 applied as the suit was filed beyond the period provided for both by article 66 and article 116. It also appears from the statement of facts as set out in the judgment that the mortgage document was not executed in compliance with the provisions of the Registration Act. It appeared that the mortgagor Suryamani executed a power-of-attorney in favour of one Lakhan on the 29th July 1884 to execute and register the mortgage deed and also a deed of sale and that it was registered on the 29th July and that the mortgage and sale were executed on the 23rd July. Their Lordships of the Privy Council after referring to section 32 of the Registration Act agreed with the High Court in thinking that the sale deed was not validity executed. They also agreed with the High Court in thinking that

"The principal mortgage purporting to be executed by Suryamani was not executed in compliance with the provisions of law so as to make it binding on Suryamani."

I think that these facts show that the mortgage document in question was not properly registered and so was to be treated as an unregistered document and if this is so, article 66 would be the article to be applied.

I may also point out in this connection that their Lordships have in two cases before them held that the six years rule was applicable in cases of registered documents for payment of money. In *Kameswar Pershad v. Rajkumari Ruttan Koer*(1), the suit was to recover money due on a mortgage bond executed on the 1st of March 1872 by one Rani Asmedh Koer whereby the money

(1) (1892) I.L.R., 20 Cal., 79.

was repayable in September 1875. She surrendered her estate to one Run Bahadur Singh on condition that he would pay her an allowance for maintenance and pay off her liabilities. A suit was filed by the mortgagee against the Rani and Run Bahadur Singh on the mortgage bond and it was held that the mortgage bond was not binding on Run Bahadur Singh. There was prior litigation which went to the Privy Council. On the 13th of January 1887 the appellant instituted a suit to have him declared liable personally on the agreement between himself and the Rani to pay her debts, the contention being that the case was governed by article 132. Lord MORRIS observes :—

"The first objection taken to the suit was that it was barred by the law of limitation.

"*Prima facie*, this would be obvious, for the bond was by its terms made payable in the month of September 1875, whereas the right to sue the defendant for a personal debt would be limited to six years, and the present suit was not commenced until the month of January 1887, an interval of over 11 years. The appellant, however, alleges that he comes within the limitation applicable to a charge on immovable property, which would be 12 years; if he is right in that contention, the suit, being instituted 11 years and some months afterwards, is not barred.

"But it is necessary for the appellant to satisfy this Board that the charge upon the estate was one which was binding upon it and, bearing in mind the facts of the earlier suit, and what was said by the Board in that case, their Lordships are not satisfied that it was so binding in fact. In this view, the period of six years, and not the period of 12 years, applies in this case, and the suit is consequently barred."

In *Beti Maharani v. The Collector of Etawah*(1), the suit was by the plaintiff as the assignee of a registered bond. Lord HOBHOUSE in delivering the judgment of the Board observes

"This appeal raises questions under the Indian Limitation Act, 1877. The suit is brought on a bond for Rs. 7,000

(1) (1894) I.L.B., 17 All., 198.

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executed on the 20th June 1876 by Lala Laik Singh, whose estate, is now under the management of the Court of Wards, in favour of the firm of Gopalji Kishen Das. The plaintiff, who is now appellant, is assignee of the bond. The defendant, the Collector of Etawah, represents the Court of Wards. The debt was made payable on the 1st November 1876. Nothing has been paid on it. The suit was brought on the 6th November 1888, more than 12 years after the date of payment. The term of limitation is six years; so that the plaintiff has to prove circumstances which interfere with this running of time."

Then His Lordship deals with the various circumstances and holds that those circumstances were not made out.

I have set out all the cases in detail and it seems to me that on the authorities as they stand the law is clear that the limitation is six years and that it would require a clear pronouncement of the Lordships of the Privy Council overruling the long course of decisions as to mortgages to enable me to hold that the period of limitation applicable is three years under article 66.

I do not think that the two cases *Ganesh Lal Pandit v. Khetra Mohan Mahapatra*(1), and *Ram Din v. Kalka Prasad*(2), contain any such clear pronouncement of their Lordships of the Privy Council. On the contrary I do not think, having regard to the considerations, which I have already set out, their Lordships had in mind the question which is at present in issue, namely, the applicability of article 66 or 116.

I would answer the reference by stating that the period of limitation is governed by article 116 where the claim is to recover money due on a personal covenant contained in a deed of mortgage.

COUTTS TROTTER, C.J.—I agree.

PAKENHAM WALSH, J.—I agree.

N.R.

(1) (1926) I.L.R., 5 Pat., 585.

(2) (1884) I.L.R., 7 All., 502.

APPELLATE CIVIL—FULL BENCH.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Ramesam and Mr. Justice Pakenham Walsh.*

VEERAPPA CHETTIAR (PLAINTIFF), APPELLANT,

v.

SUBRAMANIA AYYAR AND OTHERS (DEFENDANTS),
RESPONDENTS.*

1928,
September 4.

Mortgage-bond—Attestation—Transfer of Property Act (IV of 1882), sec. 59, Acts XXVII of 1926, X of 1927 and XII of 1927—Retrospective effect—Indian Registration Act (XVI of 1908), ss. 58 and 59—Endorsement by Sub-Registrar—Signature of Sub-Registrar and identifying witnesses, whether sufficient attestation under the above Acts—Construction of the Acts.

Acts XXVII of 1926, X of 1927 and XII of 1927, relating to the attestation of certain documents, are retrospective in their nature, so as to apply to documents executed on a date prior to their coming into force.

The signatures of the Registering Officer and of the identifying witnesses, affixed to the registration endorsement under sections 58 and 59 of the Registration Act (XVI of 1908), are a sufficient attestation within the meaning of section 59 of the Transfer of Property Act and its subsequent amending Acts.

APPEAL against the decree of the Court of the Subordinate Judge of Negapatam in Original Suit No. 14 of 1921.

The plaintiff sued to recover a sum of money due on account of dealings, had by the plaintiff with the defendants 1 and 2, and claimed to recover the amount personally and on the liability of certain properties given as security under a registered security bond, dated 25th April 1924. The bond was not attested by two witnesses; it was written by one of the executants and attested by only one attesting witness. The property was purchased by defendants 3 to 6 in execution of a decree against defendants

* Appeal No. 235 of 1924.

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1 and 2. The purchasers contended that the security bond was invalid for want of attestation by two witnesses. The Subordinate Judge held that the security bond was invalid for want of due attestation, dismissed the suit against the purchasers in respect of the property, and passed a money decree against the defendants 1 and 2, who were the debtors. The plaintiff preferred this appeal.

The appeal originally came on for hearing before their Lordships (The CHIEF JUSTICE and Mr. Justice SRINIVASA AYYANGAR) who passed the following order, calling for findings on three issues. The order was as follows:—

ORDER.

Before determining the various questions of law that have been argued in this appeal it seems to us that it is necessary that findings should be recorded and sent up by the lower Court with regard to the following matters:—

1. Whether the Sub-Registrar who registered the instrument, Exhibit A in the case, made his signature in the registration endorsement referring to the admission of execution by the executants of the document, in the presence of the executants?

2. Whether the witnesses who identified the executants before the Sub-Registrar were present when such admission of execution was made by the executants?

3. Whether they or either of them made their signature in the presence of the executants?

Time for return of the findings is two months.

Ten days are allowed for objections

In compliance with the above order, the Subordinate Judge sent up the following findings:—

On the first issue he found that the Sub-Registrar who registered Exhibit A made his signature in the registration endorsement referring to the admission of execution by the executants of the document in the presence of the executants; on the second issue, he found that the witnesses who identified the executants of Exhibit A before the Sub-Registrar were present when

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the admission of execution of that document was made by the executants; and, on the third issue, he found that both the identifying witnesses made their signatures in the presence of the executants of Exhibit A.

On receipt of the findings, the appeal came on for hearing before the learned CHIEF JUSTICE and ODGERS, J., who made the following Order of Reference to a Full Bench:—

ORDER OF REFERENCE TO A FULL BENCH.

(Delivered by COUTTS TROTTER, C.J.).—This appeal was argued before Mr. Justice SRINIVASA AYYANGAR and myself and we asked for findings on three points. The findings have come to hand, but it is pointed out by the learned vakils in the case that a point of law confronts us *in limine*, the disposal of which might affect the appeal so as to render discussion of any subsidiary points unnecessary. The points are of considerable importance and relate to the position of a Registration Officer as a witness to a document which comes before him in his official capacity and to which he affixes his signature. There is direct authority in Patna for the position taken up by the appellant, the case of *Sarada Prasad Tej v. Triguna Charan Roy*(1). The decision in that case has been gravely doubted by Mr. Justice CARR in *S.M.A.R.A.L. Firm v. R.M.M.A. Firm*(2). The opinion of the Patna High Court is also supported in *Radha Mohun Dutta v. Nripendra Nath Nandy* (3). The question is one of importance and is likely to arise constantly, especially since the definition of "attestation" in the amending Act. It is one that is very likely to recur and one of the questions that will arise will be as to the effect of the amending Acts with their new definition of "attestation" which did not exist in the old Transfer of Property Act. In these circumstances, we think it best to refer the following questions to a Full Bench:—

1. Whether Acts XXVII of 1926, X of 1927 and XII of 1927 are retrospective in their nature so as to apply to documents executed on a date prior to their coming into force?

(1) (1922) I.L.R., 1 Pat., 300.

(2) (1927) I.L.R., 5 Rang., 772.

(3) (1927) 47 C.L.J., 118.

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2. Whether the signatures of the Registering Officer and of the identifying witnesses affixed to the registration endorsement under sections 58 and 59 of the Indian Registration Act amount to sufficient attestation within the meaning of section 59 of the Transfer of Property Act read with the aforesaid amending Acts?

3. Consequently, whether or no Appeal No. 170 of 1925 was rightly decided?

ON THIS REFERENCE—

T. V. Venkatarama Ayyar (with *T. V. Ramanatha Ayyar*) for appellant.—“Attestation” is defined in section 2 of Act XXVII of 1926 in the same terms as in the Indian Succession Act. The Privy Council held in *Shamu Patter v. Abdul Kadir Ravuthan* (1) that the definition in the Indian Succession Act did not apply to attestation within the meaning of the Transfer of Property Act. It is true that there is no express provision in Act XXVII of 1926, making the definition of attestation retrospective in operation. It is still retrospective, even without express mention, as it is declaratory in its nature. When an Act is passed to define a word in another Act, it is necessarily retrospective in its operation. The decision of the Full Bench in *Girja Nandan Kelwar v. Hanuman Das Marwari* (2) by a majority of three Judges to two held that the Act XXVII of 1926 was not retrospective. In this Court, the decision of PHILLIPS and ODGERS, JJ., in *Palaniappa Chettiar v. Rajagopala Pandarathar* (3) led to this reference. The High Courts of Rangoon, Bombay and Calcutta hold that the Act is retrospective, but the Allahabad and Madras High Courts (in the cases referred to) hold that the Act is not retrospective; see *Yacub Khan v. Guljar Khan* (4), *S.M.A.R.A.L. Firm v. R.M.M.A. Firm* (5), *Radha Mohun Dutta v. Nripendra Nath Nandy* (6).

Second point.—The signature of the Sub-Registrar and attestation of the identifying witnesses before the Sub-Registrar are sufficient attestation under the Act (XXVII of 1926); see *Radha Mohun Dutta v. Nripendra Nath Nandy* (6).

T. V. Muthukrishna Ayyar for respondents.—The Acts in question have no retrospective operation; Act XII of 1927 has a saving clause; see *Girja Nandan Kelwar v.*

(1) (1912) I.L.R., 35 Mad., 607.

(3) (1928) M.W.N., 425.

(5) (1927) I.L.R., 5 Rang., 772.

(2) (1927) I.L.R., 49 All., 26.

(4) (1928) I.L.R., 52 Bom., 219.

(6) (1927) 47 C.L.J., 118.

Hanuman Das Marwari (1), *Nepra v. Sayer Pramanik* (2). On the second point (attestation by and before the Sub-Registrar), it is only the Calcutta High Court that holds it sufficient attestation. Both attestation and registration are necessary for a mortgage deed. The attestors must attest as witnesses. They must vouch for the execution of the document by the executants. Their capacity must be as attesting witnesses. The Sub-Registrar or scribe, or consenting party is not an attesting witness. If a person in some other capacity signs a document, he is not an attesting witness. The signatures of the Sub-Registrar and the identifying witnesses were made for purpose of sections 58 and 59 of the Indian Registration Act. It cannot be invoked for the purpose of attestation under the Transfer of Property Act. The net result of the operation of the three Acts (XXVII of 1926, X of 1927 and XII of 1927) is to leave the requirements of attestation as laid down by the Privy Council before these Acts were passed.

OPINION.

COUTTS TROTTER, C.J.—My brother ODGERS and I referred this case to a Full Bench rather from a desire to have an authoritative ruling for the Courts of this Presidency than from any real doubt we had as to the right answers to the questions that we referred.

The answers to the questions are as follows:—

(1) The Acts are retrospective. We should have thought that Acts XXVII of 1926 and X of 1927 showed a clear intention that they were to be regarded as retrospective, but the terms of Act XII of 1927 preclude further discussion.

(2) The signatures of the Registering officer and of the identifying witnesses affixed to the registration endorsement are a sufficient attestation within the meaning of the Transfer of Property Act and its subsequent amending Acts. The argument against this conclusion was that the signatures were made *alio intuitu*,

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(1) (1927) I.L.R., 49 All., 25 (F.B.). (2) (1928) I.L.R., 55, Cal., 67.

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to satisfy the requirements of the Registration Act, and cannot therefore be invoked in aid for another purpose, viz., attestation under the Transfer of Property Act, though in fact all the conditions laid down by the latter Act are fulfilled. The Registering officer and the identifying witnesses had exactly the same duty imposed upon them by the Registration Act as would have rested upon them as attesting witnesses under the Transfer of Property Act, and that duty they discharged. We think that this argument is, at its best, too artificial to prevail, and we agree with *Sarada Prasad Tej v. Triguna Charan Ray*(1), and *Radha Mohun Dutta v. Nripendra Nath Nandy*(2) in rejecting it.

(3) As Appeal No. 170 of 1925 has not been reported, it is unnecessary to express any opinion on the correctness of the decision.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Venkatasubba Rao.

T. RAJU (PLAINTIFF), APPELLANT,

v.

NAGAMMAL AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindu Law—Adoption by widow—Ante-adoption agreement by natural father giving absolute estate in a reasonable portion of the estate to the widow—Binding nature of the agreement on the adopted son.

An agreement by which a Hindu widow proposing to adopt a son stipulates with the boy's natural father for a portion of

(1) (1922) I.L.R., 1 Pat., 300.

(2) (1927)*47 C.L.J., 118.

*Appeal No. 82 of 1924.

her husband's estate being settled upon her for her absolute use and enjoyment with powers of alienation is valid and binding on the son on adoption, if the agreement is fair, reasonable and beneficial to him; *Krishnamurthi Ayyar v. Krishnamurthi Ayyar*, (1927) I.L.R., 50 Mad., 508 (P.C.), explained and applied.

APPEAL against the decree of the Court of the Subordinate Judge of Mayavaram in Original Suit No. 25 of 1923.

The following facts are taken from the judgment of RAMESAM, J. :—

“The facts of this case may be briefly stated as follows: One Kothandarama Ayyar of Pungavur (Tanjore district) died on 25th April 1905 leaving two daughters (1) Nagammal, first defendant, who is a widow and (2) Gnanambal, his adoptive mother Valambal, and his widow Parvathi Ammal. Prior to his death he had executed a will, dated 20th September 1902, Exhibit XIII (2) a will, dated 8th September 1903, of which we have no record, (3) a will, dated 29th October 1903, cancelling the previous will (Exhibit VI) and (4) a last will, dated 13th March 1905 (Exhibit A) in which all previous wills were cancelled. Along with the will of September 1903 he executed a deed of settlement, dated 3rd September 1903, but it was never registered and therefore never came into operation. Under his last will (Exhibit A) he gave power to his widow to adopt either a son of his daughter Gnanambal provided she begets a son before January 1908, or a son of any one of his nephews, T. Subrahmanya Ayyar or T. Venkatarama Ayyar. He made certain dispositions to come into effect in the event of either contingency. At the time of his death (viz., 25th April 1905) Gnanambal had no son. The widow Parvathi Ammal resolved upon adoption immediately after his death. Necessarily she had therefore to adopt a son of one of the testator's nephews named in the will. She resolved

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to adopt the son of Subrahmanya Ayyar and an agreement was executed settling the terms on which adoption was to be effected. This is Exhibit I, dated 26th April 1905. The boy was adopted on the same date but the deed of adoption evidencing it (Exhibit II) was executed on 2nd May. The present suit is filed by the adopted son T. Raju praying for a declaration of his title to the suit lands, namely, the lands of the village of Nallathakudi which formed part of the property of the deceased Kothandarama Ayyar. Parvathi Ammal died on 2nd July 1918 and Valambal died on 10th June 1917. The present suit was filed on 30th August 1919. The Subordinate Judge who tried the suit dismissed it on the ground that the adopted son was not entitled to the suit properties relying on the terms of Exhibit I. The plaintiff appeals."

Further facts appear from the judgment.

S. Varadachari (with *S. V. Venugopalachari*) for appellants.—Exhibit A is the last will by which a life-interest alone is given to the widow. On the widow's death the adopted son will succeed to the whole estate. The question is whether Exhibit I the ante-adoption agreement by which the widow got from the natural father of the boy an absolute estate in some of the lands belonging to the deceased testator are valid and binding on the boy on adoption. Though this agreement has been found to be fair, reasonable and beneficial to the boy it is not binding on the adopted boy according to the dictum in *Krishnamurthy Ayyar v. Krishnamurthy Ayyar*(1), which expressly prohibits an agreement granting an absolute estate in any portion of the estate either on the adoptive mother or on strangers, though the grant of a life-estate to the widow in the whole of the deceased's estate may be valid by custom. All the previous decisions to the contrary, e.g., *Visalakshi Ammal v. Sivaramier*(2), must now be taken to have been overruled.

T. V. Ramanathan, K. S. Venkataramani and *S. Panchapagesa Ayyar* for the respondent.—The Privy Council case referred

to dealt with a case of gift of an absolute estate to strangers and not to the widow. What is prohibited by the dictum therein is the grant of an absolute estate in the whole estate of the deceased to the widow and not in a reasonable portion. This would be clear from the Privy Council upholding the grant of a life-estate to the widow in all the properties. Grant of an absolute estate in a reasonable portion is not prohibited. *Visalakshi Ammal v. Sivaramier*(1) is not overruled by the Privy Council and is still good law.

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JUDGMENT.

RAMESAM, J., after stating the facts above extracted, continued:—Two points have been argued before us in appeal: (1) What are the terms of the deed of settlement, dated 3rd September 1903, bearing on the suit lands and (2) how far does Exhibit I bind the plaintiff? It becomes necessary to decide the first question, because the terms of the deed of settlement were incorporated into Exhibit I by reference to it, and though the deed of settlement itself was not registered, we have yet to ascertain its contents. The document itself is not forthcoming having been filed for refund of stamp duty and never taken back. [His Lordship then discussed the evidence and concluded that the whole of the suit lands (Nallathakudi lands) were given by the settlor to his wife for her absolute use and enjoyment after the life-estate in half of those lands in favour of his mother Valambal and that that arrangement was adhered to in Exhibit I. His Lordship also found that the wife disposed of the suit properties by means of a will in favour of the defendants.]

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The second question that arises is how far is Exhibit I binding on the plaintiff. As we have seen, the terms of the settlement are incorporated in Exhibit I. It is conceded on all hands that, but for Exhibit I, the

(1) (1927) I.L.R., 50 Mad., 508 (P.C.). (2) (1904) I.L.R., 27 Mad., 577 (F.B.).

(1) (1904) I.L.R., 27 Mad., 577 (F.B.).

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plaintiff is entitled to the suit properties on the construction of Exhibit A. The only question that now remains is whether Exhibit I is binding upon the plaintiff. The Subordinate Judge held that it was binding on the plaintiff with reference to the then case law on the subject. At the time when the Subordinate Judge decided the case he had not the benefit of the latest decision of the Privy Council in *Krishnamurthi Ayyar v. Krishnamurthi Ayyar* (1) and we have now to decide the case in the light thrown on the question by this decision of the Privy Council. That decision modified the judgment of the Madras High Court reported in *Krishnamurthi Aiyar v. Krishnamurthi Aiyar* (2). Up to the decision of the Privy Council, according to the law as understood in India and specially as laid down by decisions of the Madras and Bombay High Courts, an agreement brought about at the time of adoption by the adoptive father acting on behalf of the adopted son may be binding on him if it is fair and beneficial to him though it cuts down part of the interest which he would get but for such agreement and would not be binding on him if it is not fair and beneficial. The decision of the Judicial Committee has now modified this view. Viscount DUNEDIN who delivered the judgment of the Board referred at length to the Bombay and Madras cases. The noble Lord summed up the Bombay cases thus:

"As a question of actual decision, the Courts have always upheld the grant to the widow of her interest for life. But when the gift is to outsiders it has been held invalid. The reasons given have varied."

Then the noble Lord summed up the Madras cases thus:

"As regards decisions, the general result has been to validate the arrangements so far as provision is made for the

(1) (1927) 1 L.R., 50 Mad., 508 (P.C.). (2) (1924) 49 M L.J., 252.

widow just as in Bombay . . . As regards reasons, again they vary . . ."

Then the Board's conclusion is stated thus:—

"They are of opinion that there is such a consensus of decision in the cases . . . that they are fairly entitled to come to the conclusion that custom has sanctioned such arrangements in so far as they regulate the right of the widow as against the adopted son. It seems part of the custom that one *sine qua non* of such an arrangement should be the consent of the natural father.

"The mere postponement of his interest to the widow's interest, even though it should be one extending to a life interest in the whole property, is not incompatible with his position as a son. Their Lordships are, therefore, prepared to hold that custom sanctions such arrangements.

"As soon, however, as the arrangements go beyond that, i.e., either give the widow property absolutely or give the property to strangers, they think no custom as to this has been proved to exist and that such arrangements are against the radical view of the Hindu Law."

I think, as I understand their Lordships' judgment, the effect of it seems to be this: (1) If an agreement provides a gift to strangers it is void, (2) If the arrangement confers advantages on the widow, it will continue to be valid if it is fair and beneficial as before, and invalid, if unfair. As illustrative of the last proposition, even if the agreement confers a life interest on the widow in the whole property and the adopted son's enjoyment begins after the death of the widow, it will still be regarded as fair and valid. If the whole property is given absolutely to the widow, it will be regarded as unfair.

I infer from the above summary that if absolute interest is given to the widow in some items of the property which do not amount to practically the whole of the property, or in other words, if a substantial part of the property is still left for the adopted son, the arrangement may still be regarded as fair and beneficial and therefore may be valid. I do not understand the

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last sentence which I quoted from the Privy Council judgment to lay down that if a very small item of property is given absolutely to the widow and if the adopted son gets very large property still the whole disposition will be invalid. Such a view seems to be against the reasons given by their Lordships and would be anomalous comparing it with the other illustrations referring to the gift of life interest in the whole property to the widow. The word "property" in the last sentence, I think, refers to the whole of the property. In construing that sentence, one must remember that the actual case before their Lordships related to a gift to strangers and this they held to be invalid. They were not considering in detail particular cases of gifts to the widow. Only one case was given as illustration. On this part of the case I have had the advantage of reading my brother's judgment and I entirely agree with his view of the decision of the Privy Council and also his view on the question whether the agreement Exhibit I can be regarded as fair and beneficial to the adopted son which is also that of the trial Judge.

The result is that the appeal fails and is dismissed with costs.

The defendants have not given up one of the points they raised in the first Court, i.e., that there was an oral disposition of the suit lands by the testator after Exhibit A. But we found it unnecessary to hear them on this point.

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VENKATASUBBA RAO, J.—This is an appeal from a judgment dismissing the plaintiff's suit. He seeks to recover as the adopted son of one Kothandarama Ayyar, a village known as Nallathakudi from the latter's daughters, the 1st and 2nd defendants. Kothandarama Ayyar died on the 25th of April 1905 having executed a will (Exhibit A), dated the 13th March 1905. It is

unnecessary to state in any detail the terms of that will, beyond mentioning that the testator conferred by it upon his wife Parvathi, an authority to adopt. On the very day after the testator died, his widow adopted the present plaintiff as her son. Before the adoption was made, an arrangement was come to (Exhibit 1, dated the 26th of April 1905) regarding the enjoyment of certain properties and to that arrangement the natural father of the boy was an assenting party. Two questions are raised in the suit, first, a question of fact relating to the terms of this ante-adoption arrangement; secondly, a question of law regarding its validity.

The plaintiff bases his title on the will which bequeaths to him the village in question after the deaths of the testator's mother and widow, who were to enjoy it for their lives. The former died in 1917, the latter in 1918 and the suit was filed in 1919.

The suit is resisted on the ground that under the ante-adoption arrangement, Nallathakudi was given absolutely to the adoptive mother, who, before her death, made a will disposing of it in favour of her daughters, the defendants. As I have said, the first point to decide is a question of fact: Is it a part of the arrangement that Nallathakudi was to be taken absolutely by the testator's widow? The learned trial Judge upholding the contention of the defence, has found that, under the arrangement, Nallathakudi was given absolutely to her. My learned brother has dealt with that point fully and, for the reasons given by him, I agree in the conclusion arrived at by the lower Court.

This leads me to the consideration of the next question. Is the arrangement valid? The lower Court, applying the test laid down in the cases decided by this Court, has come to the conclusion that the agreement was fair and reasonable, that it was for the benefit of

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the adopted son and is therefore binding upon him. The argument for the appellant is, that the law on this point has since been declared by the Judicial Committee to be entirely different in *Krishnamurthi Ayyar v. Krishnamurthi Ayyar*(1). The point raised is thus of far-reaching importance and it is our duty to very carefully consider the scope and effect of the Privy Council decision. It is undoubtedly true that the case itself decides a narrow point, but the judgment contains a valuable exposition of the principles relating to ante-adoption agreements—an exposition to which the greatest weight must be attached.

The argument for the appellant may be shortly put thus. If the effect of the arrangement is to allow the adoptive widow to retain a life interest in the property, even though it may extend to the whole property, that arrangement is valid; but if a portion of the property, however small that portion may be, is allotted absolutely to the widow, that offends against the principle laid down by the Judicial Committee. To take a concrete case, if the property is worth a crore and the widow who, let us assume, is in her teens, makes the adoption, there is nothing in law to prevent her from having for her whole life at her absolute disposal, the entire income from this large property, which may amount to lakhs; but if a small fraction of this extent, say, a property worth Rs. 10,000, is allotted to her absolutely, that arrangement is bad, and cannot be upheld. This is, in short, said to be the effect of the *dicta* contained in the judgment. I am decidedly of the opinion that this contention is wrong.

To understand the decision correctly, we must first look at the facts of that case. The question there

(1) (1927) I.L.R., 50 Mad., 508 (P.C.).

raised was, whether the provisions of a will made by the adoptive father were valid by reason of an ante-adoption arrangement. By that will, certain lands were devised to persons “who were connections but were in no case within the degrees entitled to maintenance,” that is to say, some distant relations of the adoptive father. The suit was filed after the death of the testator by the legatees against the adopted son for the recovery of those lands. The case thus raised a question regarding persons “not within the degrees entitled to maintenance” and this distinction is of fundamental importance and is emphasized throughout the judgment. The opening paragraph refers to this important factor and several subsequent passages lay stress upon it. In summing up the Bombay cases, their Lordships draw a clear distinction between what the Courts did in regard to gifts to the widow of her interest for life and gifts made to outsiders. They point out that

“the Courts have always upheld the grant to the widow of her interest for life” whereas “when the gift is to outsiders it has been held invalid.”

Then again, when the effect of the Madras decisions is stated, similar language is used. Their Lordships say:—

“As regards decision, the general result has been to validate the arrangements so far as provision is made for the widow just as in Bombay.”

To quote a further passage, the same idea underlies the following remarks:—

“They are of opinion that there is such a consensus of decision in the cases with the exception of the case of *Jaganadha v. Papamma*(1) that they are fairly entitled to come to the conclusion that custom has sanctioned such arrangements in so far as they regulate the right of the widow as against the adopted son.”

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(1) (1892) I.L.R., 16 Mad., 400.

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This I consider to be the most essential part of the judgment. The antithesis is, between the right of the widow on the one hand, and on the other, the right of the "outsiders" or "strangers" or persons "in no case within the degrees entitled to maintenance." It must be borne in mind that the actual decision itself as I have already said, was in respect of outsiders, that is, those not entitled to maintenance.

In regard to gifts to widows, the matter stood thus: They were upheld by the Indian Courts, but the reasons on which they were so upheld were various. Their Lordships examine the soundness of these reasons and reject them as being totally opposed to principle. But — and this is significant — the result of the decisions was accepted however, not on the ground that they were based on sound reasoning, but, as it might be inferred from their all but uniform course, that by Hindu custom and usage the law was modified to the extent of sanctioning arrangements "in so far as they regulate the right of the widow as against the adopted son." The arguments of SUBRAHMANYA AYYAR, J., in his referring order in *Visalakshi Ammal v. Sivaramier*(1), were clearly opposed to the opinion of the Full Bench expressed later in the same case. The Judicial Committee approves of the reasons mentioned by that learned Judge, but is not prepared to adopt at the present day his conclusion. There is no warrant for saying that the decision of the Full Bench, which was at that time regarded as of binding authority in Madras, was overruled by the Privy Council. Indeed, on the contrary, it is patent from their judgment, that this was the course which their Lordships were not prepared to, and did not, adopt. In this connexion, I may observe that

(1) (1904) I.L.R., 27 Mad., 577 (F.B.).

in the Full Bench case, though other reasons are given, reasons which must now be taken to be unsound, the ground of custom is specifically mentioned. BENSON, J., with whom the other Judges concurred, quotes from West and Buhler :

"Fair arrangements for the protection of the widow's interest during her life, are commonly made, and are always supported by the authority of the caste"

— a view which found favour with the Full Bench. What then is the effect of the Privy Council decision? It unequivocally holds that such arrangements cannot be upheld as give property to strangers; in other words, *Ganapati Ayyar v. Savitri Ammal*(1) is inferentially overruled, where it had been held that a disposition in charity by the adoptive father was binding: on the other hand, *Balakrishna Motiram v. Shri Uttar Narayan Dev*(2) is inferentially upheld where a gift by the adopting father in favour of a charity was by the High Court held bad. It may not be out of place to enquire why the Bombay High Court held that gift bad. The reason is contained in a passage in the judgment of HAYWARD, J., which has been cited by the Privy Council. And what is that reason?

"Agreements for reasonable provision for widows ought to be upheld as valid according to general custom modifying the strict terms of Hindu Law."

But, there is no reason to recognize the custom in support of a more general extension of the modification. This is precisely the view that the Judicial Committee itself has now taken. The point on which I wish to lay stress, I may again refer to in this connexion. In the judgment of HAYWARD, J., the words used are "agreements for reasonable provision for widows" without a distinction being made between an absolute gift and a life estate.

1) (1897) I.L.R., 21 Mad., 10.

(2) (1918) I.L.R., 43 Bom., 542.

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I am clearly of the opinion therefore, that in the matter of arrangements in favour of widows, the law has not been in the least disturbed. For determining their validity, the tests that were laid down in *Visalakshi Ammal v. Sivaramier*(1) must still be applied. Did the arrangement receive the consent of the natural father and was it a fair and reasonable one and for the minor's benefit? If these tests are satisfied, the Courts will uphold the arrangement; if not, they will not.

Mr. Varada Acharya for the appellant seeks support for his argument in the passage in the judgment of the Judicial Committee which reads thus :

"As soon, however, as the arrangements go beyond that, that is either *give the widow property absolutely* or *give the property to strangers*, they think no custom as to this has been proved to exist and that such arrangements are against the radical view of the Hindu Law."

If this sentence stood alone, it would doubtless support the contention that their Lordships were intending a contrast between a gift of a life estate, and an absolute gift, to a widow. But, can we disregard the tenor and the tendency of the whole judgment taken together, by laying undue stress on a stray word or an isolated phrase? The dangers that follow from such a course are quite apparent. For instance, take the following passage from the same judgment :—

"But the consensus of judgments seems to solve these two questions in this way—namely, that the consent of the natural father shows that it is for the advantage of the boy, and that the mere postponement of his interest to the widow's interest, even though it should be one extending to a life interest in the whole property, is not incompatible with his position as a son. Their Lordships are therefore prepared to hold that custom sanctions such arrangements."

(1) (1904) I.L.R., 27 Mad., 577 (F.B.)

Can it, on the strength of this passage, be contended that however unfair or unreasonable, an arrangement must in every case be upheld, on the ground that what is given to the widow is a mere life interest although it extends to the whole property? I think not. And again, on the strength of the same passage, can it be contended that the consent of the natural father has always the effect of validating an arrangement, irrespective of its being fair or not fair? These considerations show that what we must have regard to, is the judgment taken as a whole and understood reasonably and not merely a passage here or there taken out of its context.

The learned Subordinate Judge has come, on the evidence, to the conclusion that the arrangement assented to by the plaintiff's natural father was fair and *bona fide* and for the minor's benefit. I entirely agree in that view and shall shortly state my reasons. The Sub-Judge points out that if the plaintiff had remained in his natural family he would have been entitled, as it was then constituted, to properties worth about Rs. 20,000, whereas, in virtue of the adoption, he obtained an estate worth at least five times that value, that is, about a lakh. There is another fact to which I may call notice. Kothandarama Ayyar's intentions in regard to the village in question varied from time to time. He made a will (Exhibit 13) in 1902 devising the village absolutely to his wife in the case of her adopting one of his nephews—the event which has actually happened. In September 1903, he prepared a settlement deed whereby again the village was given absolutely to his wife. In October 1903, he made a second will (Exhibit VI) by which he confirmed the provision made in the settlement deed. Only by Exhibit A his last will, he made a disposition somewhat different in this respect, that is to say, he conferred only a life estate upon his widow.

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Thus we find that in the view of the testator a gift of this village to his wife, in the event that has happened, was not an unreasonable provision. He declared his intentions as I have shown on four occasions and on three out of them what he intended his wife to take was an absolute and not a mere life estate. Judged from any point of view, the arrangement seems to be a fair and reasonable one as the Sub-Judge has found and it must therefore be upheld.

I therefore agree that the appeal fails and it is dismissed with costs.

M.B.

APPELLATE CIVIL.

*Before Mr. Justice Ramesam and Mr. Justice
Venkatasubba Rao.*

JANAPAREDDI VENKATAREDDI
(FIRST CLAIMANT), APPELLANT,

v.

JANAPAREDDI ADINARAYANA RAO
(SECOND CLAIMANT), RESPONDENT.*

Land Acquisition Act (I of 1894), ss. 30 and 54—Reference to the Court of a Subordinate Judge under sec. 30 of the Act—Decision by Court as to person entitled to claim compensation—Subject-matter below Rs. 5,000—Decision, whether an award under Part III of the Act—Decree—Appeal, whether lies to High Court as from an award or to District Court as from a decree.

The decision of the Court of a Subordinate Judge upon a reference made to it under section 30 of the Land Acquisition Act, is not an award under Part III of the Act, but is a decree, and, if the subject-matter of the *lis* is below Rs. 5,000, an appeal from the decision lies to the District Court and not to the High Court under section 54 of the Act.

*Appeal Suit No. 109 of 1927.

Ramachandra Rao v. Ramachandra Rao, (1922) I.L.R., 45 Mad., 320 (P.C.), applied.

APPEAL against the order, dated 30th April 1926, of the Court of the Subordinate Judge of Vizagapatam in Original Petition No. 8 of 1925.

The Special Deputy Collector, Harbour Acquisition, Vizagapatam, having determined the amount of compensation for certain lands acquired, referred a dispute as to apportionment of the same between two rival claimants to the decision of the Sub-Court of Vizagapatam under section 30 of the Land Acquisition Act without himself deciding their claims. The amount of compensation in dispute was Rs. 1,349. The Subordinate Judge held that the two claimants were jointly entitled to the amount, and awarded a half-share of the same to each of them. The first claimant, claiming the entire amount for himself, preferred this appeal to the High Court as from an award under section 54 of the Act. The respondent took a preliminary objection that an appeal did not lie to the High Court as on an award, but only to the District Court as from a decree, as the subject-matter of the *lis* was below rupees five thousand.

Y. Suryanarayana for appellant.

G. Lakshminna for respondent.

JUDGMENT.

RAMESAM, J.—This is an appeal against the decision of the Subordinate Judge of Vizagapatam on a reference to him under section 30 of the Land Acquisition Act. The facts are as follow :—

The Special Deputy Collector, Harbour Acquisition, Vizagapatam, made his award on 18th January 1925. As to the apportionment of one of the amounts he awarded, there was a dispute between two claimants. Without deciding their claims he referred the matter to

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the Civil Court under section 30. The amount in dispute which was referred to the Subordinate Judge's Court was Rs. 1,349. A preliminary objection is raised by the vakil for the respondent that this appeal does not lie to the High Court but to the District Court of Vizagapatam. We think this objection is well-founded. After a reference under section 30 is made to the Civil Court, the decision of the Court cannot be regarded as an award under Part III of the Act. In the case reported in *Ramachandra Rao v. Ramachandra Rao*(1) their Lordships of the Privy Council observe that there are two perfectly separate and distinct forms of procedure contemplated under the Act and where there is a dispute as to the relative rights of the persons together entitled to the money the duty of the Collector is

"to place the money under the control of the Court, and the parties then can proceed to litigate in the ordinary way to determine what their right and title to the property may be. How the proceedings were commenced is a matter that is not material, provided that they were instituted in the manner that gave the Court jurisdiction, for they ended in a decree made by the High Court and appealable to this Board."

These observations show that a decision on a reference under section 30 was regarded as a decree and not as an award as then understood, and it attracted all the usual consequences of an appeal to the High Court and a further appeal to the Privy Council like all decrees of Subordinate Courts. That is, the view taken there was that it was a decree governed by the Code of Civil Procedure and the Civil Courts Act. If so, the subject-matter of the *lis* being only Rs. 1,349, the appeal from the Subordinate Judge does not lie to the High Court but only to the District Court, because the value is less than Rs. 5,000. This was the view taken by our

(1) (1922) I.L.R., 45 Mad., 320 (P.O.).

brothers, DEVADOSS and JACKSON, JJ., in S.R. No. 7968, etc., of 1927.

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I must allow the preliminary objection and direct the appeal memorandum to be returned for presentation to the proper Court. Costs will abide the result.

VENKATASUBBA RAO, J.—The short question to be decided is, is the decision of the Court under section 30 of the Land Acquisition Act an award within the meaning of that Act? If it is, an appeal lies to the Court under section 54; otherwise not. To answer this question, we must have regard to the scheme of the Act. If the Collector decides as regards the persons to whom the compensation is payable, but any of the claimants is dissatisfied with that decision, the person so dissatisfied may require the matter to be referred by the Collector for the determination of the Court. Section 18 (1) deals with such a reference. It runs thus:—

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"Any person who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested."

I have now referred to what happens when the Collector's award contains a decision in regard to the persons to whom the compensation is payable. The Act seems also to provide for a case where the Collector's award does not contain such a decision. Section 30 provides for that case. It is in these terms:—

"When the amount of compensation has been settled, under section 11, if any dispute arises as to the apportionment of the same or any part thereof, or as to the persons to whom the same or any part thereof is payable, the Collector may refer such dispute to the decision of the Court."

Here I must notice a slight inconsistency in the Act. Section 11 enacts that the Collector shall proceed to

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enquire *inter alia* "into the respective interests of the persons claiming the compensation" and that he shall make an award dealing also with the question of the apportionment of the amount awarded. But the Legislature seems to have overlooked that the word used in section 11 is "shall" and assumes in section 30 that the Collector has the option either to decide that question himself or to refer it to the decision of the Court. This defect in the Act does not materially affect the question before us. The reference in the present case was made under section 30 and the point we have to decide is, if the Court gives its decision on such a reference, is that adjudication an award or not? It seems to me that *Ramachandra Rao v. Ramachandra Rao*(1) contains a decisive ruling on the point and that we can no longer be guided by the earlier decisions of the Indian High Courts. It must be borne in mind that whereas Part III of the Act uses the word "award" to describe the adjudication of a Court, section 30 and similar sections carefully abstain from the use of that term. Is this a matter of no significance? In the case to which I have referred, Lord BUCKMASTER in his judgment says, that there is a sharp distinction between the two forms of procedure contemplated by the Act. One of them relates to the fixing of the amount of compensation and this alone is described as being an award. But a dispute between the persons claiming compensation, involving questions of title, is a separate and distinct form of procedure and a decision in regard to that, is not described as an award. It is unnecessary for me to enquire at present, whether when an award made by the Court under section 26 (Part III) contains an adjudication as to

(1) (1922) I.L.R., 45 Mad., 320 (P.C.).

title, that adjudication is or is not an award. What the necessary implications of the judgment of Lord BUCKMASTER in this respect are, I do not at present propose to consider; it is sufficient in this appeal to say that the decision of a Court on a reference under section 30 is clearly not an award. If it is not an award, it follows that an appeal to this Court does not lie under section 54.

I therefore agree in the judgment just pronounced by my learned brother.

K.R.

APPELLATE CRIMINAL.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
and Mr. Justice Pakenham Walsh.*

PEDDA TIRUMALIGADU AND ANOTHER (ACCUSED).*

1928,
August 14.

Sentence of death—Number of persons banding together for taking a man's life—Found guilty of murder—Court unable to find which accused delivered fatal blow—Appropriate sentence.

Where two or more persons band themselves together for the express purpose of taking a man's life and are found guilty of murder, the Court is not justified in refraining from passing a sentence of death, which would otherwise be proper, merely on the ground that it cannot find definitely which of the accused delivered the blow which is to be regarded as fatal.

CASE taken up in revision by the High Court calling upon the accused to show cause why the sentence of transportation for life passed on them by the Court of Session of the Kurnool Division in Calendar Case No. 63 of 1927 on its file should not be enhanced to one of death.

* Criminal Revision Case No. 411 of 1928 (Taken up No. 33 of 1928).

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C.J.*D. A. Krishna Variar* for accused.*Public Prosecutor* for the Crown.

JUDGMENT.

COUTTS TROTTER, C.J.—In this case two men who are brothers were tried for the murder of a man called Narsigadu on the 21st October last. The motive for the murder is plain enough. The elder brother, the first accused, had obviously been engaged in traffic in illicitly distilled arrack. The deceased man who was an official and not a mere intermeddler with other people's affairs gave information some time in September that the first accused was engaged in this illicit business. Thereupon the Sub-Inspector of Excise, Mr. Luke, searched the first accused's house and found in it quite a substantial quantity of illicitly distilled arrack. For that the first accused was prosecuted and convicted and the case was pending at the time of this man's murder. He disappeared on the afternoon of the 21st which was a Friday. The second accused is alleged to have had a separate sexual motive, but, in view of the fact that he and his brother were both seen on the scene of the murder standing by the dead man's body, it is not really necessary to go into that question. The little boy Kasigadu called as P.W. 9 gives a very clear story of what he heard and saw. He heard a gun shot on the Friday when he was grazing some cattle. He went in the direction of the place where he heard the shot fired and met the second accused's wife and put a question to her which she did not answer. He went on a little further and there he saw the deceased man lying in the bed of a channel covered with blood. Close by him was the second accused with a gun in his hand and behind the second accused stood the first. The boy had fever that night and when he went home he did not

report what he had seen to his parents. His explanation which the learned Judge entirely accepted was that, having seen the obviously murdered body of a *talaiyari* at the feet of these assassins, he was terrified as to what might happen to himself. But next day when it became the subject of discussion that this deceased man was missing he suggested to his parents that they should search the Edurla Vanka that was near. There this man's body was found. It had been horribly mauled and half eaten away by wild beasts so much so that when the surgeon made his post-mortem a day later it was found that practically all the intestines and many other parts of the body had been devoured. But enough was left to show this, that a bullet had gone through the body fracturing the sixth and seventh ribs on its way—and that bullet was afterwards found in the bed of the channel—also that the man's skull had been fractured, a fracture which was clearly caused by an axe which was found lying near his body and which apparently belonged to himself. The probability is he was shot first and then what was to be the *coup de grace* was a blow with the axe. It is reasonably clear—not that in the light of what I am about to say it matters very much—that it was probably one person who fired the shot and the other who gave the blows with the axe. On the boy's information when the police examined him these two men were arrested and put on their trial for murder. The learned Judge convicted them of murder, but abstained from passing the death penalty. Mr. Justice DEVADOSS who perused the calendar has put this case up to us for enhancement in order that we should consider whether these men should be sentenced to death. The course is one which, speaking for myself, I extremely dislike unless I feel myself constrained to adopt it. When a man has once been on trial for his

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life and has escaped with his life, it is obviously a very serious step to take away that life on appeal except in an extreme case. I regret to say that this is clearly an extreme case. It was a horrible murder from the most sordid of motives and I am at a loss to understand what induced the learned Judge to adopt the course he did. But he has given his reasons, and I think it best to set them forth. He says this at the end of his judgment:—

“As regards the sentence I take into consideration the fact that it is not clear which of the accused fired the gun and who cut the deceased man on the head with an axe”

as if that mattered—

“The medical witness says that Narsigadu should have died owing to shock on account of the fractures of the skull and the ribs. It appears to me that the fatal wounds were those on the head as it is rarely that a man succumbs by the mere fracture of his two ribs.”

As to that the question is not merely as to the fracture of the ribs but what lesions were caused to the tissues inside and the vital organs after the bullet had passed the fractured ribs on its way through the body to go out the other side as we know it did.

“The evidence does not show which accused it was that caused the fractures to the skull. In view of these considerations, I sentence both the accused to transportation for life.”

I very much regret to say that there are quite a number of acting Sessions Judges in this Presidency who appear to labour under the delusion that, where it is clear that two or more people banded themselves together for the express purpose of taking a man's life, it is not right to pass the death sentence, however horrible the circumstances, unless you can put your finger on the accused who delivered the particular blow

that is to be regarded as mortal. That is a complete illusion and would be cured by a perusal of any elementary text-book on Criminal Law. This case is so horrible that I feel constrained to take the course which I dislike, namely, of directing that these sentences be enhanced and the accused be sentenced to death.

PAKENHAM WALSH, J.—I agree with my Lord the Chief Justice. I myself do not like enhancing of sentence in these cases unless it appears to be absolutely called for. But in this case I think the murder is such a brutal one that we have no other course but the one we adopt.

B.C.S.

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APPELLATE CRIMINAL.

Before Mr. Justice Curgenvven.

T. S. RAGUPATHI AYYAR (COMPLAINANT IN ALL), PETITIONER,

1928,
September 5.

v.

NARAYANA GOUNDAN AND TWO OTHERS, (ACCUSED),
RESPONDENTS.*

*Indian Penal Code, sec. 425—“Destruction of any property”,
“Such change in any property or in the situation thereof as
destroys or diminishes its value or utility or affects it
injuriously”—Implication of—Goats allowed to graze in
mitta forest—Grazing rights reserved to permit holders—
If “mischief.”*

The expressions “destruction of any property” and “such change in any property or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously” in section 425 of the Indian Penal Code carry the implication that something should be done contrary to the natural use and serviceableness of such property.

* Criminal Revision Cases Nos. 996, 998 and 997 of 1927.

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The offence of mischief is not committed where a person unauthorizedly allows goats to graze in a forest, the grazing rights in which are restricted to holders of permits, as by such an act the grass is only put to its normal use.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgments of the Court of the Joint Magistrate of Tiruppattur in Criminal Appeals Nos. 36, 38 and 39 of 1927 preferred against the judgments of the Court of the Sub-Magistrate of Tiruppattur in Calendar Cases Nos. 110, 112 and 113 of 1927.

V. L. Ethiraj and P. Krishnamachari for petitioner.

C. Veeraraghava Ayyar for respondents.

Public Prosecutor for the Crown.

JUDGMENT.

The respondents in these Criminal Revision Petitions and in two or three others which have since been withdrawn, were convicted of mischief, under section 426, Indian Penal Code, by the Sub-Magistrate, Tiruppattur, and sentenced to pay fines, but the convictions were reversed by the Joint Magistrate, Tiruppattur, on appeal. The petitioner is agent to the mittadar of Bommai Kuppam, and was complainant in the criminal prosecutions. The case against each respondent was that he unlawfully allowed goats to graze in the mittaforest, grazing rights being restricted to holders of permits, and in this way committed the offence in question. Arguments for revision have been based upon the terms of the judgments to which Civil Revision Petition No. 996 of 1927 relates.

In order to establish the offence of mischief, as defined in section 425, Indian Penal Code, it must be shown that the accused "with intent to cause, or

knowing that he is likely to cause, wrongful loss or damage to the public or to any persons, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously."

The only passage in the Sub-Magistrate's judgment on the question of wrongful loss or damage is this: "In cases of goat browsing in forests, it is an accepted principle that the damage caused is detrimental to tree growth and it is very difficult to arrive at any valuation of the damage caused." At that stage of the case, it was believed that tree growth was involved. But before the Joint Magistrate it was conceded that no cutting of branches or damage to trees had been made out, so that the question which the learned Joint Magistrate had to consider was whether the grazing of goats in the forest—using 'grazing' in its strict sense of allowing cattle to feed upon growing grass—necessarily occasioned such damage to the grass—as would satisfy the terms of section 425, Indian Penal Code. The conclusion expressed was that the damage caused was "only incidental to the business of goat-grazing and of the sort committed by other (sic) licensed graziers," and that complainant's remedy was the civil one of enforcing the payment of grazing fees.

Now it will be seen that whatever knowledge the Court might be entitled to import—as the Sub-Magistrate imported it—as to the havoc wrought by goats in browsing on trees, bushes, etc., that is not in question. All that I am asked to decide is whether the grazing of goats—or, for the matter of that, any species of cattle—necessarily causes to the grass grazed such damage—by destruction, etc., as will constitute the offence of mischief. For the petitioner some reliance is placed upon an old case of this High Court in *Gurram*

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Siddugadu(1) in which the facts were that the accused grazed their cattle upon Government's lands which it was under contemplation to reserve under the Forest Act, and on which therefore the grazing of cattle had been prohibited. The evidence showed that Government were in the habit of selling the grass grown on the lands, and the learned Judges found that the consumption of the grass caused the destruction of it, so far as the Government's right was concerned. "The grass on the land," they observe, "in the possession of the Government, by their officer, was a crop, though perhaps of little value, but one which was preserved." It appears to me that this circumstance in some measure differentiates the facts from a case, like the present cases, where profit is derived from the grass not by cutting or selling it but by allowing it to be grazed; and the question arises whether the offence of mischief is committed when property is dishonestly put to a use of the kind for which it is intended. In a case decided by the Calcutta High Court, *Shekur Mahomed v. Chunder Mohun Sha*(2), the point arose whether the cutting and removal of bamboos, provided it were done with the necessary intention or knowledge, was mischief. In referring the case, the Sessions Judge observed: "The mischief of which the accused was convicted consists in cutting and taking away certain bamboos the right to which was disputed. The essence of the offence of mischief is that the offender must cause the destruction of property or such change in it or in its situation as destroys or diminishes its value or utility or affects it injuriously. Now as bamboo is a thing which is grown to be cut, the cutting and removing it does not amount

(1) (1886) 1 Weir, 492.

(2) (1874) 21 W.R. (Cr.), 88.

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to its destruction or other injury defined above." The Bench which disposed of this reference concurred in this view of the law and quashed the conviction. The same reasoning was adopted by a learned Judge of the Patna High Court in dealing with a case of cutting the branch of a tree in *Sardar Singh v. Emperor*(1); and was the basis of a distinction drawn between cutting an unripe crop, which might constitute mischief, and cutting a crop ready for reaping, which would not; *Mahomed Foyaz v. Khan Mahomed*(2) and *In the matter of Miras Cowkidar*(3).

The expressions "destruction of any property" "such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously," contained in section 425, Indian Penal Code, appear to me to carry the implication that something should be done to the property contrary to its natural use and serviceableness. It may be mischief to throw the contents of a pot of food upon the fire, but it is not mischief, though it may be theft, to eat the food. And so here, since the graziers, by allowing their goats to graze, did no more than put the grass to its normal use, by the same reasoning their act would not amount to mischief, though it may have amounted to theft. As to this, that offence not having formed the subject of the charge, I do not wish to express a more definite opinion.

The Criminal Revision Petitions are dismissed.

B.C.S.

(1) (1917) 44 I.C., 451.

(2) (1872) 18 W.R. (Cr.), 10.

(3) 7 C.W.N., 713.

APPELLATE CRIMINAL.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Waller and Mr. Justice Anantakrishna Ayyar.*

1927,
December 14.

PUBLIC PROSECUTOR (APPELLANT),

v.

PONNUSWAMI NAYAK AND FOUR OTHERS (ACCUSED),
RESPONDENTS,*

AND

In re RAKKAPPA PILLAI AND TWO OTHERS
(ACCUSED 3, 7 AND 8).†

*Criminal Procedure Code, ss. 439 and 423—Improper discharge
—Jurisdiction of High Court to set aside the discharge
in revision and order retrial.*

The High Court has under sections 423 and 439 of the Criminal Procedure Code (V of 1898) jurisdiction to set aside an improper order of discharge and direct that the person so discharged be committed for trial.

Appeal by the Public Prosecutor against acquittal in Sessions Case No. 11 of 1927 in Sessions Court, Madura, and Case taken up in Revision by the High Court calling upon the accused Nos. 3, 7 and 8 in P.R.C. No. 10 of 1926 on the file of the Court of Sub-Magistrate of Nilakkottai (Madura District) to show cause why the order of discharge passed in their favour in the above case should not be set aside and why they should not be committed to take their trial before the Sessions Court.

The following paragraph is taken from the Judgment of the High Court:—"Eight persons were charged with the murder of one Venkatarama Reddi. The committing Magistrate discharged three of them and committed the rest for trial. At the trial one of the assessors

thought that all the five accused were guilty. Two thought that one of them, the fifth, was innocent and the fourth, that two, the third and the fifth, were. The Sessions Judge, however, acquitted all of them. Against this acquittal, the Public Prosecutor has appealed and we have called upon the three accused who were discharged by the committing Magistrate to show cause why they should not be committed for trial."

Further facts appear from the judgment.

Public Prosecutor (J. C. Adam) for the Crown argued on the evidence that the acquittal was wrong, and that the accused who were acquitted and those who were discharged were equally guilty of murder.

Nugent Grant (with *K. P. Gopal Menon* and *K. Kuttikrishna Menon*) for all the accused, after arguing on the merits, contended that the High Court under section 439 had no jurisdiction in revision to set aside an order of discharge made by a Magistrate and to direct a retrial. Some portions of the evidence such as those relating to *alibi* have not been well considered by the Sessions Court and it is better that the whole case be sent back to the lower Court.

Public Prosecutor.—The High Court has jurisdiction. As a Court of revision, it has all the powers of an appellate Court; and as such it can order a retrial of a person improperly discharged; see sections 435, 439 and 423, *Empress v. Ram Lall Singh*(1), *Hari Dass Sanyal v. Saritulla*(2), *Emperor v. Varjivandas*(3).

JUDGMENT.

After stating the facts extracted above, the Judgment continued:—As we are ordering a retrial, we propose to say as little as possible about the evidence in the case. A great deal of it relates to the parts said to have been played by two of the discharged accused. It is alleged that, while the acquitted accused were parleying with the murdered man, these two drove slowly past in a

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† Criminal Revision Case No. 884 of 1927.

(1) (1888) I.L.R., 6 All., 40. (2) 1888) I.L.R., 15 Calc., 618.
(3) (1902) I.L.R., 27 Bom., 84.

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motor car and instigated them to shoot. The committing Magistrate, on the strength of certain *alibi* evidence, which the Sessions Judge considered to be patently false, came to the conclusion that this part of the story could not be true. The man who is said to have addressed the deceased just before he was shot is the son of one of these persons. If the *alibi* evidence were true, he was as much entitled as his father to be discharged and yet he was committed for trial.

It is obvious that, if this part of the story is an invention, the rest of it is entitled to no credit. The committing Magistrate acted on evidence that the Sessions Judge rejected as false. At the trial, this particular issue, the two accused who were specially affected by it having been discharged, attracted less attention than it deserved. It was, however, a most material issue and we are of opinion that it could not be properly tried in the absence of the persons whom it most concerned. *Ex hypothesi* they were the instigators of the murder and they should certainly have been committed for trial along with their supposed instruments.

In Criminal Appeal No. 449 we set aside the acquittal of the respondents and direct that they be retried on the same charges. As regards the discharged men, Mr. Grant has expressed a doubt as to our jurisdiction to set aside the discharge and direct their committal for trial. A similar objection was taken before STRAIGHT, J., in *Empress v. Ram Lall Singh*(1), and he negatived it, holding that he had power to set aside an order of discharge and direct a committal. With respect, we think that his decision was right. Section 439 of the Criminal Procedure Code confers on us the powers granted to a Court of Appeal by section 423 and one of

(1) (1883) I.L.R., 6 All., 40.

the powers so granted is that of directing an accused to be committed for trial. The same view was expressed by WILSON, J., in *Hari Dass Sanyal v. Saritulla*(1):

"The High Court under section 423, embodied in section 439, can set aside the order of discharge, and direct a charge to be framed and tried by the proper Court. It can, under section 437 and probably also under section 439, order a further enquiry instead of a committal."

This decision was followed in *Emperor v. Varjivandas* (2), where it was held that the High Court had jurisdiction under sections 423 and 439, Criminal Procedure Code, to set aside an order of discharge and to direct that a person improperly discharged be committed for trial. We set aside the order discharging the three respondents and direct that they be committed for trial on the same charges as the other five accused.

N.R.

(1) (1888) I.L.R., 15 Calc., 608, at 619.

(2) (1902) I.L.R., 27 Bom., 84.

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ORIGINAL CIVIL.

Before Mr. Justice Venkatasubba Rao.

RATANSI D. MORARJI (PLAINTIFF),

v.

THE ADMINISTRATOR-GENERAL OF MADRAS
(DEFENDANT).*

The Indian Succession Act (XXXIX of 1925)—“Hindu”—In what sense used—Person of non-Hindu origin—Conversion to Hinduism—If permissible—Membership of caste—if a prerequisite to being a Hindu—Question if a given person is a Hindu—One of fact in each case—European convert to Hinduism—Hindu Law—If subject to—Test applicable—Bhatia male—European woman convert to Hinduism—marriage between—If valid.

In the Indian Succession Act (XXXIX of 1925) the term “Hindu” is used in a theological as distinguished from a national or racial sense.

A person of non-Hindu origin can become a Hindu by conversion.

Membership of a caste is not a necessary prerequisite for being a Hindu.

It is a question of fact in each case whether a given person is a Hindu or not. A European does not become a Hindu merely because he professes a theoretical allegiance to the Hindu faith, or is an ardent admirer and advocate of Hinduism, and its practices; but if he resides long in India, abdicates his religion by a clear act of renunciation, and adopts Hinduism by undergoing formal conversion, gives up along with Christianity his Christian name and deliberately assumes a Hindu name, marries in accordance with Hindu religious rites a person who is a Hindu by race and religion and cuts himself off from his old environments and takes to the Hindu mode of life, in such a case the Court may justly come to the conclusion that he is a Hindu within the meaning of the Indian Succession Act.

* T.O.S. No. 1 of 1928.

A European who becomes a Hindu is governed by Hindu Law, the test in such a case being not domicile but religion.

A marriage between a Bhatia male claiming to be a Vaisya and a European woman converted to Hinduism is valid.

TESTAMENTARY Original Suit for the grant to the plaintiff of letters of administration with a copy of the will annexed to the estate of Sulochana (*née* Mena Renda), deceased.

S. Duraiswami Ayyar with Srinivasaraghavan and Tyagarajan for the plaintiff.—The will of Mena Renda was obviously executed at Adyar outside the ordinary original civil jurisdiction of this Court, and as such no attestation was necessary. The main question however is, was Mena Renda at the time of her death a Hindu. In the Indian Succession Act the term “Hindu” is used in a theological and not in an ethnic sense. *Dagree v. Paccoti San Jao*(1), *Joseph Vathiar of Nazareth*(2) and *Whitley Stokes’ Anglo-Indian Code*, Vol. I, page 483. The deceased though of European descent had become a convert to Hinduism, and the evidence is that subsequent to her conversion she led the life of a Hindu. Such a conversion is permissible and is perfectly valid; *Muthusami v. Masilamani*(3), *Fanindra Deb v. Rajeswar Dass*(4), *Kamawati v. Digbijai Singh*(5), and *Sheodeo Narain Deo v. Kusum Kumari*(6). History has recorded instances of entire tribes of non-Hindus becoming Hindus. The case of Scythian kings adopting Hinduism and assuming Hindu names is well-known. Membership of one of the four castes or their subdivisions is not a *sine qua non* for being a Hindu. The test is, did the individual in question lead the life of a Hindu? In the present case the deceased was formally admitted into Hinduism after her deliberate renunciation of the religion of her birth, she assumed a Hindu name, she made India her home, she married the plaintiff, a Hindu, and on her death was cremated in a Hindu crematorium. Assuming the will is not proved, the plaintiff as her husband and as such entitled to her properties, gets a right to obtain letters of administration. That presupposes that the marriage between the plaintiff and the deceased was a valid one. In Bombay

(1) (1895) I.L.R., 19 Bom., 783. (2) (1872) 7 M.H.C.R., 121.
(3) (1909) I.L.R., 33 Mad., 342. (4) (1885) I.L.R., 11 Cal., 463 (P.C.).
(5) (1921) I.L.R., 43 All., 525 (P.C.) at 538.
(6) (1922) I.L.R., 2 Pat., 230.

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where the marriage took place a male can validly marry a female of a lower caste. Here the plaintiff is a Bhatia, i.e., a Vysia and assuming for the sake of argument that the deceased on her conversion attained to no caste higher than that of a Sudra the marriage is legal; *Bai Kashi v. Jamnadas*(1) and *Bai Gulab v. Jiwanlal Harilal*(2). There is also the presumption of legality in favour of a marriage that has taken place; *Inderun Valungy Pooly Tevar v. Ramasami Pandia Tulaver*(3).

Defendant in person.—A Hindu is born, not made, Mulla's Hindu Law, page 5 and Sarkar's Hindu Law, pages 44 and 45. With regard to the marriage my submission is that under the decisions of the Madras High Court marriage outside castes is prohibited.

JUDGMENT.

This case raises questions of great importance :—

(1) Is it open to a lady of European origin to become a Hindu by conversion?

(2) Is her marriage, after such conversion, with a Hindu gentleman, Bhatia by caste, valid?

The facts of the case are interesting.

Mena Renda was of Austrian origin and domiciled in Great Britain. She was a Theosophist and a Hindu by conviction. She was further a vegetarian and has been described, as having been practically a Hindu, in all her habits of life. She was living in India for several years, about 12 or 13, and then expressed a desire to be formally converted to the Hindu faith. There was a society founded in Bombay in 1917 known as the Hindu Missionary Society. Its object was to perform "Suddhi", that is to say, convert people of other faiths and admit them into the Hindu fold. On the 21st of May 1922, at her request, this society performed the ceremony of conversion. She changed her name and adopted a Hindu name, viz., Sulochana. Immediately after the conversion, on the same day, she

married according to Vedic rites, Mr. Ratansi Morarji, a mill-owner of Bombay and a Member of the Council of State. Mr. Vaidya and Mr. Raje who belonged to the Hindu Missionary Society, officiated at the conversion as well as the marriage. They depose that in regard to both the events, Vedic religious rites were performed. Mr. Vaidya says—and his statement has not been challenged—that the rites performed were such as would be sufficient under the Hindu religion to effect a conversion. Mr. Vaidya and Mr. Raje are Brahmans as also Mr. Chunilal Bhat who was present and has been examined. It was Mr. Bhat who performed the *Kanyadana*, that is, who gave away the bride. The marriage was not performed secretly, but according to the evidence of Mr. Raje, it was not for certain reasons (not stated) made very public. The conversion as well as the marriage were published in the newspapers. Soon after the wedding, the lady and her husband left for Europe. They lived in Venice, in Paris and in London and returned to India in August. While they were in Europe, Mr. Morarji's brother was living with them as a member of their family. After their return, he husband went to Bombay but the lady resided either at the Headquarters at Adyar of the Theosophical Society or was touring in South India. This state of things continued from August to December 1922, when he also went over to Bombay where she resided till her death on the 14th of August 1923. In October 1922, he made a will bequeathing her entire property to the petitioner, Mr. Morarji. The present proceeding relates to that will. Mr. Morarji claims letters of administration with a copy of that will annexed. The will has not been attested and one of the questions I have to decide is, is the will valid notwithstanding the fact that it has not been attested? This raises the question—Was she

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(1) (1912) 14 Bom., L.R., 547.

(2) (1921) I.L.R., 46 Bom., 871.

(3) (1889) 13 M.L.A., 141.

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a Hindu at the time of the execution of the will? To proceed with my narrative, after she returned to Bombay, her husband lived at his own house, while she was living either in a flat or in hotels. Mr. Morarji frequently visited her at those places and had his meals with her. In his evidence, he deposes that she was regarded as a Hindu and treated by others as such. She died, as I have just said, on the 14th of August 1923 and it is in evidence that she was cremated according to the Hindu rites in a Hindu crematorium at Bombay.

These are in brief the facts of the case. Under section 63 of the Indian Succession Act, for a will to be valid, it must be attested by two or more witnesses. This section applies in the case of Hindus, only to wills made *inter alia* within the local limits of the Ordinary Original Civil Jurisdiction of the High Courts at Madras and Bombay. (See sections 57 and 58.) In other words, if the testatrix was not a Hindu, the unattested will would in no case be valid; if she was a Hindu, it would be valid if it was made outside the Presidency towns of Madras and Bombay.

This raises the point—Where was the will made? It is clear beyond doubt that the lady was not living at Bombay between August and December. It follows from that, that the will could not have been made at Bombay. Then, the alternative is, was it made in the City of Madras? According to the evidence, during that period she was residing at the quarters of the Theosophical Society at Adyar. This is beyond the local limits of the Ordinary Original Civil Jurisdiction of the High Court of Madras. If she was not actually residing at Adyar, she was touring in the mufassal. There is no positive evidence as to where the will was made. The Adyar Bridge separates her Adyar home from the City of Madras strictly so called. In fact, the

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distinction between this part of Adyar and Madras proper becomes important, so far as we are concerned, only for the purposes of the Act. If the will was executed while the lady was touring in the mufassal, it would, in that case, be undoubtedly valid. But then if she desired to make a will while at Madras (as understood generally and not as understood in the Act), it would be most natural that she should make it at her own home. Why should it be assumed that she left her home, crossed the bridge, came to a strange place and then executed the will? The paper that is produced as the will shows that no kind of formality attended its execution. It was the note paper of the lady with her monogram that was used. It is a brief will, consisting as it does, of a few lines. It leaves the impression that it was written in the privacy of her own room, unlike a will prepared with the aid of a legal adviser and with attendant formalities. I am prepared to infer that it was not executed at Madras, i.e., as distinguished from Adyar beyond the bridge. I am satisfied on the evidence that the will was not executed either at Bombay or at Madras and that it is therefore valid.

The next question is, was she a Hindu? If she was not, even on my finding that it was executed outside the limits of the cities of Madras and Bombay, it would still be invalid. The answer depends upon the meaning of the word "Hindu" as used in the Indian Succession Act. It has been consistently held that the word "Hindu" is used in the Act in a *theological* as distinguished from a *national* or *racial* sense. In *Dagree v. Pucotti San Jao*(1), the question arose, whether Indian Christians were Hindus under the Act. If the term was used to denote a race, the parties being Hindu converts

(1) (1895) I.L.R., 19 Bom., 783.

would clearly be Hindus; but the Court held that they were not.

STARLING, J., citing Stokes' Anglo-Indian Codes, states his conclusion that the term as used in the Act is "a theological term as denoting any person professing any form of the Brahmanical religion or religion of the Puranas."

In *Joseph Vadiyar of Nazareth*(1), the High Court upheld the decision of the Civil Judge, who held that native Christians are not Hindus within the meaning of the Act, on the ground that the word connotes a religious and not a national distinction.

If the term "Hindu" is a theological expression, the question arises:—Is it legally permissible to a non-Hindu to become a Hindu? 3 M.H.C.R., App. page 7, the point for decision was whether a Christian convert relapsing to Hinduism could be convicted of bigamy on marrying a second wife. HOLLOWAY, J., observes:—

"It seems impossible to assume that a man is not equally free to go from Hinduism to Christianity and if he pleases back from Christianity to Hinduism."

The Court (HOLLOWAY and INNES, JJ.) held that the prisoner became a Hindu and was not guilty of bigamy and it quashed the conviction by the lower Court. In *Muthuswami v. Masilamoni*(2) a marriage was contracted according to Hindu rites by a Hindu with a Christian woman, who before marriage was converted to Hinduism. SANKARAN NAIR and ABDUR RAHIM, JJ., held that the marriage was valid under the Hindu law. The ground of decision was, that the Christian lady became a Hindu on conversion—although not a Hindu belonging to any of the three regenerate castes. This decision is not confined to Christians by profession only, but equally

(1) (1872) 7 M.H.C.R., 121.

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

applies to those who are Christians by descent as well. *Fanindra Deb v. Rajeshwar Das*(1), related to a family which was of "Non-Hindu origin;" if its members had become "Hindus out and out" it was assumed that they would be governed by the Hindu law unless a special custom was proved. In *Sheodeo Narain Deo v. Kusum Kumari*(2), the Court had to deal with a clan who became converted to Hinduism about 100 years previously. The Judicial Committee held that the clan "had become sufficiently Hindu" to be *prima facie* governed by the Hindu law. The expressions (1) "Hindus out and out" and (2) "become sufficiently Hindu" are the expressions used by the Privy Council. In the last mentioned case, their Lordships referring to *Palaniappa Chetty v. Alagan Chetty*(3) allude to a mass of tribes in Southern India who became "Hinduised and subject to the law of the Smritis in most respects."

If then according to Judicial decisions, a person who both by descent and profession is a Christian can become a Hindu, if the re-conversion of an apostate is permissible, if tribes of Non-Hindus can be admitted into the Hindu fold—what light do facts of Indian history throw on this question? Sir Charles Eliot in his valuable work "Hinduism and Buddhism" says:—

"It is not quite correct to say that one must be born a Hindu, since Hinduism has grown by gradually hinduising the wilder tribes of India and the process still continues." *Introduction, page 37.*

The chief feature of Hinduism is its tendency to absorb beliefs and to combine and amalgamate deities. There was a great fusion of ideas and even Persian and Greek religions made their contribution. The amplification of Hinduism and the absorption of non-Hindu

(1) (1858) I.L.R., 11 Calc., 463 (P.C.).

(2) (1922) I.L.R., 2 Pat., 230 (P.C.).

(3) (1921) 48 I.A., 539.

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tribes into the Hindu fold, were not necessarily two distinct and separate processes.

"Whenever a popular cult grew important or whenever Brahmanic influence spread to a new district possessing such a cult, the popular cult was recognized and Brahmanised. This policy can be abundantly illustrated for the last four or five centuries (for instance in Assam) and it was in operation 2½ millennia ago or earlier." *Volume I, page 104.*

If non-Hindu Gods were thus accorded recognition, non-Hindu tribes were similarly absorbed. The learned writer points out that the treatment by Hinduism of men and Gods is curiously parallel.

"Princes like the Manipuris of Assam came under Hindu influence and were finally recognized as Kshatriyas with an imaginary pedigree, and on the same principle, their deities are recognized as forms of Siva or Durga." *Introduction, page 37.*

In a foot-note, he points out that according to Census of India, 1911, Assam, page 47, about 80,000 animists were converted to Hinduism in Goalpara between 1901 and 1911 by a Brahman called Sib Narain Swami. This admission into the Hindu society was not confined to the aboriginal tribes. Even the foreigners that invaded India were gradually assimilated. Speaking of several royal families of the country, Sir Charles Eliot observes:

"Many of these belong to districts which were formerly without the pale of Hinduism; many more are the descendants of the Northern hordes, who, century after century, invaded India." *Book I, page 35.*

The Kushana dynasty which produced great Hindu rulers was in its origin non-Hindu. The names of the Kings Kadphises, Kanishka and Huvishka are not Indian; but Vasudeva, a later ruler belonging to the

same dynasty, bears a Hindu name. There are several instances of Greeks (Yavanas) who bore Hindu names and became absorbed in Hindu society. The history of Hinduism is thus one of gradual expansion and several races and tribes originally of non-Hindu origin were incorporated into it.

Then comes the question, is membership of a caste a necessary prerequisite for being a Hindu? In other words, is it incumbent upon every Hindu to belong to some caste? The statement that a man cannot be a Hindu unless he belongs to a caste, is true in the sense that it is descriptive of a process. The convert, to start with, belongs to some community which adopts Hindu usages and it is then recognized as a caste at first of very low standing, but in a few generations, it may rise in the general esteem. Hinduism and Buddhism (introduction, page 38). Sikhs have been held to be Hindus. (*Rani Bhagwan Kuar v. Joggendra Chandra Bose*(1).) Similarly, Lingayats have been treated as being within the pale of Hinduism. And yet, Nanak the founder of the *Sikhs* and Basava the founder of the Lingayats taught that there was no distinction of caste. The sect which comes into existence declaring that there is no caste, ends by observing caste. As Sir Charles Eliot put it,

"The sect which renounced caste becomes itself a caste." *See Volume II, page 177.*

"Hindu life is permeated by the instinct that society must be divided into communities having some common interest and refusing to intermarry or eat with other communities." *Volume II, page 178.*

It will thus be seen that a group of individuals professing Hinduism and adopting the Hindu mode of

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life, may in course of time become a separate caste. But this does not show that till such a caste is formed, a member of this group is not a Hindu. While the caste is in the process of formation, can it be said that the individual is beyond the bounds of the Hindu religion? Then again, if a man secedes from his caste or is expelled from it, he does not, on ceasing to belong to some caste, cease to be a Hindu. The instinct of the average Hindu may assign a new caste to those who declare that they belong to no caste. But, in such a case, is the man who belongs to no caste, to be regarded as being outside the pale of Hinduism, on the ground that a new caste, which claims him, has not come into being? As Bhattacharya points out, each Hindu sect which is formed, is practically a new caste. ("Hindu Castes and Sects" Preface). I am therefore clearly of the opinion that it is not a valid objection to a man being treated as a Hindu, that he does not belong to some caste.

Was the lady in question a Hindu at her death? It is a question of fact in each case whether a given person is a Hindu or not. A European does not become a Hindu merely because he professes a theoretical allegiance to the Hindu faith, or is an ardent admirer and advocate of Hinduism and its practices; but if he resides long in India and abdicates his religion by a clear act of renunciation and adopts Hinduism by undergoing formal conversion, gives up along with Christianity his Christian name and deliberately assumes a Hindu name, marries in accordance with Hindu religious rites, a person who is a Hindu by race and religion, and cuts himself off from his old environment and takes to the Hindu mode of life in such a case, the Court may justly come to the conclusion that he has become a Hindu within the meaning of the Indian Succession Act.

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These tests are satisfied in the present case and I therefore hold that Mena Renda otherwise called Sulo-chana was a Hindu at her death.

It then follows that the will executed by her is valid, and the petitioner is therefore entitled to letters of administration with a copy of that will annexed.

I have now dealt with the case on the footing that the will was executed outside the Presidency Towns of Madras and Bombay. If I am wrong in this finding, the case must be disposed of, as if Mena Renda died intestate. Section 218 of the Succession Act says:

"If the deceased has died intestate and was a Hindu, the administration of his estate may be granted to any person who, according to the rules of the distribution of the estate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate."

If the petitioner was her husband, he would be entitled to a grant of the administration. This raises the question, is the marriage valid? This point again must be decided with reference to the Hindu law on the subject.

To apply the Hindu law to a European may seem strange. But according to the law of British India, in the case of Hindus (as in the case of Muhammadans) questions of personal law are determined not by the test of domicile, but by reference to the religious community to which those persons belong. In other words, the law of Hindus and Muhammadans is the law of their religion. Part II of the Indian Succession Act dealing with domicile does not apply *inter alia* to Hindus. (See section 4). According to the English law, a person's domicile determines his civil status. This means that the law which governs him is the law of the country of his domicile and it is attached to his person and remains so

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attached wherever he goes, until he changes his domicile, upon which the law of the new domicile becomes attached to him in the same manner. (Halsbury's Laws of England, Vol. VI, "Conflict of Laws," page 183).

The Indian Succession Act contains provisions to the same effect. The result is that while ordinarily a British Indian subject can change his domicile and acquire a new law along with a new domicile, this right is denied to a Hindu. It must be borne in mind that I am now dealing with the law to be administered by a British Indian Court. Under that system of law, a Hindu carries along with him his personal law wherever he goes and he cannot, however fixed his determination may be, get rid of that law. Is the person a Hindu? Then, wherever the law of British India admits the operation of a personal law, his rights and obligations are determined by the Hindu law, that is the law of his religion, subject to the exception that by statute any part of that law may be abrogated. This intimate connection between law and religion in the case of Hindus and Muhammadans, is fully dealt with in the judgment of the Judicial Committee in *Abraham v. Abraham*(1). (See also the arguments of Counsel in the case.) In accordance with this principle, if a Hindu becomes a convert to Muhammadanism, he is, by virtue of his conversion, governed by the law of his new religion; this is the general presumption, though a special usage may override it.

"The reason for it is * * * the written law of India has prescribed broadly that in questions of inheritance and succession, the Hindu law is to be applied to Hindus and the Muhammadan law to Muhammadans" *Jwala Baksh v. Dharam Singh*(2). (See also Charter of

the Supreme Court, 1800; clause 19 of the amended Letters Patent, 1865 and Trevelyan on "Civil Courts in India," page 59, citing 5, Bom. 154.)

Where the law of the domicile applies, it has been held that it is unnecessary that a person should realize the legal result of his conduct. If he acquires a new domicile, he acquires a new law along with it, (See Halsbury, Vol. VI, page 186). By analogy, a European who becomes a Hindu, becomes also subject to the Hindu law, although in this case, the test is not one of domicile, but one of religion.

I shall now deal with the point whether the marriage is valid. In *Bai Gulab v. Jiwanlal Harilal*(1), it was held by the Bombay High Court that according to the Hindu law as administered in that presidency, a marriage between a Vaisya male and a Sudra female was valid. In the judgment in that case, are discussed the original authorities bearing on *anuloma* marriages. CHANDAVARKAR, J., in *Baikashi v. Jamnadoss*(2), after an examination of the smritis and the commentaries, also arrives at the conclusion that *anuloma* marriages are valid: In that case, the question related to a *pratiloma* marriage and it was held that it was invalid under the Hindu law. I am prepared to follow these cases and hold that the marriage in question is valid. I am not to be understood as saying that *pratiloma* marriages are invalid; that is not a question on which it is necessary to express any opinion at present. An *anuloma* marriage means a marriage between a man of a higher and a woman of a lower caste. In this case, the husband, a Bhatia, claims to be a Vaisya. Was the lady then a Sudra? In *Muthuswami v. Masilamoni*(3), already referred to, the wife who

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(1) (1863) 9 M.I.A., 195.

(2) (1866) 10 M.I.A., 511 at 537.

(1) (1921) I.L.R., 46 Bom., 871. (2) (1912) 14 Bom. L.R., 547.
(3) (1909) I.L.R., 33 Mad., 842.

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became a Hindu was treated as a Sudra. But the judgment shows that the word "Sudra" was not used in its ordinary sense. It was used in a somewhat special sense; in that term

"it was intended to include all Hindus who are not dwijas or twice-born classes."

Whether, in such circumstances a higher caste may not be assigned to one in the position of Sulochana, is a question which I leave open, observing for the present, that it deserves to be carefully considered, from the standpoints, both of ancient authority and of historical evidence.

I have come to the conclusion that the marriage under consideration is, for the reasons I have stated, valid.

I may add that I do not entertain the slightest doubt as regards the genuineness of the will. The facts, that it was signed by the lady in her maiden Christian name and that the petitioner is not described as her husband, these facts may be easily explained. The disposition was not to rest on the validity either of the marriage or of the conversion. To bring about this result, the testatrix had to adopt this course of conduct.

In the result, I direct grant to the petitioner of Letters of Administration with a copy of the will annexed.

Costs of both parties shall come out of the estate.

B.C.S.

PRIVY COUNCIL.

RAJA KEESARA VENKATAPPAYYA, SINCE DECEASED AND
OTHERS (PLAINTIFFS), APPELLANTS, 1928,
November 23.

v.

RAJA NAYANI VENKATA RANGA ROW (DEFENDANT),
RESPONDENT.*

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Registration—Authority to adopt—Presentation for registration—Representative of adoptive son—Guardian—Natural father—Indian Registration Act (III of 1877), ss. 332, 40 and 41.

The provision in section 40 of the Indian Registration Act, 1877, that an authority to adopt may be presented for registration after the donor's death, by the donee or the adoptive son, does not exclude the authority, under section 32, of the representative of the adoptive son to present the document. The definition of the representative of a minor in section 3 does not preclude a person who is not his appointed guardian from being his representative.

An authority to adopt was presented for registration by the adoptive son's natural father, who was then his nearest male agnate, treating the son as having passed into the adoptive family. Registration was effected, the registering officer having satisfied himself, as required by section 41, that the person presenting was entitled to do so according to section 40, and it not having been objected that he was not so entitled.

Held, that the document was duly registered, since the natural father, as the adoptive son's nearest male agnate, was the proper person to act as his natural guardian in the absence of any guardian judicially appointed; further, that any doubt upon the facts was removed by the certificate of the registering officer.

Quaere whether in the case of an adoptive son of tender years residing with his natural father, the natural father is not,

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in the absence of a guardian, his representative, even when he is not his nearest male agnate in Hindu law.

CONSOLIDATED APPEALS (Nos. 12 and 13 of 1925) from two decrees of the High Court (May 1, 1919) affirming two decrees of the District Court of Kistna at Masulipatam.

The consolidated appeals arose out of two suits which related to the right of succession to the Zamin-dari of Munagala in the Kistna District. Various questions of fact and of law arose in the suits, but the only question material to the present report was whether an authority to adopt, which had been exercised in favour of the respondent to both the appeals, and had been presented for registration under the Indian Registration Act, 1877, by the respondent's natural father, had been duly presented.

The facts giving rise to the litigation, and the material sections of the above Act, appear from the judgment of the Judicial Committee.

The judgment of the High Court (WALLIS, C.J., and SADASIVA AYYAR, J.) is reported at I.L.R., 43 Mad., 288.

Dunne, K.C., and *Parikh* for the appellants.—The authority to adopt was not validly presented for registration under the Registration Act, 1877. Sections 40 and 41 contain special provisions as to the presentation of a will or authority to adopt, and these provisions exclude those in section 32 which enable the presentation to be made by the representative of a person claiming under the document. Further, section 3 of the Act indicates that the "representative" of a minor is his guardian. The respondent's natural father was not his guardian, and was not a person entitled to present the document: *Amba v. Shrinivasa Kamathi*(1).

Upjohn, K.C., *DeGruyther, K.C.*, *Narasimham* and *Subba Row* for the respondent.—Sections 40 and 41 do not exclude

(1) (1921) 26 C.W.N., 369 (P.C.).

the power given to a representative to present by section 32. Sections 40 and 41 were necessary supplemental provisions to provide for documents taking effect at a date later than their execution. If section 32 were excluded, a testator could not present his will by an agent under a power-of-attorney. The words "and any other person entitled to present it" in section 41 clearly include persons entitled under section 32. The respondent's natural father was his natural guardian. Giving effect to the Hindu law of adoption, he was after the adoption this respondent's nearest agnate. Section 3 provides merely that a minor's representative "includes" his guardian. The natural father was the proper person to take all steps necessary to enforce the respondent's rights of succession: *Nirvanaya v. Nirvanaya*(1), *Watson & Company v. Sham Lal Mitter*(2), [Reference was made also to the Guardian and Wards Act, 1890, section 4(2)].

Dunne, K.C., replied.

The JUDGMENT of their Lordships was delivered by

LORD PHILLIMORE.—These are two consolidated appeals in two suits both brought so long ago as the year 1895, being claims to the Zamindari of Munagala in the Kistna District. They arose in the following circumstances:—

Kodanda Ramayya, who was Zamindar, died in the year 1854. He left no son; but his mother, his widow, and a daughter by her named Latchamma survived him. She married a subject of the Nizam of Hyderabad, who died in 1875. Her husband was said to have given his wife an authority to adopt a son, and it was asserted on behalf of the present respondent, Nayam Venkata, that he had been so adopted. The Court of Wards took possession of the estate on behalf of the women, and it was enjoyed by them, not without question, until the death of Latchamma, in March, 1892.

(1) (1885) I.L.R., 9 Bom., 365.

(2) (1887) I.L.R., 15 Calc., 8; I.R., 14 I.A., 178.

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Thereupon disputes arose, and various members of the Keesara family, who were agnates of the last male Zamindar, claimed that the estate was an ordinary Hindu estate owned by a joint Hindu family, further saying that the present respondent had no title as an adopted son, there neither having been any authority to adopt nor any adoption in fact. The defence set up a custom of impartibility and descent by lineal primogeniture and the title by adoption, and further pleaded the Limitation Act.

The District Judge in a very careful judgment, found that the estate was an impartible one, and that the plaintiffs' claim was ill-founded, resting largely upon forged documents; and he dismissed this suit, which though first in time is second under the order consolidating these appeals. The District Judge further held that the defence of the Limitation Act, if it was required, would have been a sufficient answer to the suit.

On appeal, the High Court affirmed this judgment. Both Judges held in express terms that the case of the plaintiffs had not been established. The CHIEF JUSTICE further held that the defence of the Limitation Act was good. The other Judge did not find it necessary to express an opinion on the point.

When the matter came before their Lordships, counsel for the appellants in the first suit found himself unable to resist the conclusion that the decisions in India had turned upon matters of fact upon which there were concurrent findings in both Courts, and he was unable to take this case out of the ordinary rule of this Board, refusing to interfere except in very special cases with decisions turning on concurrent findings of fact. It was clear, therefore, that this appeal must fail.

In the second suit, first in the consolidation order, one of the Keesara agnates purported to accept the

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position that the estate was by custom an impartible estate. He did not, however, accept the further proposition that it descended by lineal primogeniture. He claimed that he was the nearest reversionary heir excluding the respondent, whose adoption he contested. The defence denied the plaintiff's title, set up the adoption, and pleaded the Limitation Act. When the case came before the District Judge, he decided in favour of the respondent on all grounds. He held that the estate descended by lineal primogeniture, and that if this was the case, the plaintiff was not the next heir, even if there were no adoption. He further held in favour of the adoption and the defence of the Limitation Act.

When the case came before the High Court, the decision was affirmed, and the appeal was dismissed. The learned Judges of the High Court do not appear to have considered the question whether the plaintiff was, if the adopted son were excluded, the nearest reversionary heir. But the conclusions at which they had arrived in the former suit were sufficient for dismissing this suit also; and accordingly both appeals were dismissed on the 1st May, 1919.

Here, their Lordships must pause to comment upon the lamentable delay which has taken place. These suits, as already observed, were both started in the year 1895 in respect of claims which, if well-founded, would have accrued in 1892. It is true that some of the delay is to be accounted for by the fact that when the cases first came before the District Judge, he attempted to deal with them by a short cut, deciding in favour of the respondent on 21st May 1904, and that time was consumed in the appeal from these orders and the consequent remand. But he gave his second judgment on 14th April 1914, and it has taken till now to bring the matter before their Lordships. Some delays are to be

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accounted for by the fact that in the agnates' suit there were very many plaintiffs, and that all of them except the one plaintiff were made defendants in the other suit; and that from time to time deaths occurred, and that new parties had to be added by way of revivor or of supplement.

But, even so, the delays are discreditable.

Now with regard to the second appeal. It was rightly contended by counsel for the respondent that before any enquiry was made into his client's title, the plaintiff had to prove his own title, and that upon the holding of the District Judge, which he was prepared to support, the plaintiff had in any event no title. So far as this line of defence was indicated, it seemed to their Lordships not unlikely that it would succeed. But as it also seemed to their Lordships that the grounds on which the High Court decided might be sufficient, and that the conclusions arrived at in the first suit as to the impartibility of the estate and its descent by lineal primogeniture, must also be accepted in this second suit, they proceeded to hear the argument upon the question of adoption.

Now this was attacked in three ways. First of all it was said that Latchamma had never adopted; secondly, that her husband had never given her authority to adopt; and thirdly, that the alleged written authority to adopt, on which reliance was placed, could not be looked at as it had not been registered in British India as required by the Registration Act.

Several of these points turn on questions of fact. Both Courts found that Latchamma had adopted the respondent. Both found that there was no oral authority from her husband, but both found that the written authority, if it could be looked at, was genuine. Then came the questions under the Registration Act, and here

again one of these questions also turned upon fact, and so turning, was again found in favour of the respondent, and upon none of these questions of fact has any reason been shown to their Lordships for not accepting the concurrent findings.

The Indian Registration Act, 1877, provides by section 17 that an authority to adopt not conferred by a will shall be registered, and by section 25 that any document requiring registration which has been executed outside British India, shall be presented for registration within four months after its arrival in British India, and by section 49 that no document required by section 17 to be registered shall be received in evidence unless registered in accordance with the Act.

It was contended for the appellant that Latchamma, who had left Hyderabad after her husband's death, and come to reside at her old home, had brought the document with her into British India, more than four months before she presented it for registration. This issue of fact, if it was open after the decision of the Registrar, was found in favour of the respondent.

The one question that then remained was whether the document which was in fact registered had been duly presented as required by the Act.

The sections which relate to this matter are the following:—

“32. Except in the cases mentioned in section 31 and section 89, every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration office,

“by some person executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order,

“or by the representative or assign of such person,

“or by the agent of such person, representative or assign, duly authorized by power-of-attorney executed and authenticated in manner hereinafter mentioned.”

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" 40. The testator, or after his death any person claiming, as executor or otherwise under a will, may present it to any Registrar or Sub-Registrar for registration,

" and 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."

41. " A will or an authority to adopt, presented for registration by the testator or donor, may be registered in the same manner as any other document.

" A will or authority to adopt presented for registration by any other person entitled to present it, shall be registered if the registering officer is satisfied,

(a) that the will or authority was executed by the testator or donor, as the case may be ;

(b) that the testator or donor is dead ; and

(c) that the person presenting the will or authority is, under section 40, entitled to present the same."

Now the authority to adopt was presented to the Registrar on 20th August, 1892, by Nayani Raghava Reddi, who describes himself as natural father and guardian of the minor. The Registrar examined witnesses and came to the following conclusions :—

" From the depositions of the above-said witnesses, I have satisfied myself with respect to the matters mentioned herein below :—

(1) That this document was executed and given by the person who purports to have executed and given it.

(2) That the executant is dead.

(3) That the person who presented this document has authority according to section 40 of the Registration Act to present the same."

And thereupon he registered the document.

The contention is that the person presenting was, though the Registrar had accepted him, nevertheless not the person who could lawfully present under the terms of the Act. The argument took this shape. First, that section 40 excludes the provisions of section 32 and limits the persons entitled to present for registration an

authority to adopt, to the actual donor if living, and to the donee and the adopted son after the donor's death, and that it will not do to have it presented by the representative of the adopted son.

Their Lordships do not take this view. They agree with the learned Judges in the Court below and on this particular point they would specially refer to the judgment of the second Judge in the High Court, SADASIVA AIYAR, J.

Section 40 is intended for the case of what may be called ambulatory documents, documents which can be revoked at any moment, and which will have no binding effect till the death of the executant, and to that extent they are taken out of section 32. An intended executor, legatee or donee of a power might possibly under section 32 be considered as a person claiming under the instrument. But he is not to be allowed to present a document for registration while it is still capable of revocation. On the other hand, the class of persons who after death may claim to register, is defined, and it may be said, expanded. It is not merely the executor but also the legatee. It is not merely the donee of the power to adopt, but also the person claiming to have been adopted. These are the principals. Then given the principals, section 32 introduces certain agents who can take the place of principals, and one of these agents is the representative of a person claiming under the document. Now the word representative is defined in section 3 as including the guardian of a minor. Here the person presenting describes himself as being the natural father and guardian. It is said that when adoption has once taken place, the adopted child is removed wholly out of his natural family, and that his natural father has no longer a legal relation to him. This may be taken to be the case;

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but what is to happen when a child of tender years, as was the case here, is actually residing with his natural father, and has no appointed guardian. When one remembers that the definition of representative does not make it equal to guardian, but says that it includes guardian, might it not well be said that in these circumstances and in the absence of any legally appointed guardian, the natural father was the representative?

However, it is not necessary to decide this. It appears that as so often happens, the adoption was of a child of the same family, and that if the child be taken as having entered into his adoptive father's family, the natural father was nevertheless the nearest male agnate, and the proper person to be appointed guardian, and the proper person to act as natural guardian in the absence of any judicial appointment. If there were any doubt upon these facts, it might further be observed that, by section 41, the Registrar is made the judge whether the person presenting the authority is entitled to present it, and though objection was raised on behalf of the appellant to the registration on the ground that it was out of time, no similar objection was raised as to the propriety of the person presenting.

If this conclusion be arrived at, it is as unnecessary to enter upon the defence of the Limitation Act as it is upon the question of the plaintiff's title. Neither is it necessary to discuss the important but somewhat abstruse question, whether the respondent being at that time resident in and a subject of the State of the Nizam, can rely upon the unquestioned fact that his status as an adopted child was accepted by the Courts in the Nizam's dominions, as a binding decision on the question of his status precluding all dispute as to the fact and lawfulness of his adoption.

. Upon the whole, their Lordships will humbly advise His Majesty that both appeals fail, and should be dismissed with costs.

In 1913, a petition by the respondent was before the Board, applying for special leave to appeal from the orders remanding the suits. The Board did not feel able to advise that special leave to appeal should be granted from interlocutory orders, so their Lordships directed the petition to stand over generally until the proceedings on the merits in the Courts below had terminated, and they intimated that the costs of that application ought to be costs in the suits. As no order has been made in the Courts below as to these costs, it remains for their Lordships to advise that these costs should be included by the respondent in his costs of these appeals, which the appellants will pay. As the petitioner has been successful in these appeals, his petition has no further object and should be dismissed.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants : *Douglas Grant and Dold.*

Solicitors for respondent : *T. L. Wilson and Co.*

A.M.T.

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ORIGINAL CIVIL—FULL BENCH.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Beasley and Mr. Justice Reilly.*

1928
October 4.

A. V. NARAYANASWAMI NAICKER (PLAINTIFF),

v.

SAKHARAM RAO AND OTHERS (DEFENDANTS).*

Original Side Rules (High Court, Madras), O. VI, r. 4 — Suit dismissed for default under—Application to restore after period prescribed by proviso to rule 4—If Court has discretion to revive.

Where a suit on the Original Side of the High Court appeared, under Order VI, rule 4 of the Original Side Rules, in the list of default cases for three weeks and stood dismissed at the end of that period, and the plaintiff applied by a Master's summons to have the suit restored after the expiry of the thirty days prescribed under the proviso to rule 4,

Held, that the Original Side Rules gave a discretion to the Court to revive a suit even after the expiration of the time delimited for the taking of a particular step in it and that that discretion should be exercised on a consideration of the merits of the application unfettered by any supposed rule of law. *Bradshaw v. Warlow*, (1886) 32 Ch.D., 403; *Schafer v. Blyth*, [1920] 3 K.B., 140, followed.

APPEAL against the order of the Acting Master, dismissing the plaintiff's application to set aside the order of dismissal of the suit for default against defendants 1 and 7 and to restore the suit as against them. This matter came on for hearing before his Lordship Mr. Justice KUMARASWAMI SASTRIYAR, who made the following

ORDER OF REFERENCE TO A FULL BENCH:—

This is an appeal against the order of the Acting Master dismissing the plaintiff's application to set aside the order of dismissal of the suit for default against defendants 1 and 7 and to restore the suit as against them.

The suit against defendants 1 and 7 was dismissed by the Second Assistant Registrar on the 23rd of April 1928. The order runs as follows:—"This suit coming on this day before this Court in the list of default causes for orders under Order VI, rule 4 of the Original Side Rules, 1927, upon reading the plaint filed herein on the 18th day of January 1928, it is ordered that this suit as against defendants 1 and 7 do, for default of prosecution, stand dismissed out of this Court."

Under the Rules of 1927 every suit entered in the list of default causes is allowed to stand there for three weeks and if nothing is done in the meantime, it is automatically dismissed and the order is drawn up. There is no notice given to the parties.

Rule 4 of Order VI (which corresponds to Rule 54 of the old rules) under which this suit was dismissed runs as follows:—"Unless otherwise ordered, after a case has stood in the list of default causes for three weeks, the suit shall stand dismissed for default of prosecution as against the defendant in respect of whom default has been made."

Provided that the plaintiff may, within 30 days from the date of dismissal, apply by Master's summons that the suit may be restored, and thereupon the Master may make such order as he thinks fit. Notice of the application shall be given to all parties who have filed a written statement."

The plaintiff applied on the 24th of July 1928 before the Master in Chambers that the order of dismissal of the suit for default against defendants 1 and 7 may be set aside and the suit restored. To this, Counsel for defendants 2 to 4 endorsed his consent. The matter came on before the Master on the 27th of July and it was dismissed, the Master holding that the application was barred by time. The order runs as follows:—

"For the reasons given in the Master's order, dated 21st February 1928, in C.S. No. 586 of 1926 with which I agree and which was upheld by the Judge (WALLER, J.) in appeal, I must dismiss the application. I do not think that the consent of the other side could extend the period of 30 days fixed by Order VI, rule 4, within which the application for restoration should be made."

It is argued for the plaintiff who is appealing against this order that the learned Master was wrong in holding that he had no discretion in the matter and that he was bound to dismiss an application for restoration if not made within 30 days.

The main grounds urged are that this case does not fall under Article 163 of the Limitation Act and that Order I,

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rule 7, gives ample power to extend the time even though the period within which the application is to be made has expired. Order I, rule 7, runs as follows:—

“The Court or the Master shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act, or taking any proceedings. Upon such terms, if any, as the justice of the case may require; and any such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed. Provided that, when the time for filing or delivering any pleading or document, or filing any affidavit, answer or document, or doing any act, is or has been fixed or limited by any of these rules or by any direction on or under a summons for directions or by any order of the Court or Master, the costs of any application to extend such time and of any order made thereon, shall be borne by the party making such application unless the Court or Master shall otherwise order.”

It is argued that the rule is clear and that in cases governed by the Original Side Rules an extension of time can be granted even though the period within which the application is to be made has elapsed.

Order I, rule 7, corresponds to Order LXIV, rule 7 of the Supreme Court Rules which runs as follows:—

“The Court or a Judge shall have power to enlarge or abridge the time appointed by these rules; or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed. Provided that, when the time for delivering any pleading or document or filing any affidavit answer or document, or doing any act is or has been fixed or limited by any of these rules or by any direction on or under the summons for directions or by any order of the Court or a Judge the costs of any application to extend such time and of any order made thereon shall be borne by the party making such application unless the Court or a Judge shall otherwise order.

Under this rule it was held by NORTH, J., in *The Script Phonography Co. v. Gregg*(1), that, when an order has been

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made dismissing an action, an application to extend the time cannot be made after the expiry of the period fixed by the rules within which the application is to be made. NORTH, J., following *Whistler v. Hancock*(1) and *King v. Devenport*(2), observed as follows:—“The Court cannot, after the action is gone, entertain an application the result of which would be to set it on foot again. The time for delivering the statement of claim expired on the 17th of December 1889. The summons to extend the time was not returnable till the 18th of December, and under these circumstances the application was too late, and I have no jurisdiction to extend the time.”

The same learned Judge in *Walker v. James*(3), was of opinion that when an action was dismissed for the non-appearance of the plaintiff, an application made on behalf of the plaintiff to restore the action after the expiry of the time fixed by Order XXXVI, rule 33, cannot be granted by virtue of the provisions of Order XXVII, rule 15. The learned Judge observed: “I do not think the power conferred by that order can be regarded as independent of the limit of time for making the application imposed by Order XXXVI, rule 33. I must act strictly on that rule, and therefore refuse the motion with costs.”

This view in the earlier cases, however, has not been followed in the later decisions. In *Schafer v. Blyth*(4), it was held that the Court had discretion to enlarge the time fixed by Order XXXVI, rule 33, which provides that any verdict or judgment obtained where one party does not appear at the trial may be set aside by the Court or a Judge . . . upon an application made within six days after the trial. The learned Judge (LUSH, J.) followed *Bradshaw v. Warlow*(5), and dissented from *Walker v. James*(3) and observed: “Counsel for the plaintiff has taken the preliminary objection that the application is not made within six days after the trial as required by Order XXXVI, rule 33 (1), and that I have no power to enlarge the time for making it. In support of the objection he relies on *Walker v. James*(3). In that case, where the circumstances were similar to those of the present case, NORTH, J., did no doubt hold that it was imperative that the application should be made within the time appointed by the rule, and that the Court had no power to enlarge the time, and if that decision is

(1) (1878) 3 Q.B.D., 83.

(2) (1879) 4 Q.B.D., 402.

(3) (1886) 53 L.T. (N.S.), 597.

(4) [1920] 3 K.B., 140.

(5) (1886) 32 Ch.D., 403.

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binding upon me, I should have to dismiss the application. Unless it is binding upon me, I should, however, be slow to follow it, because personally I do not take the same view as was taken by NORTH, J. It cannot, I think, have been intended that the period of six days appointed by the rule should in every case be treated as a fixed period incapable of extension, inasmuch as a litigant might be absolutely prevented by illness or an accident, or other circumstances, from making an application within the six days, and in that case a grave injustice might be worked if he was debarred from making the application at a later date. On consideration, I think that the decision of NORTH, J., is not binding upon me. The same point in substance came before the Court of Appeal in *Bradshaw v. Warlow*(1). It is true that it was Order XXXIII, rule 21 of the Rules of the Palatine Court of Lancaster which was there under consideration, but the language of that rule is substantially identical with that of the rule now in question. In that case *Walker v. James*(2), was cited, but the Court of Appeal took the view that the Court had power to enlarge the time so as to admit of the application being made to the Court on the first practicable day after the expiration of the six days. That decision of the Court of Appeal seems to me to be in conflict with *Walker v. James*(2), and therefore impliedly to disapprove it."

The order of the Master in C.S. No. 586 of 1926 referred to by the Acting Master related to a case which was dismissed for default of payment of the first day's hearing fee which under Order XLIII, rule 4 is payable within 14 days from the date on which issues were settled. The suit was entered in the list of default causes under Order VI, rule 3 (d) and was dismissed under Order VI, rule 4. An application was made to restore the suit after 30 days had expired. An application was also made to excuse the delay in filing the application and to extend the time under Order I, rule 7. Mr. White, the Master, held that the application was not one under Article 168 of the Limitation Act and that the Court had no power to extend the time and relied on *The Script Phonography Co. v. Gregg*(3), *Whistler v. Hancock*(4), *King v. Devenport*(5).

An appeal was preferred against this order and it came on before WALLER, J., and the learned Judge passed the following order: "I think that the Master's order is right and that he

(1) (1886) 32 Ch.D., 403.

(2) (1886) 53 L.T. (N.S.), 597.

(3) [1890] 59 L.J. Ch., 406.

(4) (1878) 3 Q.B.D., 83.

(5) (1879) 4 Q.B.D., 402.

had no power to extend the time under Order I, rule 7 of the Original Side Rules. The appeal is dismissed with costs."

It is unfortunate that the subsequent decisions where the cases referred to by Mr. White have been overruled were not brought to the notice of the Master or the learned Judge. It seems to me that Order I, rule 7, gives ample discretion to the Court to extend the time even in cases where the time has expired.

Section 5 of the Limitation Act gives similar powers in the case of appeals and applications made under the Act. Section 148 of the Civil Procedure Code also gives the Court power to extend time even after expiry of the time fixed.

I think that the view taken by the Master in C.S. No. 586 of 1926 and by WALLER, J., on appeal therefrom, which, as I said before, was based on the earlier decisions which have not been followed, is erroneous.

As this question has arisen in several cases and the matter is of considerable importance to the practitioners and suitors, I think an authoritative ruling by a Bench is desirable and I direct that this matter be placed before the Hon'ble the CHIEF JUSTICE for orders.

ON THE HEARING BEFORE THE FULL BENCH—

K. S. Krishnaswami Ayyangar (*P. V. Subramanyam* with him).—Under Order I, rule 7, of the Original Side Rules the Master and the Court have a discretion to extend the time. Our rule corresponds to Order XLIV, rule 7, of the Supreme Court Rules. In the earlier cases, *Whistler v. Hancock*(1), *King v. Devenport*(2), *The Script Phonography Co. v. Gregg*(3), *Walker v. James*(4), the Courts dealt with cases where applications for extension of time were in respect of suits which had already been decided and not suits which had to be revived. This distinction was kept in mind in the later cases. In *Schafer v. Blyth*(5), it was decided that the Court had a discretion to enlarge the time following the decision of the Court of Appeal in *Bradshaw v. Warlow*(6). See also *Carter v. Stables*(7).

No one appeared for the defendants.

(1) (1878) 3 Q.B.D., 83.

(2) (1879) 4 Q.B.D., 402.

(3) [1890] 59 L.J., Ch., 406.

(4) (1886) 53 L.T. (N.S.), 597.

(5) [1920] 3 K.B., 140.

(6) (1886) 32 Ch.D., 403.

(7) (1880) 6 Q.B.D., 116.

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The JUDGMENT of the court was delivered by COUTTS TROTTER, C.J.—Under the provisions of Order VI, rule 4, of the Original Side Rules of this Court, this case, having been in the list of default cases for three weeks, stood dismissed. The proviso to that rule allows the plaintiff within 30 days of the date of dismissal to apply by Master's summons to have the suit restored and thereupon the Master has a discretion to restore it or not as he thinks fit. That proviso was not availed of by the plaintiff in this case and he took no steps within 30 days. The Master held that in those circumstances he had no discretion to allow the case to be restored after those 30 days. It is pointed out that by Order I, rule 7, which is in effect a reproduction of that which appears as Order LXIV, rule 7, of the Rules of the Supreme Court in England and which repeats similar rules which had been in force for many years, there is a general discretion given to revive a suit, because it says in terms that an enlargement may be ordered although the application for the same was not made until after the expiration of the time appointed or allowed. We have been referred to a series of English cases, the earliest of which is *Whistler v. Hancock*(1), a decision of Chief Justice COCKBURN and Mr. Justice MANISTY. There an order was made dismissing an action for want of prosecution unless a statement of claim should be delivered within a week. The week expired and nothing was done and it was held that the action was at an end. A similar conclusion was arrived at in *King v. Davenport*(2), a decision of Chief Justice COCKBURN and Mr. Justice MELLOR, but it has been held that this case only applied to a state of things where an extension was sought to do something in the action after the action was dead.

(1) (1878) 3 Q.B.D., 83.

(2) (1879) 4 Q.B.D., 402.

Thus it was decided in *Schafer v. Blyth*(1), that the general words of the rule covered a case where it was sought not to extend the time for taking a particular step in a case that had automatically come to an end but to revive the whole case itself and that the words of the rule gave a discretion to that effect. And in so deciding Mr. Justice LUSH was following a decision of the Court of Appeal—*Bradshaw v. Warlow*(2). It is quite obvious that the draftsman of the Madras rules went for guidance to the English rule and no doubt was familiar with these decisions. We think that it must be taken that the intention of the framers of the rules which are made under the statute—and it is not suggested that they are *ultra vires* of the statute—was to give a discretion to the Court to revive a suit even after the expiration of the time delimited for the taking of a particular step in it. The learned Master here held that he had no discretion and that he was bound by the terms of Order VI, rule 4, to decline to entertain any application or exercise any discretion with regard to its revival. We think that this cannot be upheld and we propose to remit the case to the learned Judge with this intimation of our opinion. He will probably send it back to the Master with a direction that he should consider the application on its merits and that his discretion on the merits is unfettered by any supposed rule of law.

B.C.S.

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(2) (1886) 32 Ch. D., 403.

SPECIAL BENCH.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Beasley and Mr. Justice Reilly.*

1928,
November 5.

R. M. S. R. M. RAMASWAMI CHETTIAR AND
OTHERS, ASSESSEES,

v.

COMMISSIONER OF INCOME-TAX, REFERRING OFFICER.*

*Indian Income-tax Act (XI of 1922), ss. 22 (4) and 23 (2)
and (4)—Notice calling for accounts after submission of
return, legality of.*

Even after an assessee has submitted a return of his income and has complied with the terms of the notice issued to him under section 23 (2) of the Indian Income-tax Act (XI of 1922), the Income-tax Officer has power to call for accounts under section 22 (4), and if they are not produced, to make an assessment under section 23 (4) of the Act.

REFERENCE by the Commissioner of Income-tax under section 66 of the Indian Income-tax Act (XI of 1922) and under section 45 of the Specific Relief Act (I of 1877), in the matter of assessment of R. M. S. R. M. Ramaswami Chettiar and two others.

The facts and the question referred are given in the judgment.

K. S. Krishnaswami Ayyangar (with R. Kesava Ayyangar, K. R. Rama Ayyar and M. Rajagopala Achari) for assessee.—Section 22 of the Act deals with the stage prior to the submission of return of income. Section 23 (1), (2) and (3) deal with the procedure to be adopted after a return is submitted; and section 23 (4) deals with the penalty for default in submitting a return or in producing accounts, documents or evidence. This view of section 22 is further strengthened by the position of the words “or having made a return” in section 23 (4), which must be deemed to be in antithesis to the words going before

Hence, once a return is made by an assessee, the Income-tax Officer can, if the return is not correct or complete, resort to the procedure mentioned in section 23 (2) and (3), wherein his power to call for further evidence is limited; he cannot, after a return is submitted, resort to section 22 (4) which gives him a general power to call for any accounts or documents, limited only by the wording of the proviso. This is not merely a question affecting his jurisdiction to act under section 22 (4) after submission of a return. If he has the power to act under section 22 (4) at that stage, then default under section 22 (4) entails also the disability to appeal from the assessment. I rely on *Ramaswamiiah v. Commissioner of Income-tax*(1), *Brij Raj Rang Lal v. Commissioner of Income-tax*(2) and *Khushi Ram v. Commissioner of Income-tax*(3). The case of *In the matter of Messrs. Harmukh-bai Dulichand*(4) does not discuss all the aspects of the case and gives the go-by to the words “or having made a return.” This case is simply followed in *In the matter of Chandra Sen Jaini*(5) and *Ram Khelawan v. Commissioner of Income-tax*(6). There are other penalties provided for non-production of accounts after the submission of return, such as those provided by sections 37 and 51 of the Act and sections 174 and 175 of the Penal Code. The penalty of summary assessment cannot be deemed to have been intended to cases of this kind wherein there has been a submission of return and the production of some evidence.

[*Court.*—What is the use of a power to call for accounts only before a return is made? Such power is more useful only afterwards, as it can ensure a proper return.]

M. Patanjali Sastri for the Commissioner.—Section 22 (4) is unqualified and gives a general power to call for accounts, documents, etc., whether before or after a return is made. Otherwise, any kind of false return can be made, without the officer having power (a) to check it by calling for production of accounts, documents, etc., and (b) to punish such assessee by summary assessment. I rely on the last three cases quoted by the assessee and the arguments therein. In the Act of 1918, there was no such general power to call for accounts as is provided for in the section 22 (4) of the Act of 1922. In order to provide also for a case of default under section 22 (4), suitable words were introduced in

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(1) (1925) I.L.R., 49 Mad., 881.
(3) (1928) A.I.R. (Lah.), 219.
(5) (1928) I.L.R., 50 All., 589.

(2) (1927) A.I.R. (Pat.), 390.
(4) (1928) 32 C.W.N., 710.
(6) (1928) A.I.R. (Pat.), 529.

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section 23 (4). In the Act of 1918 only one case of default after submission of return, viz., one under section 18 (2) which corresponds to section 23 (2) of the Act of 1922 was provided for. The words "or having made a return" are inadvertently retained in the Act of 1922. They are redundant. The case of *Ramaswamiah v. Commissioner of Income-tax*(1) is a case of default under section 23 (3) and not under section 22 (4).

JUDGMENT.

REILLY, J. In this case, an income-tax assessee made a return of his income, when required to do so under section 22 (2) of the Indian Income-tax Act, 1922. Not being satisfied with the return, the Income-tax Officer required the assessee under section 23 (2) of the Act to produce evidence in support of his return. The assessee produced some evidence; but the Income-tax Officer found it insufficient to show the amount of the assessee's income and then issued a notice to him under section 22 (4) of the Act to produce complete accounts of a branch business at a place in the Federated Malay States for the account-year in question. Those accounts, the assessee did not produce, and the Income-tax Officer therefore proceeded to make his assessment under section 23 (4) of the Act—that is, an assessment not made upon evidence but "to the best of his judgment,"—an assessment from which under the Act the assessee had no right of appeal. The question referred to us is, "the applicant having made a return of his income and having complied with the terms of the notice issued to him under section 23 (2), was there any jurisdiction in the Income-tax Officer to revert to section 22 (4) and make an assessment under section 23 (4) for non-compliance with the notice under section 22 (4)?" The assessee contends that in those circumstances the Income-tax Officer had no power to

(1) (1925) I.L.R., 49 Mad., 831.

make an arbitrary assessment under section 23 (4), from which there was no right of appeal.

This question has been before four of the Indian High Courts. It has been answered against the assessee by a unanimous Full Bench of three Judges of the Calcutta High Court in *In the matter of Messrs. Harmukhbai Dhulichand*(1), by a unanimous Full Bench of five Judges of the Patna High Court in *Ram Khelawan v. Commissioner of Income-tax*(2), overruling *Brij Raj Rang Lal v. Commissioner of Income-tax*(3), a decision of two Judges, and by a Division Bench of the Allahabad High Court in *In the matter of Chandra Sen Jaini*(4). Now that the earlier decision of the Division Bench of the Patna High Court has been overruled, there remains in the assessee's favour, of the cases quoted before us, only a decision of a Division Bench of the Lahore High Court in *Khushi Ram v. Commissioner of Income-tax, Lahore*(5). At one stage of the arguments before us, it was suggested that the decision of a Full Bench of this Court in *Ramaswamiah v. Commissioner of Income-tax*(6) was by implication in favour of the assessee in this matter; but on examination it will be seen that it was found in that case that the assessment was in fact made, not under section 23 (4), but under section 23 (3). The weight of authority on the question before us is, therefore, overwhelmingly against the assessee.

It was first contended by Mr. Krishnaswami Ayyangar for the assessee that the Income-tax Officer's power to call for accounts under section 22 (4) can be exercised only before the assessee has submitted a return of his income. There is nothing whatever in the wording of the sub-section to suggest that; on the contrary, the

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(1) (1928) 32 C.W.N., 710.
(3) (1927) A.I.R. (Pat.), 390.
(5) (1928) A.I.R. (Lah.), 219.

(2) (1928) A.I.R. (Pat.), 529.
(4) (1928) I.L.R., 50 All., 588.
(6) (1925) I.L.R., 49 Mad., 831.

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only limitations on the power of the Income-tax Officer to call for accounts in that sub-section are that, if the assessee is not a company, a notice requiring him to make a return of his income must have been served on him and that accounts for a period more than three years prior to the previous year cannot be called for. The fact that those restrictions are mentioned explicitly makes it the more improbable that any other restriction is implied. It is urged that the fact that the sub-section occurs in section 22, which deals with the procedure for getting in a return, makes it probable that all its provisions apply to the stage before the return comes in. That would be a very unsafe reason for limiting the plain effect of the words of the sub-section; and it may be remarked that the sub-section (3) of section 22 enables the assessee to do something after he has submitted his return. If section 22 (4) is to be construed, as in this part of his argument Mr. Krishnaswami Ayyangar would have us to construe it, we must read into it a very important restriction, which only a very careless Legislature could have omitted to express if it were intended. And, as has been pointed out by Mr. Patanjali Sastri for the Commissioner of Income-tax, in the great majority of cases it must be after the return has come in, not before, that the Income-tax Officer has any need to see the assessee's accounts. If the provision for calling for accounts were restricted to the period before the return is submitted, it would be of comparatively little use. Until he knows whether a company is going to submit its return by the 15th June or any other assessee is going to submit his return by the date specified in the notice to him under section 22 (2), the Income-tax Officer need not trouble about accounts at all, as, if no return is submitted in time, he can, as is unquestioned, make his arbitrary assessment under

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section 23 (4) without referring to any accounts or evidence. It is very highly improbable that the only specific provision made by the Legislature for calling for accounts would apply only to the period when accounts are least required. But it has been argued—and the argument was adopted in *Khushi Ram v. Commissioner of Income-tax, Lahore*(1) and in the overruled case in the Patna High Court—that this surprising restriction of the effect of section 22 (4) has been introduced by the Legislature in a cryptic and back-handed way by the wording used in section 23 (4). What the exact meaning of that wording is, I will discuss later; but pushed to its farthest grammatical extreme, as contended by the assessee, it comes to no more than this—that the penalty provided by section 23 (4) for failure to produce accounts, when required to do so by a notice under section 22 (4), applies only if the notice is issued before the return is submitted. Even if that interpretation were correct, it would in my opinion be a clearly insufficient reason for refusing to read section 22 (4) according to its plain meaning and for reading into it a remarkable and very important restriction, which those who framed it could hardly have forgotten to express. The prevailing judgments of the Calcutta, Allahabad and Patna High Courts, which I have mentioned, agree that there is no such restriction.

But Mr. Krishnaswami Ayyangar has tried to get at the same result by another road. In a later stage of his argument, he has admitted that the Income-tax Officer must have the right to call for the assessee's accounts even after he has submitted his return, but has suggested that calling for accounts at that stage is

(1) (1928) A.I.R. (Lah.), 219.

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provided for in section 23 (3). The admission that the Income-tax Officer can call for accounts under section 23 (3) in the course of an inquiry under that sub-section, Mr. Krishnaswami Ayyangar can make without reluctance, because failure to comply with a demand of the Income-tax Officer made under that sub-section does not expose the assessee to the penalty of arbitrary assessment provided by section 23 (4). If the Act provided explicitly for calling for accounts during the inquiry under section 23 (3), which is to be made after a return has been submitted, there might be some reason for supposing that the provision for calling for accounts under section 22 (4) applied only to an earlier stage. But the power given to the Income-tax Officer by section 23 (3) is to require the production of evidence "on specified points." If it were intended by those words to give power to call for accounts for several years, the language would, in my opinion, be ill-chosen and misleading. If it were intended to give power to call for accounts, what object could there be in failing to say so explicitly, what object could there be in using language in such contrast with the language of section 22 (4)? The accounts of a series of years may provide evidence on a specified point; but to describe them as "evidence on a specified point" is obviously inappropriate. To my mind, the language of section 23 (3), adds force to the Commissioner's contention. If accounts can be called for at any stage, before or after the return is submitted, then, in the inquiry under section 23 (3), power to call for further evidence on specified points is enough and the language of that sub-section need not be strained in any way.

And, though Mr. Krishnaswami Ayyangar has called section 23 (3) to his aid as showing an implied restriction of section 22 (4), on examination, it throws light on

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the question of immediate importance in this case—whether failure to produce accounts when called for after a return has been submitted, entails the penalty of arbitrary assessment under section 23 (4). Failure to comply with a direction under section 23 (3) does not entail that penalty. If the power of the Income-tax Officer under section 23 (3) is confined to the plain meaning of that sub-section, viz. to call for evidence on specified points, it is reasonable that failure to comply with such a direction should not entail the very severe penalty of arbitrary assessment without right of appeal. If it did entail that penalty, it could obviously be used in a very oppressive way. For instance, the Income-tax Officer might call for some evidence of doubtful relevance and difficult or impossible to produce, and, if it were not produced, enforce the penalty of arbitrary assessment. That would be clearly unjust, and the Legislature has rightly made the penalty of arbitrary assessment inapplicable to such a case. But, if an assessee fails to produce at any stage, when required, his accounts—the most important of all evidence in such a matter, the very evidence on which, if he is honest, he will himself wish to rely—why should he be treated more leniently when his improper and obstructive refusal comes after, instead of before, he submits his return? No reason has been suggested for such a distinction. On the contrary, the man who refuses to produce his accounts when the Income-tax Officer has expressed under section 23 (2) dissatisfaction with his return, is clearly more blameworthy and obstructive than the man who fails to produce them before he has made his return, when no one has yet expressed an opinion whether his return will be an honest one or not. When once it is admitted that the Income-tax Officer must have power to call for accounts in the course of the

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inquiry under section 23 (3)—and without it the inquiry might easily be reduced by the assessee to a farce—the omission to penalize failure to comply with the officer's requisition under that sub-section by arbitrary assessment is strong evidence that the right to call for accounts even at that stage must be found elsewhere, that is, in section 22 (4).

There remains the actual wording of section 23 (4), which sets out the failures on the part of the assessee which entail the penalty of arbitrary assessment without appeal. It is contended that, even if section 22 (4) gives power to call for accounts after the assessee has submitted his return, the penalty of arbitrary assessment is restricted to a failure to produce accounts when called for before the return is submitted. As I have indicated, there is nothing in the object or nature of the proceedings and nothing in section 22 or the rest of section 23, to make it probable that the Legislature would intend to treat more leniently a failure to produce accounts when required after the submission of a return, than before it. But it is contended that the wording of section 23 (4) has that surprising result. It is quite clear that, if a company or other assessee fails to submit a return by the proper date, the penalty of arbitrary assessment is to be enforced. That is what the sub-section first provides. Then it goes on to provide the same penalty for failure "to comply with all the terms of a notice issued under sub-section (4)" of section 22. If the notice under section 22 (4) can be issued at any time—and that I do not think can now be doubted—there is nothing so far to suggest that the penalty is attached only to failure to comply with a notice issued under section 22 (4) before a return is submitted. But section 23 (4) goes on to provide that, if a company or other assessee, "having made a return, fails to comply

with all the terms of a notice" issued under section 23 (2), the penalty shall apply. The contention of the assessee in this case rests upon the insertion of the words "having made a return". It is urged with truth that failure to comply with a notice under section 23 (2) can occur only after making a return, as that notice cannot be issued before a return is made. Therefore it is contended these otherwise useless words must have been introduced to show by contrast that the other two failures penalized must occur before a return is made. No such contrast could be of any use in regard to the first failure mentioned in the sub-section, which is failure to make a return at all. Then this supposed contrast, if it indicates anything, must be understood to indicate that the failure to comply with a notice to produce accounts under section 22 (4) is to be penalized only if the notice is issued before the return is submitted. But, if that was the intention, if the object was to express something of such importance, why try to indicate it in a clumsy and obscure way? We must all accept the principle adopted in 1928 A. I. R. Lahore, 219, that, if two constructions of a fiscal enactment are equally possible and reasonable, the construction more favourable to the subject must be enforced. But the contention of the assessee in this case rests on too frail a foundation. The words "having made a return" in section 23 (4) may be superfluous and add nothing necessary for the description of the third failure penalized; but they are applicable to that failure. Their use may be tautological and inartistic. But because they are unnecessary, we are not justified in jumping to the conclusion that they have been used to express something which it cannot be pretended they could express clearly, which a child could express clearly in other words, which no man of education and sense of

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responsibility would think of expressing in that way, and of which there is no indication in section 22 or the other parts of section 23. That, to my mind, would not be choosing between two equally possible and reasonable constructions but adopting a strained construction, unreasonable in effect and out of tune with the policy of the Act that an assessee should make full disclosure of his income. In my opinion, the power to call for accounts under section 22 (4) may be exercised by the Income-tax Officer after the assessee has submitted a return, and failure of the assessee to produce his accounts when called for after he has submitted a return may be penalized by arbitrary assessment under section 23 (4); the question referred to us must be answered in the affirmative, and the assessee should pay the costs of the reference, Rs. 250.

O.P. No. 186 of 1928.

This reference raises the same question as that decided in O.P. 188/23, and the decision must follow the decision in that case. The reference is not now pressed by the assessee in respect of any other contention. The assessee will pay the costs of this reference, Rs. 150.

O.P. No. 187 of 1928.

This case raises the same question as that decided in O.P. 188/28, and the decision so far must be the same. But in this case it happened that the Income-tax Officer in 1926-27 called for the assessee's accounts both for the year of account and for the preceding year. The accounts of the year of account were produced but not those of the preceding year. On that default, the Income-tax Officer proceeded to make his assessment for 1926-27 under section 23 (4) of the Act. The

assessee applied for cancellation of the assessment under section 27. The Income-tax Officer refused to reopen the assessment, and in his order refusing to do so, he stated that he had wanted the accounts of the preceding year for the purpose of making a revised assessment for 1925-26 under section 34. It is admitted that he had no power at that time to call for the accounts for the earlier year for that purpose, as he had issued no notice under section 34. The assessee appealed to the Assistant Commissioner of Income-tax against the refusal of the Income-tax Officer to reopen their assessment for 1926-27. The Assistant Commissioner then discovered and stated in his order, that the Income-tax Officer had required the accounts of the earlier year, not only for the purpose of revising the assessment of 1925-26 but in order to verify the opening balances of the accounts actually produced for the assessment of 1926-27. It is clear that the Income-tax Officer had the power to call for accounts of the earlier year for the purpose of the assessment of 1926-27. The notice which he issued did not disclose for what purpose he wanted those accounts. The fact that he afterwards gave to the assessee a reason which would not justify his action in calling for the earlier accounts did not make his action unjustifiable or illegal; nor did it make the failure of the assessee to produce those accounts an insufficient basis for an arbitrary assessment of their income under section 23 (4) of the Act. The assessment for 1926-27 under section 23 (4) in this case was therefore legal.

The assessee has failed on both the questions raised in this reference. But it will be seen that the second question would never have been raised and the assessee's appeal to the Assistant Commissioner would never have been preferred if the Income-tax Officer

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had stated in his order on their application under section 27, as the Assistant Commissioner afterwards stated, that he wanted the accounts of the earlier year for the assessment of 1926-27, with which he was then engaged. But he chose to give as his only reason for calling for those accounts a reason which could not justify his action and which the Assistant Commissioner afterwards discovered was not his only reason. It is at least curious that the Assistant Commissioner should afterwards have known that the Income-tax Officer had a good reason for his action which the Income-tax Officer himself did not think of stating in his own order. And, though the reason stated by the Income-tax Officer does not affect the legality of his action or the consequences of it, his statement of his reason in his order was undoubtedly misleading to the assesseees, and left them under the impression that they had a good case for appeal, when they had none. It is much to be regretted that the Income-tax Officer should have misled the assesseees and should have given to the proceedings of his department an air of disingenuity. If the only question raised in this reference had been whether the Income-tax Officer had the power to call for the accounts of the earlier year as he did, it would have been proper in the circumstances that the Commissioner of Income-tax should be ordered to pay the costs of the assesseees in these proceedings. But, as the assesseees have failed on the other question also, which is common to this case and to O.Ps. Nos. 186 and 188 of 1928, each party will bear his own costs.

COUTTS TROTTER, C.J.—I agree.

BEASLEY, J.—I agree.

N.R.

APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., Chief Justice and
Mr. Justice Madhavan Nair.

THE MUNICIPAL COUNCIL, DINDIGUL
(DEFENDANT), APPELLANT,

1928,
April 18.

v.

THE BOMBAY COMPANY, LTD., MADRAS
(PLAINTIFFS), RESPONDENTS.*

District Municipalities Act, Madras (V of 1920), ss. 92 and 350, cl. (2)—“Transacting business”—Meaning of—Company—Agent employed in a municipality to do some work—Effective control vested elsewhere—Tax under sec. 92—Company if liable—Suit by company—Recovery of sum wrongfully collected under sec. 92—Action for “money had and received”—Not “damages or compensation”—Sec. 350, cl. (2)—No bar.

In section 92 of the Madras District Municipalities Act (V of 1920) the expression “transacting business” means “carrying on business.” The mere employment by a company of an agent to do some work in a municipality will not make the company liable to a tax under section 92, so long as the effective management, administration and control are vested elsewhere.

Clan Line Steamers, Ltd. v. Municipal Council of Cocanada, (1917) 34 M.L.J., 145, approved and followed.

A suit by a company for the recovery of a sum wrongfully collected by a municipality under section 92 is essentially an equitable action for “money had and received” and not a suit for “damages and compensation,” and the bar of limitation prescribed by section 350, clause (2) of the Act will not apply to such an action.

John v. Dodwell & Co. [1918] A.C., 563, followed.

APPEAL from the judgment of the Hon'ble Mr. Justice BEASLEY, dated 14th November 1927, and passed in the

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exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 257 of 1927.

The following facts are taken from the judgment of his Lordship Mr. Justice BEASLEY :—

The plaintiff company during the material times, through its agent in Dindigul, purchased produce, such as cotton and groundnuts, and contracts in respect of such purchases were entered into at Madras and after purchase, that produce was, at Madras, sold abroad. The plaintiff company was also during the said period the managing agents of another company, viz., the Tinnevely Cotton Press Company, Ltd., which carried on business in Dindigul and elsewhere through the agency of the plaintiff company. In Dindigul, that business consisted in pressing and ginning cotton and decorticating groundnuts. The Tinnevely company had no directors, and the whole of its business and affairs were conducted by the plaintiff company as its managing agents at a remuneration of 4 annas per 300 lbs. weight of cotton or the material pressed or baled by the company. The powers of the managing agents as appeared from the memorandum and articles of association were very wide. At Dindigul there was a ginning and pressing and decorticating plant owned by the Tinnevely Company and the staff working the plant was in the first instance paid by the managing agents and the Tinnevely Company was subsequently debited with it. In every respect any payment made in order to gin, press and decorticate the raw material was eventually by the Tinnevely Company. The property tax in respect of the premises in which the machinery was, was paid by the plaintiff company. The only persons in Dindigul who were in the pay of the plaintiff company were those persons necessary for the plaintiff company to carry on its managing agency and possibly to buy raw cotton and groundnuts. With regard to its own affairs, all that the plaintiff company did at Dindigul was through its agent to buy cotton and groundnuts at a price which was fixed having regard to the cost to be incurred in ginning, pressing and decorticating the commodity. The ginning, pressing and decorticating was done by the Tinnevely Company through its managing agents, the plaintiff company. The Tinnevely Company was for this service paid by the plaintiff company and in fixing the price paid by the plaintiff company to the seller of the raw produce, what was payable or paid by the plaintiff company for the

process of ginning, pressing and decorticating was allowed for. The agent of the plaintiff company in Dindigul had no power to conclude any contract to purchase the raw produce. He had to take orders from the plaintiff company at Madras as to the price at which he was to purchase. Sometimes he would quote offers for prices, but unless those offers were accepted by the plaintiff company, he had no authority to make a purchase. The defendant purporting to act under section 92 of the Madras District Municipalities Act, 1920, and rule 16 of Schedule IV to that Act, assessed the plaintiff company to companies tax for the half-years ending 30th September 1922, 31st March 1923, 30th September 1923, 31st March 1924 and 30th September 1924, in the sum of Rs. 250 in respect of each half-year. The plaintiff company paid this tax under protest and brought an action to recover the amounts so paid.

T. M. Krishnaswami Ayyar for appellant.—“Business” is wider than “trade.” The English cases on the meaning of the expression “exercising a trade” are not applicable as the language of section 92 of the District Municipalities Act is “transacting business.” The business of management in the present case was at Dindigul. See *Smith v. Anderson*(1), *Commissioners of Taxation v. Kirk*(2), *Clan Line Steamers, Ltd. v. Municipal Council of Cocanada*(3). The suit is barred by limitation as regards five payments under section 350 of the Act. The present suit is one for damages or compensation and an action for money had and received is an action in tort. Halsbury's Laws of England, Vol. 23, article 700, *Midland Railway Co. v. Withington Local Board*(4), *Waterhouse v. Keen* (5), *Selmes v. Judge*(6), *Lyles v. Southend-on-Sea Corporation* (7), *Bradford Corporation v. Myres*(8), *John v. Dodwell & Company*(9).

Vere Mockett (R. N. Aingar with him) for respondents.—“Exercising a trade” and “carrying on a business” are synonymous. Buying is not carrying on business. *Sully v. Attorney-General*(10), *Smidth & Co. v. Greenwood*(11), *Smith & Co. v. Greenwood*(12). The business of management is carried on in

- (1) (1886) 15 Ch.D., 247 at 259.
- (3) (1917) 34 M.L.J., 145.
- (5) (1825) 4 B. & C., 200.
- (7) [1905] 2 K.B., 1.
- (9) [1918] A.C., 563.
- 11) [1920] 3 K.B., 275.

- (2) [1900] A.C., 588.
- (4) (1833) 11 Q.B.D., 788.
- (6) [1871] 3 Q.B., 724.
- (8) [1916] 1 A.C., 242.
- (10) (1860) 5 H. & N., 711.
- (12) [1921] 3 K.B., 588 (C.A.).

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Madras, *Commissioner of Income-tax, Madras v. T. S. Firm*(1). The present suit is not a suit for damages or compensation. The cases under the English Acts do not apply as the language of section 350 of the District Municipalities Act is different. The suit is not barred by limitation. See *Chunder Sikhur Bundopadhya v. Obhoy Churn Bagchi*(2), *The Rajputana-Malwa Railway Co-operative Stores, Ltd. v. The Ajmere Municipal Board*(3), and *Narayanasami Reddi v. Osuru Reddi*(4).

T. M. Krishnaswami Ayyar in reply, referred to *Kanhaya Lal v. National Bank of India, Ltd.*(5) and *Makhan Lal v. The Municipal Board of Agra*(6).

JUDGMENT.

COUTTS
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COUTTS TROTTER, C.J.—The facts relating to this case are clearly set out in the judgment of the learned trial Judge and it is unnecessary to repeat them. I considered the whole position as it stood under the Act of 1884 in the case of *Clan Line Steamers, Ltd. v. Municipal Council of Cocanada*(7), in which I reviewed all the authorities. That judgment was confirmed on appeal and I do not propose to go over the same ground again.

The only question I have to consider is whether section 92 of the new Madras District Municipalities Act of 1920 has altered the law as it stood at the date of the Clan Line Case. In my opinion it has not, though I have no doubt that it was intended to do so. Two parts of the section are called in aid by the municipality. The first is the body of the section itself which uses the phrase “transacting business” instead of the words of the old Act “exercising . . . any one . . . of the trades or callings specified in the schedule.” It is quite obvious that if “transacting business” is not to

be controlled in some way, it would render liable to the tax any company situate in Madras who made an isolated purchase for the purpose of re-sale or shipment abroad in any one of the municipalities in the Presidency. No one can suppose that any such construction could reasonably be put upon the words. Stress is also laid upon the explanation to section 92 which says “Whenever a company employs a servant or agent to represent it for the purpose of transacting business in a municipality, such company shall be deemed to transact business within the municipality and such servant or agent shall be liable for the tax in respect of the company’s business whether or not he has power to make binding contracts on behalf of the company.” In my view that carries the matter no further. I feel myself constrained to construe “transacting business” as meaning no more than the phrase “carrying on business” which has been defined by a series of decisions of the highest Courts in England and settled for this Court by the decision in the Clan Line Case. The English decisions I have reviewed in my judgment in the last named case. It may be quite true that if the Company does carry on business in the municipality, the fact that it does so by an agent who has no power to make binding contracts is no longer one of the tests to be applied. The question still remains, “does the Company either itself or by its agent transact, i.e., carry on business in the accepted legal meaning of the term ‘within the municipality’”? In my opinion it would be no more reasonable so to hold than to hold that a company who sends a commercial traveller all over India to make purchases for them can be said to carry on business in all the various places at which he calls to fulfil the purpose of his employment.

An alternative case was put forward, namely, that even if it could not be said that the Bombay Company

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(1) (1927) I.L.R., 50 Mad., 847.

(2) (1880) I.L.R., 6 Cal., 8.

(3) (1910) I.L.R., 32 All., 491.

(4) (1901) I.L.R., 25 Mad., 548.

(5) (1913) I.L.R., 40 Cal., 598 (P.C.).

(6) (1919) I.L.R., 42 All., 207.

(7) (1917) 34 M.L.J., 145.

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carried on the business of purchasing cotton and groundnuts in Dindigul, they still could be said to be carrying on the business of managing agents of the Tinnevelly Cotton Press Company in Dindigul. On the facts it appears to me absolutely plain that the business they undoubtedly carried on as managing agents of the Tinnevelly Cotton Press company was entirely carried on in Madras and the fact that the Bombay Company lent certain persons to the Tinnevelly Cotton Press Company to help them in their business of ginning and pressing cotton and decorticating groundnuts does not affect the matter. The salaries of the persons so lent are in every case ultimately paid by the Tinnevelly Cotton Press Company and not by the Bombay Company, though the Bombay Company made themselves responsible for the amount in the first instance. In these circumstances, it appears to me impossible to contend that their business as managing agents is carried on anywhere except in Madras where the whole of the accounts are kept and adjusted, and where the remuneration by way of commission for managing the Tinnevelly Cotton Press Company is paid.

The second point in the case raises a question of very considerable interest. The plaintiff Company here sued for a return *inter alia* of moneys that they had paid under protest more than six months before the action was brought, and it is contended that the recovery of such payments is time-barred by reason of section 350 of the Act of 1920. The industry of counsel put before us practically every decided case both English and Indian. I may clear the ground of two points at once. In the first place it cannot be contended, as was at one time suggested, that payment under protest can affect the position of the person who is being paid. Its value is to safeguard the position of the person who makes the

payment and to ensure that it cannot be said that the payment he made was a voluntary one; but it does not raise any obligation on the part of the person who accepts the payment to return it if it turns out ultimately that the money was not due. The question whether there is an obligation to return it has to be determined on grounds altogether independent of whether the payment was made with or without protest.

It is clear that actions such as the present are in the nature of English actions for money had and received and we were taken through a long series of authorities as to what the real nature of this action in the English Common Law Courts was, culminating in the judgment of the House of Lords in the well-known case of *Sinclair v. Brougham*(1). The history of the matter will be found in the judgment of Lord SUMNER in that case. There, the suggestion was made that it was erroneous to suppose that the cause of action was really in assumpsit which would rest upon an implied or imputed contract to return the money to the person to whom it was proved properly to belong but that Lord MANSFIELD in *Moses v. Macferlan*(2), had rested it on an equitable doctrine independent of assumpsit which made the return of the money obligatory *ex aequo et bono*. That doctrine was demolished by Lord SUMNER and it may be regarded as definitely established that in the English Common Law Courts, the cause of action is exclusively founded on an assumpsit or its modern equivalent. It would be a barren display of learning to enquire how far it is true to say that an action in assumpsit in its origin really sounded in tort, for the simple reason that I am quite prepared to concede that if an action for money had and received sounds either in tort or implied

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(1) [1914] A.C., 398.

(2) (1760) 2 Burr., 1005.

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contract in this country, it would be within the words of section 350 of Act V of 1920 and that the plaintiff company would be time-barred; because either form of such an action would obviously be a suit for damages or compensation within the meaning of the section. These words are peculiar to the Indian Statute. They are not found either in section 21 of the Public Health Act of 1875 or section 1 of the Public Authorities Protection Act of 1893 whose language is very much more general; and I am quite prepared to think that if the draftsman of the Indian Act had reproduced the words of the English Statute and not added the qualification "for damages or compensation," which has caused all the trouble, in this case these arrears could not be recovered. But there are the words which I have to deal with and the question which I have to consider is whether the Courts in India are compelled to regard a suit of this nature as confined within the limits of a suit for money had and received as known to the English Common Law. I find the highest authority for taking the contrary view, the authority of a Privy Council case binding on me, namely, *John v. Dodwell and Company*(1), LORD HALDANE there points out, referring to Ceylon, "Under principles which have always obtained in Ceylon, law and equity have been administered by the same Courts as aspects of a single system, and it could never have been difficult to treat an action analogous to that for money had and received as maintainable in all cases 'where the defendant has received money which *ex aequo et bono* he ought to refund'. If, as in Ceylon, there is no necessity to find an actual contract or to impute the fiction of a contract, inasmuch as every Court can treat the question as one not merely of

contract, but of trust fund where necessary, there is no difficulty in extending the remedy to all the cases covered by the words just quoted." I take that as being equally applicable to the Courts of British India and I take it to mean this—that in Courts such as those in Ceylon and those of British India, an action for money had and received, may be treated, though the English Common Law cannot treat it, as an action founded on an equity binding on the conscience of the recipient of the money which is shown not to be his. If that be right, it follows that the remedy being an equitable one is enforceable because it is binding as *ex aequo et bono* on the conscience of the defendant and cannot possibly be either a suit for damages or compensation. I do not quite understand His Lordship's words "trust fund," but it appears to me reasonably clear that as he is dealing throughout with an action for money had and received, he cannot be supposed to have intended to apply what he said merely to earmarked funds, for such do not arise in the case of actions for money had and received. I consider it broadly as coming to this, that LORD HALDANE considers that for Ceylon and therefore for India, where there has never been any divergence between equitable and legal remedies, it is permissible to apply the suggestion of Lord Mansfield, whether it offends against the Common Law of England or not, to such actions when brought in India. In this view, the suit for the recovery of the payments made outside the limitation period of six months is unaffected by the provisions of section 350 and neither the necessity for the notice nor the limitation of six months contained in that section applies.

I may add that a tax, the amount of which is fixed solely by the paid-up capital of the company, without reference to the amount of business done in the area

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(1) [1918] A.C., 563.

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of proposed assessment is one whose incidence the courts should watch with a jealous eye. The municipalities are to get this tax without incurring any expense of enquiry into, or consequent on, the assessment on the amount of business actually done. The tax no doubt is not heavy and perhaps it suits both sides to avoid the trouble of going into the actual volume of business done in the particular municipality. But the principle is a dangerous one, and it is not difficult to imagine cases where it would inflict great injustice on the company to be taxed.

The appeal will be dismissed with costs.

MADHAVAN
NAIR, J.

MADHAVAN NAIR, J.—The plaintiff, the Bombay Company, Limited, is a company incorporated under the Indian Companies Act and carries on business in Madras and elsewhere. The defendant, the Municipal Council of Dindigul, is a corporation constituted under the District Municipalities Act of 1920 and has its office at Dindigul. The defendant municipality purporting to act under section 22 and rule 16, schedule 4 of the District Municipalities Act, assessed the plaintiff company to Company's tax for the half-years ending 30th September 1922, 31st March 1923, 30th September 1923, 31st March 1924 and 30th September 1924 and 31st March 1925 in the sum of Rs. 250 in respect of each half-year. Under this section, tax is leviable if the company has transacted business for profit within the municipality for a specified period. The plaintiff company paid this tax under protest and filed the suit to recover the sums so paid which amount to Rs. 1,500. The contention of the plaintiff company is that it did not transact business in the municipality and therefore the tax is not leviable; the defendant on the other hand, contends that the tax is leviable as the company transacted business in Dindigul and also that the suit is

barred under section 350, clause (2) of the District Municipalities Act. The learned Judge (BEASLEY, J.), who heard the case overruled the contentions of the defendant and gave a decree to the plaintiff company. This appeal is against his judgment and decree.

Two questions for consideration in this appeal are: (1) Whether the defendant is entitled to levy the tax on the plaintiff company under section 92 of the District Municipalities Act? and (2) Is the suit barred by limitation?

The relevant portion of section 92 of the District Municipalities Act is as follows:—

" . . . every company transacting business within the municipality for profit or as a benefit society shall . . . pay a half-yearly tax on its paid-up capital on the scale shown in Schedule IV, if, and as soon as it has transacted business in the municipality for a period laid down in section 95."

According to this section, if the plaintiff company transacted business in the municipality for the specific period, the tax is leviable by the defendant. The question whether the plaintiff company transacted business within the municipality for profit is ultimately a question of fact depending on the evidence in each case. The question in what circumstances a company or person may be said to carry on or exercise a trade in any locality has been considered in England in various cases mainly under the Income-tax Acts: the principles laid down in these cases will be very helpful in examining the evidence in this case. These decisions are so well known that I propose to refer only to a few of them; and further, most of these cases have been very exhaustively, if I may say so with respect, considered in a judgment of this Court in *Clan Line Steamers, Limited v. Municipal Council of Cocanada*(1). In *Grainger and*

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Son v. William Lane Gough(1), it was held by the House of Lords that a foreign merchant, who canvasses through agents in the United Kingdom for orders for the sale of his merchandise to customers in the United Kingdom, does not exercise a trade in the United Kingdom within the meaning of the Income-tax Acts, so long as all contracts for the sale and all deliveries of the merchandise to customers are made in a foreign country. In that case a wine merchant whose place of business was in France employed Grainger and Son who had an extensive business of their own as wine merchants, as agents for the sale of his wine in the United Kingdom. They sought orders in the name of the foreign merchant and transmitted them to him in France where he exercised his discretion as to executing these orders. It was sought to assess Grainger and Son to Income-tax, on the ground that they were exercising a trade in the United Kingdom. The following extract from the judgment of LORD HERSCHELL explains the basis of the judgment:

"Taking the findings together, I think it is clear that no contracts to sell wine were ever made by the appellants on behalf of Roederer. All that they did was to transmit to him the orders received, and until he had agreed to comply or complied with them there was no contract . . . An order given to a merchant for the supply of goods does not of itself create any obligation. Until something is done by the person receiving the order which amounts to an acceptance, there is no contract. It is clear that the appellants in receiving an order did not accept or purport to accept it on Roederer's behalf so as to constitute a contract, and that they had no authority so to do."

In another part of the same judgment appears the statement: "If all that a merchant does in any particular country is to solicit orders, I do not think he can

reasonably be said to exercise or carry on his trade in that country. What is done there is only ancillary to the exercise of his trade in the country where he buys or makes, stores, and sells his goods." *Erichsen v. Last*(1), is another case where similar principles have been enunciated. In *Lorell and Christmas, Limited v. Commissioner of Taxes*(2), the following observation appears in the judgment of the Privy Council: "One rule is easily deducible from the decided cases: The trade or business in question in such cases ordinarily consists in making certain classes of contracts and in carrying those contracts into operation with a view to profit; and the rule seems to be that where such contracts, forming as they do the essence of the business or trade, are habitually made, there a trade or business is carried on within the meaning of the Income-tax Acts, so as to render the profits liable to Income-tax." See also *San Paulo (Brazilian) Railway Company, Limited v. Carter*(3). All the well-known cases on this point have been discussed, as I have already pointed out, under two heads, the tax cases and the jurisdiction cases in *Clan Line Steamers, Limited v. Municipal Council of Cocanada*(4), which is a decision on the District Municipalities Act of 1884. It was held in that case that the shipping company which was sought to be assessed at Cocanada was not exercising any trade in Cocanada so as to be liable to be taxed because the freight earning contracts entered into by the company were not entered into at the port of Cocanada.

According to these decisions, provided they are applicable to the circumstances of the case before us,

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(1) (1881) 8 Q.B.D., 414.
(3) [1896] A.C., 81.

(2) [1908] A.C., 46.
(4) (1917) 34 M.L.J., 145.

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what we have to find out mainly from the evidence is as to where the contracts relating to the business of this company are habitually made. If the contracts are made elsewhere, then the company cannot be taxed for transacting business in Dindigul. But it is argued by Mr. Krishnaswami Ayyar for the appellant that these tests should not be applied in judging the evidence in this case because they were decided under the English Income-tax Acts and they were concerned with the interpretation of the words "exercising a trade for profit" or "carrying on a trade" and not with the meaning of the term "transacting business" which are the words used in the District Municipalities Act. He also relies on the explanation to section 92 of the Act to show that these decisions are no longer applicable in considering cases arising under the section. In support of his first argument he has referred us to the decision in *Smith v. Anderson*(1) and a few other cases to show that the word "business" has a more extensive signification than "trade" and that, if there is evidence to show that some kind of business was done in Dindigul such as buying raw cotton, etc., though the contracts with regard to such purchase are made in Madras, then the company must be considered to be transacting business in Dindigul and not in Madras. It is difficult to accept this distinction. What we have to see under the Act is whether the company transacts business for profit in Dindigul. The place where the business is transacted is the place where the tax is leviable. Whether the words are "carrying on business" or "exercising a trade" or "transacting business", I think all must be considered to be used in the same sense and therefore the principles deducible from the

decisions are equally applicable to the present case. The second argument that these principles are inapplicable because of explanation to section 92 of the District Municipalities Act presents some difficulty. It is obvious that the intention of the legislature in enacting the explanation was to nullify the effect of the decision in *Clan Line Steamers, Limited v. Municipal Council of Cocanada*(1), and also generally to exclude the operation of the English cases referred to. But I think the language employed has not succeeded in fully carrying out that intention. According to the explanation, if a company employs a servant for transacting business within the municipality, such company shall be deemed to transact business within the municipality, and such servant shall be liable for the tax in respect of the company's business, whether or not he has power to make binding contracts. Even so, it is the company that is sought to be made liable for the tax and in order to make it liable for the tax, the agent or servant should be employed for the purpose of transacting business within the municipality for profit and so we are thrown back again to the consideration of the question, what is meant by "transacting business." The mere employment of the agent to do some work for the company within the municipality will not, I think, make the company liable to pay the tax so long as the effective management of the business, its administration and control, are vested elsewhere; otherwise the mere soliciting of an order by an agent in any particular case, will make the company of which he is the representative, liable for the company's tax in that case, and this will clearly be against the accepted notions of the commercial community here and elsewhere. In my view the

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(1) (1917) 34 M.L.J., 145.

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section and its explanation should not be interpreted to lead to this result.

As regards the evidence, there can be no doubt in this case that all the business contracts are concluded at Madras and that the whole business of the company is effectively controlled from there. [His Lordship referred to the evidence and continued:] I agree with the conclusion of BEASLEY, J., that no tax should have been levied on the plaintiff company by the municipality as it was not transacting any business within the municipality during the period in question. It therefore follows that the sum which the plaintiff seeks to recover from the defendant was collected by the municipality wrongfully under the provisions of the District Municipalities Act.

The next question for consideration is whether the plaintiff's suit is barred by limitation under section 350, clauses (1) and (2), of the District Municipalities Act. If the section applies, the suit for the refund of the tax paid for the first five instalments will clearly be barred, and it will be maintainable only with respect to the last instalment. According to section 350, clause (1), "No suit for damages or compensation shall be instituted against the municipal council . . . in respect of any act done in pursuance or execution or intended execution of this Act or any rule . . . regulation or order made under it or in respect of any alleged neglect or default in the execution of this Act, etc." unless some formalities are complied with, and clause (2) of that Act states "Every such suit shall be commenced within six months after the date on which the cause of action arose . . . " It is argued on behalf of the plaintiff-company that the present suit is not one for damages or compensation as mentioned in clause (1)

of section 350 and therefore is not barred under clause (2) of that section. The defendant argues contra.

The question is whether the present suit is one for damages or compensation within the meaning of section 350, clause (1) of the Act. I may state at once that I have not found the question an easy one to decide and that no decisions directly bearing on the question have been brought to our notice. The section is evidently modelled upon the provisions of section 1 of the Public Authorities Protection Act, 1893, i.e., 56 and 57 Viet., Ch. 61, but there is one striking difference between the wording of the provisions of the two enactments. In speaking of the proceedings against persons with reference to acts done in execution of statutory or other public duty, section 1 of the English Act refers to "any action, prosecution or other proceeding" and Clause (a) states that "such action shall not lie or be instituted, unless it is commenced within six months next after the act, etc." whereas in speaking of such proceedings section 350, clause (1) uses the expression "suit for damages or compensation." While the English Act gives exemption for all action, prosecution or other proceeding unless commenced within six months next after the act complained against, the Indian enactment confines its operation to "suits for damages or compensation." With the words of the English enactment "any action, prosecution or proceeding" before it, why the Indian Legislature in enacting the District Municipalities Act chose to use the expression "suits for damages or compensation" in section 350, clause (1) of the Act, it is not easy to conjecture. It may be, as contended for by the appellants, that the legislature thought that all actions of the kind that we are dealing with, namely, those brought against public authorities for acts done in execution of their

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authority might be brought under the description "suits for damages or compensation,"; in which case there can be no difference between the English Law and the Indian Law; or it may be, as contended for by the respondent, that the Indian Legislature confined the operation of the section to what are strictly called "suits for damages or compensation" thus deliberately excluding from its scope other kinds of suits which do not strictly come within that description. In this connection, it is interesting to note that in speaking of actions which may be brought against the Municipal Council, etc., for acts done in pursuance of or in execution of the Act, section 261 (1) of the old Act (that is, Act IV of 1884) states that "no action shall be brought, etc.," thus bringing within its scope all descriptions of actions, as under the English Law.

Decisions of the English Courts under the Public Authorities Protection Act and section 264 of the Public Health Act which it repealed, *Waterhouse v. Keen*(1), *Selmes v. Judge*(2), *Midland Railway Co. v. Withington Local Board*(3), *Cree v. The Vestry of St. Pancras*(4), *Lyles v. Southend-on-Sea Corporation*(5), *Bradford Corporation v. Myres*(6) were referred to, for showing that actions of the kind we are dealing with in this case are either actions in tort or in contract and therefore should be considered as "suits for damages or compensation." (See also paragraph 700 of Halsbury's Laws of England, Vol. 23, page 346). In view of the express language used in the Indian enactment, I do not think a discussion of the question whether an action of this kind would come within the description of the old form of action known to English Law as an action

(1) [1825] 4 B. & C. 200; 107 E.B., 1038. (2) [1871] 6 Q.B., 724.
(3) [1883] 11 Q.B.D., 788. (4) [1890] 1 Q.B., 693.
(5) [1905] 2 K.B., 1. (6) [1916] 1 A.C., 242.

in assumpsit or whether the claim is one in tort will yield much profitable result. It is conceded and it is clear from the English cases referred to above that actions for the recovery of money wrongfully collected by local authorities are actions for money had and received and that, in understanding the nature of such actions, we have to look more to their substance than to their form. Lord Mansfield in the well-known case of *Moses v. Macferlan*(1) stated that the action for money had and received is founded on the equity of the plaintiff's case and that the action is an equitable one to recover back the money which ought not in justice to be kept by the defendant. The learned Judge pointed out that the action is maintainable for money which *ex aequo et bono* the defendants are to refund. The money that has been wrongfully collected by the defendant from the plaintiff is to be regarded as a trust fund which the defendant is in equity bound to refund to the plaintiff. This is in substance the essence of the action for money had and received, though it is not clear as to what extent Lord Mansfield intended to import the equitable principles within the dominion of the common law action. See Viscount Haldane's comment in *John v. Dodwell and Company*(2) on Lord Sumner's view in *Sinclair v. Brougham*(3). However that may be, the Privy Council has, in *John v. Dodwell and Company*(2), a case from Ceylon, pointed out that where law and equity are administered as parts of a single system, actions for money had and received may be considered as equitable actions; and if so, it must follow that it is not correct to describe them as suits for damages or compensation. There can be no doubt that what has been said with reference to Courts in Ceylon will apply equally to Courts in India as well, inasmuch as in these

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(1) [1760] 2 Burr., 1005.

(2) [1918] A.C., 563.

(3) [1914] A.C., 398.

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Courts also, law and equity are administered as parts of a single system. The remarks of Viscount Haldane in *John v. Dodwell and Company*(1) relevant to the present question are as follows: "For, under principles which have always obtained in Ceylon, law and equity have been administered by the same Courts as aspects of a single system, and it could never have been difficult to treat an action analogous to that for money had and received as maintainable in all cases 'where the defendant has received money which *ex aequo et bono* he ought to refund'. If, as in Ceylon, there is no necessity to find an actual contract or to impute the fiction of a contract, inasmuch as every Court can treat the question as one not merely of contract, but of trust fund where necessary, there is no difficulty in extending the remedy to all the cases covered by the words just quoted". In view of these observations it must be held that the plaintiff's suit for recovery of the money wrongfully collected by the defendant cannot be described as a suit for damages or compensation, being essentially an equitable action for money had and received, and that therefore the bar of limitation prescribed by section 350, clause (2) of the District Municipalities Act, does not apply and the suit is not barred by limitation as regards the refund of any one of the plaint instalments.

I would also add that having regard to the meaning of the words "damages and compensation" and also the relief claimed in the plaint, viz., a refund of the amount of the tax overpaid, it is hardly correct to call the plaintiff's suit one for damages or compensation.

In the result, the appeal is dismissed with costs.

King and Partridge: Attorneys for respondents.

B.C.S.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Venkatasubba Rao.

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PALANIAPPA CHETTIAR AND OTHERS (PLAINTIFFS
AND DEFENDANTS 2, 3 AND 5), RESPONDENTS.*

Hindu Law—Trade, started by the father in a joint family composed of himself and his sons, one of whom was a minor—Mortgage deed, executed by the father—Amount borrowed for trade purposes—Trade, not inherited by the father—Ancestral trade—Liability of sons for such debts—Mortgage, whether binding on sons.

A Hindu father, governed by the Mitakshara Law, can start a new trade with the aid of family funds and make that a family business binding on his sons. In such a case, an alienation made by the father for raising funds for carrying on that business, is binding on the sons, on the ground that it was for legal necessity. It would make no difference whether the moneys are borrowed for starting a new trade or for carrying on a trade which had been already so started.

APPEAL against the decree of the Court of the Subordinate Judge of Coimbatore in Original Suit No. 11 of 1924.

The material facts appear from the Judgment.

T. R. Ramachandra Ayyar with *K. S. Venkatarama Ayyar* for appellant.—The appellant, who was the minor son of the first defendant, is not bound to pay the mortgage debt. The trade was not an ancestral trade. The family never traded in cotton. It was started by the first defendant for the first time. It was a purely speculative business and father has no power under the Hindu Law to start a speculative trade (which was not

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an ancestral trade inherited by him) and alienate, by way of sale or mortgage, ancestral property for the purpose of such trade. The alienation (sale or mortgage) is not binding on the sons. There is no pious obligation to pay a speculative debt. There was here no antecedent debt. The alienation is in no way binding on the appellant. Though the debt may be binding as a mere money debt of the father, it will not form a proper consideration for a mortgage or a sale. If the father starts a new trade, the sons are not liable; there is no necessity for the alienation.

T. M. Krishnaswami Ayyar for respondent.—The trade in this case was ancestral, though started by the father. It is ancestral as against the sons. See *Sanyasi Charan Mandal v. Krishna Dhan Banerji*(1), *Mahabir Prasad Misr v. Amla Prasad Rai*(2), *Ramlal Thakursidas v. Lakhmichand Muniram*(3), *Sakrabhai v. Maganlal*(4), *In the matter of Radhakrishniah Chetty*(5), *Rajagopal Pillai v. Veeraperumal Pillai*(6). The decision in *Brij Narain v. Mangal Prasad*(7) explains *Sahu Ramchandra v. Bhup Singh*(8).” The debt is binding on the sons, as it is not an illegal or immoral debt of the father. The alienation was for a necessity of the family, as it was a trade started for the benefit of the family. The trade was started in 1917-18, and the mortgage was executed in 1920, for trade necessity.

JUDGMENT.

RAMESAM, J. RAMESAM, J.—This appeal arises out of a suit to recover a sum of Rs. 63,000 and odd due to the plaintiffs on a mortgage bond, dated 26th March 1920 (Exhibit A), executed by the first defendant. Defendants 2, 3, and 4 are the sons of the first defendant. The fifth defendant is the Official Receiver of Coimbatore representing the first defendant who has become an insolvent. The Court below gave a decree as prayed for. The fourth defendant alone appeals.

• The deed of mortgage, Exhibit A, was executed for Rs. 40,000 consisting of Rs. 30,000 borrowed for the purpose of paying the branch of the Madras Bank at Coimbatore and Rs. 10,000 received at the time of registration. The learned vakil for the appellant argued that neither of the items is binding on the fourth defendant so as to form consideration for a mortgage. Taking the first item of Rs. 30,000, the existence of the prior debt to the Bank of Madras at Coimbatore and the payment of Rs. 15,000 by the first plaintiff and another Rs. 15,000 by the second plaintiff on the 30th March 1920 to the Bank of Madras in diminution of the debt of the first defendant is proved by Exhibit D, the account of the Bank, and also Exhibits B, B-1, C and C-1, chalan and receipt for each payment. The learned vakil for the appellant contends that the first defendant was speculating and the debt of the Bank was in connexion with some other person as security. Exhibit D shows that it was his own debt. The first defendant says as D.W. 1 that Rs. 30,000 was for money due on a promissory note debt negotiated by himself and drawn by his brothers-in-law in his favour. Whatever the origin of it may be, Exhibit D shows it was his own debt and it is binding on him.

We now come to the second item of Rs. 10,000 as to which it appeared at first that the appellant had got a better case than the other item. The facts relating to this item and bearing on the history of the family may be stated as follows:—The first defendant's family was a money-lending family from the time of his grandfather. They had a bank called Rukmani Vilas which ceased to work some years ago. Sometime about 1917-18, the family started a ginning factory at Ondiputtur. Originally the first defendant intended to take other partners and he took from the second plaintiff Rs. 1,000

(1) (1922) I.L.R., 49 Cal., 560 (P.C.). (2) (1924) I.L.R., 46 All., 384.
(3) (1861) 1 Rom. H.O., Appd., 51. (4) (1901) I.L.R., 26 Bom., 208 (at 220)
(5) (1924) 19 L.W., 415. (6) (1927) 53 M.L.J., 232.
(7) (1928) I.L.R., 46 All., 95 (P.C.) (8) (1917) I.L.R., 39 All., 437 (P.C.).

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towards his share of the capital and other amounts from the other intended partners. Ultimately he retained the factory entirely for himself and returned the amounts collected from the other intended partners. But in the case of the second plaintiff, he lent a pair of earrings to him (second plaintiff) and afterwards, according to the second plaintiff, asked him to take the earrings towards the amount paid for the second plaintiff's share of the capital of the partnership. The first defendant says nothing about Rs. 1,000 owing to the second plaintiff, but merely says that the price of the earrings, is still due to him. In the matter of the earrings, the Subordinate Judge believed the second plaintiff's evidence and we see no reason to differ from him. Then in 1920 Rs. 10,000 was borrowed under the suit mortgage bond for the needs of the ginning factory. The second plaintiff says "They wanted the balance for the needs of a ginning factory which their family was running." I take this to mean that the ginning factory had been started some time before the borrowing of Rs. 10,000. The first defendant does not give any definite evidence as to when the factory was started. According to the statement made by the second plaintiff (P.W. 1) in cross-examination, it must have been started in 1917-1918. Now it is contended before us by the learned vakil for the appellant that the cotton trade was not an ancestral business and therefore money borrowed for the ginning factory is not binding on the fourth defendant. Incidentally I may observe that defendants 2 and 3, who were majors at the time of the execution of Exhibit A, not only attested the document but afterwards executed Exhibits E and F admitting their liabilities under Exhibit A. The fourth defendant happened to be a minor not only in 1920 but up to 1923. It is true that the family had no cotton trade before the time of first

defendant and that the trade was started by him for the first time. There is no principle of Hindu Law prohibiting a person from starting any trade he likes. If the trade which a person who is the manager of a family is carrying on can be regarded as an ancestral trade, it will be binding not only on his sons but also on his brothers and other collaterals; but if the trade is not an ancestral trade in his hands but a trade started for the first time by himself, it will not be binding on his brothers and other collaterals, though he is the manager of a joint family, unless perhaps it can be shown to have been profitable at least for some time and that the collaterals have participated in such profits; but as against his sons, certainly, it is an ancestral trade in the sense that the father is an ancestor though it is not an ancestral trade in the hands of the father himself. Whether one may call it ancestral or not, the debt borrowed for the needs of the trade cannot stand in a worse position than any other debt contracted by the father which is not illegal or immoral, in the matter of its binding the sons. From the point of view of the son's liability, I do not see what difference it makes whether it is a trade started by their father or a trade started by their grandfather. Mr. Ramachandra Ayyar contends, while conceding that such trade debts may be binding on the sons as mere money debts, that they will not form proper consideration for a mortgage or sale. But that question depends simply upon whether there was an antecedent debt or necessity at the time of the mortgage. Now if there is a family trade carried on by the father for the benefit of himself and his children and in the course of the family trade he finds that he is in need of money for meeting the purposes of the trade, I do not see why a debt borrowed on mortgage should not be regarded as a debt for necessity. Here we find that the ginning

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factory was started some time in 1917-18 and it was going on up to 1920. The presumption is that it was going on as family trade for the benefit of the whole family, just as property acquired by a member of the family, particularly the father or manager, will be presumed to be property purchased on behalf of the joint family, where the family had a nucleus of ancestral property, and it is for members who claim it to be self-acquired property to show that it is self-acquired. Similarly, where the father builds a factory for ginning and other evidence shows that the father was in possession of ancestral property (here we have got evidence that the family had lands annually yielding Rs. 8,000) the presumption would be that the factory was built with joint family funds, and it is for those, who want to assert that it has nothing to do with the joint family, to prove that the factory was erected by means unconnected with the joint family. There is no such evidence here. Thus we start with the position that the family had run a ginning factory with the joint family funds from 1918 to 1920. In 1920 further materials were needed for the factory. The father then borrowed Rs. 10,000 from the plaintiffs. Coimbatore is a cotton-growing district. Cotton trade is a legitimate trade for trading families in that district. We cannot say that building a ginning factory was of such a speculative kind that money borrowed later on for its needs should not be regarded as for necessity from the point of view of the sons. I am therefore of opinion that there was a family necessity in 1920 supporting the mortgage Exhibit A. This is the view I took in *In the matter of Radhakrishna Chetty*(1). In that case I merely expressed an opinion to this effect

(1) (1924) 19 L.W., 415 at 417.

on the first point and stated it was unnecessary for me to give a decided opinion having regard to my decision on the second point. However it is necessary here to decide the point and I adhere to the opinion I then expressed. I think the mortgage is binding on the fourth defendant also. It is clear that every member of the family *sui juris* thought at the time that it was a good venture and they were going to be profited by it.

The result is the appeal fails and is dismissed with costs.

VENKATASUBBA RAO, J. — This is a suit on a mortgage executed by the first defendant. Defendants 2, 3 and 4 are his sons. When the mortgage was executed, defendants 2 and 3 were adults and approved of the transaction. To indicate their consent, they attested the mortgage deed in the first place and subsequently passed two documents in which their approval was expressed. The fourth defendant was a minor and is the appellant before us. He contends that the mortgage is not binding on his interest in the property.

The mortgage was executed on the 26th of March 1920 for securing repayment of Rs. 40,000 advanced to the first defendant. In order to make it binding on the other members of the family, it must be shown either that there were antecedent debts, not illegal or immoral, or, that there was a legal necessity. To the extent of Rs. 30,000 the appellant has clearly no case, for, it is beyond doubt that there were antecedent debts amounting to that sum and that the money was utilized for discharging those debts. As regards the balance of Rs. 10,000 the alienation is supported on the ground that there was legal necessity. The family of the defendant was a wealthy one. It owned lands yielding an annual income of about Rs. 6,000 and there was an ancestral business which consisted of money-lending on

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a large scale. The first defendant deposes that when he assumed the management, the family had dealings in money-lending to the extent of about Rs. 70,000. About the year 1917, the first defendant built a ginning factory and started a trade in cotton. This was not an ancestral trade and the case must be decided upon the footing that it was started for the first time by the first defendant. Money was required in connexion with this trade and the sum of Rs. 10,000 referred to above was borrowed for the needs of this business. It is contended for the appellant, that the needs of the trade started by the first defendant cannot be regarded as the needs of the family and the purpose is therefore not, what may be described, as legal necessity under the Hindu law. The contention is broadly, that a Hindu father governed by the Mitakshara Law can only carry on an inherited business, but can, on no account, commence a new trade, in the sense that it can become a family concern and that its debts are binding upon his sons. I cannot assent to this proposition. In *Rajagopal Pillai v. Veeraperumal Pillai*(1), I expressed the opinion that this is not a sound proposition, though it did not become necessary to give a ruling on the point (see pages 239 and 240). That a son is liable under the pious obligation for his father's trade-debts is, I think, a proposition that hardly admits of doubt. (See the same case.) But when the creditor is trying to support an alienation, the question is not: Is the son under a pious duty to pay the debt? but it arises in a different form: Was the debt incurred for family necessity or benefit? If the carrying on of the trade can constitute a legal necessity or family benefit, the debt must be held binding on the sons. It is agreed on all hands, that if

(1), (1927) 53 M.L.J., 232.

a debt is borrowed for an ancestral trade, it is binding on the sons. Does it then make any difference that it is not such a debt? In many decisions, an ancestral trade was differentiated from a trade started for the first time by a manager of the family. There has been a great diversity of opinion on the point; not only have the views been conflicting, but even the reasons given in support of each view have not been uniform. But it is noticeable, that these cases relate to the powers of a manager, other than a father. In the case of such a manager, in some cases, it has been held that he cannot for the first time start a trade; in others, that to do so, is within his competence. I may illustrate the extreme conflict of views by citing two cases. In *Krishna Dhan Banerji v. Sanyasi Charan*(1), it was held that it was beyond the powers of a karta (in this case the eldest brother) not only to embark on a new trade but even to extend and enlarge a previously existing ancestral trade. I must point out that this extreme view has not received much support. The very opposite of this view was taken in *Malaiaperumal Chettiar v. Arunachala Chettiyar*(2) where SADASIVA AYYAR, J. (AYLING, J., concurring) held that there is no distinction in principle, between an ancestral trade carried on by a father and a joint family trade begun for the first time, either by the father or by the elder brother. How varied and diverse between these two extremes, the opinions on this point are, may be seen from the judgments in the following cases:—*Narayana Sah v. Sankara Sah*(3), *Tammi Reddi v. Gangi Reddi*(4), *Abduraheman Kutti Haji v. Hussain Kunhi Haji*(5), *Laemiah v. The Official Assignee, Madras*(6), and *D. McLaren Morrison v. Verschoybe*(7).

(1) (1916) 51 I.C., 597.

(3) (1926) 51 M.L.J., 621.

(5) (1919) I.L.R., 42 Mad., 761.

(2) (1916) 6 L.W., 417.

(4) (1921) I.L.R., 45 Mad., 281.

(6) (1928) M.W.N., 576.

(7) (1901) 6 O.W.N., 429.

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Turning to the decisions of the Judicial Committee, *Sanyasi Charan Mandal v. Krishna Dhan Banerji*(1) and *Sadasiva Mudaliar v. Hajee Fakeer Mahomad Sait*(2) seem to support the view that the manager's powers are limited, whereas *Niamat Rai v. Din Dayal*(3) seems to recognize that his powers are more extensive. The words in the judgment of their Lordships in the last-mentioned case at page 216 "even if there had been no joint family business" are relevant in this connexion. Whatever may be the state of the law, in regard to the powers in this respect of a manager generally, I find no case in which the father's power has been so restricted. Under the Hindu Law, the father stands, in certain respects, on a footing different from that of an ordinary manager. I am not prepared to hold that in regard to his power respecting alienations, he is under the same disability with reference to trade debts, as other managers are. In *The Official Assignee of Madras v. Palaniappa Chetty*(4) SADASIVA AYYAR, J., observed that the right of a Hindu father belonging to a trading community, to begin a lawful trade as a joint family business, cannot be disputed. In the matter of *Radhakrishna Chetty*(5) my learned brother made an observation almost to the same effect that it is open to a Hindu father to start a new family business. In *Mahabir Prasad Misra v. Amla Prasad Rai*(6), a mortgage by a Hindu father to secure moneys borrowed for a trade, which was not an ancestral one, was held binding on the sons.

I am of the opinion that a Hindu father, by starting a business with the aid of family funds, can make that a family business. In such a case, an alienation made

(1) (1922) I.L.R., 49 Cal., 560.

(3) (1927) I.L.R., 8 Lah., 597; 54 I.A., 211.

(5) (1924) 10 L.W., 415.

(2) (1922) 44 M.L.J., 368.

(4) (1918) I.L.R., 41 Mad., 824.

(6) (1924) I.L.R., 46 All., 364.

by the father, for raising funds for carrying on that business, is binding upon the son, on the ground that it was for legal necessity.

In the view I take, it would make no difference whether the moneys are borrowed for starting a new trade with the aid of joint family funds, or for carrying on a trade which had been already so started.

I agree that the appeal fails and should be dismissed with costs.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Devadoss.

SREERAM RAMA KOTIAH AND SIX OTHERS
(ACCUSED), PETITIONERS,

1928,
April 19.

b.

CHINTALAPUDI SUBBA RAO AND FOUR OTHERS
(ACCUSED), RESPONDENTS.*

Criminal Procedure Code (V of 1898), ss. 263, 264 and 265—Bench of Magistrates—Judgment prepared by presiding officer—Not necessary others should sign—All to be present when judgment is prepared—Judgment reserved—Must be read to all before being pronounced—Judgment prepared and delivered by one in absence of others—Illegality—New trial.

Where the judgment of a Bench of Magistrates is prepared by the presiding officer, it is sufficient if he alone signs it and it is not necessary that the other members should also sign it.

All the members of a Bench of Magistrates must be present, when a judgment is prepared. If a judgment is reserved, it must be read to them before it is delivered.

* Criminal Revision Cases Nos. 969, 970 and 971 of 1927.

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SUBBA RAO. Where a judgment was prepared and delivered by one member of a Bench in the absence of the other members, *held*, in revision, that the procedure was illegal and that there should be a new trial.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgments of the Court of the first-class Bench of Magistrates of Ongole in B.C. Nos. 521, 604 and 603 of 1927, respectively.

V. L. Ethiraj and A. Rangaswami Ayyangar for petitioners in Crl. R.C. Nos. 969 and 970 of 1927.

V. L. Ethiraj for petitioner in Crl. R.C. No. 971 of 1927.

G. Lakshmanan and K. Kameswara Rao for respondents in Crl. R.C. No. 971 of 1927.

K. N. Ganapati for Public Prosecutor for the Crown in all the cases.

JUDGMENT.

The point raised by Mr. Ethiraj in these two cases is that the judgment of the Bench was not signed by all the members of the Bench and that therefore it is no judgment at all. Under section 265, Criminal Procedure Code, judgments have to be prepared by the presiding officer of the Court. Under clause (2) the Government may authorize any Bench of Magistrates empowered to try offences summarily to prepare the aforesaid record or judgment by means of the officer appointed in this behalf by the Court to which such Bench is immediately subordinate, and the record or judgment so prepared shall be signed by each member of such Bench taking part in the proceedings. Clause (3) is as follows: "If no such authorization be given, the record prepared by a member of the Bench and signed as aforesaid shall be the proper record."

The contention of Mr. Ethiraj is that in the absence of an authorization under clause (2) by the Government, a record prepared by the presiding officer of the Bench should be signed as is provided for in clause (2). Clause (3) does not apply to the case of the preparation of record or judgment by the presiding officer of the Court. If the record is prepared by a member of the Bench and not by the presiding officer, it shall have to be signed by each member of the Bench taking part in the proceedings. But where the presiding officer himself prepares the record or judgment it is not necessary that the other members of the Bench should sign the record or judgment. Section 367 of the Criminal Procedure Code requires the presiding officer of the Court to write the judgment and it shall be dated and signed by him in open Court at the time of pronouncing it. That being so, when the judgment of a Bench is prepared by the presiding officer it is sufficient if he alone signs it. It is not necessary that the other members should sign it. In this case the presiding officer of the Bench signed the judgment and this point does not help the petitioner.

The next point is that the judgment was delivered at about 8-30 at night after the other members of the Bench had left the Court. The Magistrate in his explanation says that the other members of the Bench gave their opinion or verdict and left the Court and he afterwards wrote the judgment and signed it. Section 366 requires that the judgment of a Criminal Court should be pronounced by the Court and, if required by the accused, it shall be explained to him. When the members composing the Bench leave the Bench, there is no Court at all. The mere fact that the presiding officer sits in the Court room and writes his judgment will not make that a Court. When a judgment is

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SUBBA RAO. delivered, the members of the Bench who took part in the trial and who concurred or differed from the judgment should be present. Mr. Lakshmananna who appears in another case strongly urges that it is only an irregularity and should not be held to vitiate the judgment. I am unable to accept this contention. The judgment of a Criminal Court must be delivered in open Court when the Court is sitting. It is not at all proper that the judgment of a Bench which is practically the judgment of a number of Judges should be written and delivered by only one of them. No doubt if all the others had concurred in the judgment and told the presiding officer to deliver it that might be different. But they must be present to know what the judgment contains. There are cases in which reasons need not be given in a judgment. In such a case the matter may be different. But where a judgment contains reasons, other members of the Bench must either concur with the reasons or express their dissent from the reasons given by the presiding officer. In this case the preparation of the judgment after the other members of the Bench had left the Court, cannot be said to be a proper judgment. In order to make the matter clear, I must observe that the mere delivery of a judgment may be left to the presiding officer by the other members of the Bench. But they must be aware of what the judgment contains and therefore they must approve of the whole of the judgment, if a judgment is written and if no judgment is written, the requirements of section 263 must be complied with. All the members of the Bench should be present when the record is prepared as required by section 263. Section 264 applies to appealable cases, and in such cases all the members of the Bench must be present when a judgment is prepared. If the judgment is reserved, it must be read to them

before it is delivered. I make these observations in order to prevent irregularities in the procedure of the Bench Magistrates. In these two cases, seeing that the judgment was prepared and delivered in the absence of other members of the Bench, I set aside the conviction and order a re-trial. The fines if paid will be refunded.

Crl. R.C. No. 971 of 1927.

In this case the judgment was prepared by the presiding officer in the absence of the other members of the Bench. The remark that I have made with regard to the judgment in the other two cases apply to this. But this is a case of acquittal and seeing that this is a petty case, though the judgment is an illegal one, it is unnecessary to order a re-trial.

I therefore dismiss this petition.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Reilly.

CHELLAPATHI NAIDU AND TWO OTHERS
(COUNTER-PETITIONERS), PETITIONERS,

v.

T. SUBBA NAIDU (PETITIONER), RESPONDENT.*

Criminal Procedure Code (V of 1898), sec. 145 (1)—Order under—Magistrate's local jurisdiction over land or water in dispute essential.

An order under section 145 (1) of the Criminal Procedure Code can be made only by a Magistrate having local jurisdiction over the land or water in dispute.

* Criminal Revision Case No. 344 of 1928.

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Where a petition was presented to a District Magistrate praying for action under section 145 of the Code in respect of certain land, and he transferred it for disposal to a Subdivisional Magistrate, the limits of whose jurisdiction did not include the land in question, and the latter passed an order first under section 145 (1) and then under 145 (6), *held*, that the whole proceedings were illegal.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Subdivisional Magistrate of Tiruvallur, dated 24th December 1927, in Mis. Case No. 19 of 1927.

M. S. Venkatarama Ayyar for petitioners.

O. Narasimhachari for respondent.

K. N. Ganapati for Public Prosecutor for the Crown.

JUDGMENT.

In this case the Subdivisional Magistrate of Tiruvallur in the Chingleput District has made what purports to be an order under section 145 (6) of the Code of Criminal Procedure. It is objected for the petitioners here that that order was made without jurisdiction. It appears that the respondent here presented a petition to the District Magistrate of Chingleput alleging that there was likely to be a breach of the peace in connexion with certain land and praying for action to be taken under section 145 of the Code. The District Magistrate, as he says, decided "to take the petition on file" and then transferred it to the Subdivisional Magistrate of Tiruvallur for disposal. The Subdivisional Magistrate of Tiruvallur proceeded to make what purported to be an order under section 145 (1). But it happened that the land concerned was not within the local limits of the jurisdiction of that Subdivisional Magistrate. The petitioners here therefore contend that he had no jurisdiction to initiate proceedings under section 145 (1).

. For the respondent it is contended that the District Magistrate had, under section 192 of the Code, power to transfer the inquiry at any stage and that the District Magistrate having once transferred this matter to the Subdivisional Magistrate of Tiruvallur, that Subdivisional Magistrate had jurisdiction to proceed with an inquiry under section 145. *Arumuga Tegundan and another*(1) and *Satish Chandra Panday v. Rajendra Narain Bagchi*(2) have been quoted for the respondent to show that inquiries under section 145 of the Code may be transferred by the proper authorities from one Court to another. But it must be noticed that, in each of those cases, the order under section 145 (1), which is the initiatory step in proceedings under section 145, had been made by a Magistrate who had local jurisdiction over the land concerned. In view of the decision in *Arumuga Tegundan and another*(1), I must take it that, if the District Magistrate had himself made an order under section 145 (1) in this case, as he had undoubtedly jurisdiction to do, and had then transferred the matter to the Subdivisional Magistrate of Tiruvallur, the Subdivisional Magistrate of Tiruvallur would have had jurisdiction to proceed with the inquiry, though I may perhaps venture to say that, if I had not that decision before me, I should have regarded that question as open to doubt. But I have no doubt that the order under section 145 (1) in such a case must be made by a Magistrate having local jurisdiction over the land or water concerned. That I think is made clear both by the object and wording of the section. The object of section 145 is, not to provide parties with an opportunity of bringing their civil disputes before a Criminal Court or of manœuvring for position for the purpose of

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(1) (1902) I.L.R., 26 Mad., 188. (2) (1895) I.L.R., 22 Cal., 898.

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subsequent civil litigation, though that is often the effect of such proceedings, but to arm the Magistrate concerned with an additional weapon for maintaining peace within the area for which he is responsible. And the wording of section 145 (1) requires the Magistrate to state in his initial order that he is satisfied that there is a dispute likely to cause a breach of the peace concerning some land or water or its boundaries within the local limits of his jurisdiction. It is not the business of any Magistrate as such to maintain order or peace outside the limits of his local jurisdiction. What the Tiruvallur Subdivisional Magistrate has in effect done in this case is to say "I am satisfied that there is a dispute likely to cause a breach of the peace concerning some land within some one else's jurisdiction, and I propose to use my powers to prevent it", which is almost an absurdity. The learned Subdivisional Magistrate has, I think, felt the difficulty of his position, as in his order purporting to be made under section 145 (1) he has said that the land is within his jurisdiction "as per the proceedings of the District Magistrate." Now in this Presidency a District Magistrate may post one Subdivisional Magistrate to the charge of another sub-division; but he has no power to alter the boundaries of any sub-division of his district permanently, temporarily or for the purpose of a particular case. No order of the District Magistrate could have brought the land with which we are concerned within the local jurisdiction of the Subdivisional Magistrate of Tiruvallur. That being so, I think it is clear that the Subdivisional Magistrate's order under section 145 (1) in this case was without jurisdiction, and it follows that his whole proceedings were without jurisdiction. There does not appear to be any direct authority on this point; but

Konda Reddi v. King-Emperor(1), which deals with a somewhat similar provision in section 107 of the Code, takes in effect the same view of the matter as I have done.

I may add that in this case, even if the learned Subdivisional Magistrate's order had not been without jurisdiction, it would have been necessary to send the proceedings back to him in order that he might write a proper judgment in the case. What he has done is, when he came to the end of his inquiry, to fill up Form 22 in Schedule V of the Code, which is in the nature of a decree, and leave the matter there without any explanation of his reasons or his view of the evidence put before him. It would be very convenient to Magistrates if they could be allowed to dispose of such cases in that way; but there can be no doubt that it is their duty to write an order or judgment which shows that they have considered the contentions of the parties and the evidence put before them and which gives the reasons for their decision. There is nothing in section 145 to absolve a Magistrate from that ordinary duty.

The whole proceedings of the Subdivisional Magistrate in this case are set aside.

B.C.S.

(1) (1917) I.L.R., 41 Mad., 246.

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APPELLATE CIVIL.

Before Mr. Justice Devadoss.

(On reference to a third Judge under section 98, Civil Procedure Code, on a difference of opinion between Odgers, J., and Curgenvven, J.)

1928,
April 3.

THE OFFICIAL RECEIVER, ANANTAPUR (FIRST RESPONDENT), APPELLANT,

v.

RAMACHANDRAPPA AND OTHERS (PETITIONER AND RESPONDENTS 2 TO 6), RESPONDENTS.*

Provincial Insolvency Act (V of 1920), ss. 2, 28—Joint Hindu trading family—Manager, not being father, and adult members, adjudicated insolvents—Power of Official Receiver to sell minor's share for a family trade-debt—Power of manager, whether becomes vested in the Official Receiver.

In a Hindu joint trading family, where there are one or more minor members and the manager is not the father, and the adult members including the manager have been adjudicated insolvents, the power of the manager to dispose of joint family property for debts incurred for trading purposes, passes to, and becomes exercisable by, the Official Receiver so as to bind the minors' shares. *Rangayya Chetti v. Thanikachalla Mudali*, (1895) I.L.R., 19 Mad., 74; and A.A.O. No. 31 of 1925, followed.

APPEAL against the order of the District Court of Anantapur in Interlocutory Application No. 129 of 1926 in Insolvency Petition No. 24 of 1924.

The material facts appear from the judgments in the Order of Reference to a third Judge. The appeal came on for hearing before ODGERS and CURGENVEN, JJ., who differed in opinion and referred the point of law to a third Judge, under section 98 of the Civil Procedure Code, subject to the orders of the Hon'ble the CHIEF

* Appeal against Order No. 895 of 1926.

JUSTICE. The judgments of the Bench were as follows:—

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JUDGMENTS.

ODGERS, J.—This is an appeal from the order of the District Judge of Anantapur on a petition under section 65 of the Provincial Insolvency Act to set aside a sale with regard to a certain minor's share in the properties sold. The matter concerns a trading family and the debts have been incurred for the family trade. The Official Receiver sold the joint family properties for the benefit of the creditors. The joint family consists of the second and third insolvents and their undivided brother, the petitioner and another member, nephew of the first insolvent. The sole question in this case is whether the power of the second insolvent as the manager but not the father of the joint Hindu family vests in the Official Receiver to permit him to sell the share of the minor in the property. It is, of course, clear that the minor cannot be adjudicated an insolvent and in *Sanyasi Charan Mandal v. Asutosh Ghose*(1), which was a case like the present of a minor partner in a family concern, it was held that the minor should not be adjudicated simply because there was a restricted remedy under the Contract Act against his share in the partnership. The Court expressly said that it would make no difference if it were a Hindu trading family. It is now settled by the Privy Council in *Sat Narain v. Behari Lal*(2), that it is not the share of the members of the joint family that vests in the Official Receiver but the power of the father to sell the shares of the other members under certain circumstances. Their Lordships lay this down perfectly clearly although they also make it clear that under section 52 (2) of the Presidency Towns Insolvency Act or in some other way the property of the sons may be made available for payment of the father's just debts. That was explained by a Full Bench of this Court in *Seetharama Chettiar v. Official Receiver, Tanjore*(3), which was the case of a father. KRISHNAN and RAMESAM, JJ., held that such a power vests in the Receiver under section 28 of the Act as the insolvent's property and not as property under section 2 (d), which was the view taken by VENKATASUBBA RAO, J. I do not understand the learned Judges to have based

(1) (1914) I.L.R., 42 Cal., 225.

(2) (1924) I.L.R., 6 Lah., 1.

(3) (1926) I.L.R., 49 Mad., 849.

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their decision exclusively on the fact that the manager in that case was the father, because it seems to me that if you can base the decision, as the majority did, on section 28 of the Act, you are free from the definition in section 2 (d) which says that property includes "any property over which or profits of which any person has a disposing power which he may exercise for his own benefit". It has been contended that in the face of that section it is only the father's power that can possibly vest in the Official Receiver, namely, the right to sell the joint family property for the payment of his own just debts. But I fail to see any difference in principle between that and the case of a brother (manager) who is justified in selling the joint property for paying the debts of the joint family business. The minor was interested in the business just as the manager was and if the manager can sell in order to preserve the business, it seems to me that he is exercising a disposing power which he may exercise for his own benefit. The Privy Council in *Sat Narain v. Behari Lal*(1), although they refer to the case in *Rangayya Chetti v. Thanikachalla Mudali*(2), later on say that it was decided under a different statute and that *Sanyasi Charan Mandal v. Asutosh Ghose*(3), was a partnership case and these are not directly in point. In the first of these cases, SUBRAHMANYA AYYAR, J., following *Fakirchand Motichand v. Motichand Hurruckchand*(4), held that the Official Assignee could convey the share of the sons in the joint property but not the share of the brother. It seems to me that once you get the idea admitted of the power of disposition over the property of the insolvent which is clearly established in *Sat Narain v. Behari Lal*(1), and *Seetharama Chettiar v. Official Receiver, Tanjore*(5), there is no difference between the power of the manager if he is a father and the power of the manager when he is a brother or other relation even in the case of a minor partner who cannot be adjudicated. I am supported in this view by a very recent decision of WALLER and MADHAVAN NAIR, JJ., in A.A.O. No. 31 of 1925, which was a case of a brother or paternal cousin, in which they say the power of the manager to deal with joint family property vests in the Official Receiver, relying on the observations of SUBRAHMANYA AYYAR, J., in *Rangayya Chetti v. Thanikachalla Mudali*(2). I would therefore hold that the

(1) (1924) I.L.R., 6 Lah., 1.

(3) (1914) I.L.R., 42 Cal., 225.

(5) (1926) I.L.R., 49 Mad., 849.

(2) (1895) I.L.R., 19 Mad., 74.

(4) (1838) I.L.R., 7 Bom., 488.

learned District Judge is wrong and that the Official Receiver, though he did not succeed to the managership of the family, had vested in him the manager's powers of disposition.

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The Civil Miscellaneous Appeal should therefore, in my opinion, be allowed with costs.

CURGENVEN, J.—The question we have to decide in this case is whether, upon the manager of a Hindu family and some but not all of the other members carrying on a family trade being adjudicated insolvents, the Official Receiver can, under the Provincial Insolvency Act V of 1920, sell the whole joint family property including the shares of those not adjudicated. In the present case, the members adjudicated were an uncle and two out of three brothers, the third brother who was not adjudicated being a minor. In the order now under appeal the learned District Judge has held that the minor's share is not liable to be sold.

There is a clear distinction between the vesting of joint family property in an Official Receiver and the vesting of a power of disposal over that property. It has been held by the Privy Council in *Sat Narain v. Behari Lal*(1), that upon the adjudication of a Hindu father under the Presidency Towns Insolvency Act the property of the joint Hindu family consisting of himself and his sons does not thereby become vested in the Official Assignee but only the father's undivided share so vests; and this decision applies equally to an adjudication under the Provincial Insolvency Act. *A fortiori* the rule holds good if we substitute a family manager other than a father for a father. This decision of their Lordships came under consideration in a recent Madras case, *Seetharama Chettiar v. Official Receiver, Tanjore*(2), where the question which arose was whether, upon a father's adjudication under the Provincial Insolvency Act, his power to sell his son's shares, as well as his own share, for paying his just and proper debts vested in the Official Receiver. The point raised being deemed one of considerable importance, a Bench consisting of three Judges (KRISHNAN, RAMESAM and VENKATASUBBA RAO, JJ.) was constituted to decide it. They unanimously affirmed the proposition, agreeing that the Privy Council decision went no further than to lay down that the son's share did not vest, and left undecided this further point. Accepting then, as we must,

(1) (1924) I.L.R., 6 Lah., 1.

(2) (1926) I.L.R., 49 Mad., 849.

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the view of the insolvency law taken by this Full Bench, does it follow that the power of disposal of a manager of a Hindu family also vests, under the Provincial Insolvency Act, in the Official Receiver?

The point which the Full Bench had in effect to decide was whether the word "property" as used in section 28 of the Provincial Act, included a father's disposing power over his son's share. "Property" is defined in section 2 (d) as including "any property over which, or the profits of which, any person has a disposing power which he may exercise for his own benefit." KRISHNAM, J., thought that there might be some difficulty in applying this definition because in the Lahore case their Lordships seemed to be of opinion that the similar definition in section 2 (e) of the Presidency Towns Act contemplated only an "absolute and unconditional power of disposal," which a father's power is not; but he thought that section 28 was enough to vest the power in the Receiver as a species of property belonging to the father. RAMESAM, J., who does not refer to the definition, seems to have been of the same opinion. VENKATASUBBA RAO, J., deemed the definition in section 2 (d) of the Provincial Insolvency Act to include "the qualified and restricted power of a Hindu father."

Whatever view be taken of the scope of the definition, it appears to me that by qualifying the words "disposing power" by the words "which he may exercise for his own benefit" the intention was to exclude a disposing power which the debtor was competent to exercise only in a representative capacity; and it can scarcely be gainsaid, I think, that a manager disposes of family property in this capacity. The judgment of SUBRAHMANYA AYYAR, J., in *Rangayya Chetti v. Thanickachala Mudali* (1) which has been relied upon in a case (A.A.O. No. 31 of 1925) recently decided by WALLER and MADHAVAN NAIR, JJ., has been criticized before us as not giving due weight to this distinction. The single insolvent had undivided sons and an undivided brother, and after holding that the insolvent had disposing power over his sons' shares, the learned Judge continues "Nor as to the 2nd defendant [the brother] am I able to see any sound distinction, in principle between his case and that of the other defendants (the sons) just referred to. For if the son's share is property which the father has power to dispose of for his own benefit, how can the share of any other undivided co-parcener, which the managing member can convey for debts incurred by

(1) (1925) I.L.R., 19 Mad., 74.

him for legal necessity, be treated differently"? The distinction in principle is perhaps that the son's property is liable for the father's personal debts contracted for his own benefit so long of course as they are not contracted for purposes illegal or immoral, whereas as family manager he can contract binding debts not for his own benefit but only for the benefit of the family.

In *Nunna Setti v. Chidara Boyina* (1) the question arose whether the undivided share of a minor co-parcener, son of one of the insolvents, vested in the Official Assignee. The judgment of BHASHYAM AYYANGAR, J., must be read subject to the observations made upon it by their Lordships in *Sat Narain v. Behari Lal* (2) it was passed under a different statute, and need not be taken as authority under either of the present Insolvency Acts. I only wish to extract from it, here, the following remark of the learned Judge:—

"If the question were *res integra* and not covered by a course of judicial decisions, bearing upon the corresponding expression occurring in section 266 of the Civil Procedure Code (now section 60) I should entertain considerable doubt as to whether a power, which, under the Hindu law, a managing member of a joint Hindu family has over the interests and shares of the junior members in the family property, is within the meaning of section 30 of the Insolvency Act, a power vested in the insolvent which he can lawfully exercise for his benefit."

Since the Privy Council have now deprecated the practice of deriving an analogy from section 266 of the Civil Procedure Code and have upon this ground among others disposed of the cases which stood in the learned Judge's way, this observation is entitled, I think, to much weight as an expression of BHASHYAM AYYANGAR, J.'s personal opinion. *Official Assignee of Madras v. Ramachandra Ayyar* (3) is another case, the authority of which has been affected by the Privy Council decision, for it lays down that the Official Assignee, in the case of a managing member's insolvency, can take possession of the family property, and of course it would follow that he has the power of sale in respect of debts binding on the family.

A case in which the contrary view was taken is *Sanyasi Charan Mandal v. Asutosh Ghose* (4) also referred to in the recent Privy Council judgment. After considering the English case

(1) (1902) I.L.R., 26 Mad., 214.
(3) (1922) I.L.R., 46 Mad., 54.

(2) (1924) I.L.R., 3 Lah., 1.
(4) (1914) I.L.R., 42 Cal., 225.

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Lovell and Christmas v. G. W. Beauchamp(1), MOOKERJEE and BEACHCROFT, JJ., say:—"The decision of the House of Lords cannot, consequently, be rightly regarded as an authority for the proposition that in a bankruptcy proceeding it is open to the Court to direct the receiver to deal with assets other than those belonging to the persons who had been adjudged insolvents. It would indeed be surprising if the Court could, in a proceeding under the Insolvency Act, deal with the property of a person who had not been adjudicated an insolvent." This statement of the law was approved in an offshoot of the same case, which came before the Privy Council in *Sanyasi Charan Mandal v. Krishna Dhan Bannerji*(2).

The conclusion, which, with great respect to the learned Judges who have held otherwise, I feel compelled to reach from this brief survey of the case law and from a consideration of the definition of "property" in section 2 (d), is that it is unwarrantable to extend the recent Full Bench decision so as to cover the insolvency not only of a father but also of a managing member. It may be said that a father, in respect of such of his own debts as are binding upon his sons, has a disposing power "for his own benefit" over the son's property, and that, therefore, the receiver has the same disposing power. The disposing power possessed by a managing member is not for his own benefit but for the benefit of the family, and such a power does not fall within the definition of an insolvent's property which, under section 28, will vest in the receiver. I would, therefore, confirm the learned District Judge's order setting aside the sale of the whole property and would dismiss the appeal with costs.

By Court.—As we have differed in opinion and the matter is one of importance and likely to recur, we decide to refer the following point of law under section 93, Civil Procedure Code, to a third Judge for opinion, subject to the direction of the Hon'ble the CHIEF JUSTICE:—

"In a Hindu joint trading family where there are one or more minor members and the manager is not the father and the adult members including the manager have been adjudicated insolvents, does the power of the manager to dispose of the joint family property for debts incurred for trading purposes pass to, and become exercisable by the Official Receiver, so as to bind the minors' shares."

(1) [1894] A.C., 607.

(2) (1922) I.L.R., 49 Cal., 540.

• The appeal was then heard by DEVADOSS, J.

ON THIS REFERENCE—

B. Somayya for appellant.

V. S. Govindachar for first respondent.

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OPINION.

This is a reference under section 98 of the Code of Civil Procedure, owing to a difference of opinion between brothers ODGERS and CURGENVEN, JJ. The point referred is, "In a Hindu joint trading family where there are one or more minor members and the manager is not the father and the adult members including the manager have been adjudicated insolvents, does the power of the manager to dispose of the joint family property for debts incurred for trading purposes pass to and become exercisable by the Official Receiver so as to bind the minors' shares?" Both the learned Judges referred to almost all the cases on the point and it is unnecessary for me to discuss them in detail. It is well settled that under the Presidency Towns Insolvency Act, the power of the father to dispose of his son's share for a debt which is neither illegal nor immoral, on his becoming an insolvent, vests in the Official Assignee. It was held by the Full Bench in *Seetharama Chettigar v. Official Receiver, Tanjore*(1) that, under the Provincial Insolvency Act (V of 1920), on the insolvency of a Hindu governed by the Mitakshara Law, his power to sell his sons' shares also for paying his just and proper debts vests in the Official Receiver, though the sons' shares themselves do not vest in the Receiver.

The question is whether the same principle would apply to the case where the manager of a joint Hindu family is not the father. The power of the father to sell

(1) (1926) I.L.R., 49 Mad., 849.

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the sons' shares for his debts has been held not to rest solely on the pious obligation of the son to pay his father's debts. If that is so, it is difficult to see how the manager of a joint Hindu family stands on a different footing when the debts contracted by him are such as would bind the members of the joint family. In *Rangayya Chetti v. Thanikachala Mudali*(1) the Official Assignee conveyed a house forming part of the family property of the insolvent to the plaintiff who sued for possession. The younger brother of the insolvent contested the suit. It was held that the Official Assignee could convey the shares of those persons upon whom the debts of the insolvent were binding. SUBRAHMANYA AYYAR, J., after referring to the cases in *Jagabhai Lalubhai v. Bhukandas Jagjivandas*(2) and *Fakirchand Motichand v. Motichand Hurruckchand*(3), observed at page 77 :

"Nor as to the second defendant, am I able to see any sound distinction in principle between his case and that of the other defendants just referred to. For, if the son's share is property which the father has power to dispose of for his own benefit in the restricted sense explained by WEST, J., in the passage quoted above, how can the share of any other undivided co-parcener, which the managing member can convey for debts incurred by him for legal necessity, be treated differently? No doubt there is difference in the proof to be adduced as to the character of the debt in the two instances. But the essential element that the shares other than that of the transferor are liable to be proceeded against for the transferor's debt is common to both the cases. I must therefore hold that the Official Assignee has in law power to transfer not only the share of the insolvent, but also those of his co-parceners, whether they be his sons or brothers or other collaterals, provided of course the debts for which the property is disposed of, are shown to have been incurred for purposes binding upon them."

(1) (1895) I.L.R., 19 Mad., 74.

(2) (1886) I.L.R., 11 Bom., 37.

(3) (1883) I.L.R., 7 Bom., 438.

This case was followed in *Nunna Setti v. Chidara Boyina*(1). That was a decision of a Bench consisting of BHASHYAM AYYANGAR and MOORE, JJ. BHASHYAM AYYANGAR, J., who delivered the judgment of the Court relying upon the decisions under section 266 of the Code of Civil Procedure and after referring to *Fakirchand Motichand v. Motichand Hurruckchand*(2) and *Jagabhai Lalubhai v. Bhukandas Jagjivandas*(3) and the judgment of SUBRAHMANYA AYYER, J., in *Rangayya Chetty v. Thanikachalla Mudali*(4) held that the power referred to in section 266 of the Code of Civil Procedure was the same as the power referred to in section 30 of the Insolvency Act. In A.A.O. No. 31 of 1925, WALLER and MADHAVAN NAIR, JJ., held following *Rangayya Chetty v. Thanikachalla Mudali*(4) that

"the power of the manager to deal with the joint family property vests in the Official Receiver and that he is entitled to sell the joint family property to satisfy the debts of the family."

If the question was *res integra*, I should be inclined to hold, that under the Provincial Insolvency Act, the power of a Hindu father to dispose of his son's shares in the family property for his debts does not vest in the Official Receiver. Section 28 of the Provincial Insolvency Act vests in the Court the whole property of the insolvent on the making of an order of adjudication. This expression "whole of the property of the insolvent" has been construed in *Seetharama Chettiyar v. Official Receiver, Tanjore*(5) as to include the power of the father to dispose of the son's share for his debt. In *The Official Assignee of Madras v. Ramachandra Ayyar*(6) it was held that where the managing member of a Hindu family consisting of himself and his sons is

(1) (1902) I.L.R., 26 Mad., 214.

(3) (1886) I.L.R., 11 Bom., 37.

(5) (1928) I.L.R., 49 Mad., 849.

(2) (1883) I.L.R., 7 Bom., 438.

(4) (1895) I.L.R., 19 Mad., 74.

(6) (1922) I.L.R., 46 Mad., 54.

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adjudicated insolvent, the interests of the sons do not vest in the Official Assignee by reason of the adjudication although it would be competent to the latter to deal with their shares, if the debts of the insolvent were of such a nature as to be binding on their interest. In *Subramania Aiyar v. Krishna Aiyar*(1), PHILLIPS and MADHAVAN NAIR, JJ., held that the power of a Hindu father over the family property including the son's interests therein must be deemed to be property within section 28 and as such vests in the Court or the Receiver. PHILLIPS, J., after referring to section 52 of the Presidency Towns Insolvency Act observed:

"If therefore the English Bankruptcy Act and the Presidency Towns Insolvency Act considered this power as the property of the insolvent, there must be very strong reason for holding that the same word 'property' in the Provincial Insolvency Act has a different meaning and excludes such powers. On this ground I think it must be held that the power of the Hindu father over the family property must be deemed to be 'property' within the meaning of the Act and as such vests in the Court or the Receiver."

The definition of the word "property" in section 2 (d) is "property includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit." In section 28, the expression is "the property of the insolvent." According to the definition of the term "property," unless there be anything repugnant in the subject or context, the word "property" should be understood as defined in section 2 (d). With very great respect to the learned Judges who decided *Seetharama Chettiyar v. Official Receiver, Tanjore*(2) 1, am unable to see why the word "property" should not be interpreted as defined in the definition section. Their Lordships of

the Privy Council in *Sat Narain v. Behari Lal*(1), clearly laid down that in interpreting the Presidency Towns Insolvency Act, the Act and the Act alone must be taken into consideration. If the word "property" as used in section 28 is understood as defined in section 2 (d), there would not be much difficulty in disposing of this case; for the term "property" includes any property over which or over the profits of which any person has a disposing power which he may exercise for his own benefit. The expression "own benefit" is derived from the English Bankruptcy Act of 1883. This expression was not found in the Indian Insolvency Act which was in force till the Presidency Towns Insolvency Act was enacted in 1909.

In section 30 of the Indian Insolvency Act, the expression was "which he might lawfully execute for his benefit". In enacting the Provincial Insolvency Act of 1907 and the present Insolvency Act of 1920, the legislature advisedly used the expression "for his own benefit." There must be some object in the legislature advisedly using the expression "own benefit" when it was not found in the Indian Insolvency Act. That expression "own benefit" has been the subject of interpretation in the English Courts. In *In the goods of Jane Turner*(2), it was held that the expression "own benefit" means his sole benefit. BUTT, J., observed at page 19:—

"The section of the Bankruptcy Act of 1883 to which I have been referred seems to me to be limited to rights which a bankrupt may exercise for his own benefit, and for his own benefit alone."

In that case the trustee in Bankruptcy claimed the right to administer the estate of the insolvent's deceased

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(1) (1924) I.L.R., 6 Lah. 1.
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(2) (1887) 12 P.D., 18.

(1) (1927) A.I.R. (Mad.), 701.

(2) (1926) I.L.R., 49 Mad., 840.

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wife to the administration of which he was entitled. The Court held that the trustee was not entitled to the administration of the estate of the insolvent's deceased wife even though he was entitled to some beneficial interest in the estate. In *In re S.S.B.(1)* and *In re Salt(2)*, it was held that under section 120 of the Lunacy Act, 1890, the committee in lunacy did not get "any power vested in the lunatic for his own benefit." Applying the principle of these cases to the expression "own benefit" as used in section 2 (d) we have to see whether the manager of a joint Hindu family can for his own benefit sell the family property. He can sell the family property for his debts which are binding upon the family; he cannot sell the family property for his own debts if they are not binding on the family. When debts are binding on the family, the whole family is bound to pay off the debts; and when the manager sells the property of the family for debts binding on the family, he sells the family property not for his sole benefit but for the benefit of or on behalf of all the members of the family on whom the debt is binding; and therefore when the managing member of a joint Hindu family becomes insolvent, the power to sell the shares of the other members cannot vest in the Official Receiver as it is not a power which is exercisable for the insolvent's own or sole benefit. In *Nunna Setti v. Chidara Boyina(3)*, BASHYAM AYYANGAR, J., observed:

"If the question were *res integra* and not covered by the course of judicial decisions bearing upon the corresponding expression occurring in section 266 of the Civil Procedure Code, I should entertain considerable doubt as to whether the power which under the Hindu Law, a managing member of a joint Hindu family has over the interests and shares of the junior members in the family property, is within the meaning of

section 80 of the Insolvency Act, a power vested in the insolvent, which he can lawfully execute for his benefit."

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In some of the later cases, it has been held that the Provincial Insolvency Act of 1907 must be understood in the light of the Indian Insolvency Act and the Provincial Insolvency Act of 1920 should be understood in the light of the Presidency Towns Insolvency Act of 1907. The Provincial Insolvency Act of 1907 made considerable departure from the old Indian Insolvency Act, Statute 11 and 12 Vic., Chap. 21. The Provincial Insolvency Act of 1920 has departed in several respects from the Presidency Towns Insolvency Act. Though in many respects the Provincial Insolvency Act of 1920 is brought into line with the Presidency Towns Insolvency Act of 1909, yet the legislature advisedly omitted to introduce into the former section 52 of the latter Act, and it is not right for the Court, I venture to say, to import into it what the legislature advisedly refrained from putting into it. The power of the father "to dispose of the joint family property is not absolute but conditional on his having debts which are liable to be satisfied out of that property"—6 Lah., 1 at page 22. If the property is the insolvent's within the meaning of section 2 (d), it vests in the Official Receiver and, if it is not, it does not vest. In the absence of some section like section 52, there is hardly any warrant for holding that the shares of the sons do not vest in the Official Receiver but the power of the father to dispose of them vests in him. Section 28, clauses (3), (4) and (5), which indicate what is, and what is not, the property of the insolvent, makes no reference to his capacity or power in or over property which he could exercise for his own benefit.

The question whether section 28 vests in the Official Receiver the power of the father to dispose of the son's share for his debt will have to be examined by a fuller

(1) [1906] 1 Ch., 712.

(2) [1896] 1 Ch., 117.

(3) (1902) I.L.R., 28 Mad., 214

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Bench when the question arises. I have indicated my view on this point in order to help discussion when the question is again brought up.

Following the decision of SUBRAHMANYA AYYAR, J., in *Rangayya Chetty v. Thanikachalla Mudali*(1), and the decision of the bench of WALLER and MADHAVAN NAIR, JJ., in A.A.O. No. 31 of 1925, I answer the question referred to me in the affirmative.

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APPELLATE CIVIL.

*Before Mr. Justice Phillips and Mr. Justice
Madhavan Nair.*

P. M. SIVAPATHA MUDALIAR (PLAINTIFF) APPELLANT

v.

SIKANDAR ROWTHER (DEFENDANT), RESPONDENT.*

*Madras Local Boards Act (V of 1920), ss. 104 (2), (3) (c), and 166—"Licensed" in sec. 104 (3) (c), meaning of—
Motor vehicles, licensed under sec. 166, whether exempt from tolls under sec. 104.*

The word "licensed" in section 104 (3) (c), of the Madras Local Boards, 1920, means licensed under clause 2 of the same section, and is not used in the wider sense of "licensed for any purpose whatever."

Consequently, although a licence was granted under section 166 of the Act to use a motor vehicle to ply for hire or to take passengers or goods at certain rates, still such a vehicle is liable to pay tolls under section 104 of the Act.

SECOND APPEAL, against the decree of the District Court of Chingleput in A. S. No. 397 of 1927, preferred against the decree of the Court of the District Munsif of Poona-mallee in Original Suit No. 597 of 1927.

The plaintiff is the owner of a motor bus, licensed to ply for hire between Kunnuathur and Madras, and the defendant is a toll-gate contractor. Plaintiff sued for a declaration that his vehicle licensed under section 166 of the Local Boards Act, 1920, is entitled to pass and ply along and through the roads specified in the licence without paying toll and for a permanent injunction restraining the defendant and his servants from levying such toll. The trial Court decreed the suit. On appeal the District Judge reversed the decree and dismissed the suit. The plaintiff preferred this second appeal.

T. M. Krishnaswami Ayyar for appellant.—The question is whether a District Board, after granting licence to a motor owner for one year is entitled to collect toll, when the vehicle passes through a toll-gate, through the medium of the toll-gate contractor. Under section 166 of the Local Boards Act, 1920, no person can ply any motor vehicle for hire, etc., except on licence obtained. The charges are Rs. 1,000 for Dodge buses and Rs. 800 for Ford buses, per annum. Under section 104 of the Act, tolls shall be levied as per rules framed. Section 104 (8)(c) says that no toll shall be levied for carriages licensed by the District Board for the period specified. It would be a case of double taxation, if a licensed vehicle should again be liable for tolls under section 104. The licence is for the motor vehicles. The basis of the licence is the car and not the business. When private cars are sold, the licence passes with the car. Under section 104, the toll is levied on the animals, carriages, etc., and the exemption is towards buses, etc., already licensed by the District Board. Under section 166, the payment may be compounded annually or for shorter periods. Section 75, clause (5) provides for the levying of taxes, tolls, etc., by District Boards, and section 104, clause (3) exempts vehicles licensed by the District Board for the period so licensed. The provisions of the District Municipalities Act, 1920, are similar. If a person compounds with a District Board, he cannot be taxed indirectly by levying

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(1) (1895) I.L.R., 19 Mad., 74.

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tolls through the toll-gate contractor. In the case of an owner of ordinary carriages, they pay toll if they are not exempted by a licence or there was no compounding with the District Board. In the licence, the route is specified, the toll-gates are specified; and the owner carries with him the licence. A taxing statute should be equitably construed in favour of the subject in cases of doubt; see 27 Halsbury, 180; *Pryce v. Monmouthshire Canal and Railway Companies*(1), *Stockton and Darlington Railway Company v. Barret*(2).

P. Venkataramana Rao (with *P. K. Janakiram*) for respondent was not called upon.

The JUDGMENT of the Court was delivered by

PHILLIPS, J.—The only question for decision here is whether the word “licensed” in section 104 (3) (c) of the Madras Local Boards Act of 1920 means licensed under clause 2 of the same section or in the wider sense of licensed for any purpose whatever. The appellant contends that if a licence is granted under section 166 to use a motor vehicle to ply for hire or to take passengers or goods at certain rates, then such a vehicle is one licensed within the meaning of section 104 and is not liable to pay toll. To put this general construction upon the word “licensed” when it follows immediately after the clause dealing with certain particular licences, would be straining the words of the section and consequently the interpretation put upon it by the District Judge seems to be the correct one. The various arguments put forward here have all been dealt with in his judgment and there is really nothing to be added thereto. The question of construing taxing Acts in the strictest sense in favour of the subject can hardly apply here, for there cannot really be reasonable doubt as to the meaning of the word “licensed” in clause (c). Judicial opinion as to whether

(1) (1878) 4 A.C., 197.

(2) (1844) 7 Man and Gr., 870; S. C., 135 E.R., 353 (357).

statutes imposing tolls need not be construed so strictly appears to be somewhat divided in England, but it is unnecessary to consider that point here, for there is really no doubt in this matter.

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APPELLATE CIVIL.

*Before Mr. Justice Wallace and Mr. Justice
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BALAKRISHNA MENON (LATE OFFICIAL RECEIVER)
(FIRST COUNTER-PETITIONER), APPELLANT,

1928,
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v.

KAKKAT MANAKKAL UMA AND SIX OTHERS (PETITIONER
AND SECOND COUNTER-PETITIONER), RESPONDENTS.*

Costs—Decree for costs against Official Receiver—Personal liability.

Where a decree dismissing an Official Receiver's appeal directed him to pay the costs of the respondents, without stating that the costs should be paid out of the insolvent's estate, the costs are executable personally against the then Receiver, though he had ceased to hold office at the time of execution.

APPEAL against the order of the District Court of South Malabar at Calicut in M. P. No. 619 of 1926.

The necessary facts appear from the judgment of WALLACE, J.

K. Kuttikrishna Menon for appellant.—Whenever an Official Receiver is made to pay the costs of an action, they are not payable by him personally, but they are payable out of the estate of the insolvent concerned, unless he had been personally guilty of any fraud or negligence; *Abdul Rahiman and Co. v.*

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Shaw, Wallace and Co.(1), Vol. II, Halsbury's Laws of England, paragraph 176; *In re Gale*, *ex parte Cundy*(2), section 61, English Bankruptcy Act, 1914, William's Bankruptcy Practice, 13th Edition, pages 358, 519, rule 96 (3) and 558, rule 263.

P. S. Narayanaswami Ayyar for respondent.—This is not a case between the insolvent's estate and the Official Receiver, but a case between the Receiver and a stranger; in the latter case, the Receiver is personally liable for costs, unless the decree directs otherwise, though he may be entitled to reimburse himself out of the estate in proper cases; Vol. II. Halsbury's Laws of England, paragraph 280; *Pitts v. La Fontaine*(3), *James Bevis v. C. A. Turner*(4), and *Ex parte Angerstein, In re Angerstein* (5). The Official Receiver must first provide himself with sufficient funds either from the insolvent's estate or from the creditors, or he must get an indemnity from the creditor before he sues or is sued.

WALLACE, J.

WALLACE, J.—On the 7th December 1920, a Bench of this Court in A.S. No. 353 of 1919 between the Official Receiver of South Malabar (Mr. A. V. Balakrishna Menon), the appellant, and various respondents, decreed "that the appellant do pay to respondents 1 to 6, Rs. 452-13-6 for their costs in opposing this appeal." The short point for decision in this Civil Miscellaneous Appeal is whether or not the wording of that decree has to be taken to imply that the costs can be recovered from Mr. Balakrishna Menon personally. The lower Court has held that it does so imply and Mr. Menon appeals. He contends that such phrasing in the decree against the Official Receiver *ex officio* implies that, unless the Court directs otherwise, he shall not be personally liable. The respondents contend that where the Court has not said that the costs will come only out of the insolvent's estate in the hands of the Official Receiver, the Official Receiver is personally liable for the costs.

(1) (1924) 21 L.W., 516.

(8) (1880) 6 A.C., 482.

(2) (1890) 7 Morrel, 253.

(4) (1888) I.L.R., 7 Bom., 484.

(5) (1874) 9 Ch. Ap., 479.

* Admittedly, Mr. Balakrishna Menon was no longer holding the office of Official Receiver, when the present execution petition on which execution has issued against him personally, was put in. The suit itself was filed in 1917 against the predecessor in office of Mr. Menon. It was by members of a tarwad to declare that certain property included in the schedule of their insolvent Karnavan was not his property but the property of the tarwad. While the suit was pending, Mr. Menon, in 1918, came into charge of the office of the Official Receiver and continued the defence in the suit. The suit was eventually decreed with costs against the Official Receiver. He, i.e., Mr. Menon preferred an appeal to the High Court which was dismissed also, the decree giving the direction noted above as to costs. Mr. Menon ceased to be Official Receiver in January 1925. There are no funds in the insolvent's estate to meet this decree for costs and the decree-holder seeks to execute it against Mr. Menon himself.

Now, there can be no doubt that the Official Receiver or a trustee in bankruptcy may, like any ordinary litigant, be ordered to pay costs in any action taken or defended by him. See *John Tweddle and Company, Limited, In re*(1), *Arthur Williams & Co., In re*; *Official Receiver, ex parte*(2), and *James Bevis v. C. A. Turner* (3). The question here is what did the Court intend, when it baldly said that he shall pay costs? As the Court has not specifically stated its intention, we have to be guided by the general principles of law. The law in England is thus stated in Halsbury, Vol. II, Bankruptcy and Insolvency, paragraph 176, under the sub-heading "Official Receiver."

(1) [1910] 2 K.B., 897.

(3) (1888) I.L.R., 7 Bom., 484.

(2) (1913) 2 K.B., 88.

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"The Official Receiver is not personally liable for costs, when being trustee, he is sued as representing the debtor's estate, or when made a party to any cause or matter on the application of another party, unless the Court otherwise directs."

And again under the sub-heading "Trustee", paragraph 218;

"He (i.e., a trustee appointed to fill the office of trustee of the property of a bankrupt, and not the Official Receiver) is in general personally liable for all costs incurred in the course of litigation instituted by him or against him, save where an action is brought against him as representing the estate, or he is made a party to any cause on the application of any other party thereto, and the Court does not direct that he shall be liable."

And again in paragraph 230,

"Where a trustee brings or defends an action as a litigant, he is as between himself and the other parties to the action like any other litigant; that is to say, he must pay any debt, damages, or costs which the other litigants recover against him, out of his own pocket, and get reimbursement, if entitled to it, out of the bankrupt's property."

The first two propositions are founded upon rule 108 (3) of the Rules framed under the Bankruptcy Act of 1883, and the last proposition is quoted from *Ex parte Angerstein*, *In re Angerstein*(1). Rule 108 (3) of the Bankruptcy Rules is now, rule 96 (3) under the present Bankruptcy Act of 1914, which lays down that where an action is brought against an Official Receiver or a trustee in Bankruptcy as representing the estate of a debtor, or where the Official Receiver or trustee is made a party to a cause or matter, on the application of any other party thereto, he shall not be personally liable for costs unless the Court otherwise directs. Now it has to be borne in mind that the word "Court" in these Bankruptcy Rules is, by virtue of rule 3, the Court as defined by the Bankruptcy Act, unless the context or subject-matter otherwise requires, i.e., a

Court having jurisdiction in bankruptcy under the Act, in other words, as we would say in this country, the Insolvency Court; see observations of PETERSON, J. in *Hill v. Cooke-Hill*(1). There is nothing, so far as I can see, in the context or subject-matter of rule 96 or the old rule 108 to render that definition of "Court" inapplicable to the word "Court" in the rule. It is highly improbable that, under a rule framed under a special Act, the legislature intended to exempt particular officials or persons from the operation of the ordinary civil law. So that, the rule only carries us as far as this, namely, that in actions against an Official Receiver, etc., he shall not be personally liable, unless the Insolvency Court otherwise directs, i.e., in the insolvency relation, if the phrase may be used, between the Official Receiver and the Insolvent's estate, the Insolvency Court will not direct that the costs come out of the pocket of the Official Receiver and not out of the estate except by a special order. It is to matters in insolvency that these rules have been applied; see the cases reported in *In re W. H. Wilkinson, ex parte The Official Receiver*(2), *In re Glanville, ex parte The Trustee*(3), *In re Bryant, ex parte Gordon*(4), *In re Agriculturist Cattle Insurance Co., ex parte Official Manager*(5). But as to any order which the ordinary Civil Court may pass in the matter of costs in an ordinary action against the Official Receiver, these rules seem to have no application. It follows that, in a case like the present, in which we are concerned with a decree in an ordinary action, a party mulcted in costs is personally liable for those costs, and the Official Receiver is therefore under the decree in question personally liable for the costs. It is open to him to apply to the

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(1) (1916) W.N., 61.

(3) (1885) 2 Morrell, 71.

(2) (1884) 1 Morrell, 65.

(4) (1889) 6 Morrell, 262.

(5) (1874) 10 Ch. App., 1.

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Insolvency Court for an order that he may reimburse himself out of the estate. It may, even, be open to him to reimburse himself out of the estate without an order of the Court, and, as between himself and the estate, he shall not be liable for costs unless the Insolvency Court by a specific order so directs.

This view is the effect of the rulings in *Ex parte Angerstein*, *In re Angerstein*(1) and *Pitts v. La Fontaine*(2). The former was a case in bankruptcy, the latter an ordinary civil action. It is true, as the appellant points out, that both these were cases not of the Official Trustee but of a trustee appointed by the creditors, but that really makes no difference in principle. The Bankruptcy Rules quoted above place both on the same footing. In fact, in *Ex parte Angerstein*, *In re Angerstein*(1), Sir G. MELLISH, L.J., said

"I see no difference between the case of an official liquidator and a trustees in bankruptcy."

Similarly in *Pitts v. La Fontaine*(2), a plea which rested on section 20 of the Bankruptcy Act, 1869, was rejected on the ground that that section does not mean that the trustee under that Act cannot be made personally liable for costs in an ordinary action. *Mackenzie, In re; Hertfordshire (Sheriff of) ex parte*(3), is to the same effect. On the other hand, the case relied on by the appellant, namely, *In re Galey, ex parte Gundy*(4), is a case in the Insolvency Court which makes all the difference. There, it was held that an order of the Insolvency Court that the Official Receiver must also pay costs of his appeal, did not mean that he was to pay them personally, thus fulfilling the intention of rule 96 or old rule 108, that the Official Receiver shall not be liable unless the Court so directs. The appellant also relies on the ruling, *Abdul Rahiman*

(1) (1874) 9 Ch. App., 479.
(3) (1899) 2 Q.B., 566.

(2) (1880) 6 A.C., 482.
(4) (1890) 7 Morrel, 258.

& Co. v. Shaw, Wallace & Co.(1). There the learned Judge was only interpreting his own decree, which is a simple matter compared with the task of this Bench to interpret the decree of another Bench. It was obviously within the discretion of the learned Judge to pass any order he chose as to who should pay costs in the action which went before him and he chose that the Official Assignee should not in that case be personally mulcted in costs. In *Borneman v. Wilson*(2), a case of a trustee in bankruptcy electing to continue an action, BOWEN, L. J., laid down on the matter of costs, that

"He cannot adopt part of the action and leave out the rest."

and FRY, L.J., said the same.

The English practice, therefore, is that when the case is in bankruptcy, a simple order for costs will not imply that the Official Receiver must pay them personally, because of rule 96. But in the case of an ordinary action, a simple order for costs against the Official Receiver has the usual meaning of such an order against any litigant, and the party against whom it is made is personally liable in the first instance, though he may later on apply to the Bankruptcy Court and repay himself out of the estate, or by enforcing any indemnity bond he may have against the creditors.

In this Presidency we have not even a rule corresponding to rule 96. The practice in this High Court and in the Calcutta High Court, even on the Insolvency Side, appears to me to hold the Official Assignee, in the first instance, personally liable for costs. (*In re Suresh Chander Gooyee*(3) and *In re Abdul Rahiman Sahib & Co.*(4)) I can therefore see no ground for holding that the learned Judges who passed this order

(1) (1924) 21 L.W., 518.
(3) (1918) 51 I.C., 654.

(2) (1884) L.B., 23 Oh. D., 53.
(4) (1928) I.L.B., 51 Mad., 308 at 317.

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intended to depart from the usual practice that an unsuccessful litigant in an ordinary civil action shall be personally liable for costs.

TIRUVENKATA CHARIAR, J.—I am of the same opinion and I wish to add a few words with reference to some of the contentions which were pressed on us by the appellant's Advocate.

I may, at the outset, observe that a Court which executes a decree has to execute it according to its terms, and if, for that purpose, it is called upon to construe the decree, it has to do so according to the plain meaning of the words of the decree. When the words to be construed are clear enough, the executing court cannot attribute some other meaning to them, unless it has to do so in virtue of any enactment or rule having the force of law applicable to the particular case before it. In the present case, the decree sought to be executed is a decree for costs passed by a Bench of this Court against the appellant in an appeal preferred by him against a decree of the District Court of South Malabar. The decree in which the appellant is described as the Official Receiver, South Malabar (Mr. A. V. Balakrishna Menon) directs that the appellant "do pay to respondents Nos. 1 to 6, Rs. 452-13-0 for their costs in opposing this appeal." According to its plain meaning, the decree is executable against the appellant in any manner in which a decree for money may be executed against any ordinary litigant who is directed to pay costs. But the appellant's Advocate contends that as the appellant filed the appeal in his capacity as Official Receiver it could not have been the intention of the Court to make him personally liable for costs and that the decree should be construed, as limited to execution out of the assets of the estate which he represented in that litigation. The learned Advocate has not referred us to any enactment

or rule by force of which a decree against an Official Receiver should be so construed, corresponding to the rules framed under the English Bankruptcy Rules, but he contends that when an official sues or is sued in an official capacity it must be presumed that the decree does not affect him personally and that otherwise it will be imposing such a heavy responsibility upon Official Receivers that few persons would be willing to accept that office.

He further contends that when the Official Receiver files the suit or appeal or defends the same with the leave of the Court obtained under section 53 of the Provincial Insolvency Act, he must be deemed to have acted *bona fide* and cannot be held personally liable for any decree which may be passed against him. The remedy of the opposite party in those cases is only against the estate unless the decree itself makes his personal liability clear.

No authorities were cited in support of these contentions. On the other hand, the only Indian authorities directly bearing on the question to which we have been referred, go against these contentions. See *James Bevis v. C. A. Turner*(1), which purports to follow the view taken by the Privy Council in *Pitts v. La Fontaine*(2), and by the Court of Appeal in *Ex parte Angerstein, In re Angerstein*(3), as regards the liability of the Official Trustee in Bankruptcy who corresponds to the Official Receiver appointed under the Provincial Insolvency Act.

Re Suresh Chander Gooyee(4) is also directly in point on this very question. There also, as in the present, the respondent had obtained an order for costs against the Official Assignee of the Calcutta High Court which did not contain any limitation as to the fund out

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(1) (1883) I.L.R., 7 Bom., 481.
(3) (1874) L.R., 9 Ch. Ap., 479.

(2) (1880) 6 A.C., 482.
(4) (1918) 51 I.C., 654.

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of which it was payable. The Official Assignee contended that he initiated the proceedings only after obtaining the leave of the Court and that he also prosecuted it with due diligence and that therefore he could not be held personally liable for costs. In overruling that contention, the learned Judge (Mr. Justice RANKIN) says as follows :

" There can be no possible question in this case as to the Official Assignee being in any sense in default. Assuming that the Official Assignee is not in any possible way in default, here is a motion which has been brought by the Official Assignee for the benefit of the creditors and which has been unsuccessful. The respondent has got certain costs against which he ought to be indemnified : what is the Court to do ? The suggestion is that what the Court ought to do is to make an order that the assets of the estate so far as they go, and they only, shall bear the respondent's costs. In my opinion that will be entirely wrong. The correct proceeding is to make an order that the Official Assignee do pay the respondent's costs. Having protected himself by obtaining leave from the Court, he has got his right of indemnity, for what it is worth, against the assets of the estate, but, if, in a case of this sort, assets of the estate are insufficient to give a proper indemnity to the Official Assignee, then the Official Assignee before starting these proceedings must approach the creditors or somebody and get a guarantee or an indemnity from the people on whose behalf the motion is to be brought : but it is quite impossible that a person against whom an unsuccessful motion has been brought by the Official Assignee should be left in the ordinary course in a position that he has to look to an insufficient fund and take his chance of that being sufficient."

I respectfully agree with the observations of the learned Judge. The contrary view will result in serious injustice in most cases to parties whose rights are unlawfully infringed by the Official Receiver. So far as they are concerned, they are equally damnified, whether the person who invaded their rights and dispossessed them of their property was an individual acting in his own interest, or an Official Receiver acting in the interests of

the creditors of the insolvent's estate. It would be contrary to justice and equity if their right to be reimbursed their costs unconditionally, should depend, not upon whether their claim was just and well founded, but upon whether a wrong-doer is a person who acts on his own behalf, or an official who *ex officio* acts on behalf, or in the interest of some other individuals whose interests he has to guard ; it may be for his own advantage also. The circumstance that the Official Receiver obtained the leave of the Court will only entitle him to claim reimbursement out of the estate or from the creditors in whose interest he was acting in the litigation in which he was unsuccessful. As pointed out by Mr. Justice RANKIN, if the estate in his hands is not sufficiently solvent to pay the costs of the opposite party, should he prove unsuccessful, he should take the ordinary precaution of getting sufficient security from the creditors before conducting the litigation on their behalf, and if he omits to do so and suffers loss, he has to thank himself for it.

As the decree against the Official Receiver in this case stands, he is clearly personally liable. Under section 35 of the Civil Procedure Code.

" The Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid."

If the intention of the Court in this case was that the costs of the respondents are to be paid only out of the assets of the insolvent's estate, the decree should have expressly said so. It would be wrong to imply such a limitation as the appellant wants us to do, in the absence of any enactment or rule having the force of law which prescribes that such an implication should be made as a rule.

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As regards *Abdul Rahiman & Co. v. Shaw Wallace & Co.*(1), the decree against the Official Assignee for costs expressly provided that the same was payable "from and out of the estate of the first plaintiff, adjudicated insolvent, in his hands." The application before the learned Judge was not to execute the decree as it stood, but an application by the successful party that the decree as drawn up was not in conformity with the judgment as to costs, which contained no such limitation so as to make it executable against the Official Assignee personally. The application came on before the same learned Judge who delivered the judgment and he held that he did not intend in his judgment to make the Official Assignee personally liable and that therefore the decree as drawn up was correct. If the case is to be regarded merely as involving an interpretation by the learned Judge of his own judgment, there is little more to be said, because no general principle is involved in such a question; but, if the observations made by the learned Judge are to be relied upon, as the appellant contends, as supporting the contention that if the Official Assignee or Official Receiver acts *bona fide* in prosecuting or defending an ordinary litigation against a third party, he should not be made personally liable for costs, its correctness is open to question as it is in conflict not only with the decision of Mr. Justice RANKIN on the same point in *Re Suresh Chandra Gooyee*(2) but also with the decision of their Lordships of the Privy Council in the analogous case of an order for costs against a trustee in bankruptcy, in *Pitts v. La Fontaine*(3).

It needs scarcely to be added that if the appellant was personally liable for costs decreed against him when he

(1) (1924) 21 L.W., 516.

(2) (1912) 51 I.C., 654.

(3) (1880) L.R., 6 A.C., 482.

was Official Receiver, he is not divested of that liability by ceasing to be Official Receiver as contended for the appellant.

I concur in the order proposed by my learned brother.

We therefore decline to interfere and dismiss this appeal with costs.

N.R.

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APPELLATE CIVIL—FULL BENCH.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Madhavan Nair and Mr. Justice Jackson.*

MADDURI VENKATASOMESWARA RAO, MINOR,
BY GUARDIAN AND NATURAL FATHER KUMARASWAMI SASTRI
(SECOND DEFENDANT—PETITIONER), APPELLANT,

1928
November, 2.

v.

PULAVARTY LAKSHMANASWAMI (DECREE-HOLDER—
COUNTER-PETITIONER), RESPONDENT.*

*Civil Procedure Code (Act V of 1908), O. XXXII, r. 3—
Minor—Guardian-ad-litem, appointment of—Suit on a
promissory note executed by mother as guardian of her minor
adopted son—Suit on the note against minor—Mother,
appointed as guardian-ad-litem—Decree passed—Objection
to attachment in execution, by minor represented by another
person as guardian—Objection to validity of decree—
Appointment of executant as guardian-ad-litem, whether
renders decree, etc., void as a matter of law in every case, or
voidable.*

When a person has executed a document or entered into a transaction on behalf of a minor as his guardian, the question, whether that same person can be validly appointed guardian-ad-litem of the minor in a suit brought against him on the document or transaction in question, is not a pure question of law,

* Appeal against Appellate Order No. 6 of 1927.

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but is one of fact governed by no hard and fast rule of law, and there is nothing, either in the Civil Procedure Code or in any of the authorities, to lay down not merely that such a person should not as a rule be appointed but cannot in any circumstances be validly appointed.

The question, whether the appointment of such a person as guardian-ad-litem renders the decree void against the minor or only voidable by him, cannot be answered as involving a pure question of law, in the absence of a finding whether the appointment of the guardian was, in the circumstances, proper or improper.

Nor can the question, whether objection could be taken in execution that the decree is void, be answered without a determination of the two previous questions which depend upon decisions of fact.

APPEAL against the order of the District Court of West Gōdāvari in Appeal No. 238 of 1926 preferred against the order of the District Munsif of Bhimavaram in C.M.C. No. 2122 of 1925 in O.S. No. 348 of 1921.

The material facts appear from the following Order of Reference to a Full Bench, passed by KUMARASWAMI SASTRI and DEVADOSS, JJ. :—

ORDER OF REFERENCE TO A FULL BENCH.

KUMARASWAMI SASTRI, J.—This appeal arises out of an application by a minor to remove an attachment of his properties in execution of the decree in O.S. No. 348 of 1921, on the ground that he was not properly represented in the suit and that the decree which was collusively obtained is not binding on him, and is not executable against him. The District Judge held that it was not competent for the minor to raise the question in execution and hence this appeal.

The petitioner is the adopted son of one Venkata Subbanna and legatee under his will. The adoptive mother of the minor was appointed executrix and under the Hindu Law she would be the natural guardian. She was, however, removed from the guardianship and the natural father of the minor was appointed guardian under the Guardian and Wards Act. The order was made on the 21st of March 1922, but he gave security on the 27th of September 1922.

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O.S. No. 348 of 1921 was filed by the plaintiff against the minor on a promissory note executed by the adoptive mother purporting to act as his guardian. The plaintiff applied to appoint the adoptive mother as the guardian-ad-litem of the minor, though she was the executant of the promissory note and she was appointed guardian-ad-litem. She raised no defence, and an *ex parte* decree was passed against the minor. The appointment of the defendant's natural father as guardian by the District Court was after the adoptive mother was appointed guardian-ad-litem, but before the decree. The plaintiff took no steps to inform the Court of the fact that the District Court appointed the natural father as guardian or get the guardian so appointed brought on record as guardian of the minor. In *Bhimaji v. Hussain Saheb*(1), it was held by SADASIVA AYYAR and SPENCER, JJ., that, if a minor has a guardian appointed for him by a competent authority and a decree is passed with somebody else as guardian-ad-litem, the decree is not binding on the minor even though the Court may have acted in ignorance of the existence of the guardian so appointed.

Rule 3 of Order XXXII of the Code of Civil Procedure requires that the guardian-ad-litem of a minor should not be one whose interests are adverse to those of the minor. It is contended for the appellant that the executant of a document is not, in a suit against the minor on the document, a fit and proper person as his interests are adverse to those of the minor, he being by reason of his position as the executant prevented from raising pleas as to the validity of the document which a stranger can raise, and that, in any event, it is to his interest to support the document as otherwise he may become personally liable. It is also contended that where a person, whose interests are adverse, is appointed, the appointment, being in contravention of rule 3, Order XXXII, is invalid, and the minor should be treated as unrepresented, and that any decree against him, it is argued, is void and incapable of execution. It is also argued that, in such cases, objection can be taken in execution.

It is contended for the respondent that the fact, that the executant of a document is appointed guardian-ad-litem, does not necessarily render the appointment invalid, that at best it would give the minor a right to set aside the decree, if there was any injury to him by reason of any fraud or collusion, and

(1) (1920) I.L.R., 43 Mad., 808.

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that, where a decree has been passed, it cannot be questioned in execution but a separate suit ought to be filed.

The questions that arise are (1) is the appointment of the executant of a document, or a person who enters into a transaction sued on, as the guardian of a minor in a suit upon the document or the transaction, valid? and (2) whether the question, as to the minor being unrepresented either by reason of the invalidity of the appointment or by reason of the guardian appointed not putting forward any defence and thereby prejudicing the minor, can be raised in execution.

I have little doubt that the person, who executes a document or enters into a transaction, should not as a rule be appointed as guardian-ad-litem of a minor in a suit upon the document or transaction, as such a person is interested in upholding the transaction which he has entered into and is precluded by law from raising some at least of the defences which would be open to third parties to raise on behalf of the minor. No person should be appointed to represent the interests of a minor, whose interests may conflict with his duty as guardian. I think that the express prohibition in Order XXXII, rule 3, makes an appointment in contravention of its terms invalid and is not a mere irregularity.

There can be little doubt that, if a minor was entirely unrepresented, the decree would be a nullity. I may refer to the decisions of their Lordships of the Privy Council in *Khiarajmal v. Daim*(1), and *Rashid-un-nisa v. Muhammad Ismail Khan*(2), and to the decision of MADHAVAN NAIR, J., in *Arunachalam Chetty v. Abdul Subhan Sahib*(3), where the learned Judge held that the question can be raised in execution. I think the same result must follow if a minor is represented by a guardian whose interests are adverse to those of the minor, as it will be in express contravention of rule 3, Order XXXII, and the *ratio decidendi* in *Bhimaji v. Hussain Saheb*(4) would apply. In *Sellappa Goundan v. Masa Naiken*(5) it was held by ODGERS and HUGHES, JJ., that a minor represented in a suit by a guardian-ad-litem whose interests are adverse to those of the minor is not legally represented at all in the suit. It appears from the facts of that case that the father, who executed

the bond on which the suit was filed, was appointed guardian-ad-litem of his minor sons, and the learned Judges were of opinion that such an appointment was invalid, as the interests of the father were adverse to those of his sons and that the decree obtained did not bind the minors. In Second Appeal No. 1092 of 1918, OLDFIELD and HUGHES, JJ., referring to the decision of their Lordships of the Privy Council in *Rashid-un-nissa v. Muhammad Ismail Khan*(1), observe "We must accept it as deciding that the representation of a minor by a guardian, whose interest is adverse, is no legal representation at all, the rule being that the decision obtained in proceedings so instituted is null and void." The learned Judges were of opinion that the father who was the debtor, and on whose liability the claim against both the father and the minor son was based, was a person whose interests were adverse and he was disqualified under Order XXXII, rule 3, and that the decree was void against the minor.

A contrary view was taken in Appeal No. 347 of 1919 by SADASIVA AYYAR and NAPIER, JJ. The learned Judges were of opinion that, where a guardian-ad-litem was appointed, the decree was good even though his interests were adverse. The same view was taken by SADASIVA AYYAR, J., in *Payidanna v. Lakshminarasamma*(2). The matter was again raised before me and WALLACE, J., in C.M.A. No. 269 of 1927, and we were of opinion that it was open to a minor to prove that the interests of the guardian-ad-litem or the next friend were adverse and he was not properly represented, and that, if he showed that he was prejudiced, the decree would not bind him.

The balance of authority is against the view taken by SADASIVA AYYAR, J., that, even if it is shown that the interests of the guardian are adverse to those of the minor, the appointment of the guardian-ad-litem would still be good and the decree still valid against the minor.

As regards the question, whether objection can be taken in execution or a separate suit should be filed, it seems to me that a distinction must be drawn in these cases as to whether the decree is void against the minor or is only voidable. If the decree is void, it is difficult to see why the matter could not be raised in execution. It seems to me to be a great hardship for

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(1) (1904) I.L.R., 32 Cal., 296.

(2) (1909) I.L.R., 31 All., 572.

(3) (1925) 50 M.L.J., 232.

(4) (1920) I.L.R., 43 Mad., 808.

(5) (1928) I.L.R., 47 Mad., 79.

(1) (1909) I.L.R. 81 All 572.

(2) (1914) I.L.R., 38 Mad., 1076.

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the minor that he should be powerless to prevent his properties from being sold in execution and that his only remedy should be to file a regular suit with incidental expenditure of money and delay in getting a final decree. The question may also arise as to how far *bona fide* purchasers in execution of the decree would be affected by any subsequent adjudication, if the decree was not binding on the minor. If the question were merely one of balance of convenience, it is better that the question as to whether the decree is void and not executable should be decided in execution proceedings rather than proceedings in execution, which may be subsequently decreed to be invalid against a minor, should be allowed to go on and properties sold under an invalid decree. The duty of the Court to see that a minor is properly represented and is not prejudiced by any violation of the laws enacted for his benefit is better fulfilled by deciding the question when it is sought to execute the decree against him. All the minor's property may be sold and he reduced to beggary in execution of a decree void against him. Giving him a right to file a suit and recover his property after all the mischief is done is not of much use.

In *Rajah of Kalahasti v. Muni Venkatadri Rao Garu*(1), it was held that the general rule that an executing Court cannot go behind the decree would not apply to cases involving the infraction of law enacted in the public interest and the learned Judges refer to the decisions of this Court and the other Courts on the point. There is no reason why the rule should not apply to cases where there is an infraction of the rule about the appointment of guardian-ad-litem, which is for the benefit of the minor.

Reference has been made by the respondent to *Kalipada Sarkar v. Hari Mohan Dalal*(2), where it was held that the executing Court could not go behind the decree; to *Zamindar of Ettiyapuram v. Chidambaram Chetty*(3), where it was held that a party who does not raise an objection as to jurisdiction in the course of a mortgage suit is not entitled to take the objection in execution; to *Sami Mudaliar v. Muthiah Chetti*(4), where AYLING and ODGERS, JJ., follow *Zamindar of Ettiyapuram v. Chidambaram Chetty*(3), and were of opinion

(1) (1927) 53 M.L.J., 533.

(2) (1916) I.L.R., 44 Cal., 627.

(3) (1920) I.L.R., 43 Mad., 675.

(4) (1922) 43 M.L.J., 298.

that the decision in *Lakshmanaswami Naidu v. Rangamma*(1), was overruled; and to *Lahore Bank v. Ghulam Jilani*(2), where it was held that the executing Court cannot refuse to execute the decree on the ground that the minor was not represented in the suit. In *Gora Chand Haldar v. Prafulla Kumar Roy*(3), it was held by a Full Bench that, where a decree is made by a Court which apparently had no jurisdiction, either pecuniary or territorial, or in respect of the debtor's person, to make the decree, it may be questioned in execution proceedings, and that the executing Court can refuse to execute the decree on this ground. If this is good law, there seems to be no reason why it could not be pleaded that a decree is void so far as the party against whom it is sought to be executed is concerned.

Having regard to the importance of the question raised, and the conflict of opinion referred to above, and the desirability of having an authoritative ruling in such cases, I would refer the following questions for the decision of a Full Bench:—

(1) Whether the appointment of a person, who executes a document or enters into a transaction as the guardian-ad-litem of a minor, is valid in a suit on the document or transaction?

(2) Whether the appointment of a person, whose interests are adverse to those of the minor as his guardian-ad-litem, renders the decree void against the minor or only voidable by him?

(3) Whether objection could be taken in execution that the decree is void?

DEVADOSS, J.—The appellant is a minor and was adopted to one Madduri Venkata Subbanna by his widow. She renewed a pro-note executed by her husband in favour of the plaintiff, who brought a suit on the pro-note against the widow as first defendant and the appellant as second defendant with his adoptive mother as his guardian-ad-litem and obtained a decree. He now seeks to execute the decree against the property of the minor. Various objections were raised against the execution of the decree, but the main objection is that the appellant was not properly represented in the suit, as the first defendant's (the adoptive mother's) interests were adverse to those of the appellant, and her appointment as guardian-ad-litem was

(1) (1902) I.L.R., 26 Mad., 31.

(2) (1923) I.L.R., 5 Lah., 54.

(3) (1925) I.L.R., 53 Cal., 168.

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therefore illegal and the decree is a nullity and cannot be executed against the appellant. Both the lower Courts have disallowed the contention of the appellant and directed the execution of the decree against his property. Hence this appeal with his natural father as his guardian.

Mr. Lakshmananna for the appellant raises two contentions (1) that the decree, obtained against the minor appellant, with a guardian whose interests were adverse to those of the minor, is a nullity, and therefore cannot be executed against the minor's property, and (2) that the executing Court can entertain an objection to the legality of the decree, when it was obtained against a minor with a guardian-ad-litem, whose interests were opposed to those of the minor. Order XXXII, rule 3 (1), Civil Procedure Code, says: "Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor."

Clause (3) says: "Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed."

Rule 4 is as follows: "Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit, provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff."

Under these rules the Court has to see that the next friend or the guardian-ad-litem has no interest adverse to that of the minor. Where a suit is brought against a minor, an application has to be made under rule 3 for the appointment of a guardian-ad-litem for the minor, and the application has to be made by the plaintiff or on behalf of the minor supported by an affidavit that the proposed guardian has no interest adverse to that of the minor, and the Court, on being satisfied that the proposed guardian has no interest adverse to that of the minor, may appoint the person proposed as guardian-ad-litem for the suit. Where there is a guardian appointed either under the Guardian and Wards Act or under a will, such guardian should be appointed as guardian for the suit, unless the Court is satisfied that the person is unfit or has an interest adverse to that of the minor in the matters in controversy in the suit.

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It is the duty of the Court to be satisfied that the interests of the person proposed are not adverse to those of the minor. If, in the course of the trial, it transpires that the guardian-ad-litem has an interest adverse to that of the minor, the Court would not be justified in allowing the guardian to act for the minor but should remove him and appoint some one else who has no interest adverse to that of the minor as guardian for the suit. The question is complicated by the peculiar principle of Hindu Law, which permits a Hindu father to incur debts which would bind him as well as his sons. The question really is, if, in a suit for the recovery of a debt incurred by the father, his minor son is made a party, is it illegal in all cases to appoint the father guardian-ad-litem for the minor, and is the decree obtained against the son a nullity? To hold that the father's interest is always opposed to that of the son, whenever a suit is brought against the father, and son for enforcement of a debt incurred by the father would result in the father being ineligible to be the guardian-ad-litem of his minor son, whatever may be the nature of the debt, and however beneficial it may have been to incur it. There are occasions when the father has to incur debts to save the family property, or to benefit the estate. In such cases, it cannot be said that the father's interests are opposed to those of the son. To hold otherwise would not only be unjust but would not be in the interests of the minor, and rule 3 does not warrant laying down such a hard-and-fast-rule. Order XXXII, rule 3, clause (3) says: "that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed." First he must have an adverse interest and secondly the adverse interest must be in the matters in controversy in the suit. It is only then that he would not be a fit person to be appointed guardian-ad-litem, if in other respects he is a fit person to be appointed.

In many cases it may not be possible before the written statement is filed for the Court to say whether the father has any interest adverse to that of the son. The appointment of a guardian-ad-litem is before the written statement is filed, and if, on the face of the pleadings and in the light of the plaintiff's affidavit or the affidavit put in on behalf of the minor, there is no reasonable suspicion of there being an interest adverse to that of the minor, the appointment of the father as guardian-ad-litem is not illegal. It is only after the written statement is put

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in that the Court would have some knowledge of the nature of the defence put forward on behalf of the minor. If nothing transpires in the course of the trial to show that the father has an interest adverse to that of the minor, it is difficult to see how the decree obtained against the minor could be said to be illegal.

The second question is, can the executing Court entertain an objection to the execution of the decree against a minor on the ground that the guardian-ad-litem had an interest adverse to that of the minor in the suit? If the decree is not illegal on the face of it, is it open to the executing Court to go behind it? Where the illegality of the decree is not apparent on the face of it, to hold that the executing Court could entertain an application to the validity of the decree would open the door to frivolous objections and to wasting the Court's time in embarking upon an enquiry which would be not only futile but which would impede the course of justice. It is open to the minor to have the decree set aside in a properly framed proceeding, but he cannot be allowed to resist execution by pleading, in the executing Court, the illegality of the decree on the ground that his guardian-ad-litem's interests were adverse to him in the matters in controversy in the suit in which the decree was passed.

The case where the minor was never represented at all in the suit in which the decree was obtained stands on a different footing, as there can be no decree against a person who is not a party to the suit. For instance, where no guardian-ad-litem is appointed to represent a minor in a suit, or where there is a guardian appointed under the Guardian and Wards Act and another person is appointed guardian-ad-litem, and a decree is obtained against the minor, in such cases, there could be no decree against the minor, as he was not properly represented in the suit, and objection could be taken to execution on the ground that there is no decree against the minor, and the executing Court will be bound to see whether there is or there is not a decree against the minor, in the same way as when a decree against one AB is sought to be executed against another AB, as if the decree is against the latter. A person, against whom a decree is sought to be executed, is entitled to say to the executing Court that he is not the judgment-debtor, though he bears the same name as the judgment-debtor, and the decree is not against him but against some one else; and the Court would have to decide, before levying execution, whether the decree is being sought to be

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executed against the right person or not, and, if he is the right person he cannot be heard to say that the decree was not properly obtained against him. If he impeaches the decree as having been obtained by fraud or that it is invalid for other reasons, his remedy is by a proper proceeding to set aside the decree, and not by resisting execution on the ground that it was obtained against him by perpetration of fraud or is otherwise illegal. The case of a Hindu mother stands on the same footing as that of the father. To hold that, in all cases where a debt incurred by the mother is sought to be recovered from the son's property, the mother's interest is adverse to that of the minor and that she is ineligible to be his guardian, is not warranted by the Hindu Law. Such a sweeping proposition would not only be unjust but might work hardship in many cases. Each would depend upon its circumstances.

There are a number of decisions on the points raised and all of them cannot be reconciled. Mr. Lakshmanna for the appellant relies upon *Arunachalam Chetty v. Abdul Subhan Sahib*(1), as supporting his contention. In that case MADHAVAN NAIR, J., held that the decree passed against a minor who was not represented in the suit by a guardian was void and incapable of execution, and hence in execution proceedings objections could be raised regarding the legality of the decree. In that case, the decree was obtained against a minor and he was not properly represented in the suit. On behalf of the creditor, the contention was raised that the executing Court could not go behind the decree or entertain an objection to its validity. MADHAVAN NAIR, J., following *Jungli Lall v. Laddu Ram Marwari*(2), observed that the decree was a void decree and might be disregarded altogether without taking any proceedings to set it aside. In *Bhimaji v. Hussain Saheb* (3), SADASIVA AYYAR and SPENCER, JJ., held a decree obtained against a minor represented not by a guardian appointed for him but by another, though the Court acted in ignorance of the existence of the appointed guardian, was not binding on the minor. In that case, there was no question of the executing Court entertaining an objection to the validity of the decree. That was a suit in which the plaintiff represented by a certificated guardian sued to set aside the decree passed against him in a suit brought by

(1) (1925) 50 M.L.J., 232.

(2) (1919) 4 Pat. L.J., 240 (F.B.).

(3) (1920) I.L.R., 43 Mad., 808.

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the first defendant as plaintiff on a mortgage bond executed by the plaintiff's mother. SADASIVA AYYAR, J., after reviewing the authorities, held that there was no legal representation of the minor in the former suit and decreed the second suit. SPENCER, J., held, following the Privy Council decision in *Rashid-un-nisa v. Muhammad Ismail Khan*(1), that a decree obtained against a person, who was not properly represented on the record, was void and without jurisdiction against such person. In *Rashid-un-nisa v. Muhammad Ismail Khan*(1), a married woman was appointed guardian-ad-litem of a minor sister. Under the Civil Procedure Code of 1882, section 457, a married woman could not be appointed guardian-ad-litem. The Privy Council held that the appellant was never a party to any of the suits in the proper sense of the term. Her sister Ulfat-un-nisa was a married woman and therefore was disqualified under section 457 of the Code of Civil Procedure from being appointed guardian for the suit and Mauladad's interest was obviously adverse to that of the minor. In that case, there was no question of the executing Court sustaining an objection to execution on the ground of the decree being void. After execution proceedings in the previous suit, a suit was brought for setting aside the decree and execution proceedings, and the second suit was decided in favour of the minor. In *Sellappa Goundan v. Masa Naiken*(2), it was held by ODGERS and HUGHES, JJ., "A minor represented in a suit by a guardian-ad-litem, whose interest is adverse to that of the minor, is not legally represented at all" following *Rashid-un-nisa v. Muhammad Ismail Khan*(1). In that case, a suit was instituted against a Hindu father and his sons on a mortgage bond executed by the father and the father was appointed by the Court as guardian-ad-litem of his minor sons. A decree was passed against the entire mortgaged property, which was sold in execution and purchased by the decree-holder. A suit was instituted on behalf of the minor sons by their mother as their next friend for a declaration that the decree and sale in the previous suit were invalid against them and their shares in the family property. ODGERS, J., following *Rashid-un-nisa v. Muhammad Ismail Khan*(1), observed: "Representation by a guardian whose interest is adverse is no representation at all" and again at page 84, "I hold that the law goes to this length, that a minor represented by a guardian whose interest is adverse

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is not legally represented at all. This is, I think, the result of the decision in *Rashid-un-nisa v. Muhammad Ismail Khan*(1)". HUGHES, J., also observed: "It is clear therefore the interests of the father were adverse to those of his sons and the sons were not legally represented in the suit and the decree does not bind them." In *Rarichan v. Manakkal Raman Somayajipad*(2), KRISHNAN and RAMESAM, JJ., observed: "Considering that he was the person who had executed the promissory note on which the suit was brought against the minor, he would have been an unsuitable guardian in any event as his interests would clash with the minor's interests", and, on the facts of the case, held "the appointment is thus vitiated by fraud and is of no legal effect and the case must be treated as having been proceeded with, without a legally appointed guardian-ad-litem. The decree and the subsequent sale are therefore not binding on the plaintiff." In that case the question of raising objection to the validity of the decree in the executing Court did not arise for consideration. That was a suit by a person after attaining majority for a declaration that a mortgage was not supported by consideration to a certain extent, and the decree on the mortgage was obtained by fraud, inasmuch as he was not represented in the suit on the mortgage by a proper guardian, and the Court guardian appointed for him acted with gross negligence in the conduct of the case, and that the decree was not binding on him, and the sale in execution of the decree should be set aside as invalid. In C.M.A. No. 269 of 1927, my brothers KUMARASWAMI SASTRIYAR, and WALLACE, JJ., held that it was open to a minor to prove that the interests of the guardian-ad-litem were adverse to him, and that he was prejudiced thereby, and, if he did that, the decree would not bind him.

In *Rajah of Kalahasti v. Muni Venkatadri Rao Garu*(3), it was held by ODGERS and CURGENVEN, JJ., "The general rule that an executing Court cannot enquire into the validity of the decree does not apply to a case in which the execution of the decree would involve the infraction of a provision of law enacted in the public interest. It is the duty of the Court, however and whenever such a consequence becomes apparent to it, to stay its hand." This decision does not really touch the present question.

(1) (1909) I.L.R., 31 All., 572.

(2) (1922) 44 M.L.J., 515.

(3) (1927) 53 M.L.J., 538.

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It is well settled that a decree could be impeached on the ground of illegality or on the ground of a party not being represented at all, in a properly framed proceeding for the purpose. But the question is whether an executing Court can entertain an objection to execution on the ground that the decree has been obtained by fraud or that it is an illegal one. Some of the decisions go to the length of saying that if a decree is a nullity it could not be executed and the executing Court could therefore entertain an objection on the part of the judgment-debtor that the decree is a nullity. As I have already observed, it is open to a person against whom a decree is sought to be executed, to show that he was not a party to the suit either because he was not a party *eo nomine* or that he was a minor at the time when the decree was obtained and he was not represented by a guardian at all, or that the guardian appointed by the Court was not a guardian who, in law, could be a guardian, or there was a proper guardian and the plaintiff, instead of making him the guardian-ad-litem, made another person guardian-ad-litem. But where the decree could only be attacked on the ground of some illegality, such as, the guardian appointed had an interest adverse to that of the minor, or that he was negligent in protecting the interests of the minor, the question arises whether the executing Court could entertain an objection to execution on those grounds.

The contention on behalf of the respondent is that the executing Court is not entitled to go behind the decree, but it should execute the decree as it stands, and any objection on the score of illegality or fraud or negligence of a guardian, or any other objection to the decree, should be urged in a proceeding framed for the purpose of setting aside the decree and should not be entertained by the executing Court. There are several decisions which support this contention.

In *Kalipada Sarkar v. Hari Mohan Dalal*(1), MOOKERJI and CUMING, JJ., after an exhaustive examination of the authorities, held "the Court executing the decree must take the decree as it stands, and has no power to go behind the decree or entertain an objection to the legality or correctness of the decree. The validity of a decree cannot be questioned in execution proceedings on the ground that, as the lunatic plaintiff was not properly

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represented by a competent next friend in the suit, no decree for costs could have been made against him. A proceeding to enforce a judgment is collateral to the judgment, and, therefore, no enquiry into its regularity or validity can be permitted in such a proceeding." In *Zamindar of Ettiyapuram v. Chidambaram Chetty*(1), a Full Bench of this Court held that an objection, on the ground of want of territorial jurisdiction, must be taken in the suit itself in which the decree was passed, and must not be considered and cannot be allowed in execution proceedings. It might be said that section 21 of the Code of Civil Procedure provides that the objection to jurisdiction must be taken at the earliest opportunity, as it reads, "No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of First Instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice." This case does not directly bear on the point. In *Sami Mudaliar v. Muthiah Chetti*(2), fourth defendant died after the preliminary decree and before the final decree in the mortgage suit. His legal representative was not brought on record in the application for a final decree. On an application filed by the plaintiff for transfer of the decree for the execution to another Court, notice was issued to the fifth respondent, fourth defendant's son, to show cause why he should not be brought on as legal representative of the father. The fifth respondent did not appear. The decree was transferred for execution and certain properties were brought to sale. The fifth respondent filed a suit for a declaration that the decree was not binding on him and for an injunction restraining the plaintiff from executing the decree. It was held that the decree against the deceased was a nullity and that that was not a matter which could have been gone into in execution, but the fifth respondent was not precluded from setting up the plea by reason of his omission to do so in 1916, when notice of an application for transfer was served on him and, that the suit brought by him was competent. The learned Judges observed at page 297, "it seems therefore clear that as far as this Court is concerned the executing Court cannot go behind the decree." In *Vaithilinga Mudaliar v. Chidambaram Pillai*(3), it was

(1) (1920) I.L.B., 43 Mad., 675.

(2) (1922) 43 M.L.J., 298.

(3) (1925) 49 M.L.J., 520.

(1) (1916) I.L.B., 44 Cal., 627.

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held that the Court executing the decree must take the decree as it stands and has no power to go behind the decree or entertain objections as to the legality or correctness of the decree. They relied upon the observations of Sir JOHN WALLIS, C.J., in *Zamindar of Ettiyapuram v. Chidambaram Chetty*(1), "This is the view taken in *Hari Govind v. Narsingrao Konherra*(2), and *Kalipada Sarkar v. Hari Mohan Dalal*(3), is also a recent authority for the proposition that the Court executing the decree cannot go behind it." In *Lahore Bank v. Ghulam Jilani*(4), Sir SHADI LAL, C.J., and LE ROSSIGNOL, J., held that "an executing Court had no jurisdiction to criticise or go behind the decree; all that concerns it is the execution of it. If the decree should be annulled, that is not the function of the executing Court," and they followed *Kalipada Sarkar v. Hari Mohan Dalal*(3), and *Rashid-un-nisa v. Muhammad Ismail Khan* (5), and dissented from *Jungli Lall v. Laddu Ram Marwari*(6).

Though in *Kalipada Sarkar v. Hari Mohan Dalal*(3), it was broadly laid down that "an executing Court could not go behind the decree but should take it as it stands," yet in *Gora Chand Halder v. Prafulla Kumar Roy*(7), a Full Bench, consisting of WALMSLEY, C. C. GHOSH, SUHRAWARDY, GHOSH and DUVAL, JJ., felt the necessity for modifying the broad proposition that "the executing Court is bound to see whether there is a decree capable of execution and whether the decree is against the person against whom execution is sought and also to see whether on the face of it the decree is one which is capable of execution against the person sought to be proceeded against." Supposing a decree gives a personal remedy against a woman, would the executing Court be justified in executing it, if such a decree is on the face of it illegal, for the law prohibits the passing of a decree against a woman so as to make her person liable for arrest? WALMSLEY, J., who delivered the judgment of the Full Bench, observed at page 173: "I think it may be said that the correct view, and the view for which there is a strong current of authority, is, that where the decree presented for execution was made by a Court which apparently had not jurisdiction, whether pecuniary or

territorial, or in respect of the judgment-debtor's person, to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction. Within these narrow limits I think that the executing Court is authorized to question the validity of a decree." The observation, that the Court which passed the decree had not territorial jurisdiction, is a matter which could be raised before the executing Court, is directly opposed to the decision of the Full Bench in *Zamindar of Ettiyapuram v. Chidambaram Chetty*(1). In *Jungli Lall v. Laddu Ram Marwari*(2), it was held by a Full Bench of the Patna High Court "when at the time of the passing of a final decree in a mortgage suit, one of the judgment-debtors was dead and his representatives have not been brought on to the record, it is open to such representatives to object to execution of the decree on the ground that the decree is a nullity, and the proposition, that an enquiry into the validity of a decree is outside the functions of an executing Court, is subject to the proviso that there is a valid decree which it can execute. A void decree ought to be disregarded without any formal proceeding to set it aside." The learned Judges proceed upon the footing that a void decree is no decree at all and if a judgment-debtor against whom a decree is sought to be executed was not represented at the time of the passing of the decree, there is no decree against him and what is spoken of as a decree is a nullity. In A.S. Nos. 347 and 338 of 1919, SADASIVA AYYAR, J., observed, with regard to the validity of a decree obtained against a minor represented by a guardian whose interests were adverse to those of the minor, "I am prepared to go further and hold that, even if it was adverse, once the Court had appointed her as guardian on the affidavits and facts proved by the affidavits before it, all proceedings against the minor judgment-debtor with the guardian so appointed are valid against the minor till set aside on proper and sufficient grounds in appropriate proceedings taken by or on behalf of the minor." He and NAJIB, J., were of opinion that a decree should be considered valid till it was set aside in appropriate proceedings.

In *Kappuswami Iyyengar v. Kamalammal*(3), it was held by OLDFIELD and PHILLIPS, JJ., that, where a mother acting as

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(1) (1920) I.L.R., 43 Mad., 675.

(2) (1913) I.L.R., 34 Bom., 194.

(3) (1916) I.L.R., 44 Cal., 627.

(4) (1923) I.L.R., 5 Lahore, 64.

(5) (1909) I.L.R., 31 All., 572 (P.C.).

(6) (1919) 4 Pat. L.J., 240; 50 I.C., 529.

(7) (1925) I.L.R., 53 Cal., 166.

(1) (1920) I.L.R., 43 Mad., 675.

(2) (1919) 4 Pat. L.J., 240.

(3) (1920) I.L.R., 43 Mad., 842.

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guardian of her minor sons mortgaged the property and a decree on the mortgage was passed against the minors represented by the mother as guardian-ad-litem and the properties sold in execution and the sons subsequently sought to recover possession of the properties alleging that their mother was not competent to represent them in the previous suit as her interest was adverse to theirs, the decree against the minors was not a nullity and had to be set aside and that a suit was consequently maintainable. In *Karri Bapanna v. Yerramma*(1), it was held that "the defendant is entitled to plead in defence invalidity of the decree obtained against him during his minority on the ground of gross negligence of his then guardian. Such a plea is not untenable because he has not brought a regular suit to have the decree set aside." This does not affect the question whether such a plea could be raised in execution proceedings. In *Subramania Aiyar v. Vaithianatha Aiyar*(2), OLDFIELD, J., held that a "decree passed after the death of the defendant and before his legal representative was brought on the record was a nullity. The result of the authorities is, if the decree is a nullity, the executing Court can ignore it; if the decree contravenes any specific provision of the law, then also the executing Court can ignore it; but, where the validity of the decree is attacked on the ground that some fraud was perpetrated in the course of the suit or that there was negligence on the part of the guardian of a minor or that the guardian had some interest adverse to that of the minor, the executing Court cannot entertain an objection to execution, but the defendant is entitled to have the decree set aside in a proper proceeding."

It is urged that the appointment of father or mother as guardian, whose interest is adverse to that of the minor, is a violation of the specific provision of the statute as contained in Order XXXII, rules 3 and 4, and therefore the decree must be considered as a nullity. The decree against the minor with such guardian-ad-litem is not a nullity. It is also urged that it would be throwing on the minor an unnecessary and unbearable burden by making him prove in a separate proceeding that the decree obtained against him is not valid, without allowing him an opportunity to show in the execution proceedings themselves that the decree is one which could not be executed against him. My view is that, where a decree is obtained against a Hindu

minor boy with the father or mother as guardian-ad-litem in a suit on a debt contracted by the father or mother, the decree obtained against him is not a nullity, but it is liable to be set aside at his instance in a proper proceeding, and the executing Court should not be asked to try a suit in execution proceedings. As there is a conflict of decisions on this point, I agree to the reference.

ON THIS REFERENCE—

G. Lakshmanna for appellant.—This appeal arises out of an order in execution of a decree in a suit on a promissory note executed by the adoptive mother, against the mother and the minor, who was represented by the executant (mother) as guardian-ad-litem. The adoptive father had left a will appointing the adoptive mother as executor, and gave severally a third of his property to the mother, the son and the daughter. The decree was passed against them with the mother as guardian-ad-litem of the minor in July 1922, but in September 1922 the mother was removed from the guardianship and the natural father of the minor was appointed guardian under the Guardian and Wards Act. The mother, being the executant, should not have been appointed guardian-ad-litem. The decree is void. Such a person cannot take all the defences open to the minor. The minor is necessarily prejudiced thereby. Order XXXII, rule 4, shows that a proper guardian should be appointed.

[The cases relied on for the appellant have been referred to in the order of reference.]

V. Viyyanna for respondent, argued *contra*.

OPINION.

In this case, the adoptive mother of a minor executed in 1918, though the exact date is not given, a promissory note, purporting to act as his guardian and to execute it on his behalf. A suit was brought, Original Suit No. 348 of 1921, on the promissory note, and the plaintiff applied to have the adoptive mother appointed as the guardian-ad-litem of the minor, notwithstanding the fact that she was the executant of the promissory note; and she was so appointed. She raised no defence to the suit and an *ex parte* decree was

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(1) (1923) 45 M.L.J., 324.

(2) (1913) I.L.R., 38 Mad., 682.

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passed; before the decree was passed, the natural father had been put in as guardian of the minor and no steps were taken to inform the Court of the existence of the natural father as guardian. But no attempt appears to have been made to substitute him for the adoptive mother as guardian-ad-litem in the suit, and he was not so substituted. In these circumstances, the learned Judges propounded three questions for the opinion of a Full Bench.

The first is this :—

“ Whether the appointment of a person, who executes a document or enters into a transaction, as the guardian-ad-litem of a minor, is valid in a suit on the document or transaction ? ” As framed, this is very difficult to understand ; what appears to be meant is this : When a person has executed a document or entered into a transaction on behalf of a minor as his guardian, can that same person be validly appointed guardian-ad-litem of the minor in a suit brought against him on the document or transaction in question ?

It seems to us that this matter cannot be treated as a pure question of law. The appointment of the guardian-ad-litem purported to be an exercise of judicial discretion, and it seems to us impossible to say that the Court had no discretion in any conceivable case to appoint such a person, and that such an appointment would necessarily be void without any inquiry into the circumstances of the particular case. The Code does not say so, and we do not think we can possibly invent such a judicial rule for ourselves. Indeed, cases can be imagined, in which a Court, with the facts before it, might think that the guardian and executant of the document was quite a suitable person to conduct the suit. Take for instance the case, which was put in the course of the argument, where the defence was going to

be that the guardian, when she executed the document, was under the influence of fraud or coercion on the part of the payee. No one could suggest that, in that event, her interest could be said to be necessarily adverse to the minor, merely because she signed the actual document herself. That, in a vast majority of cases, to appoint such a person would be wholly undesirable, is manifest. In this case it probably was very undesirable. In our opinion, that is a question of fact governed by no hard-and-fast rule of law, and there is nothing either in the Code or in any of the authorities, to lay down not merely that such a person should not, as a rule, be appointed, but cannot in any circumstances be validly appointed.

The second question is this :—

“ Whether the appointment of a person, whose interests are adverse to those of the minor, as his guardian-ad-litem, renders the decree void against the minor or only voidable by him ? ”

This, as framed, begs the very question raised by the first point; because it assumes that any person, in the position of the adoptive mother here, had an interest which, without evidence or further consideration, must, *ex hypothesi*, be adverse to the interests of the minor. In our opinion, it would be premature to decide this as an abstract question of law, without a finding on a decision of fact directed to the express point that the interests of this guardian-ad-litem were adverse to those of the minor. At present, all we have is the fact that a Court appointed her, which is *prima facie* a judicial expression of opinion that her interests were not adverse. The learned Judge, we presume, was aware of, or his attention was drawn to, the provisions of Order XXXII, rule 3, and he must have known the sole fact which is placed before us, namely, that the

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proposed guardian-ad-litem was herself the executant of the document. It may be that he failed to exercise a judicial discretion in coming to the conclusion that it was a proper step to appoint her, and that an Appellate Court might have so found, if invoked on the ground that, on the materials before the learned Judge who appointed her, there was everything to show that she was unfit and nothing to show that she was fit. That has not been done. In these circumstances, we cannot see our way to answer the second question, any more than the first, as involving a mere point of law.

Still less is it possible at this stage to deal with the third question put up, whether objection could be taken in execution that the decree is void, because that would depend on the determination of the other two questions which we have held not to be questions of law but to require decisions of fact, which do not exist.

K.B.

SPECIAL BENCH.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Beasley and Mr. Justice Madhavan Nair.*

1928,
April 19.

A. L. A. R. ARUNACHALAM CHETTY & Co., ASSESSEES,

v.

COMMISSIONER OF INCOME-TAX, REFERRING OFFICER.*

Sec. 10 (2) (iii), Indian Income-tax Act (XI of 1922)—Trader carrying on two businesses, each with borrowed capital—Loss in one and closing of that business—Payment of interest on capital lost in closed business, in year of assessment—Right of assessee to claim deduction for interest.

A trader having two branches in his trade (viz., a cloth business and a banking business) carried on both, each with borrowed capital; and as the cloth business ended in a loss, he had to close it in 1924; and all that portion of the borrowed

capital which was sunk in the cloth business was lost before 1924. The trader having had to pay interest on that lost capital in 1924–25, the year of assessment, claimed deduction therefor from the assessable profits of his remaining banking business for the year 1924–25.

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Held, that though the branches were distinct, the trade was one and though the lost capital was not available for use in the trade, viz., the banking business, in the year of assessment, the interest paid on it should be deducted under section 10 (2) (iii) of the Indian Income-tax Act.

CASE referred under section 66 (3) of Act XI of 1922 by the Commissioner of Income-Tax, Madras, to the High Court, for its opinion on the following question, viz.,

“If a person who is carrying on a banking business borrows money and invests it in a separate piece-goods business and that business subsequently fails and the sum invested is lost, can interest on the borrowed money be lawfully claimed as a deduction under section 10 (2) (iii), in computing the profits and gains of the banking business for the year of account following the year of the loss?”

The facts appear from the Judgment.

K. V. Krishnaswami Ayyar (with *V. Rajagopala Ayyar*) for assessee.—The question propounded is not in accordance with the findings and is misleading. On the facts found, A.L.A.R. Brothers and Ramaswami & Co. were not distinct firms carrying on distinct businesses but they were one and the same firm carrying on two branches of their business, viz., banking and cloth trade under different names. Both branches of the business were carried on with borrowed capital and a portion of the capital sunk in cloth trade was lost, but interest on it had to be paid even after that branch was closed. The business being one, the interest paid on the lost capital is an allowable deduction under section 10 (2) (iii) of the Act.

M. Patanjali Sastri for Referring Officer.—The finding is that the two businesses are distinct; hence loss in one cannot be set off against the gains in the other; *Commissioner of Income-tax v. Govindaswami Naidu*(1).

[BEASLEY, J.—That is under the Excess Profits Duty Act, which is different.]

(1) (1922) Indian Income-tax Cases, Vol. I, 174.

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It is only loss or expenditure in "the business", that can be allowed. Supposing the two businesses are carried on separately in two rented buildings, the rent which might have been continued to be paid for the building in which the closed business was once carried on, cannot be deducted. Money "borrowed" means "money borrowed and used" for the business. This lost capital was not used in the year in question either for the cloth business or for the banking business. If this is allowed, then the losses of the previous years will have to be allowed. It is not the intention with which the capital was borrowed that is material but its actual use.

[BEASLEY, J.—You want to add "as it is" after the words "for the purpose of the business" in section 10 (2) (iii).]

OPINION.

The assesseees here are a Nattukottai Chetti firm who trade under the vilasam of A.L.A.R. and their primary business is the usual Nattukottai Chetti business of banking and money-lending. They also trade in other ways, and under the style of Ramaswami & Co., did a considerable piece-goods business in Madras, which was opened in 1910. A.L.A.R. traded almost entirely on borrowed capital. The question is whether they are entitled to deduct from their income-tax assessment, interest paid on that part of the borrowed capital which they had put into Ramaswami & Co. That branch of their business was unsuccessful. It had to be closed in 1924, and it was found to have sustained a loss of Rs. 11,00,000 odd. Substantially two points were put forward against the claim of the assesseees to make the present deduction. It was said first that the business of Ramaswami & Co. was quite separate and distinct from that of A.L.A.R. and that interest paid on money devoted to the purpose of providing trading capital for Ramaswami & Co. was not a deduction that could be allowed in the assessment of A.L.A.R. For this, on the findings, we can see no warrant. There is nothing in a

name; Ramaswami & Co. in effect was A.L.A.R. and the case does not seem to us to be different from that of two departments of one big store. Spencer & Co., Limited, to take a familiar instance, carry on the business of chemists and druggists at one end of their buildings and that of haberdashers at the other end, and, for all I know, they may, for their own purpose, keep the accounts of these two branches of their activities separate. It is obviously important for a modern multiple store, like Whiteley's or Harrod's in London or Spencer's here, to know how each branch of their business is doing, whether it is making a profit or a loss, so that, if one particular activity is shown to be carried on at a loss, it would be open to them to close down that branch of their general business. Nor does it seem to matter that the piece-goods business conducted under the name of Ramaswami & Co. was carried on in a separate building in another part of Madras. In our opinion the findings preclude any inference that these were two separate and distinct businesses.

The second point taken was that, as the piece-goods business had been shut down in the year 1924 and did not function in the year of assessment, 1924-25, it cannot be said that the capital which had been borrowed was employed in the business during the year of assessment. The money was borrowed for the purposes of the business and was employed in the business for its purposes until it was lost. Nevertheless interest had to be paid on it and the test seems to us to be, not whether it continued to be available for the purposes of the business during the year of assessment, but whether it was in its origin money borrowed as capital for the assesseees' business and whether interest was in fact paid on that borrowed capital (existing or lost) during the year of assessment. We therefore answer the

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question propounded in the affirmative, safeguarding ourselves by saying that the word "separate" in the question framed is perhaps an unfortunate ambiguity, and on the facts of this case, means no more than that the business was carried on by A.L.A.R. in separate departments of which the unfortunate piece-goods department conducted under the style of Ramaswami & Co. was one. Costs fixed at Rs. 250 will be paid to the assessee by the Commissioner of Income-tax.

N.E.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Reilly.

1928,
September
18.

TIRUMALA CHETTY RANGAYYA CHETTI (PLAINTIFF),
APPELLANT,

v.

KANDALA SRINIVASA RAGHAVACHARLU AND
OTHERS (DEFENDANTS), RESPONDENTS.*

Mortgage—Agreement to sell to mortgagee at a concession rate, six days after mortgage—Agreement, whether part of the same transaction—Subsequent agreement to sell to another with notice of prior agreement—Sale to mortgagee—Suit by former for specific performance of his agreement—Agreement to sell to mortgagee, whether void as a clog on equity of redemption—Contract of pre-emption—Indefiniteness of contract.

A executed a mortgage to B, and six days thereafter executed an agreement to him that, in case A should happen to sell the property, he would sell it to B at a concession rate; in pursuance of the agreement A sold the lands to B under a registered sale deed. A few days prior to the sale, A had executed an unregistered agreement to sell the lands to C, who had notice of the prior agreement to sell to B, and received a part of the consideration. On a suit instituted by C against

A and B for specific performance of the agreement and for recovery of possession of the lands,

Held, that the agreement to sell executed by A to B, being at a concession rate, was void for indefiniteness;

that the agreement by A to sell to B, who was the mortgagee, was part of the same transaction as the mortgage, and was a clog on the equity of redemption and was void in law, whether the agreement to sell was to have effect before or after redemption of the mortgage;

that the agreement was not a contract of pre-emption;

and that, consequently, C was entitled to a decree for specific performance of his agreement and for recovery of possession, against A and B, even though C had notice of the prior agreement to B.

APPEAL against the decree of the Court of the Subordinate Judge of Chittoor in Original Suit No. 9 of 1921.

The plaintiff sued for specific performance of an agreement to sell to him, executed by the first and second defendants on the 25th December 1920 (Exhibit A). The latter had executed to the third defendant a mortgage on the 21st June 1918 (Exhibit VI), and an agreement (Exhibit II) on 27th June 1918 to sell the same lands to him and subsequently a registered sale deed to him (third defendant) on the 6th January 1921 under Exhibit VII, and received a part of the consideration. The plaintiff had notice of the agreement to the third defendant, at the time he obtained his agreement, Exhibit A. The plaintiff contended that the agreement to sell to the third defendant was void in law as being indefinite and as operating as a clog on the equity of redemption. The lower Court dismissed the suit for specific performance but gave him a decree for refund of the consideration paid by him to the first defendant. The plaintiff preferred this appeal.

B. Somayya for appellant.—The agreement (Exhibit II) executed to the third defendant, who was the mortgagee under Exhibit VII, was void in law as it is a clog on the equity of redemption: See *Noakes & Co. v. Rice*(1), *Samuel v. Jarrah Timber and Wood Paving Corporation*(2). These cases hold that the mortgagee is not entitled, at the time of the execution of the mortgage, to contract with the mortgagor to purchase the

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(1) (1902) A.C., 24.

(2) [1904] A.C., 823.

* Appeal No. 292 of 1923.

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property. A contract to sell to the mortgagee, in case the mortgagor happens to sell, is still a clog. The mortgage and agreement to sell in this case are parts of the same transaction. The case of *Kreglinger v. New Patagonia Meat and Cold Storage Company, Limited*(1), is distinguishable, as it is a case of a collateral advantage foreign to the contract of mortgage. See Fry on Specific Performance, page 154, section 363. Further the contract is vague, not ascertained or ascertainable. Hence also the contract is void for indefiniteness. "Concession rate" is not fair or market rate. It is not a contract of pre-emption either. It is void for offending the rule against perpetuities also, as it fixes no period within which the contract is to be performed: See *Maharaj Bahadur Singh v. Balchand*(2).

Advocate-General (C. V. Ananthakrishna Ayyar) for respondents.—The question of perpetuities has nothing to do with this case, as this is not a case of a transfer but merely of a contract to sell. Section 14 of the Transfer of Property Act does not apply to contracts. Section 54 of the Transfer of Property Act shows that no interest in land is created by a contract to sell lands. Several cases in this High Court have laid down that the rule against perpetuities does not apply to contracts.

Exhibit II does not operate as a clog on the equity of redemption. The agreement is subsequent to the mortgage, and so the agreement is not a clog: See *Samuel v. Jarrah Timber and Wood Paving Corporation*(3). The agreement to sell is six days later than the mortgage. It is not part of the same transaction. This is not a case of an option to the mortgagee. The English decisions in *Noakes v. Rice*(4) and *Samuel v. Jarrah Timber and Wood Paving Corporation*(3), are distinguishable, as they are cases of option to the mortgagee; but here it is optional with the mortgagor to sell. This is a case of an agreement for pre-emption. An agreement for pre-emption in a mortgage is not a clog on the equity of redemption; See *Haris Paik v. Jahuruddi Gazi*(5); *Bimal Jati, v. Biranja Kuar*(6); Coote on Mortgages, Volume I (8th Edition), page 23; Dart's Vendors and Purchasers (7th Edition), Vol. I, page 276. The latest case, namely, of *Kreglinger v. New Patagonia Meat Co.*(1), takes a liberal view of the doctrine of "Clog."

(1) [1914] A.C., 25.

(3) [1904] A.C., 323.

(5) (1897) 2 C.W.N., 575.

(2) (1920) 48 I.A., 376.

(4) [1902] A.C., 24.

(6) (1900) I.L.R., 22 All., 288.

The decision holds that if (1) the agreement is not unconscionable, (2) if it is collateral to the mortgage, (3) if the option is to the mortgagor only, it is not a clog. In the case of partition between brothers, an option by one brother to sell, in case he sells at all, to the other brother, is held valid: See *Virasami Mudali v. Ramasami Mudali*(1). Such an option is held to be a pre-emption and valid in law: See *Cheria Krishnan v. Vishnu*(2), *Vasudevan v. Keshavan*(3) and *Kanharam Kutti v. Uthotti*(4).

The price is not indefinite in this case. The expression "Concession rate" may be regarded as an expletive; the agreement was only for a fair or proper price. The price is ascertainable under the terms of the document. It would be the market price minus the five annas reduction of interest mentioned in the document. A contract to sell at a proper rate was held enforceable: See *New Beerbhoom Company v. Bularam Mahata*(5). Reference was also made to *Ashcroft v. Morrin*(6) and *Jackson v. Jackson*(7).

ORDER.

Before we dispose of this appeal, we think it necessary to call for a finding on the following issue:—

"Was plaintiff put in possession of the suit lands by the first defendant or under his directions, and if so, when?"

Fresh evidence will be allowed. We may add that the plaintiff has filed a statement before us in which he stated his case as to possession and also produced three letters with it. These will be taken into consideration by the Subordinate Judge subject to proof of the letters. Time allowed for submission of the finding will be six weeks from the date of receipt of records in the lower Court and ten days will be allowed for filing objections.

(1) (1880) I.L.R., 3 Mad., 67.

(2) (1882) I.L.R., 5 Mad., 198.

(3) (1884) I.L.R., 7 Mad., 309.

(4) (1890) I.L.R., 13 Mad., 490.

(5) (1880) I.L.R., 5 Cal., 932 (P.C.).

(6) (1842) 4 Man. and G., 450; 134 E.R., 185.

(7) (1853) 1 Sm. and G., 184; 65 E.R., 80.

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In compliance with the above order, the Subordinate Judge of Chittoor submitted a finding to the effect that the plaintiff was not put into possession of the suit lands by the first defendant or under his directions and that the possession taken by him on 6th January 1921 was not possession given by the first defendant or under his directions.

After the return of the finding, the appeal came on for hearing, and the Court delivered the following

JUDGMENT.

RAMESAM, J.

RAMESAM, J.—This appeal arises out of a suit for specific performance of an agreement to sell. The agreement was executed by the first defendant for himself and as guardian of his younger brother, the second defendant. The third defendant was the divided brother of the plaintiff and the two brothers were on bad terms for some time. He obtained a sale-deed from defendants 1 and 2 on the 6th January 1921 (Exhibit VII). The plaintiff alleges that this sale-deed was obtained with the knowledge of plaintiff's agreement, which is Exhibit A, dated the 25th December 1920. Defendants 4 and 5 are the undivided sons of the third defendant. The third defendant died during the pendency of the case in the Court below. The Subordinate Judge of Chittoor dismissed the plaintiff's suit for specific performance, but gave him a decree for refund of the advance of Rs. 2,500, which was received by the first defendant at the time of the plaintiff's agreement, with interest. The plaintiff appeals.

The third defendant pleaded, in his turn, that his sale-deed Exhibit VII, was obtained in pursuance of an agreement executed by the first defendant in his favour, namely, Exhibit II, dated the 27th June 1918, and that, as the plaintiff obtained his agreement, Exhibit A,

with the knowledge of the third defendant's agreement, he is not entitled to specific performance. Six days prior to Exhibit II, the first defendant executed a deed of mortgage in favour of the third defendant for Rs. 14,000 (Exhibit VI, dated the 21st June 1918). The language of Exhibit II shows, and the Court has also found, that Exhibits II and VI are connected and form part of one transaction. The Subordinate Judge says :—

“Exhibit II was executed between the date of the execution of Exhibit VI and the date of its registration. It was clearly the consideration for the low rate of interest provided in Exhibit VI and the low rate of interest in Exhibit VI was the consideration for it.”

The appeal was argued before us by the learned Advocate for the appellant and the learned Advocate-General for the respondents on the footing that the two documents form part of the same transaction. I shall later on refer to the argument of the respondents based on the fact that they were executed on different dates. In pursuance of Exhibit II, Exhibit VII was obtained by the third defendant. The Subordinate Judge also finds that Exhibit A was obtained by the plaintiff with the knowledge of Exhibit II and this finding has not been challenged in appeal.

When the appeal originally came on for hearing before us, an objection was taken by the learned advocate for the respondents that Exhibit A was inadmissible in evidence on account of the recent decision of the Privy Council in *Dayal Singh v. Indur Singh*(1). The appellant attempted to meet this objection by arguing, first, that the point cannot be raised in appeal and secondly, that there was part performance of the contract by delivery of possession and therefore specific performance can be decreed. We therefore called for a

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(1) (1926) 53 I.A., 214; 51 M.L.J., 748.

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finding on the question whether the plaintiff was put in possession of the suit lands by the first defendant or under his direction and, if so, when? A finding has been returned. In the interval, the Indian Legislature has amended the Indian Registration Act by providing that an unregistered agreement for sale even reciting payment of consideration is not inadmissible in evidence and making this provision declaratory of the law and retrospective in its operation. The result of this amendment of the Registration Act is that the objection as to the admissibility of Exhibit A ceased to be of any importance. This was conceded by both sides and the appeal was argued on the footing that Exhibit A is admissible.

The main question argued before us is whether Exhibit II was void and therefore even if plaintiff had notice of it, his knowledge of it does not disentitle him from obtaining specific performance of his agreement, Exhibit A. The main grounds on which the appellant argues that Exhibit II is void are two: (1) that it is indefinite and therefore incapable of specific performance and (2) it operates as a tie on the property which was the subject of the mortgage and is therefore invalid. For the purpose of considering these two points, I set forth the terms of Exhibit II. After describing the properties, it proceeds as follows:

"As you have advanced this amount as loan at a concession rate of 11 annas per cent per mensem and suffered a loss of Rs. 500 per annum which would be got if advanced to others for interest at the rate of 12 per cent per annum, in consideration for the same we shall sell *patteda*, etc., to you only at a concession rate. In case we happen to sell the same, we will not sell the same to others. In case we sell it so, it will not become valid. If we are to act contrary to the same, not only we shall pay interest calculated at the rate of 5 annas per cent per mensem for the said amount of Rs. 14,000, along with the

11 annas interest mentioned in the document, from the date of the document, but also we shall pay the costs also incurred by you."

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I may here mention that, under the terms of Exhibit VI, which was dated the 21st June 1918, the time fixed for payment of the principal was 30th December 1925, but interest was payable every year on the 20th June. The respondents contended that the clause providing for the additional interest of 5 annas in addition to the original interest provided for in the mortgage bond, Exhibit VI, applied only to the instalments of unpaid interest and does not apply to the amount of interest already paid and received. If, for instance, the first year's interest was paid on the 20th June 1919 and the covenant to sell the properties to the third defendant was broken some time after, the compensation by payment of additional interest of 5 annas does not apply to the first year's interest. But I cannot accept this construction of that clause in the face of the express provision in it for the payment of additional interest on the amount of Rs. 14,000 from the date of the document. It is therefore clear that the words "along with" in the clause really mean "in addition to". The respondents next contended that this clause shows that the earlier clause compelling the first and second defendants to sell the property to the third defendant only was intended to be operative only up to the time of the redemption of the mortgage and not beyond redemption, and therefore was perfectly valid as a clause of pre-emption, and, if the mortgage is redeemed by payment of the debt, the property goes back to the mortgagors without any tie. But I am unable to accept this construction of the agreement to sell. The clause relating to compensation by payment of additional interest does not necessarily show that the earlier clause binding the first defendant

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to sell to the third defendant only was intended to be operative only before redemption. Just as the first defendant was bound to pay an additional rate of 5 annas even in respect of the period for which interest has been paid under the terms of the mortgage bond, similarly even where the whole amount of the debt is paid off, it was intended that the first defendant should pay an additional compensation of 5 annas, if he broke the covenant regarding the sale to the third defendant only. How far such a clause is valid is another matter, but at present I am merely trying to construe the meaning of the two clauses and it seems to me that the meaning of the clause according to the plain intention is not to be modified or cut down with reference to the consideration that the construction according to the plain intention may render the clauses invalid. I am therefore of the opinion that the covenant compelling the first defendant to sell to the third defendant only has nothing to do either with the date fixed for payment in Exhibit VI or with the date of redemption which, it seems to me, may be either subsequent to the date fixed for payment or before it, for Exhibit VI, though it prevents the mortgagee from bringing a suit for sale on the covenant to pay before the 30th December 1925, does not prevent the mortgagor from paying the debt at any time before that date. The mortgagor might redeem the mortgage at any time prior to the 30th December 1925 or after the 30th December 1925. If, for instance, the mortgagor redeemed it in 1919, I do not think it can be said that the clause compelling the first defendant to sell to the third defendant only was inoperative after such redemption in 1919. Thus, even after redemption, if the property returns to the mortgagor's hands, there would be a tie on the property and such a tie would make the whole agreement invalid. It

is enough to refer to *Samuel v. Jarrah Timber and Wood Paving Corporation*(1).

But, even accepting the respondents' construction of this clause, it seems to me that the clause is void for more than one reason, namely, that it will operate as a tie and that it is indefinite. The respondents contend that it is not indefinite and that it is merely a clause of pre-emption and that it would not make it invalid within the meaning of the decisions on this matter. First, it seems to me that the clause is certainly indefinite because, according to it, the first defendant was to sell to the third defendant at a concession rate, the Telugu word used being *saleesuga*. Now a concession or a favourable rate must be some rate substantially less than the fair rate, the proper rate or the market rate. An agreement to sell at a moderate price or at a fair rate or at a proper rate may be perfectly valid, but an agreement to sell at a favourable or concession rate is indefinite and must be regarded as void for indefiniteness. In this respect, the present case is worse than the clause in *Bromley v. Jefferies*(2) where the agreement was to sell for £1,500 less than what any one else would pay and the clause was held to be indefinite. The respondents argue that the word *saleesuga* is merely an expletive and may be ignored and we ought to construe the clause to be merely a covenant to sell at a proper rate, but I am unable to accept this contention. The object of this clause is to compel the first defendant to sell at a substantial deduction from the fair value, that is, at a rate which is not the proper rate and the contention requires me to construe the clause as the opposite of what it is. I am therefore unable to accept it. The advocate for respondents also tried to argue

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(1) [1904] A.C., 328.

(2) (1700) 2 Vern., 415; 23 E.R., 867.

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that the clause is not indefinite because the concession expected is fairly ascertainable, for, according to him, the amount of concession is equivalent to the amount of compensation provided for by the second clause, namely, the additional interest of 5 annas. Here again, I am unable to accept this argument. The clause providing for compensation in case of breach of covenant to sell cannot throw light strictly on what the amount of concession should be. To say that the amount of concession should be exactly equivalent to the amount of compensation is to speculate on the intention of the parties and add to the terms of the document. All that the document does is that it mentions the fact of advancing the loan at 11 annas as the motive or reason for the covenant to sell but the covenant itself does not mention any definite rate and we cannot add to it. So I am not able to accept both branches of this argument for the respondents.

Even assuming that the words "concession rate" may be taken to be equivalent to "a proper rate" and also assuming that the covenant is intended to operate within the time of redemption and, by reason of these two assumptions in favour of the respondents, the clause is no more than the ordinary clause of pre-emption, it is doubtful whether the clause is valid. The respondents rely on a passage in Coote on Mortgages, 9th Edition, page 23. We find that the expression of opinion relating to pre-emption was repeated from earlier editions and the editors of the later editions did not think fit to modify it, even after the decision in *Noakes & Co., v. Rice*(1), and in *Samuel v. Jarrah Timber and Wood Paving Corporation*(2) and in *Kreglinger v. New Patagonia Meat*

and Cold Storage Company, Limited(1). The expression of opinion is based on two decisions mentioned in the foot-note. These are *Orby v. Trigg*(2), *In re Edwards' estate*(3). Then the foot-note, runs, "See *Dawson v. Dawson*(4), *Cookson v. Cookson*(5), and see also *Kreglinger v. New Patagonia Meat and Cold Storage Company, Limited*(1)". In *Orby v. Trigg*(2), it was held that the covenant was not known to the mortgagor or to the mortgagee and a decree for redemption was given to the purchaser free of the clause of pre-emption. It is not therefore a decision on the point, though it suggests that if the clause was known it might have been binding. The Irish Chancery case is not available. In *Dawson v. Dawson*(4), there was an option to purchase in favour of a son in the devise by the father. As the son did not exercise it within the time, it was held that he could not enforce it afterwards. In *Cookson v. Cookson*(5), there was a clause of pre-emption in a partnership deed. It was held that it expired with the term mentioned in it and could not be exercised afterwards. In *Kreglinger v. New Patagonia Meat, etc., Co.*(1), the reference was only to the general principles and not to a case of pre-emption. In my opinion, therefore, the opinion in Coote on Mortgages is not supported by the cases cited. On the other hand, there are the observations of Lord Macnaghten at page 326 of *Samuel v. Jarrah Timber and Wood Paving Corporation*(6),

"But in my opinion, the question here depends rather upon the rule that a mortgagee is not allowed at the time of the loan to enter into a contract for the purchase of the mortgaged property,"

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(1) [1914] A.C., 25.
(3) (1861) 11 Ir. Ch. R., 367.
(5) (1887) 8 Sim., 529.

(2) (1722) 9 Mod., 2.
(4) (1837) 8 Sim., 346.
(6) [1904] A.C., 823.

(1) [1902] A.C., 24.

(2) [1904] A.C., 823.

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and the observations of Lord Parker of Waddington in *Kreglinger v. New Patagonia Meat and Cold Storage Company Limited*(1),

"the rule referred to in some of the authorities to the effect that a mortgagee cannot as a term of the mortgage enter into a contract to purchase, or stipulate for an option to purchase, any part of or interest in the mortgaged premises."

A contract for pre-emption, though not a case of absolute option—for unless a mortgagor makes up his mind to sell, the right of pre-emption does not arise—is still a contract for purchase of property though it is contingent upon the mortgagor making up his mind to sell. It is like any other contract and when the contingency happens, is capable of specific performance even against a person who purchases with notice of it. It is therefore like any other contract of purchase and, I think, falls under the phrase "contract to purchase" in the dictum of Lord Parker quoted above. In *Davies v. Chamberlain*(2) there was a clause giving the vendor the option of finding one-third of the capital of a company which was to be floated for the purpose of developing land. The company was formed but the option was not given. It was held that, if the clause was contained in a mortgage, it would not have been binding, but, as it was part of the contract to sell, it was found valid and binding. It is therefore doubtful whether even if the clause in question is a clause of pre-emption, it is valid with reference to the authorities cited above. The case in *Haris Paik v. Jahuruddi Gazi*(3), was long before the above authorities and there is no discussion of any cases and is of no value to the respondents. But I do not think it necessary to express my final opinion on the clause of pre-emption for, as I have already said, I do

(1) [1914] A.C., 25.

(2) (1909) 26 T.L.R., 138.

(3) (1897) 2 C.W.N., 575.

not think it is a clause of pre-emption. A clause of pre-emption is generally a clause to sell at a price which any one else would give and which would be generally the market rate or proper rate. Here, it is for a favourable or concession rate, that is, something less than what another would give.

It is also contended for the respondents that even if the clause was intended to operate beyond the time of redemption, it is not invalid. They rely on *John Brothers Abergarw Brewery Company v. Holmes*(1), where it was held that the restrictive covenant may be limited to the period of continuance of the mortgage though not binding after redemption. It is doubtful how far this case can be regarded as an authority after the decision of the House of Lords in *Noakes & Co. v. Rice*(2). The case of *In re Cuban Land Co.*(3), was also relied on. The decision in that case turned upon the fact that it was a peculiar contract and the case of *Noakes & Co. v. Rice*(2), was distinguished thus by P. O. LAWRENCE, J.

"In the first place, it was not a case of debentures or debenture stock issued by a limited company, but of a mortgage between private individuals, etc."

Therefore I do not think that the case helps the respondents.

As there is an interval of six days between the mortgage Exhibit VI and the agreement Exhibit II, the respondents also rely on the observations of Lord Halsbury in *Samuel v. Jarrah Timber and Wood Paving Corporation*(4).

"If a day had intervened between the two parts of the arrangement, the part of the bargain which the appellant claims to be performed would have been perfectly good and capable of being enforced."

(1) [1900] 1 Ch., 188.

(3) [1921] 2 Ch., 147.

(2) [1902] A.C., 24.

(4) [1904] A.C., 323.

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But in the case of *Browne v. Ryan*(1), which was approved by the House of Lords in *Noakes & Co. v. Rice*(2), and particularly by Lord Halsbury, the mortgage was dated the 16th June 1898 and the agreement was dated the 21st June and it was found they were parts of one transaction. The true view is stated by Viscount Haldane in 1914, Appeal Cases, at page 39.

"The question is, in my opinion, not whether the two contracts were made at the same moment and evidenced by the same instrument but whether they were in substance a single and undivided contract or two distinct contracts . . . The question is one not of form but of substance and it can be answered in each case by looking at all the circumstances and not by mere reliance on some abstract principle or upon the dicta which have fallen *obiter* from judges in other and different cases."

Even Lord Lindley who is supposed to have taken a more favourable view in favour of restrictive covenants, on account of his decision in *Santley v. Wilde*(3), says at page 329 of 1904, Appeal Cases,

"No contract between the mortgagor and the mortgagee made at the time of the mortgage and as part of the mortgage transaction, or, in other words, as one of the terms of the loan, can be valid, etc."

I, therefore, think that the observations of Lord Halsbury do not help the respondents.

The appellant also contended that the clause in question was void for a third reason, namely, that it offends against the rule of perpetuities and the case of *L. & S.W. Railway Co. v. Gomm*(4) and *Maharaj Bahadur Singh v. Balchand*(5), were relied on, but it is not necessary to consider this question, which has given rise to considerable conflict of opinion in Indian Courts, in view of my conclusion on the other grounds on which the validity of the agreement is questioned.

(1) [1901] 2 I.R., 653.

(8) [1899] 2 Ch., 474.

(2) [1902] A.C., 24.

(4) (1882) 20 Ch. D., 562.

(5) (1920) 48 I.A., 376.

I am therefore of the opinion that the clause in question is void and as such the plaintiff is entitled to ignore it when it came to his knowledge. There is therefore no legal obstruction to the enforcement of his agreement. The plaintiff is therefore entitled to specific performance. The decision of the Subordinate Judge is reversed and the appeal is allowed and a decree will be passed with costs throughout, directing the defendants 1, 2, 4 and 5 to execute a conveyance to the plaintiff, on the plaintiff depositing the balance of the consideration, minus interest on Rs. 2,500 at 6 per cent from 4th January 1921 to the date of actual deposit by the plaintiff, and to deliver possession of the suit lands to the plaintiff, and the amount deposited will be allowed to be drawn by defendants 4 and 5.

REILLY, J.—Now that Act II of 1927 has made it clear that Exhibit A, though unregistered, is admissible in evidence, the defendants can resist the plaintiff's claim only by showing that Exhibit II, the earlier agreement for sale in favour of defendant 3, of which it is not now disputed the plaintiff was aware when he obtained Exhibit A, is valid. For the plaintiff the validity of Exhibit II is attacked on several grounds. The learned Advocate-General at one stage of his argument, as I understand him, contended that Exhibit II was not part of the same transaction as the mortgage-deed, Exhibit VI, which was executed six days earlier. That interval of time alone is not sufficient to show that the two documents represent separate transactions. And, when we examine the wording of the two documents, I think it is impossible to dissociate them. Exhibit II recites that its executants, defendants 1 and 2 and their brother, who were also the executants of the mortgage-deed, Exhibit VI, had at the time of the mortgage promised to sell the land now in question to defendant 3, the

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mortgagee, and by Exhibit II they now agree that, as defendant 3 had advanced the mortgage amount at a concession rate of interest, 11 annas per Rs. 100 per mensem instead of Re. 1, which he could have obtained for his money, if they sell the land, they will sell it to him at a concession rate and that, if they break this agreement, they will pay the additional interest of 5 annas per Rs. 100 per mensem, which would make up the Re. 1 per mensem. That makes it quite clear, I think, that the two transactions were so interlocked as to form parts of one transaction. We start therefore from the position that as part of the mortgage transaction defendant 3 obtained this agreement to sell, Exhibit II.

If Exhibit II, properly construed, would bind the mortgagors not only until the redemption of the mortgage but after redemption, it is obviously void. If on redemption the mortgagors would not get back the mortgaged property free not only from the mortgage debt but from every obligation which formed part of the mortgage transaction, there would be a clog or fetter on the equity of redemption, which the Court must refuse to recognize. The learned Advocate-General does not dispute that proposition. But he contends that the agreement to sell embodied in Exhibit II does not extend beyond the currency of the mortgage. That I think is against the plain meaning of the document. There are no words in Exhibit II explicitly limiting its effect to the currency of the mortgage. But it is suggested that the expressions used in regard to the payment of the additional interest at the rate of 5 annas per mensem, if the agreement to sell to defendant 3 is broken, show that that was the intention of the parties. It is provided that, if the agreement to sell is broken, the mortgagors shall pay the additional interest at the

rate of 5 annas along with the interest at the rate of 11 annas provided in Exhibit VI. The Telugu words in Exhibit II which have been translated "along with" are *tho kuda*. It is argued that the additional interest cannot be paid along with the original interest after redemption and therefore the stipulation to pay additional interest and with it the agreement to sell cannot have been intended to take effect after redemption. But, if we examine the document a little more closely, it becomes clear that the words *tho kuda* have not been used in this literal sense. According to the document, if the agreement is broken—that is, according to the learned Advocate-General's interpretation, broken at any time before redemption—the additional interest is to be paid *tho kuda* the original interest from the date of the document. But it is obvious that the breach might occur after several payments of interest though before redemption. If that happened, the additional interest would have to be paid from the date of the document but could not be paid literally along with the interest already paid. I do not think that we can give any reasonable effect to the words *tho kuda* in Exhibit II, unless we understand them to mean "in addition to", as they often do mean in Telugu documents. Apart from this argument based on the words *tho kuda* I see nothing in Exhibit II which restricts its effect to the currency of the mortgage, and on the ground that Exhibit II would prevent the mortgagors from getting back their property on redemption free from the obligation to sell to defendant 3 in certain circumstances, an obligation which has been found to be part of the mortgage transaction, the agreement is clearly void.

Apart from this more general view of the matter it is contended for the plaintiff that Exhibit II is invalid because a mortgagee is not permitted as part of his

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mortgage transaction to obtain a contract for the sale of the property to him, even if that contract is to give him an option to buy only until the mortgage is redeemed. We need not go further than *Samuel v. Jarrah Timber and Wood Paving Corporation*(1) for an authority for that rule. The learned Advocate-General contends that the rule does not apply to a contract for pre-emption, where the mortgagor is not bound to sell at the option of the mortgagee but only to give the mortgagee an opportunity of buying if the mortgagor wishes to sell. *Davies v. Chamberlain*(2) is by implication against that contention; and it may be remarked that a mere right of pre-emption may well prove some hindrance to a sale for full value. But I prefer not to express a definite opinion on that question on this occasion, as it appears to me unnecessary for this part of the present case. Here we have something more than a contract for pre-emption and to my mind something much more objectionable. This is not a case where the mortgagor, if he happens to want to sell the property, must give the mortgagee an opportunity of buying at the price he can get from any one else. Here, even if we do not take the words "we shall not sell to others" as meaning more than that the mortgagors will not sell to others without first giving the mortgagee his opportunity, that opportunity is, not to buy at the market-price or what can be obtained from others, but at something less, at a "concession" price. Now, if the rule that a mortgagee cannot as part of the mortgage transaction obtain an option to purchase at the full value is to be maintained, on what principle can he be allowed to obtain as part of the mortgage transaction a right to tie the mortgagor's hands so as

to prevent him from getting the full value from any one? In such a case it is true that the mortgagor cannot be forced to sell at the option of the mortgagee; but, if he wishes to sell at all, he can be forced to sell at less than the full value of the property. To my mind the one is as repugnant to the essence of a mortgage as the other. If by the mortgage transaction the mortgagor's right to sell the equity of redemption at its full value is cut down, we have at once something more than a mortgage, something repugnant to a mortgage. In *Kreglinger v. New Patagonia Meat and Cold Storage Company, Limited*(1) Lord Parker suggested that one justification for the rule that a mortgagee cannot as part of the mortgage transaction obtain a contract from the mortgagor to sell the mortgaged property to him is that such a contract is repugnant to the mortgagor's contractual right to obtain a reconveyance on redemption, which is explicit in what in this country we call an English mortgage, and also repugnant to the equitable right to obtain a reconveyance on redemption even after the date for payment has passed. That is an illuminating explanation of the rule. But Lord Parker did not suggest that the rule applies only to what we call English mortgages, nor that it is not still in full force in respect of all transactions which are really mortgages. There is no valid reason, so far as I can see, and none has been suggested before us, why the rule should not be fully applicable to a simple mortgage in this country. Apart from all question of its historical origin or development the principle behind the rule is that the mortgagor shall not by the mortgage transaction impair his right to the property or his right to deal with it except so far as it is made security for the mortgage-money

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(1) [1904] A.C., 323.

(2) [1909] 26 T.L.R., 138.

(1) [1914] A.C. 125.

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That principle is clearly infringed, if by the mortgage transaction the mortgagor binds himself, even for no longer than the currency of the mortgage, to sell, if he sells at all, at something less than the full value of the property. For this reason also I think we must find that Exhibit II is invalid.

It is also contended for the plaintiff that Exhibit II is void for uncertainty. It provides that, if the mortgagors sell the property now in question, they will sell it to the mortgagee, defendant 3, "at a concession rate." The learned Advocate-General suggested at one stage that we should read the document as a contract for pre-emption and ignore this expression "concession rate." But the tenor of the document shows that this expression was deliberately introduced; and the explanation of its introduction is set out. It is clear that it is an important term of the document, which we should not be justified in disregarding. Then can we say or ascertain what the parties to the document meant by selling "at a concession rate"? The only things in the document which go any way towards giving precision to this stipulation are the statement that the reduction of interest will cause defendant 3 a loss of Rs. 500 a year and the provision that, if the contract to sell is broken, the executants will pay to defendant 3 additional interest at 5 annas per mensem from the date of the document, which would make up the ordinary interest of Re. 1 per mensem. But Rs. 500 is a round sum, which is less than the annual difference between the two rates of interest, even if the interest were paid punctually as simple interest. And, if either the Rs. 500 a year or the interest actually lost by reduction of rate were intended to fix the amount of "concession" in the sale price, surely the parties would have expressed that definitely as the measure of the "concession",

or would at least have provided for a "proportionate concession." Here the document sets out the reason for the concession in price and the compensation to be paid, if the agreement is broken, but avoids giving any precision to the word *saleesuga*, though that might so easily have been done. I agree that the "concession" in price in Exhibit II is neither ascertained nor ascertainable and that therefore apart from its other infirmities the agreement is void for uncertainty.

The last contention for the plaintiff is that Exhibit II infringes the rule against perpetuities. I agree that it is unnecessary to discuss this question, which was not argued very fully before us. I will only add that I do not think that the decision of their Lordships of the Privy Council in *Maharaj Bahadur Singh v. Balchand*(1), on which the plaintiff relied, is of very great assistance to us in this connexion, as that case did not deal with an agreement for sale of land, in respect of which, in this country, we have the special provision in section 54 of the Transfer of Property Act.

On account of the three contentions of the plaintiff, which I think must be upheld, I agree that this appeal must be allowed and a decree made for the plaintiff with costs in both Courts in the terms proposed by my learned brother.

K.R.

(1) (1920) 48 I.A., 378.

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APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice
Tiruvengkata Chariyar.

1928.
September
24.

V. R. VENKATRAMA AYYAR (SECOND DEFENDANT),
APPELLANT,

v.

T. GOPALAKRISHNA PILLAI AND ANOTHER (PLAINTIFF
AND FIRST DEFENDANT), RESPONDENTS.*

Indian Contract Act (IX of 1872), sec. 38—Creditor refusing to entertain idea of payment by debtor and putting it out of the power of tenderor to offer payment in manner acceptable to creditor—Offer of performance by person able to carry out promise in entirety—Form of performance, not legal tender—If valid—Tender by cheque—Validity of.

Where a creditor refuses to entertain the idea of payment by his debtor or by some one acting on his behalf, and puts it out of the power of the tenderor to offer payment in a manner acceptable to the creditor, the offer of performance by a person then able to carry out the promise in its entirety is a valid tender, in spite of the form of it being itself not legal tender; and under section 84 of the Transfer of Property Act, interest ceased to run from the date of such tender.

A tender by a cheque is a valid tender unless the creditor refused the form of it.

Jones v. Arthur, (1810) 8 Dowl. Pr. Cas., 442; 59 R.R., 833; *Polglass v. Oliver*, (1831) 2 C. & J., 15; 149 E.R., 7 and *Mahomed Mozaffer Ali v. Asraf Ali*, (1914) 25 I.C., 93, followed.

APPEAL against the decree of the City Civil Court, Madras, in Original Suit No. 165 of 1926.

T. M. Krishnaswami Ayyar and N. Sivaramakrishna Ayyar for appellant.

T. Pattabhirama Ayyar and T. P. Ramachandra Ayyar for first respondent.

C. Venkatasubbaramiah for second respondent.

* City Civil Court Appeal No. 28 of 1927.

JUDGMENT.

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The appellant in this case is the second defendant. The facts not disputed are, the plaintiff had lent the first defendant a sum of Rs. 12,500 on an equitable mortgage of his house by means of a promissory note and pledge of title deeds as security. In the beginning of March 1925, plaintiff was informed that the first defendant was selling the house to the second defendant under an arrangement that the second defendant should discharge the mortgage. On 10th March 1925, first defendant paid Rs. 900 to P.W. 2 on behalf of the plaintiff in full discharge of the interest due on the mortgage and undertook to pay the principal within a week and that if the principal was not so paid further interest would accrue until the date of payment. Second defendant bought the house on 5th March 1925. According to him, he made a valid tender of Rs. 12,500 to the plaintiff on 16th March 1925 within the week of grace, but the plaintiff refused to have anything to do with him. According to the plaintiff there was no valid tender. The principal sum was deposited in the High Court on 22nd October 1925. Plaintiff in this suit sues for interest, Rs. 925, which he claims due to him as having accrued between 10th March 1925 and 22nd October 1925. The lower Court gave a decree for the sum against both the defendants personally. The second defendant appeals.

His main contention of course is that as the plaintiff refused his valid tender made within the week of grace plaintiff is not entitled to any interest, and the chief point for decision is what happened on the 16th March and whether there was then a valid tender of the whole sum due. Second defendant was the purchaser of the equity of redemption and as such was of course entitled in law to tender the mortgage amount.

The alleged tender was made at the Cosmopolitan Club. Plaintiff as P.W. 1 admits that second defendant,

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D.W. 3 and the agent of first defendant came to him at the club, that the second defendant asked him to receive the money and give him receipt and that he replied "I will take it from you if Swami Nayudu (the mortgagor) says so." Later on in his deposition he says, "He (i.e., second defendant) did not bring money on the 16th or show it to me." That is all the account the plaintiff gives of this incident, and his is the only evidence on his side about it. How he knew that no money was brought he does not explain. Second defendant's version as D.W. 2 is that the three persons abovenamed went to the club and told plaintiff that they had brought the money, that plaintiff asked "who are you"; second defendant said, "I am the purchaser as you know," plaintiff then refused to receive the money saying, "I have nothing to do with you. The mortgagor must come." Second defendant says he had the money Rs. 7,000 in cash and the rest in the form of a draft on the Imperial Bank, that he did not show the plaintiff all the money as he would not listen to the offer but showed him his "bulging pocket" and said he had it. Two witnesses on his side, D.Ws. 3 and 4, state that the plaintiff refused to receive the money. We regard the evidence of D.W. 3, a vakil of the High Court and a disinterested party, as most reliable on this point. He says that when they told plaintiff they had come to pay he said, "who are you? I do not know you. I had no dealings with you. My transactions were with the first defendant." D.W. 3 was not cross-examined on this part of his evidence and we accept his account. From this it is clear that the plaintiff refused emphatically to have any dealing with the second defendant. At the bar his learned advocate sought to defend him by alleging that he really did not know who the second defendant was. It is highly significant that plaintiff never gave that reason himself in the witness-box, and, had he ventured to do so, he would have been at once confronted

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with his own statements in the plaint, paragraph 6 that in the beginning of March (obviously some date before the 16th) he was informed of the sale of the house to the second defendant and of the arrangement that second defendant was to discharge the mortgage, and in paragraph 8 that he actually himself sent a letter to his vakil with whom he had deposited the title deeds to hand them over to the second defendant, and again in paragraph 9 where he clearly admits that he was looking to the second defendant as well as the first defendant to pay him the mortgage amount. P.W. 2 says that he himself told the plaintiff on the 10th March of the sale in favour of the second defendant. It appears to us futile for the plaintiff to argue that he did not know who the second defendant was. His profession of ignorance of who the second defendant was when second defendant came to the club was therefore a mere pretence in order to give a colour of justification to his point-blank refusal to negotiate. We are quite satisfied that the plaintiff knew perfectly well who second defendant was and that he knew him to be the purchaser of the property. If the reason which the plaintiff gives in his evidence for not dealing with the second defendant, namely, that the mortgagor must also consent, had been really stated by him, then that was also not the true reason but a mere excuse to cover his refusal to deal with the second defendant at all. The first defendant's agent D.W. 4 was then present with the second defendant and the plaintiff's statement that he did not then know him to be an agent of the first defendant is wholly disingenuous since this man was present at the previous payment of Rs. 900 interest to P.W. 2 on behalf of the plaintiff. It is significant of the plaintiff's real attitude that he does not claim that he told the second defendant that he should pay the amount to P.W. 2, whom on his own case he had authorized to receive the money. It is quite obvious that he was not going to receive the

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money from the second defendant under any circumstances or at any time or place. The real reason for his pettish refusal to receive the money appears to be pique because he had himself expected that first defendant would sell the house to him and annoyance at having been forestalled by second defendant.

The plaintiff's determination to have nothing whatever to do with the second defendant in this matter is manifested by his subsequent conduct. Foiled in his attempt to pay the plaintiff at the club, the second defendant sent him two registered letters enclosing a cheque for Rs. 12,500, namely Exhibit III on 19th March 1925 and Exhibit IV on 23rd March 1925. Of both of these the plaintiff refused to take delivery. These he refused, he says, because the covers bore no indication that they contained a cheque. Quite obviously therefore he did not know that they did not contain cheques for the principal *plus* whatever interest he then thought was due to him in full payment of the debt. It is perfectly clear that he was determined not to receive payment from the second defendant under any circumstances. It is not without significance that the plaint omits to mention both the incident at the club and these subsequent letters. We are satisfied from the evidence that the plaintiff categorically refused to deal with the second defendant at all or to entertain even the idea of receiving the money from him and that he thus put it out of the power of the second defendant to pay the debt.

It is contended for the plaintiff that even so such a refusal to treat with the second defendant will not avail the second defendant unless he actually himself made a legal tender which the plaintiff was bound to accept, and it is argued that the second defendant did not as a matter of fact have the money with him. Second defendant says he had it in the form of cash and a draft, and that when the plaintiff refused to receive it

he paid most of the cash and the draft into the Indian Bank the same day. His pass book shows that on 16th March 1925 he got a cheque book and paid in Rs. 4,200 in cash and Rs. 6,680 by draft. We are not altogether satisfied that he had time after the interview at the club, said to have been at about 3 p.m. (see Exhibit D), to have paid in this sum to the Indian Bank. It appears to us more probable that he had before he went to the club already paid in these sums into the bank and that what he took with him to the plaintiff was his cheque book. This conclusion is supported by the evidence of P.W. 2 to whose house the party had gone just before going to the club expecting to find the plaintiff there and to pay him there. P.W. 2, whose respectability gives his evidence much weight, deposes that second defendant then told him he had his cheque book with him and that he had already put the money into the bank and that he had no money with him. We are not satisfied that the second defendant has told the truth in this matter and believe that, realizing that his offer of a cheque might not be held to be a legal tender, he has endeavoured to improve upon the truth. However we are satisfied that if he had not the cash with him, he had his cheque book and that he had not less than Rs. 12,500 in the bank so that he could then and there have written out a cheque for the full amount which would have been honoured. He was able and willing to pay by cheque, if plaintiff would accept a cheque, or by cashing the cheque at once, if plaintiff wanted cash.

The facts as found by us therefore are that the second defendant was entitled in law to pay up this debt, that he went with his cheque book to the club ready to give the plaintiff a cheque or cash for the full amount and that the plaintiff prevented him doing so by refusing point-blank to have any dealings with him. What is the effect in law of such a position in fact? The law in India

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is to be found in section 38 of the Contract Act and section 84 of the Transfer of Property Act. So far as section 38 of the Contract Act governs the case, we are satisfied for reasons given that the second defendant made an offer of performance which was not accepted. The plaintiff argues first that the offer was not a legal offer, in other words, that the offer, if accepted, would not constitute performance, and secondly that it was not made at the proper time and place and under the circumstances set out in sub-section 2 of the section. His first contention rests on the broad proposition that tender of a cheque is not valid tender. As a universal proposition that is hardly correct. Tender by cheque will be valid tender if the person to whom it is tendered is willing to receive payment by a cheque. But in the present case the negotiations never got so far. The plaintiff refused at the outset to receive the money in any form or shape. It was open to him, had he allowed the matter to go on and the second defendant had tendered a cheque, to refuse the cheque and demand cash, and there was still time for the second defendant to go and bring cash. But instead of that he refused to have the payment in any shape and by this tactics put it out of his power to receive payment in cash and, therefore, to object now to the form of the payment. It is quite clear from the evidence that his objection was not to the form of the payment but to payment in any form. Where a party thus refuses to entertain the idea of payment at all and puts it out of the power of the tenderor to offer payment in a manner acceptable to the creditor, the offer of performance by a person then able to carry out the promise in its entirety is a valid tender in spite of the form of it being itself not legal tender. The tender, whether by cash and draft or by a cheque, was a valid tender unless the plaintiff refused the form of it; the plaintiff did not refuse the form of it, and therefore it was valid.

See, so far as the English law is concerned, *Jones v. Arthur*(1) and *Polglass v. Oliver*(2). The same principle has been applied in India. See *Mahomed Mozaffer Ali v. Asraf Ali*(3).

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As to the second point, it also was not an objection put forward at the time of tender. Plaintiff can object neither to the time nor place. He had been summoned by telephone to the negotiations going on in P.W. 2's house and P.W. 2 was holding himself out as under authority from the plaintiff to receive payment, although the promissory note had not then been endorsed to him. Plaintiff had refused to go to P.W. 2's house. Second defendant therefore could do no less than pursue the plaintiff to the place where he was. As to the reasonable opportunity of ascertaining that the second defendant was able and willing there and then to fulfil his obligation, plaintiff clearly had such an opportunity if he had not himself refused to ascertain anything at all. Under section 38 of the Contract Act therefore the second defendant was absolved from responsibility for non-payment.

Does that imply that the running of interest stopped? Section 84 of the Transfer of Property Act says that where a tender has been made of the amount due on a mortgage interest shall cease from the date of the tender. Obviously a party cannot come into Court and say "There was no tender because I refused to listen to any tender." Here if the second defendant had had the amount in cash and went to the plaintiff intending to offer it and the plaintiff stopped his mouth by refusing to deal with him at all, one could not but hold that there was a valid tender which stopped the running of interest. It seems to us to make no difference if the second defendant had instead of cash his cheque book ready to give the plaintiff a cheque for the full

(1) (1840) 8 Dowl. Pr. Cas., 442; 59 E. R., 833.

(2) (1881) 2 C. & J., 15; 149 E. R., 7.

(3) (1914) 25 I. O., 93.

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amount, or to cash that cheque and give the amount in cash, according as the plaintiff chose, and was prevented from doing so because the plaintiff refused to allow him to deal with him at all and was evidently determined to receive neither cash nor cheque. We are satisfied that there was a valid offer if the plaintiff would have listened to it, and that the plaintiff refused improperly to listen and thereby is estopped by his own conduct from claiming that interest will not cease to run—see *Jagat Tarini Dasi v. Naba Gopal Chaki*(1), *Kripa Sindhu Mukerjee v. Annoda Sundari Debi*(2) and *Lal Batcha Sahib v. Arcot Narainaswami Mudaliar*(3). The same principle governs English Law. An act equivalent to dispensing with the production of money is a waiver of the necessity of tender. It is equal to saying, “You need not produce the money because I will not take it”. See *Thomas v. Evans*(4), *Douglas v. Patrick*(5) and *Ex parte Danks*(6).

No question arises in this case whether the tender was a continuing offer until the money was paid into Court. The second defendant asserted, and the fact was not denied by the plaintiff or put in issue, that from 16th March 1925 till 22nd October 1925 second defendant had more than Rs. 12,500 in the bank to meet the demand of the plaintiff at any time if the plaintiff was willing to receive payment.

We cannot regard the judgment of the lower Court as satisfactory. It contains many misstatements and misquotations of the evidence. It blames the second defendant for not furnishing circumstances of time and place of tender as called upon within two weeks of the date of framing issues. The order as a matter of fact says “date of payment” and not “date of tender”. The

(1) (1907) I.L.R., 34 Cal., 305.

(2) (1907) I.L.R., 35 Cal., 34.

(3) (1910) I.L.R., 34 Mad., 320 at p. 322.

(4) (1808) 10 East, 101; 103 E.R., 714.

(5) (1790) 3 T.R., 683; 1 E.R., 798

(6) (1852) 2 De. G. M. & G., 936; 42 E.R., 1138.

lower Court goes on to remark that the plaintiff had therefore “no means of meeting the second defendant’s case that tender was made on the 16th”. But that date is clearly stated in the second defendant’s written statement, and further particulars were given when Exhibits I and III were filed on the 26th and 27th April. There is no question of any surprise being sprung upon the plaintiff. The Judge further seems to regard the principal question to be whether the second defendant took Rs. 12,500 in cash. We have indicated that that was not the principal question. By some curious reasoning which we do not follow, the Judge argues that the second defendant could not have had at his disposal more than Rs. 4,200 in cash and Rs. 6,680, the amount of the draft which he deposited in the bank on the 16th. Why the second defendant could not have procured or had in his possession more cash than he paid into the bank we do not see. The Judge twice over misquotes the plaintiff as saying that he did not know the second defendant before. The plaintiff nowhere says so. The Judge further seems obsessed by the idea that the second defendant had no right to make a tender at all unless there was some fresh contract between him and the plaintiff. But the second defendant as the purchaser of the equity of redemption was in law entitled to discharge the mortgage debt without any further contract. The judge assumes that P.W. 2 was authorized to receive payment for the plaintiff on the 16th, but this is wrong. The promissory note was not endorsed for collection to P.W. 2 until the next day. A tender to P.W. 2 on the 16th would not have been a legal tender.

We must hold for reasons already given that there was a valid tender of the money due to the plaintiff on the 16th and that interest ceased to run from that date, and the plaintiff has therefore no cause of action. The suit therefore fails and must be dismissed. The

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first defendant has not appealed, but obviously if the interest is not due at all he cannot be held liable in law for it. Moreover as the appeal brought by second defendant alone is preferred against the whole decree on a ground common to both defendants, it may, under Order XLI, rule 4, be set aside against both. We may add that we do not understand why the Judge gave a personal decree against the second defendant. There was in his view no privity of contract between him and plaintiff.

We reverse the decree of the lower Court and dismiss the plaintiff's suit with costs to second defendant in this Court. We direct that in the lower Court all parties will pay their own costs as neither plaintiff nor second defendant put forward the whole truth and nothing but the truth, and first defendant has not appealed.

B.C.S.

APPELLATE CIVIL.

*Before Mr. Justice Phillips and Mr. Justice
Madhavan Nair.*

1928,
May 3.

RAJA RAJESWARA SETHUPATHI *alias* MUTHURAMA-
LINGA SETHUPATHI (DEFENDANT), APPELLANT,

v.

MUTHUDAYAN PILLAI (PLAINTIFF), RESPONDENT.*

*Madras Estates Land Act (I of 1908), ss. 55 to 57 and 189 (3)
—Suit in a Revenue Court under sec. 55 of the Act—
Dismissal of suit on the ground that plaintiff was not a
tenant—Subsequent suit by same person in a Civil Court to
recover possession on the ground of occupancy right—Bar—
Res judicata—Exclusive jurisdiction of Revenue Court—
Issue as to title, necessary and not incidental for decision
under sec. 55.*

The decision of a Revenue Court in a suit by a tenant under section 55 of the Madras Estates Land Act, dismissing the suit

* Second Appeal No. 616 of 1925.

on the ground that the plaintiff was not entitled to demand a patta, is *res judicata*, under the provisions of section 189 (3) of the Act, in a suit instituted by the tenant in a Civil Court to recover possession of the land on the ground that he was the occupancy tenant. *Appa Rao v. Gurraju*, (1920) I.L.R., 43 Mad., 859, distinguished.

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SECOND APPEAL against the decree of the Court of the Subordinate Judge of Rāmnād at Madura in A.S. No. 61 of 1922, preferred against the decree of the Court of the District Munsif of Paramakudi in O.S. No. 155 of 1920.

This is a suit instituted by a person to recover possession of certain lands in a zamindari on the ground that he had occupancy rights thereto. He claimed title to the land under a sale in auction, held by the lessee of the portion of the zamindari estate. He had previously brought a suit in the Revenue Court to get a patta for the lands from the zamindar. The Revenue Court held that the sale in auction to the plaintiff was brought about by fraud and collusion on the part of the plaintiff, the lessee and the Tahsildar, that the zamindar was not bound by the sale and that consequently the plaintiff had no title to the holding and that his suit for getting a patta should be dismissed. This decision was affirmed, on appeal to the District Court, and on second appeal by the High Court. The tenant subsequently brought the present suit for a declaration of his title as occupancy tenant and for recovery of possession. The lower Courts decreed the suit. *The defendant preferred this Second Appeal.

S. Varada Acharya (with S. Soundararāja Ayyangar) for appellants.—The suit in the Civil Court is barred by the rule of *res judicata*, contained in section 189 (3) of the Madras Estates Land Act. The rule in section 189 (3) goes beyond the provisions of section 11, Civil Procedure Code. The question of right to get a patta is within the exclusive jurisdiction of the Revenue Court under section 55 and section 189 (3). The question of title to the land is a necessary issue and not merely incidental, under section 57 of the Act. The decision is binding

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as *res judicata* in the Civil Court. The decision in *Appa Rao v. Gurraju*(1) is erroneous.

K. Bhashyam Ayyangar for respondent.—The decision of the Revenue Court on title is not *res judicata* in a Civil Court. See *Appa Rao v. Gurraju*(1). The suit in a Civil Court is to recover possession and is not for getting a patta, which alone is in the exclusive jurisdiction of the Revenue Court. The decision as to title is only incidental for the decision in the Revenue Court.

JUDGMENT.

PHILLIPS, J.

PHILLIPS, J.—In this case the plaintiff (respondent) instituted a suit in a Revenue Court under section 55 of the Estates Land Act. His suit in respect of the plaint land was dismissed on the ground that he was not entitled to demand a patta. He has brought the present suit to obtain possession of the suit land, and the question that now arises for decision is whether the decision in the prior suit in the Revenue Court is *res judicata* or not. The section applicable is section 189 (3) of the Estates Land Act. It says,

“The decision of a Revenue Court or of an appellate or revisional authority in any suit or proceeding under this Act on a matter falling within the exclusive jurisdiction of the Revenue Court shall be binding on the parties thereto and persons claiming under them, in any suit or proceeding in a Civil Court in which such matter may be in issue between them.”

This question has been considered in several cases, but in most of these cases the circumstances were not the same as here. In *Ramalina Das Gosayiji Garu v. Bosihamo Mundalo*(2), and Second Appeals Nos. 1002 and 1213 of 1916 on the file of the High Court, the prior litigation in the Revenue Court had been in respect of commutation of rent and it was held, in a subsequent suit in a Civil Court, that the decision as to title in the Revenue Court did not constitute *res judicata* as it was a decision on a matter which did not fall within the exclusive jurisdiction of the Revenue Court. Second

Appeal No. 786 of 1919 on the file of the High Court was concerned with the decision in a suit for rent for a particular fasli and the same view was held. In all these cases it is clear that the question decided in the Revenue Court was not one falling within its exclusive jurisdiction so far as those suits were concerned. There is, however, a decision in *Appa Rao v. Gurraju*(1), in which the facts are very similar to the present, the suit in the Revenue Court in that case being one under section 56 of the Estates Land Act for enforcing a patta ; and it was there held that the decision of the Revenue Court on the title to the land or occupancy rights was not *res judicata* in a subsequent suit in a Civil Court. SADASIYA AYYAR, J., who delivered the leading judgment, has unfortunately based his judgment on a misapprehension that section 11 of the Civil Procedure Code is not applicable to proceedings under the Estates Land Act, although it is expressly made applicable under section 192. He accordingly came to the conclusion that section 189 (3) was enacted in the place of section 11, Civil Procedure Code, and was not intended to go beyond section 11 and to constitute the decisions on issues arrived at in the Revenue Court in suits cognizable exclusively by the Revenue Court binding on a Civil Court as *res judicata*. SPENCER, J., no doubt held that the decision as to title in the Revenue Court was a decision on an incidental matter inasmuch as the patta had been ordered and its provisions were settled. If in the present case the decision as to the occupancy right of the plaintiff can be deemed to be on an incidental matter, I entirely agree that it would not constitute *res judicata* in subsequent civil proceedings. I am, however, of opinion that it is not a decision on a mere incidental matter but a decision on a matter falling within the exclusive jurisdiction of the Revenue Court.

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(1) (1920) I.L.R., 48 Mad., 859.

(1) (1920) I.L.R., 48 Mad., 859.

(2) (1921) 14 L.W., 251.

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Under section 57 "In adjudicating suits under sections 55 and 56 the Collector shall first inquire whether the party sued is bound to grant or accept a patta and, unless this be proved, the suit shall be dismissed." A suit for the grant of a patta lies within the jurisdiction of the Revenue Courts and cannot be brought in a Civil Court under section 189 (1) of the Estates Land Act. When the Legislature lays down that in such a suit the Revenue Court must decide in the first place whether the party sued is bound to grant or accept a patta, it seems to me to indicate that the question is one within the exclusive jurisdiction of that Court; that is to say, section 189 (3) is applicable and the decision is *res judicata* in subsequent Civil proceedings. It is argued that only a suit for a patta is within the exclusive jurisdiction of Revenue Courts and that a suit may be brought in a Civil Court to establish occupancy right. If the land is ryoti land, the ryot is bound to accept patta and execute a muchilika. If therefore he brought a suit in a Civil Court for a declaration of his right of occupancy, he would be entitled to further relief of the grant of patta. If he asks for this further relief he would have to be referred to a Revenue Court and if he failed to ask for such relief, the Court would not grant a bare declaration. This difficulty has been met by the Legislature by enacting that the Revenue Court shall determine the right of a party to the grant of patta in a suit under section 55 or 56, and consequently that question must be deemed to be one exclusively within the jurisdiction of the Revenue Court.

In order to test the correctness of this view the result of a contrary conclusion may be considered. In the present case it has been held that the plaintiff is not entitled to a patta and consequently is not bound to execute a muchilika. If, however, the lower Courts' decision is correct, the plaintiff will be entitled to possession of certain lands which are ryoti lands within

the meaning of the Estates Land Act, but he will not be bound by any patta or muchilika. In fact his possession would be one of absolute ownership, for it has been finally decided that he is not entitled to be a tenant. The result therefore of holding that the prior decision is not *res judicata* would result in making the plaintiff, who only claims occupancy rights, the absolute owner of the land. It is to prevent such absurdity that the legislature has enacted section 57 and section 189 (3).

A further point has been raised by the appellant and that is that the finding of the lower Courts as to the plaintiff's occupancy right is wrong in law and should be reversed, but in the view I have taken on the question of *res judicata* it is unnecessary to discuss this point.

In the result the appeal is allowed and the plaintiff's suit dismissed with the costs throughout.

MADHAVAN NAIR, J.—I agree and have nothing to add.

K.R.

APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., Chief Justice and
Mr. Justice Pakenham Walsh.

SAMBAMURTHI AYYAR (PETITIONER—15TH CREDITOR),
APPELLANT,

1928,
September
13.

v.

E. RAMAKRISHNA AYYAR AND TWO OTHERS
(RESPONDENTS—INSOLVENTS), RESPONDENTS.*

Provincial Insolvency Act (V of 1920), ss. 41, 27 (2), 75 (1) (2)
—Order extending time to apply for discharge, by Subordinate Court—Appeal to District Court—No Second Appeal to High Court.

From an order of a District Court on appeal from an order of a Subordinate Court which extended under section 27 (2) of

* Letters Patent Appeal No. 188 of 1927.

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the Provincial Insolvency Act, the time for an insolvent applying for his discharge, a second appeal to the High Court is incompetent, according to section 75 (2) of the Act. Such an order is not one under section 4 of the Act so as to give rise to a second appeal under Schedule I of the Act.

APPEAL under clause (15) of the Letters Patent, against the Judgment of the Hon'ble Mr. Justice JACKSON, dated 28th June 1927, and passed in A.A.A.O. No. 120 of 1927 preferred to the High Court against the Order of the District Court of Madura, dated 16th February 1927 in C.M.A. No. 201 of 1926 preferred against the order of the Court of the Subordinate Judge of Dindigul, dated 7th August 1926, in M.P. No. 223 of 1925 in I.P. No. 21 of 1922.

In this case, a creditor of the insolvents applied for extension of time to apply for the insolvents' discharge. Rejecting the contention that the insolvents alone can so apply, the Subordinate Judge granted the application. On appeal by one of the three insolvents, the District Judge reversed the order, holding that section 43 (1) of the Provincial Insolvency Act was mandatory and left the Court no option but to annul the adjudication when the insolvents had not applied for discharge within the time allowed. He accordingly directed the Subordinate Judge to annul the adjudication.

The creditor preferred a Second Appeal to the High Court which was dismissed by JACKSON, J., on the ground that it was not an order falling under section 4 so as to give rise to a Second Appeal. Hence this Appeal under clause (15) of the Letters Patent.

K. V. Sesha Ayyangar for appellant.—The order is one falling also under section 4 (1) of the Provincial Insolvency Act; hence a second appeal lies though only on questions of law; see section 75 (1), provisos 1 and 2. This cannot be curtailed by any inference from section 75 (2); compare certain orders in execution passed under the Civil Procedure Code which have got a right of second appeal if they fall also under section 47 of the Code.

T. S. Anantarama Ayyar for respondent.—The order does not fall under section 4; hence section 75 (1) proviso does not apply.

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The JUDGMENT of the Court was delivered by PAKENHAM WALSH, J.—This is an appeal against the judgment of JACKSON, J., in appeal against the order of the District Court of Madura in C.M.A. No. 201 of 1926 which was preferred against the order of the Subordinate Judge of Dindigul, dated 7th August 1926, in M.P. No. 223 of 1925. The original order granted an extension of the time during which to apply for discharge under section 27 of the Provincial Insolvency Act. On appeal to the District Court, this order was reversed. An appeal against the order of the District Court was laid to the High Court. Mr. Justice JACKSON held that no appeal lay, evidently under the proviso to section 75 (2). Section 75 (2) runs as follows:—

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“Any such person aggrieved by any such decision or order of a District Court as is specified in Schedule I, come to or made otherwise than in appeal from an order made by a Subordinate Court, may appeal to the High Court.”

This order is one made under Schedule I and quite obviously on the terms of this section there is no Second Appeal in the matter. It has been sought however to argue from the second proviso to section 75, that the order can be taken to be one under section 4 of the Act and a Second Appeal lies against any order passed under section 4 on a question of law. To say that this order is passed under section 4 amounts to saying that every order under the Act can be brought under section 4 and that therefore a Second Appeal lies on a question of law against every order passed under the Act. That is to render the schedule and the plain proviso of section 75 (2) meaningless. A sort of analogy was sought to be drawn from the Civil Procedure Code but that does not in our opinion apply. There is nothing in

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the decisions quoted in that analogy which renders one part of that Act inconsistent with another whereas the effect here is to wipe out a definite proviso as to appeal. It is a settled principle of construction that an Act must be construed if possible consistently with itself. We, therefore, find against the contention and dismiss the appeal with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Devadoss.

1928,
August 31.

RAMASWAMI ASARI (PLAINTIFF), APPELLANT.*

Court Fees Act (VII of 1870), as amended by Madras Act (V of 1922)—Art. 17 (a) (iii) of the 2nd schedule—Suit to set aside an adoption—Valuation.

Article 17 (a) (iii) of the second schedule of the Court Fees Act, as amended by Madras Act V of 1922 enacts that the court-fee to be paid in suits to set aside an adoption is "hundred rupees, if the value for purposes of jurisdiction is less than rupees ten thousand and five hundred, if the value is ten thousand rupees or upwards."

Held, construing the above article, (a) that the plaintiff in such a suit is not entitled to put his own valuation upon the relief claimed, and (b) that the market value of such interest and not the value thereof as in a suit for possession is the proper valuation; *Keshava v. Lakshminarayana*, (1882) I.L.R., 6 Mad., 192, followed.

STAMP REFERENCE No. 11458 of 1927 in Appeal sought to be preferred against the decree of the Court of Subordinate Judge of Dindigul in O.S. No. 25 of 1925.

* Stamp Reference No. 11458 of 1927.

The following facts are taken from the Order of ^{RAMASWAMI ASARI.} DEVADOSS, J.:—

"This is a reference by the Taxing Officer of the High Court. The terms of reference are:

'Whether, in valuing the interest that would be lost to the alleged adopted son (the first defendant in the present case) if the adoption be declared invalid, the market value is to be taken.'

Plaintiff's suit was for a declaration that no adoption had taken place and even if an adoption had taken place, it was an invalid adoption. The appeal is by the plaintiff. He paid a court-fee of Rs. 100 under article 17 (a) (iii) of the Court Fees Act. The office objects to the amount and requires the appellant to pay Rs. 500, that is, Rs. 400 in addition, as the market value of the property is more than Rs. 10,000."

Further facts are to be found in the Order of DEVADOSS, J.

C. V. Harihara Ayyar for appellant.—A case falling under article 17 (a) (iii) of the Court Fees Act, like the present one, is incapable of valuation and the plaintiff is entitled to put his own valuation. *Sheo Deni Ram v. Tulshi Ram*(1), *Bai Machhbai v. Bai Hirbai*(2) and *Prahlad Chandra Das v. Dwarka Nath Ghose*(3). The plaintiff is only a reversioner and cannot get possession of the estate even if he succeeds; he can only ask for a declaration. At the most, the valuation should be as in a suit for possession and not on the market value of the interest that will be affected; *Ganapati v. Chathu*(4) and *Mohini Mohan Misser v. Gour Chandra Rai*(5). He distinguished *Keshava v. Lakshminarayana*(6) and *Vasireddi Veeramma v. Butchayya*(7).

Government Pleader (P. Venkataramana Rao) for Government.—The reference is very limited and the arguments and answer must be limited only to the question whether the market value of the interest that will be affected is to be the basis of the valuation. The amendment of the Court Fees Act assumes

(1) (1898) I.L.R., 15 All., 378.

(3) (1910) I.L.R., 37 Cal., 860.

(5) (1920) 5 P.L.J., 397.

(2) (1911) I.L.R., 35 Bom., 264.

(4) (1889) I.L.R., 12 Mad., 223.

(6) (1882) I.L.R., 6 Mad., 192.

(7) (1926) I.L.R., 50 Mal., 646.

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that a suit like this is capable of valuation. The value to be put is the value that will be lost to the adopted son, in case the adoption is set aside; see *Keshava v. Lakshminarayana*(1) and such value must be the market value when the suit is not for possession of revenue-paying lands.

JUDGMENT.

After stating the facts extracted above, his Lordship (DEVADOSS, J.) continued:—It is admitted that the market value of the property in dispute is not less than Rs. 10,000. Mr. Harihara Ayyar, who appears for the appellant, contends that in a case falling under article 17 (a) (iii), the plaintiff is entitled to put his own valuation upon the relief claimed by him, as it is not capable of valuation and even if it be held that the relief is capable of valuation, the relief should be valued not at the market value but upon the value of the relief which would accrue to the plaintiff. The question whether a relief with regard to an adoption is capable of valuation or not need not be gone into at length. Whatever may be the view of the other High Courts, this Court has taken the view that a relief with regard to the validity or otherwise of an adoption is capable of valuation. In *Keshava v. Lakshminarayana*(1) it was observed that he (meaning the plaintiff)

“has asked for a declaration that the adoption was not made, and that, if it was made, it was invalid. The fact and validity of the adoption is then the subject of the suit, and in valuing it for purposes of jurisdiction, a computation must be made of the value of the interest that would be lost to the alleged adopted minor, if the adoption be declared invalid.”

It stands to reason that, when a plaintiff comes into Court urging that an alleged adoption did not take place, and even if it did take place, it is not valid, he asks for a relief not merely with regard to the adoption but to the property which the adopted boy would acquire

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by means of the adoption. In other words, the value of the relief is the value of the property which the adopted boy would get if the adoption were true and valid. The argument of Mr. Harihara Ayyar is, that, when a person asks for a declaration that a certain adoption is invalid or that it did not take place, he asks for a relief, which, if granted, would not benefit him as soon as the declaration is made. This argument overlooks the fact that the adopted boy, in case the adoption is declared invalid, would lose the property which he would not otherwise, and the value of the relief is the value of the property the loss of which would entail on the adoption being declared invalid. Whether the plaintiff gets anything at present or not, we must consider the value of the relief as being the loss to which the defendant would be put, in case the relief asked for is granted. It is conceded that in the converse case, that is, if a person asks for a declaration that he is the adopted son of X, the valuation of the relief prayed for, would be the value of the property he would acquire by the adoption being upheld and I fail to see why a different principle should be applied when the defendant happens to be the adopted boy and the plaintiff a person who chooses to contest the factum or validity or both, of the adoption. The Allahabad High Court in *Seho Deni Ram v. Tulshi Ram*(1) departed from the view of this Court in *Keshava v. Lakshminarayana*(2), and in *Bai Machhbai v. Bai Hirbai*(3) this question did not directly arise. That was a case between Muhammadans. In *Prahlad Chandra Das v. Dwarka Nath Ghose*(4) the learned Judges followed the practice which they had been following for a number of years. I do not think that on the strength of these cases, the correctness of the decision in *Keshava v.*

(1) (1893) I.L.R., 15 All., 378.

(3) (1911) I.L.R., 35 Bom., 284.

(2) (1882) I.L.R., 6 Mad., 192.

(4) (1910) I.L.R., 37 Cal., 860.

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Lashminarayana(1) can in any way be questioned. It is also urged that in the case of a karnavan of a Malabar tarwad and in the case of a trustee, the relief cannot be valued and that principle should be applied to this case. In the case of karnavan, he does not own any property in his own individual right; he is only a manager of the tarwad for the time being and in the case of a trustee, it is well known that he has no personal interest in the matter though he may think much of his office as a trustee. Those cases cannot apply to a case like the present. The legislature in amending the Court Fees Act by inserting in column 3, the following, namely,

"Hundred rupees if the value for purposes of jurisdiction is less than ten thousand rupees and five hundred rupees if such value is ten thousand rupees or upwards"

has expressed its view that a relief with regard to an alleged adoption is capable of valuation. Under the old Act, the declaration was sought on a ten-rupee stamp. When the legislature advisedly enacted the clause with regard to the proper fee, it assumed that a relief in regard to an adoption was capable of valuation. This must be remembered in applying the case law to the present case.

The next question is, what is the correct mode of valuation? Mr. Harihara Ayyar contends that the correct mode of valuation would be the same as in the case of a suit for possession of property. In the case of property paying land revenue, the Court Fees Act requires an *ad valorem* fee of ten times the Government assessment for suits for possession. But in the case of a house and other immovable property, the market value is taken to be the value for purposes of court-fee. I do not see why, when a declaration is asked for in

(1) (1882) I.L.R., 6 Mad., 192.

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respect of property, the valuation should be on the basis of the valuation in a suit for possession. The mere fact that the Court Fees Act makes a distinction in some cases between property paying land assessment to Government and other property not paying any assessment is no ground for importing that distinction into clause 17 (a) (iii) of the Court Fees Act. As it reads, it only means the market value of the property. The clause is

"Hundred rupees if the value for purposes of jurisdiction is less than ten thousand rupees."

In cases where possession is asked for, the valuation for purposes of jurisdiction would be the same as the valuation for purposes of court-fee. But in other cases, the valuation for purposes of jurisdiction need not necessarily be the same as the valuation for purposes of court-fee. I therefore hold that in a case like this, the valuation should be calculated on the market value of the property which is likely to be affected by the declaration being granted or refused. In this view, it is unnecessary to consider *Vasireddi Veeramma v. Butchayya*(1). That is a case in which the question of jurisdiction was involved and no doubt there are some observations as to clause 17 (a) (iii), schedule 2 of the Court Fees Act. *Ganapati v. Chathu*(2) and *Mohini Mohan Misser v. Gour Chandra Rai*(3) do not touch the present point.

I answer the reference in the affirmative, that is, the market value should be taken as the value of the relief claimed in cases coming under clause 17 (a) (iii) of the second schedule of the Court Fees Act. The Taxing Officer will give such time as is necessary for supplying the deficiency in court-fee.

N.R.

(1) (1926) I.L.R., 50 Mad., 646.

(2) (1889) I.L.R., 12 Mad., 223.

(3) (1920) 5 P.L.J., 397.

APPELLATE CRIMINAL.

*Before Mr. Justice Reilly.*1928,
September
20.

RAMALINGA ODAYAR (ACCUSED), PETITIONER.*

Code of Criminal Procedure (V of 1898), sec. 231—Right of accused under to recall prosecution witnesses, after alteration of charge, such alteration not affecting his defence—if section applicable to cases under sec. 228.

Under section 231 of the Code of Criminal Procedure, the accused has a right to recall prosecution witnesses after the alteration of the charge, even if such alteration does not affect his defence; and that section applies to cases falling under section 228 of the Code.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Additional District Magistrate of Tanjore, dated 26th May 1928, in Calendar Case No. 10 of 1928.

V. L. Ethiraj, K. S. Desikan and M. Ranganatha Sastri for petitioner.

Public Prosecutor for the Crown.

JUDGMENT.

I do not agree with the Additional District Magistrate that the provisions of section 231 of the Code of Criminal Procedure are inapplicable to cases to which section 228 applies. Under section 231 of the Code of Criminal Procedure, the accused had the right to recall prosecution witnesses after the alteration of the charge, even if that alteration could not affect his defence, as the Magistrate supposes, and the Magistrate had no discretion in the matter. The witnesses whom the accused wishes to recall will be recalled.

B.O.S.

* Criminal Revision Case No. 471 of 1928.

APPELLATE CRIMINAL.

Before Mr. Justice Curgenvven.

M. L. SIVARAMAKRISHNA AYYAR (FIRST ACCUSED),
PETITIONER,

1928,
October 16.

“
SESHAPPA NAIDU (COMPLAINANT), RESPONDENT.*

Indian Penal Code, ss. 466 and 474—Judge—Pending suit—Fabricates record or dishonestly exceeds powers—If in discharge of official duty—Writing record of imaginary suit—Essence of offence—Prosecution—Previous sanction of Government, if necessary.

Where a Judge in a pending case fabricates any record or dishonestly exceeds his powers, the offence is committed by him while acting or purporting to act in the discharge of his official duty, and he is no less doing so in writing up the record of an imaginary suit, the essence of the offence in both cases being, that an officer having as part of his official duty the correct maintenance of judicial records fraudulently falsifies them.

Where a complaint alleged the commission of offences under sections 466 and 474 of the Indian Penal Code against a village munsif, in that the accused fabricated an entire record of the whole of a proceeding purporting to have been tried and decided by him under the Village Courts Act (I of 1889), *held*, the previous sanction of the Local Government, under section 197 of the Code of Criminal Procedure, was necessary before a Court could take cognizance of the offences alleged.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Stationary Sub-Magistrate, Kulittalai, dated the 10th February 1928, in P.R. No. III of 1927.

V. L. Ethiraj and A. S. Sivakaminathan for petitioner.

K. S. Jayarama Ayyar for respondent.

K. S. Vasudevan for *Public Prosecutor* for the Crown.

* Criminal Revision Case No. 310 of 1928.

JUDGMENT.

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The petitioner is a village munsif, and he applies for the revision of an order passed by the Stationary Sub-Magistrate of Kulittalai in P.R. No. 3 of 1927 on his file. That case was instituted by the complainant against the petitioner and two others under sections 466 and 474, Indian Penal Code, and the question which arose was whether cognizance of the offences complained of could be taken without the sanction of the Local Government under section 197, Criminal Procedure Code. The subject-matter of the complaint was a record of a civil suit in which the complainant figured as a defendant, and which purported to have been tried and decreed by the petitioner under the Village Courts Act (I of 1889). The complaint alleged that the whole proceeding from start to finish was fictitious, and that the entire record was a forgery. The point for decision is whether sanction under section 197, Criminal Procedure Code, is necessary before a Court can take cognizance of an alleged offence of this character.

Section 197 provides (to extract so much of it as is relevant here) that "when any person who is a Judge within the meaning of section 19 of the Indian Penal Code is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Local Government." It is not disputed that a village munsif, when he tries suits under the Village Courts Act, is a Judge. But it is contended that the alleged offence was not "committed by him while acting or purporting to act in the discharge of his official duty."

The passage just quoted represents the latest of several legislative endeavours to define the kind of

offences in respect of which sanction is required. In the 1872 Code (section 466) the phrase was "an offence committed by a public servant in his capacity as such public servant", and in the Codes of 1882 and 1898 "is accused as such Judge or public servant of any offence." But though the present wording is perhaps more explicit, there is no reason to suppose that it marks any change in the intention or the principle underlying the provision. The cases which have been decided under the successive Codes show that much difficulty has been experienced in discovering any general tests by the application of which it may be found whether sanction is or is not necessary. Before examining those cases, one fairly obvious fallacy, commonly urged and indeed to some extent countenanced by the words of the section, may be disposed of. It is said, to take an example, that a Judge who fabricates a record is not "acting or purporting to act in the discharge of his official duty" because it is no part of his official duty to commit such an act. But it is evident that no act can be at once part of his official duty and an offence, so that, were this construction accepted, the provision would involve a contradiction in terms. Clearly what is meant is that the offence must be committed in dereliction of the duty cast upon him as a Judge.

Not all such derelictions, however, it has been held, fall within the scope of the section. In *In re Gulam Muhammad Sharif-ud-Daulah*(1), PARKER, J., held, under section 197 of the Code of 1882, that sanction was required to prosecute a Judge who used defamatory language during the trial of a suit, because he was accused of uttering it "as a Judge". But in dealing with similar circumstances, a Calcutta Bench in *Nando Lal Basak v. Mitter*(2), differed from this view, adopting

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(1) (1888) I.L.R., 9 Mad., 439.

(2) (1899) I.L.R., 26 Cal., 852.

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the opinion of FIELD, J., expressed in an earlier unreported case, that the corresponding provision in the Code of 1872 "was intended to apply to those cases in which the offence charged is an offence which can be committed by a public servant only, cases, that is, in which he being a public servant is a necessary element in the offence". This view was approved and acted upon by DAVIES and MOORE, JJ., in *The Municipal Commissioners for the City of Madras v. Major Bell*(1), by COUTTS TROTTER, J. (as he then was) in *Sheik Abdul Kadir Saheb v. Emperor*(2), and by JACKSON, J., in *Raja Rao v. Ramaswamy*(3). Difficulty, however, often arises in applying this principle—in deciding, that is, whether the alleged offence contains an element necessarily dependent upon the offender being a public servant. It is not enough that the offence should be imputed to a public servant acting in the discharge of his official duties, if the nature of the offence—e.g., the use of defamatory language—is such that, so far as its ingredients go, anyone else might have committed it. This was the view taken by COUTTS TROTTER, J., in the case cited above with regard to the offence of criminal breach of trust by a public servant. Although the money came into the public servant's hands in his capacity as a public servant, yet he committed in respect of it an offence such as another, not a public servant, might have committed; but the learned Judge, in holding that section 197 would not apply, confessed that it was a question of considerable difficulty and very near the line.

Coming now to the cases which relate to the fabrication of records, an early Bombay decision (*Imperatrix v. Lakshman Sakharam Vaman Hari and Balaji Krishna*(4), under the Code of 1872, was upon facts closely similar

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to the present instance. A Mahalkari, who was an officer invested with the powers of a Judge in a certain class of cases, had fabricated the entire record of a civil suit. The language of section 466 of the 1872 Code, as I have noted above, differed from that of our present section 197, but its intended scope was probably the same. The learned Judges held that that scope extended "to all acts ostensibly done by a public servant, i.e., to acts which would have no special signification except as acts done by a public servant . . . The very object of the fabrication would be to invest those proceedings with a special character, and it is, we think, proper that the alleged fabricator should be dealt with in his official capacity under the provisions specially enacted; although private individuals charged with the same acts or omissions, or acts in one sense the same, would be proceeded against in the ordinary way". This passage brings out, I think, very clearly the nature of the issue which those fabrication cases raise. "Anyone", it is urged, "might equally well have committed the forgeries". The answer is "No, no one but the public servant himself could have produced them in the very hand in which, if genuine, they would have been written".

MILLER, J., in *Palaniandy Pillai v. Arunachellum Pillai*(1), had to deal with a case where a Village Magistrate was accused of making a false record in his register convicting the complainant of theft of pumpkins. He found that inasmuch as the karnam, and not the Village Magistrate, has to maintain the register, the latter was not acting "as a Judge" in doing what he did. I think it is clear that this finding was enough to exclude the application of section 197, Criminal Procedure Code. The learned Judge took occasion however to consider

(1) (1901) I.L.R., 25 Mad., 15.
(3) (1927) I.L.R., 50 Mad., 754.

(2) (1916) 1 M.W.N., 894.
(4) (1877) I.L.R., 2 Bom., 481.

(1) (1908) I.L.R., 32 Mad., 255.

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2 Bom., 481, and observed, in criticism of the passage from it which I have quoted,

"Anyone could have done it who had access to the register kept by the karnam or the Village Magistrate, and though the effect of it would be to give the impression that the Village Magistrate in a certain case had acted as Judge, he would not, if the charge is true, have in fact done so".

I have already ventured to suggest the answer to this line of reasoning, and would add the objection, with all respect, that the same contention would apply even to a forged interpolation in a genuine record, thereby carrying the application of the argument to greater lengths than it has been taken before me, and excluding from the scope of section 197, Criminal Procedure Code, such an offence, for example, by a public servant as that rendered punishable by section 167, Indian Penal Code (framing an incorrect document with intent to cause injury). MILLER, J., adds "I do not see how a Magistrate who fabricates a record in which he figures as Judge can properly be said to be acting as Judge when he does so".

The correctness of this latter observation was doubted by SPENCER and KRISHNAN, JJ., in *Subbiah Pillai v. Emperor*(1), a case distinguishable however on the ground that the fabrication (of a judgment and a calendar) was in a real case actually pending before the Village Magistrate. While feeling no doubt that, in these circumstances, the Village Magistrate was acting not in a private capacity but as a Judge, so that section 197 would not apply, they had not to decide whether, if the proceedings were wholly fictitious, the same conclusions should be drawn. Lastly I may notice two unreported cases. In Criminal Revision Case No. 310 of 1925,

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WALLACE, J., held that a Sub-Registrar who tampers with a document presented to him for registration is not protected by the section. Anyone who got access to the document was equally well situated to do the same. In the other case, Criminal Revision Case No. 291 of 1916, a Village Munsif before whom some suits were pending had attached a jutka and pony before judgment, and a complaint was filed against him under sections 379 and 114, Indian Penal Code, SESHAGIRI AYYAR, J., who disposed of the Revision Petition, rejected the contention that as the Village Munsif was acting *ultra vires* he was not acting as a Judge within the meaning of the section. "If this argument is pushed to its logical conclusion", he observes, "no public servant or Judge can have the safeguard of a sanction, as it is not within the powers conferred upon such an officer to commit an offence". He adds that in all cases where a public servant purports to exercise his function as such, he must be deemed to be acting as such public servant, and that accordingly sanction was necessary.

Thus it will be seen that there is good authority for the position that where a Judge, in a pending case, fabricates any record or dishonestly exceeds his powers, the offence is "committed by him while acting or purporting to act in the discharge of his official duty". Mr. Jayarama Ayyar, conceding this, contends that the fabrication of an entire record does not involve such an offence,—that in the absence of any pending case it cannot be said that the alleged offender was discharging or purporting to discharge his official functions. The best answer which I can make is that if in forging a judgment and a calendar in the one case, and in unauthorizedly issuing an attachment warrant in the other, a Judge is purporting to discharge his duties, he is no less doing so in writing up the record of an imaginary suit. The difference is a difference of degree and not of kind. The

(1) (1920) M.W.N., 7.

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essence of the offence in each case is that an officer having¹ as part of his official duty the correct maintenance of Judicial records fraudulently falsifies them. The purport of that forgery was that, acting in the discharge of his duty, he had entertained and decided a civil suit, and it can make no difference, for the purpose whether the record was wholly false or partly true and partly false, and so whether the suit was wholly fictitious or fictitious only in part. In either case, so far as the fictitious part was concerned, he was as much or as little "purporting to act in the discharge of his official duties" in inventing the record of it. Nor do I feel hesitation in deciding that an essential ingredient of the act complained of was that the author was a public servant. I had already found occasion to remark upon this aspect of the matter. It does not seem even to have been argued in (1920) M.W.N. 7, and it has received an affirmative answer in 2 Bom., 481. JACKSON, J., in 50 M., 754, finds some difficulty in following this latter decision, observing, "if the ingenious man had forged the record as coming before some other court, there presumably would be no question of sanction, and why must there be a sanction because he selected his own court?" This is really MILLER, J.'s argument in another shape and my own view is that it makes all the difference that the court and the records are those for which the Judge as a Judge is responsible.

I accordingly allow the Revision Petition, set aside the order of the Stationary Sub-Magistrate and direct that the complaint as against the petitioner be dismissed for want of sanction under section 197, Criminal Procedure Code.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Reilly.

PUBLIC PROSECUTOR, MADRAS, PETITIONER,

v.

1928,
November
30.

CHOCKALINGA AMBALAM AND FIVE OTHERS (ACCUSED),
RESPONDENTS.*

*Code of Criminal Procedure (V of 1898), sec. 526—" Trial "—
Meaning of—Application for adjournment under sec. 526
when judgment about to be pronounced—Application dis-
missed and judgment pronounced—If sec. 526 (8) contra-
vened.*

A trial, as that word is used in the Criminal Procedure Code, is completed, before the judgment is pronounced.

Where an application for an adjournment was made under section 526 of the Code just when the judgment was about to be pronounced and the application was dismissed and the Court pronounced judgment, *held*, that the dismissal of the application was proper and that the provisions of section 526 (8) were not contravened.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the Ramnad Division in Criminal Appeals Nos. 28 and 31 of 1928 preferred against the judgment of the Court of the Subdivisional Magistrate of Devakottai in Criminal Case No. 116 of 1926.

Public Prosecutor for petitioner.

Vere Mockett for respondents 1 to 5.

C. Narasimhachari for respondent 6.

JUDGMENT.

The two appeals to which this revision petition relates have not been heard upon the merits, as the

* Criminal Revision Case No. 806 of 1928.

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Sessions Judge has ordered a retrial of the case in consequence of what he regards as illegalities in the original trial.

On 26th April 1928 the trying Magistrate refused to adjourn the case when the Vakil for the accused intimated his intention of making an application to the High Court for a transfer. The learned Sessions Judge is of opinion that the Magistrate in refusing an adjournment on that occasion acted in violation of Section 526 (8), Code of Criminal Procedure. The learned Public Prosecutor contends that the intimation of intention to apply for a transfer was not made in the course of the trial, which had been closed before it was made, though judgment had not then been pronounced, and therefore the Magistrate in refusing to adjourn the case did not contravene the provisions of section 526 (8). It appears that before the Sessions Judge the Public Prosecutor of Ramnad conceded that after refusing to adjourn the case the Magistrate heard arguments in the case before he pronounced judgment. If that were so, the trial would not have been over before the intimation of intention to apply for a transfer was made. In an affidavit in support of an application to this court for bail (Criminal Mis. Petition No. 288 of 1928) the Vakil for the accused asserted that some arguments in the case were heard by the Magistrate after he refused the adjournment and before he pronounced judgment. But the Magistrate himself has stated that he heard no arguments in the case after refusing the adjournment. His diary shows that, when the judgment was about to be pronounced, an application under section 526 was made and dismissed and that he then pronounced judgment. His order on the application itself shows that the application was presented when the judgment was about to be pronounced. The Prosecuting

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Sub-Inspector of Police, who conducted the prosecution, has made an affidavit that no arguments were heard after the application for adjournment was made. I am informed that the local Public Prosecutor, who made the "concession" before the Sessions Judge, had not appeared at any earlier stage of the case and was not instructed to make any such "concession." I must accept the Magistrate's account of what happened before him, which, as I have mentioned, is supported by the record of the case, and find that no argument was heard after the application for adjournment was made but that the case had been closed before that application was made. It has been contended for the accused that, nevertheless, an application made before judgment was actually pronounced, would be made in the course of the trial within the meaning of section 526, on the ground that the trial includes the pronouncing of judgment. But sections 366 and 497 of the Code make it clear that a trial as that word is used in the Code, is over before the judgment is pronounced and that the pronouncing of judgment is no part of the trial. I find therefore that the intimation of intention to apply for a transfer and the application for adjournment for that purpose on 26th April 1928 were not made in the course of the trial and that the Magistrate's refusal to adjourn the case did not violate the provisions of section 526 (8) and did not invalidate the trial.

[His Lordship then dealt with other objections raised to the regularity of the trial and concluded :—]

Mr. Mockett has appealed to me not to interfere in revision with the Sessions Judge's order for retrial, which he urges would be unusual and improper. It is curious that the accused should be so anxious to be tried again before their appeals have been heard in full. In my opinion, now that I have found that the trial was

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not vitiated by illegalities, as suggested, it would be improper to allow more public time to be spent on trying this case, which has already been so unduly protracted, instead of having the appeals heard and disposed of in the ordinary way. The Sessions Judge's order setting aside the convictions and sentences and directing the case to be retried is reversed. The records will be returned to him. He is directed to hear the appeals in full and dispose of them with the least possible delay.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Waller.

1928,
October 29.

SUBAN SAHIB AND THREE OTHERS (ACCUSED), PETITIONERS.*

Indian Evidence Act (I of 1872), sec. 54—Criminal Court passing sentence—if precluded from considering evidence of bad character including previous conviction even where exercise of powers under sec. 75 of the Indian Penal Code not intended.

Section 54 of the Indian Evidence Act does not preclude a Criminal Court from considering evidence of bad character including previous convictions in passing sentence on an accused, even in cases where it is not intended to exercise the powers conferred by section 75 of the Indian Penal Code. *Emperor v. Ismail Ali Bhai*, (1914) I.L.R., 39 Bom., 326, followed.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session, Trichinopoly Division, in Criminal Appeal No. 8 of 1928, preferred against the judgment of the Court of the

* Criminal Revision Case No. 278 of 1928.

Subdivisional Magistrate of Trichinopoly in C.C. No. 114 of 1927. SUBAN SAHIB
In re.

M. S. Vaidyanatha Ayyar for petitioners.

K. S. Vasudevan for Public Prosecutor for the Crown.

JUDGMENT.

The four petitioners with another person not before me were charged before the Town Sub-Magistrate, Trichinopoly, with offences under sections 147, 323, 379 and 426, Indian Penal Code. The last witness was examined by him on 7th October 1927. He then wrote out a long order finding the petitioners and the other man guilty of offences under sections 147, 323, and 426, Indian Penal Code. Having arrived at that conclusion, he proceeded to record evidence which proved that two of the petitioners had previously been convicted of breach of the peace, had been bound over to keep the peace for a year and had broken their bonds. On the strength of this evidence, he sent up the case to the Sub-divisional Magistrate, being of opinion that two of the petitioners should receive a severer sentence than he could impose, and that the other two should be bound over to keep the peace. The Subdivisional Magistrate, after considering the evidence, convicted the petitioners of rioting and other offences. In view of the evidence as to their association together and the previous convictions of two of them, he decided to take action under Madras Act V of 1926. Evidence was given that the petitioners were not more than twenty years old and he ordered them to be detained in the Borstal School at Tanjore for the minimum period of two years. An appeal was taken to the Sessions Judge, who set aside the convictions for rioting, but confirmed the sentences.

In revision, it is argued that the trial was vitiated by the admission of evidence of the bad character of two of the petitioners before the Sub-Magistrate. It is

SUBAN SAHIB,
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contended that this is opposed to the provisions of section 54 of the Evidence Act and that the only method by which sentences can be enhanced is to be found in section 75, Indian Penal Code. The wording of section 54 of the Evidence Act is, no doubt, as wide as it can be, but the object is, I think, clear, to lay down that evidence of bad character, including a previous conviction, is, as a rule, irrelevant "to help to establish an accused person's guilt"; but that is not to lay down that it may not be taken into account in passing sentence. The question has been fully considered in *Emperor v. Ismail Ali Bhai*(1), a decision which I propose to follow.

The proper application of section 75, Indian Penal Code, seems to me obvious. It is to cases where it is intended to pass sentences more severe than those provided in the Penal Code for the particular offences charged. But that does not involve a complete exclusion from consideration of previous convictions in cases where it is not intended or possible to exceed the limits fixed by the Penal Code. In very few cases are minimum sentences provided for and the Judge has a wide discretion allowed him. It seems to me impossible to contend that, after conviction, he is disentitled from considering, with a view to the proper exercise of that discretion, the antecedents of the convicted man. If there could be any doubt on the point, it is, I think, set at rest by section 562, Code of Criminal Procedure. That section refers to a far wider range of offences than are included in section 75, Indian Penal Code, and distinctly contemplates the use of previous convictions (not necessarily convictions for the same offence of which the person has just been convicted) to affect the question of sentence. If it is legal to prove a previous

(1) (1914) I.L.R., 39 Bom., 326.

conviction in order to show that a convicted person cannot avoid being sentenced, I see no reason why previous convictions should not be used by the Court in exercising its discretion in regard to the quantum of the sentence.

I find no ground for interference. The Criminal Revision Petition is dismissed.

B.C.S.

APPELLATE CIVIL—FULL BENCH.

Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Kumaraswami Sastri, Mr. Justice Wallace,
Mr. Justice Beasley and Mr. Justice Pakenham
Walsh.

VASUDEVA SAMIAR ALIAS VASUDEVA PILLAI
(APPELLANT), APPELLANT.*

1928,
October 18.

Letters Patent (Madras), cl. 15—Judgment—Appeal—Amendment of cl. 15 of the Letters Patent, taking effect on 31st January 1928—Suit filed before amendment—Second Appeal filed before, but judgment of single Judge after, amendment—Appeal under Letters Patent, filed without obtaining leave from the learned Judge—Appeal, whether competent—Amendment, whether retrospective.

In a suit instituted on the 30th July 1919, a Second Appeal was presented on the 15th July 1924 and was finally disposed of by a single Judge of the High Court on the 9th February 1928. On an appeal being preferred against the judgment, under the Letters Patent, on the 24th April 1928, without leave to appeal having been obtained from the learned Judge, objection was taken to the maintainability of the appeal by reason of the amendment of the Letters Patent requiring such leave, which had come into force on the 31st January 1928.

* S.R. No. 12176 of 1928.

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Held, that the institution of a suit carries with it the implication that all appeals *then* in force are preserved to it through the rest of its career, unless the legislature has either abolished the Court to which an appeal *then* lay, or has expressly or by necessary implication given the Act a retrospective effect;

and that the words of the amended Letters Patent do not admit of such an interpretation;

and that, consequently, the appeal under the Letters Patent was competent; *Sheikh Sadar Ali v. Sheikh Dolliluddin*, (1928) 48 Cal. L.J., 150, followed; *Colonial Sugar Refining Co. v. Irving*, [1905] 1 A.C., 369, applied; *Canada Cement Co. (Ltd.) v. East Montreal (Town of)*, [1922] 1 A.C., 249, distinguished; *Badrudin v. Sitaram*, (1928) 20 Bom. L.R., 942, dissented from.

APPEAL sought to be preferred under clause 15 of the Letters Patent against the judgment of DEVADOSS, J., dated 9th February 1928, in Second Appeal No. 790 of 1924, preferred against the decree of the Subordinate Judge of Kumbakonam in A.S. No. 22 of 1923 filed against the decree of the District Munsif of Valangiman in O.S. No. 295 of 1919.

In this case a suit was instituted in the District Munsif's Court on the 30th July 1919, and a Second Appeal was filed therein in 1924 (S.A. No. 790 of 1924). The Second Appeal was finally disposed of by DEVADOSS, J., on the 9th February 1928. An appeal under the Letters Patent was preferred against the judgment on the 24th April 1928; but no leave to appeal had been obtained from the learned Judge. The Letters Patent, clause 15, as amended, requiring such leave, came into force on the 31st January 1928. Objection was taken by the office of the High Court as to the maintainability of the appeal, as no leave to appeal had been obtained from the learned Judge as required by the amendment of the Letters Patent. The case was placed before the Full Bench under the orders of the learned CHIEF JUSTICE for the determination of this question.

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A. Krishnaswami Ayyar (with *T. S. Srinivasa Ayyar*) for the appellant.—The right to appeal under the Letters Patent in this case is governed by the Letters Patent, clause 15, as it stood before it was amended; the amendment has no retrospective effect. The suit was filed in 1919. All rights of appeal attached to the case as they existed on the date of suit. When a litigant institutes a suit, he has a right of appeal and of further appeals as they existed at that time. They are vested rights, and are not mere rules of procedure. The legislature can take away the right of appeal by express enactment, or necessary intendment. Further, the Second Appeal to the High Court, having been preferred before the amendment of the Letters Patent in this case, the right to have an appeal under the original Letters Patent is not affected by the amendment subsequent to the filing of the Second Appeal. The latest decision of the Calcutta High Court is in favour of this view. See *Sheikh Sadar Ali v. Sheikh Dolliluddin*(1). The leading case is *Colonial Sugar Refining Co. v. Irving*(2). The Privy Council case has been followed in 2 Full Bench cases of this High Court in *Ramakrishna Iyer v. Sithai Ammal*(3), and *Daivanayaka Reddiyar v. Renukambal Ammal*(4). The decision of a Full Bench of the Allahabad High Court holds that an appeal is a continuation of the suit and is not taken away by a later Act; see *Ram Singha v. Sankar Dayal*(5). The decision in *Delhi Cloth and General Mills Co. v. Income-tax Commissioner, Delhi* (6) shows that a right of appeal given by a new Act (which gave a right of appeal to the Privy Council) cannot apply retrospectively. The decision in *Canada Cement Co. v. East Montreal (Town of)*(7) is distinguishable, as there the Court of appeal itself was abolished.

Government Pleader (*P. Venkataramana Rao*), *amicus curiæ*?—The jurisdiction of the High Court, original and appellate, is given by section 9 of the Charter Act, now section 106 of the Government of India Act. The jurisdiction of the High Court to hear appeals from judgments of a single Judge of that Court is taken away by the amendment of the Letters Patent, clause 15. The amended Letters Patent takes away the appellate jurisdiction of the High Court and confers only a limited

(1) (1928) 48 Cal. L.J., 150 (F.B.). (2) [1905] A.C., 369 (P.C.)

(3) (1924) I.L.R., 48 Mad., 620 (F.B.). (4) (1927) I.L.R., 50 Mad., 857.

(5) (1928) A.I.R. (All.), 437. (6) (1927) I.L.R., 9 Lah., 284 (P.C.).

(7) [1922] 1 A.C., 249.

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In re.

appellate jurisdiction. See *Framji Bomanji v. Hormasji Barjorji*(1), and *Badraddin v. Sitaram*(2). The party has no vested right of appeal to two Judges as soon as a Second Appeal is filed in the High Court, for the Second Appeal may be disposed of by two Judges or a single Judge. It is only a contingent right until a judgment is delivered by a single Judge.

JUDGMENT.

COUTTS
TROTTER,
C.J.

COUTTS TROTTER, C.J.—This case appears to me to be indistinguishable from the case of *Sheikh Sadar Ali v. Sheikh Dollukuddin*(3). For the sake of clearness, I will set out the material dates. The plaint was presented on the 30th July 1919. The Second Appeal was presented on the 15th July 1924. The Judge who heard the Second Appeal called for a finding and, in consequence of that inevitable delay, gave his judgment on the 9th February 1928. On the 24th April 1928 a Letters Patent Appeal was filed against the judgment of the learned Judge who, sitting alone, had decided the Second Appeal. Before that Letters Patent Appeal was presented, the amended Letters Patent of 1928 had become applicable to this Presidency on the 31st January.

I should, in any case, differ from the decision in the Calcutta case cited above with great reluctance, because it would lead to the result that a Second Appeal would lie in Calcutta whereas it would not lie in Madras. I should, therefore, not venture to differ from the considered opinion of the Calcutta Full Bench on any other ground than that I felt not merely that I was inclined to the opposite opinion but that I felt that the decision offended against some standard principle of statutory construction. So far from that being the case, I entirely concur in the reasoning of RANKIN, C.J., who delivered the

(1) (1866) 3 Bom. H.C.R., 49.

(2) (1928) 30 Bom. L.R., 942.

(3) (1928) 48 Calo. L.J., 150.

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judgment of the Court, and see no answer to it. The result is regrettable, because it makes the amended Letters Patent, which were doubtless brought into being to relieve the heavy burden of Second Appeals, which in this Court have now reached the startling figure of 5,000 cases, unable to effect any substantial relief to us for five years.

I have only one observation to add to the judgment of the Calcutta High Court, and that is in reference to an argument addressed to us on a case which apparently was not cited to the Calcutta High Court. That is the case of *Canada Cement Co. v. East Montreal (Town of)*(1) and it was suggested that the sentences which are to be found at the end of their Lordships' judgment were irreconcilable with the doctrine so clearly laid down by Lord MACNAGHTEN in *Colonial Sugar Refining Company v. Irving*(2), and that the later case should be followed, if there was such a conflict, and not the earlier. In our opinion, arrived at after a careful scrutiny of the Canada Cement Company's case, no such conflict arises. In that case what was taken away was not the right of appeal but the very Court to which the appeal lay, namely, the superior Court of Montreal sitting in review. By 10 George V Chap. 79 (Quebec), the right of appeal was transferred from the abolished Court to the Appellate Side of the Court of King's Bench in Quebec, but no provision was made for the transference of appeals which would have lain to the abolished Court to the newly constituted Appellate Court. In these circumstances, their Lordships of the Privy Council held that an appeal from the Circuit Court to the Court of King's Bench did not lie; but in no way did their Lordships' opinion conflict with their earlier decision in

(1) [1922] 1 A.C., 249.

(2) [1906] A.C., 389.

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the Colonial Sugar Refining Company's case. I may add that, in the later case of *Delhi Cloth and General Mills Co. v. Income-tax Commissioner, Delhi*(1) decided in 1927, the decision of the Board in *Colonial Sugar Refining Company v. Irving*(2) was authoritatively adopted and re-affirmed.

We must therefore hold, however reluctantly, that the institution of the suit carries with it the implication that all appeals then in force are preserved to it through the rest of its career, unless the legislature has either abolished the Court to which an appeal then lay or has expressly or by necessary intendment given the Act a retrospective effect. We agree with the Calcutta High Court that the words of the amended Letters Patent do not admit of such an interpretation.

Since the above was written, our attention has been called to the case of *Badruddin v. Sitaram*(3), decided by a Bench of the Bombay High Court (FAWCETT and MIRZA, JJ.), as recently as April of this year. That decision was in effect based on the case of *Framji Romanji v. Hormasji Barjorji*(4), which dates as far back as 1866. We appreciate the desire of the Bombay Court to uphold a decision which had stood for over half a century without being explicitly reversed. But in our opinion it was overruled by necessary implication in the Colonial Sugar Refining Company case(2), and can no longer be regarded as an authority. Framji's case purports to establish two propositions which may be summarized shortly as follows: (1) That a deprivation of a right of appeal from a Judge or Bench of a Court to a larger Bench of the same Court is a mere matter of procedure: (2) that a statute similar in terms to the amended Letters Patent that we have

(1) (1927) I.L.R., 9 Lah., 294 (P.C.)
(3) (1928) 30 Bom. L.R., 942.

(2) [1905] A.C., 369.
(4) (1866) 3 B.H.C.R., 49.

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to consider, must be construed as being retrospective in its operation. The first ground is disposed of by the Colonial Sugar Refining Company's case; the second by the judgment of the Full Bench of the Calcutta High Court and the English cases cited in that judgment. We feel that in this matter we must reluctantly dissent from the view of the High Court of Bombay, and agree with the conclusion arrived at by the Full Bench in Calcutta.

KUMARASWAMI SASTRI, J.—I agree.

WALLACE, J.—I agree.

BEASLEY, J.—I agree.

PAKENHAM WALSH, J.—I agree.

[The Letters Patent have, since this judgment, been amended so as to apply to all judgments delivered on or after the 1st February 1929.—Ed.]

K.R.

SPECIAL BENCH.

Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Beasley and Mr. Justice Reilly.

M. V. KRISHNA AIYAR AND SONS (ASSESSEE),

1928,
October 26.

v.

COMMISSIONER OF INCOME-TAX (REFERRING OFFICER).*

Indian Income-tax Act (XI of 1922), sec. 2 (14) and rr. 2, 3 and 4 of Part I—Registration of a firm—Deed of partnership, not in force at the time of application for registration—Continuance of partnership.

A firm can be treated as a "registered firm" within the meaning of section 2 (14) of the Indian Income-tax Act (XI of 1922), only if the deed constituting the partnership is registered

* Original Petition No. 133 of 1928.

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in accordance with rule 2 framed under the Act. The deed, for registering which an application under rule 2 has to be made in the year of assessment, cannot be registered, if it is not operative at the time of the application, though it might have been operative during the whole or a portion of the year of account.

A firm constituted by a deed of partnership for a specified time is dissolved by the efflux of the time; and if thereafter the partners tacitly or orally agree to continue as before, the continuance is, not under the deed which is spent, but under the new agreement which cannot be registered.

CASE referred under section 66 of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax in the matter of the assessment of M. V. Krishna Aiyar and Sons of Kumbakōnam.

The necessary facts appear from the Judgment.

K. S. Krishnaswami Ayyangar (with *R. Rajagopala Ayyangar*) for the assessee.—Though, at the time of application for registration, the partnership deed was not literally in force, the partners continued to act only on its basis; hence the deed, which was then governing them and which was presented for registration, must have been registered; section 256 of the Indian Contract Act, section 27 of the English Partnership Act of 1890; Lindley on Partnership, 8th Edition, page 642. Under rule 2, the registration can be made at any time before the assessment is made. The assessment is on the income of the previous year. The deed was in force at least for the first five months of the previous year. Hence registration should not have been refused. It must have been effected at least for those five months.

M. Patanjali Sastri for Referring Officer.—A partnership under a deed comes to an end on the expiry of the period fixed by the deed; if the partners tacitly continue thereafter, that is a new partnership determinable at will, though some of the terms of the deed may be applicable even then; the continuance is not under the deed but is under the new oral or implied agreement; *Clarke v. Leach* (1), *Neilson v. Mossend Iron Co.* (2), and section 32 (a) of the English Partnership Act of 1890. According to rule (2) of Part I of

the Indian Income-tax Manual, page 42, the partnership must be constituted under a deed at the time of the application. Under rule 4 (1) it is the deed of partnership that is registered and not the oral agreement under which the partnership continues. A spent instrument cannot be registered. Registration enures only for a year though it can be renewed every year. According to rules 2 and 3 of Part I, page 42, Income-tax Manual, the firm must be a registered firm in the year of assessment and application for registration must be made only in the year of assessment. It is not sufficient if it was a registered firm in any previous year, such as the year of account.

The JUDGMENT of the Court was delivered by

COUTTS TROTTER, C.J.—This is a reference put up by the Commissioner of Income-tax under section 66 of the Act. The question on which our opinion is asked is, whether, in such circumstances as this case discloses, the assessee was entitled to be registered under rule 4 of the rules framed under the Act. I will briefly summarize the material circumstances of this case. The original partnership was entered into by deed on the 3rd of November 1917, the contracting parties being Venkatarama Ayyar and Sons of the one part and D. Krishnaswami Ayyangar of the other. The business they carried on was that of silk merchants and the term of the partnership deed was expressed to be for five years, so that it expired on the 3rd of November 1922. On the 31st of August 1923 a new partnership deed came into effect for a period of 3 years, so that it would expire on the 31st of August 1926. In fact the business was continued thereafter by the partners as before, for aught we know, down to this day. A return was called for by the Income-tax authorities for the year, April 1926—April 1927, for the purposes of assessment. That return was made, and besides the return on the 26th of July 1927 the assessee put in an application for registration of the firm. The Commissioner has refused

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(1) (1883) 1 De. G.J. and S., 409; 48 E.R., 163.

(2) (1886) 11 A.C., 298, 303.

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to register the partnership for the purposes of the Act and the question is whether he was right. I will now shortly refer to the two or three material sections and rules of the Income-tax Act. By section 2 (14)—

“A ‘registered firm’ means a firm constituted under an instrument of partnership specifying the individual shares of the partners of which the prescribed particulars have been registered by the Income-tax officer in the prescribed manner” and the manner is prescribed in the rules. The material rule is rule 2 which runs as follows :—

“Any firm constituted under an instrument of partnership specifying the individual shares of the partners may, for the purposes of clause 14 of section 2 of the Indian Income-tax Act, register with the Income-tax officer particulars contained in the said instrument on application in this behalf made by the partners or any of them”

and then follows a form which sets out the particulars which are to be given. This form was filled in and the application was accompanied by a copy of the instrument of partnership of the 31st of August 1923. The Commissioner bases his refusal to register the particulars forwarded by the assessee firm on the ground that, when the application for registration was made, the instrument of partnership had ceased to be operative, that the partnership was at that date being carried on under what must be regarded as a new agreement which, being verbal, could not be said to be an instrument of partnership within the meaning of the rules. The contention of the assessee is that the true view of the position was that the business was, by verbal arrangement or tacit consent between the partners, being carried on under the original instrument of 31st August 1923, whose life had been prolonged and continued by the act of the parties. The dividing line no doubt is a very narrow one and language is used from time to time in the English authorities, which speaks of a contract to renew by implication and it is said that that enabled the

partnership, whose life had been continuous since the deed of 1923, to have it registered as the document governing their relations throughout. In one sense there clearly was no new partnership here, in the sense, that is, that there was no change in the personnel and that the trading carried on was continuous without break from August 1923. The real question we have to determine is whether in contemplation of law, the original contract was actually continued in existence, or whether the true view is that such of its terms as could be taken to govern the subsequent period could only do so on the footing that they were impliedly revived, in so far as they are applicable to the partnership at will, by the tacit verbal agreement which is to be regarded as arising from the continuance of the trade thereafter. We think that there are two decisions which conclude this question in favour of the Crown. The first is a decision of WESTBURY, L.C., in *Clark v. Leach*(1), and the Lord Chancellor says this :—

“Ordinarily a contract for a term constituted by a written agreement must be considered as having come to an end at the expiration of the period for which it was entered into; and the contract during the term differs from that which arises from the continuance of the relation by the mutual consensus of the parties after the term has expired. The one is to last for a certain term: the other only for so long a time as they both shall choose. Am I then by any principle of law bound to assume or justified in assuming that all the special articles and conditions in the original written deed of partnership for a term are at once transferred by law to this new contract, which has no particular limit to the term of its duration? That would be a strong and extravagant assumption, and one that is not warranted by any principle or authority.”

That passage appears to me to make it clear that Lord WESTBURY considered the contractual nexus of the parties after the expiry of the deed to rest upon the new implied oral agreement, and that the articles of the deed

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(1) (1863) 1 De. G. J. and S., 409.

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which are to be considered as preserved, are preserved not by virtue of the original deed which had ceased to operate but of the new agreement. In the case of *Neilson v. Mossend Iron Co.*(1), Lord SELBORNE puts the matter thus:—

“There is no doubt about the law that, when there is a partnership for a term of years, and it is afterwards, after the expiration of the term, continued at will, the rule, in the absence of a contract to the contrary, is that it may be presumed that the new business is carried on upon the old terms as far as they are applicable to it, and only so far, and as far as the principle is concerned, I do not think there is any discrepancy between any of the authorities. It is not at all necessary to examine into the particular cases in which it has been held that a particular term of a written contract did or did not go into the new and unwritten contract, because every case has turned upon its own particular circumstances, and upon the question as applied to the words of the particular instrument, whether the old term was or was not applicable to the new contract.”

Similar language is used by Lord WATSON who speaks specifically at page 308 of a distinction between the “old” contract and the “new”. And the new contract is none the less a new contract, we must take it, because it, by implication, contains within itself certain terms of the old written contract, as it were, re-enacted. These pronouncements do not turn on any special provision of any statute but are based on the general principles of the law of partnership and we should endeavour respectfully to follow those high authorities. I think that there is nothing in the language of section 256 of the Indian Contract Act which in any way modifies the effect of these decisions. The result is that at the time that the assesses applied for registration there was no operative document to be registered.

Another contention is raised, and that is this: The year of assessment with which we are concerned is the year 1927–28 and it is said that as that will be a return

(1) (1886) 11 A.C., 298.

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of trading profits for the year 1926–27 registration ought not to have been refused as four months of that trading year were before the expiration of the deed of the 31st of August 1923. We cannot accede to this contention. What we have to look to is the year of assessment; and had the application of the 21st of July 1927 been granted, it would still in our opinion only apply to the financial year 1927–28. On these grounds, we think that the Commissioner was right in rejecting the application for registration and that we must so answer the question submitted to us and order the assessee to pay the Government Rs. 250 as the cost of this reference.

My learned brothers have seen this Judgment and agree with it.

N.R.

APPELLATE CIVIL.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice, and
Mr. Justice Srinivasa Ayyangar,
(and afterwards)
before Mr. Justice Srinivasa Ayyangar and Mr.
Justice Reilly.*

TIRUVENGALAM AND ANOTHER (DEFENDANTS), APPELLANTS,
v.

1927,
August 1.

KODALI BUTCHAYYA (PLAINTIFF), RESPONDENT.*

Hindu Law—Authority to adopt given to two widows—Participation of both widows in adoption—Validity of adoption—Trusteeship of charity—Adopted son's right to trusteeship vested in adoptive father.

Where a Hindu died leaving two widows to both of whom he gave a joint authority to adopt, an adoption made by them jointly is not invalid, though the son adopted would in law be the son only of the senior widow who alone has the preferential

* Appeal No. 403 of 1923.

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right to adopt, the junior widow being considered only as his step-mother.

In the absence of any rule regulating the succession to the office of trusteeship of a charity held by a person, the office descends to his heirs just like his private property, and when an adoption is made to him by his widow, the son on adoption divests her not only of her husband's private properties but also of the trusteeship which she was having as his widow.

APPEAL against the decree of the Court of the Subordinate Judge of Bapatla in Original Suit No. 56 of 1919.

In this case, one Butchayya died leaving two widows, Pullamma and Lakshmamma, to both of whom he gave authority to adopt by means of his will (Exhibit A). The two widows jointly adopted the plaintiff, who then brought this suit to recover the office of trusteeship of a charity, which the deceased testator was exercising along with his brother, the first defendant. The defendants contended *inter alia*, (a) that, on the construction of the will, the plaintiff was not the person designated by the testator for adoption, (b) that an adoption by both the widows was invalid in law and, (c) that at any rate the trusteeship would not in law pass to the plaintiff on adoption. Overruling all these contentions, the Subordinate Judge gave a decree to the plaintiff as prayed for. Further facts appear from the judgment.

The defendants preferred this appeal.

T. V. Venkatarama Ayyar (with *T. V. Ramanathan*) for appellants.—An adoption by two widows is invalid in law; see the dictum of the Privy Council in *Narasimha v. Parthasarathy*(1). A trusteeship for life which the widow was having cannot be inherited by the adopted son; see *Ganapathy Ayyar's Religious Endowments*, second edition, page 477; *Mallikarjuna v. Sridevamma*(2). Reference was also made to *Sri Raman Lalji Maharaj v. Sri Gopal Lalji Maharaj*(3), *Thandavaroya Pillai v. Shunmugam Pillai*(4) and *Kunjamani Dasi v. Nikunja Behari*(5).

(1) (1913) I.L.R., 37 Mad., 199 at 220 (P.C.).

(2) (1897) I.L.R., 20 Mad., 162 (P.C.)

(3) (1897) I.L.R., 19 All., 428.

(4) (1903) I.L.R., 32 Mad., 167.

(5) (1915) 22 C.L.J., 404.

A. Krishnaswami Ayyar (with *Ch. Raghava Rao*) for respondent.—Courts should put such a construction on the power to adopt as would make it valid. The dictum in *Narasimha v. Parthasarathy* is only *obiter*. The adoption, in which both the widows participated, must be considered as having been made only by the senior widow, in which the junior widow acquiesced. In law, the adopted son stands in the same position as a natural son and like him inherits to all that the adoptive father owned; the adoption, when made, is deemed to date back to the death of the adoptive father and he divests the adoptive mother of her estate. See *Pratapsingh Shirsingh v. Agarsingji Rajasangji*(1). In the absence of any rule prescribing a mode of succession to the trusteeship, the office descends to the heirs like any other private property. *Mallikarjuna v. Sridevamma*(2) does not bear out the statement made in *Ganapathy Ayyar's* book.

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The JUDGMENT of the Court on the first occasion (COUTTS TROTTER, C.J., and SRINIVASA AYYANGAR, J.) was delivered by

SRINIVASA AYYANGAR, J.—The question that arises for determination in this appeal is of considerable difficulty and great interest in the Hindu Law of adoption, though it is not likely to arise frequently. It is no doubt in connection with the office of trusteeship of a temple claimed by the plaintiff jointly with the first defendant that the question has risen, but the main point raised and discussed in appeal before us related to the validity of the adoption on which the plaintiff has based his right.

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The learned Subordinate Judge in the Court below found in favour of the adoption and upheld the plaintiff's claim and granted a decree. The defendants have appealed.

Two points have now been argued on behalf of the appellants in this appeal and one of them is comparatively a small one and may be disposed of immediately.

(1) (1918) I.L.R., 43 Bom., 778 (P.C.). (2) (1897) I.L.R., 20 Mad., 162 (P.C.).

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Exhibit A is the will of the deceased Buchayya by which he gave authority to his two widows, Pullamma and Lakshamma, to make an adoption. The portion of the will referring to the adoption has been translated thus:

"If my younger brother Tiruvengalam should beget sons, you should take in adoption any of these children, or the children of any other persons, if you are desirous of doing so, and at a time when you wish to do it."

The contention put forward with regard to this clause in the will is that the adoption made by the widows not having been of a son of the first defendant, cannot be regarded as valid. The argument was that in this clause the testator has given a direction that in making the adoption preference should be given by the widows to a son of his brother Tiruvengalam. The learned Subordinate Judge has found against this construction of the will. We are satisfied that the construction placed on the will by the learned Subordinate Judge is correct. In fact, there is a great deal to be said in favour of the view adopted by the lower Court that it was only in the event of the first defendant having more than one son that the testator intended that his widows may, if they should have no objection, adopt one of his sons. It is quite possible that the testator did not contemplate his brother being deprived of his only son by adoption in the event of the brother not having more than one son. Further, it is only if the widows should be desirous of doing so, it is stated, that they should take in adoption one of the sons of the brother. We have therefore very little hesitation in repelling the contention. The other question, however, is more difficult of solution. In making the adoption it is admitted that both the said widows of the deceased testator participated. On this, it has been argued that under the Hindu Law the

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adoption to a deceased husband can be made only by one of the two widows duly authorized and that the adoption made by both the widows must be regarded as invalid. For this purpose Mr. T. V. Venkatarama Ayyar, the learned vakil for the appellants, strongly relied upon the observations of their Lordships of the Judicial Committee in the case of *Narasimha v. Parthasarathy*(1). No doubt at page 220 of the report, Lord MOULTON delivering the judgment of their Lordships observes as follows:—

"In the next place, only one wife can receive a child in adoption so as to step into the position of being its adoptive mother. This is evident from the cases which establish that the receiving mother acquires in the eye of the law the same position as a natural mother to such an extent that her parents become legally the maternal grand-parents of the child. To hold that a child can bear such a relationship to more than one mother would be entirely contrary to settled law and would produce inextricable confusion in the law of inheritance."

But it must be observed that, having made these observations, their Lordships proceed to state that—

"It is not necessary that those points should be decided and they desire to express no opinion upon them and will assume for the purposes of their position that the respondents are right in their contention that such a joint power of adoption to two widows was, if properly interpreted, a valid power and that, if they had agreed to a person to be chosen for such adoption, they could have validly executed the power."

Thereupon their Lordships proceed to construe the power in question in that case having regard to the surrounding circumstances and contemporaneous documents put in evidence and state that according to the true intention of the donor, the power given was a joint power to both the widows and came to the conclusion that as it was a joint power, it could not

(1) (1913) I.L.R., 37 Mad., 199 at 220 (P.C.).

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validly be exercised, after the death of one of the donees of the power by the survivor as *persona designata*.

Special reference may also be made in this connexion to the following observations in the judgment of their Lordships at the bottom of page 220 :

"But it does not follow as a matter of necessity from these considerations that a power given to more than one wife to adopt must be an invalid power. In many matters custom solves difficulties which appear to be insoluble when the questions are considered from a purely logical point of view. In the very question that is before their Lordships, there are indications in the cases cited that in some parts of India such a power might perhaps be interpreted as giving a preferential right of adoption to the first wife."

From the fact that both the widows are the donees of the power to adopt, it follows that the power must be exercised by both or with the concurrence of both, and any adoption made by only one of the widows is open to the obvious objection that an adoption made by the exercise of the power only by one of the donees is invalid.

The question thus resolves itself into whether by the mere concurrence in making the adoption of both the widows, there is anything in Hindu Law to make the adoption itself invalid. Though the observations of their Lordships of the Judicial Committee above cited are very strong with regard to the invalidity of an adoption made to two widows at the same time, those observations were not, it must be noted, required for the decision of the case before them. It may also be observed that, after all, an adoption in Hindu Law is based on what is essentially a fiction, and there must be obvious limits to the extension of such a fiction and if the fiction should be regarded as substituting adoption in the place of the natural birth of the son, it must follow that a bachelor cannot validly adopt, and this is certainly not the law as recognized.

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If it be merely regarded as a fiction, there must be no difficulty whatever in a person bearing the same relationship to two or more persons. However, it seems to us that, having regard to the genius of the Hindu Law and what may be regarded as the custom and consciousness of the community at large at any rate in South India, it will be more in accordance with the reason of the thing, the principle applicable and the observations of their Lordships of the Judicial Committee, to regard the adoption in this case as having been made by and to the senior widow Pullamma, though with the concurrence of the other widow.

Apart from the observations of the Judicial Committee referring to the possibility of an adoption made in those circumstances being so-regarded, there is clear authority in this Court in favour of such a view. In the decision in *Rajah Venkatappa Nayanam Bahadur v. Ranga Rao*(1), to which one of us was a party, it was held by the learned Chief Justice that an adoption made by a junior widow with the consent of the sapindas but without the consent of the senior widow was invalid in law. The decision in that case clearly proceeds on the recognition of the preferential rights of the senior widow as regards religious rites. The learned Chief Justice has referred to various Hindu Law texts in support of that view. In the same case, the decision of this Court by SANKARAN NAYAR and SPENCER, JJ., in the case of *Kakerla Chukkamma v. Kakerla Punnamma*(2), where it was held that the senior widow had a preferential right to adopt and that, so long as that preferential right subsisted, the junior widow had no right to adopt, was cited with approval and it was also indicated that any other view might have the effect

(1) (1915) I.L.R., 39 Mad., 772.

(2) (1915) 28 M.L.J., 72.

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of tending to unsettle the former decisions of this Court and give encouragement to its being challenged in other cases.

We may also in this connexion refer to the text of *Kathyayana* where the first and senior wife is said to be the *Dharma pathni*, that is to say, the wife wed for the purpose of performing religious rites and duties and the second and succeeding wives spoken of as merely for the purpose of love or lust. Again, in the Chapter treating of *Vivaha-Samskara*, it is stated in the commentary that after the sacrificial fire is created along with one wife, the wives afterwards taken do not acquire equal rights with the first wife in respect of the oblations, unless both the wives together again officiate in creating a new sacrificial fire. In the *shastras* are to be found scattered about many texts which give prominence to and recognize the superiority of the first wife or the *Dharma pathni*.

There is also a well-established rule that when the husband dies sonless, the funeral ceremonies should be performed only by the first and senior wife. Again, as in the making of *Dattahomam*, only one person can at a time perform the *Homam*, it cannot be performed by both or on behalf of both simultaneously. Hence also it is deducible that, though both may be present and participate in the performance of the *Homam*, it is *shastraically* performed only by the senior and deemed to have been performed only by her.

Having regard to all these and other similar texts and considerations recognized by several decisions in this Court, it is clear that even though both the widows might have concurred in making the adoption, the act of adoption should be deemed to have been made only by the senior widow and to herself as mother. In that case it is pointed out by their Lordships of the Judicial

Committee that the other wife who participates becomes only a step-mother. Assuming therefore that the authority in this case given by the husband to his two widows to adopt should be construed only as a joint power, that is, a power to be exercised by both of them, that condition has been fulfilled in this case, because admittedly both the widows participated in the ceremony. But there is no necessity to regard the adoption as having been made to both the mothers, more especially if it is to be supposed that there can be no valid or legal adoption to two mothers at the same time. We must assume that a Hindu husband who for the purpose of continuing his line and providing for the performance of religious ceremonies for the salvation of his soul authorizes an adoption to be made, did not authorize an invalid adoption. The reasonable construction to be placed on the terms of the will is that the direction was merely to the effect that, unless both the wives should be willing, no adoption should be made and that the boy to be adopted should be chosen by both. On the adoption being made, the appropriation of the son to the senior wife would almost seem to be by process of *shastraic* reasoning.

No question in this case arises with regard to the adoption made to the husband having been either to the one or the other wife as mother. Having regard to the nature of the rights claimed, the only question is whether it has been a valid adoption to the deceased testator. If therefore we find that there was a joint power to adopt and that in the exercise of that power there has been a valid adoption, it follows that, so far as that question is concerned, the plaintiff's right must be upheld. The plaintiff has in this suit claimed only as trustee in succession to his adoptive mother.

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At this stage, it is intimated on behalf of the appellants that, in the view taken by us with regard to this question, there are other questions raised on behalf of the appellants, which would require to be considered and decided. For this purpose the case will be posted for hearing after the long vacation before any bench hearing first appeals. Costs reserved.

The appeal coming on for hearing again, the Court (SRINIVASA AYYANGAR and REILLY, JJ. delivered the following

JUDGMENT.

SRINIVASA
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SRINIVASA AYYANGAR, J.—This case came up originally for disposal before the learned Chief Justice and myself, when two points of a preliminary character were argued for the appellants by their learned Vakil. Now, after the judgment has been delivered with regard to those two points, he intimated that there were other questions which he wished to raise on behalf of the appellants and it was necessary that those points should also be considered and disposed of.

Mr. Venkatarama Ayyar, the learned Vakil, has now raised a very ingenious contention. The plaintiff in this action having sued for joint possession of the office of trusteeship along with the first defendant, it has been contended by Mr. Venkatarama Ayyar that the office of trusteeship was not on the date of the suit, and is not even now, vested in the plaintiff in such a manner as to entitle him to any such relief or possession, because on the death of the adoptive father of the plaintiff his two widows succeeded to the office of trusteeship. Those two widows are still alive. They must still be regarded as having vested in them the trusteeship. Though the plaintiff might, having regard to the judgment of this Court, be regarded as having been validly adopted to the deceased, still such an

adoption could only have the effect of divesting the widows only with regard to the private family property which has become vested in them as the legal representatives of their husband and must be limited to the property in which the deceased had a beneficial interest. There is no principle of law on which it can be held that the adoption by a widow of a person to her deceased husband has not the effect of divesting not merely the personal estate which she has inherited from her husband but also any office, such as the office of a trusteeship which she might have inherited from him. I think it might be conceded that there is no direct authority for the position that the adoption by a widow has the effect of divesting her of the office. It may be that there is no such decision, because no one ever thought of raising any such contention. Practically, therefore, this question has to be considered and disposed of merely on the general principles of Hindu Law applicable to the point. The only case, on which Mr. Venkatarama Ayyar placed great reliance for the purpose of supporting his contention, was *Mallikarjuna v. Sridevamma*(1). That was a case of a promissory note. The suit was instituted by the widow who had succeeded as trustee in respect of certain choultry charities to her husband. In the High Court the adopted son was made a party and the defendant against whom the decree was passed appealed to the Privy Council and their Lordships in their judgment have dealt only with two pleas and contentions argued on behalf of the defendants-appellants. It was not contended in that case that the plaintiff who was suing on the note as representing the charity did not fill that character and no issue arose as to whether the trusteeship had then become vested in some other

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(1) (1897) I.L.R., 20 Mad., 162 (P.C.).

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person. In fact Mr. Venkatarama Ayyar, while conceding that there was no plea of that character in that case and therefore no discussion of the question, merely argued that, if such contention was open, it was unlikely that the same would not have been put forward by the very learned counsel before their Lordships. However, having regard to the decision, it is perfectly clear that there are no statements in it and it is not a decision for any point that arises in this case. On the finding of their Lordships that the plaintiff filled in that case the character of the trustee of the charities on behalf of which she was suing to recover the amount of the promissory note, it became clear that none of the questions that are argued here could have arisen. Then what is the principle on which the succession to the office of trusteeship depends? Primarily, as argued by Mr. Venkatarama Ayyar himself, it depends upon the original terms of the foundation of the trust. If according to those terms a line of succession was prescribed, that would have to be followed. If not, it is clear that the trustee, that is appointed, will take the office and will transmit the office to his heirs in succession, if the true intention of the maker of the trust was that the office should be hereditary in the trustee. If not, there is also authority for holding that the trusteeship will revert to the family of the founder. In this case the curious point to be observed is that in the written statement filed on behalf of the defendants the office of trusteeship is clearly regarded, dealt with and contended to be just like all the other property of the family passing by survivorship and by succession. There was no plea put forward in the lower Court that the line of succession according to the rule of this institution was anything but hereditary. In fact it may be observed that the fact that the trusteeship is hereditary

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is the common foundation of the case of both the parties. In such a case, what is to be observed is that the trusteeship, whether it is in the family of the trustee or in the family of the founder, must be held to vest in all persons who at the particular moment constitute the family, or, in other words, represent the family. There is no question of partition at all. Mr. Venkatarama Ayyar referred to the case in *Sri Raman Lalji Maharaj v. Sri Gopal Lalji Maharaj*(1), and other cases where it was held that the office of trusteeship cannot be made the subject of a partition by a Court of Law. There is no question of partition at all in this case. It is only an instance of the office coming to be held by a number of persons at the same time as joint possessors of the office. The prayer in the plaint in this case is only for that purpose. If, according to the contentions which were common to both parties in this case, the office of trusteeship was hereditary in this family, then the simple question is, who at the time of the institution of this suit should be regarded as representing the members of this family. Undoubtedly, the plaintiff and the defendants. No doubt, before the adoption, the two widows represented their deceased husband, but their representative character continued and must be deemed to have continued until a valid adoption was made to their deceased husband. From the moment of that adoption, they ceased to represent their husband, the family and the family estate and such representation became vested only in the adopted son. Therefore it follows that, according to the assumed intention of the founder or according to the admitted rule of this institution, the trusteeship should be regarded as hereditary in this family and it follows from the adoption of the plaintiff that the right to the office became vested in him.

(1) (1897) I.L.R., 19 All., 428.

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The matter may be put also in a slightly different manner. If, as admitted, in the absence of any special provision with regard to succession to the office of trusteeship, the ordinary rule of inheritance should be followed, it is clear that the ordinary rule of inheritance being that the widow's estate becomes divested on a valid adoption being made and the office being property like other properties, it follows that this office which the widow is divested of, becomes vested in the adopted son. In fact, in the case of *Thandavaroya Pillai v. Shunmugam Pillai*(1), it was held by the learned Judge that when a trusteeship is vested in a family and the members of the family remain undivided, the senior member of the family is entitled to manage the family properties and also exercise the right of management vested in the family on behalf of the trust. They say at page 169:

"But until partition no junior member is entitled to management of the trust in rotation any more than he is entitled to such possession or management of any family property."

The decision in this case seems clearly to point to the view of the learned Judges that there was no difference in this matter between the office of trusteeship and the estate of the family. Another case also cited by the learned vakil for the appellants is *Kunjamani Dasi v. Nikunja Behari*(2). In this case the learned Judges say that, when the office has become vested in persons who at the time constitute the heirs of the founder, upon the death of each member of the group, it passes by succession to his heir. That also makes it abundantly clear that, when the office is held by a number of persons jointly, the right to the office on the death of any of the joint holders passes to his personal heirs, i.e., to those who would be his heirs in

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respect of his separate property. If so, it is difficult to see how, on a widow making a valid adoption to her deceased husband and all the estate, right, title and interest of her husband becoming immediately vested in the adopted son, only the office of trusteeship continues to remain vested in her. It is unnecessary to refer at great length to all those decisions, many of them by their Lordships of the Judicial Committee, where effect has been given to the theory of the Hindu Law that the adopted son must for most purposes be regarded as having been born at the time of the death of the person to whom he is adopted. If the adopted son had been in existence, it cannot be denied that the office would have passed on to him and reference need not also be made to cases where it has been held that the vesting of the estate in the widow who has had from her husband authority to adopt is a sort of suspended vesting and liable at any time to be divested on the exercise of the power. In fact the effect of divesting has been extended even to collaterals as has been justly pointed out by Mr. Alladi Krishnaswami Ayyar. We are therefore of opinion that there is no point in the contention that the plaintiff did not succeed to the office of trusteeship on his being validly adopted, as has been found by this Court already.

None of the other points which were raised in the Court below have been argued before us. It follows that the appeal fails and must be dismissed with costs.

The memorandum of objections is dismissed with costs, but any claim therein may be made the subject-matter of a separate suit.

REILLY, J.—I agree.

N.B.

(1) (1908) I.L.R., 32 Mad., 167.

(2) (1915) 22 C.L.J., 404.

APPELLATE CIVIL.

*Before Mr. Justice Ramesam and Mr. Justice
Venkatasubba Rao.*

1928,
December 11.

P. A. SUNDARA AIYAR (PETITIONER), PETITIONER,

v.

THE BOARD OF COMMISSIONERS FOR HINDU
RELIGIOUS ENDOWMENTS, MADRAS, AND TWO OTHERS
(RESPONDENTS), RESPONDENTS.*

*The Indian Court Fees Act (VII of 1870), art. 17 (1) of
schedule—The Madras Hindu Religious Endowments Act
(II of 1927), sec. 84 (2), application under.*

The Court-fee payable on an application under section 84 (2) of the Madras Religious Endowments Act (II of 1927), to set aside an order of the Endowments Board under section 84 (1), is according to article 17 and not article 17-A, or 17-B of the Court Fees Act; and under article 17, it is 17 (1) alone that is applicable; hence the fee is rupees fifteen only and not rupees fifty; *Godasankara Valia Rajah v. Board of Commissioners, Hindu Religious Endowments, Madras*, (1928) M.W.N., 509, dissented from.

PETITIONS under section 115 of Civil Procedure Code (V of 1908) and section 107 of the Government of India Act, praying the High Court to revise the orders of the District Court of South Malabar, Calicut, in O.P. Nos. 42, 53, 80, 169, and 24 of 1927, 131 of 1926, 159, 70, 110, 126, and 55 of 1927 and 2 and 32 of 1928, respectively.

The facts and arguments are fully given in the Judgment.

P. G. Krishna Ayyar for petitioner.

P. Venkataramana Rao for respondents.

JUDGMENT.

RAMESAM, J.—These revision petitions are filed against the orders of the District Judge of South Malabar in O.P. Nos. 42 of 1927, 131 of 1926, 159, 110, 126, 55, 53, 80, 169, 24 and 70 of 1927 and 2 and 32 of 1928.

The point for decision is what is the correct court-fee payable on these petitions under section 84 (2) of the Madras Hindu Religious Endowments Act, II of 1927. Under schedule II of the said Act, the Court-fee on an application to modify or set aside the decision of the Board of Commissioners for Hindu Religious Endowments under section 84 (1) of the Act is the Court-fee leviable on a plaint under article 17, schedule II of the Madras Court Fees Amendment Act, 1922. The right to apply to set aside the decision was conferred by section 84, clause (2). When we refer to schedule II of the Madras Court Fees Amendment Act of 1922, we find there are articles numbered 17, 17-A and 17-B. The first question that arises is, whether "article 17" in the Madras Court Fees Amendment Act includes 17-A and 17-B, or in other words whether 17-A and 17-B are parts of article 17. On this point we are referred to a decision of our brothers, PHILLIPS and ODGERS, JJ., in *Godasankara Valia Rajah v. Board of Commissioners, Hindu Religious Endowments, Madras* (1), and as I respectfully differ from that decision, I think it is necessary to give my reasons at length.

When we refer to the practice of either the Imperial Parliament or the Imperial Legislature of India or the local legislatures, we find one definite rule of practice in numbering sections of enactments, the practice being to adopt the small letters of the English alphabet, (a), (b), (c), etc., to denote parts of a section and if

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further subdivisions are required to use the Arabic numerals with or without brackets, but where a new section is required to be inserted between two sections and where they consider it desirable not to alter the number of the sections, they add the capital letters of the English alphabet, A, B, C, etc., without brackets to the Arabic numerals. Thus if a new section is required between sections 17 and 18, they use 17-A, but if section 17 contains only one clause and requires another sub-section, they would number the old section as 17 (a) and introduce a new sub-section 17 (b). The practice is so well established that it is impossible to imagine that any legislature is ignorant of it. I now proceed to give illustrations of this method of adding to enactments to show how conclusive it is against the view that clauses 17-A and 17-B can be parts of clause 17. In the Court Fees Act VII of 1870, the Imperial Legislature found it necessary to introduce a number of sections dealing with Court-fees relating to probate and letters of administration and certificates of administration. They found that these sections would properly come between sections 19 and 20. They therefore added sections 19-A to 19-K, these letters being added without any brackets. That these cannot be regarded as parts of section 19 is clear from the fact that they are so different in their nature from section 19 that the legislature found it necessary to put them in a separate chapter and numbered the chapter as Chapter III-A. Now it cannot be suggested that Chapter III-A is part of Chapter III, for if the legislature intended the new chapter to be part of the old and not a distinct chapter, all that they had to do was merely to add the sections to Chapter III with such method of numbering them as they liked but not to group all these new sections as an additional chapter. Thus, we see that Chapter III-A

and sections 19-A to 19-K cannot be parts of section 19. Exactly the same thing happened in the Indian Penal Code, where sections 120-A and 120-B are added as parts of a new Chapter V-A and similarly sections 171-A to 171-I are added, being made parts of a new Chapter IX-A. In the Criminal Procedure Code, we have got Chapter XLIV-A consisting of sections 528-A to 528-D and in the Government of India Act of the Imperial Parliament, we have got Part VI-A enacting section 14-A and other sections. In the above instances, it is not possible to say that the sections described by arabic numerals with the capital letters are parts of the preceding sections described by the numerals only. Section 516-A of the Criminal Procedure Code is added in Chapter XLIII whereas section 516 remains in Chapter XLII. This instance differs from the prior instances in the fact that whereas in the former group of instances a new chapter with new sections is added, in this case no new chapter is added but only a new section and we have got sections 516 and 516-A allotted to different chapters showing that 516-A is never thought of as part of 516. A similar example is that of section 129-A of the Government of India Act which is added to Part XII whereas section 129 remains in Part XI. Coming to Madras Acts, in Act VI of 1922, the Act succeeding the one we are dealing with, section 7 says "After section 19, the following shall be inserted, namely, section 19-A," the marginal note being "addition of a new section 19-A" and if the Statute Book of the Imperial Government from 1837 up to now is examined, this is always found to be the practice, the description of the marginal note of such sections is denoted by the addition of capital letters being that of new sections. As an example, I may mention section 2 of Act XVI of 1919 which adds the new sections 11-A and

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11-B to the Indian Naturalization Act of 1852. The marginal note is "insertion of new sections 11-A and 11-B." Where new sub-sections are intended to be added to a section, this method is not adopted, as for example, section 4 of Madras Act II of 1921 which amends the District Municipalities Act of 1920 and adds new sub-sections to section 368 of the main Act, the original section being re-numbered as sub-section (1) and sub-sections (2) to (5) being newly added. Such additions to a section are always described as sub-sections and not as new sections. The object of the method is to create new numerals between two consecutive numerals, which is merely a device of the Legislature intended not to disturb the numbering of the sections in the statute, so much so that sometimes where sections have been repealed, the numbers of the repealed sections remain unutilized and lower down a new section is added with the letters of the English alphabet. I am therefore clear that 17-A and 17-B cannot be regarded as parts of 17 but only as new sections. From a perusal of the judgment of our brothers PHILLIPS and ODGERS, JJ., we are led to conclude that these considerations have not been relied on before them and secondly that, in some portions of the judgment, the capital letters A and B are referred to with brackets, as 17 (A) and 17 (B) which is not a correct description of the articles in question. I am not aware of any instance of bracketting the capital letters of the English alphabet in enactments. The first conclusion, therefore, I come to, is that we should look at only article 17 of the Act. The learned Government Pleader referred to certain considerations such as the scheme of the Religious Endowments Act or the scheme of the Court-Fees Act or the history of articles 17, 17-A and 17-B as compared with the old articles 17 of the Court-Fees Act of 1870.

I do not see anything definite in these considerations to induce me to come to a different conclusion.

Now coming to article 17, all that we have got to do is to take the court-fee mentioned in that article and accept it as the court-fee for an application under section 84 (2) of the Religious Endowments Act, for the schedule to the Religious Endowments Act does not require us to apply article 17 of the Madras Court-Fees Amendment Act, but only requires us to take the court-fee mentioned there and use that as the court-fee for the application in question. Thus, in the first instance, we have not got to read the first column of article 17. In the first instance, our business is only to take the third column and take the figure mentioned there. We have nothing to do with the discussion whether the descriptions in the first column of article 17 is applicable to an application under section 84 (2). I have referred to this matter at this length because a good deal of argument has been addressed to us as to which description in the first column, that is, whether the description in 17 or 17-A or 17-B, is best applicable to an application under section 84 (2). But it seems to me this is an erroneous process. We have nothing to do with the description in the first column of article 17 or 17-A or 17-B. The argument was addressed to us with a view to induce us to hold that in this particular amendment Act, article 17 includes articles 17-A and 17-B and that only by so holding we could get to some description in the first column applicable to the application in question. But as a matter of fact, we find none of the descriptions in the first column of articles 17, 17-A and 17-B is applicable to the application in question, because all these three articles deal with a plaint or a memorandum of appeal, whereas we have got to do with an application and there is no section in the Religious Endowments

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Act saying that an application should be numbered as a suit as we find in the second schedule to the Civil Procedure Code relating to arbitration. See for instance, clauses 17 (2) and 20 (2). Similar examples occur in other enactments, for example, see section 83 of the Probate and Administration Act. We have nothing of the kind in the Religious Endowments Act.

While, therefore, holding that either 17, 17-A or 17-B has not got to be examined to see which is properly applicable to an application under section 84 (2) and that that mode of examining the articles cannot help us for the purpose of showing that 17 includes 17-A and 17-B, we find we have to look at the first column of article 17 for another reason. As I said we have got to take the figure in the third column of article 17 and if there is only one figure, there is no further question to be discussed. That figure represents the court-fee for an application under section 84 (2). Unfortunately, we have got two figures in the third column of article 17, namely, Rs. 15 and Rs. 50. We have now to choose between these two figures and solely for the purpose of choosing between these two, I have got to examine the three varieties of suits described in the first column of article 17, not that any of them does apply to an application under section 84 (2)—for we know that none of them applies—but solely for purposes of making a choice between Rs. 15 and Rs. 50. However much the three clauses in the first column of article 17 are inapplicable, I look at them merely to see which comes nearest to the application in question. I am of opinion that article 17 (i) resembles the matter we are now concerned with. By this, I do not mean that the description in article 17 (i) applies to the application we are dealing with. I refuse to discuss the question whether the word “Civil Courts” in article 17 (i)

applies to the tribunal called the Board of Commissioners for Hindu Religious Endowments. While inclined to agree with the view expressed by my brother VENKATASUBBA RAO, J., in another case that “Civil Courts” there would include other and special tribunals in the land established by the Indian Legislature which are not Criminal or Revenue Courts, at present, I simply refuse to discuss the question because the point is not whether any of the three sub-clauses of article 17 applies to the matter with which we are now concerned but which resembles it nearest. As I already said, I think article 17 (i) comes nearest. I therefore hold that Rs. 15 is the proper fee for all the petitions which have now come before us in the above civil revision petitions. Each party will bear its own costs in the High Court.

VENKATASUBBA RAO, J.—I agree. The question to be decided is, in respect of an application under section 84 (2) of the Madras Hindu Religious Endowments Act, what is the proper court-fee payable? Section 84 reads thus—

84. (1) If any dispute arises as to whether a math or temple is one to which this Act applies or as to whether a temple is an excepted temple, such disputes shall be decided by the Board.

(2) A trustee affected by a decision under sub-section (1), may, within one year, apply to the Court to modify or set aside such decision, but, subject to the result of such application, the order of the Board shall be final.

Under section 81, the proper fee for such an application is that set forth in schedule II of the Act. Now turning to that schedule, the material portion reads thus—

“84. (2) Application to modify or set aside the decision of the Board under sub-section (1). The fee leviable on a plaint under article 17, schedule II of the Madras Court Fees Amendment Act, 1922.”

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What we are called on to construe, is the expression "article 17" in the above column 3. The Madras Court Fees Amendment Act contains articles 17, 17-A and 17-B. The short question is, does the reference to article 17 include 17-A and 17-B? My learned brother has fully set forth the numerous instances to which we have been referred, which show by their variety, that there is a well-recognized method of creating new numbers by affixing capital letters to pre-existing figures. Thus, new sections are inserted without disturbing the original arrangement, the object of the device being to avoid imposing a needless strain on a mind which has learnt to associate certain sections with certain numbers. If this be remembered, 17-A and 17-B are in fact new figures and they can no more mean 17 than they can mean 18. The learned Government Pleader refers to the history of the section and says that 17, 17-A and 17-B of the Madras Act correspond to the original 17 of the Imperial Act. This, in my opinion, is quite beside the point. The reference in the Religious Endowments Act is to section 17 of the Madras Act. What does section 17 in that connexion mean? I am clearly of the opinion that 17 does not include 17-A and 17-B.

For the petitioners it is contended that the article applicable is 17 (i) which fixes a fee of Rs. 15. The Government contends, on the other hand, that the article applicable is 17-A (i) or 17-B. What the Government Pleader says is this:—You must look at the nature of the relief asked for in the application filed under section 84 (2), and then turn to the three articles (17, 17-A and 17-B) to find out which of them applies. Under the terms of 84 (2), the aggrieved party is required to *apply* to the Court to modify or set aside the decision of the Board. It is impossible to hold that either 17-A (i) or 17-B deals in terms with such a relief. As a matter of

fact, none of the three articles to which we have been referred, literally applies to an application of the kind with which we are dealing. We cannot therefore usefully apply the test suggested by the Government Pleader. That is a further reason for holding that we must confine our attention to the article expressly indicated in the schedule to the Religious Endowments Act and that article is, as I have said, article 17.

The learned Government Pleader strongly urges that the legislature meant to include 17-A and 17-B. He may be right, but it is our duty to gather the intention from the words employed and I must say that, if his contention is correct, apt language has not been used.

Then turning to 17, there are three subdivisions, the second and the third of them being utterly inapplicable. Then remains the first subdivision and we are driven to apply it, for the sole reason that it is the most reasonably appropriate part of the article.

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APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice
Venkatasubba Rao.

1928,
December 10.

VEERANNA, MINOR BY ADOPTIVE MOTHER AND GUARDIAN
AOHAMMA (PLAINTIFF), APPELLANT,

v.

SAYAMMA AND FIVE OTHERS (DEFENDANTS 2 TO 7),
RESPONDENTS.*

Hindu Law—Joint family—One member dying, giving his widow power to adopt—Right of sole surviving coparcener to alienate entire family property before adoption—Inapplicability of theory of adopted son's rights relating back.

The last surviving male member of a joint Hindu family is the full owner of all the family properties in spite of an unexercised power of adoption possessed by the widow of a deceased member; such survivor can alienate all or any of the family properties absolutely (e.g., even by gift) without the son adopted after the alienation, being able to question the same. The theory that, on an adoption, the adopted son's rights to property ordinarily relate back to the date of his adoptive father's death, does not apply to such a case.

SECOND APPEAL against the decree of the Court of the Additional Subordinate Judge of Narsapur in Appeal Suit No. 7 of 1922 (Appeal Suit No. 87 of 1922, Temporary Sub-Court, Narsapur) presented against the decree of the Court of the District Munsif of Bhimavaram, in Original Suit No. 415 of 1919.

The facts are given in the judgment.

S. Varadachariyar (with A. Satyanarayana) for appellant.—In the case of an adoption by a widow, there are two fictions:—(1) the adopted son is deemed to be existing on the date of his adoptive father's death; (2) Or, the personality of the deceased husband is supposed to survive in the widow; West and Buhler,

* Second Appeal No. 859 of 1925.

4th Edition, pages 560 and 890. An adopted son's rights have been likened to those of a posthumous son or of an absent coparcener. Hence, the possibility of an adoption keeps alive the joint family status and the other male members of the family are owners subject to the liability to recognize the adopted son's rights whenever he may be adopted. They have been termed in the decisions as provisional or intermediate owners. There is no hiatus in the continuity of the line of the deceased till the adoption. This is the position of the adopted son's rights whether the estate is partible or impartible; *Sri Raghunadha v. Sri Brozo Kishoro*(1), *Madana Mohana Deo v. Purushothama Deo*(2), *Sri Jagannada Gajapati v. Sri Kunja Bihari Deo*(3), *Aiyannachariar v. Lakshmi Ammal*(4), *Sivagnanam Servaigar v. Ramaswamy Chettiar*(5), *Venkatramier v. Gopalan*(6), *Mussumat Bhooban Moyee v. Ram Kishore Achraj Chowdhry*(7), *Pratap Singh Shiv Singh v. Agarsingji Rajasangji*(8), *Mataprasad v. Nageshar Sahai*(9), *Bachoo v. Mankorebai*(10). Even a full owner cannot alienate in fraud of the rights of others; *Maharaja of Bobbili v. Zamindar of Chundi*(11), *Meenakshi Achi v. Somasundaram Pillai*(12), *Venkatarama Aiyar v. Aiyasami Aiyar*(13), *Rangammal v. Echammal*(14), and section 39, Transfer of Property Act. The statement in Mayne's Hindu Law, 9th Edition, paragraph 198, at page 298, *Chandra v. Gojarabai*(15), and *Adivi Suryaprakasa Rao v. Nidamarty Gangaraju*(16), are wrong.

A. Krishnaswami Ayyar (with Ch. Raghava Rao) for respondents.—Before a person is actually adopted, other male members of the family are not provisional owners but are full absolute owners of all the family properties with full power to alienate the same and the rights of the adopted son are only subject to such prior alienations. The theory that the existence of a power to adopt introduces a notional coparcener for all time debarring other coparceners from exercising their full rights is fraught with difficulties (1) in the law of alienation, (2) in the

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| (1) (1876) I.L.R., 1 Mad., 69 (P.C.). | (2) (1918) I.L.R., 41 Mad., 855 (P.O.). |
| (3) (1919) M.W.N., 52. | (4) (1911) 21 M.L.J., 500. |
| (5) (1911) 22 M.L.J., 85. | (6) (1918) 35 M.L.J., 628. |
| (7) (1905) 10 M.I.A., 279. | (8) (1918) I.L.R., 43 Bom., 778 (P.C.). |
| (9) (1925) I.L.R., 47 All., 883 (P.C.). | (10) (1907) I.L.R., 31 Bom., 273 (P.C.). |
| (11) (1910) I.L.R., 35 Mad., 168. | (12) (1920) 39 M.L.J., 403. |
| (13) (1922) 43 M.L.J., 340. | (14) (1898) I.L.R., 22 Mad., 305. |
| (15) (1890) I.L.R., 14 Bom., 463. | (16) (1908) I.L.R., 33 Mad., 228. |

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law as to the quantum of the share of the alienee and (3) in the exercise of the right to partition at one's own will. Such a theory is also opposed to the dictum of the Privy Council in *Krishnamurthi Ayyar v. Krishnamurthi Ayyar*(1); see *Lakshmana Rao v. Lakshmi Ammal*(2), *Sivagnanam Servaigar v. Ramaswamy Chettiar*(3), *Sri Raghunada v. Sri Brozo Kishoro*(4), *Bhubaneswari Debi v. Nilcomul Lahiri*(5), *Moro Narayan Joshi v. Balaji Raghunath*(6), *Harekchand Babu v. Bejoy Chand Mahatab*(7), *Jaganadha Rao v. Ramayamma*(8), *Raja Ram Tewary v. Luchmun Pershad*(9), *Rambhat v. Lakshman Chintaman Mayalay*(10), *Ramakrishna v. Tripurabai*(11). The law from the earliest times is that the property is the father's and the son gets a right by birth only as the result of the decisions. When he is not in existence or when he dies, the father is or becomes full owner. The observations in some of the cases quoted by the appellant are *obiter* and the other cases are distinguishable.

S. Varadachariyar replied.

JUDGMENT.

ODGERS, J.

ODGERS, J.—This Second Appeal has opened a very wide field in the Hindu Law of adoption and we have had a very learned and instructive argument on both sides and I should like to say personally that I feel very much indebted to the learned Advocates who appeared. The question opened up by the arguments have been very far-reaching and several topics perhaps not strictly germane to the actual point for decision have been touched upon, but this is only an illustration of the way in which the different elements in the Hindu Law of adoption interact upon each other, and it is almost impossible in discussing the case-law, on which after all the law of adoption is developed at least as far as this

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| (1) (1927) I.L.R., 50 Mad., 508 (P.C.). | (8) (1911) 22 M.L.J., 85. |
| (2) (1881) I.L.R., 4 Mad., 160. | (6) (1885) I.L.R., 12 Cal., 18 (P.C.). |
| (4) (1878) I.L.R., 1 Mad., 89. | (7) (1905) 2 O.L.J., 87. |
| (5) (1894) I.L.R., 19 Bom., 809. | (9) (1867) 8 W.R., 15 (F.B.). |
| (8) (1923) I.L.R., 41 Mad., 189. | (11) (1908) I.L.R., 38 Bom., 88. |
| (10) (1881) I.L.R., 5 Bom., 630. | |

Presidency is concerned and on which it now depends, not to discover a great variety of elements which largely overlap. Thus we shall find in the cases to be examined, that most of them deal with more than one of these elements and the question which presents the greatest difficulty is, as to how far the decisions and particularly the *dicta* on which the decisions seem to be based are reconcilable and whether it is possible to obtain from the present state of those decisions any really definite line to guide us to a decision on this and similar cases.

The facts of this case can be stated in a very few words. The first defendant had a son called Abbulu and they formed a joint Hindu family. This son Abbulu on the 30th August 1918 gave his wife an authority to adopt. A month afterwards, namely, on the 29th September 1918, the son Abbulu died and four days after that on the 3rd October 1918 the father settled practically the whole of the family property on his daughters. On the 22nd November 1918 the plaintiff was adopted by Abbulu's widow and in 1919 this suit was brought on behalf of the minor adopted son claiming a half share on partition with his adoptive grandfather who died while the suit was pending in the first Court. Hence, the plaintiff now claims to be entitled to the whole of the family property. The question thus arises, whether the plaintiff receives practically nothing (i.e.) takes the family property subject to the settlement of the 3rd October 1918 or whether his adoption can relate back to the date of his adoptive father's death, namely, the 29th September 1918 in order to defeat the grandfather's settlement. The Munsif decided that the plaintiff was entitled to the properties. The Subordinate Judge decided on the other hand that the plaintiff must take subject to the disposition by the grandfather, (i.e.) as I understand it, practically nothing.

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This appeal therefore opens up questions of the highest importance which, owing, as I think, to the interaction of the elements in the Hindu Law of adoption, do not perhaps appear very clearly from the decided cases, so that we shall have to consider (a) the nature of the estate taken by the surviving member of a coparcenary when the only other member has died leaving a widow with power to adopt and (b) the position of a donee of the surviving member in competition with a subsequently adopted son, in other words, does the settlement by the grandfather of the 3rd October 1918 divert the course of devolution of the property under the Hindu Law? And this, of course, opens the first of these questions, namely, the estate of the surviving member.

Perhaps it is as well to begin an examination of the authorities with a text, and the text that I would begin with, can be found in Mayne, paragraph 198 (9th edition). This paragraph of Mayne comes after a discussion, of which there are many examples in the cases, on the power of an adopted son to challenge alienations made prior to his adoption by the widow who adopts him. Mr. Mayne says:—

“I am not aware of any case which has raised the same question, where the person whose estate was divested by adoption was a male, and therefore a full owner. But I conceive the same principles would apply. Until adoption has taken place he is lawfully in possession, holding an estate which gives him the ordinary powers of alienation of a Hindu proprietor. No doubt he is liable to be superseded; but on the other hand, he never may be superseded. It would be intolerable that he should be prevented from dealing with his own, on account of a contingency which may never happen. When the contingency has happened, it would be most inequitable that the purchaser should be deprived of rights which he obtained from one, who, at the time, was perfectly competent to grant them.”

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Of course if that text can be taken to be literally true and correct, there is an end of the matter and till the adoption has taken place, the grandfather was in the position of full owner and could do what he liked with the property and therefore pass by his settlement a perfectly valid and indisputable title to his donees. But Mr. S. Varadachariyar challenges the accuracy of this absolute statement and undertakes to show from the authorities that it needs very considerable modification. In fact his contention may be fairly indicated by saying that no Hindu is an absolute owner so long as there is a power of adoption outstanding which, if and when exercised, will diminish his interest in the family property by one-half. This has been called by Mr. Justice SESHAGIRI AYYAR in *Madana Mohana v. Purushothama*(1), “an estate subject to defeasance”. With great respect, I rather doubt if that is the correct expression to apply to an estate of this kind, which is of course familiar to every Hindu—I mean the possibility of the interest of a single coparcener in joint family property being increased or decreased on partition according as more coparceners come into being or coparceners go out of being. That is inherent in the conception of a Hindu joint family. What I take the learned Judge to mean is, that where you have a single coparcener, though he still remains owner of the property on the birth or coming into existence of a second coparcener, still on a division he has lost the absolute estate which he had as sole surviving member of the coparcenary but will now only be able to take as his separate property one-half of the whole or less according to the number of new members, so that the theory with regard to the surviving member of a coparcenary in the position of

(1) (1914) I.L.R., 88 Mad., 1105.

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the grandfather in this case is that so long as the power to adopt is outstanding, he has really only got an absolute estate in a half, because, if and when an adoption to his deceased son takes place, that adopted son becomes immediately a coparcener with himself, entitled to half the property on a partition. So that, what we have to see is whether this theory is supported by the decisions and even supposing it is so supported, is it to apply to alienations made by the adoptive grandfather before the adoption took place? It is settled that an after-born *aurasa* son cannot question the alienations made, e.g., by the manager of his coparcenary, his father, prior to his birth and it seems startling if it is true that an adopted son should be in any better position. Many inconveniences suggest themselves to the mind, if this theory is true, as for instance, the effect it would have on succession, for, it would make all succession provisional. It would add a further element of infirmity to titles to immovable property in this country because it would be necessary to enquire on every transaction involving immovable property whether there was an outstanding authority to adopt, because, if there were, on this theory, the transferor would not have absolute power to alienate more than one-half. However, inconvenience is of course by way of being an argument in the last resort. Although enough has been said to show that, if the argument is adopted, an extremely serious state of things may ensue—the fact that it entails inconveniences or infirmities of title is no excuse for evading its recognition.

This theory advanced by Mr. Varadachariyar is, according to his contention, illustrated in a number of cases and as I have already stated, the cases are what we have to look to in a matter of this sort, because, as is well-known, the ancient texts are singularly bare of

authority with regard to adoption and the law on this subject has been practically entirely judge-made. The cases, I have analysed under three heads. Although, as will presently appear, the decision in any particular case, may overlap more than one head, that is an illustration of what I was saying just now as to the interaction of the various elements in this branch of the Hindu Law. The heads that I propose to examine the cases under, I have called

- (a) as affecting inheritance,
- (b) with regard to the doctrine of relation back, and
- (c) as affecting alienations.

I have dealt with the cases under each head, repeating, if necessary, reference to the same case when it falls under more than one head.

(a) The earliest case to which our attention has been called is the well-known case of *Bamundoss Mookerjee v. Mussamut Tarinee*(1). That was a case in which the Sudder Dewanny delivered a very full judgment covering a number of points in the law of adoption and which the Privy Council adopted in its entirety both upon the question of law and the question of fact save for one incidental observation which is not material. That decision, *inter alia*, laid down that until a widow exercised the power of adoption vested in her, she is possessed of the property from the death of her husband and can therefore sue in her character as widow* in order to claim succession to the estate of her husband in spite of the fact that she possesses an unexecuted power of adoption. In *Mussamat Bhooban Moyee Debia v. Ramkishore Acharj Chowdhry*(2), we have an example of the limit on the power to adopt. Several

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(1) (1868) 7 M.I.A., 169.

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

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cases were quoted with regard to the limit of the power (i.e.) as to when it comes to an end, because as their Lordships laid down in the case last cited, there must be some limit, but that seems to me to be a definite topic that we can dispense with in considering the case before us. Then we have the cases from the Chinnakimidy Zamindari beginning with *Sri Raghunadha v. Sri Brozo Kishoro*(1), where it was contended that the widow could not displace by adoption an heir in whom the estate had once vested. It was a case of an impartible estate where the widow of the senior coparcener and late zamindar adopted two years after his death and divested the late zamindar's next younger brother who had succeeded to the zamindari on his death in 1868. The Privy Council held that on the widow exercising the power conferred on her by the late zamindar to adopt, the adopted son divested his uncle, though in the case of the youngest brother of the late zamindar, who also had an adopted son, it was held that there was no relation back in the case of an adoption by a male. Now, this case is cited to show that the estate of the next younger brother was only conditional till a possible adoption took place. At the same time, their Lordships point out at page 83 that

"at that time, Raghunadha (that is to say, the next younger brother) was in default of a son of Adikonda (the deceased zamindar) natural or adopted, unquestionably entitled to the zamindari".

The case is also of importance from the fact that their Lordships of the Privy Council decreed mesne profits against Raghunatha only from the date of suit, which shows of course that he was not a trespasser as he was entitled in default of a nearer heir of Adikonda.

(1) (1876) I.L.R., 1 Mad., 69.

It is important to note this feature in the case, as it is relied on in a subsequent case for another proposition under one of the several heads. *Madana Mohana v. Purushothama*(1), referred to *supra*, and *Madana Mohana Deo v. Purushotham Deo*(2), are further cases as to the succession to this same Chinnakimidy estate. These cases involved the power of the widow of Adikonda to adopt, when there was the son's widow alive who might have adopted to that son. The plaintiff who had been adopted in 1907 by the widow of Adikonda claimed the property as against the son's sons of Raghunadha, the younger brother of Adikonda. Mr. Justice SESHAGIRI AYYAR pointed out that a Hindu estate can never be in abeyance but must vest in somebody or other. The "intermediate holder" as he was called³ is not to be regarded as the absolute owner of the property. This case went up to the Privy Council in *Madana Mohana Deo v. Purushotham Deo*(2), where their Lordships held that the succession of Raghunada was only provisional and that the widow of Adikonda can have had no further right to adopt after the death of her original adopted son who had attained full legal capacity to continue the line. The third of the Chinnakimidy cases is *Bheema Deo v. Bahari Deo*(3), *Sri Jagannadha Gajapati v. Sri Kunja Bihari Deo*(4) in the High Court, where it was held that the estates of Visvanatha and Purushotham, that is, the son and grandson of Raghunatha were defeasible estates. The question involved in this case was the validity of the adoption made by Ratnamala, the widow of the first son adopted to Adikonda. To continue the cases in the order of dates, *Krishna v. Sami*(5), shows that the existence of the power creates the potentiality

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(1) (1914) I.L.R., 38 Mad., 1105.

(2) (1918) I.L.R., 41 Mad., 855 (P.C.).

(3) (1921) I.L.R., 44 Mad., 733 (P.C.).

(4) (1919) M.W.N., 52.

(5) (1884) I.L.R., 9 Mad., 64 (F.B.).

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of inheritance. As pointed out in *Babu Anaji v. Ratnoji* (1), the effect of adoption must always be to divest to some extent an estate vested elsewhere. *Venkappa Bapu v. Jivaji Krishna*(2), was a case of limitation on a widow's power to adopt which the learned Judges said depended upon the question as to whether by such adoption she derogates from any other rights but her own; and in *Bachoo v. Mankorebai*(3), which went to the Privy Council (*Bachoo v. Mankorebai*)(4), it was decided that the estate had not absolutely vested in one Bachoo, the plaintiff in the suit, owing to the existence of a power in the widow of Bhagavandas to adopt. Their Lordships applied the decision in 1 Madras, 69 that the estate did not absolutely vest and this may be an example of the diminution of the interest of a sole coparcener by the emergence of another which was referred to in the opening of this judgment. *Pratap Singh Shiv Singh v. Agarsingji Rajasangji*(5), in the Privy Council, was a case of succession to a Jivai grant. There, it was held that there was no *hiatus* in the succession and no extinction of the line until the death of the widow without having adopted. Now it will be apparent from a consideration of these cases and the decisions which have been extracted above, that all these cases have in view mainly the question of inheritance and as Mr. Varadachariyar suggested and as we shall see when we come to consider the class (b) cases as to relation back, that two theories are possible, namely, that the existence of the deceased husband is *fictionally* prolonged in his widow or that the adoption of the son is *fictionally* related back to the death of his adoptive father. As to

(1) (1895) I.L.R., 21 Bom., 319.

(8) (1904) I.L.R., 29 Bom., 51.

(2) (1900) I.L.R., 25 Bom., 306.

(4) (1907) I.L.R., 31 Bom., 373.

(5) (1918) I.L.R., 43 Bom., 778 (P.C.).

which, if either, is the correct theory, I am rather doubtful whether it can be established from the decisions. The former theory is favoured by Messrs. West and Buhler who, on page 983 of their work, state

"It is true that in many instances the supposed prohibition (i.e., against adoption) coincides in its operation with the actual principles of the Hindu Law as drawn from the Hindu sources, but in others it does not. It is desirable, therefore, that these principles and their bearing on the matter in question should, if possible, be ascertained and established. The *sacra* of a Hindu family are regarded as descending regularly with its estate from father to son for ever."

The widow's life is, in the view of the learned authors, a prolongation of her husband's and her adoption to her deceased husband simply a deferred act of the husband himself.

(b) I want now to take the second class of cases and see if the decisions in which this theory of relation back has been applied has, as Mr. Alladi Krishnaswami Ayyar contends, nothing to do with any question of validating or invalidating alienations but only to do with the question of divesting intermediate holders by the fiction that the adoption took place either at the same moment or prior to the possession obtained by the person or persons so divested. I gather there are only some eight decisions on this point of relation back. The earliest and the one very often relied on is *Bamundoss Mukerjee v. Mussamut Tarinee*(1), though how far this reliance is now well-founded may perhaps be questioned owing to the view of the Privy Council in *Pratap Singh Shiv Singh v. Agarsingji Rajasangji*(2), where they held that this case only decided as to a widow's right to maintain an action in her own name when she possesses a power to adopt. There the Sudder Dewanny said

(1) (1858) 7 M.I.A., 169.

(2) (1918) I.L.R., 43 Bom., 778 (P.C.).

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"the after-born son's right is to his share of the estate as it stands at the time of his birth, and not retrospectively with reference to its state at any supposed period of his conception."

So in *Lakshmana Rau v. Lakshmi Ammal*(1), where *Bamundoss Mukerjea v. Mussamut Tarinee*(2), is relied on, it was held that the title of an adopted son does not relate back to the death of the widow's deceased husband. Further in *Moro Narayan Joshi v. Balaji Raghunath*(3), which was a question of limitation, adverse possession was said not to begin to run till adoption and the adoption did not relate back to the adoptive father's death, again relying on *Bamundoss Mukerjea v. Mussamut Tarinee*(2). In *Babu Anaji v. Ratnoji*(4), it was held that for purposes of inheritance, the adoption must be considered as relating back to the death of the adoptive father—compare *Mataprasad v. Nageshar Sahai*(5), where the adoption of a boy was related back to the death of the father to whom he was adopted. In *Harekchand Babu v. Bijoy Chand Mahatab*(6), another case of limitation, HARRINGTON, J., held that for certain purposes an adopted son is regarded as being in existence at the adoptive father's death. On the other hand, MUKERJEE, J., held that the rights of an adopted son did not relate back to a period earlier than the date of adoption. Of authority in this Court as to relation back, there is but little. In *Madana Mohana Deo v. Purushothama Deo*(7), to which reference has already been made, it was observed that Adikonda's widow at one time by exercising her power could establish the direct succession to the estate of her husband which related back to his death. In *Pratap Singh Shiv Singh v. Agarsingji Rajasangji*(8), to which also reference has already been made, it will

(1) (1881) I.L.R., 4 Mad., 160.

(3) (1894) I.L.R., 19 Bom., 809.

(5) (1925) I.L.R., 47 All., 883 (P.C.).

(7) (1918) I.L.R., 41 Mad., 866.

(2) (1868) 7 M.I.A., 169.

(4) (1896) I.L.R., 21 Bom., 319.

(6) (1905) 2 C.L.J., 87.

(8) (1918) I.L.R., 43 Bom., 776 (P.C.).

be remembered that the Privy Council held that there was no *hiatus* in the continuity of the line and that so far as this was concerned, the adoption had a retrospective effect.

(c) Now it seems to me from my examination of the cases that the only case in which it can be said that the adopted son can, on the theory of relation back, object to alienations made before his adoption, is confined to the case of alienations by a widow. It is well known that a reversioner may object successfully to a widow's alienations except for family necessity while the estate of her husband is in her hands, she possessing a Hindu widow's estate in the same. It is of course also well known that since *Vaidyanatha Sastri v. Savithri Ammal*(1), an adopted son can set aside alienations by the widow not made for necessity during her lifetime, his cause of action having arisen from the date of adoption. He is thus in a better position than the ordinary reversioner with regard to a widow's alienations and it is perhaps significant that in Sirkar's learned exposition on the law of adoption, to which we have been referred, in his paragraph on page 416 on the relation back of adoption and alienations made by a widow before adoption, his discussion is entirely confined to the rights and acts of the widow. As Sir ARNOLD WHITE, C.J., said in *Sivagnanam Servaigar v. Ramaswamy Chettiar*(2), the question of the effect of an alienation by a man holding a full estate with reference to a subsequent divesting as the result of a subsequent adoption does not seem to have been considered in any reported case. That case is of importance because it is a clear authority for the decision that when an estate is divested by subsequent adoption, the adopted son's rights date only from his

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(1) (1917) I.L.R., 41 Mad., 75 (F.B.).
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(2) (1911) 22 M.L.J., 86.

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ODGERS, J. adoption and therefore he takes the estate subject to alienations by the holder for the time being. *Bamundoss Mukerjea v. Mussamut Tarinee*(1) is relied on, as also *Harekchand Babu v. Bijoy Chand Mahatab*(2). Sir ARNOLD WHITE also relies in his judgment on *Sri Raghunada v. Sri Brozo Kishoro*(3) where it will be remembered the Privy Council decreed mesne profits against the intermediate holder only since the date of the suit to show that the male owner can deal as he likes with his own. In *Rambhat v. Lakshman Chintaman Mayalay*(4) it was held that alienation by a Hindu without issue binds the subsequent born or adopted male issue and such issue take a vested interest in such property only as is that of the father at that time. In *Moro Narayan Joshi v. Balaji Raghunath*(5) it was held that the adopted son comes in bound by such acts of the widow as would bind the natural heirs of the husband after her and entitled to set aside unauthorized alienations of the widow. The well known case in *Sreeramulu v. Kristamma*(6), which was subsequently overruled in this Court, contains Justice Sir V. BHASHYAM AYYANGAR'S view that all alienations of any kind by a Hindu widow are valid at least for her widowhood. She takes an estate of inheritance only restricted as to her power of disposition and she is not a guardian of the property, so that even an unauthorized alienation (i.e.) one not for family necessity, cannot be questioned until after her death. In *Ramakrishna v. Tripurabai*(7), *Sreeramulu v. Kristamma*(6) was disapproved and the Court held that alienations not for necessity by a widow cease to have any effect after an adoption made by her as she

(1) (1858) 7 M.I.A., 169.

(3) (1876) I.L.R., 1 Mad., 69.

(5) (1894) I.L.R., 19 Bom., 809.

(7) (1908) I.L.R., 33 Bom., 88.

(2) (1905) 2 C.L.J., 87.

(4) (1881) I.L.R., 5 Bom., 680.

(6) (1902) I.L.R., 26 Mad., 143.

has by then ceased to represent the estate. There is an *obiter dictum* in *Maharaja of Bobbili v. Zamindar of Chundi*(1) to the effect that the first defendant's estate in that case was only that of a limited owner like a widow and not being absolute it could not validate loans and alienations, but that cannot be regarded as a serious decision on the point as it is distinctly *obiter* and really turned on the question as to whether sufficient enquiry had been made by an intending lender. In *Jagannadha Rao v. Ramayamma*(2), a decision to which I was a party, a sole coparcener made a will, having an absolute power of disposition. He appointed a person to manage the property and to be the guardian of the son to be adopted after his death. We held that he had the power to do so. Finally, in *Krishnamurthi Ayyar v. Krishnamurthi Ayyar*(3) their Lordships of the Privy Council say as follows:—

“When a disposition is made *inter vivos* by one who has full power over property under which a portion of that property is carried away, it is clear that no rights of a son who is subsequently adopted can affect that portion which is disposed of. The same is true when the disposition is by will and the adoption is subsequently made by a widow who has been given power to adopt. For the will speaks as at the death of the testator, and the property is carried away before the adoption takes place.”

It is suggested that that decision of their Lordships cannot stand in view of what is said in their earlier decisions but it seems to me that if we construe the earlier decisions I have quoted, apart from those referring to alienations by a widow, as applying entirely to matters of inheritance (i.e.) continuity of line, divesting of an intermediate holder, the fiction that the adoption is a deferred act by the father, that his life is prolonged in

(1) (1910) I.L.R., 35 Mad., 108.

(2) (1920) I.L.R., 44 Mad., 189.

(3) (1927) I.L.R., 50 Mad., 508 (P.C.).

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the widow, or that the adoption relates back, we shall find that all these fictions are simply introduced for the purpose of introducing a new heir into the succession, the ordinary rule being that when the succession opens there must be, as so often pointed out in the decisions referred to above, somebody to take the property even if he is only a temporary or intermediate holder. There must, in a word, be somebody to catch the property when the previous holder relaxes his possession of it. So that, adoption regarded of course by Hindus as of the extremest importance from both spiritual and temporal points of view, is really an exception to the rule that the successor must be in existence to take the property immediately the succession opens. The fact cannot but be recognized that there is in reality no such successor in the case of adoption by a deceased coparcener's widow, so that various devices and fictions have had to be invented to place the adopted son in the same position as a natural son, that being according to the texts and the judicial authorities his proper position. See *Dinu Bin Yesu v. Shripad*(1).

My opinion therefore is that the doctrine of relation back has nothing to do with a last male-holder. It seems to me that a sole surviving coparcener has always been regarded as the owner of the coparcenary property. The theory of relation back has only to do with establishing a line of succession to the adoptive father and in order to establish that line, it is necessary that certain intermediate holders should give way to the adopted son's superior claims as that of a natural born son of his adoptive father. There are limits. We have seen some of them, but I have not discussed all the cases in this connexion regarding his power of divesting, as

for instance, when the succession to the property gets into a collateral line. But within these limits, he can so to speak insist on the property devolving in a direct line as far as possible from father to son or from grandfather to grandson and it is in this connexion and this alone that the doctrine of relation back and the cases I have quoted in the first category of inheritance, are to be regarded. What authority there is with regard to alienations by a male-holder, are strongly, and it seems to me conclusively, against the contention argued by the appellant. We cannot conclude that the Privy Council in *Krishnamurthi Ayyar v. Krishnamurthi Ayyar*(1) were oblivious of their previous decisions and it seems to me that their Lordships must clearly be held to distinguish the case of interference with alienations from cases of divesting on the theory of relation back or any theory of continuity of succession or no *hiatus* in the line as they put it in *Pratap Singh Shiv Singh v. Agarsingji Rajasangji*(2).

For these reasons, I am of opinion that the learned Subordinate Judge was right and this Second Appeal must be dismissed. We think that each party should bear his own costs throughout.

VENKATASUBBA RAO, J.—I agree.

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This appeal raises an important question, which may be stated in this form:—when in a joint family, the property on the death of a coparcener is taken by the surviving member and he alienates it either wholly or in part, what are the rights of a son subsequently adopted by the deceased member's widow, in regard to the alienations already made?

The facts of the case may be briefly stated. The first defendant and his son were the only members of a joint

(1) (1927) I.L.R., 50 Mad., 508 (P.C.) (2) (1918) I.L.B., 43 Bom., 778 (P.C.).

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Hindu family. Before his death, the son (against the wishes of the father) gave his wife authority to adopt. In less than a month, the son died and on the fifth day after his death, the father settled all the joint family property on his daughters. The son's widow, about fifty days thereafter, made an adoption and the minor plaintiff is the adopted son. He filed the present suit against his adoptive grandfather (the first defendant) for partition of the joint family property. He impleaded the alienees and attacked the settlement and asked for a declaration that it was not binding upon him. While the suit was pending, the grandfather (the first defendant) died and the action was converted into one for possession of the entire property. The lower Appellate Court disagreeing with the District Munsif dismissed the suit holding that the plaintiff is not entitled to impeach the alienation made before his adoption. The question is, what is the effect of the adoption on the settlement previously made?

The main contention advanced by Mr. Varadachari for the appellant in his able and interesting argument is, that the adoption whenever made by the widow dates back to the death of her husband and that the rights of the adopted son must, subject to a narrow exception, be determined on that footing. He presents the same argument in another form. When a Hindu dies leaving a widow, the estate, by whomsoever it is taken, vests in that person only provisionally. If the intermediate holder (as the person in whom the estate vests is called) is no more than a provisional heir, it follows, Mr. Varadachari contends, that his alienee cannot be in a better position than himself, the alienor. He puts his argument somewhat thus:—The legal effect of an adoption made by a widow is that the adopted son divests the estate in the hands of a third party, whether

that person is the widow herself or some other inferior heir. How can this divesting be accounted for except on the hypothesis that the adoption dates back to the death of the husband? The governing principle according to him is, that so long as there is the widow alive, there is potentiality of inheritance, for by making an adoption, she brings an heir into existence whose title is retrospective. According to the Hindu Law, he contends, there is no gap between the adoptive father's death and the adoption itself. This is said to rest on one of two fictions: the personality of the deceased husband may be supposed to survive in the widow (that is, the dead husband never died); or, the adoption may be antedated (that is, the non-existing person existed), the result in either case being, that there is no *hiatus* in the continuity of the line.

Our attention has been drawn to various passages either in judgments or text-books, which have recognized one or the other of the theories to which I have adverted. In *Mussumat Bhooban Moyee Debia v. Ram Kishore Acharj Chowdry*(1), the Judicial Committee after negating the power of a mother to adopt on the death of her son leaving a widow, observed thus, at the close of their judgment, at page 312,

"An additional difficulty in holding the estate of the widow of Bhawani Kishore (the son) to be divested may, perhaps be found in the doctrine of Hindu Law, that *the husband and wife are one, and that as long as the wife survives, one half of the husband survives*; but it is not necessary to press this objection."

In *Krishna v. Sami*(2), the sons of a deaf and dumb member of an undivided Hindu family were held entitled to a share of the family estate in the lifetime of their father, notwithstanding that they were born after the

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(1) (1885) 10 M.L.A., 279.

(2) (1885) I.L.R., 9 Mad., 64 (F.B.).

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death of their grandfather. Sir CHARLES TURNER, C.J., in delivering the judgment of the Full Bench referred by way of analogy to the position of an adopted son and after citing *Sri Raghunada v. Sri Brozo Kishoro*(1), observed thus:—

“The existence of valid power created a potentiality of inheritance which may be likened to that of a son in the womb. The estate is taken conditionally.”

This was referred to as an example in support of the conclusion, that in certain cases the Hindu Law recognizes divesting. Having thus cited the case of an adopted son as an instance, the learned Chief Justice, for further elucidation, compared an adopted son to a posthumous son.

In *Babu Anaji v. Ratnoji*(2), the adoption in regard to its effect, was treated as relating back to the death of the adoptive father. The intermediate estate was referred to in the judgment as having vested conditionally. These are the observations that are now relied on by the appellant.

Then we come to two recent cases of the Privy Council on which he strongly relies. The first of them is *Madana Mohana Deo v. Purushothama Deo*(3). To understand the argument founded on this case, one has to turn to the pedigree given in the judgment. Their Lordships refer to the adoption of Brojo Deo as relating back to the death of Adikonda. Raghunada's succession is described as being provisional and subject to defeasance by the emergence of a male heir to Adikonda. It is on these expressions that the learned Counsel relies. We are not concerned in the present enquiry with the actual decision in the case or the reasons on which it

rests; nor is it necessary to examine whether this case affects (as is suggested) the authority of any earlier rulings on the subject of adoption.

Now turning to the second Privy Council case, *Pratap Singh Shiv Singh v. Agarsingji Rajasangji*(1), the point actually decided was that an adopted son, quite as much as a natural son, would prevent the grant from reverting. In affirming the right of the adopted son, their Lordships proceeded on the analogy of a posthumous son and observed at page 794

“But it was admitted that a posthumous son would prevent the reversion. If the widow happened to be *enceinte*, the reversion naturally would remain in suspense until the birth of the child, to see whether it was a male or a female. It is futile, therefore, to say that the property reverts to the grantor's estate immediately the breath leaves the body of the Jivaidar.”

From these observations found in the various judgments, can a principle of general application be deduced? Can it be inferred, for instance, that the position of an adopted son is in every respect similar to that of a posthumous son? To explain certain legal results, this theory of relation back has been adopted. Can it be accepted as an inflexible legal formula, on the ground that every rule must be logically applied? The theory is, that a Hindu cannot be said to have died without male issue, until the death of the widow, makes adoption impossible; in other words, so long as the widow is alive, there is the possibility of an heir coming into existence. (West and Buhler, 4th Edn., 890; *Pratap Singh Shiv Singh v. Agarsingji Rajasangji*(1). Supposing this doctrine is carried to its logical results, what follows? The mere fact that the widow of a deceased member exists, hinders the male owner from dealing with, what is presumably, his own property.

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(1) (1876) I.L.R., 1 Mad., 69.

(2) (1895) I.L.R., 21 Bom., 319.

(3) (1918) I.L.R., 41 Mad., 855.

(1) (1918) I.L.R., 48 Bom., 778 (P.C.).

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The widow may never adopt and yet the fetter is quite effectual. If the widow happens to outlive the surviving coparcener, the restriction on his power lasts till his death. With the conception that a widow has limited powers over property, the Hindu Law has made us familiar; but the doctrine we are now asked to accept leads to the startling result, that the position of a male proprietor is infinitely worse than that of the widow, under the law. As Mayne observes:

"It would be intolerable that he (a Hindu proprietor) should be prevented from dealing with his own, on account of a contingency which may never happen. When the contingency has happened, it would be most inequitable that the purchaser should be deprived of rights which he obtained from one, who at the time was perfectly competent to grant them." Ninth Edn., paragraph 198.

Granting that the alienee satisfies himself that the widow had no pre-existing authority from her husband to adopt, is he even then safe? She may adopt in the absence of her husband's authority in this Province with the consent of the sapindas and in Bombay even without such consent. The result is, that in no circumstances can a male coparcener give a valid title, so long as there is a widow in the family, alive. Then again, in a joint family any one at his will, may sever himself from his coparceners and deal freely with the property, that falls to his share; but according to the theory put forward, the last survivor, where a widow exists, is helpless and without a remedy. Is there anything that compels us to enforce a rule leading to such strange results? The contention seems on the contrary to be inconsistent with well-established principles of the Hindu Law. It is a normal incident of a joint family that a bare possibility of a concurrent interest coming into existence imposes no fetter on alienation. A sonless father enjoys power of alienation without restraint;

with the son, the fetter comes into being and on his death, the father's full rights re-emerge. But according to the contention advanced, the restriction depends not on the existence of a concurrent interest but upon the possibility of such an interest coming into being. That the rule Mr. Varadachari contends for, cannot be applied without some reservation, he himself is constrained to admit. Any alienation for a necessary purpose, he concedes, would be binding on the adopted son. This is scarcely consistent with his main argument; for, where is the question of a necessary purpose, in the case of a provisional owner? In other words, he is willing to import into this branch of the law, considerations pertaining to a Hindu widow's estate. He is driven again to suggest that the theory of provisional vesting may be confined to the possible share of the future adopted son. This is a conception unknown to the Hindu Law.

The doctrine of relation back, has been discussed in several reported cases and the Courts have refused to extend its application. In regard to a widow's alienation, a different test is not applied in the case of an adopted son, from what is applied in the case of a reversioner; her dealing with the property is not dealt with, on the footing of her being the guardian of a possible adopted son. In *Lakshmana Rao v. Lakshmi Ammal*(1), the contention was put forward that the title of the adopted son related back to the death of the adopting widow's husband (see page 162). The learned Judges observe:

"In the interval then between the death of her husband and the exercise of the power, the widow's estate is neither greater nor less than it would be if she enjoyed no such power or died without making an adoption. She has the same power

(1) (1881) I.L.R., 4 Mad., 160.

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no greater and no less to deal with the estate. Such acts of hers as are authorized and would be effective against reversioners will bind the son taken in adoption. Such acts as are unauthorized and in excess of her powers may be challenged by the son adopted or by any other successor to the estate."

In that case *Bamundoss Mukerjea v. Mussamut Tarinee*(1) was referred to and treated as authority for the proposition

"that an authority to adopt a son possessed by a widow does not supersede or destroy her personal rights as widow and that those rights continue in force until an adoption is actually made."

In *Bhubaneswari Debi v. Nilcomul Lahiri*(2), in the case of a succession to a collateral relation, the doctrine of relation back was not applied. It was laid down in that decision, that an adoption after the death of a collateral, does not entitle the adopted son to come in as an heir. In *Moro Narayanjoshi v. Balaji Raghunath*(3), the question was whether the suit of the adopted son to recover possession, was barred. FARREN, J., after stating that under article 144, limitation runs from the date when the possession of the defendant becomes adverse to the plaintiff, observes

"His adoption, however, does not relate back to the death of his adoptive father."

It was held that the suit was not barred by limitation. In *Harekchand v. Bijoy Chand Mahatab*(4), MUKERJEE, J., examines the authorities on the subject fully and comes to the conclusion that the fiction that the adopted son was in existence at the death of the husband, cannot be applied for the purpose of enabling the son, to take the property as it stood at the moment of the death of the person to whom he was adopted, by ignoring the previous acts of the adoptive

mother or other persons whose estate is divested by the adoption. This point is discussed in connexion with the question of limitation; but the observations made have a direct bearing on the present case. The learned Judge says:—

"He (the adopted son) cannot dispute the previous acts of the adoptive mother unless they were in excess of her legal powers as widow in possession, nor can he question the acts of a previous male-holder in whom as a member of a joint Mitakshara family, the property had vested as full owner and whose estate was divested by adoption."

In *Jagannadha Rao v. Ramayamma*(1), it was argued that a son adopted by a widow under authority stands in exactly the same position as a posthumous son and that in his case also the appointment of a testamentary guardian is incompetent. For this proposition, reliance was placed upon the case already quoted, *Pratap Singh Shiv Singh v. Agarsingji Rajasangji*(2). AYLING, J., and my learned brother who heard the case repelled that argument. Mr. Justice AYLING made an observation with which I entirely concur,

"This process of argument is attractive, but we must be on our guard not to follow it too blindly."

In *Ganapati Ayyan v. Savitri Ammal*(3), a Hindu, shortly before his death, directed his widow to employ a part of his property in the upkeep of a charitable institution and at the same time empowered her to make an adoption. Accordingly, the widow, ten days after her husband's death, executed a document creating a charitable trust and some time later made an adoption. It was contended that the title of the adopted son related back to the date of his adoptive father's death, and that as the document was later, the alienation

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(1) (1858) 7 M.I.A., 169.

(3) (1894) I.L.R., 19 Bom., 809.

(2) (1885) I.L.R., 12 Cal., 18 (P.C.)

(4) (1905) 2 O.L.J., 87.

(1) (1920) I.L.R., 44 Mad., 189.

(2) (1918) I.L.R., 43 Bom., 778 (P.C.).

(3) (1897) I.L.R., 21 Mad., 10.

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was not binding on the son. SUBRAHMANYA AYYAR, J., summarily rejects the contention remarking

“That part of the contention may be dismissed from notice, for it is too late to question the doctrine that the adopted son's rights arise from the time of the adoption.”

It is unnecessary to refer to the other cases cited, which have only an indirect bearing. The point directly arose in two cases. The first of them is, *Sivagnanam Servaigar v. Ramasami Chettiar* (1). ARNOLD WHITE, C.J., and PHILLIPS, J., held that the adopted son took the property, subject to the mortgage created by the intermediate holder. The passage from Mayne, which I have extracted above, is relied on by the learned Chief Justice. This case is a direct authority against the appellant's contention. The second case is *Maharaja of Bobbili v. Zamindar of Chundi* (2). Some *dicta* in this case which are *obiter* are relied on for the appellant. The case relates to an impartible zamindari. Certain debts incurred by an intermediate holder were held binding on an adopted son who divested the former's estate. In that case, the learned Judges (ABDUR RAHIM and KRISHNASWAMI AYYAR, JJ.) held on the facts that there was enquiry by the lender, which was reasonably sufficient to justify the loan, so as to make it recoverable from the estate. As the debts were held to be binding on this limited ground, it became unnecessary to deal with the contention that was put forward, namely, that the intermediate holder was the full owner and therefore could deal with the property just as he pleased. The rival contention advanced was, that the intermediate holder occupied the position of the holder of a life-estate. This contention

(1) (1911) 22 M.L.J., 85.

(2) (1910) I.L.R., 35 Mad., 108; 21 M.L.J., 593.

was negatived and in the course of the judgment, the following observation was made:

“The analogy of the first defendant's (intermediate holder) estate is rather to that of a limited owner like a widow than to that of a life owner.”

It will thus be seen that in this case, although the learned judges were inclined to hold that the powers of an intermediate holder were restricted, they did not decide the point, whether or not he possessed plenary powers. With the *obiter dicta* in this judgment, with great respect, I am unable to agree.

In the view I take, it makes no difference whether the alienation was or was not for value, though I may state that I regard the alienation in the present case as purely voluntary.

The appellant's contention is thus against principle and opposed to authority. It introduces, as Mr. Krishnaswami Ayyar has forcibly pointed out, a novel and perplexing rule into the law of adoption. It is too obvious to need mention, that the conduct of the first defendant was morally wrong; but that cannot affect our decision.

The judgment of the learned Subordinate Judge is upheld and the Second Appeal is dismissed. Each party shall bear his costs throughout.

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APPELLATE CIVIL.

Before Mr. Justice Waller and Mr. Justice
Madhavan Nair.

1928,
November 23.

KASIA PILLAI ALIAS SUBRAMANIA PILLAI, MINOR BY
MEENAKSHI AMMAL (FIRST DEFENDANT), APPELLANT

v.

GANESHAMUTHU KUMARASWAMI PILLAI
(PLAINTIFF), RESPONDENT.*

*Customary and natural right—Letting off agricultural and rain
water by means of vents, on to lower land.*

In India, the right of an agriculturist to drain off into the neighbouring lower lands the water brought into his land for agricultural operations is a customary right, and the right to drain off rain water is a natural one. He can exercise these rights even by opening vents in a bund erected on his land so long as no damage is caused to the lower proprietor by such a course.

SECOND APPEAL from the decree of the Court of the Additional Subordinate Judge of Tinnevely in A.S. No. 197 of 1924 preferred against the decree of the Principal District Munsif of Tinnevely in O.S. No. 344 of 1921. The facts are given in the judgment.

B. Sitarama Rao (with *T. Nallasivam Pillai*).—Though the lower Court found that I had a natural right to pass both rain water as well as water brought for agricultural purposes on to the plaintiff's land, it held that I had no right to do so by opening vents. It does not find that I made any unreasonable user of my right or caused damage. The right to pass water by opening vents is part of the natural right; vide *Gibbons v. Lenfestey*(1), adopted in *Sheik Hussain Sahib v. Subbayya*(2), and followed in *Ramakrishna v. Venkata*(3). It can also be

* Second Appeal No. 1452 of 1925.
(1) [1915] 113 L.T., 55 (C.P.). (2) (1925) I.L.R., 49 Mad., 441 (F.B.).
(3) (1928) A.I.R. (Mad.), 52.

regarded as an easement of necessity because there is no other way of escape for the water coming on my lands; *Chidambara Rao v. The Secretary of State for India in Council*(1). KASIA PILLAI v. KUMARA-SWAMI PILLAI.

T. R. Venkatarama Sastri (with *K. S. Sankara Ayyar*).—The lower Court erred in holding that natural right included a right to bring water artificially on to one's land and then pass it on to the neighbour's. It extends only to pass on water coming naturally to one's land by the operation of rain or otherwise. Water brought on for agricultural purposes is artificial water. All the cases recognise this principle; *John Young & Co. v. Bankier Distillery Company*(2), *Doraisami Muthiriyar v. Nambiappa Muthiriyar*(3), *Sinnana Goundan v. Veerappa Goundan*(4), *Ambica Saran Singh v. Debi Saran Singh*(5). The cases quoted by appellant expressly hold that natural right does not extend to artificial water. Such a right must be acquired by grant or prescription; neither has been proved in this case.

B. Sitarama Rao in reply.—The right to pass water brought for agricultural purposes can be regarded as a customary right. It comes under section 7 of the Easements Act, and has been so regarded in *Doraisami Muthiriyar v. Nambiappa Muthiriyar* (3). The lands are wet lands and wet crops had always been raised with the aid of water from the adjacent channel. That water had always passed on through the plaintiff's land. There is no other outlet for the water.

The JUDGMENT of the Court was delivered by

MADHAVAN NAIR, J.—The first defendant is the appellant. The plaintiff and the first defendant are owners of adjoining lands. The plaintiff's lands lie on the north and the first defendant's lands which are on a higher level lie on the south. Along the boundary between their respective lands, the first defendant put up a bund three feet high, and in two particular places in this bund he cut openings for allowing the surplus water collecting on his lands to flow over into the plaintiff's lands and thence into the Palaiyam channel which lies to the north of the plaintiff's lands. It is the common case of both parties

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(1) (1902) I.L.R., 28 Mad., 68. (2) [1898] A.O., 831.
(3) (1918) M.W.N., 167. (4) (1925) M.W.N., 282.
(5) (1914) 12 A.L.J., 685.

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that the plaintiff's land was part of the Palaiyam channel till it was granted to the plaintiff in about 1905 by the Government. It has been found by the Courts below that the bund stands on the first defendant's land and was put up by him, though the plaintiff alleged that it belonged jointly to the first defendant and himself. The case of the plaintiff is that the first defendant is not entitled to drain off the surplus waters of his lands into the plaintiff's lands on the north and that, in any event, he is not entitled to let them off through particular openings in the bund. He therefore instituted the suit out of which this second appeal arises for a declaration that the first defendant is not entitled to let off the waters of his lands into the plaintiff's lands and for necessary injunctions for giving effect to that declaration. He also claimed damages of Rs. 200 alleged to have been sustained by him on account of the first defendant allowing water to flow through his lands. It may be stated here that the waters which collected on the first defendant's lands consisted not only of the rain water but also of the water which he was entitled to bring into his lands for cultivation purposes from the Palaiyam channel.

The District Munsif dismissed the plaintiff's suit, holding that the first defendant has a natural right to drain off the waters of his fields into the plaintiff's fields lower down under section 7 of the Easements Act and that he could do this by making openings in the bund as he had been doing so for over 60 years. On appeal, the Subordinate Judge held that the first defendant had a natural right to drain off into the lower lands of the plaintiff, the rain water as well as the water coming into his lands by ordinary agricultural operations, but he held that he had no right to let these waters into the plaintiff's lands through particular vents in the bund as

according to his finding he had not established an easement right for doing so by 60 years' user against the Government. He therefore gave a decree for the plaintiff to the following effect: "the first defendant will be declared entitled, as a matter of natural right to drain the surplus waters collecting on his land into plaintiff's lands as they would do according to the natural situation of the fields without any bunds, and not by putting up any bund or opening vents into it and an injunction will issue restraining defendants, etc., from letting the waters of the southern fields into plaintiff's land on the north through the vents." The plaintiff's claim as regards damages was dismissed by both the lower Courts.

In second appeal, Mr. Sitarama Rao contends that the Subordinate Judge declaring the first defendant's right to drain off into the plaintiff's fields both the surplus and the artificial waters brought by agricultural operations, should have held that he is entitled to do so by opening vents in the bund so long as no damage is caused to the plaintiff by this procedure. The respondent argues that the appellant is entitled to let off only the natural water and not the artificial water and that this right which he has cannot be exercised by letting the water by opening vents in the bund. Section 7, illustration (i), of the Easements Act states clearly that every owner of upper land has got a natural right that the water rising in or falling on such land and not passing in defined channels shall be allowed by the owner of the lower land to run naturally thereto. There can, therefore, be no doubt of the appellant's right to drain off the rain water that collects on his lands into the respondent's lands. (See *Beard v. Moira Colliery Co., Ltd.*(1), *Gibbons v. Lenfestey*(2), *Sheik Hussain Sahib*

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(1) [1914] 84 L.J.Ch., 155.

(2) [1915] 113 L.T., 55.

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v. Subbayya(1) and Ramakrishna v. Venkata(2). The learned Subordinate Judge says that this natural right has been also held to apply to water coming on the upper land by ordinary agricultural operations. Except the dictum of SADASIVA AYYAR, J., in *Doraisami Muthiriyar v. Nambiappa Muthiriyar*(3) no authority has been quoted in support of this proposition. PHILLIPS, J., the other member of the bench who heard that case did not think it necessary to express a definite opinion as to the nature or the extent of the natural rights, and the learned Judges ultimately decided the case after calling for a finding on the question whether the plaintiff is, by custom or by prescription, entitled to drain into the lower fields the water brought into his land for purposes of irrigation. It appears to us that in India, the right of an agriculturist to drain off into the lower lands the water brought into his land for ordinary agricultural operations is a customary right. He is entitled to do so by custom; otherwise, it will be impossible to carry on agricultural operations successfully. In this case it is not denied by the plaintiff that the appellant has such a customary right; but what he says is that the water of the appellant's lands is being drained away by a different channel. This is what he states in his plaint. "The water of the defendant's lands is being drained into the odai in the east and the nanja fields in the west, but, contrary to the said custom, the first defendant made an opening in the bund at the place marked A in September 1919 and discharged into the plaintiff's fields the water which he collected on his own fields and thereby damaged the crops." (See the extract from the pleadings given in the District Munsif's Judgment.) It has not been proved that the water of the first defendant's land

was being drained in the manner alleged by the plaintiff. On the other hand, from the natural situation of the lands of the plaintiff and the first defendant it would appear that the only direction in which the surplus waters collecting on the appellant's land could drain is the northern direction, i.e., into the plaintiff's lands. (See the Commissioner's report.) It is also clear from the facts of the case, that, before the respondent obtained on darkhast the bed of the Palaiyam channel, the appellant would have been draining his waters into the Palaiyam channel itself, as his fields then adjoined the channel. In these circumstances, we have no doubt that the appellant is entitled by custom to discharge into the respondent's lands the water coming into his land for ordinary agricultural operations, and he has a natural right to discharge the surplus rain water also into the plaintiff's lands. He can exercise this right by opening vents in his bund so long as no damage is caused to plaintiff. The finding that no damage has been caused has been challenged by the respondent in the memorandum of objections filed by him; but, this being a finding of fact, cannot be questioned in second appeal.

In view of the facts of the case, no question has been raised with regard to the first defendant's right to put up the bund.

In the result, we reverse the decree of the lower appellate Court and restore that of the District Munsif with costs here and in the Court below.

Memorandum of Objections.

The Memorandum of Objections is dismissed with costs.

N.B.

(1) (1925) I.L.R., 49 Mad., 441.

(2) (1928) A.I.R. (Mad.), 52.

(3) (1918) M.W.N., 167.

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APPELLATE CRIMINAL.

Before Mr. Justice Devadoss and Mr. Justice Walter.

1928,
November 27, ELAVARTHI PEDDABBA REDDI (PETITIONER), ACCUSED,

v.

IYYALA VARADA REDDI (RESPONDENT), COMPLAINANT.*

Statements by witness—Privilege—If absolute—Witness answering counsel's question—Protection of sec. 132 of Indian Evidence Act, not sought—Effect of.

In India, the statements made by a witness are entitled not to an absolute but only to a qualified privilege. *Manjaya v. Sesha Setti* (1888) I.L.R., 11 Mad., 477, dissented from.

A witness who answers a question or questions put to him by counsel without seeking the protection of section 132 of the Indian Evidence Act is not entitled to that protection. *The Queen v. Gopal Doss* (1881) I.L.R., 3 Mad., 271 (F.B.), followed.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order framing a charge against the petitioner (accused) of the Sub-divisional Magistrate of Chittoor, dated 29th March 1928, in Calendar Case No. 11 of 1928.

V. L. Ethiraj and A. S. Sivakaminathan for petitioner.

T. K. Srinivasa Thathachari for respondent.

K. N. Ganpati for Public Prosecutor for the Crown.

JUDGMENT.

DEVADOSS, J.—The petitioner is being prosecuted for defamation in respect of certain statements made by him as a witness before arbitrators. He has applied to this Court for quashing the proceedings against him on the ground that no indictment for defamation would lie in respect of statements made in answer to questions by

Counsel. The question for determination is, “is a witness absolutely privileged as regards statements made by him on oath in answer to questions by Counsel or Court except as to a charge for perjury?” So far as the Criminal Law of this country is concerned, defamation is defined in section 499 of the Indian Penal Code. Section 499 contains ten exceptions and a person who pleads privilege has to bring himself within one or more of the ten exceptions. The first exception and the ninth exception afford sufficient protection to a witness; in the case of the first exception, the imputation should be true and for the public good, and in the case of the ninth exception, imputation should be made in good faith for the protection of the interest of the person making it or of any other person or for public good. What is claimed for the petitioner is absolute privilege, whether the statement be relevant or irrelevant, bona fide or malicious, or false or true. In other words, a eleventh exception is sought to be added to section 499 to provide for the case of witnesses.

The Criminal Law of India as to defamation is different in many respects from the English Law. Under the Penal Code all libels and slanders are indictable, for section 499 begins thus: “Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes, etc.” Under the English Law slander is not indictable except in the cases of slanderous words to a Magistrate in the execution of his office. Only certain cases of libel are indictable, such as seditious libel, blasphemous libel, libel affecting the administration of justice, obscene libel and defamatory libel calculated or intended to provoke a breach of the peace or to expose a person to public hatred, contempt or ridicule or to damage his reputation. In the Indian Criminal Law there is no distinction

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between libel and slander. When a statute like the Penal Code contains exhaustive provisions as to the law of defamation we cannot hold that an exception was left out and that the Court should engraft an exception to the codified law. The Penal Code which was drafted by Lord Macaulay in the early thirties and was considered by more than one Law Commission, did not become law till 1860. When a Code has been in a state of gestation for more than 20 years, it should not be lightly considered to have omitted anything material. The framers of the Indian Penal Code were English lawyers who were familiar with the state of the law at the time in England, and if they had wanted to give absolute protection to a witness, they would have done so in so many words and it is bad policy to add to codified law some of the provisions of the English Common Law on the ground that the codified law is silent as to them. The words of a statute should not be departed from on the ground that something was omitted to be enacted. In this view I hold that a witness has not absolute privilege as regards the statements made by him but has only a qualified privilege under the ninth exception or the first exception to section 499 of the Indian Penal Code. In *Gopal Naidu v. King-Emperor*(1), it was held, "The Criminal Law of India has been codified in the Indian Penal Code and the Criminal Procedure Code; the former code deals specifically with offences and states what matters will afford an excuse or a defence to a charge of any offence and the Court is not entitled to invoke the Common Law of England in such matters at all".

Reliance is strongly placed by Mr. Ethiraj upon *Manjaya v. Sesha Setti*(2), in support of his contention.

(1) (1922) I.L.R., 46 Mad., 605 (F.B.). (2) (1888) I.L.R. 11 Mad., 477.

In that case it was held by COLLINS, C.J., and SHEPHARD, J., that a conviction under section 500, Indian Penal Code, could not be sustained in respect of a statement made by a witness under cross-examination. The learned Chief Justice relied upon *Seaman v. Netherclift* (1), and *Goffin v. Donnelly*(2), and SHEPHARD, J., relied upon an observation of the Judicial Committee in *Baboo Gunnesb v. Mugneeram*(3). In *Seaman v. Netherclift*(1), COCKBURN, C.J. observed, "If there is anything as to which the authority is overwhelming it is that a witness is privileged to the extent of what he says in course of his examination. Neither is that privilege affected by the relevancy or irrelevancy of what he says; for then he would be obliged to judge of what is relevant or irrelevant, and questions might be, and are, constantly asked which are not strictly relevant to the issue. But that, beyond all question, this unqualified privilege extends to a witness is established by a long series of cases, the last of which is *Dawkins v. Lord Rokeby*(4), after which to contend to the contrary is hopeless. It was there expressly decided that the evidence of a witness with reference to the enquiry is privileged, notwithstanding it may be malicious; and to ask us to decide to the contrary is to ask what is beyond our power." In *Goffin v. Donnelly*(2), the action was in respect of the statement made by a witness before the Select Committee of the House of Commons. FIELD and MANISTY, JJ., held that the principle of *Seaman v. Netherclift*(1) applied to the case. In *Baboo Gunnesb v. Mugneeram*(3), their Lordships observed, "Witnesses cannot be sued in a Civil Court for damages in respect of evidence given by them upon oath in a judicial proceeding. Their Lordships hold this

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(1) (1876) L.R., 2 Q.P.D., 53.
(3) (1872) 11 Beng.L.R., 321.

(2) (1881) L.R., 6 Q.B.D., 307.
(4) (1875) L.R., 7 H.L., 744.

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maxim which certainly has been recognized by all the Courts of this country, to be one based upon principles of public policy. The ground of it is this, that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes the fear of being harassed by suits for damages; but that the only penalty which they should incur if they give evidence falsely should be indictment for perjury." Notwithstanding the high authorities relied upon by the learned Chief Justice and SHEPHARD, J., in *Manjaya v. Sessa Setti*(1), the question still remains whether the Penal Code did not make a departure from the English Law. As already stated the Criminal Law of defamation is different from the Criminal Law of England as to libel and slander and the privilege that is accorded to a witness in England on grounds of policy is deliberately cut down by the framers of the Penal Code to statements made in good faith for the protection of the interests of the person making it or of any other person or for public good. With due respect I decline to follow *Manjaya v. Sessa Setti*(1).

The next branch of the argument is that under the law a witness is compelled to answer all questions put to him and therefore the protection given by section 132 of the Evidence Act applies to all statements made by him in Court. Under the English Law of Evidence a witness cannot be compelled to answer certain kinds of questions. Sections 121 to 129 contain the provisions as to questions which a witness cannot be compelled to answer. Sections 130 and 131 relate to production of documents. Section 132 is, "A witness shall not be excused from answering any question as to any matter

relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate or may tend directly or indirectly to criminate such witness, or that it will expose or tend directly or indirectly to expose such witness to a penalty or forfeiture of any kind : Provided that no such answer which a witness shall be compelled to give, shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer". The English Law as to the privilege of a witness from being compelled to answer certain questions was taken away by section 32 of Act II of 1855 and the present section 132 of the Evidence Act is a reproduction of that section. In order to avail oneself of the protection given, he must bring himself within the proviso; in other words, he should be compelled to answer the question. The contention of Mr. Ethiraj is that the mere fact that a witness is asked to get into the witness box and is sworn to tell the truth and nothing but the truth, is tantamount to compulsion under section 132 of the Evidence Act. Section 132 is clear in its terms. It says that no witness shall be excused from answering any question on the ground that the answer might expose him to civil or criminal proceeding or may tend to his prejudice. The proviso protects him from arrest or prosecution or proof of the statement in criminal proceeding against him except as to perjury. The compulsion contemplated in section 132 is something more than being put into the box and being sworn to give evidence; the compulsion may be express or implied. It is not necessary that the compulsion must be in any set form of words or that the asking for protection should be in a particular form. If the witness is made to understand that he must

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answer all questions without exception, it would amount to compulsion. In all cases, it is a question of fact whether there was or was not compulsion. Whether the witness seeks the protection of the Court in a set form of words or not, if the witness is made to understand directly or indirectly that he has no option in the matter but to answer all the questions put to him, I conceive he would bring himself within the proviso to section 132. I am not prepared to hold that the proviso would only apply to witnesses who ask in so many words the protection of the Court under section 132. The words of the proviso should be understood in the ordinary sense and the word "compelled" means forcing or insisting upon a witness to answer the question. The witness may not know that he should apply for protection; but any reasonable man ought to know that any statement defamatory of another would expose him to a charge of defamation. If he hesitates to answer and the Court tells him he must answer the question, I would hold that that hesitation and the direction of the Court to the witness to answer would bring the witness within the proviso.

In *The Queen v. Gopal Doss*(1) it was held by the majority of the Full Bench, where an accused person has made a statement on oath voluntarily and without compulsion on the part of the Court to which the statement is made, such a statement, if relevant, may be used against him on his trial on a criminal charge. In that case an affidavit and the deposition of the accused made in a small cause suit were sought to be put in evidence against the accused. TURNER, C.J., INNES and KINDERSLEY, JJ., held that both the affidavit and the deposition were properly admitted. KERNAN and

MUTTUSWAMI AYYAR, JJ., held that the affidavit was properly admitted but not the deposition. The contention that a witness as soon as he is sworn is compelled by law to answer all questions was put forward by Mr. Handley, who appeared for the prisoner. The learned Chief Justice negatived the contention and observed at page 278, "If the term 'compelled' in the proviso to section 132 and 'compel' in section 148 do not refer to the Court but to the obligation of the law, then the witness is left without protection if the Court arrives at an erroneous conclusion as to whether or not the question is as to a matter which the witness is bound to answer, or if he has incautiously answered an irrelevant question. On the other hand, if the term refers to the constraint put upon the witness by the authority before whom he is examined, he is protected whether that authority has decided rightly or wrongly that the question is such as the witness is bound to answer. If it had been the intention of the legislature to protect the witness whenever he was, or believed himself to be, constrained by law to give an answer criminating himself, then this intention could clearly have been expressed in very much more simple language; and if unlearned persons, not assisted by Counsel, are not to be placed in a worse position than persons who are acquainted with the law or have the benefit of professional assistance, I can suggest no reason why the protection should not have been extended to all answers whether relevant or irrelevant. The terms of Section 132 especially when read with the rest of the Act, impel me to the conclusion that protection is afforded only to answers to which a witness has objected or has been constrained by the Court to give." With this observation of the learned Chief Justice I respectfully agree and I would add that the expression "has been constrained by the Court to give"

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(1) (1881) I.L.R., 8 Mad., 271 (F.B.).

used by the learned Chief Justice should be understood in a liberal sense. The constraint need not be in so many words and the protection for the witness need not be in any particular form or in any set words.

Great reliance is placed by Mr. Ethiraj upon the recent decision of Mr. Justice WALSH in *Emperor v. Ganga Sahai*(1). In that case the learned Judge held "that a witness in a civil suit cannot be prosecuted for defamation in respect of an answer made by him to a question asked by the Court." He differed from two judgments of his own Court and held that the word "compelled" means the obligation under the law to answer questions. In that case the question was by the Court. When a Court asks a question, it may be inferred that the Court insists upon an answer; with due respect, that by itself would not be sufficient to bring the witness within the proviso of section 132. If he hesitates to answer or if he says, "I cannot answer, or I won't answer," without actually asking for protection and if the Court says, "You must answer," and he answers, he is within the exception. Where the Court makes a witness understand that he has no option but to answer, the proviso would apply whether the witness asks for protection or not, but to hold that 'compelled' includes the ordinary obligation of a witness to answer all questions, is to make the proviso meaningless. The learned Judge quotes the observation of PIGGOTT, J., in *Kallu v. Sital*(2) but the sentence following the extract, "Whether this be so or not, I think the principle laid down in these rulings fully applies to the facts of the present case," shows how PIGGOTT, J., viewed the matter. In *Queen Empress v. Moss*(3) Sir JOHN EDGE, C.J., observed, "In my opinion

(1) (1920) I L R., 42 All., 257.

(2) (1918) I L R., 40 All., 271.

(3) (1898) I L R., 18 All., 88.

'compelled' in section 132 of the Indian Evidence Act only applies where the Court has compelled a witness to answer a question, and not to a case in which the witness has not asked to be excused from answering a question, but gives his answer without any claim to have himself excused. I think that in reading section 132 and considering the word 'compelled' in the proviso, we must not overlook the earlier part of the section, which says 'a witness shall not be excused'." In *Kallu v. Sital*(1) PIGGOTT, J., held that "compelled" means compelled by the Court. The learned Judge felt the difficulty of ignorant witnesses not being able to claim the protection afforded by section 132 and also the difficulty of framing the request so as to satisfy the terms of the section and observed, "Obviously no form of words can be prescribed in which this claim is to be made; and I conceive that cases may arise in which the Courts will be compelled to hold that the claim has been made by implication, or that the witness was placed under practical compulsion to answer certain questions by the mere fact of his appearance in the witness box". In *Emperor v. Chatur Singh*(2) TUDBALL, J., held that "an answer given by a witness in a criminal case on oath to a question put to him either by the Court or by Counsel on either side, especially when the question is on a point which is relevant to the case, is within the protection afforded by section 132 of the Indian Evidence Act, 1872, whether or not the witness has objected to the question asked him." He held that he had no doubt whatsoever that the accused persons in the case were compelled within the meaning of the law to answer the questions put to them when they entered the witness box. With due respect, I am unable to agree either

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(1) (1918) I L R., 40 All., 271.

(2) (1920) I L R., 43 All., 92.

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with the reasoning or with the conclusion of the two learned Judges, WALSH, J., and TUDBALL, J., in *Emperor v. Ganga Sahai*(1) and *Emperor v. Chattur Singh*(2). As observed by TURNER, C.J., if the interpretation of these two learned Judges is correct, the proviso to section 132 may as well be omitted. In *Bai Shanta v. Umrao Amir*(3), it was held by the Full Bench of the Bombay High Court, "Relevant statements made by a witness on oath or solemn affirmation in a judicial proceeding cannot be held to be protected by the proviso to section 132 of the Indian Evidence Act, in case where the witness has not objected to answering the question put to him." In *Tiruvengada Mudali v. Tripurasundari Ammal*(4) it was held that defamatory statements in complaints to Magistrates are not absolutely privileged. The cases, *Mir Anwaruddin v. Fathim Bai Abidin*(5) and *McDonnell v. King-Emperor*(6) are cases of Advocates and need not be considered as the point is not before us. In *Emperor v. Banarsi*(7) it was held, "Whether or not a witness is 'compelled' within the meaning of section 132 of the Indian Evidence Act to answer any particular question put to him while in the witness box is in each case a question of fact. . . ."

It is strongly urged that on grounds of public policy a witness should be free to answer questions put to him in examination or in cross-examination or by the Court. The expression "public policy" is not capable of any accurate definition. It is as much public policy to protect a witness from harassment as much as it is to protect the character and reputation of a party or a person not connected with the matter before the Court.

(1) (1920) I.L.R., 42 All., 257.

(2) (1920) I.L.R., 48 All., 92.

(3) (1923) I.L.R., 50 Bom., 162 (F.B.)

(4) (1926) I.L.R., 49 Mad., 728 (F.B.).

(5) (1926) I.L.R., 50 Mad., 667.

(6) (1925) I.L.R., 3 Rang., 524.

(7) (1928) I.L.R., 48 All., 254.

It is a matter of common experience that parties and witnesses attack the character and reputation of the relations of the opposite party maliciously; unfounded allegations are made recklessly with a view to injure such persons, and it is within my experience that many persons avoid going to the Court for fear of being exposed to unfounded imputations and slanderous remarks. In a petty case of assault, the Advocate for the accused may be instructed to put the most obnoxious and slanderous questions to the complainant or to his witness, affecting the character and reputation of the female members of his family. Is it in the interests of public policy to expose innocent persons like the complainant's relations to the imputation contained in the question by reason of the protection that the law is supposed to give to the accused in defending himself? Anything which is *bona fide* and which would protect his interest, in other words, which would bring him within exception 9 to section 499 is privileged. But to allow a witness to make the most unfounded insinuation or allegation against any person without restraint is certainly opposed to public policy. The administration of justice in my opinion would not suffer by limiting the privilege to that contained in the exceptions to section 499 of the Indian Penal Code. A witness who is prosecuted for defamation in respect of a statement made by him on oath before a Court has two courses open to him. He may plead in bar of the prosecution the protection given to him under section 132 of the Evidence Act. If he did not claim the protection of section 132 when he gave his evidence he can claim the privilege given by the ninth exception or any other exception to section 499 of the Indian Penal Code. I hold that the petitioner has not the absolute privilege claimed by him but has only a qualified privilege given

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by the exceptions to section 499 of the Penal Code. The petition is dismissed.

WALLER, J.—This petition raises the question whether statements made by a witness are entitled to absolute or only to qualified privilege. The petitioner was examined as a witness before arbitrators. In the course of his evidence he made certain statements regarding the respondent, on which the respondent charged him with criminal defamation. Mr. Ethiraj asks us to quash the proceedings on the ground that the statements are entitled to absolute privilege. He relies on the decision in *Manjaya v. Sesha Setti*(1), but that decision is based on the Common Law of England and more recent decisions of this Court have held that, in matters of this kind, we must look to the Statutory Law of India and not to the Common Law of England for guidance. I must therefore hold that we are in no way bound by it.

Mr. Ethiraj falls back on section 132 of the Evidence Act, which, he contends affords absolute protection to a witness who has answered a relevant question. This contention was considered and rejected by a Full Bench of this Court in *The Queen v. Gopal Doss*(2). The majority of the Bench held that "If a witness does not desire to have his answers used against him on a subsequent criminal charge, he must object to answer, although he may know beforehand that such objection, if the answer is relevant, is perfectly futile, so far as his duty to answer is concerned, and must be overruled." Mr. Ethiraj asks us to say that the majority of the Judges based their ruling on the English Law and to concur in the opinion of the minority. It seems to me perfectly clear that their ruling was based on the construction of the language of the section and on nothing else. With

great respect, I do not see how the language could have been construed otherwise. Had it been the intention of the legislature to refer to a general obligation of law and not to specific compulsion by a Court, the section would have been very differently worded. Worded as it is, it seems to require a request by the witness to be excused from answering and compulsion by the Court on him to answer. This ruling was followed by PIGGOTT, J. in *Kallu v. Sital*(1) and also in *Queen Empress v. Moss*(2). WALSH, J. in *Emperor v. Ganga Sahai*(3), did not consider the 3 Madras case at all. As regards Moss's case, he thought that the ruling was *obiter*. Some remarks made incidentally by PIGGOTT, J., in *Kallu v. Sital*(1), he quoted with approval in which that learned Judge observed that he could "conceive that cases might arise in which the Courts will be compelled to hold that the witness was placed under practical compulsion to answer certain questions by the mere fact of his appearance in the witness-box", but that seems dangerously near the theory of a general obligation of law which the Madras decision—and PIGGOTT, J., was following it—expressly repudiated. In any event, what WALSH, J., decided was that a witness, who was questioned by the Court itself, was bound to answer and was therefore protected. When such a case arises here, it will be time to decide whether his view is correct. In *Emperor v. Chatur Singh*(4), TUDBALL, J. held that answers given by witnesses on relevant points to the Court or to Counsel on either side were protected by section 132 of the Evidence Act. He relied in fact, on the theory of a general obligation of law, which was rejected by the Madras Full Bench and in 16 and 40 Allahabad. In the most recent Allahabad case *Emperor v. Banarsi*(5), WALSH and

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(1) (1918) I.L.R., 40 All., 271.

(2) (1893) I.L.R., 16 All., 88.

(3) (1920) I.L.R., 42 All., 257.

(4) (1920) I.L.R., 43 All., 92.

(5) (1928) I.L.R., 46 All., 254.

(1) (1888) I.L.R., 11 Mad., 477.

(2) (1881) I.L.R., 8 Mad., 271 (F.B.).

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RYVES, JJ., held that the question whether a witness was "compelled" to answer a particular question was, in each case, one of fact. In *Bai Shanta v. Umrao Amir* (1), a Full Bench of the Bombay High Court took the same view of section 132 as was taken by the Full Bench in the 3 Madras case.

Following the ruling in *The Queen v. Gopal Doss* (2) I must find that, in this case, the petitioner who answered a question or questions put to him by his Counsel without seeking the protection of section 132 of the Evidence Act is not entitled to that protection. All that he is entitled to is the limited privilege afforded to him by section 499 of the Indian Penal Code. He must prove that he made the imputations against the respondent in good faith for the protection of his own or some other person's interest. I agree that the petition should be dismissed.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Ourgenvven.

1928,
October 9.

T. SIVASANKARAM PILLAI AND FIVE OTHERS
(PETITIONERS) ACCUSED.*

Local Boards Act (XIV of 1920) Madras, sec. 16—President of Taluk Board—Communication to individual members tendering his resignation—If proper—Power of Government to decide question—President—If public servant—Sec. 197, Criminal Procedure Code—Applicability of.

A communication by a President of a Taluk Board tendering his resignation of his office as such President addressed to each

(1) (1925) I.L.R., 50 Bom., 162 (F.B.). (2) (1931) I.L.R., 3 Mad., 271 (F.B.).

* Criminal Revision Case No. 298 of 1928.

member of the Board separately is not a proper resignation within the meaning of section 16 of the Madras Local Boards Act.

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The Act contains no provision empowering the Government to decide a question of this character and any order that Government may issue on the matter will not be binding upon a Court of Law.

A President of a Taluk Board is a public servant and under section 197 of the Code of Criminal Procedure the sanction of the Local Government is necessary to prosecute him for any offence alleged to have been committed by him as such public servant.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate of Penukonda in Calendar Case No. 62 of 1927.

V. L. Ethiraj and S. Ranganatha Ayyar for petitioners.

K. S. Vasudevan for Public Prosecutor for the Crown.

JUDGMENT.

This case arises out of an occurrence which took place at a meeting of the Taluk Board of Penukonda held on the 24th August 1927 and which resulted in the conviction of six persons by the Joint Magistrate of that place. The first petitioner, Mr. T. Sivasankaram Pillai, was a nominated member of the Taluk Board and had been elected President. Whether he was still President when the meeting in question was held is in dispute, but he took the chair in that capacity. While the meeting was proceeding, one of the members, R. Siddana Gowd, who was the complainant in the criminal case, entered and took the attendance register for the purpose of signing it. The President told him not to do so, as he had disqualified himself as a member by failure to attend some previous meetings. As he persisted the

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President told another member, now the second petitioner, to take the book from him, and in so doing the second petitioner pushed the complainant so that the chair in which he was sitting was broken and he fell, sustaining some slight injuries. The President, after some further disorder ordered some of the servants of the Board to evict the complainant from the meeting and they accordingly turned him out. Upon these incidents is founded the criminal case. The learned Joint Magistrate has found that Mr. Sivasankaram Pillai had ceased to be President at the time of the occurrence, and that his action was therefore unauthorized. He has convicted him accordingly of abetment of voluntarily causing hurt and wrongful restraint and sentenced him to pay a fine of Rs. 50. The second petitioner has been convicted of voluntarily causing hurt and sentenced to pay a fine of Rs. 25, while of the remaining four petitioners (accused Nos. 3, 4, 5 and 7), who are Board servants, accused Nos. 4 and 5 have been convicted under sections 352 and 341, Indian Penal Code, and accused Nos. 3 and 7 under section 352, Indian Penal Code only. Each of these four persons has been fined the nominal sum of one anna.

The contention raised in this Criminal Revision Petition against these convictions is that the Joint Magistrate was in error in holding that Mr. Sivasankaram Pillai had ceased to be President at the time of the occurrence. If he was still President, two separate consequences, it is said, would follow. In the first place, his prosecution could not have been undertaken without the Local Government's sanction under section 197 of the Criminal Procedure Code and, secondly, he would then have been acting within his rights in evicting the complainant. The facts upon which it was successfully contended in the lower Court that he had ceased to be

President are briefly these. It appears that the members of the Board had split into two parties, one supporting the President and the other hostile to him. On the 15th January 1927 the Board by 10 votes to 8 passed a token resolution reducing the education budget by one rupee as a protest against the President's administration. In consequence of this, on the 16th February, the President sent to each member separately a tender of his resignation in the terms of Exhibit II. The next meeting of the Board was fixed for the 25th February and the subject of this resignation was put down on the agenda as resolution or item No. 92. At the meeting, one of the members proposed that this item should be advanced in position and disposed of before the other intervening items, but the President disallowed the proposal for want of notice. Thereupon the opposite faction withdrew and held a separate meeting outside at which they passed a resolution accepting the resignation. A copy of their proceedings has been filed as Exhibit V. Meanwhile, and before the subject of his own resignation was reached, the President adjourned the meeting of the Board till 8 a.m. on the following day (the 26th), waited for half an hour, and there being no quorum within that time, further adjourned the remainder of the agenda, including the question of his own resignation. The members of the other faction, who had been waiting outside, then entered the room, appointed one of their number as President and seemingly in derogation of their own previous action, again passed a resolution accepting the President's resignation. So far as the proceedings of the Board or of its members are concerned, it may be said that matters stood thus at the time of the occurrence.

Section 16 of the Madras Local Boards Act enables a President to resign by giving notice to the Local

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Board. The question accordingly is whether notice of resignation was so given. It is clear I think that a Local Board is something other and more than the mere sum of its individual members. Section 6 (3) of the Act declares it to be a body corporate with perpetual succession and a common seal and vests it with the capacity of suing or being sued in its corporate name. It would follow upon general principles and by analogy with other bodies corporate that such a body can transact business only at duly constituted meetings and that this is so, is borne out by the provisions of the Act and the rules framed thereunder. Those rules are contained in Schedule II. Rules 1 and 2 lay down the circumstances in which meetings of the Board shall be held, and rule 3 provides that no meeting shall be held, except in cases of urgency, unless notice of the hour and the business to be transacted has been given seven days in advance. Rule 6 prohibits the transaction of any business at a meeting unless at least one-third of the number of members are present; and *a fortiori* no business can be transacted otherwise than at a meeting. There is of course no question but that any resolution of the Board passed in circumstances at variance with these and other rules would be invalid. Section 16, it is true, does not require that the resignation should be accepted, only that notice of it should be given to the Board. But it appears to me that the act of receiving such notice is as much business to be transacted by the Board in accordance with the rules framed for its meetings as any other of its activities, and consequently that such receipt could only take place at a duly constituted meeting. The notice circulated by Mr. Sivasankaram Pillai to the members on the 16th February was accordingly not a notice to the Local Board, and was not a notice received by the Local Board; and

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I cannot hold that by issuing it to each member and upon its receipt by each member his resignation of the office of President took effect. It needs no further discussion of the provisions of the Act to justify the conclusion that the two so-called meetings of the opposite faction on the 25th and 26th February were not properly constituted meetings of the Local Board, and that no steps taken at those meetings with regard to the resignation were valid. My conclusion accordingly is that the President did not give notice of his resignation to the Local Board and that he cannot be held to have resigned.

The learned Joint Magistrate has based his conclusion upon this point not upon the terms of the Act but upon a Government Order—G.O. No. 2310, L. & M., dated 21st June 1927—apparently passed after correspondence with the President and the dissentient members. It expresses the Government's view that the resignation communicated by Mr. Sivasankaram Pillai to all the Taluk Board members on the 16th February took effect as soon as the notice of resignation reached the members, and it proceeds to direct him to hand over charge to the Vice-President. It will be seen that this does not amount to an order depriving the President of his office, whether or not it would be competent to the Government to pass such an order. I read it merely as an expression of opinion that the intimation given of his resignation by the President to the members amounted to notice to the Local Board under section 16. Such an expression of opinion does not of course prevent a Court of law from coming to a contrary conclusion, since the Act contains no provision empowering the Government to decide a question of this character. The Joint Magistrate makes reference also to a suit (O.S. No. 12 of 1927) filed in the District Court of

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Anantapur to declare that the first petitioner had ceased to be President. After the learned District Judge had reached the conclusions at which I have myself arrived, and recorded them in a judgment, the Plaintiffs, doubtless being aware of what the result would be, withdrew the suit. The circumstance does not of course in any way affect the issue before me.

On the finding that Mr. Sivasankaram Pillai was still President, it is clear that the sanction of the Local Government to his prosecution was necessary under section 197 of the Criminal Procedure Code. One need look no further than to the illustration to section 21 of the Indian Penal Code for proof that a member of a Taluk Board is a public servant; and under section 43 of the Local Boards Act, the President of a Taluk Board can only be removed by the Local Government. Thus the prosecution of the first petitioner was irregular for want of sanction.

That does not of course dispose of the matter as against the other petitioners. If, however, the first petitioner was lawfully presiding at the meeting, it has not been contended before me that what he did or caused the other petitioners to do would in the circumstances have amounted to any offence. Under section 32 of the Act, the President is empowered to preserve order and the complainant seems deliberately to have flouted the first petitioner's authority on the ground that he was no longer President. If he sustained any slight injuries in so doing, they were of his own seeking.

I allow the Criminal Revision Petition, set aside the convictions, acquit the petitioners and direct that the fines, if paid, be refunded.

B.C.S.

PRIVY COUNCIL.

SEETHAYYA AND OTHERS—APPELLANTS,

v.

SUBRAMANYA SOMAYAJULU AND ANOTHER—RESPONDENTS
(AND CONNECTED APPEALS).*

1929,
February
14.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Madras Estates Land Act (1 of 1908), sec. 3 (2) (d)—Indian Evidence Act (1 of 1872), ss. 65, 90—Shrotriyam grant—Construction of grant—Whether grant of land or revenue only—Grant by Despandiyas—"Mauje"—Secondary evidence of grant—Copy more than 30 years old—Authentication by indorsement.

In 1689 an agrapharam village was granted as shrotriyam at six pagodas, the grant stating "as we have granted the said agrapharam you should enjoy the same from son to grandson paying the shrotriyam thereon and be happy." The grant was by Despandiyas, revenue officers or farmers of revenue under the paramount authority, to Brahmins, who did not reside in the village granted, but about two miles away. The village was described in the grant as a "mauje", a Telugu form of "mauza." The grant had been recognized by the British Government, and it was admitted that the grantees had not owned the *kudivaram*.

Held, that having regard to the terms of the grant and to the circumstances above stated, the grant was of the land-revenue only; consequently by the Madras Estates Land Act, 1908, section 3 (2) (d), the village was an estate under that Act, and suits to eject ryots could not be brought in the Civil Court.

A shrotriyam grant may grant the *kudivaram* as well as the *melvaram*: the statement to the contrary in Wilson's Glossary was based upon decisions which have since been questioned.

The word "mauje" in a Telugu document indicates a village in which there were peasant proprietors owning cultivable lands. Observation of SADASIVA AYYAR, J., in *Venkata*

* *Present*:—Lord PELLIMORE, Lord BLANESBURGH, Lord ATKIN, Lord SALVESON and Sir LANCELOT SANDERSON.

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SREETHAYYA v. SOMAYAJULU. *Sastrulu v. Sitaramudu*, (1912) I.L.R., 38 Mad., 891, 892, to that effect accepted as correct.

The original grant was lost, but there was produced from the custody of respondents, successors to the grantees, a document in Telugu purporting to be a copy of the grant and of a translation of a Persian Dumbala of 1765. The document bore the following indorsement, signed by three predecessors of the respondents "Originals have been retained by us and copies have been filed, 1858."

Held, that the document was properly admitted under the Indian Evidence Act, sections 65, 96, as secondary evidence of the terms of the grant, the statement in the indorsement authenticating the copy being evidence as a statement by a deceased person in a document relating to a relevant fact, also as an admission by the respondents' predecessors.

CONSOLIDATED APPEAL (No. 47 of 1925) from orders of the High Court (April 5, 1922) in an appeal under the Letters Patent, reversing orders of a Division Bench which had affirmed orders of the Principal District Munsif of Tenali.

The respondents brought suits in the Munsif's Court to eject the appellants who were ryots from lands in the agraharam village of Arepalli. The question in the litigation was whether the village constituted an estate within the Madras Estates Land Act, 1908, in which case the Revenue Courts had exclusive jurisdiction in the suits by section 189 of the Act. It was contended by the defendants that the village was an estate within section 3, sub-section (2) (d), which is set out in the present judgment, and the substantial question arising was whether the inam grant to the plaintiffs' predecessors included, as they contended, the *kudivaram*, or was, as the defendants contended, merely of the *melvaram*, or land-revenue.

The original grant was lost but there was produced from the custody of certain of the plaintiffs a document (Exhibit I) which was more than thirty years old and

purported to contain a copy of the grant of 1689. This document appears in the judgment of their Lordships.

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The District Munsif who first tried the suits (N. Gopalakrishna Rao) held that the Civil Court had not jurisdiction; he ordered the return of the plaints for presentation in the Revenue Court. The plaintiffs appealed to the District Court, and the appeals were transferred to the High Court, which held that the grants were presumably grants of the land, and called for revised findings on all the issues upon the evidence.

The suits then came before another District Munsif who held that Exhibit I was inadmissible in evidence, and that the village was not an estate within the Act, and found that the plaintiff was entitled to ejectment.

The appeals were then heard together by AYLING, Offg. C.J., and ODGERS, J. The former held that Exhibit I was admissible in evidence, and that upon its true construction the respondents' predecessors had acquired only the *melvaram*; he accordingly was of opinion that the Civil Courts had no jurisdiction. ODGERS, J., was of the contrary opinion upon both points. Accordingly the decision of the first Munsif returning the plaints was affirmed under section 98 of the Code of Civil Procedure.

Appeals by the defendants under section 15 of the Letters Patent were heard together by SCHWABE, C.J., OLDFIELD, J. and COURTTS TROTTER, J. and were allowed. The learned Judges held that Exhibit I was admissible in evidence, but that it was equally consistent with the grant having been of the land-revenue or of the land itself; that therefore, under the decision of the Full Bench in *Muthu Goundan v. Perumal Iyen*(1), (which was

(1) (1920) I.L.R., 44 Mad., 588.

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SOMAYAJULU. subsequently disapproved by the Privy Council in *Sivaprakasa Pandara Sannadhi v. Veerama Reddi*(1), the grant was to be presumed to have been of both *varams*; and that the evidence did not negative that presumption. The suits were accordingly remanded to be disposed of. The Letters Patent appeal is reported in *Somayajulu v. Seethayya*(2).

De Gruyther, K. C. and *Parikh* for the appellants.

Dunne, K. C. and *Narasimham* for the respondents.

Upon the admissibility of Exhibit I in evidence, reference was made to the Indian Evidence Act, 1872, sections 32, sub-sections (7), (63), (65), (90), (114); and upon the construction and effect of the grant to *Suryanarayana v. Patamma*(3), *Venkata Sastrulu v. Seetharamudu*(4), *Sivaprakasa Pandara Sannadhi v. Veerama Reddi*(1), also to *Venkatanarasimha Naidu v. Dandamudi Kotayya*(5), as to the relation between *zamin-dars* and *ryots* in pre-British days; to *Venkata Sastrulu v. Sdaramudu*(6), and to Wilson's Glossary, section 5 "*mauza*," as to "*mauje*"; to Fifth Report, Madras, Vol. 2, p. 157, and Wilson's Glossary as to *Despandyas*; and to Baden-Powell's Land Systems of British India, Vol. 3, p. 134, as to *sanads* given by the *Moghul* to *zamindars*.

The JUDGMENT of their Lordships was delivered by

LORD ATKIN.

Lord ATKIN.—This is a consolidated appeal from the judgment of the High Court at Madras given in eleven suits of ejectment brought by the respondents against the respective appellants. Seven out of the eleven suits were instituted in 1913, and the only question

so far decided and the only question before the Board is whether the Civil Court in which the actions were brought had jurisdiction and not, as the appellants contend, the Revenue Courts. The determination of this question has required recourse on seven different occasions to the Courts and has occupied nine years in Madras. The case has taken six years more to reach the Board. Their Lordships deplore this delay, which was obviously much greater than was necessary, and reaches the borders of a scandal. They do not, however, propose to recapitulate the various stages in which the case toiled to and fro between the lower Courts and the High Court, or to apportion blame; but will address themselves at once to the question of jurisdiction. This question arises under the Madras Estates Land Act, 1908. By section 189 of this Act exclusive jurisdiction is given to the Revenue Courts to entertain all suits set out in Schedule A, which includes a suit to eject a *ryot*. This, by reference to section 6, involves the question whether the *ryot* holds land in the "estate" of a landholder, and we are thus brought to the definition of "estate", which by section 3 (a) means "any village of which the land revenue alone has been granted in *inam* to a person not owning the *kudivaram* thereof, provided that the grant has been made or recognized by the British Government or any separated part of such village." The present respondents' claim under an *inam* grant made "about 250 years ago." The grant has been recognized by the British Government. In the course of these proceedings the respondents have admitted that they did not own the *kudivaram* before the grant, and that they did not acquire the *kudivaram* independently of and after the grant. The question of jurisdiction therefore depends upon whether the *inam*

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(1) (1922) I.L.R., 45 Mad., 583; L.R., 43 I.A., 280.

(2) (1922) I.L.R., 46 Mad., 92.

(3) (1918) I.L.R., 41 Mad., 1012; L.R., 45 I.A., 209.

(4) (1916) I.L.R., 43 Mad., 166; L.R., 46 I.A., 123.

(5) (1897) I.L.R., 20 Mad., 299. (6) (1912) I.L.R., 38 Mad., 891, 892.

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grant was of the "land revenue alone"; whether it granted the *melvaram* alone or also the *kudivaram*, i.e., the land revenue alone or also the cultivator's share of the produce.

The principal question in the case is whether the terms of the original grant were proved, and, if so, what is the proper construction to be put upon them. The respondents' case was that the original grant was lost: its express terms were not proved; and that the proper inference from all the facts, including acts of ownership by themselves and their predecessors, was that under the grant they received the *kudivaram*. The appellants, on the other hand, said that the respondents had disclosed a copy of the original grant which the appellants tendered in evidence. They contended that the document in sufficiently plain terms gave the *melvaram* only. The respondents, while denying the admissibility of the copy, said that the grant on its true construction gave the *kudivaram* as well as the *melvaram*, or at any rate was so ambiguous as to admit extrinsic evidence leading to the same result.

The document tendered was a Telugu document purporting to be a copy of two documents. The first was a document making a grant of the village in question to the predecessor of the plaintiffs for 6 pagodas, setting out the boundaries and signed by the grantors. The second was a Telugu translation of a Persian Dumbala, dated 1765 A.D., increasing the revenue to be paid by the holders from 6 to 25 pagodas. The document contains the endorsement "originals have been retained with us and copies have been filed, 1858," signed by the then predecessors of the respondents, one of whom Ponnappalli China Ramaswami was a plaintiff to some of the original suits now before the Board, but died at an

advanced age during the proceedings. Their Lordships SEETHAYYA agree with the learned CHIEF JUSTICE and his colleagues SOMATAJULU. in the High Court that the document was admissible LORD ATKIN. as evidence of the terms of the lost original. The document is over 30 years old and is produced from proper custody. By section 90 of the Evidence Act of 1872 the Court may therefore presume the signatures authenticating the copy to be genuine. The statement to which the signatures are appended, viz., that the document is a copy of the original, appears to be evidence both for the reason given by the CHIEF JUSTICE, i.e., as a statement made by a deceased person in a document relating to a relevant fact, and also as an admission made by a party and a predecessor-in-title of the parties.

The document, being admissible, is secondary evidence of the terms of the original grant. The Court therefore must proceed upon the footing that the express terms of the original written grant are before it, and must proceed to construe them. Some confusion has been introduced into the case by conflicting decisions as to presumptions to be made in construing such a grant. The original District Munsif held that there was a presumption that such a grant did not give the *kudivaram*.

The High Court, relying on a decision of a full Bench of the Court in *Muthu Goundan v. Perumal Iyen*(1) took the view that the presumption was that both the *melvaram* and *kudivaram* are included. It is, however, made clear by the subsequent decision of this Board in *Sivaprakasa Pandara Sannadhi v. Veerama Reddi*(2) that there is no presumption either way, and

(1) (1920) I.L.R., 44 Mad., 588.

(2) (1922) I.L.R., 45 Mad., 586, 607; L.R., 49 I.A., 286, 303.

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that each case must be decided on its own circumstances.
The document is in the following terms:—

Deed of gift executed and given on the 15th day of Adhika Chaitra Suddam of the year Parabhava, corresponding to 1610 of the Era of Salivahana, in favour of Ponnappalli Annappa Garu, who is eager in performing the six acts, viz.: Yagna, Yajana, Adhyayana, Adhyapaka, Dana and Pratigraha, by Puligadda Mallaparaju, Lakaraju Perraju, and Mazumdar Papanna, Rajas of Komaravole, and residents of Nizampatam.

As we have granted to you the shrotriyam of Arepalli *agraharam* village, Nizampatam *taluk*, in the name of Siva on the occasion of the lunar eclipse, for 6 pagodas, you shall enjoy the same accordingly from son to grandson and shall live happily.

(The usual Sanskrit *sloka* omitted.)

Signatures of the Rajas:—

(Signed) Mallaparaju.

(Signed) Perraju

(illegible).

Memorandum of the description of the boundaries for the *agraharam* executed and given on the 9th day of Chaitra Bahulam of the year Parabhava corresponding to 1610 of the Era of Salivahana in favour of Ponnappalli Annappa Garu who is eager in performing the six acts, viz.: Yagna, Yajana, Adhyayana, Adhyapaka, Dana and Pratigraha, by Puligadda Mallaparaju, Lakaraju Perraju, Mazumdar Papanna Garu, Rajas of Komaravole, residents of Nizampatam.

As we have granted to you Arepalli *agraharam* attached to Nizampatam, fixing a shrotriyam of 6 pagodas thereon, particulars of the boundaries which have been shown in respect thereof are as follows:—

North-west.—Cherukumilli Pronnapalli village boundary lying to the north of the Kudali (meeting place) of Cherukumilli and Arumbaka—Patugattu roughly.

North-east.—The village boundary of Nadimpalli and Rajavole.

East.—From the village boundary of the aforesaid Rajavole roughly through the middle portion and through the channel

forming the village boundary of Dhulipudi, roughly Bagirevungunta.

South-east.—The Kudali (meeting place) of Nagaram and Dhulipudi.

South.—To the south of Chavutavala, roughly Turukalaguntalu through the middle of Chittupaggala Katta and on the southern side of Vadanadum and through the middle of Peddaputtalu, the Kudali of Balusulapalem and Pudivada roughly.

South-west.—Jammulagunta boundary through the middle portion of Nallavada.

West.—Arumbaka through the *patu gattu* of the said village and through the middle of the *vada* and through Kudali and through Chavata Dibbalu and through Dagglumadugu roughly.

As we have granted to you the said *agraharam*, you should enjoy the same from son to grandson paying the shrotriyam thereon and be happy.

(The usual Sanskrit *sloka* omitted.)

Signatures of Rajas:—

(Signed) Mallaparaju.

(Signed) Papanna

(illegible).



A copy of the Telugu translation written on the right-hand side of the Dumbala written in the Persian language:—

Having fixed a shrotriyam of 25 pagodas (twenty-five pagodas) as fixed rent for next fasli 1172 in respect of *maluva* and *molarfa*, *libabu* and tobacco of Arepalli village, *sircar* Nizampatam, a cowle has been given by Nageshwara Dikshitulu, Somanna, Subbanna, Somayajulu and others (illegible) referred to in cowle for the coming fasli 1172. Without allowing it to remain (illegible), rich *ryots* should be permanently selected to (illegible) satisfaction and cultivation should be carried on extensively and the produce should be tendered to the *sircar* in season.

30th Mahazulahali 1175.

Hizra.

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(Signed) Ponnappalli China Ramaswami.

(Signed) Ponnappalli Suryanarayana Somayajulu.

(Signed) Lakshmipathi.

A copy of the Dumbala, a rough sketch of the village and a copy of the *kyfiat* of the villagers have been filed.

The learned Principal District Munsif of Tenali, who decided that he had no jurisdiction, delivered a careful and able judgment with which, on the point of construction, their Lordships, except on the question of presumption, find themselves substantially in accord. He relied on four main points:—

1. The grant purports to be a grant “of Shrotriyam” or “as Shrotriyam.” Shrotriyam, according to Wilson’s Glossary, means “a grant of lands or a village held at favourable rate, properly an assignment of land or revenue to a Brahmin learned in the *Vedas*, but latterly applied to similar assignments to native servants of Government, Civil or Military, and both Hindus and Muhammadans, as a reward for past services. A shrotriyam grant gives no right over the lands and the grantee cannot interfere with the occupants as long as they pay the established rents.” If the above definition were accepted in its full terms, the case would be concluded in favour of the appellants. But the learned CHIEF JUSTICE in his judgment points out reasons for supposing that Mr. Wilson in the last sentence was purporting to give the effect of legal decisions which since his time have been questioned, and their Lordships are not prepared to differ from the view that a shrotriyam grant may in fact grant the *kudivaram* as well as the *melvaram*. But in this case the document itself in the final recital uses the term again. “As we have granted to you the said *agraharam*, you should enjoy the same from son to

grandson, paying the shrotriyam thereon and be happy.” SEETHAYYA v. SOMAYAJULU. LORD ATKIN. In this phrase the term can only mean revenue, and though their Lordships could not consider this consideration in itself conclusive, it points to the construction contended for by the appellants. It is not without significance, though it is later than the document under construction, that the same use of the term is found in the translation of the Persian order “having fixed a shrotriyam of 25 pagodas, etc.”

2. The grant was of a *mouje*. Their Lordships accept the view expressed by SADASIVA AYYAR, J., in *Venkata Sastrulu v. Sitharamudu*(1) that the phrase indicates “a village in which there were peasant proprietors owning cultivable lands even then.” Probably no more weight should be attached to this than may be borne by the circumstance that the village granted was presumably a revenue producing village, some of the lands of which were already occupied. Their Lordships cannot accept the view favoured by the CHIEF JUSTICE that the word in the particular context merely means a defined place.

3. It is agreed that the grantors were *Despandyas* who were revenue officers or farmers of revenue under the paramount authority. It is pointed out that this fact does not exclude the possibility of the grantors being themselves personally possessed of the land, *i.e.*, of the *kudivaram* rights. This no doubt is so, but the strong probability is that they granted that which in their position as *Despandyas* they would possess, *viz.*, the rights over the revenue.

4. The Brahmans represented by the grantee were learned Brahmans apparently not resident in the village

(1) (1912) I.L.R., 38 Mad., 891.

SEETHAYYA granted, but resident about two miles away. This circumstance by itself is by no means conclusive. At the same time it appears to their Lordships to make it more probable that the grant was in the nature of an endowment of revenue rather than of land for the purposes of cultivation.

The learned CHIEF JUSTICE deals with each of these points separately, and as to each of them finds the point inconclusive, and apart from the presumption upon which he relies, finds the document equally consistent with a grant of both *varams* as of the *melvaram* only. In their Lordships' opinion this is to ignore the weight which is obtained from the effect of the whole. Taking into account all the considerations mentioned, their Lordships are of opinion that they lead strongly to the conclusion that the grant was of the *melvaram* only, and they so construe the document.

In view of the admissions made for the purposes of these cases that the respondents did not acquire the *kudivaram* subsequently to the grant, it becomes unnecessary to consider the subsequent acts of the parties, and the inferences to be drawn from them. The document is unambiguous and the rights given by it must be determined by its words. It follows that the decree of the High Court on the Letters Patent Appeal, dated the 5th April 1922, must be set aside, and the decree of the High Court, dated the 19th October 1921, be restored. The appellants should have their costs of the Letters Patent Appeal and before this Board. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellants: *H.S.L. Polak.*

Solicitors for respondents: *Douglas Grant and Dold.*

A.M.T.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Odgers.

THE RAJA OF RAMNAD (FIRST DEFENDANT), APPELLANT,

v.

M. R. M. A. SUBRAMANIAM CHETTIAR AND OTHERS
(PLAINTIFF, L.R. OF THE FIRST RESPONDENT—DECEASED),
RESPONDENTS.*

1928,
April 26.

Election—Mortgage substituted for bonds—Mortgage held invalid—Right to sue on bonds—Section 6 (d), Transfer of Property Act (IV of 1882)—Puisne mortgagee—Remedies open to—Suit under Order XXI, rule 63, after dismissal of claim petition, continuation of claim petition—Sec. 25, Indian Contract Act (IX of 1872).

A person who was absolute owner of an impartible zamindari and certain movables, such as jewels, furniture, etc., pledged some of his jewels with the fourth defendant in consideration of a debt. Then the zamindar who had become heavily indebted to various persons made a settlement of all his other properties in order to secure the zamindari for his son and heir and also to provide for the payment of his debts and for the maintenance of himself and his dependants. He constituted the third defendant as the trustee under the settlement, whom he also directed to redeem the jewels and hand them over to him. After the execution of the settlement, the zamindar borrowed certain sums from the plaintiff for which he hypothecated his equity of redemption in the jewels and a part of the monthly allowances due to him under the settlement. Thereafter, the trustee with the consent of the zamindar executed in favour of the plaintiff a mortgage of the zamindari for all debts incurred by the zamindar both prior and subsequent to the settlement, including the aforesaid debt. In suits, after the zamindar's death, between the zamindar's son and heir, the trustee and plaintiff, the mortgage executed by the trustee was held to be void as regards post-settlement debts of the zamindar.

Thereafter, the plaintiff brought this suit against the trustee, the son and heir of the zamindar, and the fourth defendant,

* Appeals Nos. 4, 6, 12, 13, 26, 42, 57, 79, 80, 106 and 109 of 1918.

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claiming the amount due to him on the original hypothecation.

Held (1) that on the mortgage, which was a new transaction substituted for the hypothecation, being declared void, the plaintiff was entitled to fall back and sue on the hypothecation, *Har Chandi Lal v. Sheoraj Singh* (1916) I.L.R., 39 All., 178 (P.C.), followed,

(2) that the allowances being only reservations out of the income of the estate to which the settlor was fully entitled were his "property" and were not in the nature of maintenance grants personal to and inalienable by the holder of the allowances; *Raja of Kalahasti v. Venkatappa Nayanim Bahadur* (1928) 27 L.W., 544 (F.B.), followed; *Subraya v. Krishna* (1928) I.L.R., 46 Mad., 659 (F.B.), distinguished,

(3) that under section 25 of the Indian Contract Act a person can validly bind himself to pay a time-barred debt even of his deceased father which the father would have been bound to pay out of his estate,

(4) that as the late zamindar could have compelled the trustee to redeem for his benefit the jewels pledged with the fourth defendant, the plaintiff, as a later encumbrancer, stood in the shoes of the zamindar and was entitled to a decree both as against the trustee and the zamindar's son and heir, compelling them to redeem for his benefit the fourth defendant and in default of their so redeeming, to a decree authorizing himself to pay the fourth defendant the amount due to him on the jewels and add the same to his decree amount; *Ascherson v. Tredegar Dry Dock and Wharf Co., Ltd.* [1909] 2 Ch., 401, followed,

(5) that though a transfer of a part of a debt was not good at English Common Law it was good at equity and in Indian law,

and (6) that though a suit against a minor under the Court of Wards would be bad for want of notice under section 49 (1) of the Madras Court of Wards Act, yet no such notice need be given, if the suit be one under Order XXI, rule 63, Civil Procedure Code, after the allowance or even dismissal of a claim petition to which the minor was a party.

APPEALS preferred against the decree of the Court of the Temporary Subordinate Judge of Rāmnād, dated the 12th day of September 1917 in Original Suit No. 153 of 1910 (Original Suit No. 44 of 1905, Subordinate Court, Madura, Madura East).

The facts are given in the judgments. Further facts are given in *Subramanian Chettiar v. Rajeswara Dorai*(1) and *Subramanian Chettiar v. Raja Rajeswara Dorai*(2).

S. Srinivasa Ayyangar (with *A. C. Sampath Ayyangar*) for appellant.—The bonds sued on have no consideration. One item of consideration is a time-barred debt of the father. Under section 25 of the Indian Contract Act, one can revive only his own barred debt and not a barred debt of his father. The plaintiff cannot maintain this action on these bonds, as in the place of these bonds executed by the Raja, the plaintiff accepted a mortgage from a third party, viz., the trustee of the Raja and elected to sue the trustee on the mortgage. The fact that the mortgage was held to be void does not give the plaintiff a right to fall back on these superseded bonds especially during the pendency of that suit; *Sinnan Chetty v. Alagiri Aiyar*(3), *Scarf v. Jardine*(4), *Morris v. Baron & Co.*(5). Moreover on the execution of the mortgage, the plaintiff and the Raja actually released their rights on these allowances; *Noble v. Ward*(6); *Noble v. Ward*(7). A charge on the allowances due to the Raja which are purely personal to him and which are not heritable is invalid; section 6 (d) of the Transfer of Property Act; *Subraya v. Krishna*(8).

The equity of redemption in the jewels had passed to the trustee and to the beneficiary by virtue of the trust deed and the Raja had no further right to pledge them to the plaintiff. The lower Court has asked me, the beneficiary under the trust, to redeem the jewels and has given the plaintiff (a) a right to redeem them himself in case of my default and (b) a decree against the estate in my hands. The decree is wrong (a) as the plaintiff was no party to the trust deed and (b) as he has not yet redeemed the jewels, even if he had a right to redeem them, which is doubtful. Plaintiff's position is not analogous to that of a surety; *Muhammad Mahmud Ali v. Kalyan Das*(9), illustration (c) to section 141 of the Indian Contract

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| (1) (1909) I.L.R., 32 Mad., 490. | (2) (1915) I.L.R., 39 Mad., 115 (P.C.). |
| (3) (1923) I.L.R., 46 Mad., 852. | (4) (1882) 7 A.C., 345. |
| (5) [1918] A.C., 1. | (6) (1866) L.R., 1 Exch., 117. |
| (7) (1887) L.R., 2 Exch., 135. | (8) (1923) I.L.R., 46 Mad., 659 (F.B.). |
| | (9) (1895) I.L.R., 18 All., 189. |

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Act. The trustee was not bound to pay debts incurred subsequent to the trust, such as this debt and therefore the plaintiff cannot compel the trustee to redeem the jewels for his benefit.

S. T. Srinivasa Gopalachari for attaching decree-holders—Assignment of a part of a chose in action (e.g., part of the allowances to the plaintiff is invalid; *Doraiswami Mudaliar v. Doraiswamy Aiyangar*(1). Moreover if the contention of the first defendant that his estate is not liable for the mortgage of the allowances succeeds, our burden will be increased if the charge on the allowances alone is upheld. Moreover, the first defendant has not made many of the attaching decree-holders parties to his appeal and they will all be prejudiced by not having any remedy by way of contribution.

K. Raja Iyer for appellant in Appeal No. 57.—I am a minor under the Court of Wards; as no notice of suit was given to me as required by section 49 (1) of the Madras Court of Wards Act, the suit is not maintainable against me. A suit under Order XXI, rule 63, after the dismissal of a claim petition, as in this case, is not a continuation of the proceedings in the claim petition, though it would be so, if the claim had been allowed; *Maruthamalai v. Palani*(2).

A. Krishnaswami Aiyar (with M. Patanjali Sastri) for respondent.—Full consideration was paid for all the bonds. A person can revive a barred debt even of his father if the estate would, as in this case, have been liable. Section 25 of the Contract Act is not against this view. The mortgage on which I once sued and which was held to be void was a different transaction from those on the bonds now sued on, though the mortgage was substituted for the bonds. This is not a case of election of two remedies for the same transaction as in the cases cited by the appellant. On the mortgage being held void, I can fall back on my right on the bonds which was not once for all given up; *Har Chandi Lal v. Sheoraj Singh*(3), *Mussumut Gulab Koer v. Badsha Bahadur*(4); *Payana Reena Saminathan v. Panna Lana Palaniappa*(5), *Noble v. Ward*(6), *Ramunni v. Kerala Varma Valia Raja*(7), *Nando Kishore Lall v. Mussumut Ramsookhee Koer*(8). I never gave up my right on the allowances once for all. Nor did the Raja. These allowances are not like maintenance allowances given to widows by others

which are purely personal but are reservations out of the estate, for one's own use by a person who was fully entitled to the estate; hence they are "property" which can be charged. If an allowance is payable out of an estate, a charge is thereby created; *Raja of Ramnad v. Sundara Pandiyasami Tevar*(1), on appeal from *Raja of Ramnad v. Sundara Pandiyaswami Tevar*(2). Assignment of a part of a debt is valid in equity; *In re Steel Wing Co.*(3). The Raja did not, by the trust deed, give up his right to redeem the jewels, though he gave up his right to all "claims" in respect of his estate. As for the form of the decree, I, as the hypothecatee from the Raja stand in his shoes and as the Raja has not only hypothecated the jewels but has also covenanted with me to redeem the jewels for me and as he has also directed the trustee to redeem them for his and for my benefit, I can compel both the Raja and his trustee to redeem them for me; See sections 12 (a), 18 and 23 of the Specific Relief Act; and on default by them I can redeem them myself or compel the beneficiary who has succeeded to the Raja's estate to redeem them for me. If the beneficiary does not do so, a decree can be given against the beneficiary's estate. *Lacey v. Hill* (4) *Ascherson v. Tredegar Dry Dock and Wharf Co., Ltd.*(5). My position being analogous to that of a surety I can bring a suit to be indemnified, even before I am compelled to pay; *Wolmershausen v. Gullick*(6) I never made any representation to the attaching decree-holders that I gave up my right to the allowances. A suit under Order XXI, Rule 63, even after the dismissal of a claim petition is its continuation; *Phulkumari v. Ghanshyam Misra*(7). Hence no new notice of suit is necessary to the minor.

A. C. Sampath Ayyangar replied.

JUDGMENT.

Appeal No. 26 of 1918, etc.

PHILLIPS, J.—This suit is based upon three documents, PHILLIPS, J.
Exhibits B, B-1 and B-2, executed in 1895 and 1896 respectively. These documents evidence loans taken by the late Raja of Ramnad (hereinafter called the Raja) from the plaintiff's father and hypothecate certain jewels

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(1) (1924) 48 M.L.J., 432.

(3) (1916) I.L.R., 39 All., 178 (P.C.).

(5) (1913) 41 I.A., 142.

(7) (1891) I.L.R., 15 Mad., 166.

(2) (1912) I.L.R., 37 Mad., 535.

(4) (1909) 10 O.L.J., 420.

(6) (1886) I.L.R., 1 Ch., 117.

(8) (1879) I.L.R., 5 Cal., 215.

(1) (1918) I.L.R., 42 Mad., 581 (P.C.).

(2) (1914) 27 M.L.J., 694.

(4) (1874) 18 Eq., 182.

(6) [1893] 2 Ch., 514.

(3) [1921] 1 Ch., 349.

(5) [1909] 2 Ch., 401.

(7) (1907) I.L.R., 35 Cal., 202 (P.C.).

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which had previously been pledged to the fourth defendant, Annamalai Chetti, certain allowances reserved for the Raja under the trust deed, Exhibit Q executed by him on 12th July 1895 in favour of the third defendant and in one case certain furniture. The Raja had become heavily indebted and consequently executed the deed of trust, Exhibit Q, in order to secure the estate, namely the zamindari of Ramnad, for his minor son, the first defendant. Under this deed he handed over the whole of the zamindari to the third defendant in trust and provided *inter alia* for the payment of his debts then existing and for the payment of certain allowances to himself and to other members of his family. The allowances to the Raja consisted of a monthly payment of Rs. 5,500 and an annual payment of Rs. 10,000 for Dasara and these allowances were to be paid by the trustee out of the rents, income and profits of the estate. After executing this trust deed, the Raja borrowed further sums of money under the plaint documents, Exhibits B series. Subsequently the trustee entered into an arrangement with the plaintiff under Exhibit E on 16th January 1899 and undertook to secure the debts due to the plaintiff, not only those under Exhibits B series, but also those incurred prior to Exhibit Q by a mortgage of the zamindari. This arrangement was approved by the Raja in Exhibit C-1 and accordingly a mortgage deed, Exhibit N was executed on 6th July 1899. The plaintiff brought a suit on Exhibit N in 1900, and in 1902 the first defendant brought a suit to set aside that mortgage and another mortgage executed by the trustee to the Raja. These suits went on appeal to the High Court; (the Judgment is reported in *Subramanian Chettiar v. Rajeswara Dorai*(1), and

finally to the Privy Council *Subramanian Chettiar v. Rajarajeeswara Dorai*(1). It was there held that Exhibit N was not a valid mortgage and was not binding on the estate of the first defendant so far as the debts incurred after the date of the trust deed were concerned. After the dismissal of his suit in the first Court the plaintiff filed the present suit on 15th April 1905 and has obtained a decree. A number of appeals have been filed against that decree, but the main appeal is No. 26 of 1918 filed by the first defendant, and in his appeal memorandum he deals with practically the whole of the case. Various objections to the decree have been put forward and I propose to deal with them in the order in which the learned vakil for the appellant has argued them.

Objection is taken in the first place to the consideration for Exhibits B series. Four items (Rs. 8,000, Rs. 4,000, Rs. 15,000 and Rs. 15,000 respectively), are objected to. These sums formed part of the consideration for the suit documents and apart from the recital in the documents by the Raja that debts did exist, we have the further fact that at the time of the mortgage deed, Exhibit N, he again admitted liability for all these sums. [After finding that first, second and fourth items were proved, his Lordship continued.] The third item of Rs. 15,000 is said to have been a time-barred debt due by the Raja's father. This debt was apparently not paid when the estate was under the management of the Court of Wards after the Raja's father's death; but it does not follow that the amount was not really due. The Raja's agreement to pay the barred debt of his father is not illegal, for the whole estate in his hands would have been liable for his father's debt. There was therefore a moral obligation to pay

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the amount and even if there was no fresh consideration at the time of the acknowledgment of the debt, the debt would not be illegal. It is also very possible that the repayment of this debt formed part of the consideration for advancing the new loan. In these circumstances I must agree with the learned Subordinate Judge that full consideration for Exhibits B series has been proved.

The next objection is that the suit is not maintainable because the plaintiff had a remedy under Exhibit N as well as the remedy under Exhibits B series, and, inasmuch as he filed a suit upon Exhibit N, he must be deemed to have elected his remedy and cannot therefore fall back upon the alternative remedy. The fact that plaintiff prosecuted appeals in the suit based upon Exhibit N, even after he filed his present suit, cannot affect the question in any way; for his claim under Exhibit N having been negatived in the trial Court, he had to pursue his present remedy in order that he might not be met by a plea of bar by limitation. Mr. Srinivasa Ayyangar has not clearly stated the nature of the so-called doctrine of election upon which he relies; for he admits that he does not rely on the doctrine of election under the provisions of the Transfer of Property Act, but cites three cases to prove his proposition, namely, *Sinnan Chetty v. Alagiri Ayyar*(1), *Scarf v. Jardine*(2) and *Taylor v. Hamstead Colliery Company*(3). *Scarf v. Jardine*(2) is a case where the plaintiff was dealing with a partnership after one of the partners had withdrawn but without notice of the withdrawal. The plaintiff had therefore a remedy either against the new firm with which he actually transacted business or against the retiring partner and his firm. He chose to enforce his claim against the new firm and proved his debt against

that firm in bankruptcy. Having done so it was held that he could not also prosecute his claim against the retiring partner. *Sinnan Chetty v. Alagiri Ayyar*(1) is a very similar case. Both these cases can be distinguished on the ground that the plaintiff's two remedies in these suits were based upon one and the same transaction and it was held that having enforced one remedy he could not enforce the second remedy arising out of the same transaction. The present case is very different. Here we have two independent transactions; Exhibits B series and Exhibit N; and the plaintiff's remedy under each of them is distinct. Although he had agreed under Exhibit N to release his charge on the Raja's allowances given him by Exhibits B series, yet it is quite clear from the language of that document that it was not his intention to rescind the earlier transaction altogether, but in consideration of certain promises he accepted a new security. That subsequent transaction having been found to be invalid, he was thrown back on his original remedy, and that he is entitled to do so, there is distinct authority in *Har Chandi Lal v. Sheoraj Singh*(2) and also in *Noble v. Ward*(3). In the former case the Privy Council decided that even when the first mortgage had been actually surrendered and a fresh mortgage executed in its place and the fresh mortgage had been partially enforced, yet when a portion of the later mortgage was found to be invalid, the mortgagee was held to be entitled to fall back upon the earlier mortgage which he had actually surrendered. A similar principle is to be found in *Mussumut Gulab Koer v. Badsha Bahadur*(4) and *Payana Reena Saminathan v. Pana Lana Palaniappa*(5). In the present case therefore the

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(1) (1923) I.L.R., 46 Mad., 852.

(2) (1916) I.L.R., 39 All., 178.

(3) (1886) L.R., 1 Exh., 117.

(4) (1909) 10 C.L.J., 420.

(5) (1913) 41 I.A., 142.

(1) (1923) I.L.R., 46 Mad., 852.

(2) (1882) 7 A.C., 345.

(3) [1904] 1 K.B., 888.

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plaintiff having failed to enforce his remedy under Exhibit N, as that document was held to be invalid, is certainly entitled to fall back upon the original transaction, Exhibits B series. Appellant relies on *Morris v. Baron & Co.*(1) but in that case *Noble v. Ward*(2) was not dissented from, but distinguished on the ground that it was a case of intention to vary and not to rescind a contract, whereas a definite intention to rescind was found in the former case. Here we have merely a variation in the security and the release of one security on condition that another security should be substituted cannot be held to evidence an intention to rescind the original contract, which was a contract to pay back certain money, but only an intention to vary the terms. *Taylor v. Hamstead Colliery Co.*(3) is not at all relevant here, for it relates to the option granted under the provisions of a special statute, namely, the Workmen's Compensation Act, and can have nothing to do with any general principle of election. Adopting therefore the principle laid down in *Har Chandi Lal v. Sheoraj Singh*(4), which confirms prior rulings in this Court such as *Ramunni v. Kerala Varma Valia Raja* (5), it must be held that the plaintiff in the present suit can maintain his claim under Exhibits B series.

The next argument relates to the validity of the charge created by Exhibits B series on the allowance payable to the Raja under Exhibit Q, and it is contended (1) that the allowance being a maintenance allowance cannot be alienated and (2) that the charge upon this allowance was specifically released by the provisions of Exhibit N. On the second point it is argued that Exhibit N was not in itself void but was

only voidable, but inasmuch as it was held in the prior litigation that the trustee, third defendant, was not competent to mortgage the estate as security for debts incurred by the Raja after the settlement deed, Exhibit Q, and also that if Exhibit N were treated as a compromise it was invalid for want of sanction, that portion of Exhibit N, therefore, which related to the plaint debts was void as being beyond the powers of the trustee. As to whether the former contract was rescinded by Exhibit N, I have discussed above, and found that there was no rescission of the original contract. Because Exhibit N was incapable of being enforced, the condition expressed in it that the Raja released his right to his allowance must disappear with the rest of the contract. As regards the first point it is contended that the allowance of Rs. 5,500 per month which is provided for in Exhibit Q is a mere maintenance allowance and as such cannot be alienated because it comes within the provisions of section 6 (d) of the Transfer of Property Act, being an interest in property restricted in its enjoyment to the owner personally; and reliance is placed on *Subraya v. Krishna*(1). In that case it was observed that every case must be determined on its own facts and it was held that on the facts of that particular case a certain allowance for maintenance allotted to a widow was a right within section 6 (d). On the other hand it was held by a Full Bench in *Raja of Kalahasti v. Venkatappa Nayanam Bahadur*(2) that, where an allowance had been decreed or settled by a compromise, it was not a right coming within section 6 (d) of the Transfer of Property Act, but was alienable. In the present case it is doubtful whether the allowance can in any way be termed a maintenance allowance. The Raja, prior to the

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(1) [1918] A.C., 1.

(2) (1866) L.R., 1 Exch., 117.

(3) [1904] 1 K.B., 938.

(4) (1916) I.L.R., 39 All., 178.

(5) (1891) I.L.R., 15 Mad., 166.

(1) (1923) I.L.R., 46 Mad., 659 (F.B.)

(2) (1928) 27 L.W., 544.

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Impartible Estates Act, was the absolute owner of the estate and, when he made the alienation under Exhibit Q and reserved an allowance of Rs. 5,500 per mensem for himself, this allowance was a reservation of his own property. The fact that it is not mentioned in clause 5 of Exhibit Q styled "Reservation of Devasthanams, etc.," does not take away from it its character of a reservation. The income of the estate belonged to the settlor and when he executed the trust deed so much of the income as amounted to Rs. 5,500 per mensem was distinctly reserved for his own use in addition to a sum of Rs. 10,000 per annum on account of Dasara. There can therefore be no objection to his alienation of this allowance which is in its nature an annuity reserved out of the settlor's own estate.

As mentioned, Exhibits B series hypothecated certain valuable jewels which had been pledged with the fourth defendant, and it is argued that after executing Exhibit Q the Raja had no power to hypothecate these jewels, as he had handed them over to the trustee under Exhibit Q. The actual possession of the jewels was admittedly with the fourth defendant and the Raja possessed only the equity of redemption. The property therefore did not actually pass to the trustee and the appellant is constrained to rely on the language of paragraph 5 of Exhibit Q in support of his case. The contention is that this equity of redemption comes with the words "all securities for such claims, demands," etc., and inasmuch as the Raja had a right to bring a suit to recover these jewels that right must be deemed to be a claim or demand which was assigned by him to the trustee. This is straining the language of the clause very considerably, for what the Raja possessed was the right to pay a certain sum of money and recover possession of the jewels. Unless such

possession was refused the Raja had no right of suit and consequently it cannot be said that the equity of redemption of these jewels passed to the trustee under Exhibit Q. That being so, he was within his rights in hypothecating them to the plaintiff.

Having found on this point in favour of the plaintiff, the only question that remains for decision is the nature of the remedy which should be allowed. The Subordinate Judge has decreed the plaint amount as against the assets, if any, of the late Raja in the hands of defendants 1 and 2. Secondly he has directed the first defendant to redeem the jewels pledged to the fourth defendant and declared that in default of his doing so within six months the plaintiff is entitled to have the first defendant's estate sold for his debt. A further relief is given against a large number of defendants in respect of the late Raja's allowance which had been drawn by them from Court towards the debts due to them. There is also another provision that if the first defendant does not redeem the jewels the plaintiff should deposit the pledge amount and the fourth defendant should produce the jewels. Since this appeal was filed the jewels have been sold and this portion of the decree cannot be enforced, and the plaintiff does not seriously press for the establishment of his right to redeem the fourth defendant's pledge although it would appear that the fourth defendant has acted somewhat rashly in selling these jewels without the leave of the Court, while paragraph 5 of the lower Court's decree was still in force. The main contention of the first defendant is that the decree making his zamindari liable for the plaintiff's debt is wrong and the plaintiff is not entitled to any charge against the estate. In order to decide this point it is necessary to consider the facts which induced the Subordinate Judge to give such a decree.

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The jewels were admittedly pledged to the fourth defendant and subsequently hypothecated to the plaintiff in 1895 and 1896. The debt due to the fourth defendant on the pledge of the jewels is one specified in Exhibit Q as being payable by the trustee out of the incomes and profits of the premises thereby assured. The Raja could therefore have enforced the payment of the fourth defendant's debt by the trustee. The Raja hypothecated the jewels under Exhibits B-1 and B-2. He recited in the documents that the trustees were bound to redeem the hypothecated jewels and return them to him. This recital is to be found in both the Exhibits B-1 and B-2 and is in effect a representation that the jewels were free from encumbrances when they were hypothecated to the plaintiff. Subsequently the fourth defendant obtained a mortgage of the estate as further security for his loan, Exhibit III, dated 28th September 1899. The Subordinate Judge has based his order on the principle in *Ascherson v. Tredgar Dry Dock and Wharf Co., Ltd.*(1) finding that the plaintiff's position is analogous to that of a surety who has become liable for his principal's debt and can enforce all the claims that the principal has against the creditor. As the Raja had a right to enforce the payment of this liability, namely, the loan on pledged jewels, against the trustee and the estate in his hands, so the plaintiff, as a person who is liable to pay the pledge debt before he can enforce his charge on the jewels themselves is subrogated to the Raja's right to enforce payment of that debt against the estate in first defendant's hands. It is well-settled law that a surety is entitled to be indemnified against liability as well as against loss incurred

(1) [1909] 2 Ch., 401.

on behalf of his principal. *Lacey v. Hill*(1) *Ascherson v. Tredgar Dry Dock and Wharf Co., Ltd.*(2), and *Wolmershausen v. Gullick*(3). In order to apply the same principle here it is necessary to hold that the plaintiff's position is analogous to that of a surety; and the appellant relies on a dictum in *Muhammad Mahmud v. Kalyan Das*(4), which contradicts this proposition in terms, for it is stated at page 193 that a puisne encumbrancer is not in a position analogous to a surety, but the position that we have in this case was not under consideration by the learned Judge and the observation is couched in general terms. Admittedly, if the plaintiff redeemed the pledge of the jewels, he would step into the shoes of the fourth defendant and could enforce the fourth defendant's rights against the estate, but until he does exercise his right of redemption it is difficult to see how he can be deemed to be subrogated to the fourth defendant's rights, as suggested by plaintiff's vakil but the case put forward by the plaintiff that he is entitled to subrogation not to the prior encumbrancer, but to the Raja is a more plausible proposition. The Raja had, in effect, represented to the plaintiff that the jewels were unencumbered. In order to make that representation true the Raja had a right to compel the trustee to pay the fourth defendant's debt out of the estate. Can the plaintiff not be heard to say that inasmuch as he could enforce his claim against the Raja personally he must be able to enforce any right which the Raja had against the estate? None of the reported cases relied on is quite analogous to the present one, but they are all somewhat similar, and must be examined in order to see if the principles contained therein can be extended

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(1) (1874) L.R., 18 Eq., 182.
(3) [1893] 2 Ch., 514.

(2) [1909] 2 Ch., 401.
(4) (1896) I.L.R., 18 All., 189.

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(1) [1909] 2 Ch., 401.

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(1) (1874) L.R., 18 Eq., 182.
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to the facts in this case. In *Ascherson v. Tredegar Dry Dock and Wharf Co., Ltd.*(1), a certain company had given a guarantee to a bank, and one of the directors of the company who joined in the guarantee died, and upon his death the total liability on the guarantee was ascertained by the bank as on that date and the deceased's estate was held liable to make good the amount jointly with the other directors of the company. The executors accordingly sued to enforce the guarantee given to the bank by the other directors, and the claim was allowed because it was a claim which could have been enforced by the bank itself and the executors of the deceased were given the advantage of that security. An assignee of the right to proceed against sureties has been held entitled to sue on such assignment, even before he has been made to pay any amount, the right of suit arising when he becomes liable to such payment; *British Union and National Insurance Co. v. Rawson*(2), and again *In re Raybould; Raybould v. Turner* (3), where the trustee of an estate had been held liable for damages caused to an adjoining owner, that adjoining owner was allowed to recover the amount of his damages not from the trustee but from the estate in the hands of the trustee on the ground that the trustee was entitled to be indemnified out of the assets of the estate. These rights are all recognized as equitable rights and it cannot be gainsaid that the plaintiff's rights in the present case are somewhat analogous to the rights considered therein, although, possibly, it may be necessary to extend the principle somewhat to make it applicable here. As against the Raja the plaintiff was entitled to have his debt secured on jewels unencumbered and the Raja was entitled to compel the

(1) [1909] 2 Ch., 401.

(2) [1916] 2 Ch., 476.

(3) [1900] 1 Ch., 199.

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trustee to redeem the encumbrances upon the jewels out of the income of the trust property in the estate. It is therefore equitable that the plaintiff should be allowed to enforce the rights of his debtor in order to secure his money. It is true that the plaintiff is not himself liable to pay any debt, but he has to redeem the pledge debt before he can enforce his hypothecation and in that sense there is a liability upon him which has been imposed by the omission of the Raja to enforce the payment of this debt by the trustee. I do not therefore, think that it would be straining the principle of cases I have cited above to apply it to the plaintiff here. The same principle has been adopted in this Presidency in *Sanka Krishnamurti v. The Bank of Burma*(1), where a creditor was allowed to proceed directly against the assets of a minor which would have been available in the guardian's hands for the payment of the suit debt. I must, therefore, agree in the conclusion arrived at by the learned Sub-Judge and find that plaintiff is entitled to proceed against the estate of his mortgagor in the hands of the trustee, and consequently against that estate in first defendant's hands, he having obtained possession from the trustee.

The objection taken that the suit is barred by limitation as having been brought more than six years from the date of the suit documents is met by the plea that the Raja acknowledged the suit debts within the periods of limitation. In Exhibit C-1, dated 15th April 1899, just six years before suit, the Raja approved of what was done "in settlement of the amounts due by me to Devakottah Ramanadham Chettiyar in the compromise of suit No. 60 before the Madura Sub-Court (East)." The contention that the word "settlement"

(1) (1911) I.L.R., 35 Mad., 692.

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means payment cannot be accepted for a moment. The circumstances of the case as disclosed by the evidence show that there was no payment and that the word "settlement" merely means an arrangement and therefore this document is a clear acknowledgment of the debts now sued on. This being just six years before suit, it is unnecessary to consider the other documents, Exhibits Y and Y-1, which are also relied on by the plaintiff as acknowledgments. The suit is clearly not barred by limitation. On all these points, therefore, the appeal fails and must be dismissed with costs.

Appeal No. 79 of 1918.

In this appeal the appellants are persons who attached the allowances payable to the late Raja and against whom a decree for refund to the plaintiff has been passed. The contention on their behalf is that the Raja was not in a position to transfer a part only of his allowance. The transfer of a part of a debt was not recognized in English Common Law, but the assignment of a part of a debt was always held to be good in equity and was deemed to pass the property in that portion of the debt. In enforcing such claim it would be necessary to implead the owner of the other portion of the debt, but apart from that there is no objection in equity to enforcing a claim for part-payment of a debt. (*Vide In re Steel Wing Company*(1). It has also been held that the partial transfer of a debt is valid in Appeal No. 53, etc., of 1919 in this Court, and this objection must therefore be disallowed although there is a remark in *Doraiswami Mudaliyar v. Doraiswami Ayyangar*(2) which throws some doubt upon this conclusion.

(1) [1921] 1 Ch., 349.

(2) (1924) 45 M.L.J., 432 at 439.

A further contention raised by these appellants, who support the appellant in Appeal No. 26 of 1918 in his main contentions is that, if his contention that the estate is not liable for the suit debt is upheld, the burden cast upon them will be very much increased if the charge upon the allowances alone is upheld. These appellants and also the appellants in appeal Nos. 4, 6, 12, 13, 42 and 57 of 1918 who stand in the same position are not made parties to his appeal by the appellant in Appeal No. 26 of 1918, and it is contended that unless that appeal is allowed *in toto* in which case it would not affect the interests of these other appellants, relief cannot be given in respect only of the charge against the Ramnad estate. The only answer that the appellant in Appeal No. 26 can give to this contention is that those other appellants must pay what they have drawn and therefore cannot be affected in any way by the denial of the plaintiff's claim against the estate. This is true to a certain extent, but the appellants would be entitled to contribution from the other properties given as security for the plaintiff's debt and to that extent they would be injured. That being so, it would be inequitable to grant such relief to the appellant in Appeal No. 26 as would damnify persons who were not made parties to his appeal and this is a further ground for rejecting first defendant's contention that his estate cannot be made liable for the suit debts.

The appellant in Appeal No. 57 of 1918 is a minor under the Court of Wards and he urges as a further ground of appeal that no notice was given to him as provided in section 49 (1) of the Court of Wards Act. This suit has, however, been brought under Order XXI, rule 3, to set aside the order of Court dismissing the plaintiff's claim petition and it must be deemed to be a continuation of those proceedings and therefore no fresh

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notice to the appellant is necessary. The argument that a suit may be a continuation of the prior proceedings when the claim is allowed but is not such continuation when the claim is dismissed, is based on *no recognized* principle and appears to be untenable. In fact, in *Phulkumari v. Ghanshyam Misra*(1), for the purpose of court-fee, a similar suit was deemed to be a continuation of the prior proceedings when the suit was brought after the claim petition had been dismissed.

The first defendant has raised a further point with regard to the amount declared in the decree to be due by him to the fourth defendant. Apparently a statement was filed in Court by the seventy-fifth defendant, representative of the fourth defendant, on 28th July 1917, whereas the decree is dated 12th September 1917, and the first defendant does not appear to have taken any objection to the same. It is rather late now to object to the further statement put in in pursuance of the earlier one by the plaintiff and fourth defendant's representative jointly, and it is in accordance with the further statement that the lower Court has made its calculations. This contention must therefore fail.

All these appeals are therefore dismissed with costs.

Appeal No. 106 of 1918 and Memorandum of objections.

There remains Appeal No. 106 of 1918 and this relates to the interest disallowed by the lower Court. The Subordinate Judge has disallowed interest on the plaint amount from the date of the plaint to the date of the decree and has done this because he holds that the plaintiff is responsible for the very long delay that has taken place in the disposal of this suit. In this respect we are not prepared to interfere with his discretion. He has, however, allowed only six per cent interest from

the date of the decree to the date of payment, but as the contract was to pay interest at the rate of 12 per cent we think in that respect he was wrong and we therefore order that, so far as the first defendant and the estate are concerned, interest must be allowed at 12 per cent from the date of the lower Court's decree.

With this modification the appeal is dismissed with costs.

The memorandum of objections is dismissed with costs. In the appeal the appellant will pay the costs of the respondents except the first defendant and will get proportionate costs as against the first defendant on the amount allowed.

Time for payment of the decree amount, six months from this date.

In Appeal No. 26 of 1918 we certify costs for two counsel.

In Appeal No. 79 of 1918 there will be no order as to costs as they are said to have been paid already by the appellant.

ODGERS, J.—The main appeal argued was appeal No. 26 of 1918 by the first defendant. The suit which was originally one brought as long ago as 1905 was by M. R. M. A. Subramaniam Chetty, the adopted son of Muthiah Chetty alias Ramanadhan Chetty, for moneys borrowed by the late Raja of Ramnad who is the father of defendants 1 and 2. The plaint as originally framed asked that these defendants as representing the late Raja should be ordered to pay the sum of Rs. 3,45,000 odd with subsequent interest out of the assets of the late Raja and that the properties in schedule A (jewels) should be produced by the fourth defendant, the pledgee, and that these and the properties in Schedule B (furniture) be ordered to be sold and the sale-proceeds

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credited to the amount due to the plaintiff. It was also prayed that defendants 3 and 5 to 51 be ordered to produce the sums taken by them from Court in order to be paid to the plaintiff on account of the amounts due to him. By an amendment made in August 1917 a prayer was added in the alternative that the first defendant as beneficiary under the settlement or deed of trust be ordered to pay to the fourth defendant's legal representatives the amount now due on account of the debt of Rs. 60,000 and interest thereon from out of the settled properties or that on payment by the plaintiff to the fourth defendant's legal representatives the plaintiff be declared to be entitled to realize the said amount from the settled properties in default of the first defendant as beneficiary under the settlement making the payment within such time as the Court may fix.

The other connected appeals are principally by the creditors who have been ordered to restore the sums drawn by them from Court towards satisfaction of decree debts due to them.

The Subordinate Judge found on all points substantially in favour of the plaintiff, though the latter has preferred appeal No. 106 which was argued solely on a question of interest.

The facts leading up to the questions of law argued in the main appeal have been set out more than once, for instance, in the judgment of this Court in *Subramanian. Chettiar v. Rajeswara Dorai*(1), which went to the Privy Council in *Subramanian Chettiar v. Raja Rajeswara Dorai*(2). It is therefore sufficient for the present purpose to say that the first document

with which we are concerned in this case, is Exhibit Q, dated 12th July 1895, which is called the settlement or deed of trust, whereby the late Raja of Ramnad being desirous of settling his properties for the benefit of his heir-apparent and also to provide for his own maintenance and that of the other members of the family, appointed a trustee, Rao Bahadur Venkatarangier, to whom the settlor conveyed the entirety of his estate or zamindari together with outstanding debts, arrears of rent, etc., due, owing or payable to the settlor and all rights to prosecute any suit. The settlor however reserved the devasthanams, chatrams and kattalais situate within his zamindari and rights to prosecute suits, etc., in respect of the same. He also reserved the right of residence for himself and members of the family in the estate palaces and directed the trustee to pay to the settlor at the end of a year the sum of Rs. 50,000 and after the expiry of two years a further like sum and annually Rs. 10,000 for the Dasara in addition to the monthly sum of Rs. 5,500 which appears in the second schedule to the document. The trustee was to make the several payments mentioned in the document "as and when the same shall be required." The plaintiff's father's debt of Rs. 1,30,000 appears in the third schedule to the document.

On 21st November 1895, 7th November 1896, and 24th November 1896 the late Raja executed three bonds Exhibits B, B(1) and B(2) in favour of the plaintiff's father. The first of these is secured on jewels worth Rs. 2,09,000 odd which the borrower had pledged with S. A. Annamalai Chetty (fourth defendant) of Kanadukathan for Rs. 60,000. The document contains a list of these jewels and their value and says they were delivered on the 21st April 1893 to A. L. A. R. Ramaswami Chetty of Devakottah and also recites that

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(1) (1909) I.L.R., 32 Mad., 490.

(2) (1915) I.L.R., 39 Mad., 115 (P.C.).

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the jewels have been pledged to S. A. Annamalai Chetty of Kanadukathan "with the knowledge of" or "through" the abovementioned A. L. A. R. Ramaswami Chetty. The second bond Exhibit B(I) recites Exhibit B "executed to you by me on the pledge of my jewels which the trustees are bound to redeem on payment of money and return to me." This is therefore a second mortgage secured on the same jewels and also on the allowance, i.e., Rs 5,500 a month provided in the trust deed. The third bond for Rs. 35,000 is to be repaid in monthly instalments of Rs. 1,350 from the allowance of the late Raja. The suit is brought on these bonds. The next document is Exhibit E, dated 16th January 1899, between the trustee Venkata Rangier and the plaintiff. It recites Exhibit Q, the settlement, and also that the late Raja borrowed subsequent loans from the plaintiff's father and it further recites that the plaintiff's father had agreed to relinquish and transfer in favour of the trustee the securities held by the former for the above said loans. It was just about this time that negotiations for what has been called the English loan were proceeding and it was important that the estate on the security of which the English loan was to be advanced should be as unencumbered as possible. The trustee, therefore agrees in this Exhibit E to pay Rs. 1,79,000 odd which is the amount due to the Plaintiff up to the 13th January 1899, the balance of Rs. 2,75,000 odd being due for subsequently contracted loans. Various payments are agreed to be made by the trustee in case the English loan is obtained and the trustee further agrees that as soon as it is obtained he will effect a mortgage of all the immovable properties vested in him by the settlement deed and that the mortgage shall contain certain covenants, *inter alia* the payment of instalments of Rs. 50,000 every year.

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On such payments being made the Chetty was to relinquish his security on the Raja's allowance and withdraw the suit that had been instituted, viz., suit No. 50 of 1897. On the trustee making a further payment of Rs. 1,25,000 the Chetty was to release the late Raja from all obligations and relinquish and transfer to the trustee all the other securities given to the Chetty by the late Raja. The clause concludes: "I agree to sell the jewels only after giving intimation to you." In pursuance of the aforesaid, on the 6th July 1899, the trustee purported to effect a mortgage in favour of the plaintiff for Rs. 4,73,000 odd. This document contains a promise to pay the sum of Rs. 1,81,000 odd out of the total amount due, on demand with interest at 12 per cent from the 3rd July 1899, to date of payment. The important clause is clause 12 which provides that "except as hereunder provided the Chetty's existing rights shall not be affected" but that from the date of the document his lien or charge on the Raja's allowance shall cease and that on payment of the abovementioned sum of Rs. 1,81,000 odd and Rs. 1,25,000 (which was a subsequent debt) all debts other than the securities created by this document (Exhibit N) shall cease. The only other document that is necessary at present to refer to is Exhibit P, dated 13th July 1899 which is a small loan of Rs. 30,000 secured on mortgage of paddy. The mortgage Exhibit N was held by this Court and subsequently by the Privy Council to be invalid.

The following contentions were raised in this appeal:—

(a) consideration under Exhibit B series, of which four items are impugned namely Rs. 8,000, Rs. 4,000, Rs. 15,000, and Rs. 15,000.

[After finding that items 1, 2 and 4 of the consideration were proved, His Lordship continued—]

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As to the third sum, also Rs. 15,000 there is perhaps a little more difficulty. The Raja in his deposition says that the plaintiff put it to him that he should discharge this sum as a moral debt, since it was due by his father. (Page 710 of the 'Blue Book'; it appears in the plaintiff's accounts, Exhibit H.) The contention is that the present first defendant cannot be liable for a barred debt of his father included as it is in Exhibit B (1). But the answer to that seems to be as follows: This is an impartible zamindari and prior to the Impartible Estates Act, the whole estate was liable for the father's debt in the hands of his successor who was bound to pay from the assets of the father in his hands. The argument on the other side seems to rest on a misconception of the effect of section 25 of the Contract Act that the debt must be that of the promisor himself. There is also the fact that payment of a barred debt may be consideration for fresh transactions and very likely formed an item of consideration in the present instance. The Subordinate Judge disallowed this objection and observed that there is absolutely no evidence on the defendants' side, defendants 1 to 3 having withheld the accounts of the late Raja. In my opinion therefore all these sums must be allowed.

The second point argued is that the suit is not maintainable. The contention is that as the mortgage Exhibit N had been held as stated to be void the plaintiff has no right to revert to his original cause of action on the bonds, Exhibit B series; it is said that he might elect the remedy which he will pursue and he having elected to proceed on the mortgage, Exhibit N, he cannot now turn round and maintain this suit on his original cause of action. The contention on behalf of the appellant is definitely put on the doctrine of election; it seems to me very doubtful if we have here

really a question of election as it is understood in equity. As pointed out in Halsbury, Volume 13, page 127, note (a), questions of election proper arise where the person electing has to choose between two things. No doubt the plaintiff assumed that Exhibit N was a good and valid document in his favour. He brought his suit on that. The document was held invalid and he then proceeds with his suit on the bonds. This seems to me an entirely different proposition from the doctrine of election either as set forth in the Transfer of Property Act or that which has prevailed in English Courts of Equity mostly in connexion with wills. The Appellant relies on the case *Sinnan Uhetty v. Alagiri Aiyar*(1), which decided that the plaintiff could after judgment elect to look only to his chance of obtaining satisfaction by execution or by proof and must give up his claim to the property. In the case cited, the plaintiff had elected to give up his rights to a certain ring when he had proved against the defendant in insolvency on the ground of the balance between the two debts, i.e., on the amount owing to the plaintiff by the defendant plus the value of the ring detained by the defendant. This refers to a doctrine peculiar to Bankruptcy law and appears to me to have no application to the present case. Reliance is also placed on *Scarf v. Jardine*(2), where the plaintiff was held to have disavowed his action on estoppel against a retired partner by suing the new firm with which he had actually dealt. The goods in question were supplied by the plaintiff in ignorance of the change in the partnership and the new firm had become insolvent. The firm had been dissolved by the retirement of one partner and a new partnership had been constituted

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(1) (1928) I.L.R., 46 Mad., 852.

(2) (1882) 7 A.C., 345.

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with the second of the old partners and a third person. Lord SELBORNE said (page 350):—

“Put it as I can. I am unable to understand how there could have been a joint liability of the three”;

Lord BRAMWELL at page 365 puts it on the ground that otherwise two actions for the same debt would lie against the partner Rogers who was a partner in both the firms. This appears to me to turn on the special law applicable to partnership and the choice to a creditor who has no notice of dissolution, to sue either the old or new firm. It seems to me that it is not a case of election as understood in equity at all. There are, moreover, several cases on the other side which seems to me to decide conclusively in favour of the respondent. *Har Chandi Lal v. Sheoraj Singh*(1), is a very strong case in the Privy Council. There was a mortgage of 1876. The mortgagor died leaving a widow and a separated nephew who was the owner of the one-sixth of the mauza that had been mortgaged in 1876. In 1879 and 1891 the divided nephew mortgaged his share to the same mortgagee and in 1887 the widow and nephew effected two mortgages to the same mortgagee of the entire mauza. Upon this, the mortgagee delivered up the mortgage deed of 1876 to the nephew. In 1896 the mortgagee brought a suit on the mortgages of 1887 and obtained a decree against the entire mauza. On appeal by the widow it was held by the High Court that the deeds of 1887 were not binding on her. The mortgagee appealed to the Privy Council during which the widow died. It was held that the intention of the mortgagee after the two deeds of 1887 was to accept a new security extending to the whole mauza in lieu of the security of 1876. The intention, however, of the

(1) (1916) I.L.R., 39 All., 178.

mortgagee was entirely frustrated by the fact that the two deeds were held not binding on the widow and the Privy Council said:

“It does not appear to their Lordships to be consistent with equity or good conscience that the first three defendants, having successfully maintained that the transaction embodied in the two deeds of 1887 was not binding on Mussammat Nandan and consequently did not bind them as heirs of Jai Chand should now claim the benefit of such transaction as a release of the mortgage of the 13th November 1876.”

It seems to me that the defendants here are in exactly the same position. They have had the benefit of the plaintiff's money. Plaintiffs have failed to recover in their mortgage suit on account of certain considerations for which they were in no way responsible and it seems to me that it would be equally against equity and good conscience if defendants were allowed to say now that the plaintiff cannot recover on foot of these bonds. The remedy now sought by the plaintiff really arises because the more recent cause of action, namely, that on Exhibit N has been declared void. That Exhibit N was held invalid for want of sanction is the alternative case stated by their Lordships in *Subramanian Chettiar v. Raja Rajeswara Dorai*(1), when they say that

“If on other grounds the deed of compromise (here marked as Exhibit N) could be supported, it is invalid in not complying with the condition imposed by section 462 of the Civil Procedure Code applicable when the compromise was made. .

. . In the present case the leave of the Court was not obtained, and in the absence of such leave the compromise cannot be supported.”

Reference may be made to another case in the Privy Council, *Ganesh Row v. Tuljaram Row*(2), where it was held a certain agreement and satisfaction

(1) (1915) I.L.R., 39 Mad., 115.

(2) (1913) I.L.R., 36 Mad., 295 (P.C.).

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entered thereunder were not binding on the plaintiff who was remitted to his original rights under the decrees in a partition suit. Other cases on the point were cited, namely, *Mussumut Gula's Koer v. Badsha Bahadur*(1), where Mr. Justice MUKERJEE held a party is not always bound to make his election when two remedies are open to him. It depends on whether the remedies are inconsistent, election being the choice between the two or more co-existing and inconsistent remedies and in *Payana Reena Saminathan v. Pana Lana Palaniappa*(2), an appeal from the Supreme Court of Ceylon, it was said that even the same transaction may furnish different causes of action and a second action can be maintained. In that case certain promissory notes were sued on and the suit failed owing to some material alteration in the documents. It was held that a subsequent suit could be maintained to recover the consideration for the notes. So also in *Raja Rajeswara Sethupathi v. Kuppusami Ayyar*(3), it was held that if a compromise is set aside, the parties are remitted to their original rights as they stood before the compromise was effected. I therefore think the point fails.

The third point argued for the appellant is on the subject of the charge on the allowances. It is first said that the mortgage of maintenance allowance is illegal. We have already seen that an allowance was payable to the Raja under the terms of Exhibit Q. For this reliance is placed on *Subraya v. Krishna*(4), which is a Full Bench decision of this Court holding that the personal right of a widow to future maintenance is purely personal and within section 6 of the Transfer of Property Act. As against this there is the consideration that the Raja was, before the Impartible Estates Act

(1) (1909) 10 C.L.J., 420.

(3) (1921) 41 M.L.J., 474.

(2) (1913) 41 I.A., 142.

(4) (1913) I.L.R., 46 Mad., 659.

the full owner of the property over which he had full powers of disposition and he had therefore full power to make a reservation out of his own property in favour of himself. The consideration for these payments is set out in paragraph 23 (11) of Exhibit Q and it is impossible to say that an allowance of this kind or magnitude is on the same footing as a mere maintenance allowance for a widow. There is also the consideration that the allowance is a charge, for, the paragraph 23 whereby the allowances were made payable contains the words "by, with and out of the rents, income and profits of the premises hereby assured" cf. per SESHAGIRI AYYAR, J., in *Raja of Ramnad v. Sundara Pandiyaswami Thevar*(1) approved by the Privy Council in *Rajah of Ramnad v. Sundara Pandiyaswami Thevar*(2) holding that the payment of an allowance was a charge. There is also a judgment of three learned Judges of this Court in *Raja of Kalahasti v. Venkatappa Nayanam Bahadur*(3) of which we were two, which seems to me to conclude the matter as far as we are concerned. Mr. S. Srinivasa Ayyangar tried to distinguish that decision from the present case by saying that here the allowance was not fixed by a decree. I am unable to see any valid distinction in law between an allowance which is fixed by covenant and becomes a charge on the estate and such an allowance which has been confirmed by a decree. It is also said that here there was a partial assignment which is invalid and reliance was placed on the decision of RAMESAM, J., in *Doraiswami Mudaliar v. Doraiswami Aiyangar*(4). The ground for saying that it is a partial assignment is that in Exhibit B only Rs. 1,350 was assigned. With respect to the learned Judge of this Court who decided otherwise, as far as we are concerned,

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(1) (1914) 27 M.L.J., 694.

(3) (1928) 27 L.W., 544.

(2) (1918) I.L.R., 42 Mad., 581.

(4) (1924) 48 M.L.J., 432.

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we are concluded by our judgment in the Full Bench case already referred to.

A more serious contention was raised that from the date of Exhibit N the lien on the allowance ceased and Mr. Srinivasa Ayyangar's contention was that the plaintiff's rights have gone even if the document be unenforceable provided the covenant to release is clear and unequivocal. Reference was made to the case of *Morris v. Baron & Co.*(1). That was a case under the Statute of Frauds in which it was held that although one part of the transaction was invalidated by the statute, the latter did not affect the other part. The case, I think, clearly proceeded on the construction of the Statute of Frauds. See Lord DUNEDIN, page 27, "If then the contract exists . . . as well as express words," cf. also Lord ATKINSON, page 35. Lord FINLAY stated the question as being whether the respondents could make a valid claim to have goods delivered under their option while refusing to observe their part of the bargain.

Noble v. Ward(2) and *Noble v. Ward*(3) were also referred to and is fully discussed in the opinion of the Lords; Lord FINLAY said it does not lay down as a matter of law that the parties cannot agree to rescind a written agreement which the law requires to be in writing by the substitution for it of another agreement not in writing and therefore unenforceable and again he said (page 13) "all that . . . existed." So Lord HALDANE (page 18). It was not decided by *Noble v. Ward*(2) that the Statute of Frauds prevents a parol agreement if it plainly purports to do so from rescinding in its entirety a previous written contract. That case *Noble v. Ward*(3) again turned on the requirements of

the Statute of Frauds. It is difficult to see here that any clear and unequivocal release in the sense that plaintiff must be taken to have confined his remedy entirely to Exhibit N and to have abandoned any other rights he might have, should Exhibit N prove abortive—we come back again to the point of election previously considered. It is highly improbable that this should have been plaintiff's intention and it is impossible to believe that it was.

A much more serious question arises on the paragraphs of the amended plaint already referred to above as to whether the plaintiff is bound to redeem the jewels and hand them over in payment of the plaintiff's debt. The plaintiff in fact wants to be subrogated to the rights of the trustee as regards the jewels and the Subordinate Judge in paragraphs 58, 60 and 61 of his judgment has held he is so entitled. Reference was made to Exhibit III which was a bond of the 28th September 1899 by the trustee to Annamalai Chetty binding himself to pay the sum of Rs. 1,15,000 which is the sum of Rs. 60,000 *plus* interest. There is certainly no reference to the jewels in that document and it is impossible to my mind to say that there is reference to them by implication in the words "undermentioned Ramnad Samasthanam, etc." The argument for the appellant turns largely on the reference by the Subordinate Judge in his judgment to the question of suretyship. The Judge observes in paragraph 61 of his judgment "The creditor is the fourth defendant and the plaintiff stands in the place of a surety." *Mahammad Mahmud Ali v. Kalyan Das*(1) was quoted for the proposition that the position of a puisne encumbrancer who redeems a prior mortgage is not analogous to that of a surety who pays

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(1) [1918] A.C. 1.

(2) (1866) L.R., 1 Exch., 117.

(3) (1867) L.R., 2 Exch., 135.

(1) (1895) I.L.R., 18 All., 189.

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a debt due by his principal and acquires the benefit of the security held by the creditor against the principal. Reference was also made to *Ascherson v. Tredegar Dry Dock and Wharf Co., Ltd.*(1), which held that a surety can in equity sue to compel the principal debtor to relieve him of his liability by paying off the debt. It was also said that the Raja had no right to hypothecate the jewels because they passed under the deed of settlement. Beyond the words referred to already in Exhibit III the only words in Exhibit Q which are relied on for this purpose are "the rights to prosecute suits or other proceedings." It is said that the jewels must be included in these, because it is possible that the Raja might have a cause of action against one or more of the pledgees. It seems to me a most far-fetched and preposterous suggestion that in a document which has been obviously drafted by solicitors and is intended to provide for every kind of contingency one should have to seek for a conveyance of jewels in general words of this description which to my mind cannot refer to the jewels at all. It seems to me that the language of the document is perfectly clear against the appellant and secondly the conduct of the parties is just as clear because in the judgment of the Subordinate Court of Madura in U.S. No. 72 of 1900 (Exhibit AA) which was brought by a creditor against the late Raja and others the learned Subordinate Judge says:—

"The first defendant as plaintiff's third witness says, 'the jewels were handed to the third defendant by the late A. L. A. R. Ramaswamy Chetty. I did not include the jewels as one of the properties I intended to pass to my son. The jewels were to be given to me. That is the duty of the Diwan Trustee by discharging the debt of the third defendant and redeeming the jewels. I believe that up to this moment the

jewels are with Annamalai Chettiar (third defendant.) They have not been delivered to me'".

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There it seems that the Raja's title to the jewels is recognized. This judgment was confirmed by the High Court in Exhibit AA-2 where the learned Judges held that the plaintiff is entitled to enforce his hypothecation of the jewels which are the subject of a prior pledge to the third defendant and prior hypothecations to the fourth and fifth defendants by the sale of his equity of redemption. It would seem most improbable that the plaintiff here should give up his lien on the jewels in order to allow the Raja to borrow from the English lenders without being paid off as provided in Exhibit N. As pointed out in Exhibit AA (2) it seems to me that the plaintiff here has two remedies. He can either redeem as a subsequent hypothecatee and if he does, take the benefit of the securities. This seems to have been referred to in the judgment Exhibit AA-2 as the equity of redemption and this right is somewhat similar to the right possessed by a surety under section 141 of the Contract Act. This section refers to the state of things existing at the time when the contract of suretyship is entered into, so that as seen from illustration (c) the surety has no interest in any security subsequently acquired by the creditor. Secondly, the Raja contracted with the plaintiff that "the estate should be unencumbered (Exhibit B-1) whereby the trustee is bound to redeem on payment of money and return to me" which means that the Raja intended apparently to take advantage of the benefit of the covenant to redeem, so that it seems that as hypothecatee the plaintiff can be subrogated to the rights of the Raja, and he can enforce his rights against the estate itself instead of going through or via the Raja. It is said on the other side

(1) [1909] 2 Ch., 401.

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that the trustee did not contract to pay this S. A. Annamalai Chetty's debt and that the words "as and when" in paragraph 24 of Exhibit Q give the trustee a discretion to pay or not as he pleases. This, to my mind, is most certainly not the case. The reference here is to the order in which the payments are to be made, and that the trustee is bound to make the several payments detailed, there is no doubt, but only as to the time at which such payments are to be made and that he is not bound to make the payment until demand is made or till required. Mr. A. Krishnaswami Ayyar referred to several cases on executors or guardians as for instance *Sanka Krishnamurthi v. The Bank of Burma*(1) where it was held that the creditors of the business had no right of direct recourse against the minor or his estate, but as the guardian is entitled to indemnity for liabilities properly incurred out of the assets of the minor embarked in the business, the creditors of the business are entitled to proceed directly against such assets. So in *Lacey v. Hill*(2), it was held that any one in equity having a right to be indemnified has a right to have a sufficient sum set apart for that purpose. This was approved in *Wolmershausen v. Gullick*(3), and the principle already cited from *Ascherson v. Tredegar Dry Dock and Wharf Co., Ltd.*(4), may be applied in aid. The Raja could no doubt have called on the trustee to redeem and need not have waited till Annamalai Chetty enforced his debt by a suit. In other words, he could have brought a *quia timet* action. As Lord Justice WARRINGTON observed in *British Union and National Insurance Co. v. Rawson*(5), the Court of Equity has in many cases ordered the person indemnified to pay the debt

(1) (1911) 1 L.R., 35 Mad., 692.

(3) [1893] 2 Ch., 514.

(2) (1874) L.R., 18 Eq., 182.

(4) [1909] 2 Ch., 401.

(5) [1916] 2 Ch., 478.

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against which the indemnity has been given though nothing had been paid by the person indemnified. It therefore seems to me clear that the plaintiff has his right of action against the estate and I agree with the Subordinate Judge on this point.

The last point is as to limitation. It turns on the words in Exhibit C (1) a letter, dated 15th April 1899 from the Raja to the trustee in which he expressed his approval of all that the trustee has done "in settlement of the amounts due by him to the Chetty in the compromise of the suit No. 60"; the settlement here must mean arrangement and not payment; it means that the amount due was settled and provision for payment was made. The point fails. This appeal must therefore be dismissed with costs.

As to the cross Appeal of 106 of 1918 and the other appeals and memorandum of objections I agree with my learned brother for the reasons he gives in his judgment, just delivered.

[The cases having been posted to be spoken to, the Court made the following]

ORDER:—

PHILLIPS, J.—In view of the objections that have been raised to the draft decree it is necessary to further explain the intention of the Court in the judgment. So far as Appeal No. 106 of 1918 is concerned, it appears that the 49th respondent was an unnecessary party as the lower Court has found that he was not liable to repay any amount. It is admitted that no relief was claimed against him and that his name was included in the appeal by mistake. As he has had to come to Court to answer the appeal owing to appellant's fault he is entitled to some costs. We think in the circumstances that he should get half his costs in that appeal. So far

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as the other respondents are concerned their costs will be apportioned in accordance with the amounts claimed.

The other question that is raised is with reference to the provisions of the lower Court's decree regarding the jewels. These jewels having been sold, the fourth defendant has realized his money out of the sale and it is therefore useless to make any provision in the decree for what is to be done in case these jewels are redeemed either by the first defendant or by the plaintiff. It is necessary therefore to strike out paragraph 2 of the decree up to the words "till date of realization" Clauses 5 and 6 must also be struck out.

The appellant in Appeal No. 4 of 1918 is reported to have died before the appeal came on for hearing. As the appeal was dismissed with costs the order will stand.

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ODGERS, J.—I agree and I have nothing to add.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Jackson.

NEYNA MOONA KAVENNA MUHAMMAD MOIDEEN *
AND OTHERS (DEFENDANTS), APPELLANTS,

1929,
February 1.

v.

S. K. R. S. K. R. CHINTHAMANI CHETTIAR AND
OTHERS (PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 13—Suit on a foreign judgment—Judgment of foreign Court passed after defendant filed written statement and issue taken—Trial adjourned by consent with a view to settlement—Decree passed on non-appearance of defendants on adjourned date, as per consent order already passed—Suit on judgment in a British Indian Court, whether maintainable—Res judicata—Estoppel—Judgment, whether on merits—Assignment of foreign decree to a co-plaintiff, not recognized in foreign Court—Suit in British Indian Court by assignee, whether maintainable without such recognition.

In a suit in a foreign Court, the defendants appeared, filed their written statement raising their plea, and an issue was framed according to their plea; but when the suit came on for trial, both the parties filed a joint petition to the effect that the trial of the suit might be adjourned for three months with a view to settlement and that, if the suit was not settled, judgment might be entered for the plaintiffs as prayed for with costs and that the property mortgaged with the plaintiffs might be sold by certain auctioneers forthwith. The Court passed an order accordingly; on the adjourned date, the plaintiffs appeared and reported that the case was not settled; the defendants did not appear and the Court passed judgment in terms of the previous order. One of the plaintiffs therein assigned his interest in the foreign decree to the others who are the present plaintiffs, but no steps had been taken in the foreign Court to have the assignment recognized by that Court. On a suit brought in a British Indian Court by the assignees on the foreign judgment, the defendants pleaded that the suit was not maintainable:

* Appeal No. 273 of 1924.

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Held (1) that the foreign judgment, in this case, was not one passed on non-appearance of the defendants, nor was it one passed on account of the failure of the defendants to comply with a provision of law; and that, consequently, the suit based on the foreign judgment was maintainable in the British Indian Court under section 13 (b), Civil Procedure Code;

and (2) that the judgment of a foreign Court creates a debt and is *prima facie* assignable; that the circumstance, that the assignment had not been recognized by the foreign Court, did not prevent the British Indian Court from recognizing the assignment in the suit brought on the foreign judgment.

APPEAL against the decree of the District Court of West Tanjore in O.S. No. 3 of 1923.

The suit was on a foreign judgment passed by the District Court of Colombo, instituted by the plaintiffs herein and another, who also obtained an assignment of the decree from the latter but did not apply in the foreign Court for recognition of the assignment. The assignor was not made a party to this suit. The defendants pleaded that the suit was not maintainable. The lower Court passed a decree for the plaintiffs; the defendants appealed. The other material facts appear from the judgment.

T. Ranga Achariyar (with *K. Bashyam Ayyangar*) for appellants.—The foreign decree in this case cannot be sued on, as it was not passed on the merits under section 13 (b) of the Civil Procedure Code: Reference was made to the following cases:—

Mohamed Kassim & Co. v. Seeni Pakir Bin Ahmed(1), *Keymer v. Viswanatham Reddi*(2), *A. N. Abdul Rahiman v. J. M. Mahomed Ali Rowther*(3) and *Bradshaw v. M'Mullan*(4). Reliance was placed on the passage in *Spencer Bower on res judicata*, at page 25.

The plaintiffs herein, who are the assignees of the foreign decree, are not competent to sue, as they had not applied to the Ceylon Court to recognize the assignment. The assignor is not a party to the suit in the British Indian Court. At Common

(1) (1926) I.L.R., 50 Mad., 261.

(2) (1916) I.L.R., 40 Mad., 112 (P.C.).

(3) (1928) I.L.R., 6 Rang., 552.

(4) [1920] 2 Ir. Rep., 412.

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Law, a decree is not assignable. Under the Statute Law, the assignee must apply to the Court which passed the decree to recognize the assignment. Mere assignment is not sufficient to pass the title to the decree to the assignees, without an application to, and recognition by, the Ceylon Court, under section 339 of the Ceylon Ordinance. The assignment is not complete; there is prejudice to the defendants, as there is no guarantee that the assignor would not execute the decree in the foreign Court.

S. Varada Achariyar for the respondents.—A foreign judgment constitutes a debt. Section 13, Civil Procedure Code, contemplates a suit on a foreign judgment, which is a suit on a debt, created by the foreign judgment. A debt is assignable. There is no law which prevents the British Indian Court from recognizing the assignment. The Ceylon Ordinance No. 339 is not binding on the British Indian Court. The respondents will give an indemnity against execution in the foreign Court.

The JUDGMENT of the Court was delivered by

RAMESAM, J.—This appeal arises out of a suit on a foreign judgment. The lower Court granted a decree. The defendants appeal. The plaintiffs-respondents are members of the S. K. R. S. K. R. firm. This firm acting through their agent Nachiarpa Chetti and another A. V. R. V. Andappa Chetti filed a suit in the Court of the District Judge of Colombo, No. 46088. When the case came on for trial, both the parties filed a joint application to the effect that the trial of the case be postponed for three months with a view to settlement and that if not settled, judgment be entered for plaintiffs as prayed for with costs, less Rs. 150, and that the property mortgaged with the plaintiffs be sold by Messrs. A. Y. Daniel and Sons, Licensed Auctioneers, forthwith. This was on the 16th March 1917. The case, accordingly, stood over for the 18th June. On that day, the case was called on again and the District Judge passed this order—

“Case called. Mr. Somasundaram for plaintiff states that the case has not been settled. The defendant and his

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Proctor are absent. Enter decree in terms of the order of 16th March 1917."

The present plaintiffs also obtained an assignment of the share in the Ceylon decree belonging to the second plaintiff therein and now sue to recover the whole of the amount of that decree.

Two objections are taken now by the learned Advocate for the appellants. The first objection is that the judgment of the Court of Ceylon is not conclusive, because it has not been given on the merits of the case. Vide section 13 (b) of the Civil Procedure Code. He relied on the following decisions:—*Mohamed Kassim & Co. v. Seeni Pakir Bin Ahmed*(1), *Keymer v. Viswanatham Reddi*(2) and *A. N. Abdul Rahiman v. J. M. Mahomed Ali Rowther*(3). In the first of these cases, the Penang Court passed a judgment against the defendant as he did not appear, according to the procedure of that Court. It was held that that judgment was not conclusive in British Indian Courts. The same view was taken in *A. N. Abdul Rahiman v. J. M. Mahomed Ali Rowther*(3), where it appears that there is a similar procedure according to an Ordinance of Singapore similar to the Ordinance in Penang. In *Keymer v. Viswanatham Reddi*(2), the former judgment was that of an English Court and the judgment was given on the ground of defendant's refusal to answer certain interrogatories and there was no trial. It was held by the Privy Council that the first judgment was not a bar. But all these cases are distinguishable from the present case. In the present case, the defendants appeared. They filed their written statement and raised their plea and an issue was framed according to the plea. They had to prove that they made certain payments of interest. When the case came on for trial,

(1) (1926) I.L.R., 50 Mad., 261. (2) (1916) I.L.R., 40 Mad., 112 (P.C.).
(3) (1928) I.L.R., 6 Rang., 552.

they along with the plaintiffs filed a joint petition to the effect mentioned above. This is not therefore a case of non-appearance nor a case of a decree being passed on account of failure to comply with a provision of law. The defendants appeared and deliberately chose not to insist on their plea and not to adduce evidence of it. Mr. Ranga Achariyar relied on Spencer Bower on *res judicata*, page 25, where it is observed that a decision cannot be called a "judicial decision,"

"which does not purport to embody any consent to an existing judgment, but merely records an undertaking by a party to allow judgment to be signed if at a future date he fails to comply with certain conditions."

Now, as already observed, this is not a case of failing to comply with certain conditions. The case in *Bradshaw v. M'Mullan*(1) is also relied on. This decision is really against the appellants. Towards the end of page 424, Lord SHAW of Dunfermline observes—

"It is, I am aware, possible to maintain that a judgment by consent has the qualities of a *judicium* to which I have referred. There are expressions of opinion in some of the numerous English cases upon the subject. It seems to me that such a doctrine may be founded, not upon the judgment pronounced, but upon the consent with all its limits and to all its extent which preceded the judgment; that, in short, you have there left the region of strict *res judicata* and entered the region of a possible wide estoppel."

It does not matter what the principle of recognizing a foreign judgment is, whether it is called *res judicata* or estoppel, but that consent will do as estoppel is clear from the judgment of Lord SHAW. We are, therefore, of opinion that there is no substance in the first point.

The second point argued is that the assignment of the decree by the second plaintiff in the Ceylon Court

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(1) [1920] 2 Ir. Rep., 412.

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ought not to be recognized in this Court because, under section 339 of the Ceylon Ordinance, that Court had not recognized the assignment and substituted the name of assignee in the place of the assignor. The short reply to this argument is that the Ceylon Ordinance does not bind us and we have nothing to do with it. The judgment of a foreign Court creates a debt like any other judgment, and a debt is *prima facie* assignable. It merely embodies the obligation of the defendants. There is nothing to prevent us from recognizing the assignment. It is said that there is a danger of the assignor executing the decree while the decree of this Court is in force. Mr. Varada Achariyar, the learned Advocate for the respondents, has offered to indemnify the appellants against any injury caused to them by any execution taken on the Ceylon decree by the assignor. It is enough to record this undertaking in this judgment and it is unnecessary to do anything more.

In the result, both the points fail and the appeal is dismissed with costs.

K.B.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Jackson.

K. R. V. R. VEERAPPA CHETTY AND ANOTHER
(DEFENDANTS 1 AND 7), APPELLANTS,

1929,
January 21.

v.

P. L. S. P. MUTHIAH CHETTY AND OTHERS
(PLAINTIFF AND DEFENDANTS 3, 6 AND 8 TO 10) RESPONDENTS.*

Partnership—Assignment by a partner of his interest—Dissolution—Settlement of accounts of partnership, after assignment—Rights of assignee—Settlement of account, behind the back of assignee, whether binding on assignee, in the absence of fraud—Conversion of dollars into British Indian Currency—Rate of exchange on what date to be taken—Indian Contract Act (IX of 1872), Sec. 263—English Partnership Act, Sec. 31 (2).

The assignee of the interest of a partner is not bound by a settlement of accounts of the partnership, made behind his back, after the date of the assignment. *Hugh Stevenson & Sons v. Aktiengesellschaft, etc.*, [1918] A.C. 239, followed.

Though, under section 263 of the Indian Contract Act, the rights and obligations of the partners continue for the purpose of its winding up, yet as against the assignee of a partner, a settlement of account behind his back, after the assignment, is not binding on him, and the Court will re-open the account at his instance.

As regards the rate of conversion of dollars into British Indian Currency, to which the assignee was entitled, the rate prevailing at the date on which the winding up of the partnership was completed and the assets were realized, is the proper rate to be allowed to the assignee.

S. S. Celia v. S. S. Volturro, [1921] 2 A.C., 544, followed.

APPEAL against the decree of the Court of the Additional Subordinate Judge of Sivaganga in Original Suit No. 58 of 1923.

* Appeals Nos. 840 of 1924 and 204 of 1925.

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This is a suit by the assignee of the interest of a partner for a declaration that the partnership was dissolved and for the recovery of his share of the assets and the profits with interest from the defendants. The assignment to the plaintiff was on the 25th March 1919. Subsequently there was a settlement of accounts of the partnership on 29th March 1920, behind the back of the assignee; the plaintiff contended that the settlement was not binding on him, and he also claimed compound interest, etc., and a rate of conversion of dollars into British Indian Currency as it stood on the date of the assignment. The Subordinate Judge held that the settlement of account was not binding on the plaintiff allowed the accounts to be re-opened, fixed the rate of conversion as on the date of his final decree, and allowed interest at 9 per cent per annum. The defendants appealed against the decree as to the re-opening of the accounts and as to the rate of conversion, in Appeal Suit No. 204 of 1925; while the plaintiff claimed compound interest and a higher rate of interest in the connected Appeal No. 340 of 1924.

S. Varadachari for appellants in A.S. No. 204 of 1925.—The settlement of account by the partners is binding on the assignee. The other partners are entitled after dissolution to wind up the partnership without the consent of the assignee from a partner. They have the same rights, subject to liability, after dissolution, as before dissolution. The provisions of section 263 of the Indian Contract Act apply. If their acts in winding up are fraudulent, they may be void and not binding on the assignee. All bona fide actions of the surviving partners are binding on the assignee. The assignee has no right to interfere in the affairs of the partnership. This rule is laid down in *Chidambaram Chetty v. Karuthan Chetty*(1).

T. M. Krishnaswami Ayyar (with *M. Subbaraya Ayyar*) for respondents in A.S. No. 204 of 1925.—The settlement of account, after the assignment and behind his back, is not binding on the plaintiff. In the case of dissolution, the assignee from a partner is not bound by a settlement of partnership behind his back, even in the absence of fraud. See *Watts v. Driscoll*(2) *Hugh Stevenson & Sons v. Aktiengesellschaft, etc.*(3)

(1) [1916] 4 L.W., 10.

(2) [1901] 1 Ch., 294.

(3) [1918] A.C., 239.

The plaintiff is entitled to damages as in a suit for an account. *Manners v. Pearson & Son*(1). Reference was also made to the other English cases mentioned in the judgment.

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JUDGMENT.

RAMESAM, J.—These two appeals arise out of the same Original Suit and in each appeal there is a memorandum of objections. Appeal No. 340 of 1924 is by the plaintiff and the memorandum of objections is by the first respondent who is the first defendant. Appeal No. 204 of 1925 is filed by defendants 1 and 7 and the memorandum of objections is preferred by the plaintiff who is the first respondent.

The facts may be briefly stated as follows: Defendants 1 to 3 and the father of the fourth defendant entered into a partnership for carrying on a money-lending business at Parit Buntar in the Federated Malay States under the name and style of R.M.V.R.A.N. This was on 23rd March 1914. Four partners had equal shares in it. The fourth defendant's father died in August 1916; but the business was continued with the fourth defendant as a partner in his place by the consent of all the partners. In or about April 1917 a new partnership was constituted by taking in two new partners, defendants 5 and 6. In the new partnership the first defendant's share was the largest and the shares of the fifth and sixth defendants were smaller than those of the others. The seventh defendant is a son of the first defendant, the eighth defendant is a son of the fourth, the ninth defendant is a son of the sixth and tenth defendant is a son of the fifth. On 25th January 1919, the third defendant executed Exhibit C in favour of the present plaintiff, purporting to transfer his interest in the partnership. He informed the firm of the fact of transfer

(1) [1898] 1 Ch., 581.

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by two letters, Exhibit E, dated the 28th January 1919, sent directly and Exhibit D (1) handed over to the plaintiff and forwarded by him with Exhibit L. Exhibit H is a hundi for Rs. 16,500, which was the consideration for the assignment. The first defendant, having learnt of Exhibit E, replied by a registered letter, Exhibit F, dated 4th March 1919. In it he says that he had written to Arunachalam, the sixth defendant, who was then the local agent to close the business at the termination of his agency and wind up the firm and not to enter into any new transactions but to make the necessary collections and disbursements for winding up the firm. The plaintiff addressed Exhibit L on the 16th March 1919 to the sixth defendant. Exhibit D (1) was sent as an enclosure with this letter. Exhibit G was a letter by the third defendant to the first defendant, in which he acknowledges the receipt of Exhibit F. Meanwhile the third defendant's son raised a dispute about the validity of the assignment by the third defendant and he issued through his vakil the notice, Exhibit I contesting the validity of the assignment. He also issued a similar letter to the fourth defendant, Exhibit VI. Exhibit II is a letter addressed by the plaintiff to the first defendant in which he requests that he should be taken as a partner in the firm and that the firm should not stop business merely because the third defendant's share was transferred to him. In September 1919, a new firm was formed by defendants 1 and 6 and Exhibit N is the power-of-attorney executed by the first defendant in favour of the sixth defendant. Exhibit J is a registered deed of assignment confirming Exhibit C which was not registered. In March 1920 the plaintiff's agent in the Federated Malay States got his Solicitors, Messrs. Gibb and Hope, to issue the notice Exhibit III to the sixth defendant demanding him to render an account of the profits of the firm. Exhibit

III (a) is the reply to Exhibit III by Messrs. Donaldson and Burkinshaw, Solicitors of the sixth defendant. In this letter they refer the plaintiff's solicitors to the first defendant on the ground that the sixth defendant was only accountable to him. They also refer to the fact that the third defendant's son raised a dispute as to the assignment. On this ground they refused to recognize the plaintiff's right to demand an account. Exhibit IV is the reply to Exhibit III (a), in which Messrs. Gibb and Hope say that they had also written to the first defendant. They also intimate their intention of filing a plaint and request the addressees to make arrangements for accepting service at Perak. Exhibit IV (a) is the reply to Exhibit IV. It says that Veerappa Chetty (the first defendant) does not admit that the plaintiff has any rights. It is dated 31st March 1920. There is no further correspondence up to December. On 6th December Messrs. Donaldson and Burkinshaw addressed the letter Exhibit V to the plaintiff and the third defendant and to his son. In this letter they say "The firm has now been wound up and the accounts are ready. Veerappa Chetty, the managing partner, desires to close the matter and pay out the sums due." They then refer to the fact of receipt of notice of assignment from the plaintiff and notice of objection from the third defendant's son. They also say that unless the disputes are settled by agreement or otherwise payments cannot be made. The present suit was filed on 20th January 1922. Meanwhile the third defendant's son himself filed a suit O.S. No. 42 of 1919. That suit was finally settled by reference to arbitrators and their award in August 1922. Under this award the third defendant's right to assign was recognized by his son. In the written statement of the defendants they plead that there was a settlement of the accounts of the

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partnership on or about 29th March 1920. On the basis of this settlement a certain sum of money was allotted to the third defendant and the basis of the settlement was also accepted by defendants 2 and 5. The Subordinate Judge finding that the settlement is not binding on the plaintiff, has gone into the accounts himself and found that, in addition to the assets found according to the settlement, certain other sums under various headings were due to the partnership and the plaintiff's share in such additional sum was found to be 1,380 dollars. The first item of dispute between the parties is whether the plaintiff is entitled to this additional sum.

Another question in the case is, what is the rate of conversion of dollars into the British Indian currency. As the exchange was varying between January 1919 and April 1925, the date of the final decree, this question turns upon the date when the conversion into British Indian currency should be made. The dollar reached its lowest value on 11th March 1920 when 100 dollars were equivalent to Rs. 95 and on 29th March 1920 it was Rs. 99-8-0. The Subordinate Judge held that the date of the final decree should be adopted as the date of conversion. These two questions are the subject of Appeal No. 204. The appellants (defendants) contend that the settlement of 29th March 1920 should be held to be binding on the plaintiff and that the same date ought to be adopted as the date of conversion into British Indian currency.

Taking up the first question as to the binding nature of the settlement of the 29th March 1920, I may observe that the settlement itself is somewhat suspicious. [His Lordship dealt with the evidence and proceeded.] We must therefore hold that the plaintiff had the first notice of the closing of accounts on 6th December 1920 and he

was not bound to recognise any such closing prior to that date. Assuming that there was some such settlement the next question is—is it binding on the plaintiff? Mr. Varadachari relied on *Chidambaram Chetty v. Karuthan Chetty*(1). It was observed in this decision that the principle of section 31 of the English Partnership Act may be recognized as the principle to be adopted in India. So far as the first clause of the section is concerned, it gives the assignee no right to interfere in the affairs of the partnership and all *bona fide* actions during the continuance of the partnership will be binding on him. Under clause (2), the assignee is entitled to an account as from the dissolution. In the present case the other partners were not willing to take the plaintiff as a partner and they all agreed to dissolve the partnership. This could have only been by March 1919. But the pleadings in the case show that all the parties recognized 25th January 1919, as the date of dissolution. In the decision in 4 L.W., 10, clause (2) of section 31 also was referred to and it was observed that it may be taken as the law in India. In *Dhanaji Jhelaji v. Gulabchand Pana*(2), it was observed that the Common Law with regard to the position of an assignee of a partner was codified by section 31 of the Partnership Act and section 31 (2) was also recognised as having codified the Common Law. In *Hugh Stevenson and Sons v. Aktiengesellschaft, etc.*,(3), Lord ATKINSON referred to the decision of GRANT, M.R., in 17 Ves. 298 and pointed out that at Common Law the assignee of a partner was not bound by any settlement behind his back. He also referred to the approval of the rule by Lord SELBORNE and Lord BLACKBURN in 6 A.C., 64. He also pointed out that the

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(1) (1916) 4 L.W., 10.

(2) (1924) 87 I.O., 812.

(3) [1918] A.C., 239.

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relation of surviving partners and the representative or assignee of the outgoing partner is a fiduciary relation. So it must be taken that section 31 (2) of the Partnership Act only codified the Common Law. If so, a settlement behind the back of the assignee cannot be binding as a settlement. LINDLEY states the rule thus at page 450 of his book on Partnership:—

“His rights are not affected by any sale of, or agreement for valuing and dealing with, the assignor's share, which may have been entered into between the partners subsequently to the assignment and with notice of it,” and *Watts v. Driscoll*(1) is cited in support of the statement of law. Mr. Varadachari, while recognising the force of these authorities, relies on section 263 of the Contract Act for the proposition that the rights and obligations of the partners continue in all things necessary for winding up the business. He, therefore, contends that the first defendant, who was the managing partner, has a right to make collections and put up to sale items of the assets belonging to the partnership and realize them in the shape of money and deal with the claims of the servants of the partnership. This is true; but in the present case the two very important items of the assets of the partnership are (1) *inums* or the amounts due from various constituents of the firm to the firm on money lending transactions and (2) the house belonging to the partnership. According to the settlement of accounts, the *inums* were taken up by the new firm at the value of the principal amounts, the interest being remitted. Similarly a certain valuation was put upon the house and it was taken up by the new firm. This is different from putting up these items to a public sale in open market after due notice to the public. Here they were taken

(1) [1901] 1 Ch., 294.

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over by another firm consisting of two of the partners of the dissolved firm. It cannot be said that such a transaction should not be scrutinized and must be taken to be *prima facie* binding on the assignee unless it is shown to be *mala fide*. On the other hand such a transaction is *prima facie* not binding. The Court is therefore entitled to look into the matter itself. The lower Court has given certain valuations of the *inums* and the house on the evidence on record and we are not prepared to differ from its conclusions. Some of the items in the *inums* were disallowed and others were allowed. As to the other items of assets one of them is item 6 in Exhibit O. It related to the salary of Arunachalam and under this head the Subordinate Judge disallowed 1,138 dollars out of the figure mentioned in the settlement on the ground that the agent Arunachalam was also attending to the new firm. But he was engaged for a term of three years and the work of winding up was going on certainly during these years. The fresh business was started on 25th January 1919. Anyhow, the partnership has no right to stop his salary during the term ordinarily agreed upon, which among Chetties is admitted to be three years. We think this item must be allowed, that is, the figure allowed by the Subordinate Judge must be diminished by the plaintiff's share of this item, namely, 215 dollars. As to the other items, we are not prepared to differ from the Subordinate Judge. The first item (which is a very large item) is described as *samans*, i.e., presents allowed to agents among Chetties. In the present case the agent is a brother-in-law of the first defendant who was a partner of the old firm. He is also a partner of the new firm. It was said that the amount of the *samans* was really drawn by the agent some time before and the parties were only settling the claim in 1920. This is true, but it is not clear how

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much of the amount was drawn before January 1919 and how much after January 1919. In these circumstances we are not prepared to interfere with the conclusions of the Subordinate Judge. Similar remarks apply to the other item particularly to the third item which related to the samans of an earlier agent Avadayappa Chetti. The result is that the Subordinate Judge's conclusion on the first question must be confirmed subject to the diminution of the amount awarded to the plaintiff by 215 dollars.

On the second point the Subordinate Judge relied on the decision in *Manners v. Pearson & Son*(1). In this case, LINDLEY, M. R. and RIGBY, L.J., held that the date of the ascertainment by the Court must be the date of conversion. The defendant pleaded that the amount due was found to be a certain amount on the 31st August 1896 but offered to convert it into English money only on 13th November 1897. The plaintiff insisted on 31st August 1896 or certain earlier dates as the proper dates of conversion. The Court ascertained the amount on 4th November 1897 and held that that date was the date to be adopted for conversion. VAUGHAN WILLIAMS, L.J., dissented. He thought that 31st August 1896, the date on which a certain sum of money was found due to the plaintiff, should be the proper date. In *Di Ferdinando v. Simon* (2), ROCHE, J., held that the conversion should be made, not on the date when the Court ascertained the amount, but on the date when it was properly due to the plaintiff, that is, in that case the date when the breach was committed. In the case of a partnership which is wound up, the date of the termination of the winding up would be the proper date, ROCHE, J., distinguishing an earlier decision of his

(1) [1898] 1 Ch., 581.

(2) [1920] 2 K.B., 704.

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own, apparently decided on a different principle. This decision was confirmed by the Court of Appeal in *Di Ferdinando v. Simon Smits Co.*(1). BANKES, L.J., followed the dissenting judgment of VAUGHAN WILLIAMS, L. J. A similar rule was applied by BAILHACHE, J., in *Barry v. Van Den Hurk*(2), and this decision, though it did not go to the Court of Appeal, was approved by BANKES and SCRUTTON, L. JJ., in (1920) 3 K.B., 409 already mentioned. So also the same rule was applied by McCARDIE, J., in *Lebeaupin v. Crispin*(3). This was also approved by the same judge in the Court of Appeal. Finally in *S. S. Celia v. S. S. Volturmo* (4), Lord BUCKMASTER approved the view of VAUGHAN WILLIAMS, L.J., and was not prepared to accept the view of LINDLEY, M. R. and RIGBY, L. J. He also approved of the cases in (1920) 2 K.B. I think the decision in *Manners v. Pearson & Son*(5), has practically ceased to be the law and it seems to me that we have nothing to do with the date of the determination of the amount by the Court. The plaintiff's share was certainly ascertainable by 6th December 1920, when the winding up was completed and the accounts were ready according to the first defendant's own statement, and if the plaintiff was willing to accept the amount he could have taken the amount that might be ascertained as the proper amount due on that date. It is true that this need not be the amount which the defendants were willing to offer. But still the assets of the partnership may be held to have crystallized on that date and the only question remaining for the Court should be to decide the difference between the parties. It is impossible to accept any date earlier than 6th December 1920, because

(1) [1920] 3 K.B., 409.

(3) [1920] 2 K.B., 714.

(2) [1920] 2 K.B., 709.

(4) [1921] 2 A.C., 544.

(5) [1898] 1 Ch., 581.

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the winding up was not completed and not until after the partnership assets are all realized and converted into money can the share of a partner be settled—*vide* LINDLEY, page 427. On 6th December 1920 the rate was Rs. 154-8-0. The appellant gains only Rs. 1-8-0 by our view. To this extent the judgment of the lower Court is modified.

The memorandum of objections in Appeal No. 204 relates to the value of the house. We have already held that there is no reason to disturb the finding of the Subordinate Judge in this matter. Another item in the memorandum of objections is a claim for the rent of the house up to the date of suit. But if the plaintiff has got his share of the value of the house in December 1920, the house being sold sometime in 1920, there is no question of any claim for rent. Another ground in the memorandum of objections is that the date of the preliminary decree ought to be adopted as the date of conversion. This question has already been dealt with in the judgment in the main appeal.

In Appeal No. 340 the only point is the rate of interest that should be allowed to the plaintiff. Some of the inams of the suit firm were taken over by the new K.R.V.R. firm. In such a case it is now conceded to be the law that the assignee is entitled at his option either to the profits of the new firm or interest. In the present case he elected to take interest. The Subordinate Judge held that the reasonable rate of interest, to be given to the plaintiff, is 9 per cent. The plaintiff wants this to be increased and the defendant in the memorandum of objections wants it to be reduced to 6 per cent. We think the rate allowed by the Subordinate Judge is the reasonable rate and we decline to interfere with his discretion. This is the course followed by the Privy

Council in *Ahmed Musaji Saleji v. Hashim Ebrahim Saleji*(1).

The result is Appeal No. 340 and its memorandum of objections are dismissed with costs. Appeal No. 204 is modified as indicated above. The memorandum of objections is dismissed with costs. In Appeal No. 204 the parties will give and take proportionate costs. In the lower Court also, the parties will give and take proportionate costs.

JACKSON, J.—I agree.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Odgers.

SHUNMUGA SUNDARA MUDALIAR AND 2 OTHERS,
PETITIONERS *

1928,
December 11

v.

RATNAVELU MUDALIAR AND 4 OTHERS,
RESPONDENTS.

Civil Procedure Code (V of 1908), ss. 109 and 110—Appeal and Memorandum of Objections before High Court—Common ground of disposal of both—Valuation of appeal to Privy Council.

In a suit for a general account against a trustee which charged him also with specific items of malversation, the Court of first instance trying the items on the merits, decreed only some of them. On an appeal and a memorandum of objections, the High Court dismissed the whole suit on a new ground common to both, viz., the non-liability of the defendant to account, on account of his prior accounting and handing over of account books.

(1) (1915) I.L.R., 42 Cal., 914.

* Civil Miscellaneous Petition No. 2776 of 1928.

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In a petition for leave to appeal to the Privy Council on the subject-matter of both the appeal and the memorandum of objections, whose aggregate value was above Rs. 10,000, but the separate values less than 10,000.

Held, granting the petition, that as the subject-matter of both, as newly determined by the High Court was the same (viz., liability or otherwise to account), the decree of the High Court cannot be construed as two decrees, one in respect of each, but was a single decree on a single subject-matter, which did not "affirm" the decree of the first court within the meaning of section 110 of the Civil Procedure Code.

Held, further that in a suit for a general account, each of the items of malversation was not a distinct subject-matter.

Ramanathan Chetty v. Subramanian Chetty, (1926) 51 M.L.J., 295, distinguished.

Petition under sections 109 and 110, Civil Procedure Code (V of 1908), praying for the grant of a certificate to enable the petitioners to appeal to the Privy Council against the decree of the High Court in Appeal Suit No. 218 of 1925 preferred against the decree of the Court of the Subordinate Judge of Chingleput in Original Suit No. 5 of 1922.

The facts are given in the judgment.

N. S. Srinivasa Ayyar for petitioner.—In this case the suit was for a general account; the High Court did not affirm the decree of the trial Court, and the value of the suit and of the appeal to the Privy Council is above Rupees ten thousand, each. The appeal and the memorandum of objections must be taken together; for the latter is in law dependent on the former; *Alagappa Chettiar v. Chockalingam Chettiar*(1), *Murugappa Chettiar v. Ponnusami Pillai*(2). Moreover the ground of High Court's decision in this case both on the appeal and on the memorandum was the same, viz., liability to account. Hence the value of both alone should be taken for the purpose of appeal to the Privy Council even if one of them is confirmed. In the light of the above decisions *Ramanathan Chetty v. Subramanian Chetty*(3) should be reconsidered. Anyhow it is distinguishable from the present case. I rely on C.M.P. No. 126

(1) (1918) I.L.R., 41 Mad., 904 (F.B.). (2) (1921) I.L.R., 44 Mad., 828.
(3) (1926) 51 M.L.J., 295.

of 1926; See also *Ghulam Abbas v. Govind Rao* (1) and *Annapurna Bai v. Rup Row*(2).

T. M. Krishnaswami Ayyar (with *M. S. Venkatarama Ayyar*) for respondents.

An appeal and a memorandum of objections are two distinct matters and the value of both cannot be joined for valuing the appeal to the Privy Council; see Order XLI, rule 22, Civil Procedure Code. At any rate, in respect of the subject-matter of the memorandum of objections, the decree must be taken to be an affirming decree. When that is left out, the value of the appeal to the High Court alone is less than Rs. 10,000; see C.M.P. No. 785 of 1928 which has decided this point in my favour after noticing *Annapurna Bai v. Rup Row* (2). This last case decides that particular heads of claim, such as the eight items of malversation in this case, must be considered as separate claims; see *Ramanathan Chetty v. Subramanian Chetty*(3), *Vikrama Deo Garu v. Maharaja of Jeypore*(4), *Narendra Lal Das Choudhury v. Gopendra Lal Das Choudhury*(5).

N. S. Srinivasa Ayyar in reply. The plaintiff's claim was only for a general account and he only instanced eight cases of malversation; this cannot change the nature of the suit.

JUDGMENT.

PHILLIPS, J.—The petitioners brought a suit against the respondents asking for an account in respect of their trusteeship of the plaint temple. Although they asked for a general account in the plaint, eight specific charges of malversation were alleged and these charges formed the subject-matter of the trial in the first Court. Without taking a general account, the Subordinate Judge examined the evidence relating to the eight charges and held that two charges were proved and that the other six failed. The judgment is not altogether satisfactory, for it is quite possible that, if a general account had been taken, some sums of money might have

(1) (1925) 91 I.C., 200 (Nag.) (2) (1924) I.L.R., 51 Cal., 969 (P.O.).
(3) (1926) 51 M.L.J., 295. (4) (1916) 1 M.W.N., 122.
(5) (1927) 31 C.W.N., 572; 45 C.L.J., 426.

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been found to be due to the respondents which could have been set off against the two claims allowed. The respondents filed an appeal in respect of these two claims and the appeal was allowed in this Court. The petitioners filed a memorandum of cross-objections relating to the other six items, and that was dismissed in toto. The ground for dismissing the claim of the petitioners in toto, both in appeal and in the memorandum of objections, was that the petitioners had no right to claim a general account, as accounts had already been furnished and the petitioners themselves had suppressed the accounts and thereby prevented any further account being taken. The petitioners now wish to appeal to the Privy Council in respect of the whole of the subject-matter of the original suit.

It is contended for the respondents that the decree of this Court which was drawn up in respect both of the appeal and of the memorandum of objections is in effect an affirming decree and that no substantial question of law arises. So far as the appeal is concerned, the decree of this Court can in no circumstances be deemed to be an affirming decree for it disallowed a sum of Rs. 7,000 which had been allowed by the trial Judge. The contention for the respondents is that the appeal and the memorandum of objections must be treated as separate appeals, and that, so far as the decree in respect of the memorandum of objections is concerned, no appeal would lie to the Privy Council as the judgment of the lower Court was affirmed, and that, so far as the decree in the appeal itself is concerned, the value of the subject-matter is less than Rs. 10,000 and therefore no appeal would lie. The petitioners contend that the memorandum of objections must be deemed to be so intimately connected with the appeal itself as to constitute one appeal and that therefore the total value of

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the subject-matter is over Rs. 10,000 and the decree of this Court is a reversing decree. I am not prepared to hold that in all cases the memorandum of objections must be deemed to be dependent upon the appeal itself. The alteration in law effected by Order XLI, Rule 22 (4), clearly indicates that the memorandum of objections may, in certain cases, be treated as a separate cross-appeal. The decision in *Alagappa Chettiar v. Chockalingam Chettiar*(1), does not affect the point, for, that only dealt with the question of limitation. The further decision in *Murugappa Chettiar v. Ponnusami Pillai*(2), which purported to follow *Alagappa Chettiar v. Chockalingam Chettiar*(1), does not apply here; but, with all respect, it seems to me difficult to hold that the abatement of an appeal on the death of the appellant and its subsequent dismissal does not amount to a dismissal for default of prosecution within the meaning of Rule 22, clause 4. What has to be considered in a question of this sort is whether the appeal and the memorandum of objections must be treated as forming two independent proceedings relating to distinct sets of facts, and it is now contended for the respondents that each of the eight charges of malversation formed a separate subject-matter and that inasmuch as this Court affirmed the decree of the lower Court in respect of six charges, it must be deemed to be an affirming decree and that therefore in respect of these six charges no appeal would lie to the Privy Council. It is, however, difficult to say that all these eight charges are separate and distinct subject-matters, for they were all based on the alleged breach of trust by the respondents, and, in fact, the six charges were dismissed by the trial Court not on the ground taken by this Court, namely, that the petitioners

(1) (1918) I.L.R., 41 Mad., 904 (F.B.). (2) (1921) I.L.R., 44 Mad., 828.

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had no right to demand an account, but on the merits of the evidence which was held not to prove the charges. In these circumstances, *Ramanathan Chetty v. Subramanian Chetty*(1), decided by this Bench can be distinguished, for, there the memorandum of cross-objections related to a matter entirely distinct from the subject-matter of the appeal, nor do I think that *Raja Sree Nath Roy Bahadur v. The Secretary of State for India in Council*(2), and *Narendra Lal Das Choudhury v. Gopendra Lal Das Choudhury*(3), apply. It is unnecessary to refer to the other cases cited, for, the question that has to be decided is, whether the decree of this Court in the appeal and memorandum of objections really consists of two separate decrees in respect of separate subject-matters or whether it is really one decree dealing with one subject-matter only. In the former case, it may well be that in respect either of the appeal or of the memorandum of objections, no appeal would lie to the Privy Council, whereas, in the latter case, if the subject-matter of the suit in the first Court and the value of the appeal to the Privy Council is over Rs. 10,000 an appeal would lie to the Privy Council. Here, so far as the value of the subject-matter of the suit and the appeal is concerned, the provisions of section 110, Civil Procedure Code, are complied with and it is not possible to split the decree into two parts and hold that one part is an affirming decree and that the other part is a reversing decree, and that because the latter is below Rs. 10,000 in value, no appeal would lie. In these circumstances, I would hold that the petitioners have a right to appeal.

It is perhaps unfortunate that in this particular case, this litigation which is undoubtedly prejudicial to the

(1) (1926) 51 M.L.J., 295.

(2) (1901) 8 C.W.N., 294.

(3) (1927) 31 C.W.N., 572; 45 C.L.J., 425.

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interests of the suit temple should have been instigated by a factious feeling prevailing between two parties. This, however, cannot affect the right of appeal of the parties. The petitioners have been prejudiced by the judgment of this Court and therefore they must be allowed to appeal to the Privy Council.

I certify that the provisions of sections 109 and 110 of the Civil Procedure Code have been complied with in this case and grant leave to the petitioners to appeal.

ODGERS, J.—This is an application for leave to appeal to the Privy Council from a judgment of PHILLIPS, J., and myself. The suit was brought by certain persons interested in the temple of Sri Karuneeswaraswami, Saidapet, against the defendants, for a general account of their management of the shrine and for a decree that defendants 1 to 4 be directed to pay Rs. 14,458 or such other sum as may be found due on such account being taken. The learned Judge decided the case on the eight points of particulars of claim lodged with the plaint and decided as to points A and B that the first defendant was liable to account but that as to the other items he was not liable. It was held by us that the first defendant could not be held liable to a general account and accordingly he was not even liable on the two items found by the Subordinate Judge. Now, the first question is, is this a decree of affirmance? The Subordinate Judge, as stated, did not find on the broad question of liability to general account at all which was the main ground for our decision here.

As regards the particulars there is no doubt that it was not a decree of affirmance and I think therefore that it cannot be said that our decree was in affirmance of the decree of the lower Court.

Then the question is whether the appeal is worth Rs. 10,000. The total amount claimed is about

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Rs. 14,500. I think there is no doubt that this is the amount in question on appeal to the Privy Council. The question is complicated by a memorandum of objections in which the respondents took objection to the finding of the Subordinate Judge with regard to the six other particulars of claim.

It is contended that all the eight items of particulars are independent and that therefore the value of the subject-matter must be under Rs. 10,000. I do not think that these items can be considered as being separate. They are really particulars of the claim for a general account, i.e., they are incidents of the alleged misuse of trust moneys, so that they really all depend on a finding as to whether the first defendant was liable to a general account or not. I therefore agree with my learned brother that they are not independent items.

The question is further as to whether the Court's order below as to the six items can be separated from the appeal as to the two allowed by the Subordinate Judge. Of course, if the memorandum of objections relates to an entirely different matter as in *Ramanathan Chetty v. Subramanian Chetty*(1), it may be that the memorandum of objections must be considered as a separate cross-appeal quite distinct from the main appeal. In any case, the petitioner is to have the benefit of any doubt that may arise, *Vikrama Deo Garu v. Maharaja of Jeypore*(2), though there is no doubt that, if an appeal is dismissed as being out of time, the memorandum of objections cannot be heard as it is dependent to that extent on the appeal. *Alagappa Chettiar v. Chockalingam Chettiar*(3). But as I have held that all these items are not independent items but really hang together

(1) (1926) 51 M.L.J., 295.

(2) (1916) 1 M.W.N., 122.

(3) (1918) I.L.R., 41 Mad., 904 (F.B.).

and are collectively dependent on and form particulars of the claim for a general account, I think this objection must be overruled. I therefore agree that this is a fit case for appeal to the Privy Council and that the certificate may issue.

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N.R.

APPELLATE CRIMINAL.

*Before Mr. Justice Waller and Mr. Justice
Krishnan Pandalai.*

PANCHANATHAM PILLAI, PRISONER.*

1929,
January 16.

General Clauses Act (X of 1897)—“Magistrate”—Definition of—If confined to Magistrates exercising jurisdiction under Criminal Procedure Code—Intention of legislature—Confession to a Juge d'instruction—If admissible under sec. 26 of Indian Evidence Act.

Under section 26 of the Indian Evidence Act, British Indian Courts are not precluded from taking into consideration confessions made by prisoners in police custody to Magistrates in England or in a foreign country, the definition of “Magistrate” in the General Clauses Act not being confined to Magistrates exercising jurisdiction under the Code of Criminal Procedure.

A confession made by a prisoner in police custody to a *Juge d'instruction* in French India, if otherwise proper, is admissible in evidence. *Queen-Empress v. Nagla Kala*, (1896) I.L.R., 22 Bom., 235, referred to.

TRIAL referred by the Court of Session of the East Tanjore Division at Negapatam for confirmation of the sentence of death passed upon the said prisoner in case No. 19 of the Calendar for 1928.

* Referred Trial No. 124 of 1928.

N. Somasundaram for appellant.

K. N. Ganpati for Public Prosecutor for the Crown.

JUDGMENT.

The appellant has been convicted of the murder of his daughter, with whom he is alleged to have been on bad terms. They were living together in the French portion of a village which is partly in French and partly in British territory. The appellant, it is said, went away with his daughter on the 15th or the 16th July 1926 and returned the next day alone. On the 18th P.W. 1 complained to the French Police, that the appellant had murdered his daughter, and at about the same time the appellant reported her disappearance. The appellant was arrested, and at once made a confession to a Police Officer, who has since been dismissed for torturing prisoners in order to extort confessions from them. After this the appellant was placed before the *Juge d'instruction*, to whom he made a statement (Exhibit J-1) that his daughter was tired of life and that he assisted her to commit suicide. Though it was by then obvious that the murder—if it was a murder—was committed in British territory, a French Sub-Inspector, accompanied by a British Constable, took the appellant to the river where his daughter had been drowned. The body was not found at the place indicated by the appellant. On the next day it was found a considerable distance away on information furnished by a shepherd boy. That death was not due to natural causes is clear. For the hands had been tied together, and the cloth was weighted with bricks. At the same time, there was nothing to show that the woman had been stunned, or that there had been a struggle between her and her father, before her hands were tied and her cloth was filled with bricks. The *Juge d'instruction*, who is a sort of Committing

Magistrate, with power to commit or discharge a prisoner, but not to convict, continued his enquiries till January 1927, when he sent the appellant up to the *Chambre des mises en accusation* at Pondicherry. That Court in April held, that it had no jurisdiction, as the crime had been committed in British territory, and the appellant was a British subject. What happened after that is not clear, but it was not till October 1928 that the appellant was tried by the Sessions Judge of East Tanjore.

A great part of the exhibits consists of the record of the French investigation, of statements made by witnesses, and of admissions extracted from the appellant. Mr. Ganpati concedes that most of it is inadmissible in evidence. He, however, excepts Exhibit J-1, the statement made by the appellant to the *Juge d'instruction*, which appears to us to be admissible under section 26 of the Evidence Act. The appellant was, no doubt, in police custody at the time, but he was in the immediate presence of a judicial officer, and if that officer is a Magistrate within the meaning of section 26, the statement is admissible, provided, of course, that there is no other legal objection to its validity. We are clear that the *Juge d'instruction* is a Magistrate within the meaning of the section. The definition of "Magistrate" in the General Clauses Act is not confined to Magistrates exercising jurisdiction under the Criminal Procedure Code; it merely includes them. As pointed out in *Queen-Empress v. Nagla Kala*(1), it can scarcely have been the intention of the legislature to exclude from the consideration of our Courts confessions made by prisoners in Police custody to Magistrates in England

(1) (1896) I.L.R., 22 Bom., 235.

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or in a foreign country. We therefore hold that Exhibit J-1 is admissible in evidence.

[Their Lordships then discussed the evidence.]

We set aside the conviction and sentence and direct that the appellant be set at liberty.

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APPELLATE CRIMINAL.

Before Mr. Justice Waller and Mr. Justice Jackson.

1928,
December 21.

T. R. SRIRAMULU NAIDU AND ANOTHER (ACCUSED).
PETITIONERS *

Indian Penal Code, sec. 471—Scope of—Person forges document and uses it as genuine—If can be sentenced for both the offences.

Section 471 of the Indian Penal Code only lays down that the sentence that can be imposed for the offence of using a forged document as genuine, is the same as the sentence that can be imposed for the offence of forgery; and a person who both forged a document and used it as genuine can be sentenced for both the offences. *Queen-Empress v. Umrao Lal*, (1900) I.L.R., 23 All., 84, dissented from.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of Session of Trichinopoly Division, dated 5th July 1928 in Criminal Appeal No. 15 of 1928 preferred against the Judgment of the Assistant Sessions Judge of Trichinopoly Division in Sessions Case No. 10 of 1928.

V. L. Ethiraj and A. S. Sivakaminathan for petitioners.

K. N. Ganpati for Public Prosecutor for the Crown.

* Criminal Revision Case No. 624 of 1928.

The JUDGMENT of the Court was delivered by

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WALLER, J.

WALLER, J.—The first petitioner has been convicted under section 467, Indian Penal Code, of forgery. The second petitioner has been convicted of abetment of forgery and of having used the forged document as genuine. The first objection taken is, that they should not have been tried together. It is not, in our opinion, sustainable. The offences were parts of one and the same transaction, and the first petitioner assisted the second at both stages. The second objection is, that the second petitioner should not have been convicted of abetment, no separate charge of abetment having been framed against him. We see no reason to enter on a discussion of this somewhat vexed question, for the objection is entirely academic. The Assistant Sessions Judge, though he convicted the petitioner of abetment of the forgery, passed sentence on him only for using the forged document as genuine; so that, even if we upheld the objection, the result—as far as the petitioner is concerned—would be exactly nothing. The Assistant Sessions Judge, in following the course he did, relied on a ruling from Allahabad, *Queen Empress v. Umrao Lal* (1). AIKMAN, J. thought the words ‘as if he had forged such document’ were directed against some person other than a person proved to be the actual forger and held that a man who both forged a document and used it as genuine could not be sentenced for both offences. With great respect, we cannot agree. All, it seems to us, that section 471, Indian Penal Code, lays down is, that the sentence that can be imposed for the offence of using a forged document as genuine is the same as the sentence that can be imposed for the offence of forgery. They are separate offences and, under section 35, Criminal Procedure Code, separate sentences may be

(1) (1900) I.L.R., 23 All., 84.

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passed on an accused person who has been convicted at the same trial of both. The last objection is that the second petitioner should not have been convicted of an offence under section 471, Indian Penal Code, as it was another person that physically presented the forged document for registration. The evidence shows that the petitioner actively participated in the process of presentation. He was the prime mover in the affair and the second accused was a tool in his hands. He brought her to the Registrar's office, was with her all the time and, knowing the document to be a forgery, aided in its use by lending his services as an identifying witness. He was therefore properly convicted.

The Criminal Revision Petition is dismissed.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Odgers.

P. SANKARAN PILLAI (APPELLANT), ACCUSED *

1929,
January 25.

Indian Post Office Act (VI of 1898)—Postal employee prosecuted under sec. 55—Sanction under sec. 72, if to be obtained before or after Court takes cognizance.

Sanction under section 72 of the Post Office Act to prosecute a postal employee, for an offence under section 55 of the said Act, may be obtained either before or after the Court takes cognizance of the offence.

APPEAL against the order of the Court of the Assistant Sessions Judge, the Nilgiris, Ootacamund, in case No. 87 of the Calendar for 1928.

(Miss) Sita Devadoss and T. A. Ananta Ayyar for appellant.

K. S. Vasudevan for Public Prosecutor for the Crown.

* Criminal Appeal No. 550 of 1928.

JUDGMENT.

In this case the facts have been fully and I think correctly set out by the Assistant Sessions Judge. The accused, who was the sub-postmaster of a small place called Cherambadi, was convicted of criminal breach of trust or misappropriation in respect of a value payable article. This article was a cover addressed to himself containing a railway receipt for certain motor car parts which, the proprietor of a bus plying between Cherambadi and Calicut, P.W. 3, had induced the accused to order for him from Bombay. The goods were duly ordered and arrived at Calicut station and the accused took possession of this V.P.P. cover and, of course, of the railway receipt and also obtained delivery of the goods from the Calicut station (or rather the bus conductor, P.W. 4, was the man who actually obtained the goods). The Bombay firm who supplied the goods sent them on the 27th April and on the 29th the parcel receipt was presented and the goods delivered. The Bombay firm was paid on the 27th June. The accused postmaster had, of course, to disguise the fact that he had taken possession of this V.P.P. letter and he did so by manipulating the register maintained in the Post Office, Exhibit C series. The accused was convicted and sentenced to 5 years' rigorous imprisonment and a fine of Rs. 100 under section 409, I.P.C., read with section 52 of the Post Office Act, and on the charge of having fraudulently prepared the V.P. register, with which he was charged under section 477-A, I.P.C., and section 55 of the Post Office Act, he was sentenced to one year. If the fine was not paid he was to undergo a further six months' imprisonment. The learned Advocates for the accused have endeavoured to show that the accused received this railway receipt in an ordinary cover and not as a value payable article. In order to establish this, of course, Mr. Ananta Ayyar had to try and induce

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me to consider that the evidence of the manager of the Bombay firm, P.W. 5, was wrong or mistaken and that he must be incorrect when he says that this V.P. article was sent on the 22nd of April 1927 from Bombay Hughes Road Post Office. I can see no reason for distrusting this gentleman, Mr. K. R. Srinivasan. Nothing in his cross-examination throws the slightest doubt on his accuracy.

The second point urged is that this story of the postmaster having purchased or arranged to purchase from the bus proprietor, P.W. 3, is got up for the occasion, in order to account for the anxiety of the accused to obtain these motor parts. It does not seem to me to be at all unlikely, and neither the bus proprietor, P.W. 3, nor his conductor, P.W. 4, were examined in any way to break down that story. It seems to me the only tenable theory to account for the somewhat extraordinary conduct of this man. He apparently was responsible for the payment of these motor parts and I can only suppose from the facts that are revealed, that he had not the money to pay in April. He therefore wanted to put off payment as long as possible and he actually succeeded in putting it off for two months, from about the 29th April to about the 27th June.

Under section 62 of the Post Office Act, sanction is required before a postal employee can be prosecuted for an offence under section 55 of the Post Office Act. The objection taken here is, that the sanction was given after the prosecution had begun. This objection does not seem to have been taken in the lower Court. The section does not say that the complaint made under authority from the Director-General or Postmaster-General must precede the cognizance of the offence; that is to say, it does not seem to me to matter as long as sanction is obtained, whether it is obtained before the Court takes cognizance of the offence or not. I think, therefore, the

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conviction under section 55 of the Post Office Act must stand. The sanction in this case is Exhibit D and was dated 28th and 30th January. The complaint is dated 14th January of the same year.

For the first offence he received five years' rigorous imprisonment, and the reason why I have taken time to think over this case is, that it has caused me some anxiety as to what the right sentence in cases of this sort is, because I am quite convinced that five years is extremely excessive. I am quite aware that, the man is a postmaster, and that postmasters and other persons occupying public posts of trust must be expected to carry out their duties conscientiously, and when they fail to do so they must be punished in accordance with the responsibility that rests upon them. If this man had tried or succeeded in converting to his own use money, I should have taken a very different view of the case to what I am going to take. In a way, I suppose, and technically, he did convert the money which was due to be paid on the 29th April for this V.P. article to his own use. What he actually got out of the transaction, which was an extremely foolish one—for it has entailed the loss of his position, and I am told he is a man of 13 years' service in the Postal department—was a mere putting off of payment for two months. Under these circumstances, I think that the accused will be properly punished by reducing his sentence to one year. I do not interfere with the sentence under section 477-A, I.P.C., and section 55 of the Post Office Act which will run concurrently with the other sentences.

If the fine is not paid I reduce the period of further imprisonment to three months.

B.C.S.

PRIVY COUNCIL.*

1929,
March 15.

RAJA OF PITTAPUR (PLAINTIFF), APPELLANT,

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL
(DEFENDANT), RESPONDENT.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Minerals—Unenfranchised Service Inam—Finding that estate held under grant from zamindar—Second appeal—Absence of proof of grant of minerals—Code of Civil Procedure (Act V of 1908), sec. 100.

The owner by a purchase in 1879 of 27 villages in the Northern Circars claimed that he was entitled to the underlying minerals. The villages had formed part of an estate held by the vendor's forefathers as Mansabdars. In or about 1785 the Mansabdar had been paying a fixed annual sum to a neighbouring Zamindar and was under an obligation to provide him with 700 peons. In 1802 the zamindari was permanently settled, the annual payment being treated as among the assets upon which the peshkash was fixed. In 1847 the Government acquired the zamindari, and in 1859 commuted the services for an annual payment. There had been no enfranchisement of the inam. The Subordinate Judge (on appeal from the Munsif) found that the estate was originally held under a grant from the Zamindar subject to a fixed rent and an obligation to provide a military force. Upon appeal it was contended that the Mansabdars had been independent chieftains and did not take under any grant.

Held, that the above contention was inadmissible as there was evidence upon which the finding of the Subordinate Judge could have been based, and that it was therefore binding under the Code of Civil Procedure, 1908, in the second appeal; and as

* Present: Lord SHAW, Lord DARLING, Lord ATKIN, Lord TOMLIN and Sir LANCELOT SANDERSON.

it was not established that the grant by the Zamindar included the minerals, the suit failed.

Shashi Bhusan Misra v. Jyoti Prasad Singh Deo, (1916) I.L.R., 44 Calc., 585; L.R., 44 I.A., 46, followed.

APPEAL (No. 72 of 1927) from a decree of the High Court (March 31, 1925) reversing a decree of the Subordinate Judge of Cocanada (December 12, 1921) affirming a decree of the District Munsif.

The appellant instituted a suit against the respondent Secretary of State claiming a declaration that he was entitled to the underground rights in certain villages in the Northern Circars; he claimed also a return of sums collected from his tenants as royalties and penalties on gravel and stone raised by them, and an injunction.

The facts of the case and the course of the proceedings in India are stated in the judgment of the Judicial Committee.

The appeal to the High Court was finally heard by PHILLIPS and ODGERS, JJ. The learned Judges pointed out that the High Court had already held that the villages had not been enfranchised. It had been found that Totapalle was held as an inam burdened with service. By a series of decisions of the Privy Council the onus was upon the plaintiff to show that the minerals were included in the grant, but there was no evidence that that was so. Nor was there anything in the judgment of the Privy Council in 1870 to support the view that the Mansabdar was in the position of an independent chief. The suit was accordingly dismissed.

DeGruyther, K.C., and *Narasimham* for the appellant.—The material before the Board as to the early history of the estate concerned shows that the holder of Totapalle was an independent chieftain owning all rights in the soil of the estate. Though Totapalle was subjugated by Peddapur and a tribute, in the form of services and an annual payment, was imposed, the rights of the Mansabdar in the soil remained unaffected. He held

independently of any grant; there is no indication that one was made. Upon the permanent settlement of Peddapur the annual tribute was naturally treated as an asset in fixing the peshkash, but that did not affect the title of the Mansabdar to all the rights in the soil. The proceedings before the Board in the appeal of 1870 (1) show that there was no creation of a tenure under Peddapur, but a recognition of hereditary right as Zamindars. As the Mansabdars did not hold under a grant, the decision of the Board in *Shashi Bhusan Misra v. Jyoti Prasad Singh Deo*(2), and in similar cases do not apply. Nor has *Secretary of State for India v. Srinivasa Chariar*(3) any bearing upon the question now raised.

Dunne, K.C., and *Kenworthy Brown* for the respondent.—The present contention is inconsistent with the finding of the Subordinate Judge that Totapalle was originally held under a grant from the Zamindar of Peddapur. Under the Code of Civil Procedure, section 100, the finding was binding in second appeal; it is also binding in this appeal: *Durga Chowdhurani v. Jewahir Singh Chowdhuri*(4), *Nafar Chandra Pal Chowdhury v. Shukur Sheikh*(5). Further the finding was correct. If the Mansabdar had been in the position now alleged he would have applied for a permanent settlement in 1802. By the annexation any previously existing titles were nullified: *Vajesingji v. Secretary of State for India*(6). As the effect of the permanent settlement, Totapalle was a tenure held under Peddapur; the existence of a reversion is the test. Nothing which afterwards occurred affected the sub-infeudation. The failure of the plaintiff to prove that the minerals were granted to him is fatal to his case: *Shashi Bhusan Misra v. Jyoti Prasad Singh Deo*(2), *Raghunath Roy Marwari v. Durga Prashad Singh*(7), *Secretary of State for India v. Srinivasa Chariar*(3).

DeGruyther, K.C., in reply.—The permanent settlement did not take away any pre-existing rights: *Collector of Trichinopoly v. Lekkamani*(8).

- (1) (1870) 13 Moo. I.A., 383.
 (2) (1916) I.L.R., 44 Cal., 585; L.R., 44 I.A., 46.
 (3) (1920) I.L.R., 44 Mad., 421; L.R., 48 I.A., 56.
 (4) (1890) I.L.R., 18 Cal., 23; L.R., 17 I.A., 122.
 (5) (1918) I.L.R., 46 Cal., 189; L.R., 45 I.A., 183.
 (6) (1924) I.L.R., 48 Bom., 618; L.R., 51 I.A., 357.
 (7) (1919) I.L.R., 47 Cal., 95; L.R., 46 I.A., 158.
 (8) (1874) L.R., 1 I.A., 282.

The JUDGMENT of their Lordships was delivered by

Lord TOMLIN.—The appellant in this case who is the plaintiff in the suit, and will be hereinafter referred to as the plaintiff, is appealing against a decree, dated the 31st March 1925, of the High Court of Judicature at Madras, whereby the plaintiff's suit was dismissed and the plaintiff was ordered to pay certain costs.

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The plaintiff as successor-in-title of his father holds 27 villages, formerly part of an estate known as the Totapalle estate situate in the Gōdāvari District in the Northern Circars of Madras. These villages were purchased in 1879 by the plaintiff's father from the then holder and Mansabdar of the Totapalle estate.

In the years 1913 and 1915 the Tahsildar of Peddapur collected from tenants of the plaintiff in two of the 27 villages royalties or penalties for the removal of gravel and stone from hills within the boundaries of such two villages. He did so on the footing that the underground rights in the villages belonged to the Government.

Thereupon the plaintiff launched in the Court of the District Munsif of Peddapur a suit against the defendant, the Secretary of State for India in Council, claiming a declaration of his title to the underground rights in his villages formerly part of the Totapalle estate. He also asked an injunction to restrain interference with his rights and a refund of the amount collected from his tenants. The defendant denied the title of the plaintiff to the underground rights alleging that the Government retained the right to resume (i.e., to re-assess) the Totapalle estate and that the underground rights were therefore vested in the defendant-respondent. The substantial issue between the parties is the title to the underground rights.

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The Mansabdar of the Totapalle estate admittedly transferred to the plaintiff's father in 1879 all his interest in the 27 villages. It was open to the plaintiff to show either that the interest of the Mansabdar transferred in 1879 included the underground rights or that the plaintiff's father or he himself subsequently acquired them. In fact, in the first instance, he framed his claim on the footing that the underground rights passed to his father in or about 1883 by reason of the Government having at that time resumed the villages and enfranchised them in favour of his father.

This point is raised by paragraph 3 of the plaintiff's filed plaint in the following terms:—

"The plaintiff is the owner of Nellipudi, Meraka Chama-varam and some other villages in the Totapalle estate as per the plaint schedule. The underground rights in the said villages had become absolutely vested in and been enjoyed by plaintiff and his predecessors-in-title and the said villages were purchased from the then Mansabdar by plaintiff's father in or about 1879. They were subsequently resumed by Government and enfranchised in plaintiff's father's favour and quit-rent imposed on them."

As will be seen from the succeeding narrative, the plaintiff subsequently changed his ground more than once. On the 18th December 1916, the District Munsif pronounced judgment in the plaintiff's favour so far as his title to the underground rights was concerned, and gave him a declaration accordingly, but did not grant him any injunction and rejected his claim for a refund of the royalties or penalties which had in fact been paid not by him but by his tenants.

The District Munsif appears to have held that the alleged enfranchisement did not enlarge the appellant's rights but that the title to the Totapalle estate rested upon an ancient grant, which had not been produced, and that by virtue of a general rule to the effect that

the grantor must in the absence of evidence to the contrary be taken to have parted with all his rights, the underground rights had passed by the grant and were therefore vested in the plaintiff.

An appeal was taken to the Subordinate Judge who, on the 17th December 1917, also pronounced judgment in the plaintiff's favour. He appears to have held that there was an original service grant of the estate which must be presumed to have carried the underground rights and further that the plaintiff was entitled to the underground rights by virtue of the alleged enfranchisement. He therefore confirmed the decree of the lower Court with the addition of an injunction to which he considered the plaintiff entitled.

The defendant appealed to the High Court of Judicature at Madras. On the 7th March 1919, the Court set aside the decisions of the lower Courts. It remanded the suit to the District Munsif for readmission and retrial, and directed the trial of an additional issue, namely:—"Whether the suit village in the hands of the plaintiff's predecessors was subject to a burden of service or was in lieu of wages for service?"

From the judgments delivered in the High Court it appears that the Court took the view that the Subordinate Judge had decided the case upon the basis that there had been an enfranchisement by the Government which carried the underground rights to the plaintiff's father, but that in fact what had taken place had not amounted to an enfranchisement at all. The learned Judges however directed the trial of the further issue because the plaintiff's counsel had presented to them an argument to the effect that apart from the alleged enfranchisement his client's predecessors-in-title had always held the estate subject to a burden of service and not merely in lieu of wages for service. This fact,

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if established, would (he had contended) lend strength to the plaintiff's claim to the underground rights. The suit was accordingly retried by the District Munsif. On the 21st June 1920, he again gave judgment in the plaintiff's favour, holding that the Totapalle estate was held only burdened with service and was not held in lieu of wages for service, and that the underground rights were therefore in the plaintiff. The District Munsif's view seems to have been that the holding of the villages was first and the imposing of the burden of service subsequent.

On appeal the Subordinate Judge, on 12th December 1921, confirmed the District Munsif, holding that the estate was enjoyed under a grant from the Zamindar of Peddapur, subject to the obligation of rendering some service and paying a quit-rent, and that such a grant carried the underground rights.

The suit was again taken by the defendant to the High Court of Judicature at Madras. The appeal was, on the 1st May 1925, allowed, the learned Judges holding that in the absence of any evidence that the underground rights were included in the grant they could not be treated as having thereby passed.

It is to be observed that in the High Court on the second appeal the plaintiff for the first time put forward a new contention that the Mansabdar of the Totapalle estate was originally a chief in a position analogous to a Poliagar in the South of the Presidency and as such entitled to the underground rights. This contention was rejected by the learned Judges of the High Court on the grounds that it had not been raised in the lower Courts and that there was no evidence to show any similarity between the tenure of the Totapalle estate and that of an estate held by a Poliagar.

It is against this judgment that the plaintiff now appeals.

The history of the Totapalle estate prior to the early part of the 19th century is not free from obscurity. No grant of the estate has been produced. The material placed before the lower Courts consisted of (a) Mr. James Grant's Political Survey of the Northern Circars, written about 1785 and annexed to the Fifth Report of the Select Committee on the affairs of the East India Co.; (b) Morris's account of the Gōdāvari District, published in 1868 under Government authority; (c) "The Gōdāvari Gazetteer" a Government publication of 1907; (d) the Government documents relating to the transactions of 1881-1883, which are printed at pp. 89-100 of the record; and (e) the extracts from the statement of a former Mansabdar of Totapalle printed in 13 Moo. I.A., 333, in the course of the report of the case of *Stree Rajah Yanumula Venkayamah v. Stree Rajah Yanumula Boochia Vankondora*.

From this material certain facts emerge as to which there is no dispute, namely, (1) that in or about the year 1785 the Mansabdar was paying a fixed annual sum to the Zamindar of Peddapur and was under an obligation to furnish him with a military force of 700 peons when called upon to do so; (2) that some time prior to the end of the 18th century the Zamindar resumed certain villages forming part of the estate to satisfy his claims in respect of the annual sum; (3) that in 1802 there was a permanent settlement by the Government of Madras of the zamindari of Peddapur and that the annual sum receivable by the Zamindar from Totapalle was treated as an asset of the Zamindar; (4) that in 1847 the Government of Madras acquired the zamindari of Peddapur at a sale for arrears of revenue;

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(5) that in 1859 the Government commuted the obligation of the Mansabdar of Totapalle to supply 700 peons for an annual payment of 6,500 rupees; (6) that the Mansabdar from time to time alienated certain other parts of the Totapalle estate as well as the 27 villages alienated to the plaintiff's father in 1879; and (7) that the Government's documents show that the Government regarded the Totapalle estate as a service *inam* and dealt with it on that footing in 1881 to 1883 by making a settlement in respect of it, which was expressly stated not to amount to a permanent settlement or enfranchisement.

Mr. Grant in his survey of 1875, describes Totapalle as a small hilly country and a region of tigers. The obscurity of its early history may in part be due to its lack of importance.

At any rate their Lordships are of opinion that there is a definite finding by the Subordinate Judge to the effect that the estate was originally held under a grant from the Zamindar of Peddapur subject to a fixed annual rent and an obligation to provide a military force. After an examination of the materials placed before the lower Courts (in the course of which their Lordships saw a full copy of the statement of the Mansabdar, extracts from which are printed in 13 Moore's Indian Appeals, 333), their Lordships are of opinion that there was before the Subordinate Judge evidence upon which his finding of fact could have been based.

Before their Lordships it has been urged by the plaintiff that the Mansabdars of Totapalle were originally independent chieftains not taking under any grant at all, and that the findings of fact arrived at by the Subordinate Judge should be reviewed and modified accordingly.

In their Lordships' opinion they have no jurisdiction in the circumstances of this case to embark upon any such review. Under the Civil Procedure Code no second appeal will lie except on the grounds specified in section 100. Directly in point are the observations of Lord MACNAGHTEN in *Durga Chowdhrami v. Jewahir Singh Chowdhri*(1), in which he says:—

"It is enough in the present case to say that an erroneous finding of fact is a different thing from an error or defect in procedure and that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact however gross or inexcusable the error may seem to be."

There remains then only the question whether the High Court of Judicature at Madras was right in holding that the underground rights did not pass in the absence of evidence of the inclusion of such rights in the grant found by the Subordinate Judge.

There was, in fact, no evidence that the grant included the underground rights or that the minerals had ever been worked by the Mansabdars of Totapalle or by any of their alienees. The fact that minerals were in terms reserved in leases to tenants granted by the plaintiff and his father cannot in their Lordships' opinion be evidence that the underground rights passed from the Zamindar of Peddapur under the original grant to the Mansabdar of Totapalle.

The lower Courts based their conclusion that the underground rights passed by the original grant upon a presumption that, in the absence of any evidence as to the terms of the grant, the grantor passed all that he had to the grantee.

In their Lordships' opinion no such presumption is admissible. Such a presumption would be contrary to many decisions of their Lordships' Board in which it

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(1) (1890) I.L.R., 18 Cal., 22, 30; L.R., 17 I.A., 122, 127.

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has been from time to time pointed out that the rules of English law as to real property in England can afford no guidance as to what has passed under an Indian grant.

The principle to be applied to the present case is in their Lordships' judgment to be found stated by Lord BUCKMASTER in *Shashi Bhusan Misra v. Jyoti Prasad Singh Deo*(1), where referring to earlier decisions, he says :—

"These decisions therefore have laid down a principle which applies to and concludes the present dispute. They establish that when a grant is made by a Zamindar of a tenure at a fixed rent, although the tenure may be permanent, heritable and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect."

In the result therefore their Lordships are of opinion that the judgment of the High Court at Madras was right and that the appeal fails and ought to be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Douglas Grant and Dold.*

Solicitor for respondent: *Solicitor, India Office.*

A.M.T.

(1) (1916) I.L.R., 41 Calo., 585, 594; L.R., 41 I.A., 47, 53.

PRIVY COUNCIL.*

SUBRAMANYA CHETTIYAR AND OTHERS (DEFENDANTS),
APPELLANTS,

1929,
March 19.

v.

SUBRAMANYA MUDALIYAR AND OTHERS (PLAINTIFF),
RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Landlord and tenant—Right of permanent occupancy—Burden of proof—Long continued possession at uniform rent—Alienations—Purchase of kudivaram.

It is well established that those claiming a right of permanent occupancy must prove that it exists by custom, contract or title, or possibly by other means.

In a suit by a ryotwari pattadar claiming partition of his undivided half share in an estate, the defendants contended that they had a right of permanent occupancy as to certain well-irrigated lands and palmyra trees, and that consequently they should be excluded from the partition.

Held that the defendants, who proved that they had been in undisturbed possession of some of the land for a long period at a more or less uniform rent, and that at a comparatively recent date they had made alienations not of such a kind as ordinarily would be brought to the notice of the pattadar, had not discharged the burden of proof upon them; the fact that some of the defendants had purchased the kudivaram militated against their claim.

Seturatnam Aiyar v. Venkatachala Gounden, (1919) I.L.R., 43 Mad., 567; L.R., 47 I.A., 79 and *Sivaprakasa Pandara Sannadhi v. Veerama Reddi*, (1922) I.L.R., 45 Mad., 586; L.R., 49 I.A., 286, distinguished on the facts.

APPEAL (No. 10 of 1927) from a decree of the High Court (October 15, 1924) varying a decree of the Subordinate Judge of Tinnevely.

The first respondent was the owner by purchase of the pattadar rights in an undivided moiety of certain

* Present: Lord CARSON, Lord SALVESSEN and Sir GEORGE LOWNDEN.

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lands in a village. He brought the present suit claiming a partition. The defendants-appellants were, or claimed through, persons who had been in possession since 1857 or earlier. By their written statement they alleged that as to part of the land they had a permanent right of occupancy, and they contended that it should, therefore, be excluded from the partition.

The facts appear more fully from the judgment of the Judicial Committee.

The High Court (WALLIS, C.J., and SADASIYA AYYAR, J.) held that the burden of proof was upon the defendants in question, and that they had failed to discharge it. The decree of the trial Judge was accordingly varied.

Dunne, K.C., and *E. B. Raikes* for the appellants.

DeGruyther, K.C., and *Dube* for the first respondent.

The JUDGMENT of their Lordships was delivered by

LORD
SALVESEN.

LORD SALVESEN.—This is an appeal from a judgment and decree, dated the 15th October 1920, of the High Court of Judicature at Madras, which varied a judgment and decree, dated 21st December 1917, of the Subordinate Judge of Tinnevely.

The appellants were defendants in a suit which was raised at the instance of the plaintiff-respondent for a partition of his one-half share of certain lands situate in what is called the Chinna Pannai division of the village of Ayyanarkulam in the Tinnevely district. By alienations and purchases which are not now disputed, the first respondent is the owner of a one-half share of the Chinna Pannai division of the village, and the *ryotwari* settlement having been made by the Government with his predecessors-in-title, he is at present *ryotwari patta-dar* of one-half undivided share of this estate. The earliest document of title is dated 1857 and refers back

to a state of possession in 1851, but it is probable that the settlement took place at an earlier date. Even at that time the land was described as belonging to three classes: rain-fed lands, dry lands, and lands which were then irrigated by means of wells but had been formerly dry; and the wells were at least of two classes, *samudayam* wells—that is, wells common to the three *pannais*, of which the respondent now holds one-half share of the *chinna pannai* and other wells, some of which are probably named after persons through whom the appellants claim, and may be assumed to have been sunk by the cultivating occupiers. It appears also that palmyra trees had been planted, some by the owners and some by the cultivators. It is these lands, irrigated by wells, and the palmyra or garden lands, which alone are in dispute in the present suit, which is one for partition between the appellants and the said respondent of the properties comprised within the *chinna pannai* above referred to.

In the statement made on their behalf, the appellants admitted that the respondent's predecessors-in-title had been regularly receiving *tirwa swamibhogam* for his share of the lands. *Tirwa* is the share of the rents payable to Government, and *swamibhogam* the revenue derived from the tenants or occupiers over and above what was necessary to pay the tax. In statement No. 11 they raised no objection to a division being effected in respect of the dry and rain-fed lands specified in Schedule No. 3, but they maintained that the well-irrigated lands and palmyras should be excluded from the partition on the ground that they had acquired permanent rights of occupancy in the same, subject to the payment of a fixed rate of Rs. 4-6-0 for *punja* lands irrigated with water obtained from old wells, and Rs. 2-3-0 per acre for *punja* lands irrigated with water from new wells and

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pies four per palmyra. Some of these new wells, it appears from the evidence, were of comparatively recent date, but no distinction is made between the lands watered by these wells and those which were watered by wells of older date. In respect to all of them the appellants claimed that they were permanent tenants who had acquired by long occupation the *kudivaram* of these lands, subject only to the payment of a fixed annual return at the rates above mentioned.

The principle upon which disputes of this kind, which have frequently come before the Courts in India, fall to be decided, have now been conclusively fixed by two judgments of this Board. In the earlier of these, *Seturatnam Aiyar v. Venkatachela Goundan*(1), the long-contested dispute as to the burden of proof was dealt with in the judgment of the Board which was delivered by Sir LAWRENCE JENKINS :—

“ The plaintiff's title was conceded, and the notice by which he purported to terminate the defendants' tenancy was not disputed. It was also admitted that the defendants held under, if not from, the plaintiff. To resist the plaintiff's claim, the defendants set up a permanent tenancy or an occupancy right in themselves. If this was not established, then, the defendants must fail, and, to adopt the language of section 101 of the Indian Evidence Act, as the defendants were bound to prove the existence of their permanent tenancy or occupancy right, the burden of proof as to it lay on them. This view as to the incidence of the burden has been repeatedly recognized in the series of Madras decisions cited in argument, and is, in their Lordships' opinion, not open to doubt.”

In the latest case, *Nainapillai Marakayar v. Ramanathan Chettiar*(2), this view was expressly re-affirmed.

The judgment of the Subordinate Judge in the present case is vitiated by the fact that he misapprehended

the proper incidence of the burden of proof, his judgment having been delivered before *Seturatnam Aiyer's* appeal above referred to had been decided in the Privy Council.

The question, then, in the present case, is whether on the evidence the appellants have established the permanent occupancy rights which they claim. In the case last mentioned, the High Court had held that the appellants in that case had satisfied the onus of proof which in the first instance lay upon them, and their Lordships of the Privy Council saw no reason to disturb the inference which they had drawn from the facts proved. A similar result was arrived at in the case of *Sivaprakasa Pandara Sannadhi v. Vecrama Reddi*(1), but in *Nainapillai Marakayar v. Ramanathan Chettiar*(2), the inference from the facts there proved was to the opposite effect.

In the present case the Judges of the High Court have very carefully examined all the evidence and have reached a result unfavourable to the appellants. It would serve little purpose to go through the evidence which has already been dealt with in detail by these learned Judges, seeing that the accuracy of their statement of facts and the soundness of their reasoning has not been successfully criticised. It is sufficient to point out that the facts in the other two cases, 47 I.A. and 49 I.A., were very different from those which the appellants have been able to prove here. In the former case it was found to be established as a fact that the possession of the occupancy tenants had been immemorial and, what is perhaps more important, that at the inception of the relations between the owner and the tenants, the latter had possessed occupancy rights. In the latter

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(1) (1922) I.L.R., 45 Mad., 583; L.R., 49 I.A., 286.
(2) (1923) I.L.R., 47 Mad., 387; L.R., 51 I.A., 83.

(1) (1919) I.L.R., 43 Mad., 567; L.R., 47 I.A., 76.
(2) (1923) I.L.R., 47 Mad., 387; L.R., 51 I.A., 88.

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case the tenants succeeded in showing that they had been dealing with the property as their own for at least a hundred years. They had also shown that they had received compensation from the Government for lands taken out of their holdings for public purposes and that the plaintiff's evidence had been found to be mostly false and fabricated. No such facts have been established in the present case.

To use the language of Sir LAWRENCE JENKINS, "permanence is not a universal and integral incident of an under-ryot's holding. If claimed, it must be established. This may be done by proving custom, contract or a title, and possibly by other means." In the present case, the appellants have succeeded in showing little else than that they have remained in undisturbed possession of some of the land in question for a long period at a more or less uniform rent, but they have not attempted to prove any custom upon which they could found, and the attempt which they made to prove a contract with regard to the lands in which new wells were sunk, under which they were to be allowed to occupy these on a reduced rate of rent as compared with the lands on which the old wells were situate, has completely failed. The alienations on which they found and which, if they had been made over a long period, would have been valuable evidence in establishing the right which they claim, all turn out to be of comparatively recent date, and not of such a kind as would ordinarily be brought to the notice of the *pattadar*, for they do not seem in most cases to have involved any change of tenancy.

There is also one point on which one of the learned Judges of the High Court relies, and which does not appear to have been present in any of the previous cases, namely, that in the half of the *chinna pannai* which is not claimed by the respondent some of the appellants

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actually acquired the *kudivaram* of the land. This, while not conclusive, as it might have been done by way of excessive caution, militates against the claim which they are now making. A cultivator who has acquired permanent rights of occupancy may purchase the *melvaram* of the lands so as to become the absolute proprietor, but if he considers himself to be the owner of the *kudivaram* it is not likely that he would expressly purchase the latter without some indication that he was only doing so to avoid disputes. The present suit is not an action of ejection, but is brought to establish that the plaintiff-respondent is entitled to have all the lands within his title partitioned on the footing that the appellants as a community of cultivators have not acquired the permanent rights of occupancy which they claim. Their Lordships express no opinion as to the terms on which ejection of any individual occupier may be sanctioned by the Court if and when such a suit is brought.

Their Lordships have therefore come to the conclusion not merely that there are no sufficient grounds for disturbing the inferences which the High Court have drawn from the facts proved before them, but they agree with them that these were the proper inferences to be drawn.

They will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellants: *H. S. L. Polak.*

Solicitors for respondent: *Douglas Grant and Dold.*

A.M.T.

APPELLATE CIVIL—FULL BENCH.

Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Madhavan Nair and Mr. Justice Jackson.

RAMAKOTTAYYA (PLAINTIFF), APPELLANT,

v.

VIRARAGHAVAYYA (SECOND DEFENDANT), RESPONDENT.*

*Hindu Law—Gift by widow with the consent of next reversioner—
Personal estoppel.*

If the next presumptive male reversioner consents, though for no consideration, to an alienation without necessity by a Hindu widow (e.g., a gift as in this case), the transaction will be binding on him when he actually succeeds to the estate; *Fateh Singh v. Thakur Rukmini Ramanji Maharaj*, (1923) I.L.R., 45 All., 339 (F.B.) and *Akkawa v. Sayadkhan*, (1927) I.L.R., 51 Bom., 475 (F.B.), followed; *Rangasami Gounden v. Nachiappa Gounden*, (1918) I.L.R., 42 Mad., 523 (P.C.), applied.

APPEAL under clause 15 of the Letters Patent against the Judgment of Mr. Justice RAMESAM in Second Appeal No. 814 of 1923, preferred against the decree of the District Court of Guntūr in Appeal Suit No. 92 of 1922 preferred against the decree of the Court of the District Munsif of Repalle at Tenali in Original Suit No. 147 of 1919.

The facts are given in the Judgment.

In the Second Appeal Mr. Justice RAMESAM gave a decree declaring that the gift impugned in this case would be binding on the plaintiff if he happened to succeed to the estate and not on the other reversioners.

* Letters Patent Appeal No. 93 of 1926.

Against that decree the plaintiff preferred this Appeal under clause 15 of the Letters Patent.

The Appeal coming on for hearing, the Court (the CHIEF JUSTICE and MADHAVAN NAIR, J.) referred the following question to a Full Bench:—

“Where an alienation without necessity (Exhibit I) by a Hindu widow of property forming part of her husband's estate is consented to by the next presumptive male reversioner, who, however, receives no consideration for giving such consent, is the transaction binding on the consenting reversioner, if he succeeds to the estate after the death of the widow and of the female reversioner succeeding her?”

ON THIS REFERENCE—

V. *Govindarajachari* for appellant.—This alienation being a gift is not binding on the plaintiff (reversioner) especially when he did not get any consideration for it; *Rangasami Gounden v. Nachiappa Gounden*(1). There is no estoppel within the meaning of section 115, Evidence Act. As the succession has not yet opened, there is no scope for election by the reversioner “to hold the dead good” within the meaning of the above decision. Election is the choice between two inconsistent benefits conferred by another; See Story's Equity, section 1075; Encyclopaedia of the Laws of England under the heading “Election,” White and Tudor, Vol. I, page 373, 9th Edition; whereas, ratification or confirmation is of one's own act. In this case there is no scope for the doctrine of ratification either. The Privy Council have held that whether a reversioner consents to an alienation by a widow by joining in the alienation, or whether he alienates his own reversionary right, he is not thereby prejudiced as he has in either case only a *spes successionis*. What cannot be done directly cannot be done indirectly either. Hence his consent later on, before the succession actually opens to him is equally immaterial. The decisions of the Allahabad and Bombay High Courts in *Fateh Singh v. Thakur Rukmini Ramanji Maharaj*(2) and in *Akkawa v. Sayadkhan Mithekhan*(3), are against the view of the Privy Council in the above *Gounden's case* and are wrong.

(1) (1918) I.L.R., 42 Mad., 523, 538 (P.C.).

(2) (1923) I.L.R., 45 All., 339.

(3) (1927) I.L.R., 51 Bom., 475.

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Ch. Raghava Rao for respondent.—Election to hold the deed good is different from the doctrine of general election. If the reversioner has done some act, even before the succession opens, showing his intention to hold the deed good, he is estopped even if he received no consideration, *Clough v. London North-Western Railway*(1). This has been definitely laid down in *Rangasami Gounden v. Nachiappa Gounden*(2), and in the above Allahabad and Bombay cases; see also 20 Halsbury, pages 737, 740 and 748.

OPINION.

COUTTS
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COUTTS TROTTER, C.J.—The facts necessary for the determination of this reference are briefly these :—

Vemulapalli Subbayya died in 1909, leaving a widow Seethamma, the first defendant and his mother Bapamma, the third defendant surviving him. On the 2nd of October 1918, Seethamma executed a deed of gift in respect of some of the properties that came to her from her husband in favour of her own brother Veeraghavayya who is impleaded as the second defendant in this case. The gift was effected by means of a document which is filed as Exhibit I in the case, and on the 19th of October, the plaintiff executed a document filed as Exhibit II, which in effect is a complete relinquishment of all his rights as prospective reversioner and also purports to give full consent to the transaction evidenced by Exhibit I, to which document indeed he was an attesting witness. The question is whether by reason of his action in these matters he is to be held to be precluded from challenging the transaction. The exact wording of the question is as follows :—

“Where an alienation without necessity (Exhibit I) by a Hindu widow of property forming part of her deceased husband's estate is consented to by the next presumptive male reversioner, who, however, receives no

(1) (1871) L.R., 7 Ex. Cas., 26, 34.

(2) (1918) I.L.R., 42 Mad., 528.

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consideration for giving such consent, is the transaction binding on the consenting reversioner, if he succeeds to the estate after the death of the widow and of the female reversioner succeeding her?”

There is a Full Bench decision of the Allahabad Court, *Fateh Singh v. Thakur Rukmini Ramanji Maharaj*(1), which is directly in favour of the respondent here, and that in its turn was followed by a Full Bench of the Bombay Court, *Akhawa v. Sayadkhan Mithekhan* (2). In substance, the argument before us is that these cases are inconsistent with the Privy Council decision in *Rangasami Gounden v. Nachiappa Gounden*(3).

The learned Judge who decided the Second Appeal, RAMESAM, J., speaks in his judgment, of the plaintiff, the prospective reversioner, being estopped. In our opinion no question of estoppel arises in this case at all, for the essence of the doctrine of estoppel is that a person who acts on a representation of fact made to him by another person and is thereby damnified, is entitled to say that the person who made that representation cannot be heard to contest the truth of the facts which he himself asserted. The essence of the doctrine is that the person who acted on the faith of the assertion was damnified by so acting, and that feature is altogether absent in this case.

The next ground on which it is suggested that the plaintiff may be put out of Court is on the doctrine of election. That well-known equitable doctrine is stated in the leading case of *Streatfield v. Streatfield* decided in 1735 and most conveniently reported in 1 White and Tudor, 9th Edition, 373, and I cannot summarize it better than in the words of the learned editors in their notes

(1) (1928) I.L.R., 45 All., 339. (2) (1927) I.L.R., 51 Bom., 475.

(3) (1918) I.L.R., 42 Mad., 523.

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to that case which begin at the bottom of page 444.
They say this:—

“Election is the obligation imposed upon a party by Courts of Equity to choose between two inconsistent or alternative rights or claims in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both. Every case of election, therefore, presupposes a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both that one should be a substitute for the other. The party who is to take has a choice, but he cannot enjoy the benefit of both.”

The same principle is often put in another form that a person cannot approbate and reprobate the same transaction. In this case that doctrine can have no application for the simple reason that no benefit was taken by this plaintiff of any kind, and that his approbation was a mere expression of intention which had no further consequences. But there is a third doctrine of Equity, an obviously indispensable one which has received various legal labels, sometimes being spoken of as election and sometimes as ratification. Its most authoritative exposition for an Indian Court is to be found in the judgment of the Board in *Rangasami Gounden v. Nachiappa Gounden*(1), delivered by Lord DUNEDIN and I think it best to set out the material passage in full:

“No doubt there is another view which is not estoppel, but is expressed by one learned Judge as ratification. It is scarcely that, though it might be hypercriticism to object to the use of the word. What it is based on is this. An alienation by a widow is not a void contract, it is only voidable—*Bijoy Gopal Mukerji v. Krishna Mahishi Debi*(2). Now in all cases of voidable contracts there is a general equitable doctrine common to all systems that he who has the right to complain must do so when the right of action is properly open to him and he knows the facts. If, therefore, a reversioner, after he became *in titulo* to reduce the estate to possession and knew of the alienation, did something which showed that he treated the alienation as

good he would lose his right of complaint. This may be spoken of, though scarcely accurately, as ratification. In some cases it has been expressed as an election to hold the deed good—*Modhu Sudan Singh v. Rooke*(1).

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“But it is well settled though he who may be termed a presumptive reversionary heir has a title to challenge an alienation at its inception, he need not do so, but is entitled to wait till the death of the widow has affirmed his character, a character which up to that date might be defeated by birth or by adoption. The present plaintiff raised these proceedings immediately after his title was confirmed.

“Of course something might be done even before that time which amounted to an actual election to hold the deed good.”

His Lordship points out that an alienation of this nature by a widow is not a void but only a voidable contract, and that it can be affirmed expressly or impliedly by conduct of those whose interest it is to have it avoided. It has been argued that their Lordships meant to confine the class of persons who could validate the voidable contract to a reversioner who had not merely a *spes successionis* but had become *in titulo* to reduce the estate into possession. Giving the best consideration we can to this leading authority, we think that that passage is by way of illustration and should not be treated as exhaustive of the possibilities of a reversioner validating a *prima facie* voidable contract. There are two cases in which a reversioner may lose his rights. The first is when he does something definite and positive to indicate his election to abide by it; the other is where he is merely guilty of laches and sleeps on his rights. It is clear that what their Lordships call a presumptive reversioner like the present plaintiff cannot be deemed to have affirmed the widow's alienation by mere inactivity. He is entitled to bring a declaratory

(1) (1897) I.L.R., 25 Cal., 1 (P.C.).

(1) (1918) I.L.R., 42 Mad., 523, (2) (1907) I.L.R., 34 Cal., 329 (P.C.).

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suit but he is not bound to do so; he may wait until the succession opens by the death of the widow and the termination of any other intervening interest. The question is, whether the same holds good in the case not merely of passivity but of a positively manifested intention to abide by the act of the widow. That seems to be left open by the concluding words of the passage that I have quoted, in which it is said that something may be done even before that time (that is, when the succession opens) which amounted to an actual election to hold the deed good. Their Lordships do not specify what class of cases they had in contemplation. One would obviously be where the presumptive reversioner had brought himself either within the doctrine of estoppel, or had taken a benefit and thereby fallen within the doctrine of election strictly so called, as defined in *Streetfield v. Streetfield*(1). The Allahabad and Bombay High Courts hold that a third case exists, namely, where although no one has been damnified so as to call into operation the doctrine of estoppel and the reversioner has taken no pecuniary benefit to bring himself within the meaning of the strict doctrine of election, he has nevertheless positively and definitively chosen to announce his intention and in fact agreed to abide by the act of the widow. The Full Benches of Allahabad and Bombay have decided that he can do so even while he only occupies the character of a presumptive reversioner. We agree with the Allahabad and Bombay Courts in thinking that if he takes such a step he is personally debarred from resiling from it afterwards. Indeed it is so obviously desirable that the Courts of India should speak with one voice on a matter of such constant recurrence as this that we should not

(1) (1735) 1 White and Tudor (9th Edition), 373.

dissent from those decisions unless we were convinced that they were contrary to the decision of the Privy Council in *Rangasami Gounden v. Nachiappa Gounden*(1). For the reasons stated we do not think that they are.

MADHAVAN NAIR, J.—I agree.

JACKSON, J.—I agree.

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APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kumaraswami Sastri, Mr. Justice Ramesam and Mr. Justice Reilly.

IMMIDISETTI DHANARAJU AND ANOTHER (PETITIONERS),
APPELLANTS,

v.

SAIT BALAKISSENDAS MOTILAL AND ANOTHER
(COUNTER-PETITIONERS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 98—Letters Patent, 1862, as amended in 1865—Appeal preferred to the High Court under Civil Procedure Code—Equal division of opinion between the Judges who heard the Appeal—Procedure to be adopted, whether under clause 36 of the Letters Patent or section 98 of the Civil Procedure Code—Amendment of section 98 of the Code—Amending Act XVIII of 1928, effect of—Practice.

In the case of an equal division of opinion between the judges of the High Court, in an appeal preferred to it under the Civil Procedure Code, the procedure to be adopted by the High Court is governed by clause 36 of the Letters Patent, and not by section 98 of the Code of Civil Procedure.

APPEAL against the order of the Subordinate Judge of Cocanada in Civil Miscellaneous Petition No. 381 of 1926 in Original Suit No. 67 of 1922.

This reference to a Full Bench arose out of a difference of opinion between PHILLIPS and TIRUVENKATACHARIYAR, JJ., in certain miscellaneous appeals arising out of

(1) (1918) I.L.R., 42 Mad., 523.

* Appeal against Order No. 155 of 1926.

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execution proceedings. In execution of a decree obtained by the respondents against the appellants, the former attached and brought to sale a preliminary decree in a suit for dissolution of partnership obtained by the appellants against their partners. The appellants objected to the attachment and sale of the decree, but the lower Court held that the sale was valid. On appeal being preferred to the High Court under the Civil Procedure Code, PHILLIPS, J., held that the sale of the decree was invalid as being contrary to Order XXI, rule 53, of the Code, that the appeals should be allowed, and that the sale should be set aside. On the contrary, THIRUVENKATACHARIYAR, J., held that the sale was valid, as the decree sold was not a money decree, that the sale could not be set aside on any ground, and that the appeals should be dismissed. In consequence of this difference of opinion, a question arose as to whether the procedure prescribed by section 98 of the Civil Procedure Code or by clause 36 of the Letters Patent, should be followed. The question was referred to a Full Bench by the following:—

ORDER OF REFERENCE TO A FULL BENCH:—

PHILLIPS, J.—Owing to the difference of opinion between my learned brother and myself, there remains for decision the question whether the provisions of section 98 of the Civil Procedure Code or the provisions of clause 36 of the Letters Patent should be applied. A similar provision to that contained in section 98 was first enacted in 1861 by an Act amending the Civil Procedure Code of 1859. Subsequently, in 1862, Letters Patent were issued establishing the High Court of Madras and these Letters Patent were modified in 1865. Clauses 15 and 16 of the Letters Patent conferred appellate jurisdiction on the High Court and in clause 36 it is declared that in the exercise of appellate jurisdiction a certain procedure is to be adopted. That this overruled Act XXIII of 1861 was held in *Nundeeput Mahta v. Alexander Shaw Urquhart*(1), where it was held by the

(1) (1870) 18 W.R., 209.

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Calcutta High Court that both clause 15 and clause 36 of the Letters Patent prevailed over the previous Act of 1861. In 1877 the Civil Procedure Code was again amended and also in 1882, and in neither of these Acts is there any section providing that the Code shall not affect the Letters Patent. It has accordingly been held that, under the Code of 1882, section 575 supercedes the provisions of the Letters Patent so far as clauses 16 and 36 are concerned but not in the case of clause 15. The latter point was decided by the Privy Council in *Hurriah Chunder Chowdhry v. Kalisunderi Debi*(1), but there has been no pronouncement by the Privy Council on the former point. In *Sri Gridharaji Maharaj Tickait v. Purushotum Gossami*(2), *Appaji Bhivray v. Shivalal Khubchand*(3), and *Husaini Begam v. The Collector of Muzaffarnagar*(4), and other cases to which I need not refer in detail, it was held that section 575 of Act XIV of 1882 supercedes clause 36 of the Letters Patent. When the Code of 1908 was enacted, a provision was inserted, i.e., section 4:

“In the absence of any specific provision to the contrary, nothing in the Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed by or under any other law for the time being in force.”

Notwithstanding this provision it has consistently been held that section 98 of that Code overrides clause 36 of the Letters Patent—vide *Bhuta v. Lakadu Dhansing*(5), and many other cases in each Court. There is one exception to this series of cases, namely, *Veeraraghava Reddi v. Subba Reddi*(6), where it was held, without discussing the question, that the procedure in clause 36 was to be followed even in the case of an appeal from a mufassal Court. In other cases it was held that clause 36 prevailed in appeals from the Original Side and in *Chappan v. Moidin Kutti*(7), that view was affirmed contrary to the previous practice in the Court, in view of the decision of the Privy Council in *Hurriah Chunder Chowdhry v. Kalisunderi Debi*(1). I do not propose to deal in detail with the many cases in which the question is discussed both in this Court and in other High Courts where the view has prevailed that section 575 applies in all cases to which section 96, Civil Procedure Code, directly applies but not in other cases such

(1) (1882) I.L.R., 9 Cal., 482.

(2) (1884) I.L.R., 10 Cal., 814.

(4) (1889) I.L.R., 11 All., 176.

(6) (1919) I.L.R., 43 Mad., 37.

(3) (1879) I.L.R., 3 Bom., 204.

(5) (1918) I.L.R., 43 Bom., 435.

(7) (1898) I.L.R., 22 Mad., 68 (F.B.).

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as appeals from revision and appeals from the Original Side. If, therefore, the general trend of the decisions is to be followed, the present case would be governed by section 98, Civil Procedure Code, for we are dealing with an appeal from a mufassal Court. The decision in all these cases was arrived at before the pronouncement of the Privy Council in *Bhaidas Shivdas v. Bai Gulab*(1), and in *Sabitri Thakurain v. Sari*(2). We also have now Act XVIII of 1928 under which the following amendment to section 98 is made :—

To section 98 the following sub-section shall be added, namely :—

“Nothing in this section shall be deemed to alter or otherwise affect any provision of the Letters Patent of any High Court.”

The Letters Patent were also amended in 1927 to take effect from February of this year and this amendment prescribed a procedure to be adopted in the case of equal division of opinion between Judges deciding an appeal so as to be more in conformity with the provisions of section 98. The question, therefore, is whether, in view of these two decisions and the subsequent legislation, the prior cases which decided that the section 98 was to be applied in appeals coming within the jurisdiction conferred by clause 16 of the Letters Patent and that clause 36 applied in other cases, are still good law. The point has been considered in this Court in *Venktasubbiah v. Venkatasubbamma* (3), and it was held that the law had not been altered, but in that case no reference is made to the decision in *Sabitri Thakurain v. Sari*(2), nor of course to Act XVIII of 1928. In *Pandu v. Jannadas*(4), it was held that clause 36 applies in a case arising in the mufassal when the appeal lies only under clause 15 of the Letters Patent. In *Punjab Akhbarat & Press Co. v. Ogilvie*(5), it was held that section 98 still applies in appeals from mufassal Courts although the Chief Justice appears to have been inclined to the opposite view, but he followed the trend of prior decisions as the matter was not *res integra*. In *Suresh Chandra Mukherjee v. Shiti Kanta Banerjee*(6), decided by a Full Bench of three Judges, NEWBOLD, J., says “We accept the contention that the decision of the Judicial Committee in *Bhaidas Shivdas v. Bai Gulab*(1), shows that the procedure laid down in section 98 of the Civil Procedure Code was wrongly applied in the present case” and that case was one

arising in appeal from the mufassal. In a later case *Prafulla Kamini Roy v. Bhapani Nath Roy*(1), it was held by PAGE, J., who was one of the Judges in *Suresh Chandra Mukherjee v. Shiti Kanta Banerjee*(2), that the decision of the Privy Council in *Bhaidas Shivdas v. Bai Gulab*(3), must be confined to its own facts and laid down no general rule. WALMSLEY, J., who was previously of a different opinion, deferred to the opinion of PAGE, J., because it was in agreement with the previously expressed opinion of SUHRAWARDY, J. From all these cases it would appear that there is considerable doubt on the subject and it is therefore necessary to examine these two cases, i.e., 45 Bom. and 48 Calc. somewhat carefully. In addition to those two cases we have now the amendment to section 98, which has so far as appears from the reports, never been considered by any Court till now. In 48 Calc., which was decided on 20th January 1921, it is held that Order XLI, rule 10, Civil Procedure Code, applies to an appeal under clause 15 of the Letters Patent, but, in the judgment of Lord SUMNER in that case, there are certain remarks which seem to have a general bearing. In referring to the prior decisions of Indian Courts, notably the Courts in Madras, he says at page 490 :—

“It is true that in *Sesha Ayyar v. Nagarathna Lala*(4), BHASHYAM AYYANGAR, J., said that in a Letters Patent Appeal from a single Judge a respondent could not apply for security for costs, because section 549 of the Civil Procedure Code (which corresponded to Order XLI, rule 10, of the Code of 1908), applied only to appeals to the High Court from Subordinate Courts, and that in *Sabapathi Chetti v. Narayanasami Chetti*(5), the Court said that the provision made by section 15 of the Letters Patent was entirely foreign to the provisions of the Civil Procedure Code relating to appeals from one Court to another, but both these cases followed and purported only to apply *Chappan v. Moidin Kutti*(6), a Full Bench decision of 1898, and *Toolsee Money Dasee v. Sudevi Dasee*(7). These are cases in which the point actually decided was that the appeal expressly given by section 15 of the Letters Patent is not interfered with by section 588 of the Code of 1882, on the principle *generalia specialibus non derogant*, following *Hurish Chunder Chowdhry v. Kalisunderi Dobi*(8). From a consideration of these older cases, which were very fully argued and considered, it appears that the

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(1) (1921) I.L.R., 45 Bom., 713.

(3) (1924) 21 L.W., 721.

(5) (1925) I.L.R., 7 Lah., 179.

(2) (1921) I.L.R., 48 Calc., 481.

(4) (1924) 26 Bom. L.R., 470.

(6) (1924) I.L.R., 51 Calc., 669 at 672.

(1) (1925) I.L.R., 52 Calc., 1018.

(3) (1921) I.L.R., 45 Bom., 718.

(5) (1901) I.L.R., 25 Mad., 555.

(7) (1899) I.L.R., 26 Calc., 361.

(2) (1924) I.L.R., 51 Calc., 669 at 672.

(4) (1903) I.L.R., 27 Mad., 121 at 123.

(6) (1898) I.L.R., 22 Mad., 68.

(8) (1882) I.L.R., 9 Calc., 482.

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decisions *Sabapathi Chetti v. Narayanaswami Chetti*(1), and in *Sesha Ayyar v. Nagarathna Lala*(2) laid down their effect much more widely than was necessary and overlooked the distinction between rules which took away existing rights of appeal and rules which recognize these rights but regulate the procedure of the Court in which such appeals are pending. It is also plain that the words in section 104 of the Act of 1908 are inserted for the purpose of giving effect to the decisions of the Full Bench at Madras and of the High Court at Calcutta, for the excepting words "save as otherwise expressly provided by any law" cut down the general words, and thus carry out the very reasoning of those two judgments.

We see that Lord SUMNER recites with approval *Chappan v. Moidin Kutti*(3) which follows *Hurish Chunder Chowdhry v. Kalisunderi Debi*(4), but held that the two subsequent cases *Sabapathi Chetti v. Narayanaswami Chetti*(1) and *Sesha Ayyar v. Nagarathna Lala*(2) laid down the effect of the former cases much more widely than was necessary. In fact the general trend of the judgment is to show that the Civil Procedure Code is applicable to High Courts with the proviso that it does not affect any of the provisions of the Letters Patent. Immediately after this judgment, namely, on 20th January 1921, we have the decision in *Bhaidas Shivdas v. Bai Gulab*(5). There it was held that in an appeal from the Original Side, clause 36 of the Letters Patent was not affected by section 98, Civil Procedure Code. It was no doubt observed "This view of the section is not novel, for it has been supported by the judgments in Madras, in Allahabad and in Calcutta, see *Roop Lal v. Lkshmi Doss*(6), *Lachman Singh v. Ram Lagan Singh*(7) and *Nundeeput Mahta v. Alexander Shaw Urquhart*(8) but the decision in the judgment is not arrived at on the same grounds but is based upon section 4 of the Civil Procedure Code of 1908, namely,—“In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed by or under any other law for the time being in force.” Lord BUCKMASTER then observes in *Bhaidas Shivdas v. Bai Gulab*(5):

- (1) (1901) I.L.R., 25 Mad., 555.
(2) (1903) I.L.R., 27 Mad., 121.
(3) (1882) I.L.R. 9 Cal., 42.
(4) (1905) I.L.R., 29 Mad., 1.
(5) (1870) 13 W.R., 209.
(6) (1878) I.L.R., 22 Mad., 68.
(7) (1921) I.L.R., 45 Bom., 718.
(8) (1903) I.L.R., 26 All., 10.

"There is no specific provision in section 98, and there is a special form of procedure which was already prescribed. That form of procedure, section 98 does not, in their Lordships' opinion, affect."

This is a very general statement and is wide enough to include the statement that section 98 does not affect the procedure laid down in the Letters Patent. That procedure is given in clause 36 which applies to cases arising both under clauses 15 and 16. It would, therefore, appear that this dictum would apply equally to clauses 15 and 16 of the Letters Patent and this is supported by the judgment of Lord SUMNER in *Sabitri Thakurain v. Savi*(1) where he observes:

"In conclusion there is no reason why there should be any general difference between the procedure of the High Court in matters coming under the Letters Patent and its procedure in other matters."

This is a very general pronouncement and supports the view that if the procedure under clause 36 is to be adopted in cases falling within clause 15, it should also be adopted in cases falling within clause 16.

It is quite clear that before 1877 the appellate procedure of this High Court was governed by clause 36 and not by the Procedure Code of 1859 as amended in 1861. This is clear from the decision in *Nundeeput Mahta v. Alexander Shaw Urquhart*(2). The Codes of 1877 and 1882 being subsequent in date to the Letters Patent of 1865 may be held to have overruled the Letters Patent, for there is no provision in those codes corresponding to section 4 of the present Civil Procedure Code and that was the view adopted by all the High Courts in India. The same view was taken even after the Civil Procedure Code of 1908 came into force, but reference is not made in any of the decisions to the effect of section 4 of that Code. The effect of that section in one particular instance is clearly laid down in *Bhaidas Shivdas v. Bai Gulab*(3) and that this effect should be held to be of general application is supported by the language of *Bhaidas Shivdas v. Bai Gulab*(3) and also the observations in *Sabitri Thakurain v. Savi*(1). That this is the correct view is also supported by the recent amendment of section 98 which in terms says that section 98 shall not affect any provision of the Letters Patent. In the statement of objects and reasons it is said that the object of this amendment is to enact more

- (1) (1921) I.L.R., 48 Cal., 481 at 492. (2) (1870) 13 W.R., 209.
(3) (1921) I.L.R., 45 Bom., 718.

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- (1) (1901) I.L.R., 25 Mad., 655.
(2) (1903) I.L.R., 27 Mad., 121.
(3) (1882) I.L.R., 9 Cal., 452.
(4) (1882) I.L.R., 9 Cal., 452.
(5) (1921) I.L.R., 45 Bom., 718.
(6) (1905) I.L.R., 29 Mad., 1.
(7) (1903) I.L.R., 26 All., 10.
(8) (1870) 13 W.R., 209.

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It is quite clear that before 1877 the appellate procedure of this High Court was governed by clause 36 and not by the Procedure Code of 1859 as amended in 1861. This is clear from the decision in *Nundeeput Mahta v. Alexander Shaw Urquhart*(2). The Codes of 1877 and 1882 being subsequent in date to the Letters Patent of 1865 may be held to have overruled the Letters Patent, for there is no provision in those codes corresponding to section 4 of the present Civil Procedure Code and that was the view adopted by all the High Courts in India. The same view was taken even after the Civil Procedure Code of 1908 came into force, but reference is not made in any of the decisions to the effect of section 4 of that Code. The effect of that section in one particular instance is clearly laid down in *Bhaidas Shivdas v. Bai Gulab*(3) and that this effect should be held to be of general application is supported by the language of *Bhaidas Shivdas v. Bai Gulab*(3) and also the observations in *Sabitri Thakurain v. Savi*(1). That this is the correct view is also supported by the recent amendment of section 98 which in terms says that section 98 shall not affect any provision of the Letters Patent. In the statement of objects and reasons it is said that the object of this amendment is to enact more

- (1) (1921) I.L.R., 48 Cal., 481 at 492. (2) (1870) 13 W.R., 209.
(3) (1921) I.L.R., 45 Bom., 718.

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clearly the provision which was previously implied in section 4 of the Act. This seems to me to be clear proof that it was the intention of the Legislature in making this amendment to declare that the procedure laid down in clause 36 of the Letters Patent should be generally applicable in all appeals heard by the High Court and was unaffected by section 98 of the Code.

It is suggested that the amendment of section 98 merely leaves the law as it was before, but as there has been no pronouncement of the Privy Council saying that section 4 did not protect clause 36 equally with clause 15 which it was definitely held to protect, it cannot be said that section 98 prior to the amendment necessarily affected clauses 16 and 36. The distinction drawn between the jurisdiction of the High Court under clauses 15 and 16 was based on the language of section 96, for it has been held that section 96 refers only to appeals from Subordinate Courts and not to appeals from one Judge of the High Court to the High Court. Section 93 does not in terms exclude appeals from one Judge to the other Judges of the High Court for it includes all appeals from "any Court exercising original jurisdiction to the Court authorized to hear appeals from decisions of such Court." This language is wide enough to include appeals from one Judge to the other Judge of the High Court. If that is so, then section 93 applies to all appeals and section 98, which clearly relates back to section 9 must also deal with all appeals. If section 98 does not affect appeals under clause 15, how can it be held to affect appeals under clause 16. It appears to me that in view of the judgments of the Privy Council in *Bhaidas Shivdas v. Bai Gulab*(1) and in *Sabitri Thakurain v. Savi*(2), section 4 of the Civil Procedure Code of 1908 was enacted in order to save, among other enactments, the provisions of the Letters Patent. That this was the view of the Legislature is now made clear by the very recent amendment of section 98, Civil Procedure Code.

Another question now arises, namely, whether, if clause 36 is to be applied in this case, its provisions at the date of the filing of the appeal should be adopted or its provisions as they now stand after amendment. I am inclined to take the latter view, but as the question has been referred to a Full Bench by another Bench of this Court, the decision on the point may be deferred until the opinion of the Full Bench is known.

That being so, it would seem to be advisable to refer the first question at issue for the decision of a Full Bench, as in my view the two decisions of the Privy Council in 45 Cal., 718 and

in 48 Cal., 481, coupled with the recent amendment of section 98, show that the cases hitherto decided are no longer good law. I would, therefore, refer for the decision of a Full Bench the following question :—

"Is the procedure to be adopted by the High Court in case of an equal division of opinion between the Judges to be governed by clause 36 of the Letters Patent or by section 98 of the Code of Civil Procedure?"

TIRUVENKATA ACHARIYAR, J.—The question whether section 98 of the Civil Procedure Code or clause 36 of the Letters Patent applies when the Judges hearing an appeal preferred to the High Court from a decree of a Subordinate Court differ in their opinion arises in this case and has been argued at considerable length on both sides. For the appellant it is contended that clause 36 of the Letters Patent applies to all appeals which are heard by the High Court whether the appeals are preferred to it under section 96 of the Civil Procedure Code or clause 15 of the Letters Patent.

The contention for the respondent on the other hand is that clause 36 of the Letters Patent applies only to appeals preferred to the High Court under the Letters Patent and that section 98 of the Civil Procedure Code to appeals preferred to it under section 96 of the Civil Procedure Code. This point has been discussed in several cases both before and after the decision of the Privy Council in *Bhaidas Shivdas v. Bai Gulab*(1), and the conclusion at which all the High Courts have arrived is that section 98 of the Civil Procedure Code applies to appeals preferred to the High Court from the decree of Subordinate Courts. The question has been considered in these cases from every conceivable point of view that hardly anything useful can be added to the discussion of the point; and whatever our own opinion might be, we sitting as a divisional bench would not be justified in dissenting from that view. So far as this case is concerned there is a further point to be considered which has not been considered in the previous cases for the reason that it arises out of a recent amendment of section 98 of the Civil Procedure Code by Act XVIII of 1928 which came into force on 25th September 1928. By that amendment the following words were added to section 98 of the Civil Procedure Code :—

"Nothing in this section shall be deemed to alter or otherwise affect any provision of the Letters Patent of any High Court."

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(1) (1921) I.L.R., 45 Bom., 718. (2) (1921) I.L.R., 48 Cal., 481.

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It should be here mentioned that clause 36 of the Letters Patent was itself amended recently and the amendment came into force so far as this High Court is concerned on the 1st February 1928. That amendment materially modifies the procedure which was laid down in that clause as to how the appeal should be disposed of in case the Judges hearing the appeal were equally divided. In that case the clause as amended says "that they shall state the points upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it." Before this amendment the rule laid down in the clause was that "in such a case the opinion of the senior Judge shall prevail." Section 98 of the Civil Procedure Code as it stood before the recent amendment prescribes a different rule for a case where the Judges are equally divided in opinion. In such a case it says that the decree appealed from shall be confirmed; but there is a proviso which says that "where the Bench hearing an appeal is composed of two Judges belonging to a Court consisting of more than two Judges and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal including those who first heard it." It will be seen that the recent amendment of clause 36 of the Letters Patent is modelled on the provisions of the Civil Procedure Code, with this difference, viz., (1) that the reference of the points in difference for the decision of another Judge or Judges is not *discretionary* as in section 98 of the Civil Procedure Code but *obligatory*, (2) the reference to be made under clause 36 is not to be confined to a question of law only as in section 98, Civil Procedure Code, but to extend to questions of fact also on which the opinion is divided. The amendment of clause 36 of the Letters Patent thus incorporates and extends the rule enacted in section 98 to all the points (be they questions of fact or questions of law) on which opinion is divided, and the reference to those points is also made obligatory. It seems to me that the subsequent amendment of section 98, Civil Procedure Code, is consequential upon the amendment of clause 36 and if the question is considered in the light afforded by the provisions of the Code and of the Letters Patent as they now stand it seems to be fairly obvious that the intention of the

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Legislature in amending section 98 as stated above is to make it clear that all appeals to the High Court whether they are preferred under the Letters Patent or under the Civil Procedure Code shall, when the opinion of the Judges hearing the appeal is equally divided, be governed by one and the same procedure, viz., that laid down in clause 36 of the Letters Patent. I may, however, observe that the actual wording of the amendment and its position in the Code leaves room for the contention advanced on behalf of the respondent that all that the amendment of section 98 says is "that the operation of the Letters Patent with regard to the procedure relating to appeals preferred under the Letters Patent is not intended to be affected by the procedure laid down in section 98, Civil Procedure Code. In fact in *Bhaidas Shivdas v. Bai Gulab*(1) the procedure laid down in section 98 was applied by the High Court to an appeal preferred under the Letters Patent from a decree of a single Judge passed on the Original Side of the High Court and the decree of the trial Judge was affirmed though, if clause 36 of the Letters Patent applied, it should have been reversed. Their Lordships of the Privy Council on appeal held that the procedure prescribed in clause 36 should have been followed and not that prescribed in section 98, Civil Procedure Code.

It was argued for the appellant that the effect of the decision of the Privy Council in *Bhaidas Shivdas v. Bai Gulab* (1) and of the recent amendment of section 98 is not only to make clause 36 of the Letters Patent applicable to all appeals heard by the High Court whether they are preferred under the Letters Patent or under the Code, but that in the present case what should be applied is not clause 36 of the Letters Patent as it now stands, but clause 36 as it stood before the amendment. Speaking for myself, I am unable to accept such a contention. The reference to "the provisions of the Letters Patent of any High Court" which is made in the recent amendment of section 98, is, in my opinion, to the provisions of the Letters Patent as they stood when the said amendment came into force." Both section 98, Civil Procedure Code, and clause 36 of the Letters Patent are, if I may express my opinion on the point, mere rules of procedure, differing in that respect from clause 15 of the Letters Patent which gives a right of appeal in certain cases from the decision of a single Judge or of a division bench. In that view if clause 36 applies to the present case, I should think that it is the clause as amended which has to be

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applied and not the clause as it stood before the amendment came into force. This question is already under reference to a Full Bench. I need only add that after the recent amendment of clause 36 there seems to be no reason why the same procedure should not be applied in the case of all appeals heard by the High Court whether the said appeals are preferred to it from the decrees passed in the exercise of its original jurisdiction or from the decrees of Subordinate Courts and that, having regard also to the recent amendment of section 98 of the Civil Procedure Code, the question should, so far as this High Court at least is concerned, be set at rest by a Full Bench.

I therefore concur in the order of reference to a Full Bench proposed by my learned brother.

By Court.—Final orders must now await the result of our Reference to Full Bench.

ON THIS REFERENCE—

T. M. Krishnaswami Ayyar for appellants.—The procedure laid down by clause 36 of the Letters Patent should be followed in an appeal under the Civil Procedure Code, as in an appeal under clause 15 of the Letters Patent. Section 98, Civil Procedure Code, does not apply. The matter is made clear by the Legislature by the Amending Act XVIII of 1928, by which an explanation is added to section 98, Civil Procedure Code. Clause 36 of the Letters Patent applies to all appeals preferred to the High Court, whether under clause 15 of the Letters Patent or the Civil Procedure Code or otherwise. The High Court has appellate jurisdiction conferred on it by clauses 15 and 16 of the Letters Patent. The particular cases in which appeals lie are determined by other Acts, such as Civil Procedure Code, section 96, Madras Civil Courts Act, section 13, etc., but the appellate jurisdiction of the High Court exists under clause 16; the procedure in the appeal before the High Court is similar in all cases. After an appeal is preferred to the High Court, the special procedure under the Letters Patent will apply; the special procedure under the special law (viz., the Letters Patent) is preserved by section 4 of the Civil Procedure Code; it is not abrogated by any provision of the Code. The Amending Act removes all doubts as to the applicability of clause 36, and shows that section 98 does not apply to appeals where clause 36 can apply. The language of clause 36 is general, and is not controlled by section 98. Under the former Code of 1859, even after a section corresponding to section 98 was introduced in 1861, clause 36 of the Letters

Patent prevailed over the section of the Code. See *Nundeeput Mahta v. Alexander Shaw Urquhart*(1). There are some cases in which it has been held directly that clause 36 applied to mufassal appeals:—

See *Lachman Singh v. Ram Lagan Singh*(2), *Veeraraghava Reddi v. Subba Reddi*(3), *Suresh Chandra Mukerjee v. Shit Kanta Bannerjee*(4), *Purna Chandra Chatterji v. Narendra Nath Chowdry*(5). The Privy Council in deciding cases of appeals under the Letters Patent have used language and reasoning which are applicable to appeals under the Code, in regard to the applicability of clause 36: See *Bhaidas Shivdas v. Bai Gulab*(6), *Sabitri Thakurain v. Sari*(7), and they have approved of cases applying clause 36 to mufassal appeals such as *Lachman Singh v. Ram Lagan Singh*(2). Section 98 does not apply to chartered High Courts, to which clause 36 applies; but section 98 will apply to chief Courts or Courts of Judicial Commissioner.

K. S. Krishnaswami Ayyangar for respondents.—Before the amendment of section 98, Civil Procedure Code, by Act XVIII of 1928 the view that prevailed in all the High Courts was that, in the cases of appeals to the High Court under the Civil Procedure Code, section 98, Civil Procedure Code, applied, but in cases of appeals under the Letters Patent, clause 15, clause 36 thereof, applied. Appeals under clause 15, are from one judge to other judges of the same Court; they are distinct from appeals under the Civil Procedure Code, which are preferred from one Court to another Court under section 96 of the Code; section 98 applies to appeals under section 96 of the Code. Section 98 applies to High Court by virtue of sections 117 and 120 of the Code. Clause 36 also applies to High Court in some cases. The construction adopted should give effect to both section 98 and clause 36, namely, by applying section 98 to appeals under section 96 and clause 36 to appeals under clause 15 of the Letters Patent. This was the state of the law that prevailed when the amending Act was passed; the amendment does not affect or alter that construction. Section 98, Civil Procedure Code, is not repealed, but amended; the amendment is only declaratory of the existing law by adding an explanation to section 98, Civil Procedure Code. The object

(1) (1870) 18 W.R., 209.

(8) (1919) I.L.R., 48 Mad., 37.

(5) (1925) 29 C.W.N., 755.

(2) (1903) I.L.R., 26 All., 10.

(4) (1924) I.L.R., 51 Cal., 669.

(6) (1921) I.L.R., 45 Bom., 718 (P.O.).

(7) (1921) I.L.R., 48 Cal., 481 (P.C.).

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of the amendment was to declare that section 98 applied to cases to which it was formerly applied, and did not apply to cases, to which it was not formerly applied, namely, appeals under the Letters Patent. The amending Act was only to confirm the former state of the law. The Privy Council decisions above referred to related to appeals under clause 15 of the Letters Patent. Even after these decisions, the case in *Pandu v. Jamnadas*(1), held that section 98 applied to appeals under the Code. See also to the same effect the decisions in *Venkatasubbiah v. Venkatasubbamma*(2), *Pujari Lakshman Goundan v. Subrahmanya Iyya*(3). There has been a uniform course of practice at all events in this High Court, of applying section 98 to mufassal appeals.

The preamble and sections of the amending Act, show that the prevailing state of the law was not altered, but preserved. Section 4 of the Act expressly preserves previous rights, principles and rules of law, prevailing at the time it was passed.

T. M. Krishnaswami Ayyar in reply.—There is no settled or uniform practice in any of the High Courts applying section 98 to mufassal appeals: See *Veeraragava Reddi v. Subba Reddi*(4), *Nagappa Pillai v. Arunachalam Chetti*(5), *Suresh Chandra Mukerjee v. Shili Kanta Banerjee*(6), *Purna Chendra Chatterji v. Narendra Nath Chowdry*(7).

OPINION.

RAMESAM, J.

RAMESAM, J.—The question referred to the Full Bench is:—

“Is the procedure to be adopted by the High Court in case of an equal division of opinion between the Judges to be governed by clause 36 of the Letters Patent or by section 98 of the Code of Civil Procedure?”

The Letters Patent were issued in 1862 and were modified in 1865, but previously a section like section 98 had been introduced into the Civil Procedure Code of 1859 by the Amending Act of 1861. Between 1865 and 1877, it could not be suggested that the Civil

(1) (1924) 26 Bom. L.R., 470.

(3) (1924) M.W.N., 278.

(5) (1924) 47 M.L.J., 876.

(7) (1925) 29 C.W.N., 755.

(2) (1924) 21 L.W., 721.

(4) (1919) I.L.R., 43 Mad., 37.

(6) (1924) I.L.R., 51 Calo., 889.

Procedure Code prevailed over the Letters Patent. It was obvious that the Letters Patent prevailed over the Civil Procedure Code. In case of difference of opinion between two Judges, the procedure in the Letters Patent was the only procedure to be followed. This was accordingly held in *Nundeeput Mahta v. Alexander Shaw Urquhart*(1). A fresh Civil Procedure Code was passed in 1877 and another in 1882, and in these Codes section 575 similar to section 98 of the present Code was inserted as in the Code of 1859. As these Codes were after the Letters Patent, the question arose whether section 575 superseded clause 36 of the Letters Patent. That the Indian Legislature could alter or amend the provisions of the Letters Patent was clear from clause 44 of the Letters Patent. But for clause 44 the question would never have arisen. One would have thought that an attempt by the Indian Legislature to alter or amend the provisions of the Letters Patent would have been made in express and unambiguous terms and not left to be inferred by implication. No express attempt was made by the Legislature. Still apparently it was contended that impliedly the Indian Legislature did intend to supersede clause 36 of the Letters Patent by section 575 of the Civil Procedure Code. This argument prevailed in *Appaji Bhivrao v. Shivalal Khubchand*(2) a decision of a Full Bench (WESTROPP, C.J., MELVILLE and WEST, JJ.). They said:

“We consider that the provisions of the Letters Patent in this respect have been superseded by section 575 of the Act X of 1877—so far as regards cases to which section 575 is applicable.”

This was followed in *Sri Gridharji Maharaj Tickait v. Purushotum Gossami*(3) even in the case of an appeal

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(1) (1870) 13 W.R., 209.

(2) (1879) I.L.R., 3 Bom., 204.

(3) (1884) I.L.R., 10 Calo., 814.

from the Original Side of the High Court under section 15 of the Letters Patent and in *Hussaini Begam v. The Collector of Muzaffarnagar*(1) and other cases. But meanwhile the Privy Council held in *Hurrish Chundar Choudhry v. Kalisundari Debi*(2) that clause 15 of the Letters Patent was not superseded by section 588 of the Civil Procedure Code. Accordingly in *Chappan v. Moidin Kutti*(3) (Full Bench), it was held that clause 15 of the Letters Patent was not controlled by any of the provisions of the Civil Procedure Code and this was applied in *Sabapathi Chetty v. Narayanaswami Chetty*(4). As a result of the group of cases beginning with *Hurrish Chundar Choudhry v. Kalisundari Debi*(2), it was then held in Allahabad (where there is no Original Side) that clause 36 of the Letters Patent was not superseded by section 575 of the Civil Procedure Code. This was followed in *Roop Laul v. Lakshmi Doss*(5) though the latter case was from the Original Side. It will be noticed that the reasoning in *Lachman Singh v. Ram Lagan Singh*(6) is perfectly general and if clause 36 of the Letters Patent was not to be considered as superseded by section 575 of the Civil Procedure Code, it must be so as regards all appeals whether the appeals themselves are under the Civil Procedure Code or under clause 15 of the Letters Patent. In spite of this obvious consideration and the decision in *Lachman Singh v. Ram Lagan Singh*(6) a practice arose in this Court according to which it was supposed that the only effect of the decision in *Roop Laul v. Lakshmi Doss*(5) was to make clause 36 of the Letters Patent applicable to appeals under clause 15 of the Letters Patent but not to appeals under the Civil Procedure Code as to which,

(1) (1889) I.L.R., 11 All., 176.
 (3) (1898) I.L.R., 22 Mad., 68.
 (5) (1905) I.L.R., 29 Mad., 1.

(2) (1882) I.L.R., 9 Cal., 492.
 (4) (1901) I.L.R., 25 Mad., 555.
 (6) (1903) I.L.R., 26 All., 10.

in case of difference of opinion, section 575 of the Civil Procedure Code would continue to apply as before *Hurrish Chundar Choudhry v. Kalisundari Debi*(1). But this practice is not represented by any reported decision in this Court. In *Surajmal v. Horniman*(2), it was held that clause 36 of the Letters Patent applied in an appeal from the Original Side, but the reasoning on which the judgment was based was perfectly general and will equally apply to appeals under the Civil Procedure Code. In *Veeraraghava Reddi v. Subba Reddi*(3) it was held that even in the case of appeals from mufassal Courts, clause 36 of the Letters Patent applied, but the question was not discussed. But in *Bhuta v. Lakadu Dhansing*(4) the opposite conclusion was arrived at by a Full Bench. Then we have got the decision in *Bhaidas shivdas v. Bai Gulab*(5) a decision of the Privy Council. That was a case on the Original Side of the Bombay High Court. There was an appeal. The learned Judges differed and section 98 of the Civil Procedure Code was applied. Under section 98, sub-section (2) the question was referred to another Bench and was decided adversely to the plaintiff. This must have been before the Full Bench decision in *Bhuta v. Lakadu Dhansing*(4). The plaintiff then carried an appeal to the Privy Council on the ground that section 98 was wrongly applied. The Privy Council held that clause 36 of the Letters Patent ought to be applied. Lord BUCKMASTER who delivered the judgment of the Judicial Committee rested his conclusion by reference to section 4 of the Civil Procedure Code. His reasoning is similar to that in *Surajmal v. Horniman*(2) and was perfectly general, so that even in the case of appeals under the

(1) (1882) I.L.R., 9 Cal., 482.

(3) (1919) I.L.R., 43 Mad., 87.

(2) (1917) 20 Bom. L.R., 185.

(4) (1918) I.L.R., 43 Bom., 433.

(5) (1921) I.L.R., 45 Bom., 718.

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Civil Procedure Code, clause 36 should apply. Lord BUCKMASTER expressly approves of the decision in *Lachman Singh v. Ram Lagan Singh*(1) which was a case of an appeal under the Code. The point was accordingly raised in this Court in *Venkatasubbiah v. Venkatasubbamma*(2). The case in *Bhaidas Shivdas v. Bai Gulab*(3) was cited before the learned Judges, but the fact that *Lachman Singh v. Ram Lagan Singh*(1) was approved by the Privy Council seems to have been overlooked. VENKATASUBBA RAO, J., relied on the previous practice in this Court in applying section 98 of the Civil Procedure Code to appeals under that Code and he held that *Bhaidas Shivdas v. Bai Gulab*(3) was not intended to overrule the prior rule of law as represented by the practice of this Court. This is the first decision of this Court, apart from practice, which decided after a consideration of the point that section 98 and not clause 36 of the Letters Patent applied to appeals under the Civil Procedure Code. In *Purna Chandra Chatterji v. Narandra Nath Choudhry*(4), WALMSLEY, J., held that clause 36 ought to apply and a similar conclusion was arrived at by a Bench of three Judges in *Sures Chandar Mukerjee v. Shiti Kanta Banerjee*(5). But in a later case, *Prafulla Kamini Roy v. Bhabanath Roy*(6), PAGE, J., who was a party to *Sures Chandra Mukerjee v. Shiti Kanta Banerjee*(5) changed his opinion and held that the decision of the Privy Council in *Bhaidas Shivdas v. Bai Gulab*(3) must be limited to appeals under clause 15 of the Letters Patent and does not apply to appeals under the Civil Procedure Code. WALMSLEY, J., who was a party to *Purna Chandra Chatterji v. Narandra Nath Choudhry*(4) deferred to the opinion of PAGE, J., and

(1) (1903) I.L.R., 26 All., 10.

(3) (1921) I.L.R., 45 Bom., 718.

(5) (1924) I.L.R., 51 Cal., 660.

(2) (1924) 21 L.W., 721.

(4) (1925) 29 C.W.N., 755.

(6) (1925) I.L.R., 52 Cal., 1018.

was willing to change his opinion. PAGE, J., invited the Legislature to solve the doubts and difficulties by an express enactment. In *Punjab Akhbarat & Press Co. v. Ogilvie*(1), it was held that section 98 should apply, though the Chief Justice appeared to be inclined to the opposite view if the matter were *res integra*.

At this stage of the case law, Act XVIII of 1928 was passed, amending section 98 of the Code of Civil Procedure. An explanation was added to section 98 to this effect:—

“Nothing in this section shall be deemed to alter or otherwise affect any provision of the Letters Patent of any High Court.”

This explanation is perfectly clear and is intended to provide that clause 36 of the Letters Patent should not be governed by section 98 of the Civil Procedure Code. I have referred to the earlier history of the case law, not for the purpose of construing this amending Act in the light of such history—a practice condemned by the House of Lords in *Bank of England v. Vagliano Brothers*(2), but for a different purpose to be referred to presently. Mr. Krishnaswami Ayyangar, the learned Advocate for the respondent, contended that the amending Act does not lead to the conclusion that in appeals under the Civil Procedure Code, clause 36 of the Letters Patent applies. His argument may be thus stated: the amending Act is declaratory in its nature; it is not intended to alter the law; the law as previously understood, was that section 98 applies to appeals under the Civil Procedure Code and clause 36 of the Letters Patent applies to appeals under the Letters Patent, and this was not intended to be altered by the amending Act; the effect of the amending Act is only to confirm

(1) (1925) I.L.R., 7 Lah., 179

(2) [1891] A. C., 107.

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the previous state of the law. There is a fallacy in the whole of this argument. It is true that the amending Act is intended to be declaratory, that is, not only is its object to make the law clear from its date but also to make the Act retrospective, that is, there is no change in the law. The law both before the amendment and after the amendment is the same. To this extent, I agree with the argument of the learned Advocate that the amendment is declaratory. But to assume from this that the amending Act did not intend to alter the law as expounded by the decisions up to that date does not follow. In the first place, it is not correct to say that there is a well understood rule of law prior to the amendment in the manner stated by the learned Advocate for the respondents. The decision in *Lachman Singh v. Ram Lagan Singh*(1) and *Veeraraghava Reddi v. Subba Reddi*(2) indicate the contrary. In my opinion, the object of the amendment is to make it now perfectly clear that for any purpose clause 36 of the Letters Patent should never be controlled by the Civil Procedure Code. This was the view of Lord BUCKMASTER in *Bhaidas Shivdas v. Bai Gulab*(3) and the cases approved therein. The amending Act is really the response of the Legislature to the invitation of PAGE, J.

The learned Advocate for the respondents addressed another argument which also proceeded on the footing that there was a well-understood practice or rule of law prior to the Act. I have already shown that there is no such well-understood practice or rule of law, but apart from this, this argument is otherwise equally fallacious. He relied on section 4 of the amending Act which saves prior existing rights, etc. Clause 3 of the section saves any principle or rule of law previously established

“notwithstanding that the same may have been derived by, in or from any enactment hereby repealed.” This shows that section 4 applied only to the repealing part of the enactment and has nothing to do with the amending part of the enactment. If any rule of law under an enactment amended by the Act of 1928 was intended to be saved, the language used would have been “from any enactment hereby amended or repealed.” Therefore this argument of the learned Advocate fails.

The result is that it is now beyond all doubt that clause 36 of the Letters Patent applies to all appeals. It may be asked—when does section 98 of the Civil Procedure Code have any operation and why should the Legislature not say that the section does not apply to chartered High Courts instead of adding an explanation to the section? The reply is that section 98 applies now only to Courts other than the chartered High Courts, that is, the Chief Courts, and the Courts of Judicial Commissioners, and the reason why the Legislature adopted this particular form of elucidating the matter is that it was intended to retain section 98 as applicable even to chartered High Courts but to make the application subject to clause 36 of the Letters Patent. If, at any time, clause 36 of the Letters Patent ceases to exist, section 98 will come into operation. It is to attain this particular result that the explanation was added to section 98 instead of saying that section 98 does not apply to chartered High Courts at all. I would answer the question referred to us thus:

“The procedure adopted by the High Court should be governed by clause 36 of the Letters Patent.”

KUMARASWAMI SASTRI, J.—I agree.

REILLY, J.—I agree.

K.R.

(1) (1903) I.L.R. 26 All., 10.

(2) (1919) I.L.R., 43 Mad., 37.

(3) (1921) I.L.R., 45 Bom., 718.

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APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Kumaraswami Sastri, Mr. Justice
Ramesam and Mr. Justice Reilly.*

1929,
February 26. GURUSWAMI PILLAI AND ANOTHER (SECOND PLAINTIFF AND
NEW TRUSTEE), APPELLANTS,

v.

VEERABHADRA TAVULKARAN AND ANOTHER
(DEFENDANTS 1 AND 2), RESPONDENTS.*

*Letters Patent, clause 36, as amended—Amendment coming into
force on 1st February 1928—Letters Patent appeal, pending
when amendment came into force—Effect of amendment,
whether applicable to pending appeal—Procedure to be
followed on difference of opinion, whether procedure of the
amended clause 36.*

Clause 36 of the Letters Patent, as amended, applies to an appeal which was pending at the time the amendment came into force.

APPEAL under clause 15 of the Letters Patent against the judgment of ODGERS, J., in Second Appeal No. 453 of 1922 preferred against the decree of the Subordinate Judge of Tanjore in Appeal Suit No. 25 of 1921 against the decree in Original Suit No. 34 of 1917, on the file of the District Munsif's Court of Tiruvadi.

This reference to the Full Bench was made on a difference of opinion between JACKSON and TIRUVENKATA ACHARIYAR, JJ., in a Letters Patent appeal preferred against the judgment of ODGERS, J. The appellants, who were the plaintiffs in the suit, were the trustees of a temple, who sued to eject the defendants from a site and superstructure thereon, said to be given to them by the former for performance of services in the temple. The Subordinate Judge on appeal dismissed

* Letters Patent Appeal No. 202 of 1925.

the suit, and on second appeal, ODGERS, J., dismissed the second appeal. On a Letters Patent Appeal being preferred, the case was heard by JACKSON and TIRUVENKATA ACHARIYAR, JJ., who differed in opinion: JACKSON, J., holding that as the plaintiffs did not pay the full remuneration due to the defendants, the latter could not be held to have wilfully defaulted in rendering their services, and could not therefore be ejected; while TIRUVENKATA ACHARIYAR, J., held that the trustees had been paying the emoluments in full to the defendants, that the defendants were found to have wilfully defaulted in the performance of their services and were liable to be ejected and that the decree of ODGERS, J., should be reversed. During the pendency of the Letters Patent Appeal, clause 36 of the Letters Patent had been amended, with effect from 1st February 1928. The question was whether the provisions of clause 36, before the amendment, applied to this appeal, so as to make the opinion of the senior Judge (JACKSON, J.) prevail, or whether the case should be referred to a third Judge under the amendment. After pronouncing their respective opinions, their Lordships referred the following question for the opinion of the Full Bench:—

“Does clause 36 of the Letters Patent as amended apply to an appeal which was pending at the time the amendment came into force?”

ON THIS REFERENCE—

K. Balasubramania Ayyar for appellants.—Clause 36 of the Letters Patent regulates the procedure at the hearing of the appeal. The provision of the clause is a rule of procedure; this does not affect the right of appeal. As the clause stands, there is no right to the judgment of the senior Judge. The clause does not say it is final. It is not a substantive right. There is no vested right in the procedure laid down in clause 36; no right of appeal is taken away or

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given: see *Colonial Sugar Refining Company v. Irving*(1), *Canada Cement Co. v. East Montreal (Town of)*(2), *Vasudeva Samiar, In re*(3). The decision of the Privy Council in *Bhaidas Shivdas v. Bai Gulab*(4), refers to the provisions of clause 36 or section 98, Civil Procedure Code as rules of procedure; see also *Attorney General v. Sillem and others*(5).

V. Sundaram Ayyar for respondents.—The question is whether any right is vested in a party under clause 36 before amendment in 1928. The party is entitled to the judgment of the senior Judge before the amendment was made. The Privy Council, in *Bhaidas Shivdas v. Bai Gulab*(4), speaks of the right of the party to the judgment of the senior Judge before the clause was amended. The decision of the Full Bench in *Daivanayaki Reddiar v. Renukambal Ammal*(6), shows that the party has a right to the judgment of the senior Judge and that it is a vested right. Under clause 15 of the Letters Patent before amendment, there was an appeal on law and facts (i.e.), the whole case was open on the Letters Patent Appeal; but now under the amended clause 36, only the points of difference could be referred; there is a restriction on the right of appeal, as in *Vasudeva Samiar, In re*(3). The provisions of the amendment cannot operate retrospectively.

OPINION.

RAMESAM, J.

RAMESAM, J.—In the Full Bench case (p. 563 ante) which was heard along with this case, we have held that where two Judges differ in a chartered High Court it is clause 36 of the Letters Patent that applies and not section 98 of the Civil Procedure Code. Now, clause 36 of the Letters Patent has been recently amended. The question naturally arises whether the amendment is retrospective. Accordingly the question referred to the Full Bench in this case is, does clause 36 of Letters Patent as amended apply to an appeal which was pending at the time the amendment came into force?

(1) [1905] A.C., 369.

(3) (1928) I.L.R., 52 Mad., 861 (F.B.)

(5) (1864) 10 H.L.C., 704.

(2) [1922] 1 A.C., 249.

(4) (1921) I.L.R., 45 Bom., 718 at 722.

(6) (1927) I.L.R., 50 Mad., 857 at 868.

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It was held in *Colonial Sugar Refining Company v. Irving*(1), that a subject has got a vested right in an appeal and where an Act is passed abolishing the right of appeal, it cannot be used retrospectively so as to deprive him of the right of appeal in cases pending at the time the Act was passed. It has also recently been pointed out in *Vasudeva Samiar, In re*(2), that that decision is not in conflict with the later decision in *Canada Cement Co. v. East Montreal (Town of)*(3), where a Court was abolished. In the Madras case, it was held that all appeals in force when a suit was instituted are preserved to it through the rest of its career unless the Legislature has either abolished the Court to which an appeal then lay or has expressly or by necessary intendment given the Act a retrospective effect. The same result was arrived at in *Sheikh Sardar Ali v. Sheikh Dolluiddin*(4). Accordingly it has been contended by the learned Advocate for the respondents in this case that the amendment of clause 36 of the Letters Patent does not operate retrospectively and the opinion of the senior Judge should prevail. The fallacy of this argument is obvious. The effect of the cases cited above is that the right of appeal which existed once cannot be taken away by an Act unless it is expressly retrospective. The only logical effect of applying that principle should be that if two Judges hear a case, deliver their judgments and for some reason the senior Judge's judgment prevails, then the right of appeal which existed before to a Bench of three Judges is not taken away and continues to exist, but the effect of the amended clause 36 of the Letters Patent is not to deprive the right of appeal but to change the procedure as to what two Judges should do when they find that

(1) [1905] A.C., 369.

(3) [1922] 1 A.C., 249.

(2) (1928) I.L.R., 52 Mad., 361 (F.B.).

(4) (1928) 48 C.L.J., 150.

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they are about to differ. The clause says that the question shall be referred to a third Judge. To argue that the two shall continue to deal with the case as under the old clause and that, when their judgments are delivered, the rule that the senior Judge's judgment should prevail should still apply is to argue that the rule of procedure which ceased to exist must be applied so as to enable the party in whose favour the senior Judge's judgment is, to put the opposite party to the necessity of an appeal and thereby to have the chance of that judgment not being appealed against. To insist on the application of such a procedure is really to say that a party has a vested right in two Judges continuing the old procedure and not referring to a third Judge. Now it is well established that a party can have no vested right in a mere right of procedure. Here, what the respondent wants is not the right of appeal, for it is not he that loses the right of appeal. He wants certain procedure to be followed so as to put the opposite party to the necessity of appealing. In the *Attorney-General v. Sillem and others*(1), the questions were whether the right of appeal can be created by a tribunal or by legislative authority only and secondly whether a new right of appeal would affect existing suits. On the first question, the noble Lords differed, but on the second question, Lords WESTBURY, CRANWORTH and WENSLEYDALE expressed their opinions. Lord WESTBURY observed :

"It was strongly contended by the respondents that even if the Barons of the Exchequer had power to make the rules in question, they had no power to make them apply to pending proceedings, and that the attempt to do so was unjust. This argument is not, in my

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opinion, well founded." (Page 727.) Lord CRANWORTH was of the same opinion. (Pages 735 to 737.) Lord WENSLEYDALE expressed himself more explicitly: ". . . I think that if it were an alteration in the mode of proceeding only, to the prejudice of the claimants, the objection would not prevail. ". . . there is a material difference when an Act of Parliament is dealing with a right of action already vested, not intended to be taken away; and when it is dealing with mere procedure to recover those rights, which it may be quite reasonable to regulate and alter. "The right of the suitor is to bring the action, and to have it conducted in the way and according to the practice of the Court in which he brings it; and if any Act of Parliament, or any rule founded on the authority of the Act of Parliament, alters the mode of procedure, then he has a right to have it conducted in that altered mode. That, therefore, takes away nothing. The right of action does not constitute a title to keep all the consequences of the right as they were before. It gives the right to have the action conducted according to the rules then in force with respect to procedure." (Pages 763 and 764.)

And this is all that the appellant wants here.

We are therefore of opinion that the amended clause 36 of the Letters Patent applies to all pending cases. We answer the question referred to us accordingly.

KUMARASWAMI SASTRI, J.—I agree.

REILLY, J.—I agree.

K.B.

(1) (1864) 10 H.L.C., 704.

APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., Chief Justice
and Mr. Justice Pakenham Walsh.

1928,
November 8. M. P. P. S. T. PALANIAPPA CHETTIAR AND THREE OTHERS
(DEFENDANTS), APPELLANTS,

v.

VALLIAMMAI ACHI (APPLICANT), RESPONDENT.*

Indian Limitation Act (IX of 1908), article 183—Transferee² decree-holder—Application by, to have execution proceeding³ under decree transferred to another Court—Order passed recognizing him as transferee decree-holder and transmitting⁹ decree for execution to the other Court—If such order operates³ as revivor within the meaning of article 183—Order qu^a order of transmission—If creates a new starting point of limitation.

Where the transferee of a decree passed on the original side, applied to have the decree transferred to another Court, on the ground that the judgment debtors resided within the jurisdiction of that Court and had immovable properties situate there, and an order was made by the Deputy Registrar recognizing him as transferee decree-holder and transmitting the decree for execution to that Court, held, that such an order effected a revivor within the meaning of article 183 of the Indian Limitation Act, and therefore gave a new starting point of limitation; held further, that an order transferring the decree for execution to another Court, qua order of transmission, did not give a new starting point of limitation.

ON APPEAL against the order of the Hon'ble Mr. Justice WALLER, dated 2nd September 1927 and passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in E.P. No. 504 of 1926 in C.S. No. 98 of 1911.

The facts necessary for this report appear in the Judgment of COUTTS TROTTER, C.J.

* Original Side Appeal No. 58 of 1927.

The order passed by the Deputy Registrar (In Chambers) on 8th March 1917 was as follows:—

“Upon the application of . . . for the applicant, and upon reading the execution application . . . the deed of transfer and the revival notices issued herein to the defendants, and the defendants herein not appearing in person or by pleader though served with the said revival notices . . . it is ordered as follows:—

1. That R. M. M. Subramanyam Chetty as the transferee of the said decree herein in favour of the plaintiff, dated the 17th January 1912, be at liberty to execute the decree against M. P. P. S. T. Palaniappa Chetti . . . the defendants herein.

2. That a copy of the said decree together with the usual certificates be transmitted to the District Court of Ramnad for execution against the said defendants.”

Sir C. P. Ramaswami Ayyar (with him V. Ramaswami Ayyar) for appellants.—An application for transmission does not effect revivor within the meaning of article 183 of the Limitation Act, *Banku Behari Chatterji v. Narindas Dutt*(1). An order of transmission is a ministerial and not a judicial act. The order was passed by the Deputy Registrar in Chambers. His sole duty on that occasion was merely to transmit. The expression “be at liberty to execute” in the order is unwarranted. The execution is done by the Court to which the decree is transmitted. Order XXI, rule 16, Civil Procedure Code, governs the case. The order for transmission upon an application for transmission, and not for execution, did not constitute revivor, *Khajeh Salauddin v. Mt. Afzal Begum*(2). The prayer in application is that the decree may be transmitted to the Ramnad Court for execution.

[CHIEF JUSTICE:—By continual transfers a decree can be kept alive for all time.]

The transferee cannot have rights higher than the transferor. See also *Monohar Das v. Futteh Chand*(3) and *Chutterput Singh v. Sait Sumari Mull*(4).

(1) (1927) I.L.R., 54 Cal., 500. (2) (1924) 28 C.W.N., 963 at 965 and 966.
(3) (1903) I.L.R., 30 Cal., 979 at 981. (4) (1916) I.L.R., 43 Cal., 903.

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A. Krishnaswami Ayyar (with him E. Vinayaka Rao) for respondent.—Whenever there is a change of parties either of judgment debtor or judgment creditor there is a “revivor” in law. “Revivor” in the Indian Limitation Act is taken from English Law, the Bill of Revivor in Chancery and the Writ of *Scire facias* in Common Law, the underlying theory being that it is only by revivor a suit can be kept alive. See Encyclopædia of the Laws of England, Vol. 13, p. 1; Wharton's Law Lexicon *Scire facias*, p. 786; Edwards on Execution, pp. 48 and 49; and Tidd's Practice (1821), p. 1148. The following decisions of the English and the Irish Courts have put the matter beyond all doubt. *Farrell v. Gleeson*(1), *Farran v. Beresford*(2), *Ottiwell v. Farran*(3) and *In re Walter Blake*(4). The principle of these decisions has been recognized and followed by the High Courts in India in a number of cases. The decision of the judicial committee in *Raja of Ramnad v. Velusami Tevar*(5), concludes the matter. The Deputy Registrar's order is a judgment entitling me to execute. The circumstance that it is opposed or defended does not make any difference. The Deputy Registrar acted under powers delegated to him and this order made by him was quite competent.

Sir C. P. Ramaswami Ayyar replied.

JUDGMENT.

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COUTTS TROTTER, C.J.—Before dealing with the question of law raised in this appeal it is necessary to set out briefly the facts which raise them. They are all matters of record and are not disputed. One Jayanna Rao Daga brought a suit C.S. No. 98 of 1911, on the Original Side of this Court against a family of Nattukottai Chetties who may be described for the present purposes as M.P.P.S.T. which is their *vilasam*. On the 7th of January 1912 he obtained a decree for Rs. 8,957; he took no steps to execute it, but on the 8th of May 1913 he assigned his

decree to one R.M.M. Subramanyam Chetti for a sum of Rs. 3,800. R.M.M. discovered that neither the judgment-debtors nor any of their property were to be found in Madras. So on the 17th of October 1916 he applied to have the execution proceedings under the decree transferred to the District Court of Ramnad, on the ground, that the judgment-debtors resided within the jurisdiction of that Court, and had immovable properties situate there, and on the 8th of March 1917 an order was made recognizing him as transferee decree-holder and transmitting the decree for execution to the Ramnad Court. No execution was effected in the Ramnad District and the papers were returned to the Original Side of the Madras High Court. Meanwhile a side-issue arose. One S. N. Subramanyam Chetti came forward and alleged that he was the principal behind R.M.M. Subramanyam Chetti, the decree-holder who was only his benamidar, and, he issued an execution petition which was filed on the 17th of January 1924, and on the very same day, R.M.M. himself filed an execution petition as decree-holder. KUMARASWAMI SASTRI, J. passed an order on the 2nd of April 1924 accepting S. N. Subramanyam Chetti as the true owner of the decree and allowed him to proceed in execution. That decision was brought up in appeal and was reversed by myself and SRINIVASA AYYANGAR, J., who held that where a transfer is evidenced by an instrument in writing in favour of a named person no one can come forward and allege that that person is a benamidar for himself, *Palaniappa Chettiar v. Subramania Chettiar*(1). There therefore remained pending the rival application of R.M.M. for execution; but before anything was done R.M.M. died and his widow Valliammal applied to be

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(1) [1844] 11 Cl. and F., 702.

(3) [1839] 2 Ir. Rep., 110 at 144 and 145.

(5) (1920) 48 I.L., 45.

(2) [1843] 10 Cl. and F., 319.

(4) [1853] 2 Ir.Ch. Rep., 648.

(1) (1924) I.L.R., 48 Mad., 553.

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brought on the record as his legal representative and to be allowed to continue the execution. The Judge of first instance, SRINIVASA AYYANGAR, J., allowed that to be done, but on appeal that decision was reversed by myself and CURGENVEN, J., a decision reported in *Palaniappa Chettiar v. Valliammal Achi*(1). Shortly afterwards Valliammal on the 3rd of December 1926 made a fresh application for execution of the old decree in her own right. On the face of it, it was clearly barred by limitation, but WALLER, J. held that the order of the Deputy Registrar, dated 8th of March 1917, for transmission for execution of the decree to Madura operated as a revivor within the meaning of article 183 of the Limitation Act. It is from that order of WALLER, J. that this appeal is brought.

The elaborate and learned argument before us has really centred on two points. The first is that the order of the Deputy Registrar transferring the decree for execution to another Court in March 1917 gave a new starting point of limitation *qua* order of transmission. That contention is unsustainable after the decision of the Privy Council in *Banku Behari Chatterji v. Naraindas Dutt*(2). The second is that the order transmitting the decree for execution to Ramnad also substituted R.M.M. as the person entitled to execute the decree; that this was a judicial act and gave a new starting point for limitation.

I will deal first with certain rules of Order XXI, which deals with matters arising in execution. The governing rule is Order XXI, rule 16 in which the material words are as follows:—

“Where a decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution

of the decree to the Court which passed it and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder.” There is added the following proviso:—

“Provided that, where the decree. . . has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution.”

On the one hand it is contended that the order of the Deputy Registrar is a mere order of transmission, a ministerial act and involved no determination of a judicial character as to the validity of the alleged transferee to stand in the shoes of the original judgment-creditor, which is said to be a matter outside his jurisdiction, even if he had purported to exercise it in that direction. All he had to do, it was argued, was to satisfy himself that the person who represented himself to be a transferee was able to produce documents which purported to disclose that character, but that it was left at large in the transmitted execution proceedings for the judgment-debtors to contend that the alleged transferee in fact fulfilled no such character. In that view the order would be a ministerial and not a judicial act and would not give rise to a fresh period of limitation. It is certainly a startling result if a Deputy Registrar by this order can alter the whole law of limitation applicable to these matters. He was at liberty to refer the matter to a Judge, which he would doubtless have done, had he thought himself clothed with the power to pass a judicial, as distinct from a ministerial, order allowing the alleged transferee decree-holder to go on with the execution in the Ramnad Court. It is argued that his order amounts to no more than this:—“You allege yourself to be the transferee decree-holder and ask for an order of transmission to the

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(1) (1926) I.L.R., 50 Mad., 1.

(2) (1927) I.L.R., 54 Calc., 500.

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Rāmnād Court. That I do as a ministerial act and that is the effect of my order. The question as to whether you are in truth and in fact the transferee of the decree is one which must be decided by the Court in which execution must be sought and to which I have transferred the decree. You take the order at your own risk, the risk, namely, of it being proved in the Rāmnād Court that you cannot establish your claim there to be considered the true transferee decree-holder."

Much wider ground has been covered in the argument, and the industry of counsel has put before us all the learning of the English reports as to bills of revivor and writs of *scire facias*. I enter on such an enquiry with reluctance, but I do not see how I can escape it. The respondent's case is put thus, that wherever there is a change of parties under an order of Court there is a revivor, and consequently a new starting point of limitation. That is said to be the necessary result of the use of the word "revived" in article 183 of the Limitation Act, because it throws us back on the English and Irish cases relating to bills of revivor and writs of *scire facias*. I have always regarded the Indian Limitation Act as the worst drafted piece of legislation which it has been from time to time my misfortune to be compelled to construe. But I think that the climax is reached in article 183 with its use of the word "revived", which could easily have been defined but was not. Of two things, one: either the draftsman had acquainted himself with the English case law on the subject or he had not. If he had not, he neglected a plain duty cast upon him by his own action in using a term of art like "revived" without attempting either to enquire into its history or to formulate his own definition of it; if he had, he must have known that the use of the term was a throwing of an apple of discord

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into the arena, which would set Indian Counsel and Indian Judges to grope among the English authorities in the quest of a guiding principle. The pursuit has undoubted intellectual attractions akin to those which sustain a classical scholar in the task of collating manuscripts in the endeavour to produce an authoritative text of the ancient writer he has elected to edit. I see indications in the reported Indian cases that such an enquiry has presented those attractions to various Judges. For myself, I confess it has none. I have neither the knowledge nor the leisure in an already overworked Court to hope to master the subject sufficiently to throw any new light upon it. The bar has given us the greatest assistance, delved into the English cases with diligence and put them all before us. I therefore feel it incumbent upon me to follow the example of other Indian Courts and briefly review the English case law on the subject. I shall be brief for two reasons. If this case stops here—which I do not suppose it will—I do not wish to embarrass my successors by an extended discussion which would almost inevitably contain *obiter dicta* which it would probably be their duty in later cases to reject or explain away. If the case goes to the Privy Council, I am not foolish enough to suppose that an elaborate disquisition from me would give the Board any real assistance in a subject-matter which must be far more familiar to its members than to any Indian Court.

The first book cited to us was Tidd's Practice of which the 7th Edition is dated 1821, in which the following passage occurs:—

"The *scire facias* upon a change of parties is governed by the rule laid down in the case of *Penoyer v. Brace*(1), but where a new person is to be benefited or

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charged by the execution of the judgment, there ought to be a *scire facias* to make him a party to the judgment."

In Wharton's Law Lexicon, 12th Edition (1916) an elaborate account is given of the writ of *scire facias* with a significant note that "the writ though not abolished is now almost out of use." The equitable remedy of filing a bill of revivor is fully dealt with in Volume XIII of the Encyclopædia of the Laws of England, Second Edition, p. 1. There arose a series of cases in the Irish and English Courts which discussed the effect of the taking out of a writ of *scire facias* in which the point argued was, whether a writ of *scire facias* merely continued an old cause of action as it stood at the time of the writ, or whether it created a new right. The cases I refer to are *Farrell v. Gleeson*(1), *Farran v. Beresford*(2), *Ottimell v. Farran*(3), and finally before an imposing bench of the Privy Council in 1853, *In re Walter Blake*(4).

I will take it that those decisions establish that a judicial determination following on the taking out of a writ of *scire facias* which gave the right to the new person on the record to continue execution under the old decree, gave a new starting point of limitation. I fail to see the justice of holding that a statute-barred decree can be given a new life by the operation of an antiquated writ; but it is not for me to question the decisions of the House of Lords and the Privy Council. No later English or Irish case has been referred to in the argument before us and the matter stood thus when article 183 of the Limitation Act compelled the Indian Courts to come to some conclusion on the matter. All these cases have been cited before us. There are three decisions of the Calcutta High Court

and several of the Madras High Court with which I will deal shortly. The decision in *Ashootosh Dutt v. Doorgachurn Chatterjee*(1) expressly bases itself on the English Common Law rule relating to *scire facias*, namely, that a judgment on a writ of *scire facias* does not merely extend the original remedies but creates new ones; and that decision was followed in *Futteh Narain Chowdhry v. Chundrabati Chowdhra*(2), and in effect in *Jagendra Chandra Roy v. Shyam Das*(3), a very learned judgment in which the English case law is exhaustively reviewed. The Madras Court proceeded on the same lines, *Ganapathi v. Balasundara*(4). The trend of the later Madras cases is in the same direction, viz., to hold that to bring a transferee decree-holder on to the record is not merely a recognition of his character as transferee decree-holder but is a step in execution which will save limitation. I will enumerate the cases without discussing them in detail. They are *Ramachendra Aiyar v. Subramania Chettiar*(5) and *Bolla Brahmada v. Ruddaraju Venkataraju*(6). In *Chutterput Singh v. Sait Sumari Mull*(7) the decision was obviously adverse to the present respondent's first contention.

The point, therefore, seems to narrow itself to this. Was the order of the Deputy Registrar of the 8th of March 1917 a ministerial order or was it a judicial determination in so far as it not merely transmitted the case for execution to Ramnad but purported to recognize the position of the alleged transferee decree-holder? In the Code of Civil Procedure, by Order XXI, rule 16, proviso, it is enacted that notice of an application for execution by a transferee decree-holder shall be given to the transferor and the judgment-debtor and the

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(2) [1848] 10 Cl. and F., 319.
(4) [1853] 2 Ir. Ch. Rep., 643.

(1) (1880) I.L.R., 6 Cal., 504. (2) (1892) I.L.R., 20 Cal., 551.
(3) (1909) I.L.R., 36 Cal., 543. (4) (1884) I.L.R., 7 Mad., 540.
(5) (1903) 14 M.L.J., 898. (6) (1916) 33 I.C., 71.
(7) (1916) I.L.R., 43 Cal., 903.

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decree shall not be executed until the Court has heard their objections, if any, to its execution. It appears on the face of the order of the Deputy Registrar that such notices had been given. The actual words are these:

"The defendants herein not appearing in person or by pleader though served with the said revival notices as appears by the affidavit of Doraikannu Mudaliyar" and the Deputy Registrar purported to affix to his order the statement that it was "by the Court" speaking through him. In view of that I should find it very difficult to hold, even if I had no further guidance on the matter that that was other than a judicial act. Those affected had the right and the opportunity to be heard and they did not choose to avail themselves of it. But I think that the matter is concluded for me not merely by the words of Order XXI, rule 16, but by the pronouncement of the Privy Council in *Raja of Ramnad v. Velusami Tevar*(1) which appears to me to be a direct authority for the proposition that when a Court has recognized the assignment of a decree and passed an order allowing the assignee to execute it, that gives a fresh starting point of limitation and that it is not open to the judgment-debtor to contend that it did not act as a revivor. The Allahabad Court had consistently taken the same view; see *Dwarka Das v. Muhammad Ashfaqullah*(2). I may point out that the decision of the Privy Council in *Banku Behari Chatterji v. Naraindas Dutt*(3), proceeded on the express ground that an order of transmission was not a judicial act, because it could be passed *ex parte*, and that the matter was not affected by the fact that actually notices to the parties concerned had been given, because their Lordships held

that they need not have been given and should not have been given; and that therefore the order of transmission remained what it was always meant to be under the Code, a ministerial order. Under Order XXI, rule 16, notices not only may, but must, be given."

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In the result, I feel myself compelled to hold that the Deputy Registrar's order of the 8th of March 1917 did give a fresh starting point of limitation. The result is one which I confess I greatly regret. These orders are passed without any realization of the far-reaching effects and implications they may have. In this case an original decree debt of Rs. 8,957 has been converted in the intervening years by accumulation of interest to a sum of Rs. 17,626 up to November 1926, and at this date is nearly Rs. 20,000 and those who are to be the recipients of this large sum of money have obviously slept on their remedies for many years. I feel myself unable to find a way out. If this case goes to a higher tribunal I trust it will be able to discover that which escaped me. The appeal is dismissed with costs.

PAKENHAM WALSH, J.—I concur with the conclusions of my Lord the Chief Justice with whom I have discussed the matter fully and have nothing to add.

B.C.S.

(1) (1920) 48 I.A., 45.

(2) (1924) I.L.R., 47 All., 86.

(3) (1927) I.L.R., 54 Calo., 500.

APPELLATE CRIMINAL.

*Before Mr. Justice Waller and
Mr. Justice Anantakrishna Ayyar.*

1928,
March 12.

JUJJAVARAPU GANGARAJU (ACCUSED), APPELLANT,

v.

KANDIBOYINI VENKI (COMPLAINANT), RESPONDENT.*

Code of Criminal Procedure (V of 1898), sec. 197—Prosecution of public servant for offence alleged to have been committed while actually engaged or purporting to be engaged in official duty—Sanction—If a pre-requisite.

Sanction under section 197 of the Code of Criminal Procedure is an essential pre-requisite to the prosecution of a public servant in respect of an offence alleged to have been committed by him, while he was actually engaged in or purported to be engaged in the discharge of his official duty. The question is not as to the nature of the offence, such as, whether the alleged offence contained "an element necessarily dependent upon the offender being a public servant", but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official duty.

Sivaramakrishnayyar v. Seshappa Naidu, (1928) I.L.R., 52 Mad., 347, referred to.

CASE referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the Sessions Judge of West Gōdāvari at Ellore in his letter Dis. No. 708/21—12—1928, dated 18th December 1928.

K. N. Ganpati for Public Prosecutor for the Crown.

B. T. M. Raghavachari for accused.

Ch. Raghava Rao for complainant.

* Criminal Revision Case No. 84 of 1928.

The JUDGMENT of the Court was delivered by
WALLER, J.—This is a reference by the Sessions Judge, West Gōdāvari. One Venki preferred a complaint against the Village Magistrate of her village, charging him with wrongful confinement and bribery. The Sub-Magistrate took cognizance only of the former offence and issued notice to the Village Magistrate. The latter appeared and objected that sanction for the prosecution was necessary under section 197 of the Criminal Procedure Code. The Sub-Magistrate overruled the objection and the Village Magistrate took the matter up to the Sessions Judge, who, disagreeing with the Sub-Magistrate, has made a reference to this Court.

Sub-section (1) of section 197 of the Criminal Procedure Code as amended by section 50 of Act XVIII of 1923, runs as follows:—

"When any person who is a Judge within the meaning of section 19 of the Indian Penal Code, or when any Magistrate, or when any public servant who is not removeable from his office save by or with the sanction of a Local Government or some higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Local Government."

It is framed in very wide terms. It requires that Judges, Magistrates and certain public servants shall not be prosecuted without the sanction of the competent authority for any offences alleged to have been committed by them while acting or purporting to act in the discharge of their official duties. The object obviously is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them, while they were acting or purporting to act as public servants. The policy of the Legislature is, we conceive,

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to afford adequate protection to public servants, to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause and, if sanction is granted, to confer on the Local Government, if they choose to exercise it, complete control of the prosecution. We can see nothing in these precautions to which the public at large can legitimately take exception, and consider that the sub-section should be construed as widely as it has been framed. If the policy of the Legislature has been to afford a reasonable protection to public servants against vexatious charges arising out of the performance by them of their official functions, it has not been conspicuously successful. By a series of judicial decisions that protection has been refined down to the vanishing point. A learned Judge of this Court, SESHAGIRI AYYAR, J., remarked in *Sankaralinga Tevan v. Avudai Ammal*(1), "If this argument is pushed to its logical conclusion, no public servant or Judge can have the safeguard of a sanction, as it is not within the powers of such an officer to commit an offence. Any offence committed by such a person must *prima facie* be beyond his official rights and duties. I do not think that such a result is the necessary consequence of the language employed by the Legislature." And yet that is the effect of some of the decisions, that the commission of an offence being no part of a public servant's duties, no sanction is required for his being prosecuted for an offence alleged to have been committed by him while he was discharging or purporting to discharge those duties. The language of section 197, Criminal Procedure Code, does not, in our opinion, afford any justification for such a construction.

(1) (1916) 35 I.C., 826.

Numerous decisions have been cited on the point. Most of them turn on the wording of the corresponding sections in the Codes of 1882 and 1898. In this connexion we endorse the criticism of Mitra in his commentary on the present Criminal Procedure Code, see page 521 of the 5th Edition.

"These cases, though correctly decided under the old Codes, would be of no authority now as the language of the present section materially differs from the language of the old law. Under the present section it will not be necessary to decide whether the fact of the accused being a Judge or a public servant was a necessary element in the offence or whether the offence was one which could not have been equally committed by a private person. These nice questions would no longer arise; and if it is found that the Judge, Magistrate or public servant has committed the act at a time when he was doing (or purporting to do) an official duty, this will be sufficient to attract the provisions of this section. In other words, the Legislature has now given a greater protection to the officers concerned than it did under the old section."

At the same time, we would express a doubt whether the Legislature, when it departed, in the Codes of 1882 and 1898, from the language of the Code of 1872, really intended to diminish the protection afforded to public servants by section 466 of that Code. It is not permissible for us, in attempting to interpret section 197 of the present Code, to rely on the statement of objects and reasons that led to its modification, but, it is of some significance as indicating what view the Legislature took of section 466 of the Code of 1872 and with what intention section 197 in its present form was framed. As stated, the intention was "to amplify the words with the object of rendering the section clear, reverting rather to the wording of the Code of 1872." The inference appears to be that the Legislature had not intended in the Codes of 1882 and 1898 to abandon the

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WALLER, J. policy of the Code of 1872, but, finding that its intention had been misinterpreted by the Courts, decided to go back to that Code.

The leading Madras case, *Municipal Commissioners for the City of Madras v. Major Bell*(1), was decided with reference to the Code of 1898. Major Bell, who was a public servant, was prosecuted for having, in his official capacity, brought timber into the City without the statutory licence. The Bench overruled the plea that sanction was necessary "as the offence charged was not one which could be committed only by a public servant, nor did it involve as one of its elements that it had been committed by a public servant." In arriving at this conclusion, they attached the greatest importance to the difference in language between section 466 of the Code of 1872 and section 197 of the Code of 1898, admitting, at the same time, that, if they had had to apply section 466 to the facts of the case, they would have been obliged to arrive at exactly the opposite conclusion. Section 466 reads as follows:—

A complaint of an offence committed by a public servant in his capacity as such public servant of which any Judge or public servant not removable from his office without the sanction of the Government is accused as such Judge or public servant, shall not be entertained against such Judge or public servant, except with the sanction or under the direction of the Local Government, or of some officer empowered by the Local Government, or of some Court or other authority to which such Judge or public servant is subordinate, and whose power so to sanction or direct such prosecution the Local Government shall not think fit to limit or reserve.

No such Judge or public servant shall be prosecuted for any act purporting to be done by him in the discharge of his duty, unless with the sanction of Government.

(1) (1901) I.L.R., 25 Mad., 15.

Its effect was considered by PONTIFEX and FIELD, JJ., in an unreported case which is referred to in *Nando Lal Basak v. Mitter*(1). They decided, on the facts, that the second paragraph of the section applied and that sanction was necessary. As regards the first paragraph, they thought that it "was intended to apply to those cases in which the offence charged is an offence which can be committed by a public servant only, cases, that is, in which the being a public servant is a necessary element." In other words, prosecution for all offences alleged to have been committed by public servants purporting to act as such required sanction, while prosecution for all but a very limited class of offences alleged to have been committed by public servants when acting as such did not. With great respect, we think that the Legislature when it decided to re-enact the provisions of section 466, took a more correct view of what that section was intended to mean. Where, in the present section 197, it used the words "while purporting to act in the discharge of his official duty," it was, in effect, reproducing the second paragraph of the old section. When it used the words "while acting

. . . in the discharge of his official duty," it was recasting the first paragraph in a clearer and more compendious form. As we have stated already, we think it probable that the Legislature, though it adopted a different phraseology in 1882 and 1898, never intended to depart from the policy it had laid down in 1872, and explicitly reverted to it in the present Code, because that policy had been nullified by a series of judicial decisions. We will refer to only one other case, which was decided with reference to the present Code. In *Sivarama-krishna Ayyar v. Seshappa Naidu*(2), CURGENVEN, J.,

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(1) (1899) I.L.R., 26 Cal., 851.

(2) (1928) I.L.R., 52 Mad., 347.

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WALLER, J. held that the offence contemplated by section 197 "must contain an element necessarily dependent upon the offender being a public servant." We are of opinion that that is too limited a construction of the section. The question is not as to the nature of the offence, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official duty. We hold that, if the offence alleged was committed by the public servant, while he was as actually engaged in or purported to be engaged in the discharge of his official duty, sanction is required. Assuming that *In re Gulam Muhammad Sharif-ud-daulah*(1), was wrongly decided, as the law then stood—the decision would certainly be correct—in our judgment—as the law now stands.

It only remains to apply this principle to the facts of the present case. The complainant's story is that the Village Magistrate sent his talayari to fetch her in connexion with a case before him, in which she had not appeared, told her that "for not appearing when summons were sent to her, he sentenced her to imprisonment in the chavadi," and he confined her in his chavadi—the place where the persons he sentences are by law to be confined. It is clear that—assuming all this to be true—he was purporting to act in the discharge of his duty as a Village Magistrate. Sanction for his prosecution was therefore necessary. We quash the proceedings. It will of course, be open to the complainant, if and when she obtains sanction from the proper authority, to file a fresh complaint.

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[(1) (1866) I.L.R., 9 Mad., 439.

APPELLATE CRIMINAL.

Before Mr. Justice Devadoss.

PALIMUTHU AMBALAGAR (ACCUSED), PETITIONER,

1928,
August 31.

v.

THE PRESIDENT, UNION BOARD, KATTUPUTHUR
(COMPLAINANT), RESPONDENT.*

The Madras Survey and Boundaries Act (VIII of 1923), ss. 13 and 14—Dispute between Union Board and private individual in respect of certain property—Survey held and marked as belonging to Union—Notification under section 13—Notice to remove encroachment on property—Non-compliance—Prosecution within three years from decision of Survey Officer—If Criminal Court competent to go into question of title to property.

Where, in respect of a property under dispute between a Union Board and a private individual, a survey was held and the property was marked off as belonging to the Union Board, and a notification under section 13 of the Madras Survey and Boundaries Act was published in the District Gazette, and in consequence of the failure of the other party to comply with a notice calling upon him to remove an encroachment on the said property, a prosecution was instituted within three years from the decision of the Survey Officer, *held*, that as the decision of the Survey Officer was subject to the result of a suit in a Civil Court to set aside the order and to be filed within three years from the date of such order, a Criminal Court was not precluded from going into the question of title to the property in dispute and to decide the question on the evidence before it.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgments of the Court of the Subdivisional Magistrate of Musiri in Criminal Appeals Nos. 32 and 33 of 1927 preferred against the judgments of the Court of

* Criminal Revision Cases Nos. 934 and 935 of 1927.

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the Stationary Second Class Magistrate of Musiri in Calendar Cases Nos. 92 and 91 of 1927, respectively.

The facts necessary for this report appear in the judgment.

T. M. Krishnaswami Ayyar for petitioner.

S. Panchapakesa Sastri for respondent.

K. Krishna Menon and *K. Venkataraghavachari* for Public Prosecutor for the Crown.

JUDGMENT.

These are applications for revising the conviction of the petitioner under section 207 of the Local Boards Act of 1920. The petitioner, in each case, was asked to remove an encroachment upon a vacant site belonging to the Union and the prosecution was for non-compliance with the notice within the time fixed. The petitioner was prosecuted and fined Rs. 20 in each case. There was some dispute in respect of the vacant land between the Union Board and the Pillayar temple of which the petitioner in Crl. R.C. No. 934 of 1927 is the Dharma-kartha, and also in respect of the plot of land in front of the land of the petitioner in Crl. R.C. No. 935 of 1927. There was a survey of the lands belonging to the Union Board, and under the survey, the plots in dispute were marked off as belonging to the Union Board and a notification was published in the District Gazette as required by section 13 of the Survey and Boundaries Act. That was somewhere in 1926. Notice was issued to the petitioner in both the cases in October 1926 to remove the obstruction and again another notice was issued, Exhibit B, in February 1927. The petitioner not having complied with the notice, prosecution was launched against him and he was found guilty and sentenced to pay a fine of Rs. 20 in each case.

The question that is raised by Mr. Krishnaswami Ayyar is that the decision of the Survey Officer is not conclusive as regards the title to the property inasmuch as the petitioner has three years from the date of the notification to file a suit to modify the order of the Survey Officer. Under section 13, unless the survey so notified be modified by a decree of a Civil Court under the provisions of section 14, the record of the survey shall be conclusive proof that the boundaries determined and recorded therein have been correctly determined and recorded. Section 14 of the present Act gives three years to a party to file a suit for setting aside or modifying the order of the Survey Officer. The three years have not elapsed. The question is whether in a prosecution launched before the expiry of the three years, a Criminal Court is debarred from considering the question of title to the land in dispute or whether the Criminal Court is bound to hold that the order of the Survey Officer is conclusive on the question of title. If no suit is filed within three years, the order of the Survey Officer would be conclusive proof as to the boundaries determined and recorded by him. Before the expiry of three years, the party against whom the order is made, has a right to institute a suit and if the result of the suit be that the order of the Survey Officer is wrong, then the order of the Survey Officer will have to be set aside or modified. The question is whether, when a prosecution is launched before the expiry of three years, a criminal Court is entitled to go into the evidence as to the title to the property taking the decision of the Survey Officer as *prima facie* evidence in favour of it or whether a Criminal Court is precluded from doing so by reason of the order of the Survey Officer. Reliance is placed by Mr. Panchapakesa Sastri upon the wording of section 13 that unless set aside or modified by the decree of a Civil

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Court, the order shall be conclusive proof that the boundaries determined and recorded have been correctly determined and recorded. No doubt, this clause, if it had stood alone, would mean that the order of the Survey Officer is conclusive proof of the boundaries determined and recorded by him, but his order is subject to the decision of a Civil Court and for filing a civil suit, the law gives a period of three years. If, before the expiry of the three years, a prosecution is launched, I think a Criminal Court is not precluded from going into the question of title to the property in dispute and to decide on the evidence whether the property in dispute belongs to the Union Board or to the accused, in other words, the Court is entitled to go behind the order of the Survey Officer. When a prosecution is launched, it is for the prosecution to make out affirmatively all the ingredients necessary to make out the offence, and the fact that under the law an order, if not modified, is conclusive proof, is not sufficient to oust the jurisdiction of a Criminal Court to consider whether on the evidence before it the prosecution has made out the offence. If a suit had been filed within three years and had been dismissed, no doubt the remedy under section 14 given to the unsuccessful party may be taken as having been negatived; but where no suit has been filed or where a suit has been filed and the result of the suit is not known, I do not think a Criminal Court is barred from going into the question as to the ownership of the land in respect of which the prosecution is launched before the expiry of three years from the date of the Survey Officer's order.

In this view, the judgments of the lower Courts ought to be set aside. The accused has adduced some evidence as to the ownership of the land and the appellate Magistrate has declined to consider the evidence in his view

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of the law that the Survey Officer's order is conclusive as to the ownership of the land in dispute. The trial Court has also been misled in its appreciation of the evidence by its view that the question of the ownership of the land is concluded by the determination of the Survey Officer. I think the proper order would be to set aside the conviction in both cases and direct the trial Court to weigh the evidence as regards the ownership of the land and dispose of the cases according to law. The fine paid will be refunded.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Odgers.

LAZAR FERNANDO (ACCUSED), PETITIONER,

v.

AMIRTHAM FERNANDO (COMPLAINANT), RESPONDENT.*

*Abkari Act, Madras (I of 1886)—Opium Act (I of 1878)—
Offences under—Private person—If has locus standi to
institute proceedings.*

A private person has no *locus standi* to institute proceedings in respect of offences under either the Abkari Act or the Opium Act.

In re Kuppusami Naidu, (1922) 44 M.L.J., 231, followed.

Lakshmi Narasayya v. Narasimhachari, (1913) 25 M.L.J., 577, referred to.

PETITION praying that the High Court will be pleased to quash the proceedings of the Court of the Sub-Magistrate of Tuticorin in C.C. No. 322 of 1928.

* Criminal Miscellaneous Petition No. 791 of 1928.

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K. S. Jayarama Ayyar and S. Nagaraja Ayyar for petitioner.

K. Venkataraghavachari for Public Prosecutor for the Crown.

No one appeared for the respondent.

JUDGMENT.

In this case the complainant, a brother of the accused, has laid his complaint in the Court of the Sub-Magistrate of Tuticorin under section 55 of the Abkārī Act and section 9 (c) and (d) of the Opium Act. The story is very shortly, that the accused was seen by the complainant and others going down towards the shore, where it is said he had a boat ready to ship ganja and opium on board a vessel that was lying at the port of Tuticorin. The complainant and his party are said to have arrested the accused. The former informed the Sub-Inspector who arrived with two constables at about one o'clock in the morning and to whom the accused, who is said to have had a sack with him, was handed over by the complainant and his party. Objection was taken that the provisions of both the Abkārī and the Opium Acts prohibit prosecution by private individuals and that, therefore, the complainant had no *locus standi* to institute these proceedings as the police refused to interfere and referred the case as false, apparently believing that the accused was beaten by the prosecution witnesses and the bundle of exciseable goods was foisted upon him while drunk, the prosecution witnesses as well as the accused being, in the opinion of the police, notorious smugglers.

Now the question is whether there is any right of private complaint under these two Acts. As regards the Abkārī Act, Madras Act I of 1886, there is a long series of sections in Chapter 8 headed "powers and duties of

officers, etc." For instance certain Abkārī and Police Officers may search and arrest (section 31), or enter and inspect premises (section 32), and the Collector or Magistrate may on information issue a warrant to search (section 30), any officer of the Abkārī, Salt, Police, Land Revenue or Customs departments or any other person duly empowered may arrest (section 34). By all these sections there is provided a special procedure, e.g., a preliminary enquiry before an Abkārī Inspector who may summon witnesses (section 40 following). The Abkārī Inspector may forward a person, in custody to a Magistrate, and his report is to be treated as a complaint (section 50). Throughout the Act there is no mention of any private person having power to arrest. In fact, several sections provide that the person who is to take action should be not below a certain rank. Here there was of course no complaint by an Abkārī officer under section 50. We have the authority of a Bench of this Court in *Kuppusamy Naidu, In re*(1), to the effect that, on an abkārī offence, if a charge sheet is put in under the ordinary police procedure, the proceedings are not properly instituted, because they are not in accordance with the procedure to which I have referred contained in the Abkārī Act. The learned Judges held that the accused person has the right to a special procedure regulating the course of the investigation and that, he having been denied this special procedure, he was placed under a considerable disability. They also held that the matter was governed by the provisions of the Abkārī Act read with section 5 (2) of the Criminal Procedure Code, adding that there is a much more formal enquiry laid down under the Act than is laid down under the

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Criminal Procedure Code. The case in *Lakshmi Narasayya v. Narasimhachari*(1) may also be referred to. That was an insolvency offence specially provided for by the Presidency Towns Insolvency Act. It was there held that, as the offence is created by that Act and the Insolvency Court was constituted into a special tribunal to try that offence with a special procedure, the ordinary Criminal Procedure Code was not applicable. I think therefore there is no doubt that under the Abkārī Act the proceedings must be initiated and conducted under the elaborate rules contained in the chapter and sections of the Act to which I have referred. It is obvious that that was not done in the present case.

Now the further question arises with regard to the Opium Act, because, it is said, that in this sack of which the accused was in possession, when he was seen by the police, were 1½ lb. of opium besides a very considerable quantity of ganja. The latter will clearly fall under the Abkārī Act, but we have to deal with the opium and the complaint laid under that Act. Now the Opium Act is an Imperial Act and was passed as long ago as 1878 and Mr. Jayarama Ayyar, the learned Advocate for the accused and the learned Public Prosecutor say that their researches have not enabled them to find any authority on this Act. So, it is unfortunately for me a question of first impression as to whether a similar or somewhat similar procedure is contemplated by the Opium Act as is laid down in the Abkārī Act. The Act is very much shorter than the Abkārī Act and there is much less detail in it. To begin with, there is a prohibition against the possession of opium. That is all we are concerned with in this case (section 4). Then the Local

Government may make certain rules with regard to this possession, etc. Then section 9 (c) provides a penalty on conviction before a Magistrate for possessing opium; section 11 provides for the confiscation of opium in certain cases; section 14 gives the power to enter, arrest and seize. Now that power is given to any officer of any of the departments of Excise, Police, Customs, Salt, Opium or Revenue, superior in rank to a peon or constable, who may in right of his office be authorized by the Local Government in this behalf. He may enter into a building where he has reason to believe opium is manufactured, kept or concealed, seize the opium, detain, search or arrest any person whom he has reason to believe to be guilty of any offence relating to such opium. Section 15: "Any officer of any of the said departments may seize in any open place or detain or search any person whom he has reason to believe to be guilty of any offence and, if such person has opium in his possession, arrest him." Section 18 provides for punishment for vexatious entry or search or seizure or arrest. Then section 19: "The Collector of the District, Deputy Commissioner or other officer authorized by the Local Government in this behalf, either personally or in right of his office, or a Magistrate, may issue a warrant for the arrest of any person whom he has reason to believe to have committed an offence relating to opium, or for the search, etc." Section 20: "Every person arrested and things seized under section 14 or section 15, shall be forwarded without delay to the officer in charge of the nearest police station; and every person arrested and thing seized under section 19 shall be forwarded without delay to the officer by whom the warrant was issued." Then follows a sub-paragraph: "Every officer to whom any person or thing is forwarded under this section, shall, with all

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convenient despatch, take such measures as may be necessary for the disposal according to law of such person or thing." I take it that that means that the person arrested and the thing seized are to be forwarded to the officer in charge of the nearest police station or to the officer who has issued the warrant and he has to take steps according to law to bring the person to punishment and to deal with the things seized, under section 11. There is no mention throughout the Act of any right of private arrest or complaint. Although the Act, as I have said, does not contain these elaborate provisions of the Abkâri Act, there is very little doubt in my mind, that for an offence against the Opium Act, the procedure which is indicated in that Act is to be strictly followed; that is to say, that the officers of the departments mentioned together with the Collector of the District, Deputy Commissioner or other officer authorized by Government have alone the power to initiate proceedings. The utmost that a private person can do is to set one of these authorized persons in motion by information. That, it will be noticed, was attempted to be done in the present case by the information to the police, but the police have referred the complaint as false. In any event, there would seem to be no warrant for the previous private arrest by the complainant and his party of the accused. I see no reason therefore to hold that there is any essential difference between the procedure under these Acts.

Now, the second point urged before me was, that the Second-class Magistrate of Tuticorin was not authorized to try this offence as under the Opium Act "Magistrate" means outside the Presidency Towns a Magistrate of the first class, or (when specially empowered by the Local Government to try cases under this Act) a Magistrate of the second class. It was held in a case

in *Mahomad Kasim v. King-Emperor*(1) by SPENCER and SESHAGIRI AYYAR, JJ., that the notification in the Gazette of the 12th October 1880 was an insufficient compliance with section 3 of the Opium Act, and that where a class of officials is invested with powers, such officials are only generally and not specially empowered. Government apparently were advised to issue a fresh notification, which they did in June 1915, where they specially empower the Second-class Magistrate of Tuticorin in the District of Tinnevely. That was held by Mr. Justice AYLING and myself to be a sufficient compliance with the notification, and that that was a special empowering of the person holding that office, which would satisfy the requirements laid down by the learned Judges in *Mahomad Kasim v. King-Emperor*(1). That point therefore goes.

Having regard to my decision on the Abkâri and Opium Acts, the proceedings in C.C. No. 322 of 1928 on the file of the Sub-Magistrate of Tuticorin must be quashed on the ground that he has no jurisdiction under the circumstances to entertain the complaint made to him by the complainant. The accused will be set at liberty.

B.O.S.

(1) (1915) 2 L.W., 233.

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APPELLATE CIVIL—FULL BENCH.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Madhavan Nair and Mr. Justice Jackson.*

1928,
December
18.

KALAGA ANNAPURNAMMA (SECOND DEFENDANT), APPELLANT,

v.

KALAGA APPAYYA SASTRI AND ANOTHER
(PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS.*

*Hindu Law—Adoption—Assent of the son to adoption by his
mother—Adoption made after son's death—Validity of
assent—Validity of adoption.*

The assent of a son to an adoption by his mother, in the event of his death, is sufficient assent under the Hindu Law to validate the adoption, where there has been no change in the circumstances and there are no other grounds for the next presumptive reversioner to object to the adoption, when actually made.

APPEAL against the decree of the Court of the Subordinate Judge of Vizagapatam in Original Suit No. 10 of 1921.

This and the connected appeal A.S. No. 208 of 1923 arose out of a suit by a reversioner to the estate of a deceased Hindu for a declaration that the adoption by the first defendant of the second defendant's husband was invalid. The first defendant was the mother of the deceased last male holder, who died unmarried, leaving a will in 1906 authorizing his mother to adopt. The mother adopted in 1908 the second defendant's husband, who died in 1919. At the time of the adoption, the nearest reversioner was one Bhyravappa who died in 1909 without instituting a suit for a declaration that the adoption was invalid. At

the time of the adoption, the present plaintiff was a minor and was the next presumptive reversioner after Bhyravappa. The plaintiff brought this suit in 1921 for a declaration that the adoption was invalid, within three years after he attained majority in 1920. The second defendant pleaded the bar of limitation and also that the adoption was valid. The Subordinate Judge held that the adoption was invalid, but that the suit for a declaration was barred by limitation, and dismissed the suit, directing each party to bear his or her own costs. The plaintiff appealed in A.S. No. 208 of 1923, while the second defendant appealed in A.S. No. 155 of 1923 against the decree disallowing her costs and thus raised the question of the validity of the adoption decided against her. The other facts appear from the following

ORDER OF REFERENCE:—

KUMARASWAMI SASTRI, J.—These appeals arise out of a suit filed by the plaintiff claiming to be the next reversioner to one Sambamurthi, who died about the year 1907, for a declaration that the adoption by the first defendant of one Krishnamurthi, the husband of the second defendant, is not valid. The last male owner of the property was one Sambamurthi, son of one Sanyasi Ayya. He survived his father and died unmarried in 1906 or 1907, leaving his mother, the first defendant, who, if he died intestate, would succeed to the property as mother and heir under Hindu Law. He, however, left a will which has been filed as Exhibit II in the suit, dated the 4th of December 1906. There is some dispute as to the translation of the will, but, for the present, it is sufficient to say that by the will he consents to his mother making an adoption and to the son so adopted succeeding to the property. The first defendant who was the mother of the deceased Sambamurthi adopted Krishnamurthi, the husband of the second defendant. At the date of the death of Sambamurthi, the nearest reversioners who were admittedly alive were one Bhyravappa who was a major and the present plaintiff who was a minor. Bhyravappa died towards the end of 1909 about a year or a year and a half after the

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adoption without filing any suit disputing the adoption. It is alleged by the second defendant and denied by the plaintiff that Bhyravappa gave his consent to the adoption and took part in the ceremonies. Krishnamurthi died in 1919 issueless leaving the second defendant his widow. The case of the plaintiff is that the adoption is invalid, that Krishnamurthi acquired no interest in the properties and consequently the second defendant has no interest, that the first defendant as the mother of Sambamurthi is entitled to the properties as heir under Hindu Law with the limited estate of a Hindu mother succeeding to her son, that he the plaintiff is the nearest reversioner and that he is entitled to a declaration that the adoption is invalid and not binding on him. The main contentions of the second defendant who is the contesting defendant are that the adoption of her husband is valid both by reason of the will of Sambamurthi and by reason of the consent and active concurrence in the adoption by Bhyravappa, and that, as Bhyravappa died without disputing the adoption, the plaintiff's claim is barred by limitation, his minority making no difference. The Subordinate Judge dismissed the plaintiff's suit on the ground that it was barred by limitation. He, however, held that the adoption was invalid. Appeal No. 208 of 1928 is by the plaintiff against the decree dismissing his suit, and Appeal No. 155 of 1923 is by the second defendant against the finding as to the invalidity of the adoption. As the Subordinate Judge directed each party to bear his or her own costs making the invalidity of the adoption the ground for depriving the second defendant, who succeeded on the question of limitation, of her costs, the appeal is filed by her against the portion of the decree depriving her of her costs, and thus raising the question as to the propriety of that finding.

The first question is whether the Subordinate Judge was right in holding that the suit was barred by limitation. There is no dispute that at the date of the adoption there were two reversioners, Bhyravappa and the plaintiff, that, Bhyravappa died within two years after the adoption, that the plaintiff was a minor and that if his minority could be taken into consideration, a suit which was filed within three years after his attaining majority would be in time. Although each reversioner has got only a *spes successionis* and although a nearer reversioner has got no higher rights than the one who is most distant, a right of suit is allowed to reversioners to question any acts which are prejudicial to the reversion. The nature

of such a suit filed by a reversioner has now been settled by their Lordships of the Privy Council in *Venkatanarayana Pillai v. Subbammal*(1), where their Lordships held that where a suit to set aside an adoption is brought by a presumptive reversioner in his representative capacity and on behalf of all the reversioners and if the act complained of is to their common detriment and the right to relief is for their common benefit, the death of the reversioner does not put an end to the suit but entitles another reversioner to be brought on record. They also held that there is no difference between suits to set aside an adoption and suits to set aside an alienation. This view was followed by their Lordships of the Privy Council in *Janaki Ammal v. Tarayanaswami Ayyar*(2), and *Maharaja Kesho Prasad Singh v. Sheo Pargash Ojha*(3). After the decision in *Venkatanarayana Pillai v. Subbammal*(1), questions arose as to the period of limitation for suits by reversioners. In *Varama v. Gopala-asayya*(4), it was held by a Full Bench of this Court that all the reversioners, whether existing or thereafter to be born, have a single cause of action to set aside an alienation by a widow prejudicial to their reversion, the cause of action arising on the date of the alienation and that where the existing reversioners allow a suit to be barred, the reversioners thereafter born are equally barred. In *Polepeddi Venkatasivayya v. Polepeddi Idemma*(5), it was held that a suit brought after the expiry of six years by a reversioner born after the adoption but before a suit became barred under Article 118 of the Limitation Act would be barred even though the nearest reversioner had precluded himself from filing a suit to set the adoption aside. WALLIS, C.J., and SESHAGIRI AYYAR, J., were of opinion that the birth of a reversioner after the adoption did not give him any fresh cause of action or stop the running of time against the whole body of reversioners.

These cases do not touch the present question as the appellant was in existence at the date of the adoption and the next presumptive reversioner died a year and a half after the adoption before his suit would have become barred. It could not be said that he allowed the suit to become barred by not suing within six years. If the present appellant, who was in existence

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(1) (1915) I.L.R., 38 Mad., 406. (2) (1916) I.L.R., 39 Mad., 634.
(3) (1924) 47 M.L.J., 824. (4) (1917) I.L.R., 41 Mad., 659.
(5) (1920) 39 M.L.J., 621.

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at the date of the adoption, had the right to impeach the transaction and if the next reversioner died before the period of limitation expired, there seems to be no principle on which it can be held that a suit by a remoter reversioner who was a minor at the date of the death of the next presumptive reversioner would be barred by limitation if filed within three years of his attaining majority.

It is contended by Mr. Krishnaswami Ayyar for the respondent that each reversioner has not got a right to sue even though there is an injury to the reversion but only the immediate presumptive reversioner, that time begins to run against the whole body of reversioners from the date of the adoption which is impugned and that if the next minor reversioner does not file a suit before the period of limitation so far as the adult reversioner is concerned, expires, he cannot claim extension on the ground of his minority. He argues that if a reversioner born subsequently cannot claim the benefit of section 6, one in existence on the date of the adoption cannot do so. As I pointed out before, in the present case the next presumptive reversioner died within 1½ years after the adoption which was long before the period of limitation would expire and the next presumptive reversioner was a minor. The question is whether section 6 of the Limitation Act would give the minor, who on the death of Bhyravappa was the next presumptive reversioner, a right to sue within three years after he attained majority.

I shall first deal with the contention that no reversioner other than the next presumptive reversioner has got the right to file a suit to set aside the adoption. There is no authority for the proposition that it is only the next presumptive reversioner that has the right to challenge the alienation or adoption by a widow. Each reversioner is equally affected by the adoption and his interests are as much prejudiced as the interests of the next presumptive reversioner as it may be that when the widow dies a person lower in the scale of heirs may be the person entitled to the property. It is difficult to conceive of a representative suit where the persons represented have no cause of action or no injury to redress. In *Venkatanarayana Pillai v. Subbammal*(1), their Lordships of the Privy Council observed :

"There is nothing to preclude a remote reversioner from joining or asking to be joined in the action brought by the presumptive reversioner or even obtaining the conduct of the suit

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on proof of laches on the part of the plaintiff or collusion between him and the widow or other female whose acts are impugned. It is the common injury to the reversionary right which entitles the reversioners to sue."

These observations of their Lordships clearly indicate that a remoter reversioner has a right to impeach the transaction which right he can enforce though under ordinary circumstances the person who is to file a suit to enforce the right is the next presumptive reversioner. The rule of law that the suit should be filed by the next presumptive reversioner unless the remoter reversioner can show that the next reversioner disabled himself from filing the suit either by concurrence in the transaction or by collusion with the widow is based on principles of expediency and to prevent multiplicity of suits rather than on a negation of the rights of the remoter reversioner to impeach the transaction. In *Rani Anandkunwar v. The Court of Wards*(1), their Lordships of the Privy Council observe "Their Lordships are of opinion that although a suit of this nature may be brought by a contingent reversionary heir, yet that, as a general rule, it must be brought by the presumptive reversionary heir—that is to say, by the person who would succeed if the widow were to die at that moment. They are also of opinion that such a suit may be brought by a more distant reversioner if those nearer in succession are in collusion with the widow or have precluded themselves from interfering. They consider that the rule laid down in *Bhikaji Apaji v. Jagannath Vithal*(2), is correct. It cannot be the law that anyone who may have a possibility of succeeding on the death of the widow can maintain a suit of the present nature, for, if so, the right to sue would belong to every one in the line of succession, however remote. The right to sue must, in their Lordships' opinion be limited. If the nearest reversionary heir refuses without sufficient cause, to institute proceedings or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue; see *Koor Goolab Singh v. Rao Kurun Singh*(3)." I agree with the following observations of WALLIS, C.J., in the order of reference in *Varama v. Gopaldasayya*(4). The

(1) (1880) I.L.R., 8 Cal., 764.

(3) (1871) 14 M.I.A., 176.

(2) (1873) 10 B.H.C.R., (A.C.J.), 351.

(4) (1917) I.L.R., 41 Mad., 659.

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learned CHIEF JUSTICE observes "It also follows I think that as pointed out by the Full Bench, the cause of action of all the reversioners is the same and arises on the date of the alienation, and that the question dealt with in *Rani Anandkunwar v. The Court of Wards*(1), as to when a remote reversioner is to be allowed to sue is merely a question as to which reversioner should have the conduct of the suit which is instituted on a cause of action common to all." It seems to me, therefore, there is no point in the argument that no reversioner other than the next presumptive reversioner has got the right to sue to set aside the adoption.

If on the death of the next adult presumptive reversioner before the suit is barred, the person next to him is a minor, the question is whether he is entitled to the benefit of section 6 of the Limitation Act. In this connexion it is well to consider sections 6, 7 and 9 of the Limitation Act. Section 6 enacts that where a person entitled to institute a suit is, at the time from which the period of limitation is to be reckoned, a minor, or insane, or an idiot, he may institute the suit within the same period after the disability has ceased as would otherwise have been allowed from the time prescribed therefor in the third column of the first schedule. By section 8 the period is not extended beyond three years after attaining majority. Section 7 relates to the disability of one of several plaintiffs and enacts that in cases where a discharge can be given without the concurrence of the minor, time will run against all the persons jointly entitled to institute the suit; but where no such discharge can be given time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased. Section 9 states that once time has begun to run, no subsequent disability or inability to sue stops it. It is argued by Mr. Varadachariar that in the case of reversioners, who do not claim through each other, no reversioner, however near in grade, can give a discharge so as to bind the other reversioners and section 7 has no application to the facts of this case, that section 9 would not bar the plaintiff as he was alive at the date of the adoption and there was no subsequent disability after the time commenced to run, that section 6 therefore applies to this

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case and that the suit is not barred. If this argument is accepted, the plaintiff is clearly in time. Mr. Krishnaswami Ayyar, for the respondent, argues that having regard to the nature of reversionary rights and to the fact that the injury is, according to their Lordships of the Privy Council, common to the reversion, the plaintiff would not be the person entitled to institute the suit when the adoption was made so as to attract the provisions of section 6 of the Limitation Act. He also argues that on the principle of law that if the next reversioner is barred by limitation the whole body would be barred, and that decrees obtained by or against the next presumptive reversioner with reference to the reversion would bind all the other reversioners, the fact that no suit was filed within 6 years after the adoption bars all the reversioners, adults or minors, as Bhyravappa was alive and did not sue, that if Bhyravappa had been alive for 6 years the suit would have been barred irrespective of the plaintiff's minority and that his death would not make any difference.

Having regard to the importance of the question and the absence of any authorities bearing directly on the point, I think it necessary that the point should be referred to a Full Bench which will settle the law on the point.

The next question is as to the validity of the adoption of the second defendant's husband. He was adopted by the first defendant. It is admitted that the first defendant's husband did not give any authority to adopt and the ground on which the validity of the adoption is sought to be established is that the adoption was made with the consent of her son, the deceased Sambamurti and also with the consent of Bhyravappa, the immediate presumptive reversioner. There is no dispute as to the factum of the adoption. As regards the alleged consent of Bhyravappa, the Subordinate Judge did not believe the evidence and was of opinion that no such consent was given. There is no documentary evidence as to any consent by Bhyravappa and, as pointed out by the Subordinate Judge, Exhibit III, the deed executed by the natural father of the adopted boy, refers only to the consent of the first defendant's son Sambamurti expressed by his will, dated the 4th December 1906. If as a matter of fact the next presumptive reversioner was asked and signified his express consent to the adoption, it is hardly likely that so important a fact would have been omitted in Exhibit III

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executed contemporaneously. There is the evidence of defendant's fifteenth witness, the wife of Bhyravappa, of defendant's fifth witness, the brother in-law of Bhyravappa, and of defendant's tenth witness, the natural mother of the adopted boy, as to Bhyravappa giving express consent and this has been relied upon as strongly supporting the case of the second defendant that Bhyravappa gave his consent. But it appears from the cross-examination that these witnesses are interested in the second defendant and I cannot say that the Subordinate Judge was wrong in not placing reliance on their evidence. There is, however, evidence to show that Bhyravappa knew of and was present at the adoption. Bhyravappa was living next door and there is no suggestion that he was not in the village at the time of the adoption and the probabilities are that he was present at the adoption like other relations. It is also in evidence that the mother of the present plaintiff was present and that she accompanied the adopted son after the adoption to Benares where *sradh* was performed. The plaintiff was a minor at the time, and there can be no question of his consent or acquiescence by conduct. I think the evidence shows that the adoption was made on the footing of the consent having been already given by the son of the first defendant in his will, and that Bhyravappa and the other relations raised no objection to the adoption. Probably they all thought that consent had already been given and they were present at the ceremony. It is clear that, if the adoption was made on the footing of the consent by the son, the mere presence of the next presumptive reversioner would not make the adoption valid if the consent of the son on the basis of which the adoption was made is not proved or is invalid. I do not think the adoption can be supported on the footing of Bhyravappa's consent. There can be no doubt that the son did assent to the adoption in Exhibit II, his will, dated the 4th of December 1906, the genuineness of which is not questioned. There was some dispute as regards the translation of the will and we had it translated by the Chief Interpreter of this Court on the Original Side. The correctness of this translation is not disputed. After referring to the properties, the testator proceeds as follows:—"As to this, as I am apprehensive that there will be no continuation of the family after my lifetime, as, being unmarried, I have no issue, and as I am apprehensive whether my mother may, after my lifetime, suffer trouble at the hands of the *gnatis* (agnatic sapindas), (I direct

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that) till our family is continued and the lineage becomes established, my mother shall under this will make an adoption in my stead and, after the adopted boy attains majority, shall hand over to the possession of the said adopted boy all the property, movable and immovable, belonging to me." The words "I direct that" after the word "*gnatis*" and before "till our family" are put in brackets by the Chief Interpreter. It is clear that so far as the authority to adopt is concerned, it can only be given by the husband, so that the will in law can only amount to a consent by the son who under the Hindu Law would be the nearest sapinda of his mother. A consent need not be by a registered instrument or in any form and when it is by will and the executant who is a sapinda can only consent to the adoption there is no reason why the will should be read as an "authority" to adopt and not merely as a consent to the proposed adoption. It is contended by Mr. Krishnaswami Ayyar that the consent of the son would be sufficient assent of a sapinda to the validity of the adoption, the son being a sapinda of his mother and the law only requiring the assent of a sapinda, that such assent may be given by will and that as the adoption with the assent of the son can only be made after his death, the Hindu Law forbidding any adoption to his father during his lifetime, the death of the son makes no difference. It is contended by Mr. Varadachari for the plaintiff that a son can never consent to an adoption as a sapinda, as the consent of sapindas contemplated in Hindu Law is the consent of sapindas existing at the time of the adoption and that the death of the person giving consent puts an end to the consent.

As regards the widow's power to adopt, the necessity for the widow making the adoption to get the consent either of her husband or of the sapindas is based on the texts of Vasishta "Let not a woman give or accept a son unless with the assent of her husband", and on the texts of Manu and other writers that a woman, who is to be under the protection of her parents during her youth, of her husband during coverture and of her son after her husband's death or of the elder members of the family in the absence of a son, cannot act independently of advice. This text of Vasishta has been construed in Bengal and Benares as prohibiting an adoption after the husband's death. Vignaneswara and other commentators, however, treat the text as limited to an adoption made during the husband's lifetime, and are of opinion that after his death the assent required by Vasishta to be given

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by the husband during his lifetime is sufficiently replaced by the assent given by sapindas, such assent taking the place of the assent of the husband. Now, there can be little doubt that under all the texts, the mother, after the death of the husband, is under the protection of her son who is her nearest sapinda and I can see nothing in the texts which disqualifies a son giving assent to an adoption because *ex hypothesi* the adoption could only be made after his death. In *Collector of Madura v. Mootoo Ramlinga Sathupathy*(1), their Lordships of the Privy Council dealing with the assent of sapindas observe, "It is not easy to lay down an inflexible rule. Every case must depend on the circumstances of the family. All that can be said is, that there should be such evidence of assent of kinsmen as suffices to show that the act is done by the widow in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from corrupt motives." In *Vellanki Venkata Krishna Rao v. Venkatarama Lakshmi*(2), their Lordships of the Privy Council again emphasize this view and observe "All that is required to be established is that there was such a consent as would be sufficient to support the inference that the adoption was not made from capricious or corrupt motives, but upon a fair consideration of the expediency of substituting an heir by adoption to the deceased husband." If the propriety or the necessity of the adoption is to be considered, there can be little doubt that in the present case there was every reason for the first defendant's son to assent to the adoption. There is no suggestion that the adoption was made from any corrupt or improper motive. I can find no authority for the proposition that the assent of the son is not the assent of the sapinda and that his assent would be invalid. Sircar in his valuable work on adoption is of opinion that there is nothing to prevent a son from giving authority to his mother to adopt as the son is the legal guardian of his widowed mother under Hindu Law and he refers to *Strange's Hindu Law*, Vol. I, page 93 (see Sircar on Adoption, page 255, 2nd Edition). He is the person most concerned both in getting an heir who will perform his *sradh* and perpetuate his family, the two purposes which according to Manu and other writers justify or necessitate an adoption. I agree with the remarks of Sircar in his work on adoption that the son's assent is sufficient. The argument of Mr. Varadachariar is that

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the assent of the sapinda is not valid to support the adoption if the adoption is actually made after the assenting sapinda is dead. As regards the necessity for the assenting sapinda to be alive at the date of the adoption there seems to be a conflict of authorities in Madras, but the balance of authority is in favour of the view that unless there has been a change of circumstances between the date of the assent and the date of the adoption, the assent of the sapinda, though dead at the time of the adoption, is sufficient to support its validity. In *Mami v. Subbarayar*(1), it was held by BENSON and ABDUR RAHIM, JJ., that a consent previously obtained from a deceased sapinda cannot be efficacious to validate an adoption, if it is not approved of or is objected to by the persons who are the nearer sapindas at the time of the adoption. In this case, the consent was contained in a will by which the son authorized his mother to make an adoption, and the adoption was made, but it was found that the *dayadis* did not expressly consent to it. It was held that the adoption was invalid. I may point out that the view the learned Judges took was that the adoption would be valid "if it was not disapproved" by the sapindas, and in the present case they did not disapprove of it but attended the ceremony. In Appeals Nos. 294 and 354 of 1921, KRISHNAN and RAMESAM, JJ., were of opinion that no sapinda is entitled to give, by way of a will to take effect after his death, a consent to an adoption by a widow. They seem to place some importance on the fact that the widow never applied for any consent in that case. With respect, it seems to me that the application by the widow for consent has no bearing as it cannot be said that the adoption would be invalid if the reversioners asked the widow to adopt and she does so at their request. The extreme view, taken in the 36 Madras case, that the death of the assenting sapinda necessarily puts an end to the efficacy of the consent, has not been accepted in the later decisions. In *Suryanarayana v. Ramdoss*(2), it was held that mere lapse of time without more or the death of the consenting sapinda will not put an end to a consent freely and *bona fide* granted. In *Anne Brahmayya v. Chelasami Rattayya*(3), RAMESAM and JACKSON, JJ., were of opinion that the death of the consenting sapinda would not affect the validity of the adoption, if the adoption was made within a

(1) (1911) I.L.R., 36 Mad., 145.

(2) (1917) I.L.R., 41 Mad., 604. (3) (1924) 20 L.W., 508.

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

(2) (1876) I.L.R., 1 Mad., 174.

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reasonable time after the consent. RAMESAM, J., at page 517 observes as follows:—"In my opinion there is an essential difference between the authority of the husband and the assent of a sapinda. The former is intended to be exercised only after the death of the husband. The latter is intended to be used at a reasonable time after the consent is given. When the interval is short, the death of the sapinda may not matter, but a sapinda's assent is not to be pocketed by the widow and used long after it was given, when entirely different considerations as to the expediency of the adoption may apply." This seems to be in consonance with the view taken in the 41 Madras case though it is difficult to reconcile it with the view taken by the learned Judge in Appeals Nos. 294 and 354 of 1921. In *Ammanna v. Satyanarayana*(1), the question was considered by ODGERS and VISWANATHA SASTRI, JJ., and it was held that the consent of the nearest sapinda for an adoption made by a widow can be acted upon after his death if no objection is taken by the sapindas alive at the date of the adoption. I may point out that in *Krishnayya v. Lakshmiopathi*(2), their Lordships of the Privy Council at page 659 in dealing with the contention that the death of the sapinda puts an end to the power expressly refrain from expressing any opinion upon this and other matters which were argued. Owing to the difference of opinion I have referred to above between the Benches of this Court, I think this question ought to be referred to a Full Bench.

I would refer the following questions for the decision of a Full Bench:—

(1) Whether a suit filed by a reversioner who was a minor at the date of adoption would be in time if filed within three years after his attaining majority where the immediate presumptive reversioner dies before the period of limitation expires, and

(2) Whether the assent of a son to an adoption by his mother is sufficient assent under Hindu Law to validate the adoption, where there is no change in circumstances and there are no other grounds for the next presumptive reversioner to object to the adoption, when actually made.

REILLY, J.—I agree that the two questions should be referred to a Full Bench and I agree also with the view of the facts of this case taken by my learned brother.

(1) (1925) I.L.R., 49 Mad., 636. (2) (1920) I.L.R., 43 Mad., 650.

ON THIS REFERENCE

A. Krishnaswami Ayyar (with Y. Suryanarayana) for appellant.—The consent given by the son to his mother to adopt after his death is valid. The son is the nearest sapinda of his mother after his father's death. The mere fact that the adoption could take place only after his death does not affect the validity of the consent previously given. Mere death of the sapinda, who gave his consent to the adoption, does not make it invalid or insufficient. See *Suryanarayana v. Ramdoss*(1), *Ammanna v. Satyanarayana*(2), *Anne Brahmayya v. Chelasaami Rattayya*(3). The consent must have been such as to show that the adoption by the widow was *bona fide* made: See *Veerabasavaraju v. Balasurya Prasada Rao*(4).

T. M. Krishnaswami Ayyar for respondent.—In the case of a son giving consent to his mother to adopt to her husband, the son takes away the privilege or obligation of advising the widow at the time of the adoption. If the son's consent is valid, a similar consent by any other sapinda in the son's lifetime, should be considered equally valid. The right to give consent arises only when the widow is competent to adopt. The power to adopt must have come into existence, when consent is given. The guarantee of the nearest sapinda, who loses his possibility of succession by giving his consent, and who therefore acts *bona fide*, is taken away, when the son gives his consent. Reference was made to 36 Mad., 145 and A.S. Nos. 294 and 391 of 1921.

A. Krishnaswami Ayyar in reply.—The assent of sapindas is equivalent to a power given by the husband as laid down by the Privy Council in 1 Mad., 69 and other cases. The husband can authorize successive adoptions, which authority can be exercised after his death, though it is ineffectual in his lifetime.

OPINION.

The second question referred to us for decision is "Whether the assent of a son to an adoption by his mother is sufficient assent under Hindu Law to validate

(1) (1917) I.L.R., 41 Mad., 604. (2) (1925) I.L.R., 49 Mad., 636.
(3) (1924) 20 L.W., 503. (4) (1918) I.L.R., 41 Mad., 998 (P.O.).

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the adoption, where there is no change in the circumstances and there are no other grounds for the next presumptive reversioner to object to the adoption, when actually made."

In this Presidency, the law is well settled that a Hindu widow, not having her husband's permission, may, if duly authorized by his kindred, adopt a son to him (See 12 M.I.A., 397—the Ramnad case). It is also settled that the condition regarding the consent of the husband's kindred is sufficiently satisfied if the consent of the nearest sapindas—even if there be only one such—be obtained (*Subrahmanyam v. Venkamma*(1), at page 635, and *Veerabasavaraju v. Balasurya Prasada Rao*(2),) they being by virtue of the relationship the most competent advisers of the widow and the proper judges of the propriety of her act in making the adoption. As observed in the referring order, under the Hindu Law, the mother is under the protection of the son, who is the nearest sapinda after the husband's death. It follows that *prima facie* his assent is sufficient to validate an adoption by his mother. According to the theory underlying the law of adoption, this assent of the son can be acted upon only after his death. Does the fact that the son is not alive when the adoption is actually made render his consent ineffectual, and, in consequence, the adoption invalid?

It is argued on one side that the son's consent is valid, as he is the natural guardian and protector of the widowed mother and is the person most interested in the main purposes which constitute the necessity for the adoption, namely, the performance of his *shraddha* and the perpetuation of his family. On the other side it is contended that the consent contemplated is that of the

sapindas whose presumptive or reversionary rights would be defeated by the adoption, and not of the deceased son as regards whom no question of endangering proprietary interests could possibly arise. In *Collector of Madura v. Moottoo Ramalinga Sathupathy*(1), wherein the validity of a widow's adoption with the consent of her husband's kindred was authoritatively laid down, their Lordships of the Privy Council observed that

"the assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption."

That the rights of property should also be taken into account was for the first time expressed in *Sri Virada Pratapa Raghunatha Deo v. Sri Brozo Kishoro Patta Deo*(2). At page 83, the Privy Council said,

"It may be the duty of a Court of Justice administering the Hindu Law to consider the religious duty of adopting a son as the essential foundation of the law of adoption, and the effect of an adoption upon the devolution of property as a mere legal consequence. But it is impossible not to see that there are grave social objections to making the succession of property, and it may be in the case of collateral succession, as in the present instance, the rights of parties in actual possession, dependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over, property. It seems, therefore, to be the duty of the Court to keep the power strictly within the limits which the law has assigned to it."

In *Veerabasavaraju v. Balasurya Prasada Rao*(3), the Board, after stating that, in the judgment in the Rāmṇād case, some expressions were used which might imply that the question of reversionary interest formed only a

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

(2) (1876) I.L.R., 1 Mad., 62 (P.C.).

(3) (1918) I.L.R., 41 Mad., 998.

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secondary consideration in determining what sapindas' assent was primarily requisite, observed that rights to property cannot be left out of consideration in the determination of the question. It is noteworthy that in the latter two cases the language of the Board is guarded and their Lordships do not say that proprietary rights form the paramount consideration. The necessary result of every adoption is to divest the sapindas of the interest of the widow's husband which devolved on them; this circumstance by itself should not therefore be regarded as conclusive in determining the validity of the consent on the strength of which the adoption is made. Having regard to these circumstances, the observations of the Privy Council adverting to the importance of proprietary rights in relation to the validity of sapindas' consent can only be understood to mean that such consideration should not be lost sight of but should be given due weight in determining what sapindas' consent would be sufficient.

That the ultimate effect of an adoption on the reversionary interest of the sapindas does not form the primary consideration in determining the question may be gathered from the views of the Privy Council regarding the nature of the evidence of consent required in cases of this description. The Rāmṇād case laid down that

"there should be such evidence of consent of kinsmen as suffices to show that the act is done by the widow in the proper and *bona fide* performance of a religious duty and neither capriciously nor from corrupt motives."

In *Vellanki Venkatakrishna Rao v. Venkatarama Lakshmi*(1), the Board observed:

"Their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of

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the widow and that all that which this Committee in the former case intended to lay down was that there should be such proof of consent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow not from capricious or corrupt motives in order to defeat the interest of this or that sapinda, but upon a fair consideration of what may be called a family council of the expediency of substituting an heir by adoption to the deceased husband."

This proposition was referred to with approval in *Virabasavaraju v. Balasurya Prasada Rao*(1). It follows that the decisive consideration in such cases is whether the adoption was a proper and *bona fide* act; and in coming to a conclusion on that point, the fact that the sapinda giving the consent had no proprietary interest to lose or that it will prejudicially affect the property rights of the nearest reversioners at the time of the adoption will merely be an important element for consideration.

The crucial test being as stated above, the consent of the son who is the nearest sapinda would be sufficient if the circumstances showed that the adoption was made by the widow in the proper and *bona fide* performance of a religious duty, and the real motive which actuated her was the conferment of spiritual benefit on her husband. The adoption would not be vitiated merely because the son had no proprietary interest to lose by the adoption when actually made or it tended to defeat the reversionary rights of other sapindas. If, however, the evidence bearing on consent leads to the conclusion that the motive which actuated the widow in making the adoption was to defeat the reversionary interest of the sapindas, then the adoption would necessarily be invalid. These being the true considerations, it would follow that the death of the son will not affect the validity of his consent or of the adoption based on it.

(1) (1918) I.L.R., 41 Mad., 998.

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No authority has been brought to our notice in support of the contention that the assenting sapinda should be alive at the time of the adoption. The question was raised before the Judicial Committee in *Krishnayya v. Lakshmipathi*(1), but their Lordships refrained from expressing any opinion on it. In *Suryanarayana v. Ramdoss*(2), SESHAGIRI AYYAR, J., with whom AYLING, J., concurred, held that the death of the consenting sapinda will not put an end to a consent freely and *bona fide* granted. To the same effect is the decision in *Anne Brahmayya v. Ohelasami Rattayya*(3). In that case, RAMESAM, J., observed

“When the interval is short, the death of the sapinda may not matter; but a sapinda's assent is not to be pocketed by the widow and used long after it is given when entirely different considerations as to the expediency of the adoption may apply.”

In *Ammanna v. Satyanarayana*(4), ODGERS and VISWANATHA SASTRI, JJ., upheld an adoption made by a widow after the death of the assenting sapinda and approved by the sapinda living at the time of the adoption. VISWANATHA SASTRI, J., however, was prepared to go to the length of holding that such subsequent approval was not essential. *Vide* his observations at page 649 to the effect that

“in my opinion the trend of these decisions is that when the consent is given by the father-in-law who happens to be the nearest sapinda then living, his death before the adoption is made would not *ipso facto* revoke the consent; and that such a consent would come to an end only if the circumstances had materially changed after his death.”

If, as we have already pointed out, the determining factor is the object of the widow in making the adoption and the considerations based on the loss of proprietary rights of the reversioners merely serve as aids in

appreciating the true nature of the consent and the circumstances relating to the adoption, it is difficult to perceive the necessity for the subsequent consent or approval of the reversioners living at the time when the adoption is actually made. The reservation that the consent should be acted upon with reasonable promptitude and that circumstances should not have undergone a material alteration would seem to meet the end in view, irrespective of the question whether the assenting sapinda was dead at the time of the adoption or whether those living then approved it.

The doctrine of subsequent approval was suggested in the decision in *Mami v. Subbarayan*(1). It may at once be stated that it is not an authority for the extreme view that the death of the assenting sapinda necessarily put an end to the efficacy of the consent. The case merely decided that the adoption on the basis of the consent of a deceased sapinda would be invalid “if not approved of by the persons who are the nearest sapindas at the time of the adoption.” A close examination of that decision shows that the Judges were considerably influenced by the fact that the death of the assenting sapinda would make his consent irrevocable. It is not evident why that circumstance should destroy the efficacy of the consent. Its validity has to be tested solely by the consideration laid down in the judgments of the Privy Council already referred to, and if it satisfies them, the consent should be allowed to have full operation irrespective of the fact that the assenting sapinda had died. In dealing with the argument that adoption within a reasonable time after the death of the assenting sapinda would be valid, the learned Judges observe:

“No doubt it may not be necessary that the consent should be given actually at the time the adoption is made, but

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(1) (1920) I.L.R., 43 Mad., 650.

(2) (1917) I.L.R., 41 Mad., 604.

(3) (1924) 20 L.W., 503.

(4) (1925) I.L.R., 49 Mad., 636.

(1) (1911) I.L.R., 36 Mad., 145.

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it seems to us that at any rate a consent previously obtained from a deceased sapinda cannot be efficacious to validate an adoption which is not approved by the persons who are the nearest sapindas at the time the adoption is actually made."

This pronouncement is halting and indecisive. In *Suryanarayana v. Ramaloss*(1), this case was considered by SESHAGIRI AYYAR, J., with whose comments we agree; (see also 49 Madras, 636).

For the above reasons, the answer to the second question referred to us is in the affirmative.

In view of our answer to the second question, we do not think it is necessary to consider the first question.

K R.

ORIGINAL SIDE—SPECIAL BENCH.

Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Odgers and Mr. Justice Beasley.

1929,
January 17.THE MADRAS CENTRAL URBAN BANK, LTD.,
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THE COMMISSIONER OF INCOME-TAX, REFERRING
OFFICER.*

Sections 6, 8, 10 and 60 of the Indian Income-tax Act (XI of 1922)—Co-operative Society—Profits exempted from income-tax—Optional investment of surplus funds in Government securities—Liability to pay tax on interest from securities.

A notification under section 60 of the Indian Income-tax Act (XI of 1922) exempted from assessment to income-tax "profits of any co-operative society registered under the Co-operative Societies Act, 1912." A society so registered was by an order of Government required to keep 40 per cent of its

(1) (1918) I.L.R., 41 Mad., 604.

* Original Petition No. 202 of 1928.

total liability under call deposits in a liquid or fluid form and instead of keeping the necessary cash with itself, the society invested it in Government securities which produced interest.

Held, that in the absence of proof that such investments are obligatory on the society or are a part of its usual business, the interest on the securities was not part of the "profits" of the "business" of the society within the meaning of the notification and section 10 of the Income-tax Act, but that it was chargeable to income-tax as "interest on securities" under section 8 of the Act.

REFERENCE under section 66 of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax in the matter of the assessment of the Madras Central Urban Bank, Ltd.

The facts are given in the Judgment.

M. Subbaraya Ayyar for assessee.—The Government Order requires this Bank to keep 40 per cent of its total liability under call deposits in a liquid or fluid form. Hence the Bank is obliged to have on hand a lot of ready money and the usual way with all banks in such cases is to make such investments as have been made in this case. Such investments are not made with a view to earn interest. They are incidental to every banking business and the interest earned from the investments is therefore part of the 'profits' of the business and must be assessed as such only under section 10 and not under section 8 of the Act. Profits of similar investments have been treated in England as business profits; *Smiles v. Australasian Mortgage and Agency Company*(1), *Scottish Investment Trust Company v. Forbes*(2), *Norwich Union Fire Insurance v. Magee*(3), *Liverpool and London and Globe Insurance Company v. Bennett*(4), from which there was an appeal to the Court of Appeal in (1912) 2 K.B., 41 and a further appeal to the House of Lords in [1913] A.C., 610. See also *James Waldie and Sons, Ltd. v. The Commissioners of Inland Revenue*(5).

M. Patanjali Sastri for the Commissioner.—The exemption is only in respect of "profits" and not in respect also of "interest" earned on securities. The Income-tax Act has in

(1) [1888] 2 Tax Cases, 367.

(3) [1898] 3 Tax Cases, 457.

(2) [1893] 3 Tax Cases, 281.

(4) [1911] 2 K.B., 577.

(5) [1919] 12 Tax Cases, 113.

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section 6 differentiated between these two categories or sources of income. It is not obligatory on this Bank to put the surplus amounts only in Government securities; these investments are not part of the usual business of the Bank but are distinct transactions; *Back v. Daniels*(1), and *Commercial Properties, Ltd., In re.*(2).

JUDGMENT.

This is a case stated for our opinion by the Commissioner of Income-tax at the request of the Madras Central Urban Bank, Limited. This is a society registered under Act II of 1912, and the question arises from its assessment on interest derived by it from investments in Government securities. The society contends that it is exempted from paying tax in respect of these investments by a notification in the Finance Department issued under section 60 of the Indian Income-tax Act, 1922 which corresponds to section 28 of the Co-operative Societies Act enabling the Governor-General in Council to remit income-tax payable in respect of the 'profits' of the society. The question is whether this interest is part of the 'profits' of the society. The notification, Exhibit A, exempts "the profits of any co-operative society . . . registered under the Co-operative Societies Act, 1912, or the dividends or other payments received by the members of any such society on account of profits." The notification has been interpreted to include interest on securities which according to the Commissioner is consistently termed "income". "Profits" according to him does not include interest on securities and hence the latter is taxable. The contention for the Bank is that it is bound by the Government Orders to keep 40 per cent of its total liability under call deposits in a liquid or fluid form and that, instead

of keeping these fluid assets in their safe or till, they keep them in as nearly a fluid form as possible in Government securities upon which of course they receive interest. It is said that this is part of the business of the Bank and that unless this interest was received, the activities of the Bank would be very severely handicapped. That of course is a matter for detailed examination of accounts and balance sheets and so on, of which nothing has been attempted before us. But what we have to decide is as to whether this investment in Government securities is part of the business of the Bank or whether such investment falls under section 8 of the Act which says

"The tax shall be payable by an assessee under the head 'interest on securities' in respect of the interest receivable by him on any security of the Government of India or a Local Government,"

whereas the Bank contends that it should be assessed under section 10 (1),

"the tax shall be payable by an assessee under the head 'Business' in respect of the profits or gains of any business carried on by him."

If the Bank is assessed under that head, no tax will be payable. Mr. M. Subbaraya Ayyar for the Bank has referred us to several English cases. Before referring to them, however, it may be as well to note that the English Income-tax Act, 1918, is a good deal more complicated than the Indian Act and that the English Statute is divided under schedules with rules under each schedule. For instance, Schedule C concerns tax charged in respect of profits arising from interest, annuities, dividends and shares of annuities payable out of public revenue; Schedule D tax charged in respect of profits or gains to any person residing in the United Kingdom (1) from any kind of property whatsoever, (2) from any trade or profession, etc.; so that, really the only question

(1) [1925] 1 K.B., 528.

(2) (1928) I.L.R., 55 Cal., 1057.

that arises on this reference is, whether the investment is part of the Bank's trade or not; in other words, whether it falls under 1 (3) of their by-laws "to carry on general business of banking not repugnant to the provisions of the Co-operative Societies' Act". Turning to the Indian Act, it will be observed that this complication of schedules is absent, but that section 6 which is the first section in Chapter III headed "Taxable Income" divides the heads of income which are chargeable to income-tax into (1) salaries, (2) interest on securities, (3) property, (4) business, (5) professional earnings, and (6) other sources. To refer to the cases cited by Mr. M. Subbaroya Ayyar:—In *Smiles v. Australasian Mortgage & Agency Company*(1), a company in the course of wool-broking business granted temporary advances on the security of second mortgages or on wool and produce. The Court of Exchequer, Scotland, held that interest was chargeable under the first case of Schedule D, i.e., trade, manufacture, etc. The Lord President pointed out that the account between the company and its customers was of the nature of a current account as between bankers and customers and held that this was proper trading and nothing else and not investment of money upon securities. Lord SHAND said:—

"If a company which has a large rest fund laid aside for the purpose of investment makes investments in foreign stock or other foreign securities, . . . that is a case in which the charge is to be made under the fourth case."

But the President was of opinion that the present case was entirely different because the company was doing the business of wool-brokers. Lord SHAND also thought:

"It is quite unlike a case of investment; the interest fluctuates; it is for no fixed period; the transaction may be

closed at any time. In short it is the case of a wool-broker combining with his business that of a banker."

But as Lord SHAND further points out:

"If this had been the case of a banking company carrying on the business of a Bank, that would not be a case falling within the fourth case, which is the case applying to investments."

Scottish Investment Trust Company v. Forbes(1) is also a decision of the Court of Exchequer, Scotland. That was a case of an investment company and therefore investments was an essential feature of the business and therefore the net gain made by the company by realizing investments at higher prices than were paid for by them was to be reckoned among the profits and gains for the purpose of assessment. *Norwich Union Fire Insurance v. Magee*(2): that was an insurance company receiving as part of their profits, interest on American securities not remitted to the United Kingdom. Held that the interest formed part of the profits of the company being assessable under case (1) of Schedule D. So in *Liverpool and London and Globe Insurance Company v. Bennett*(3), the Liverpool and London and Globe Insurance Company carried on business, at home and abroad. By the laws of certain of the foreign countries in which it conducted its business the company was required to deposit with the Governments of those countries certain sums of money and to invest those sums in accordance with the local laws. This was done. They also voluntarily invested certain other sums. Both classes of investments yielded interest which was received abroad and not remitted to the United Kingdom. It was held that the interest on both classes of investments was assessable under the first case of Schedule D as being part of the business. HAMILTON, J., held that the

(1) [1898] 3 Tax Cases, 281.

(2) [1896] 3 Tax Cases, 457.

(3) (1911) 2 K.B., 577.

(1) [1888] 2 Tax Cases, 367.

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voluntary investments were not for the sake of investments but for the sake of having a fund abroad readily realizable to meet the liabilities of their business and that the making of the investments was just as much part of their mode of conducting the business as the taking of risks and in the event of the current account at the Bank being insufficient to meet the liabilities, all the investment funds might have to be called upon at sometime or other. The object of the investments was to extend the business, so the making of them was part of the business. These extracts from the judgment of HAMILTON, J., seem to me sufficient to at once distinguish this from the case before us. In *Liverpool and London and Globe Insurance Company v. Bennett*(1) this very case went to the House of Lords after having been affirmed by the Court of Appeal in *Liverpool and London and Globe Insurance Company v. Bennett*(1). Their Lordships dismissed the appeal holding that the income of the foreign investments formed part of the profits or gains of the company's business and was properly taxed under case 1 of Schedule D. See Lord LOREBURN at page 619 who adopts BUCKLEY, L.J.'s expression that the investments were "the fruit derived from a fund employed and risked" in a business coming within the statutory description. It has also to be noticed that *Liverpool and London and Globe Insurance Company v. Bennett*(1), was not a case of Government securities. It seems to me impossible, at least without a great deal more information than has been presented to us, to say that these investments of more or less amounts for a longer or shorter time on the part of the Bank in order to prevent their fluid assets from lying absolutely idle in their coffers, formed part of the business of the Bank. It

(1) [1913] A.C., 610.

(2) [1912] 2 K.B., 41.

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seems to me that they are in the same position as any private person who with a large credit balance in his private account desires to put it into a remunerative form which shall at the same time be readily realizable and therefore invests for shorter or longer periods in Government paper. Mr. Patanjali Sastri for the Crown cited *Back v. Daniels*(1), where the Court of Appeal held that under the peculiar circumstances of that case, the Daniels were occupiers of some part of the land in question which prevented their being assessed under Schedule D, but the importance of the case is in the expression of the opinion of SCRUTTON, L.J., at page 544, that

"When there is a separate and distinct operation unconnected with the occupation of the land, such as a cheese factory dealing with the milk of a dairy farm, or a butcher's shop dealing with the beasts of a cattle farm, I can understand a separate assessment of that operation; but I do not think that the fact that the farmer sells his produce either on the farm or at the local market, or at Mark Lane, or even if he sells it in a shop, justifies an assessment under Schedule D as well as or in substitution for Schedule B."

It, therefore, seems to me from the best consideration that I can give to the matter that this investment of these fluid assets of the Bank cannot be held to be part of the business of the Bank in accordance with the decisions quoted from the Scotch and English cases which seem to me to be all distinguishable and to be clearly assignable to an operation in furtherance of the particular business of the firm or company concerned. The obligation on the Bank to keep 40 per cent of its total liabilities in a fluid form is in consequence of an administrative order of Government and does not oblige them, although it may permit them, to invest the fund at all, and it seems to me that as they are to hold the

(1) [1925] 1 K.B., 526.

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fund in readiness to meet some particular liability which is specified, it cannot be said to be part of their business as a Bank to invest these liquid assets in the interval. I think therefore the decision of the Commissioner was right.

We think the Bank must pay Rs. 250 for the Commissioner's costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao
and Mr. Justice Reilly.

1929,
January 17.

JETHAJI PERAJI FIRM, APPELLANT,

v.

KRISHNAYYA AND OTHERS, RESPONDENTS.*

Sections 27, 37 and 43 of the Provincial Insolvency Act (V of 1920)—Failure to apply for discharge—Annulment of adjudication, effect of—Official Receiver's petition under section 54, before annulment—Effect of annulment on petition.

On an annulment of adjudication under section 43 of the Provincial Insolvency Act (V of 1920) owing to the insolvent's failure to apply for his discharge, the insolvency proceedings do not necessarily come to an end and his property does not *ipso facto* revert to the insolvent. The Court may, in proper cases, vest it in the Official Receiver or other person as provided by section 37 of the Act. And if before the annulment, the Official Receiver had applied to set aside a mortgage under section 54 of the Act, as an act of fraudulent preference, he can prosecute the application after the annulment.

Quære, whether section 43 is mandatory?

APPEAL against the Order of the District Court of Guntūr made in Insolvency Appeal No. 144 of 1924 in I.P. Nos. 12 and 16 of 1921.

* Civil Miscellaneous Appeals Nos. 310 to 313 of 1923 and C.R.P. Nos. 627 and 628 of 1924.

The facts are given in the Judgment.

Advocate-General (A. Krishnaswami Ayyar) with V. Govindarajachari for appellant.—Section 43 of the Provincial Insolvency Act is not mandatory but is only directory. For, according to section 27 of the Act the Court may extend the time for applying for discharge and this can be done either before or after the time originally fixed. Though the insolvent alone can apply for discharge, others also can apply for extension. See section 148, Civil Procedure Code, and *Badri Narain v. Sheo Koer*(1), and compare *In re Lord Thurlow, Ex parte Official Receiver*(2). I rely on *Abbireddi v. Venkatarreddi*(3), *Manikkam Pattar v. Nan-chappa Chettiar*(4), *Abraham v. Sookias*(5), *Fateh Muhammad v. Maya Das*(6), and per KRISHNAN, J., in *Arunagiri Mudaliar v. Kandaswami Mudaliar*(7). The words "shall be annulled" in section 43 mean "shall be liable to be annulled" in proper cases. Insolvency proceedings are not solely for the benefit of the insolvent, they are also for the benefit of the creditors. On an annulment of adjudication, insolvency proceedings do not necessarily come to an end. Compare *Thimmappa v. Devasi Harpal*(8). Even when no application is made after the original time, section 43 is not mandatory. Even if section 43 is mandatory, the Judge should have in this case acted under section 37. See Williams' Bankruptcy Practice, 13th Edition, page 135. "Void" in section 34 means "voidable at the instance of Official Receiver"; see *Official Receiver of Trichinopoly v. Somasundaram Chettiar*(9), *Mariappa Pillai v. Raman Chettiar*(10). The Official Receiver having chosen to apply for avoiding the mortgage before the annulment of the adjudication, his application can and must be continued under section 37 even after annulment.

S. Srinivasa Ayyangar (with *B. Somayya, V. Suryanarayana* and *Kasturi Seshagiri Rao*) for respondents.—Under sections 27 and 43 the debtor alone can apply even for extension of time and not any one else. Section 43 is mandatory, when no application for extension has been made before the time fixed; compare the words "may be annulled" in section 41 of the Presidency Towns Insolvency Act. See *Venugopalachariar v.*

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| (1) (1889) I.L.R., 17 Cal., 513 (P.C.). | (2) [1895] 1 Q.B., 724. |
| (3) (1926) 51 M.L.J., 60. | (4) (1923) M.W.N., 441. |
| (5) (1923) I.L.R., 51 Cal., 337. | (6) (1926) 100 I.C., 134. |
| (7) (1923) 19 L.W., 418. | (8) (1929) M.W.N., 22. |
| (9) (1916) 30 M.L.J., 415. | (10) (1918) I.L.R., 43 Mad., 322. |

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Advocate-General replied.

JUDGMENT.

VENKATASUBBA RAO, J.—Several connected appeals and revision petitions have been argued before us, but, in my opinion, C.M.A. Nos. 310, 311 and 312 of 1925 really raise the question of substance which presents itself for decision. If we decide these appeals in favour of the appellants there, our decision in them governs the other cases and the contentions raised in the latter by the respondents seem beside the point. Shortly stated,

(1) (1926) 51 M.L.J., 209.
(3) (1923) 19 L.W., 418.
(5) (1895) 1 Q.B., 724.

(2) (1927) 54 M.L.J., 344.
(4) (1924) 1 L.R., 4 Pat., 51.
(6) (1929) M.W.N., 22.

the question we have to decide relates to the construction and effect of sections 43, 37 and 27 of the Provincial Insolvency Act of 1920.

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The facts are undisputed and I shall briefly state them. Three brothers were adjudicated insolvents, first on their own petitions and subsequently on petitions filed by certain creditors. The orders of adjudication were passed on the debtors' petitions by the Official Receiver on the 25th of November 1921 and he fixed 18 months, as the period within which the debtors were to apply for their discharge. The same debtors were subsequently adjudicated by the District Judge on the 12th of December 1921 and the period fixed by him was 12 months. Pausing here for a moment, one fails to understand how two such sets of parallel orders came to be made; but this curious irregularity has no bearing on the question we have to decide. The total liabilities shown amount to over 2½ lakhs. The insolvents had, on the 10th of January 1921, executed a mortgage in favour of certain creditors, whom I shall, in this judgment, call the mortgagees, for about Rs. 60,000 and it is said that the mortgage deed comprises the bulk, if not the whole, of the insolvents' property. In the insolvency petition, a proceeding was commenced by the Official Receiver under section 54, for the annulling of the mortgage. He filed his petition under that section on the 20th of April 1922. Its trial began on the 1st of February 1923 and became a protracted one, the evidence being recorded piecemeal from time to time. In fact, from the 1st of February 1923 to the 1st of May 1924, that is for 15 months, witnesses were examined off and on, but the trial was not, even on the last mentioned date, concluded. I may mention that the evidence of 10 witnesses for the petitioner and 3 for the respondent had by then been taken. On the 30th of April 1924 a creditor by name

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Krishnayya applied under section 43 that the orders of adjudication might be annulled, on the ground that the debtors had not applied for their discharge within the time fixed. The date chosen for making the application is significant. On the 24th of April, the petition under section 54 was adjourned to the 1st of May. The application to annul the adjudication was made, as I have said, on the 30th of April, that is, the day previous to the date fixed for the hearing of the substantive petition. On the 1st of May, I have already stated, the Judge heard the petition for annulling the mortgage. Curiously enough, on that very date, without notice to, or knowledge of, the creditors, an order appears to have been made on Krishayya's petition directing the Official Receiver to submit a report. This petition came on the 3rd of May 1924 and the District Judge made an order annulling the adjudication. It must be noted that the petition under section 54 stood adjourned from the 1st of May to the 28th of July. It was between these two dates, that is on the 3rd of May, that the adjudication was annulled. It is surprising that when this order was made without notice to creditors, the fact was overlooked that there was pending on the file of the Court, the petition under section 54 which was being hotly contested. So far as the record goes, the Official Receiver does not appear to have taken any steps to safeguard the interests of the general body of creditors. This led to the strange result that the adjudication was unconditionally annulled. I use the words "strange result" advisedly. The order under section 43 was made presumably to punish the debtors. But in this case the persons who are prejudicially affected, are not the debtors but the creditors generally. Another unexpected result of that order is, that the petition under section 54 was held to have lapsed automatically and the mortgage,

which was the subject of attack, became, for the time being, valid and final. The very object of the insolvency petitions, so far as the creditors collectively were concerned, became frustrated, for it cannot be gainsaid that the creditors started the proceedings mainly if not solely, for the purpose of getting rid of the mortgage. The rest of the story may be briefly told. Several creditors applied to the District Judge for review of the orders made under section 43 and the review petitions were dismissed. As a necessary result, the Judge held that the petition to annul the mortgage under section 54 lapsed and that petition was accordingly dismissed.

The general body of creditors (whom I shall refer to as appellants) attack these orders of the learned District Judge, whereas Krishnayya and the mortgagees support them. It is contended for the appellants that the word "shall" in section 43 is not used in a mandatory sense, but must be held to be directory only. The argument is put thus: Generally, no doubt, it is the debtor that is punished by the annulling of the adjudication. The very terms of the section show that what is intended is in the nature of a penalty to the insolvent. If the adjudication is annulled, the section provides that the Court may re-commit the debtor to his former custody and that he shall be subject to all the processes that had previously been in force against him. But there may be cases where, if no discretion is left to the Court, the very opposite of what is intended may result. In this case, it is asked, how are the insolvents really prejudiced by the orders? The parties who profited by them are the mortgagees, that is to say, the creditors fraudulently preferred. The honest creditors, on the contrary, have been seriously prejudiced. Can this be the intention of the section?

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I shall now deal with this contention. Section 43 provides that if the debtor fails to apply for his discharge within the period specified by the Court, the order of adjudication shall be annulled. The learned Advocate-General contends for the appellants, that the word "shall" is directory and the expression "shall be annulled" means "shall be liable to be annulled." Section 43 is, in my opinion, controlled by section 27 which reads thus:—

27. (1) "If the Court does not dismiss the petition it shall make an order of adjudication, and shall specify in such order the period within which the debtor shall apply for his discharge."

(2) The Court may, if sufficient cause is shown, extend the period within which the debtor shall apply for his discharge and in that case shall publish notice of the order in such manner as it thinks fit.

From these two sections read together, it is clear that the party who can make the application for discharge is the debtor and no one else. It is equally clear that the Court has the power to extend the period and it may be so done, not merely at the instance of the debtor but on the application of anybody interested. The section merely requires, that sufficient cause shall be shown, but it does not say, that the debtor alone may apply for extension or shall show sufficient cause. If then, before the expiry of the term fixed, an application is made under section 27 (2), it is obvious that it is not obligatory upon the Court under section 43 to annul the adjudication. To this extent, it is plain that the word "shall" is not imperative. In *re Lord Thurlow, Ex parte Official Receiver*(1), is an authority on this point. In that case, the Court of Appeal held the expression "shall adjudge" in section 20, cl. (1) of

(1) (1895) 1 Q.B., 724.

the Bankruptcy Act, 1883, to be directory and not mandatory, on the ground that a discretion was left to the Judge under the words of another section, namely, section 105 (2) which contained a provision to the effect that the Court may at any time adjourn any proceedings before it upon such terms, if any, as it may think fit to impose.

Then comes the question, supposing the Court is moved under section 27 (2), after the expiry of the time originally fixed, but before the adjudication is annulled under section 43, has the Court the power, to extend the period, within which the debtor could apply for his discharge? In the first place, I must observe that the adjudication does not get automatically annulled under section 43 on the expiry of the original period. The words of the section show that the Court must make an order of annulment. This is the correct interpretation of the section and *Abraham v. Sookias*(1), supports this view. Next, section 27 (2) while saying that the Court may extend the time, does not say in express terms, that it may be extended either before or after the expiration of the period originally fixed. Section 148 of the Civil Procedure Code enacts that the rule to be applied under that Code is, that the time may be enlarged, irrespective of the fact that the application is made either before or after the expiry of the period originally specified. It is unnecessary to decide whether by reason of section 5 of the Provincial Insolvency Act, section 148 of the Code is attracted or not; for *Bhadri Narain v. Sheo Koer*(2), establishes clearly that the power of the Court is not fettered in the way suggested. That case was decided under the old Code which did not contain a provision similar to section 148. I am therefore

(1) (1923) I.L.R., 51 Cal., 337.

(2) (1839) I.L.R., 17 Cal., 513 (P.O.).

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disposed to hold that it is open to the Insolvency Court under section 27 (2) to extend the time, on a proper application to that effect, made at any time before the adjudication is annulled under section 43. This is the view taken by KRISHNAN, J. in *Arunagiri Mudaliyar v. Kandaswami Mudaliyar*(1), by DEVADOSS and WALLACE, JJ. in *Abbi Reddi v. Venkata Reddi*(2) and by the present CHIEF JUSTICE in *Manikam Pattar v. Nanchappa Chettiyyar*(3). The Lahore High Court has taken the same view in *Lakhi v. Molar*(4) and *Fateh Muhammad v. Mayadas*(5); the Burma Court in *K. K. S. A. R. A. Chettiyyar v. Maung Myat Tha*(6) and the Calcutta High Court in the case already cited, *Abraham v. Sookias*(7). A different view was taken by WALLER, J., who, differing from KRISHNAN, J., held in *Arunagiri Mudaliyar v. Kandaswami Mudaliyar*(1), that the Court has no such power. To the same effect are the decisions in *Venugopala Chariyar v. Chinnu Lal Sowcar*(8), *Thirumala Reddi v. Kolakula Thomas Reddi*(9) and in *Ramkrishna Misra, Ex parte*(10). There is thus a conflict of authority on this point. But I am in favour of holding that, on the right construction of the two sections [section 43 and section 27 (2)] in the light of *Bhadri Narain v. Sheo Koer*(11), the Court may enlarge the time, even though the application is made after the expiry of the period originally fixed. Thus, in this case again, the terms of section 43 are not imperative or obligatory.

I have so far dealt with two classes of cases, but over and above these, there remains a third, namely,

(1) (1923) 19 L.W., 418.

(3) (1928) M.W.N., 441.

(2) (1925) 51 M.L.J., 60.

(4) (1924) 88 I.C., 115.

(5) (1926) 100 I.C. 134.

(6) (1926) 6 Bur. L.J., 5=(1927) A.I.R., Rang., 136.

(7) (1923) I.L.R., 51 Calc., 337.

(8) (1926) 51 M.L.J., 209.

(9) (1927) 54 M.L.J., 344.

(10) (1924) I.L.R., 4 Pat., 51.

(11) (1889) I.L.R., 17 Calc., 513 (P.C.).

what has actually arisen in this insolvency. If, before the District Judge made his order under section 43, there was before him an application to extend the time, he would have, as I have said, a discretion to enlarge the period, and in the circumstances of this case, he would have exercised it properly by granting an extension. There are other provisions in the Act under which the debtor can be punished, while an adjudication still remains in force. For one thing, his protection may be revoked, while the proceedings may be continued for the benefit of the creditors. In this case, I cannot help remarking that the Official Receiver failed in his duty by not asking for an extension. However that may be, the question is, is section 43 to be construed as peremptory, in the absence of an application before the Judge under section 27 (2)? In other words; can the Judge *suo motu* refuse to make an order under section 43 if he thinks there are sufficient reasons for adopting that course? The learned Advocate-General argues that even in such a case, the section is not mandatory. There is no authority and I wish to reserve my own opinion on the point, for, I can rest my judgment for the appellant on a much firmer ground.

Section 43, after saying that the order of adjudication shall be annulled, adds that the provision of section 37 shall apply. That section runs thus:—

“37. (1) Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the Court or Receiver, shall be valid; but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such condition (if any) as the Court may, by order in writing, declare.”

Under this section, it was open to the Court to have directed the insolvents' property to vest, for the

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creditors' benefit, in some person named for the purpose. This is not disputed. That is the order that, in the circumstances, ought to have been made. Had such a conditional order been made, though it would have revoked the status of the debtors as insolvents, it would not have *proprio vigore* put an end to the insolvency proceedings by legal implication. The District Judge held that, as the annulment of adjudication had the effect of terminating the insolvency petition, the proceeding instituted by the receiver under section 54 in that petition lapsed as a matter of course. But this result could have been avoided. For, if, as I have said, action had been taken under section 37, the annulment would not have been unqualified or absolute and in that case, the Court would still retain control over the insolvent and his assets. The scheme of the Act shows that, in certain cases, the annulling of adjudication does not necessarily lead to the finally putting an end to the insolvency petition. This, in my opinion, is the correct view, and I am supported by *Ex parte Lennard*(1) and *Thimmappa v. Devasi Harpal*(2). In the last mentioned case, the question arose, what was the effect of an order under section 39 annulling adjudication, which was made consequent on a scheme of composition, approved by the Court under section 38? It was held that the order did not bring the insolvency petition to an end and that the Court, although the adjudication was annulled, continued to retain control over the insolvent's assets. I entirely agree with that decision, and the point is fully dealt with in the judgment of WALLACE, J. But there is one observation made by the learned Judge—an *obiter dictum*—with which I do not agree. While holding that an order of annulment under

(1) (1875) 45 L.J. (Bank), 49.

(2) (1929) M.W.N., 22.

section 39 does not terminate the petition (that was the point that directly arose), the learned Judge incidentally observed that under section 43 the case would be different. If what WALLACE, J., meant was, that an unconditional annulment under that section would bring an insolvency petition to an end, that is a proposition to which no exception can be taken; and, in my opinion, that is all that the learned Judge could have meant.

Now, turning to *Ex parte Lennard*(1), the facts are these. A composition scheme provided for the annulment of the bankruptcy and the assignment by the debtor of all his personal property to the trustee to secure the composition. The scheme having been approved and the bankruptcy annulled, a question arose whether the rights of an execution creditor under an execution that was void in the bankruptcy revived upon the annulment. The Registrar granted an injunction restraining the creditors from proceeding with their execution. It was contended that the Court had no jurisdiction, the bankruptcy having been annulled. The Court of Appeal overruled the objection. JAMES, L.J., observes:—

"I am of opinion that under sections 28 and 72 of the Bankruptcy Act, 1869, the Court of Bankruptcy has jurisdiction to determine all questions which may arise in the case of a scheme of arrangement. . . . But here, though the bankruptcy has been annulled, the composition was made in bankruptcy by the Court itself as part of a scheme which was approved by the Court. . . . The order was therefore made in what continued to be a matter of bankruptcy and the question was a question to be decided under section 72 for the purpose of making a complete distribution of the property."

At this point, a passage from Williams' Bankruptcy, 13th edition, may be quoted. The learned author while commenting on section 29 of the English Bankruptcy

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Act (which contains a sub-clause on which section 37 of our Act is modelled) says thus :—

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“ Although in cases where the annulment is on the ground that the adjudication ought never to have been made, the Court will in all respects try to remit the bankrupt to his original position, yet in cases where the annulment is, as it is under section 21, *a continuance of the bankruptcy in another form*, the rights of and against the bankrupt or the person in whom the bankrupt's estate becomes vested by the order of the Court in respect of that estate will remain as they were under the bankruptcy ” (page 135).

Assuming then that, in the events that have happened, section 43 was mandatory, the District Judge ought to have made a conditional order under section 37.

I would therefore in C.M.A. Nos. 310, 311 and 312 of 1925 set aside the order of the District Judge and under sections 32 and 37 annul the adjudication of the insolvents, subject to this condition, that their property shall remain vested in the Official Receiver.

The result of the view I have taken is, the insolvency petition not having come to an end, the proceeding started by the receiver under section 54 must be deemed to be pending ; and the lower Court is directed to complete the enquiry and dispose of the petition according to law in the ordinary course.

It only remains to add that section 37, which deals with the consequences of annulling, validates all acts done previously by the Official Receiver. The word “acts” is wide enough to include the receiver's act of avoidance under section 54. “Void” in that section has been held to mean “voidable”, that is, it is open to the Official Receiver, as representing the creditors, to disaffirm the transaction (the fraudulent preference). The effect of the saving in section 37 is, to preserve the validity of the receiver's exercise of his option of avoidance. The result is, now that I have held that the

insolvency petition has not been brought to an end, the proceeding under section 54 subsists and can be continued.

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I make an order accordingly in C.M.A. No. 313 of 1925. This is scarcely an independent order, for as a matter of fact, it follows as a consequence from the orders already made in C.M.A. Nos. 310, 311 and 312 of 1925.

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These orders will really suffice to dispose of all the matters before us. In that view, I make no separate orders on C.R.Ps. Nos. 627 and 628 of 1924 and 173 and 174 of 1925.

In regard to costs, though collusion between Krishnayya and the mortgagees may be suspected, it cannot be said that either of them acted wrongly. I therefore direct that each side shall bear its costs of these appeals and petitions.

Mr. S. Srinivasa Ayyangar says that his client was brought on the record as alienee who acquired the interest, at a Court sale, of the mortgagees, Bhadri Narain and Soorja Narain. He contends that he is protected by section 54 (2). This is a question which must be left to be decided by the lower Court when it disposes of the petition under section 54.

REILLY, J.—In these cases the insolvents did not apply for their discharge within the time specified ; nor was any application made either before or after the expiry of that time for its extension. That being so, I do not wish to express any opinion on this occasion on the question whether the time specified can be extended by the Court after its expiry. But in the circumstances stated, the District Judge was bound in my opinion under section 43 of the Provincial Insolvency Act to annul the adjudication. In the decisions of this Court on the question culminating in *Thirumala Reddi v. Kolakula*

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Thomasu Reddi(1) the weight of authority is clearly in favour of the view that the words "shall be annulled" in section 43 of the Act are mandatory. But in *Manikam v. Nanchappa*(2) where the question was not decided, the learned CHIEF JUSTICE suggested that another view was possible and referred to *In re Lord Thurlow, ex parte Official Receiver*(3), as deciding that a similar provision in the English Bankruptcy Act was not mandatory. The learned Advocate-General has relied strongly on *Lord Thurlow's case*(3) in support of his contention that the expression "shall be annulled" in section 43 of the Provincial Insolvency Act is not mandatory, but directory, and that in this case the adjudication should not have been annulled. But, when we examine *In re Lord Thurlow, ex parte Official Receiver*(3), I doubt with great respect whether the learned CHIEF JUSTICE was right in suggesting that the Court of Appeal was there interpreting an exactly similar provision of the English Bankruptcy Act. In that case the statutory meeting of creditors eventually passed no resolution, and it was contended for the appellant (the Official Receiver) that under section 20 (1) of the Bankruptcy Act, 1883, in those circumstances it was obligatory to adjudge the debtor bankrupt forthwith. The Court of Appeal decided that it was not obligatory on the Registrar to make the order of adjudication forthwith but that he had power to adjourn the matter. It was not explicitly set out in section 20 (1) of the Bankruptcy Act, 1883, that, if the meeting of creditors passed no resolution, the debtor should be adjudged bankrupt forthwith, and even taking that section by itself I doubt whether "shall adjudge" was a mandatory provision which left the Court no discretion to do anything except to adjudge

(1) (1927) 54 M.L.J., 344.

(2) (1928) M.W.N., 441.

(3) [1895] 1 Q.B., 724.

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the debtor bankrupt forthwith; it appears to me rather to set out that the next step in the procedure was to make the order of adjudication. However, all the members of the Court of Appeal called to their aid another section of the Bankruptcy Act, section 105, which provided that the Court might at any time adjourn any proceedings before it, and reading that section with section 20 (1) they had no doubt that the Registrar was not bound by section 20 (1) to adjudge the debtor bankrupt forthwith. And it must be noticed that RIGBY, L.J., indicated that he would have regarded the provision in section 20 (1) by itself as obligatory and was only saved from doing so by reading it with section 105; and even Lord ESHER, M.R., eventually came to the conclusion that it was obligatory subject to the power of adjournment. Although it appears to me that, even taking section 20 (1) of that Act by itself, the provision "shall adjudge" was not mandatory in the sense that, in the circumstances stated, the Registrar was bound to adjudge the debtor bankrupt forthwith, it is clear that the Court of Appeal did not decide that, by themselves, the words "shall adjudge" were not mandatory in that sense. But in my opinion, in section 43 of the Provincial Insolvency Act, we have a different provision. It is one thing to provide that on a certain thing happening or not happening the next step shall be such and such; it is quite another thing to provide that, if a certain order of the Court is not carried out within a certain time, a certain consequence shall follow. The latter provision is to my mind much more clearly mandatory than the former. It was very difficult to suggest any reasonable explanation why the words "shall be annulled" were used in section 43 of the Provincial Insolvency Act if something other than their plain meaning was intended, and it is not disputed that

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their plain meaning is mandatory. The learned Advocate-General has suggested that what the Legislature meant by using those words was "shall be liable to be annulled"; but he has not been able to suggest any satisfactory reason why, if so, the Legislature did not say what it meant. If anything less than a mandatory provision was intended, it would have been the simplest matter to express the real intention. I am very averse to accepting suggestions, which are not infrequently made in this Court when the plain language of a statute appears to lead in particular circumstances to inconvenient consequences, that the Legislature has done its work carelessly and inefficiently and has not said what it meant or has said what it did not mean. On the contrary we have no right to depart from the plain meaning of a statute except for some compelling reason, and our own view of what is convenient can seldom provide such a reason. In this instance, the use of the words "shall be annulled" becomes more marked when we contrast it with the provision "may be annulled" in section 41 of the Presidency Towns Insolvency Act. It would be extravagant to assume that when framing section 43 of the Provincial Insolvency Act the Legislature had forgotten the wording of section 41 of the Presidency Towns Insolvency Act on the same subject; and, if the latter provision had not been entirely forgotten, the words "shall be annulled" in section 43 of the Provincial Insolvency Act can hardly have been chosen otherwise than advisedly and deliberately. But the learned Advocate-General has suggested that, even if the legislature used the words "shall be annulled" advisedly and deliberately, it would be possible for us to soften them by a kind of equitable interpretation, if experience showed that in certain circumstances they led to gross and un contemplated hardship or to some

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unexpected conflict with the general purpose of the Act. In very exceptional cases it may be necessary for us to modify by interpretation even the most unambiguous words deliberately used by the Legislature in a particular passage of a statute if we are convinced that in the circumstances under consideration they lead to consequences wholly un contemplated by the legislature and repugnant to the purpose of the statute. The plainest words most deliberately chosen in a particular passage cannot be allowed to defeat the unquestionable intention of the Legislature in framing a statute. But that is only one aspect of the fundamental rule that we must enforce a statute "according to the intent of them that made it." Before we depart from the plain meaning of particular words deliberately chosen by the Legislature, we must be very sure of our ground; we must be convinced that we have to deal with circumstances which the Legislature never foresaw and to which it never intended its words to apply, and of that we can hardly ever be convinced except by the clearest repugnancy to the purpose of the statute. It is true that our Insolvency Acts are intended not only for the relief of debtors but also for the fair treatment of their creditors, and that, if the plain meaning of a particular passage, though deliberately adopted, led to the infliction of gross and obviously un contemplated hardship on a debtor or his creditors, which the Legislature could not have intended, we might be driven to depart from the language used in order to do what the Legislature clearly intended, not what it actually said. But can it be said that there is any such compelling reason to depart from the plain language in this case? The annulment of his adjudication can inflict no such hardship on a debtor, as section 10 (2) of the Provincial Insolvency Act indicates that, if he has been prevented from

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making his application for discharge by some reasonable cause, the Court will permit him to present a new insolvency petition on the same facts as before. The hardship, which the learned Advocate-General has pressed upon us is, hardship to the creditors or some of them, if the adjudication is annulled on account of the debtor's default, when it is clearly profitable to them that the realization and distribution of the debtor's assets should go on in the insolvency proceedings, or disastrous to them that his property should again vest in the debtor. But it is to prevent any such hardship that the Legislature has by the terms of section 43 made the provisions of section 37 applicable in such a case. It is not necessary, when the adjudication is annulled because the debtor has failed to apply for his discharge within the specified time, that his property should revert to him; it may be vested by the Court in some other person. In a case such as the present one the obvious course is that the Court should order the property to vest in the Official Receiver. It has not been contended before us for the respondents that that would not be a proper order in this case or that, when the debtor's property has so vested in the Official Receiver, he would not be able to realize it by sale and suit and to distribute it rateably among the creditors. In my opinion the annulment of the adjudication in these cases was correct and must stand, as the District Judge had in the circumstances no discretion to refuse to make an order of annulment, but he should have made use of the provisions of section 37 and should have ordered the debtors' property to vest in the Official Receiver, which order we should now make.

That order we can make in C.M.A. Nos. 310, 311 and 312 of 1925. But it will not serve the purpose of

the appellant in C.M.A. No. 313 of 1925, another creditor, who objects to the dismissal of I.A. No. 402 of 1922 on the file of the District Court. That was a petition by the Official Receiver originally under sections 53 and 54 of the Provincial Insolvency Act, but apparently pressed only under section 54, for the annulment of a mortgage of almost the whole property of the debtors concerned, as made with a view of giving the mortgagees a preference over their other creditors, and was dismissed by the District Judge as having abated when the adjudication was annulled. It is contended by Mr. Srinivasa Ayyangar, who has argued the case for respondents 2 and 3 in this appeal, that, even if a debtor's property is ordered to vest in the Official Receiver under section 37 of the Provincial Insolvency Act, proceedings under section 54 cannot go on after the adjudication has been annulled. He first argues that under the wording of section 54 such a petition can only proceed while the debtor continues to be an adjudged insolvent, which he is no longer when the adjudication has been annulled. But that is not to be found explicitly or implicitly in the section. It is true that, unless the debtor is once adjudged an insolvent, the receiver cannot move under the section. But apart from that essential, the words "if such person is adjudged insolvent on a petition" are of grammatical effect in the section only to fix the identity of the petition from the date of which the period has to be calculated within which a transfer, etc., made comes within the scope of the section. There are no words in the section to express or imply that the petition, once properly preferred, can be prosecuted only while the adjudication is in force. And there is nothing incongruous in a receiver, if the property of a debtor has vested in him under section 37 for realization and distribution, continuing to prosecute a petition

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under section 54. It is the duty of the Receiver in such circumstances, as before the annulment of the adjudication, to distribute the property rateably. A petition under section 54 is only an incidental proceeding by which the receiver ensures a fair distribution by making the creditor to whom preference has been given disgorge what he has got in excess of his fair share. Such a creditor is not prevented from getting his fair share with the other creditors; in effect it is only the excess which he must give up. But the objection of substance raised by Mr. Srinivasa Ayyangar is that the jurisdiction to annul the preferential transaction and to make the preferred creditor disgorge is peculiar to insolvency proceedings and it is only in the course of those proceedings that it can be exercised. That proposition is sound so far as it goes. Outside its insolvency jurisdiction, the Court has no power to annul a preferential transaction merely because it gives preference to one creditor over others. But Mr. Srinivasa Ayyangar goes on to contend that immediately an adjudication is annulled, the insolvency proceedings come to an end. As a general proposition that is not so. Certainly it cannot be suggested that in this country annulment of adjudication puts the clock back as if the adjudication had never been. The opening part of section 37 of the Provincial Insolvency Act, which validates what has been done while the adjudication has been in force, is enough to dispose of any such suggestion. But apart from that, I think it is clear that the insolvency proceedings do not always stop at the moment of annulment. Sections 39 and 40 show that insolvency proceedings continue after adjudication has been annulled on a composition or scheme being approved, so much so that on the debtor's failure to

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pay any instalment due in pursuance of the composition or scheme, the Court can readjudge him insolvent, without any fresh insolvency petition being put in, which it could not do if the insolvency proceedings were at an end. That the insolvency proceedings continue in such a case was decided recently in *Timmappa v. Devasi Harpal*(1). And see *Ex parte Lennard*(2). It is true that in the former case, WALLACE, J., said that an annulment of adjudication under section 43 is evidently intended to put an end to the insolvency proceedings as a whole. But that statement was *obiter dictum*. It was not necessary for that case, and the question was not before him; and with great respect I doubt whether he considered fully all the consequences of his proposition. Mr. Srinivasa Ayyangar urges that we must infer from the fact that after an annulment of adjudication under section 43, a debtor, as indicated by section 10 (2), is able in certain circumstances to present a fresh insolvency petition on the same facts as before, that the previous insolvency proceedings came to a complete end when his adjudication was annulled. No doubt all such advantages as he got by adjudication then came to an end; but that does not necessarily imply that the whole insolvency proceedings came to an end. And, when once we reach the conclusion that under section 37 the Court may order the property of the debtor to vest in a receiver for the purpose of realization and distribution among his creditors—and that is admitted by Mr. Srinivasa Ayyangar—it is only by going out of our way that we can suppose that the receiver, who has been appointed by the Court in the exercise of its insolvency jurisdiction, is to be controlled and directed by the Court, as he must be controlled and directed, in the

(1) (1929) M.W.N., 22.

(2) (1875) 45 L.J., (Bank), 49.

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exercise of some other jurisdiction. In a large proportion of the cases in which an adjudication is annulled otherwise than under section 35 or section 36, there will be further proceedings to be taken or superintended by the Court, and that must be done in the exercise of its insolvency jurisdiction. The Act does not say that insolvency proceedings cease in all cases with the annulment of adjudication, and sections 37, 39, 40 and 50 show that proceedings may continue, which must be proceedings before the Court in its insolvency jurisdiction. In my opinion, if the Court orders under section 37 that the property of the debtor shall vest in a receiver, the insolvency proceedings will continue while the receiver's work goes on. That being so, there is no difficulty in the receiver continuing to prosecute in those circumstances a petition under section 54 after the adjudication has been annulled under section 43. Moreover, if, as in this case, the receiver has initiated proceedings under section 54 before the adjudication is annulled, the position is still simpler. Section 37 validates acts done by him after the adjudication is made and before it is annulled. Even if we do not go so far as to say that the presentation of any petition to the Court in his capacity as receiver is an 'act' within the meaning of section 37, the presentation of a petition under section 54 must, I think, as the learned Advocate-General contends, be such an act. By presenting a petition under section 54 the receiver exercises his option to treat the transaction concerned as void. The formal exercise of that option is an act within his competence. If, as can hardly be denied, the institution of a suit in the interest of the debtor's estate by the receiver after the adjudication is made and before it is annulled, is an act which will remain

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valid under section 37 after the adjudication is annulled for the benefit of the debtor or anyone else concerned, the formal exercise of his option to avoid a transfer must surely be an 'act' which under section 37 will remain valid. If it remains valid after the annulment of the adjudication, then it is unreasonable to suppose that the receiver cannot continue to pursue the remedy provided by section 54. I agree therefore that C.M.A. No. 313 of 1925 must be allowed and the dismissal of I.A. No. 402 of 1922 must be set aside and that petition must be remanded to the District Judge for fresh disposal. I agree also that C.R.Ps. Nos. 627 of 1924, 628 of 1924, 173 of 1925 and 174 of 1925 against the District Judge's refusal to review his order annulling the adjudication should be dismissed as unnecessary and that in those revision petitions and in the four appeals each party should bear his own costs.

Mr. Srinivasa Ayyangar's contention that his client, an auction-purchaser in execution, is protected by section 54 (2) of the Provincial Insolvency Act as a purchaser in good faith for valuable consideration, is clearly one which should be urged before the District Judge, when I.A. No. 402 of 1922 is reheard.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice
Tiruvankata Achariyar.

1928,
December 14.

P. M. RAMAKRISHNA AYYAR (PLAINTIFF), APPELLANT,

v.

P. MUTHUSAMI AYYAR AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Partnership—Dissolution of—Rights of a retiring partner—Partnership carried on by surviving partners with share of assets of retired partner—Right of retiring partner to profit or interest on his share of assets after the dissolution of partnership—Option to retiring partner to claim either profits or interest—Election by him—Indian Trusts Act (II of 1882), ss. 88, 90 and 95—English Partnership Act, 1890, sec. 42—Indian Contract Act (IX of 1872), ss. 240 and 241—Election, when should be made by retiring partner.

Where a partner retires from a business, which is not wound up but is continued by the surviving partners, he is entitled, at his option, either to interest on his share of the assets of the partnership at the date of its dissolution, or to a share in the profits which have been obtained by the use of such share after dissolution. It is not necessary that the whole of the partnership assets should be used in making the subsequent profits, for, if any portion of the assets is so used, the retiring partner, who has a share in every portion of the assets, is entitled to a similar share in the profits, *Bhagwandas v. Rivettcarnac*, (1898) I.L.R., 23 Bom., 544 (P.C.), relied on.

A retired partner is not bound to make his election between a share of profits and interest on his share of assets, as regards profits made subsequent to the dissolution, until accounts have been taken and his share of profits has been ascertained; and, if the business ended in loss after dissolution, the retired partner can claim interest on his share of assets at the dissolution.

If it is difficult to ascertain the exact share in the profits, it would be proper, in such cases, to award interest on his share of the assets at the date of the dissolution of the partnership.

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In taking an account of the profits, the surviving partners will be entitled to be credited with a sum sufficient to recompense them for the skill and labour employed in the conduct of the business after dissolution; and it will be open to them to prove that any portion of the profits was obtained, not by reason of the use of the partnership assets, but in some other manner.

The term "partnership assets" must be deemed to include "the goodwill" of the business.

APPEAL against the decree of the Court of the Subordinate Judge of Tinnevely in Original Suit No. 18 of 1924.

The plaintiff was the son of the first defendant and the brother of the second and third defendants. The plaintiff sued for partition of the family properties, which comprised, besides movable and immovable properties, a partnership in a salt business carried on by the family. The division of status and the dissolution of the partnership took place on the 31st December 1921, and this suit was instituted on the 9th February 1922. The partnership was carried on by the defendants even after the dissolution by reason of the retirement of the plaintiff. The latter claimed in the suit, besides his one-fourth share of the assets at the date of the dissolution, his share of the profits even after the dissolution. The defendants denied his share to the profits after dissolution. The lower Court held that the plaintiff was entitled only to interest and not to profits after dissolution, and decreed accordingly. The plaintiff appealed. Further facts appear from the judgment.

T. M. Krishnaswami Ayyar (with T. S. Anantharama Ayyar) for the appellant.—The plaintiff is entitled to his share of the profits made after the dissolution. His share has been utilized by the surviving partners after the dissolution. Both as a retired partner and as co-owner of joint property, which has been utilized by the

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defendants after division of status, the plaintiff is entitled to a share of profits from the defendants, who are liable to account to him. See section 88, illustration (f), sections 90 and 95 of the Indian Trusts Act. See also section 42 of the English Partnership Act, 1890. Section 42 of the English Act embodies the previous law: see Lindley on Partnership (9th edition, pages 707 to 710). The question is concluded by the decision of Privy Council in *Bhagwandas v. Rivett* ^{carnac}(1); see also *Hedayatulla v. Mohamed Kamil*(2), *Ahmed Musaji Saleji v. Hashim Ebrahim Saleji*(3). The decision in *Haji Summar Sait v. Mahomed Hussan Sait*(4) is erroneous.

S. Varadachari (with *K. R. Rangaswami Ayyangar*) for respondents.—Where the status of a joint Hindu family has become divided, the quondam manager is no longer such in law, and is not liable to account for profits of partnership after the dissolution. Unless it is shown that the defendants used the plaintiff's share of assets also in the partnership after the dissolution, the defendants are not liable to account. There is no presumption that the manager did so use the plaintiff's share of assets. Here the plaintiff notified his intention to divide and also that he did not want the continuance of the partnership or profits, but claimed only interest in the plaint. He has made his election for interest. There is no statutory provision in India, as in England, for award of interest on the retired partner's share, utilized after he retired and partnership was dissolved. The Court can, in its discretion, award interest in such cases, but the partner has no legal right to claim interest. There is no exclusion of the plaintiff in this case in any sense. Reference was made to *Haji Summar Sait v. Mahomed Hussan Sait*(4) and to *Ahmed Musaji Saleji v. Hashim Ebrahim Saleji*(3). Under sections 240 and 241 of the Indian Contract Act, the retiring partner becomes only a creditor and is not entitled to a share of the profits after dissolution. The plaintiff has elected to take interest and against profits.

T. M. Krishnaswami Ayyar in reply.—The plaintiff is entitled to make his election after profits are ascertained by taking accounts. Even if he made his election without full knowledge, such an election is not final. Here accounts were not taken, as the defendants refused to give accounts.

(1) (1898) I.L.R., 23 Bom., 544.

(3) (1915) 42 Cal., 914 (P.O.).

(2) (1923) 19 L.W., 425 (P.C.).

(4) (1916) 4 L.W., 521.

JUDGMENT.

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PHILLIPS, J.—Plaintiff and defendants 2 and 3 are the sons of the first defendant. They conducted a partnership business, at first in conjunction with the fourth defendant, and subsequently as a family partnership consisting of themselves alone. Misunderstandings arose in 1920 and plaintiff refused to continue in the business and finally expressed his determination to become separated in status and to dissolve the partnership. It has been found in the lower Court that this separation in status and the dissolution of partnership took place on the 31st December 1921, and this is not now disputed. The plaintiff's suit is for the recovery of his share in the family property and in the partnership assets. He has obtained a decree for one-fourth share in the partnership assets as they stood on the 31st December 1921 and for one-fourth share of the immovable and movable properties belonging to the family. So far as his share of the partnership assets is concerned, he has been awarded interest at 6 per cent on the amount due to him from the 31st December 1921 till delivery.

The plaintiff now appeals and objects to the decree on the ground that he is entitled not only to interest on his share but also, in the alternative, to a share of the profits which have been obtained by the use of the share. It is not disputed that since 1921 defendants 1 to 3 have continued to carry on the same business as was carried on before that date by them in conjunction with the plaintiff. The plaintiff's claim to share in the profits earned since he left the business, is based on section 88 of the Trusts Act. Illustration (f) to that section runs as follows:—

“A and B are partners. A dies. B instead of winding up the affairs of the partnership, retains all the

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assets in the business. *B* must account to *A*'s legal representative for the profits arising from *A*'s share of the capital."

In a case in this Court reported in *Hajee Summar Sait v. Mahomed Hussun Sait*(1) a divisional bench held that this illustration went beyond the law in India, the main ground of this decision being that the surviving partners did not stand in a fiduciary relation to the retiring partner or his representative. No reference was made in that case to the decision of the Privy Council in a similar case, *Bhagwandas v. Rivettcarnac*(2), where we find at page 550.

"It seems to their Lordships that the proper order will be to direct an account to be taken of the partnership dealings and transactions, to enquire what was due to the estate of Hemabai in respect of her share at the time of her death, and how the amount due to her estate has been dealt with, and, if it appears that such amount, or any part thereof, has been employed in the business continued by the surviving partners, to direct the accounts of such business to be taken."

This principle has been subsequently repeated in *Hedayatulla v. Mahomed Kamil*(3), where it was held that the representatives of the deceased partner were entitled to the same share as the partners would have taken if the partnership had not been dissolved. The same principle is laid down by Statute in English Law, i.e., section 42 of the Partnership Act, 1890, and the question has been considered at great length in *Hugh Stevenson and Sons v. Aktiengesellschaft*(4), where the contention that the surviving partners do not stand in a fiduciary relation to a retiring partner or to the representatives of a deceased partner is very emphatically negatived, and it was held that section 42 of the Partnership Act, 1890, only gave effect to what was the

law then existing. This proposition is discussed in RAMAKRISHNA
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"Lindley on Partnership," 9th edition, page 707 *et seq.*

"On the other hand, to limit the compensation to interest (at the accustomed rate) would frequently enable the wrongdoer to profit by his own wrong, and be an inadequate compensation to the owner. It may, therefore, be necessary to give the owner the profits made by the trader by the use of the property in question, after making the trader all just allowances, including a fair remuneration for his trouble. To do so may, moreover, be justified upon the ground that the profits are accretions to the property which has yielded them and ought to belong to the owner of such property, in accordance with the maxim, *accessorium sequitur sum principale*."

It seems, therefore, to be very clearly established that when a partner retires from a business which is not wound up but is continued by the surviving partners, he is entitled to a share in the profits which have been obtained by the use of his share in the partnership assets. It is not necessary that the whole of the partnership assets should be used in making the subsequent profits, for if any portion of the assets are so used, the retiring partner, who has a share in every portion of the partnership assets, is entitled to a similar share in the profits. This is laid down by ROMER, J., in a very recent case in *Manley v. Sartori* (1). It is often difficult to ascertain the exact share in the profits, which should be awarded, as Lord Lindley points out in ("Lindley on Partnership," at page 710), and it may, therefore, be more proper in such cases to award interest on the share of the assets at the date of the dissolution.

That the law is as set out above is not seriously disputed by Mr. Varadachariar for the respondents, but he contends that the plaintiff has not claimed such a

(1) (1916) 4 L.W., 521.

(8) (1928) 19 L.W., 425.

(2) (1898) I.L.R., 28 Bom., 544.

(4) [1918] A.C., 289.

(1) [1927] 1 Ch., 157.

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remedy in his plaint and he must be deemed to have elected to seek his remedy in the shape of interest and to have given up his claim to a share in subsequent profits. Naturally the plaint does not specifically claim this share in subsequent profits, for, at the time it was drafted, the plaintiff could not know that the other partners would not at once make over to him his proper share nor that they would continue the business, but there is nothing in the plaint which goes to show that the plaintiff relinquished any right to subsequent profits which he has in law. In fact at the trial when it was clear that the business had continued for some considerable period after the dissolution, his claim to these profits was strongly asserted but negatived by the Subordinate Judge for the reasons given in paragraphs 34 and 35 of his judgment, in which he refers to the weight of authorities negating such a right. Inasmuch as the suit partnership was a family business, the matter might be deemed to be somewhat more complicated, as it is difficult to ascertain what are the partnership assets as distinguished from the joint-family properties, but this point is not of very much weight, for, even under section 95 of the Trusts Act, the same principle is prescribed with reference to joint owners of property and it has always been held in the case of a joint Hindu family that the manager, after the date of division in status, is under an obligation to account for his management of the whole of the family property, he being co-owner in possession of the property of the separated member of the family; *C. F. Watson & Company v. Ramchund Dutt*(1) and *Sri Ranga Thathachariar v. Srinivasa Thathachariar*(2).

(1) (1890) I.L.R., 18 Cal., 10.

(2) (1927) I.L.R., 50 Mad., 866.

A long argument has been addressed to us relating to the conduct of the respective parties, but that is really immaterial except possibly in the awarding of costs, when we have to determine what are their legal rights, and it is not seriously disputed now that the plaintiff has a right in law to claim a share in the subsequent profits of the partnership.

The enquiry that will now be made is an examination of the accounts of the business not only up to the 31st December 1921 but up to the date of this decree. In taking this account, the defendants will be entitled to be credited with a sum sufficient to recompense them for the skill and labour employed in the conduct of the business since 1921 and it will also be open to them to prove that any portion of the profits was obtained not by reason of the use of the partnership assets but in some other manner. The term "partnership assets" must be deemed to include the goodwill of the business, for the plaintiff is entitled to a share in the goodwill as well as to a share in the actual assets of the business.

The contention of Mr. Varadachariyar that plaintiff has elected to receive interest rather than a share in future profits must be negatived, for a person cannot elect between two things unless he is in a position to know what those two things are and can make a voluntary choice between them. In the present case, the plaintiff is not therefore bound to make his election until the share of the profits that would fall to him has been ascertained. If the subsequent business ended in a loss, the plaintiff would be entitled to claim the assets due to him at dissolution together with subsequent interest and therefore his final election must be postponed until the accounts have been taken.

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The next point on which the appeal has been argued relates to the family movables. The plaintiff claimed certain items in his plaint, some of which were admitted and others denied. The Subordinate Judge has held that the plaintiff has not proved the existence of those that he claims and that therefore he was only entitled to a share in those admitted by the defendants. It appears that the plaintiff has tried to secure the appointment of a receiver in this suit, and that when that was disallowed, he applied for a commissioner to take an inventory of the movables, which was also disallowed. When the plaintiff was in the witness-box, his pleader made a statement that oral evidence as to movables would not be adduced and that the plaintiff would rely on what could be shown from the accounts, when they were examined to ascertain the partnership assets. This statement was apparently accepted by the Court and consequently no oral evidence was let in. In these circumstances and in view of the fact that the plaintiff has been out of possession of the family movables, he ought to be allowed an opportunity of proving what movables existed by reference to the family and partnership accounts and this must be done in the taking of the accounts.

The third point relates to the mesne profits from the immovable property. A sum of Rs. 1,250 was deposited by the defendants in respect of the first year's profits, but this was done in order to avoid the appointment of a receiver and cannot be treated as an admission that Rs. 1,250 was the actual amount of mesne profits in that year. The actual amount must be ascertained by reference to the accounts and the various payments made by defendants must be set off against that amount and the plaintiff awarded his share accordingly.

This appeal must therefore be allowed and the lower Court's decree modified in accordance with the above judgment. The third defendant has not opposed this appeal and therefore defendants 1 and 2 will pay plaintiff's costs of the appeal. The Sub-Judge will take steps to secure the accounts from defendants as soon as possible and then proceed to appoint a Commissioner for their examination.

THIRUVENKATACHARIYAR, J.—This appeal arises out of a suit brought by the appellant for the partition of family properties belonging to him and defendants 1 to 3. The first defendant is the plaintiff's father and defendants 2 and 3 are his (plaintiff's) brothers. It has been found by the lower Court that the family continued undivided in status till the 31st December 1921 on which date the plaintiff became divided in status and in estate from the other members of the family. This finding is not questioned before us. The family besides owning considerable immovable and movable properties was also carrying on trade from a very long time and on the date when the plaintiff separated from the family and became divided in status, the family was carrying on a business in salt at Tuticorin in the name of R. M. Muthusami Ayyar & Sons; and among the properties sought to be divided are the assets of that family trade. The plaintiff in his plaint says that he is no longer willing to carry on that business as a family concern and that it is therefore just and necessary to dissolve the firm as from the date of the plaint and ascertain the net profits available for distribution between him and the defendants 1 to 3. The plaint was filed on the 9th February 1922. The defendants 1 to 3 in their written statement pleaded that

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"Plaintiff severed his connexion from the business in Arpisi 1096 and from the family on 1st Margali 1096. Since then he became a divided member. Plaintiff is not therefore entitled to the benefits of nor is he liable to the obligations under any contracts entered into since he left the business."

With reference to this plea the fourth issue in the case was framed in the following terms :—

"Whether plaintiff has no interest in the firm of R. M. Muthuswami Ayyar & Sons after he became divided in status from defendants 1 to 3,"

that is, after the 31st December 1921. It is admitted that, even after the plaintiff had separated from the family and became divided in status, the other members of the family continued to carry on the business in salt and it was still being carried on when the suit came on for trial about four years after its institution.

At the trial, the plaintiff claimed that, though the family partnership stood dissolved, so far as he is concerned, on the 31st December 1921, and he is entitled to his share of the assets of the business as it stood on that date, he is also entitled to a share of the profits earned by the business continued by defendants 1 to 3 subsequent to his separation therefrom.

Defendants 1 to 3 denied the plaintiff's claim to a share in these profits and contended that he can be awarded only interest on the amount found due to him on the date his connexion with the firm ceased. This was one of the main questions raised at the trial. On that question the Subordinate Judge finds that plaintiff became divided in status and in estate on the 31st December 1921 and that he had no interest in the firm of R. M. M. & Sons continued by defendants 1 to 3 after the said date; and that he would be entitled to the money value of his share in the said firm as it stood on the said date together with interest thereon at 6 per cent per annum.

The main question argued before us in this appeal is that the plaintiff's claim to a share in the profits of the business carried on by defendants 1 to 3 subsequent to the 31st December 1921 should have been allowed. It is contended on behalf of the appellant that when a partner retires and the business of the firm is thereafter carried on by the other members of the firm with its capital or assets without any final settlement of accounts as between them and the outgoing partner, then he in the absence of any agreement to the contrary is entitled at his option either to claim a share of the profits made with the use of his share of the partnership assets since the dissolution of the firm by his retirement, or to interest on the amount of his share in the partnership as it stood on the date of its dissolution. That is the rule enacted in section 42 of the English Partnership Act. There is no corresponding provision in the Indian Contract Act, but it is contended that section 42 of the English Act, merely enacted what had prior to that Act been held to be the law in a long series of decisions of the Courts of Equity and that the same rule has also been held to be applicable to partnerships in this country, as a rule of justice, equity and good conscience. The appellant's advocate relies also on sections 88, 90 and 95 of the Indian Trusts Act in support of the same contention. Section 88 says (to quote only the relevant portion):

"Where a trustee, executor, partner, agent, director of a Company, legal adviser or other person bound in a fiduciary character to protect the interests of another person by availing himself of his character gains for himself any pecuniary advantage . . . he must hold for the benefit of such other person the advantage so gained."

Illustration (f) to that section is particularly relied on and it runs as follows :

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"A and B partners. A dies. B instead of winding up the affairs of the partnership, retains all the assets in the business. B must account to A's legal representative for the profits arising from A's share of the capital."

Section 90 enacts :

"Where a co-owner by availing himself of his position as such, gains an advantage in derogation of the rights of other persons interested in the property, he must hold for the benefit of all persons so interested, the advantage so gained but subject to re-payment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against the liabilities, properly contracted in gaining such advantage."

Lastly section 95 says :

"The person holding property in accordance with any of the preceding sections of this chapter, must, so far as may be, perform the same duties, and is subject, so far as may be, to the same liabilities and disabilities, as if he were a trustee of the property for the person for whose benefit he holds it :

Provided that where he rightfully cultivates the property or employs it in trade or business, he is entitled to reasonable remuneration for his trouble, skill and loss of time in such cultivation or employment."

It is argued that these provisions recognize the same equity which was recognized by the earlier English decisions which have since been embodied in section 42 of the English Partnership Act and that upon the facts of the present case the plaintiff is entitled to claim a share of the profits by reason of defendants 1 to 3 having used his share of the assets in carrying on the business subsequent to 31st December 1921. In support of this contention the decisions of the Privy Council in *Bhagwandas v. Rivettcarnac*(1) and *Hedayatulla v. Mahomed Kamil*(2) are relied on. In both these cases the partnership was dissolved by the death of one of the partners and thereafter the business was continued by

the surviving partner or partners with the assets of the dissolved firm, and their Lordships held that the legal representatives of the deceased partner were entitled not only to an account to be taken of the partnership dealings and transactions to ascertain what was due to the estate of the deceased partner in respect of his share at the time of his death, but also to an enquiry as to how the amount due to the deceased partner's estate has been dealt with by the surviving partners subsequently and if it appears that such amount or any part thereof has been employed in the business continued by the surviving partners to direct an account of such a business to be taken. In *Bhagwandas v. Rivettcarnac*(1) their Lordships also recognize the right of the legal representative of the deceased partner to elect either for the profits so ascertained or for interest, and he may exercise that option after the accounts for the subsequent period are taken and the result ascertained. In that case the legal representative of the deceased partner was a minor, on whose behalf the suit was filed by the Administrator-General to whom letters of administration were granted for the estate of the deceased.

In *Hedayatulla v. Mahomed Kamil*(2), which was an appeal from *Mahomed Kamel v. Haji Hedayatulla*(3), a business was carried on by two persons in partnership. On the death of one of them, named Fazil, the partnership became dissolved, but the surviving partner continued the business with the assets of the firm. In a suit brought against him by the legal representatives of the deceased partner for accounts being taken, the Calcutta High Court held that he was liable to give to the representatives of Fazil a share of the profits of the business which may have accrued

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(1) (1898) I.L.R., 23 Bom., 544.

(2) (1923) 19 L.W., 425.

(1) (1898) I.L.R., 23 Bom., 544.

(2) (1923) 19 L.W., 425.

(3) (1921) I.L.R., 48 Cal., 908.

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subsequent to his death up to the date when the final decree is made, all just allowances including fair remuneration to be allowed in favour of the defendant for managing the business, and further ordering that the plaintiffs as representatives of Fazil will be entitled to the same share as he would have taken if the partnership had not been dissolved and the profits will be assessed on the basis of what may be found due to him on the date of his death. This decree was affirmed by the Privy Council. In this case the only question raised appears to have been whether the accounts should be taken only up to the period of dissolution of the partnership by the death of Fazil or up to the date of final decree. No question appears to have been raised as to whether Fazil's legal representatives could claim only interest on his share of the assets as it stood on the date of the dissolution. The only other decision of the Privy Council which has been referred to in the arguments is the case in *Ahmed Musaji Saleji v. Hashim Ebrahim Saleji*(1). In this case, after the dissolution of a partnership by the retirement of a partner, the other partners continued the business of the firm using its assets for that purpose. In a suit brought against them by the legal representatives of the retired partner (who subsequently died) they were ordered by the trial Judge FLETCHER, J., to account for such assets with interest thereon from the date of dissolution. That decree was on appeal affirmed by Sir LAWRENCE JENKINS, C.J. and WOODROFFE, J., who observed that FLETCHER, J., had a discretion to allow interest and that, having regard to the conduct of the appellant and the circumstances under which their liability arose, that discretion ought not to be interfered with. In the appeal to the Privy

Council, preferred against that decree, the Counsel for the appellants contended that in such a case interest should not be awarded unless fraud on the part of the partner, who continued the business, was found. The respondents' Counsel in meeting that objection contended that the right to interest depended on the law of the Equity courts that where, after a partnership has been dissolved, a partner continuing the business takes the assets of of the partnership and trades with them, the other partners have a right to elect whether they will have a share of the profits made, or interest on the amounts taken. He further contended that the discretion of the Court was properly exercised by decreeing interest in that case. With reference to these contentions, Lord SUMNER in delivering the judgment of their Lordships dismissing the appeal observed as follows:—

"It is well settled that, in certain cases, when on the dissolution of a firm one of the partners retains assets of the firm in his hands without any settlement of accounts and applies them in continuing the business for his own benefit, he may be ordered to account for these assets with interest thereon, and this apart from fraud or misconduct in the nature of fraud."

It seems to me, upon a careful consideration of the report of this case, that the plaintiffs made no alternative claim therein either for a share of the profits or for interest as the Court may think fit to allow, but that they elected to have interest on the amount due to the retired partner and that the only question decided was that they were entitled to interest as claimed. In this view, Mr. Justice SESHAGIRI AYYAR's observation in 4 Law Weekly, 521, that this case is authority for the proposition that in such cases the Courts have a discretion whether to allow, to the retiring partner, or to the representatives of the deceased partner, a share of the profits or only interest, seems to be not warranted. If the decision in 42 Cal., 914 is to be so understood, it

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(1) (1916) I.L.R., 43 Cal., 914.

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would be in conflict with their Lordships' previous decision in 23 Bom., 544, wherein it is clearly recognized that the plaintiff has an option to claim either profits or interest as in section 42 of the English Partnership Act. Neither in 42 Calo., 914, in which interest was awarded, nor in 19 Law Weekly, 425, where profits were awarded, was the question of the plaintiff's option to claim either of the alternative reliefs considered, as it was in 23 Bom., 544, and the only legitimate inference to be drawn therefrom is that in both those cases the plaintiffs definitely elected for one of those reliefs in the plaint and the Court therefore had only to consider the right of the plaintiff to that relief. The further observation, made by SENHAGIRI AYYAR, J., in the same case, that illustration (f) to section 88 goes further than the operative portion of the section seems to me to be also not well founded. The section says (to quote only so much of it as is relevant) that

"Where a partner or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, he must hold for the benefit of such other person the advantage so gained."

It may be that there may be no fiduciary relationship between the surviving partner and the legal representatives of the deceased partner (which is a question on which opinion is divided). But the partner in continuing the trade with the assets of the dissolved partnership certainly avails himself of the opportunity he had as a partner in possession of the assets and that is sufficient to bring him within the operative part of the section. The words in the section "or other person bound in a fiduciary character to protect the interests of any other person" have to be construed not as referring to a trustee, executor, partner, agent, director of a

company or legal adviser, who are expressly mentioned in the section as holding a fiduciary character, but to bring in any other person not coming within those categories, who is bound to protect the interests of any other persons, under illustration (f). As in section 42 of the English Partnership Act, the liability of the surviving partner who continues the business, is based on his using the assets of the old firm for that purpose, Partners being co-owners of all the partnership assets including its goodwill, the partner who continues the business, after the death or retirement of the co-partner, with the assets of the firm, will, under sections 90 and 95 of the Trusts Act, be accountable to the retired partner or to the legal representatives of the deceased partner for the profits made by him by such user of the common property subject to a fair allowance being made to him for his labour and skill and to the other provisions in his favour contained in those sections. Indeed, having regard to the ground on which liability of the partner continuing the business is based, the right to claim profits would seem to be rather the primary right and the right to claim interest the alternative right, the option to choose between them being given to the partner or his representative whose property has been so used without his authority.

The Subordinate Judge, in support of his conclusion that the plaintiff is not entitled to claim a share in the profits of the business which was continued by defendants 1 to 3 after the date of the dissolution, relies on 4 L.W., 521, and also on section 241 of the Contract Act, which according to him supports the view that whatever is due to an outgoing partner or to the representative of the deceased partner is a debt and nothing else than an ordinary debt accruing on the date of the dissolution. Section 241 has to be read with section

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240, and when so read, it has no application whatever to the present case. The effect of section 241 is merely to provide that a retiring partner by leaving his property to be used in the business after his retirement does not become a partner as regards the business which is continued after his retirement but is merely in the position of lender to the business within the meaning of section 240. The question as to what right he can claim by reason of such user of the property, when there has been no agreement regarding it, is a question which is not touched by section 241. Upon the authorities already referred to, there can be hardly any doubt that the retiring partner can, in the absence of any agreement to the contrary, claim at his option either a share of the profits of the business which was continued with his assets or interest on the amount of his share of the partnership assets.

This proposition is hardly disputed by the learned Advocate for defendants 1 to 3, but he contends firstly that they made no use of plaintiff's share of the assets of the business in continuing the business after the date of the dissolution and that therefore the foundation of plaintiff's claim to share in the profits fails, and secondly that the plaintiff by his conduct prior to the suit and in his plaint has elected to forego any share in the profits of the business. It is argued that, if defendants 1 to 3 did not actually use more than their three-fourths share of the assets of the business in continuing the same after dissolution, they cannot be held liable to the plaintiff for the profits they may have made after dissolution. This argument ignores the rights of the plaintiff with regard to the common assets of the business. Until those assets are divided and his share given to him, he is a tenant in common with them in respect of the whole

assets, and, even though only a portion of the assets may be used in the new business, the assets so used is the common property of all the co-sharers including the plaintiff, and he will be entitled to claim a share of the profits by such user. This contention is, therefore, untenable. I may however add that it is not open to the plaintiff in making the election to claim a share of the profits with regard to a portion of the assets and claim interest with regard to the rest. He must choose between the alternative reliefs with regard to the entire assets as a whole. In the present case the continuance of the family business by defendants 1 to 3 cannot, *per se*, be regarded as wrongful merely because one member of the family who was entitled to a fourth share in it chooses to break off suddenly. To discontinue a long-standing business suddenly in which a large amount of capital has been embarked may result in heavy loss to the other members of the family and there can be no objection to their continuing the business on their behalf and at their risk, and their doing so will in no way prejudice the plaintiff's rights to have accounts taken of the dissolved partnership as it stood at the date of the dissolution. He has a further right to claim, at his option, either his share of the profits which were earned by the employment of his share of the assets in the new business or interest on the amount due to him at the date of the dissolution. If he elects to claim profits it will have to be ascertained what profits are attributable to his share of the assets employed by defendants 1 to 3 in continuing the business and what allowances should be made in their favour as provided in section 95 of the Trusts Act.

As regards the further contention that the plaintiff has in fact elected against claiming a share of the

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profits, our attention was drawn to the following statement in paragraph 13 of the plaint:—

“ Under the circumstances the plaintiff is not willing to continue the business any longer as a family concern and he has reasonable grounds to fear that want of mutual confidence cannot but lead to loss. It is therefore just and necessary to dissolve this new firm and ascertain the net assets available for distribution between the plaintiff and defendants 1 to 3.”

And also to prayer (e) which runs as follows:—

“ That the family trade as now carried on be dissolved as from this date. That account of the profits accrued up to date be taken and direct defendants 1 to 3 to pay one-fourth share of the ascertained profits.”

This suit was filed on the 9th February 1922 within a comparatively short time after the date of the dissolution and when the plaintiff would not know whether defendants 1 to 3 will immediately wind up the business or continue the same on their behalf. The contingency for making an election as between the alternative reliefs had not then happened. It is argued that the plaintiff's statement, in paragraph 13, that continuing the business in the circumstances cannot but lead to loss, shows a definite election on his part not to have any concern in the profits or loss of the business after his retirement therefrom. But it seems to me that all that the plaintiff says therein is that he is not willing to continue the business any longer as a family concern as, owing to want of confidence between himself and the other members of the family, co-operation between them is not possible and the business conducted without it must result in loss. The prayer (e) also does not take the matter any further. At the trial of the case which took place about four years after the date of the plaint, during which time the business had been conducted by defendants 1 to 3, the plaintiff elected to claim a share of the profits. That is quite clear from the Judgment of the

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lower Court, which refers to the rival contentions put forward by both the parties on this question. In the appeal before us, the plaintiff has definitely elected to ask for a share of the profits; grounds Nos. 2 to 7 of the memorandum of appeal relate to this question, but it will be sufficient to refer to ground No. 5 which runs as follows:—

“ In any event the Court below ought to have held that the plaintiff has a right to elect whether he will take a share of the profits made or have interest on the property retained in the business by the defendants and that the plaintiff has elected to ask for a share of the profits.”

The position taken here is quite clear and unambiguous. That a person who has an option to elect between two alternative claims or reliefs, cannot be required to elect without a clear knowledge of the respective claims between which he has to elect is clear law. (See Halsbury's Laws of England, Vol. 13, page 124, paragraph 141). The learned author therein says:

“ Hence he is entitled to be allowed time to consider as to his election, and, if necessary, election will be postponed till the accounts of the property concerned have been taken. Election made before the party has had an opportunity of ascertaining his rights and the value of them or under a mistake as to matters on which those rights depend will not be binding; though, if election has once been deliberately made, the persons claiming under the electing party are bound thereby without distinct evidence being given that he was aware of his rights.”

The accounts of the business, carried on by defendants 1 to 3, have not yet been taken and it was quite open to the plaintiff to put off his election until the result of the taking of the accounts is known. He could do so under the authority of 23 Bombay, 544, but nevertheless the plaintiff has in his memorandum of appeal chosen to elect to claim a share of the profits, in the belief, no doubt upon such knowledge as he may possess, that it

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will be much more advantageous to him than to claim interest on the amount due to him on the date of the dissolution. It seems to me that the present case falls within the last proposition stated in the paragraph cited above from Halsbury's Laws of England. In support of that proposition, the learned author cites the case in *Dewar v. Maitland*(1). In that case the law on this point is stated as follows:—

"There is no doubt that, before the heir was put to election, he is entitled to know everything which concerns the situation and value of the property in respect of which he may be required to make the election. But there is no authority for the proposition that, where the heir has chosen deliberately to confirm a devise of land which, without his confirmation, would be invalid, there must be distinct evidence of his knowledge of his rights. Although a Court compels persons to elect, yet election itself is a voluntary act."

I have referred to this point because Mr. Krishnaswami Ayyar in his arguments in reply contended that he has not yet made any definite election and that, even if he has made, it is not binding upon him and that if the taking of the accounts of the new business is less favourable to him than claiming interest he still can elect to claim interest. I should be very loath to allow the plaintiff to go back upon an election which I think he has deliberately made but for the special circumstances of this case. The plaintiff applied for the appointment of a receiver and for the production of the accounts of the new business and both those reliefs have on the objection of defendants 1 to 3 been withheld from him so far. He had therefore to form an opinion on that question on other and much less satisfactory materials, and perhaps also he was not advised that he can put off his election till his accounts were looked into. Having regard to the conduct of the defendants

(1) (1866) L.R., 2 Eq., 834.

in this case in withholding from the plaintiff the information which he was entitled to, I am not prepared to hold the plaintiff finally bound by the election he has already made. I am therefore of opinion that the contention of the appellant on this question must be allowed in its entirety. Two other questions were argued before us and, on these questions, I agree with the observations of my learned brother, whose judgment I have had the advantage of perusing, and have nothing to add thereto. I agree also in the order proposed by him.

K.R.

APPELLATE CRIMINAL.

*Before Mr. Justice Madhavan Nair and
Mr. Justice Reilly.*

NUNE PANAKALU (COMPLAINANT) PETITIONER,

v.

RAO SAHIB RAVULA SUBBA RAO (SECOND ACCUSED IN
CRL. R. CASES NOS. 281 AND 283 OF 1927) RESPONDENT,

AND

PULAKAM RAMAKRISHNA REDDY AND ANOTHER
(ACCUSED 1 AND 3 IN CRL. R. C. No. 282 OF 1927)
RESPONDENTS.*

Madras District Municipalities Act (V of 1920)—Chairman of Municipality—If a Municipal Officer—Prosecution under sec. 52 (2)—Sustainability of—Complaint against under sec. 54 (a) and (b)—Sanction of Government under sec. 197 of the Criminal Procedure Code—If a pre-requisite.

The Chairman of a Municipality is not a municipal officer within the meaning of the provisions of the Madras District Municipalities Act, and therefore cannot be prosecuted under

* Criminal Revision Cases Nos. 281 to 283 of 1927.

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Palaniappa Chettiar v. Krishnaswami Chettiar, (1925) 22 L.W., 429, followed.

No sanction under section 197 of the Code of Criminal Procedure is necessary in respect of a complaint under section 54 (a) and (b) of the District Municipalities Act against the Chairman of a Municipality, as the alleged wrongful acts cannot be said to have been committed by the Chairman in his capacity of a public servant as such.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate of Guntur, dated 14th February 1927, in Criminal Revision Case No. 42 of 1926 (C.C. No. 112 of 1926 on the file of the Court of the Joint Magistrate, Ongole) and the order of the Court of the Joint Magistrate, Ongole, dated 1st March 1927, in C.C. No. 112 of 1926 and the order of the Joint Magistrate of Ongole, dated 5th November 1926, in C.C. No. 112 of 1926.

The facts necessary for this report appear in the Judgment of their Lordships.

A. Krishnaswami Ayyar, M. Patanjali Sastri and M. Venkatasubbayya for petitioner.

Hon'ble V. Ramadas and K. Kameswara Rao for respondent in Criminal Revision Cases Nos. 281 and 283 of 1927.

G. Lakshmanan and A. Ramaswami Ayyangar for respondents in Criminal Revision Case No. 282 of 1927.

JUDGMENT.

MADHAVAN NAIR, J.—The petitioner in these cases, a defeated candidate at an election in the Chirala Municipality, filed a complaint before the Joint Magistrate of Ongole against the first accused the successful

candidate, the second accused the Municipal Chairman, and the third accused the Polling Officer, under sections 52 (2), 54 (a), 54 (b), 56 and 57 of the District Municipalities Act. Generally stated, the charge against them was, that they all conspired together and procured improper entries in the voters' list, threatened voters with prosecutions for alleged encroachments, etc., detained some of them under wrongful restraint, and infringed the rules for preserving secrecy of the election—these things having been done for the purpose of supporting the candidature of the first accused. The Joint Magistrate took the complaint on file against the first and the third accused and passed an order that sanction of the Government appeared to be necessary for the prosecution of the second accused. The complainant thereupon filed a fresh petition before the Joint Magistrate requesting him “to include the second accused, issue summons to him and take fresh evidence.” The Joint Magistrate issued summons, and, after hearing the pleaders on both sides regarding the necessity for Government sanction, passed an order under section 203 of the Code of Criminal Procedure dismissing the case against the second accused. In doing so he held that no case was made out against the second accused under sections 56 and 57 of the District Municipalities Act as he was not a Municipal Officer and that, as regards the offences under sections 52 and 54, sanction of the Local Government was necessary before proceeding against him. The District Magistrate was called upon to revise this order (Criminal Revision Petition No. 42 of 1926) and he held that the Joint Magistrate's order, under section 203, Criminal Procedure Code, must be construed as an order of acquittal. He also held that, even if it did not amount to an order of acquittal, the proceedings could not go on against

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the second accused without the sanction of the Local Government and that he was not prepared to move the Government to appeal against the acquittal on his own motion "as the complaint was too nebulous to warrant a presumption that a good case could ever be made out." He therefore dismissed the petition.

Criminal Revision Cases Nos. 281 and 283 have been filed by the complainant against the above orders of the District Magistrate and the Joint Magistrate respectively. After disposing of the case against the second accused, the Joint Magistrate took up the case against the first and the third accused and, as he was of opinion that the complainant absented himself to prevent the Court from proceeding with the trial of the case on an adjourned date, he acquitted the two accused under section 247 of the Criminal Procedure Code. This order is sought to be revised in Criminal Revision Case No. 282 of 1927.

CRIMINAL REVISION CASES NOS. 281 AND 283 OF 1927.

I will first deal with Criminal Revision Cases Nos. 281 and 283 in which the second accused is the counter-petitioner. Mr. Ramadas for the second accused has not argued that the order of the Joint Magistrate amounts to an order of acquittal. Though the Joint Magistrate issued summons to the second accused there was no order either under section 202 or under section 204 of the Criminal Procedure Code. The records show that no evidence was recorded on either side. The District Magistrate's opinion that evidence must have been tendered is a pure conjecture. In these circumstances, I do not think that the order of the Joint Magistrate dismissing the complaint amounts to an order of acquittal. It is, as it distinctly purports to be, an order under section 203 of the Criminal Procedure Code dismissing the complaint and nothing more.

The real question for consideration is whether sanction of the Local Government is required for prosecuting the second accused for any of the offences mentioned in the complaint. As sections 56 and 57 of the District Municipalities Act relate to offences by polling officers, clerks or other persons in attendance at the polling room, clearly the second accused cannot be prosecuted for these offences as he is the Municipal Chairman and admittedly not a polling officer, clerk or other person in attendance at the polling room and so no question of sanction arises with reference to these sections. The same is the case with regard to the complaint under section 52 (2) brought against him. Under that section "Every Municipal officer, or servant, or polling officer who wilfully makes or procures any improper entry in the electoral roll or any improper omission therefrom shall be punished" It is argued that the Municipal Chairman is not a Municipal officer and so he cannot be proceeded against for an offence under this section. In support of this argument reliance is placed on the wording of sections 18 (3), 70, 73, 75, 76, 352 and 355 (1) of the District Municipalities Act and also on the decision in *Palaniappa Chettiar v. Krishnaswami Chettiar* (1). In the Act a distinction is made between a Municipal Chairman and a Municipal officer, though with respect to some of the sections it has been argued that the Chairman has to be referred to as such in describing his individual powers and duties, and the powers, in certain circumstances, which he possesses over Municipal officers. To illustrate what I have said: section 18 says that the executive powers of the chairman may be delegated to any Councillor, Municipal officer or servant, etc. Section 70 (1) says that

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the Chairman shall from time to time lay before the council a schedule setting forth the designations and grades of the officers and servants. Section 75 says that, subject to certain provisions, the Chairman may fine, reduce, suspend, remove or dismiss any Municipal officer or servant. Section 76 says that the Chairman may grant leave to all Municipal officers and servants. Though the use of the term "Chairman" as an individual different from a Municipal officer in these sections may perhaps be thus explained, it seems to me that the Chairman of the Municipality is not classed along with the Municipal officers, but is treated, for the purposes of the Act, as different from a Municipal officer. This appears to be clear from sections 352 and 355 (1). Section 352 says that no suit shall be maintainable against any Municipal Chairman, officer or servant or any person acting under the direction of any Municipal Chairman, officer or servant, or of a Magistrate, etc. Section 355 (1) states that it shall be the duty of every police officer to assist the Chairman or any Municipal officer or servant reasonably demanding his aid for the lawful exercise of any power vesting in the Chairman or in such Municipal officer or servant under the Act, etc. The explanation that was plausibly attempted for distinguishing the Municipal Chairman from a Municipal officer in the sections I have referred to, does not evidently apply to these sections which show that the Municipal Chairman is put in a different class as distinguished from a Municipal officer or servant of the Municipality. In *Palaniappa Chettiar v. Krishnaswami Chettiar* (1), to which one of us was a party, it was held that the Vice-Chairman is not an officer of the Municipality, within the meaning of section 49, incompetent to stand for an

(1) (1925) 22 L.W., 429.

election. I see no reason why we should not follow this decision and hold that the Chairman is not an officer of the Municipality within the meaning of section 52 also. So far as possible, the terms appearing in the different sections of the Act should be interpreted in the same way. The main argument urged in support of the contention that the Municipal Chairman is a Municipal officer within the meaning of section 52 is based upon the fact that it is the duty of the Chairman under section 44 (1) of the Act to prepare and publish an electoral roll showing the names of the persons qualified to vote. If that is so, it is argued that the Act could not have contemplated to exclude from the scope of section 52 (2) dealing with improper entries in electoral rolls or improper omissions therefrom, the Municipal Chairman whose duty it is to prepare and publish the electoral roll. I cannot accept this argument. In view of the rules for the preparation of electoral rolls in Municipalities published under the Act, in cases where objections are taken against the preliminary roll, the Municipal Chairman must be considered as sharing the responsibility for the accuracy of its contents with the "revising authority"; and further rule 8 (g) says that "None of the officers entrusted with the preparation of the rolls shall be held legally liable for their completeness or accuracy: neither shall they be held liable to any action for damages by reason only of any omission or inaccuracy in respect of such rolls or any non-compliance with the dates prescribed in these rules". It would thus appear that the reason suggested for bringing a Municipal Chairman within the scope of section 52 (2) has not much force. As I have held, on an examination of the relevant sections of the District Municipalities Act, that a distinction is made in the Act between a Municipal

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Chairman and a Municipal officer, the second accused cannot be prosecuted under section 52 (2) of the Act.

The next question is whether under section 197 (1) of the Code of Criminal Procedure the previous sanction of the Local Government is required before instituting a complaint against the Chairman of a Municipality under section 54 (a) and (b) of the District Municipalities Act. In this case the second accused is alleged to have threatened some voters that he would increase their property tax, and others that he would institute prosecutions against them for alleged encroachment if they did not vote for his candidate. He is said also to have wrongfully restrained some people from voting. I am clearly of opinion that no sanction is required before proceeding against the Municipal Chairman with respect to these alleged offences. No doubt, the Chairman of a Municipality is a public servant and not removable except by the Local Government, see *1 Weir*, 243 and *King-Emperor v. U. Maung Galle*(1). But the acts alleged against him cannot be said to have been committed by him while acting in the discharge of his official duty. It is conceded that the alleged act of wrongful restraint cannot be said to have been committed by the Chairman in his capacity of public servant as such. In my opinion, the allegations made against him under section 54 (b) also fall within the same description. In *Kamisetty Raja Rao v. Ramaswamy*(2), it was held that no previous sanction of the Local Government was necessary for instituting a complaint against the Chairman of a Municipality for threatening a voter with injury to his property with intent to induce such voter to vote for any candidate or to abstain from voting. I therefore, hold that sanction under section 197 (1), Criminal Procedure Code,

(1) (1926) I.L.R., 4 Rang., 121 at 130.

(2) (1927) I.L.R., 50 Mad. 754.

is not necessary in respect of the complaint against the second accused under section 54 (a) and (b) of the District Municipalities Act.

Mr. Ramadas then argues that as the complaint alleges that all the accused conspired together to commit the aforesaid offences, sanction under section 196-A of the Criminal Procedure Code is required for proceeding against the second accused and also against the other accused. I cannot accept this argument, for the complaint does not disclose a charge of criminal conspiracy punishable under section 120-B of the Indian Penal Code against the accused. It is not alleged in the complaint that any of the accused committed that offence; nor do the allegations in it make out that such an offence has been committed. The words "conspire" and "conspiracy" are vaguely used in the complaint only to show that all the accused are jointly responsible for the commission of the offence. Sanction under section 196-A, Criminal Procedure Code, is therefore not required for proceeding against any of the accused in this case.

The last argument advanced on behalf of the second accused is that, since the offences alleged against him under section 54 (a) and (b) of the District Municipalities Act fall within Chapter IX of the Indian Penal Code, viz., section 171-C, sub-section (2), clause (a), he is immune from prosecution for those offences except under the authority of Government as referred to in section 196 of the Code of Criminal Procedure. The point is not free from doubt. In *Sesha Ayyar v. Venkatasubba Chetty*(1), where a Municipal Chairman was prosecuted for offences under the District Municipalities Act which fell also under Chapter IX-A of the Indian Penal Code, it was held that, though no authority of the Government

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had been procured as required under section 196, Criminal Procedure Code, it was open to proceed with the prosecution as regards those offences under the District Municipalities Act without any sanction. This decision is against the view contended for by Mr. Ramadas, but he argues that the case has been wrongly decided. The language of section 196 of the Criminal Procedure Code is very general. It says that "No Court shall take cognizance of any offence punishable under Chapter IX-A of the Indian Penal Code. . . . unless upon complaint made by order of, or under authority from, the Governor-General in Council, the Local Government" The wording of the section would seem to lend some support to the view that, even if the offences alleged are offences punishable under a Local Act, if they happen to be punishable under Chapter IX-A of the Indian Penal Code no prosecution either under the Penal Code or under any other law can be instituted except under authority from the Local Government as required by the section. If this view is right the decision in *Sesha Ayyar v. Venkatasubba Chetty*(1) would seem to require reconsideration. But it is not necessary to consider the question any further in view of the order that we are going to pass in this case and also having regard to the fact that in the amendments proposed in the District Municipalities Act election offences which fall within the purview of Chapter IX-A of the Indian Penal Code are omitted.

I have now dealt with all the legal objections that have been brought against the prosecution of the second accused. To sum up: He cannot be proceeded against

under sections 52 (2), 56 and 57 of the District Municipalities Act as these sections, as I have shown, do not apply to him. As regards sections 54 (a) and 54 (b) no sanction is required under section 197 (1), Criminal Procedure Code. Sanction under section 196-A of the Criminal Procedure Code also is not required as the offence of criminal conspiracy punishable under section 120-B of the Indian Penal Code is not alleged in the complaint. Assuming that the sanction of the Local Government under section 196 (1) is also not necessary, we think we are not justified in interfering with the order of the lower Court as regards this accused for the reason that the allegations made against him taken as a whole are extremely vague and indefinite. The only definite allegation is that the Municipal Chairman is said to have wrongfully restrained one or two persons; but they have not come forward with any complaint, nor is the present complaint supported by any affidavits or statements from them. On a careful perusal of the proceedings in the case we are satisfied that, in the interests of justice, we should not interfere with the order of the lower Court as regards the prosecution of this accused.

CRIMINAL REVISION CASE No. 282 OF 1927.

I will now take up Criminal Revision Case No. 282 against accused 1 and 3. In this case Mr. Lakshman's main argument is that the order complained against is an order of acquittal and that we should not interfere with such an order at the instance of a private party. No doubt the learned Joint Magistrate has acquitted these accused under section 247 of the Criminal Procedure Code; but, in my opinion, the facts do not show that the hearing of the case stood adjourned to the date on which it was dismissed on account of the

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absence of the complainant. The case against accused 1 and 3 could not go on as the entire records had been called up by the District Magistrate in connexion with the revision petition relating to the Municipal Chairman which I have already referred to. The papers were received back only on the 23rd of February 1927. On that date fresh summonses were issued against the accused, and notice was also sent to the complainant mentioning that the case would be heard on the 12th of March 1927. The summonses to the accused were served, but the notice could not be served on the complainant as he was absent elsewhere. The endorsement on the notice shows that the complainant had gone to Madras and that the returning officer did not know when he would return. When the case was taken up, the complainant's pleader filed a petition for adjournment stating that his client had gone to Bombay and Ahmedabad *via* Madras in connexion with his business some days back and that he had no information that the case was posted for that day. The learned Joint Magistrate apparently did not believe that the complainant had gone to Bombay, but stated that "Even if he had gone to Bombay on his own business, it cannot be taken as an excuse for inconveniencing the accused and this busy Court." I think it is clearly proved from the endorsement on the notice sent to the complainant that he was not in Chirala at the time when this notice was sent to him; and if he was not there, it is clear that he could not have known that the case had been posted for the 12th of March 1927. It cannot therefore be said that he had information that the hearing of the case stood adjourned to the 12th of March. In these circumstances, I cannot say that the complainant was absent on the date to which the hearing of the case stood adjourned, within the meaning of section 247 of the Criminal

Procedure Code. The order, therefore, does not amount to an order of acquittal. It is clearly an order of dismissal and can be revised by this Court.

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As regards the first accused, it is clear that section 52 (2) of the District Municipalities Act does not apply to him. It is argued that, as in the case of the second accused, proceedings cannot be taken against this accused also, as he is punishable under section 171-C of the Indian Penal Code, and that therefore sanction is necessary under section 196 of the Code of Criminal Procedure. On this question the opinion that I have already expressed with reference to the case of the second accused applies to this case also. From what has been said it is clear that sanction under section 196-A also is not necessary, and it is not suggested that sanction is required under section 197 of the Criminal Procedure Code before proceeding against this accused.

The substantial offences alleged against the third accused are those which come under sections 56 and 57 of the District Municipalities Act. It is conceded that no sanction under section 197 of the Criminal Procedure Code is required for prosecuting him for such offences. Sanction under section 196 or 196-A also is not required for proceeding against him, as the offences he is charged with are not punishable under Chapter IX-A of the Indian Penal Code, and as I have already held that the complaint does not make out a case of criminal conspiracy under section 120-B of the Indian Penal Code.

In view of the facts which I have already adverted to, namely, that the complaint is vague and indefinite and the allegations are of a very unsubstantial character, I think that in the case of these accused also, no further proceedings need be taken.

In the result, all the revision cases are dismissed.

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REILLY, J.—The petitioner's complaint, so far as it is against accused 2, the Chairman of the Chirala Municipal Council was dismissed by the Subdivisional Magistrate of Ongole, and the District Magistrate of Guntūr refused to interfere with that order in revision. Accused 1 and 3 were afterwards acquitted by the Subdivisional Magistrate, who professed to act under section 247, Code of Criminal Procedure.

2. It is convenient to deal first with the allegations in the complaint against accused 2. The petitioner first complains that accused 2 got some of his "underlings" entered on the electoral roll who had no right to a vote and so committed an offence punishable under section 52 (2) of the Madras District Municipalities Act. But under that sub-section the only persons who can be punished are Municipal officers or servants or polling officers. It is contended for accused 2 that he is not a Municipal officer or servant within the meaning of that provision, and it is not suggested that he was a polling officer. The contention that accused 2, who holds the most important municipal office in the town, is not a Municipal officer within the meaning of this sub-section, is at first sight surprising. But, when we examine the Act, it appears that the expression "Municipal officer" as used in it, does not include the Chairman of a Municipal Council. This is clear from sections 18 (3), 49 (2) (iv), 70, 73, 75, 76, 352 and 355 (1) (b). It is suggested for the petitioner that in section 318, which provides that Municipal officers, servants, contractors, agents and others shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code, the Chairman must be included in the term Municipal officer, as otherwise he will not hold the position given to his subordinates by this section. But that argument is fallacious as section 21, Indian Penal Code, itself clearly includes the Chairman of a Municipal Council within

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the definition of a "public servant". Then it is argued for the petitioner that, whatever "Municipal officer" may mean in other parts of the District Municipalities Act, in section 52 (2) it must include the Chairman of the Municipal Council because he is the person chiefly responsible for the electoral roll and in the best position for committing the offences made punishable by that sub-section, from which it would be anomalous that he should be exempt. But, when we read the rules made under the Act, as we are bound to do, with the Act, of which they have been made part, we find that the most important part of the Chairman's duties in connexion with the electoral roll is performed as President of a quasi-judicial tribunal, which may explain why he should be exempted from the scope of section 52 (2) and that provision be confined to those who are likely to have the custody of the roll or to use it after its preparation. However I do not think it is necessary to make any elaborate search for reasons which may have led to the Chairman's exemption from section 52 (2). If in the rest of the Act the term "Municipal officer" is used in a sense excluding the Chairman, only an overwhelming reason would justify us in interpreting the term so as to include the Chairman in this sub-section. I agree that the Chairman does not come within the scope of section 52 (2) and therefore accused 2 cannot be prosecuted for an offence punishable under that sub-section.

3. The complaint next charges accused 2 with offences punishable under section 54 (a) and section 54 (b) of the District Municipalities Act on the ground that he threatened voters with prosecution for alleged encroachments or nuisance or with improper raising or levy of profession or property tax in order to induce them to vote for accused 1 or to abstain from voting for the petitioner at the election in question and that he committed wrongful restraint of some voters. It has

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been contended for accused 2 that he cannot be prosecuted for the alleged offence or offences punishable under section 54 (a) of the Act in the absence of the sanction required by section 197, Criminal Procedure Code, on the ground that he is a public servant to whom that provision applies. But it is clear that section 197, Criminal Procedure Code, is not applicable, the petitioner's allegation in his complaint being, not that accused 2 did anything when acting or purporting to act in the discharge of his official duty, but that at a time when he was not so acting or purporting to act, he threatened that at some future date he would use his official powers to the detriment of the voters concerned. Next it has been contended that accused 2 cannot be prosecuted for either of the alleged offences punishable under section 54 (a) and section 54 (b) of the District Municipalities Act because both those offences are now punishable under Chapter IX-A of the Indian Penal Code, and under section 196, Criminal Procedure Code, no Court can take cognizance of any offence punishable under Chapter IX-A without the prescribed sanction, which has not been obtained. A good deal might perhaps be said in favour of this contention, and it would require serious consideration but for the fact that it has been decided by a Bench of this Court in *Sesha Ayyar v. Venkatasubba Chetty* (1), that cognizance can be taken under the District Municipalities Act of an offence made punishable under that Act, even though it is punishable also under Chapter IX-A, Indian Penal Code, without the sanction required by section 196, Criminal Procedure Code. In my opinion, we must follow that decision. The Magistrate was therefore at liberty to take cognizance of the allegation against accused 2 of offences punishable under section

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54 (a) and section 54 (b) of the District Municipalities Act without the sanction required by either section 196 or 197, Criminal Procedure Code.

4. Accused 1, the petitioner's opponent at the election, was charged in the petitioner's complaint with committing in concert with accused 2 the alleged offences punishable under section 52 (2), section 54 (a) and section 54 (b) of the District Municipalities Act. Section 52 (2) obviously does not apply to accused 1; but like accused 2 no sanction under either section 196 or 197, Criminal Procedure Code, was required for prosecuting accused 1 for the other two offences.

5. Against accused 3 the petitioner's complaint alleged that he, as polling officer, committed offences punishable under sections 56 and 57 of the District Municipalities Act. Those offences are not punishable under Chapter IX-A, Indian Penal Code, and it is not suggested that for accused 3's prosecution any sanction was required under section 196 or 197, Criminal Procedure Code.

6. But another contention has been raised for all the accused—that the petitioner's complaint really charges them with criminal conspiracy punishable under section 120-B, Indian Penal Code, and for that offence they can be prosecuted only with the sanction required by section 196-A, Criminal Procedure Code, which has not been obtained. It is true that in the complaint it is alleged that accused 1 and 2 conspired together in respect of the offences with which they are charged and that accused 3 committed the offence punishable under section 57 of the District Municipalities Act in conspiracy with the other accused; and in a supplemental petition presented by the petitioner on 24th October 1926 he stated that "the main allegation in the complaint is that all the three accused conspired together and committed all the offences jointly and in

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REILLY, J. the same transaction in promotion of the object of the criminal conspiracy in which all of them are partners." But it cannot be seriously suggested, when more persons than one are charged by a complainant with the commission of an offence, that merely because the allegation involves incidentally an implicit or explicit charge of criminal conspiracy the offenders cannot be tried for the alleged offence unless the sanction required by section 196-A, Criminal Procedure Code, for their prosecution for criminal conspiracy is obtained. If that were so, no offenders, for instance, could ever be tried for dacoity without previous sanction for their prosecution for criminal conspiracy. That is clearly not the effect of section 196-A, Criminal Procedure Code, and it is surprising that this contention should have been raised.

7. The result of the discussion is that there is no technical reason why the Subdivisional Magistrate should not have proceeded with the charges against the accused other than those for offences punishable under section 52 (2) of the District Municipalities Act as it is not disputed that the petitioner complied formally with the requirements of section 59 of that Act. The acquittal of accused 1 and 3 under colour of section 247, Criminal Procedure Code, appears to me to have been improper, as it is not shown satisfactorily that the petitioner was aware that the case, which had been adjourned *sine die*, had been reposted to 12th March 1927, when he failed to appear. But it has still to be decided whether it is necessary or proper for us to set aside the Subdivisional Magistrate's orders in the case and to direct him to proceed with it. There appears to me to be a good reason why we should not do so. The petitioner's complaint is an extraordinary one. I do not think that I have ever seen so vague a complaint.

In regard to none of the offences except that of wrongful restraint is a single definite fact alleged. It is alleged that some of accused 2's "underlings" were wrongly entered in the electoral roll and that some voters were threatened, but who they were or when these things were done there is nothing to show. It is alleged against accused 3 that he announced the names of some voters as having voted for accused 1, informed accused 2 which voters had supported accused 1, allowed some persons to vote who were not entitled to do so and prevented others who were entitled to do so from voting; but here again not a single voter's name is mentioned. In regard to wrongful restraint, it is alleged that "Rattayya and Raghavalu and some others were detained in the houses of the first and third accused under wrongful restraint." That is the nearest approach to any definite allegation in the complaint; but even there, it is not mentioned who were detained in which house. And it does not appear that Rattayya or Raghavalu or any one else himself complained of any such detention. The provisions of section 59 are obviously introduced into the Act partly with the object of preventing stories of election offences being invented and worked up at leisure by disappointed candidates or their partisans. If vague complaints such as this one are accepted, and the complainants allowed to fill in the details afterwards, that object will be defeated. In my opinion the only proper way for the Subdivisional Magistrate to deal with the complaint would have been to dismiss it at once, and we should certainly not be justified in allowing the case to be reopened now. I agree that all these revision petitions should be dismissed.

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APPELLATE CRIMINAL.

Before Mr. Justice Waller and Mr. Justice
Krishnan Pandalai.

A. RAHEEM SAHIB PETITIONER (ACCUSED).*

1929,
February 25.

Madras Local Boards Act (XIV of 1920), sec. 221—Proceeding under—If party entitled to prove fee not due—Sec. 184—If includes omnibus stand—Union Board—If can levy fee on such stand.

A party appearing before a Magistrate under section 221 of the Local Boards Act (Madras) is entitled to allege and prove that the fee claimed is not due from him or under or by virtue of the Act.

Ramachandran Servai v. President, Union Board, Karaikudi, (1925) I.L.R., 49 Mad., 888, dissented from.

Section 184 of the Act does not include a stand for omnibuses, and a Union Board cannot levy a fee in respect of such a stand.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Stationary Second-class Magistrate of Tindivanam in C.C. No. 662 of 1928.

S. Panchapagesa Sastri for petitioner.

K. N. Ganpati for Public Prosecutor for the Crown.

JUDGMENT.

This petition has been referred to a Bench owing to the doubt as to the correctness of the decision in *Ramachandran Servai v. President, Union Board, Karaikudi*(1), expressed in two other cases from this Court, *In re Gopayya*(2), and *Union Board, Paramakudi v. Chellaswami*

Thevar(1). The facts are these. The petitioner owns two motor omnibuses. The Union Board of Tindivanam have provided a stand for buses and have prescribed fees for the use thereof. The fees leviable from the petitioner amount to Rs. 10 for each of his buses. He refused to pay, whereupon the Board took action against him under section 221 of the Local Boards Act. Before the Magistrate the petitioner contended that the fee was not legally leviable. To that the Board replied that such a contention was not open to him. The Magistrate following *Ramachandran Servai v. President, Union Board, Karaikudi*(2), held that he had no jurisdiction to consider the legality of the fee. On the merits he was of opinion that the fee was legally leviable.

With great respect, we think that *Ramachandran Servai v. President, Union Board, Karaikudi*(2), was wrongly decided. The fee to be paid under section 221 of the Act must be due to a Local Board "under or by virtue of the Act" and it cannot be that the party called upon by the Magistrate to pay it is disentitled from pleading that it is not due under or by virtue of the Act. Take a case under section 106. The provisions of sub-section (2) are clear. No toll can be charged unless a table of tolls is put up at the toll-gate. If action is taken against a party under section 221 to recover tolls, can he not allege and prove that section 106 (2) was not complied with or must he pay and file a civil suit to recover the tolls illegally levied from him? The learned Judges thought it a startling proposition that a Magistrate should be constituted a sort of appellate authority over a Local Board, but the section gives him jurisdiction to decide that the amount charged by the Board is incorrect and there seems no reason, as

RAHEEM
SAHIB,
In re.

(1) (1926) M.W.N., 676.

(2) (1925) I.L.R., 49 Mad., 888.

* Criminal Revision Case No. 914 of 1928.

(1) (1925) I.L.R., 49 Mad., 888.

(2) (1927) I.L.R., 51 Mad., 838.

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PHILLIPS, J., pointed out in the 51 Madras case, why he should not have jurisdiction also to decide that the Board is not entitled to charge anything at all. We are of opinion that it is open to a party appearing before a Magistrate under section 221 of the Act to allege and prove that the fee claimed is not due from him under or by virtue of the Act.

On the merits, we cannot uphold the view taken by the Magistrate. A motor omnibus is a carriage and not a cart within the meaning of the Act. Section 184 allows a Board to construct or provide public landing places, halting places and cart-stands. A stand for omnibuses is neither the first nor the third; nor in our opinion, is it the second. Halting place is, no doubt, a very general term, which is nowhere defined in the Act, but it appears to us to be meant to cover places like choultries and rest-houses. Assuming that it could include stands for omnibuses, it is by no means clear that the intention of the Act was that Union Boards should, under section 188, exercise powers over anything but cart-stands strictly so called. Section 164 is also relied on, but that section specifically excludes public roads and we are here concerned with a public road. Apart from that, the standing of an omnibus for a few minutes periodically on the land is not the sort of occupation contemplated by the section.

The order of the Magistrate is set aside. The amount, if levied, will be refunded.

B.C.S.

APPELLATE CIVIL—FULL BENCH.

*Before Sir Murray Coultts Trotter, Kt., Chief Justice,
Mr. Justice Odgers and Mr. Justice Beasley.*

THE OFFICIAL ASSIGNEE OF MADRAS
(APPLICANT), APPELLANT,

v.

E. NARASIMHA MUDALIAR, PROPRIETOR OF
JAMES & Co., PERIAMET, MADRAS
(GARNISHEE), RESPONDENT.*

1929.
March 12.

*Presidency Towns Insolvency Act (III of 1909), sec. 7—
Operation of—If limited to matters in which Official
Assignee claims a higher title than insolvent—Money claim
against stranger—If Official Assignee entitled to proceed
under sec. 7—Limitation of right where witness summoned
under sec. 36—Official Assignee in no higher position than
insolvent—Seeking to recover debt not admitted—Matter of
discretion for Court in each case, whether such claim be dealt
with in Insolvency Court or not.*

Section 7 of the Presidency Towns Insolvency Act is not limited in its scope to matters in which the Official Assignee by the operation of the Insolvency Law claims a higher title than what the insolvent himself would have had, and the Official Assignee is entitled to proceed by way of motion under section 7 in cases where he has a money claim against strangers to the insolvency, the only limitation placed on the jurisdiction of the Insolvency Court being, that when once the Official Assignee has summoned a witness under section 36 of the Act, and that witness disputes his indebtedness, the Official Assignee has no option but to proceed by way of suit.

Where the Official Assignee, standing in no higher position by reason of the special provisions of the Insolvency Law than the bankrupt himself, seeks to recover a debt which is not

* Original Side Appeal No. 26 of 1928.

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admitted, it is a matter of discretion for the Judge sitting in Insolvency whether in any given case he should deal with such a claim in the Insolvency Court, or refer it to the machinery of the ordinary Courts.

Ex parte Brown, In re Yates, (1879) 11 Ch.D., 148, *Ellis v. Silber*, (1872) 8 Ch. App. Cas., 83, *Gnanendra Bala Debi v. The Official Assignee of Calcutta*, (1925) I.L.R., 54 Calc., 251, followed.

ON APPEAL from the order of Mr. Justice WALLER, dated 13th February 1928, and passed in the exercise of the Ordinary Original Insolvency Jurisdiction of the High Court in Petition No. 193 of 1926 (In the matter of A. Swaminatha Mudaly, an insolvent), Application No. 498 of 1927.

The facts necessary for this report appear in the Judgment.

Nugent Grant (V. *Varadaraja Mudaliyar* with him) for appellant.—For a long number of years the Insolvency Court has entertained applications called garnishee proceedings to enable the Official Assignee to recover moneys due to the insolvent's estate. It may not be possible in every case for the Official Assignee to file a regular suit and pay the necessary Court-fee. In special cases, however, pleadings were directed as in a regular suit. Section 36 has been regarded only as a discovery section, i.e., as a convenient method of obtaining information. The information obtained under section 36 was either used or not used in applications under section 7. The intention of the Legislature was that one must not begin with section 36 and end in section 7. The amendment has not carried out the intention of the Legislature. The Court must be satisfied that the scope of section 7 has been whittled down by the amendment. Section 7 does not exclude matters other than those arising in Insolvency. English Bankruptcy Act of 1914, section 105 (1) corresponds to section 7 of our Act. The Court constituted under the Act must deal with matters arising under the Act—see *Official Assignee of Bombay v. Sundarachari*(1). *Abdul Khader v. Official Assignee of Madras*(2) is a case where BAKEWELL, J., refused to exercise jurisdiction on an application

in the Insolvency Court for a declaration that certain property belonged to the insolvent, and the Appellate Court (RAHIM, Offg. C.J., and SESHAGIRI AYYAR, J.) set aside the order. They also refer to the advisability of trying difficult questions of title in the ordinary civil Courts. The Insolvency Court has to assume jurisdiction for the purpose of doing complete justice or making complete distribution of property—*Doraippa Aiyar v. Official Assignee, Madras*(1). The decision in Insolvency also operates as *res judicata*. *Inanendra Bala Debi v. Official Assignee of Calcutta*(2), decides that the jurisdiction is not restricted to cases under sections 55 and 56. Only section 36 should not be made an instrument of torture. See also Halsbury's Laws of England, Vol. 2, page 137, Article 235, on Mode of Enforcement. It must be a matter of discretion for the Court, whether in any particular case the Court would or would not exercise jurisdiction in Insolvency. Vide also *Abdul Khader Sahib v. Official Assignee of Madras*(3), and *In re Kancherla Krishna Rao*(4).

R. N. Aingar (amicus curiae).—The ordinary way of collecting a debt is by a suit. The Official Assignee stands in the shoes of the insolvent. Where the trustee has a higher title, the Insolvency Court is the appropriate forum, *Ex parte Brown, In re Yates*(5). A demand at law or in equity against a stranger cannot always be enforced in the Insolvency Court, *Ellis v. Silber*(6). The summary procedure under the Act is not intended for contentious proceedings. *Re Suresh Chander Gooyee*(7), held that it was discretionary with the Court to direct at the hearing of the motion that the matter be dealt with by an action.

Nugent Grant in reply.—The convenience of the Official Assignee as representing the general body of creditors is of great importance. The Official Assignee may, under certain conditions, have to be allowed the aid of the inquisitorial procedure. In every case a discretion must be left to the Court as to whether, with reference to the surrounding circumstances, the matter should or should not be dealt with in Insolvency—see *Ex parte Dickin, In re Pollard*(8).

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(1) (1921) 42 M.L.J., 141.

(3) (1918) 25 M.L.J., 308

(5) (1879) 11 Ch.D., 148.

(7) (1918) 23 C.W.N., 431.

(2) (1925) I.L.R., 54 Calc., 251.

(4) (1927) I.L.R., 51 Mad., 540.

(6) (1872) 8 Ch. App. Cas., 83.

(8) (1878) 8 Ch.D., 377.

JUDGMENT.

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COUTTS TROTTER, C.J.—I have had the advantage in this case of perusing the judgment about to be delivered by BEASLEY, J. It sums up the results arrived at after a long discussion between him, ODGERS, J., and myself and it may be taken to be the judgment of the Court. I only add a few words because I feel it is incumbent upon me to do so, as for 8 years I was in charge of the Insolvency jurisdiction of the Original Side of the High Court. The procedure which was prohibited by the judgment of the Calcutta High Court in *Jnanendra Bala Debi v. The Official Assignee of Calcutta*(1) was, that persons alleged to be indebted to the bankrupt estate known in our Court for some reason I never quite understood as “garnishees” should be examined, which of course in effect means cross-examined, by the Official Assignee under the powers of section 36, and that statements made by them not amounting to a definite admission of indebtedness to the estate should be used under section 7 to ask the Court there and then to pass a decree against the garnishee, on the ground that, though they are not tantamount to direct admissions, they were available as evidence to show that their answer to the claim put forward by the Official Assignee was untrue. That procedure in my opinion was not only rightly denounced by the Calcutta High Court but is definitely prohibited by the statute as amended. That is sufficient to uphold the judgment of WALLER, J., and dismiss this appeal.

But a much wider question was argued, and I think it would be wrong for us not to express our opinion upon it. It was said, on the authority of the English cases cited by my learned brother, that where a debt was

not admitted, being a debt as to which the Official Assignee stood in no higher position by reason of the special provisions of the Bankruptcy Law than the debtor himself, the matter could not be tried within the jurisdiction of the Insolvency Court. That that is the law in England, I do not question. I do not think it is, or was intended to be, the law in India under the Presidency Towns Insolvency Act. It is obvious that the Indian statute aims at relieving the Official Assignee in charge of a bankrupt estate, in suitable cases, from incurring the heavy burden of institution fees, which would necessarily be incurred if he were compelled in all cases to have recourse to ordinary suits (see section 115 of the Act). I am quite content to leave it as a matter of discretion to the learned Judge, as to whether in any given case he should deal with such a claim in the Insolvency Court here or refer it to the machinery of an ordinary suit. It must be remembered that the Court-fees of an ordinary suit in England are very small, and that no inconvenience is caused, and no obstruction is put in the way of the bankrupt estate, by confining the jurisdiction of the Bankruptcy Court to claims where the title of the trustee of the bankrupt estate stands on a higher footing than would have been the case if the debtor had been suing himself. In India, it is quite a different matter, and in many cases it would be quite impossible to obtain a sum out of such estate as is actually in the hands of the Official Assignee sufficient to institute proceedings for the recovery of outstanding debts, though the Official Assignee's claim may be a perfectly good one. I am quite content that it should be left to the Judge in Insolvency to decide, on the balance of convenience, whether it is best to try such cases himself or to relegate their disposal to the ordinary Courts; and that is a discretion which, when exercised by him, an appellate

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(1) (1925) 1.L.R., 54 Cal., 351.

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Court would interfere with only on grounds which are well-known and must necessarily be of rare occurrence. It is quite easy for the Judge who tries the summons to insist upon the Official Assignee giving to the other side what is in effect a pleading giving detailed particulars of the nature of his claim and to give full discovery of documents if that is sought for. On the other hand, there may be cases where the person sought to be made liable to the estate lives at a great distance, or where the estate has ample funds for payment of the necessary institution fees, in which it would be just and right for the learned Judge in Insolvency to decline to deal with the matter here in Madras. In this case WALLER, J., has exercised his discretion that this was a case which was properly triable by the ordinary Courts and with that exercise of discretion I decline to interfere

I may add, in conclusion, that, now that our attention has been drawn to it, I think the present form of what is called a garnishee summons is capable of being construed as throwing the burden of proof not on the Official Assignee but on to the so-called garnishee. In my experience, the Official Assignee never sought to take that attitude, and always proceeded to prove his case as he were a plaintiff. Though it may not be a practical difficulty, I think it is proper that the form of summons should be amended so as to show that the burden of proof does rest on the Official Assignee. That is a matter for the Rules Committee and one of no real difficulty, the only point of importance being to omit the words which call upon the garnishee to show cause why he should not be adjudged to be a debtor to the estate, and substitute some other form of words which will make it clear that he is only called upon to meet a claim, the burden of proving which lies upon the Official Assignee.

ODGERS, J.—In this case, I had prepared a separate judgment, but I agree so entirely with the judgment about to be delivered by my brother BEASLEY, that I do not feel I should be justified in taking up time by trying to express what he has so clearly enunciated. I agree that the appeal should be dismissed.

BEASLEY, J.—This appeal raises a question of the greatest importance in Insolvency. It is an appeal from the order of WALLER, J., dated the 13th of February 1928. One E. Narasimha Mudaliar is alleged by the Official Assignee of Madras to owe the estate of an insolvent, A. Swaminatha Mudaliar, Rs. 1,445-2-0. A summons was taken out by the Official Assignee in order to obtain that money from Narasimha Mudaliar. This summons has come to be known on the Insolvency side of this High Court as a garnishee summons and the person summoned is known as the garnishee. When the matter came before WALLER, J., who was then sitting in Insolvency, the garnishee admitted that he owed the insolvent Rs. 173 and WALLER, J., made an order for payment of that amount, but as regards the disputed balance, as the garnishee did not agree to that matter being tried out on that summons, WALLER, J., ordered it to be tried elsewhere.

The question which arises in this appeal is, whether the Insolvency Court has jurisdiction to make an order for payment by a stranger to the insolvency of money in respect of which that person disputes his indebtedness to the insolvent. WALLER, J., in his judgment, stated that the claim before him was very clearly a case under section 36 of the Presidency Towns Insolvency Act, and I think that it is obvious that it was so from the wording of the summons. Before the Presidency Towns Insolvency (Amendment) Act of 1927, the Court could summon before it any person who was supposed to be indebted

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to the insolvent and examine that person, and if on examination the Court was satisfied that he was indebted to the insolvent, the Court could forthwith make an order upon him for the payment of the amount in which he was found to be indebted. But the Presidency Towns Insolvency (Amendment) Act of 1927 has brought about an alteration, and sub-sections (4) and (5) of section 36 of the Presidency Towns Insolvency Act of 1909 have been amended by the substitution of the following words "if on his examination any such person admits," for the words "if on the examination of any such person, the Court is satisfied." The result of this amendment is, that, where after an examination a person admits that he owes a sum of money to the insolvent, the Court can then and there order him to repay that amount to the Official Assignee, whereas, before the amendment, the Court could make that order even where there had been no such admission. In the case before us, the garnishee admitted that he owed a portion of the amount claimed by the Official Assignee but disputed that he owed the balance. WALLER, J., was therefore perfectly right in making an order upon him for the payment of the admitted amount and in declining to try the question of the disputed balance. The amendment to section 36 makes it quite clear that the Court has no jurisdiction whatever, on a summons under that section, to make orders for payment of debts disputed by garnishees. This disposes of the appeal, but we are asked to decide another important question arising out of this appeal, as it is argued on behalf of the Official Assignee that section 7 of the Presidency Towns Insolvency Act of 1909 gives the Insolvency Court jurisdiction to try money claims made by the Official Assignee, even where those claims are disputed by garnishees. Section 7 is as follows;—

"Subject to the provisions of this Act, the Court shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case."

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The Official Assignee invites the Court to put the widest possible construction upon that section and to say that the Insolvency Court has jurisdiction to collect simple money debts owing to the insolvent's estate. It is argued by Mr. R. N. Aingar on the other side, that section 7 only entitles the Insolvency Court to deal with matters arising in insolvency, such as questions of fraudulent preferences and relation-back and so on, and that as regards simple money claims, the Official Assignee merely stands in the shoes of the insolvent, and has no greater rights conferred upon him by the Insolvency Law than the insolvent himself had before his insolvency. If that contention is well-founded, then it is not necessary to consider what effect section 2 of the Presidency Towns Insolvency (Amendment) Act of 1927 has upon that section, and it is therefore necessary to consider first of all whether the Insolvency Court before the amendment had jurisdiction to try simple money claims and, if it had, whether the section as amended, has taken away or limited that right. In this connexion there are two decisions of the English Courts, namely, *Ex parte Brown, In re Yates*(1) and *Ellis v. Silber*(2), which are of great importance. In the former case, it was held that the Court of Bankruptcy is the proper Court to try questions in which the trustee in bankruptcy has a higher and better title than the bankrupt, that is to say, in those cases where the

(1) (1878) 11 Ch.D., 148.

(2) (1872) 8 Ch. App. Cas., 83.

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Bankruptcy Act itself gives him that better title, for example, questions of fraudulent preferences, but where a trustee in bankruptcy does not stand in any higher position than the bankrupt himself would have stood, the Bankruptcy Court ought not to assume jurisdiction, but should leave the matter to be dealt with by the ordinary Courts. In the latter case, Lord SELBORNE, L.C., said that the general proposition, that whenever a trustee in bankruptcy has a demand at law or in equity as against a stranger to the bankruptcy, then that demand is to be prosecuted in the Court of Bankruptcy, was a proposition entirely without warrant of anything in the Acts of Parliament and wholly unsupported by any trace or vestige whatever of authority. The position in England seems to be that the Bankruptcy Court does not entertain simple money claims by the trustee or Official Receiver in bankruptcy against strangers to the bankruptcy, but that such claims are tried in other Courts, unless there is an admission by the stranger to the bankruptcy, on an examination, that he is indebted to the insolvent, in which cases sub-section (4) of section 25 of the English Bankruptcy Act enables the Court to make an order upon him for payment, although RANKIN, J., in *Jnanendra Bala Debi v. The Official Assignee of Calcutta*(1) said: "The power under the English Act has hardly been exercised but it is quite clear that it is exercisable", and the English section is the prototype of section 36 of the Presidency Towns Insolvency Act, which before the recent amendment differed from it in that the Court could, on the examination of such a person, on being satisfied that he was indebted to the insolvent, make the order for payment. This distinction has, however, now been removed by the Presidency Towns

Insolvency (Amendment) Act of 1927, sub-section (4). It seems, therefore, that even under section 25 of the English Bankruptcy Act, the Bankruptcy Court rarely exercises the power it has given to it by that section, and *Ex parte Brown, In re Yates*, 1) and *Ellis v. Silber*(2), are authorities for the statement that in England the Bankruptcy Court ought not to entertain simple money claims against strangers to the bankruptcy. But it is a question whether the Bankruptcy Court in England has not a discretion nevertheless to entertain such claims but does not exercise it. Conditions in England are totally different from those in this country, and the collection of simple money debts where they are disputed by the debtors is a comparatively simple, speedy and inexpensive matter, whereas in India, if the Official Assignee is to be compelled to file suits in every case against a stranger who contests the claim, his position will be an impossible one. He will have to incur heavy expenses in order to file those suits and will be obstructed by those who are indebted to the insolvent at every turn, and there is no question that, if there is a discretion in the Insolvency Court to decide such claims in that Court, and it is properly exercised, the collection of the assets of the insolvent must be a much simpler and less expensive matter. The question is whether section 7 does give the Insolvency Court such a discretion, and the views expressed by RANKIN, J., in I.L.R., 54 Calc., 251 are of great assistance on this point. The facts in that case were that a lady was alleged by the Official Assignee to be a mere benamidar for the insolvent, and she was summoned under section 36 of the Presidency Towns Insolvency Act and as a result of the examination of the lady, the Official Assignee moved

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(1) (1879) 11 Ch., D 148.

(2) (1872) 8 Ch. App. Cas., 83.

(1) (1925) I.L.R., 54 Calc., 251.

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the Court for a declaration that she was merely a benamidar for the insolvent. On page 258 RANKIN, J., stated as follows:—

“The ordinary course having regard to the subject-matter and the length of time over which the investigation might have to be carried, would have been to commence a suit against the lady for a declaration that she was a benamidar for the insolvent. But under section 7 of the Presidency Towns Insolvency Act this Court in its Insolvency jurisdiction has jurisdiction to determine such a point as that; just in the same way as where a person who carries on a retail business becomes an insolvent in this Court, the Court would have jurisdiction by motion in Insolvency to collect debts due to the business by third parties in Tipperah or somewhere else. As a rule, however, that class of proceeding against a mere third person as against whom the Official Assignee claims no higher title than the insolvent's is not brought in the Insolvency jurisdiction, and in any ordinary case any such motion brought in that jurisdiction unfairly and unreasonably, would be refused as the learned Judge is in no way obliged in the Insolvency jurisdiction to try such a question. I would guard myself from being supposed to lay down that the only proper subjects for such a motion are cases within section 55 or 56 of the Presidency Towns Insolvency Act. There are many other cases. There may be cases, for example, where a property is claimed as having been taken by the opposite party from the insolvent after an available act of bankruptcy and it can be successfully claimed if the opposite party cannot bring himself within the protective sections. There may be cases where a transfer can be set aside if it is after an adjudication order. There are cases which come under section 53 of the Transfer of Property Act, where the right asserted by the Assignee is a right which belongs to creditors as such. It is important that it should be understood, first, that the rule that the Official Assignee should have recourse to this jurisdiction only when he has a higher title than the insolvent's, is not a rule of law in the sense that the Insolvency Court has not the jurisdiction to entertain such a case, and, secondly, that it is not restricted only to sections 55 and 56. But the rule is well established if it is not rigid, and it is necessary in fairness to third parties who cannot help their creditors, debtors or *certain qui trustent* going insolvent, who may live far from Calcutta, and whose

right may be difficult to ascertain apart from a regular suit. It is necessary also in the interests of this Court which cannot undertake in its Insolvency jurisdiction to collect debts all over India or to decide on motion all classes of disputes, merely because an insolvent or his estate is a party.”

It is, I think, clear from this, that RANKIN, J., considered that the Insolvency Court had discretion under section 7 to deal with simple money demands, and that right apparently has been exercised in the Calcutta High Court on its Insolvency side. But I also gather from his observations that the usual procedure is not to proceed by way of motion but by regular suit. On page 263, after dealing with the examination under section 36, RANKIN, J., says:

“It is quite true there is power to order the examination to be done by a Commissioner, but in that case I think it tolerably clear that sub-sections (4) and (5) are out of action altogether, although the same result can be obtained by proceeding under section 7 and using the deposition as evidence against the respondent. What is contemplated under these sub-sections is the most summary of all proceedings, namely, an order made upon the witness there and then and without previous notice, and it would be absolutely wrong ever to act under sub-section (4) or (5) unless there was a case so free from difficulty even on the story of the witness as to make it reasonable to act *brevi manu*. It is quite extravagant to suppose that in this case and under this section any order could have been made. A question of this sort, whether a purchase ten years ago in the name of a lady was a purchase benami, is a long way from being within anything that section 36 contemplates. The correct course in these cases where there is any real conflict is either to proceed by way of a motion before the Judge in Insolvency or to proceed by way of suit.”

I see no reason for differing from the view expressed by RANKIN, J., but the question is, whether the amendment to section 7 and section 36 has altered the position as it then was in 1925, when that case was decided. The amendment to section 36, I have already referred to and I now propose to deal with section 2 of the Presidency

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Towns Insolvency (Amendment) Act of 1927, which amends section 7 of the Act of 1909. The amendment is contained in a proviso which is as follows:—

“ Provided that, unless all the parties otherwise agree, the power hereby given shall, for the purpose of deciding any matter arising under section 36, be exercised only in the manner and to the extent provided in that section.”

In view of the fact that I agree with RANKIN, J., that section 7 before its amendment was not limited in its scope to matters in which the Official Assignee by the operation of the Insolvency Law claims a higher title than the insolvent would himself have had, I have to consider whether the amendment puts a limitation upon the jurisdiction of the Court, and in this connexion, I have to consider why this amendment and the amendment to section 36 were introduced. It is obvious that the amendment to section 36 was to prevent anything like a summary trial and orders being passed against strangers to the insolvency except upon the admission of those persons. It was to prevent a contested enquiry under the guise of an examination under that section, and I think it was intended by the amendment to section 7 to prevent the stranger to the insolvency from being first of all examined under section 36, and then, under section 7, having used against him his deposition taken under the former section. I am of the view that it is only when the garnishee has previously been examined under section 36 that any limitation is placed upon the jurisdiction of the Court. The proviso says “for the purpose of deciding any matter under section 36” and section 36 deals with the examination of persons suspected of being indebted to the insolvent. In all such matters, the Court has no jurisdiction under section 7 to deal with them, unless the garnishee admits his indebtedness. For the reasons I have already stated, in

my view, the Official Assignee is entitled to proceed by way of motion under section 7 of the Act in those cases where he has a money claim against a stranger to the insolvency. It is then for the Court to say whether the matter is one which it is reasonable, having regard to the convenience of all concerned, to deal with on a motion or whether it should be dealt with in a regular suit. But, in my opinion, no money claim in which any difficult questions arise should be dealt with by way of motion, nor should large claims; only simple cases capable of easy and speedy proof should be so dealt with. But I am clearly of the opinion that, when once the Official Assignee has summoned a witness under section 36 of the Act, if that witness disputes his indebtedness, the Official Assignee has then no option but to proceed by way of suit.

In the result, I agree with the learned CHIEF JUSTICE and my brother ODGERS, J., that the judgment of our brother WALLER, J., should be confirmed and the appeal of the Official Assignee dismissed.

B.C.S.

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APPELLATE CIVIL—FULL BENCH.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Wallace and Mr. Justice Anantakrishna
Ayyar.*

1928,
March 15.

J. SELVARANGA RAJU (FIRST RESPONDENT), PETITIONER,

v.

T. DORAISWAMI MUDALIYAR (PETITIONER),
RESPONDENT.*

Madras District Municipalities Act (V of 1920), ss. 49, 50 and 51, Election Rules I and II (c)—Election petition, scope of—Disqualification of a candidate under sec. 49 of the Act, whether can be ground of objection in an election petition under the Election Rules—Sec. 51, remedy under, whether excludes election petition by elector.

A disqualification under section 49 of the Madras District Municipalities Act, 1920, can be made a ground for a petition before an Election Court impugning the election under Rules I and II (c) of the rules for the decision of disputes as to the validity of elections held under the Act, and there is nothing in section 51 to preclude such a course being taken.

PETITION under section 115 of the Civil Procedure Code and section 107 of the Government of India Act, to revise the order of the Court of the Subordinate Judge of Chingleput in Original Petition No. 30 of 1927.

This reference arises out of a Civil Revision Petition, which was heard by PAKENHAM WALSH, J., against the order of the Subordinate Judge of Chingleput in an election petition filed by the respondent impugning the election of the petitioner as a Municipal Councillor, on the ground of his disqualification under section 49 of the Act. The Subordinate Judge allowed the petition of the respondent, and the petitioner preferred this Civil

Revision Petition to the High Court. The material facts and contentions appear from the Order of Reference of the learned Judge.

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ORDER OF REFERENCE.

This is a revision petition against the order of the Subordinate Judge of Chingleput, in an election petition, O.P. No. 30 of 1927. The facts of the case are as follows:—

The petitioner was nominated as a candidate for the 9th Ward of Saidapet Municipality. The last day for nominations was the 13th of August 1927, the election being on the 7th of September 1927. After scrutiny the petitioner and one T. Doraiswami Mudaliyar, who is the respondent in the present petition, were accepted as nominees. The petitioner took objection to the nomination of the respondent on the ground that his name was not on the electoral roll. The Chairman overruled the objection on the ground that it was only due to a clerical mistake. No objection was taken to the petitioner's nomination and he was elected. After his election the respondent put in an election petition challenging the petitioner's election on the ground that at the time of nomination he was an Honorary Magistrate in the Saidapet Bench Court and thus disqualified under section 49 (2) (iv) of the District Municipalities Act. The learned Subordinate Judge allowed the petition and declared the respondent, the only other candidate, to have been duly elected. The revision petition proceeds on three grounds:—

(1) that no election petition lay and hence the order is without jurisdiction,

(2) that on a proper interpretation of the various documents the petitioner was not an Honorary Magistrate at the time of the nomination and election, and

(3) that in any case the learned Subordinate Judge should have ordered a fresh election.

The first objection goes to the root of the whole matter and, as I am satisfied on hearing the arguments that this is a point which I should suggest to His Lordship the CHIEF JUSTICE be referred to a Bench of two Judges or to a Full Bench as he thinks fit and as I shall not be here at the time orders on such reference are made, I think it would only embarrass my successors if I gave any finding on points 2 and 3. I shall now briefly

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The question at issue is whether the disqualification of a candidate to sit on the Council can be questioned in an election petition before the Subordinate Judge; and this depends on the meaning of Rule II (c) of the rules for the decision of disputes as to the validity of elections. Clause (c) runs:—

“If (in the opinion of the inquiring authority) the result of the election has been materially affected by any irregularity in respect of a nomination paper, or by the improper reception or refusal of a vote, or by any non-compliance with the provisions of the Act or the rules made thereunder, the election of the returned candidate shall be void.”

The contention for the petitioner is that the disqualification of a candidate cannot be questioned under this rule. It is urged that, if at the nomination any objection in regard to such disqualification is overruled by the Chairman, the only other remedies are an appeal against such order to the local Government and the remedy under section 51 of the Act by a petition to the District Judge. The actual point has been raised in two cases before two Judges of this Court sitting singly. The first case was that reported in *Devasigamony v. Sethuratna Iyer*(1), and decided by RAMESAM, J. It was under the Madras Local Boards Act XIV of 1920, but the matter is the same in principle. In that case an ex-officio member of a District Board who had ceased to be such at the time proposed another member of the Board to be the Vice-President of the Board. Objection was taken that the proposal was not legally made by a member of the Board; but it was overruled and the person proposed got the largest number of votes. An election petition was filed against the successful candidate in the Court of the Subordinate Judge of Trichinopoly. Against the order of the Subordinate Judge, a petition was filed in this Court and RAMESAM, J., in disposing of the case observed:

“I therefore decide that the validity of the vote of Mr. Pethachi Chettiar can be and ought to be decided in this election petition.”

The next case is that reported in *Mangala Goundar v. Ayyathorai Mudaliyar* (2). This came up before DEVADOSS, J.,

(1) (1925) 87 I.C., 363.

(2) (1927) 55 M.L.J., 632.

and was under the District Municipalities Act. He held that no election petition lay under Rule II (c) based on the disqualification of a candidate and dissented from the opinion expressed by RAMESAM, J., in *Devasigamony v. Sethuratna Iyer*(1). The same learned Judge confirmed this decision in a later case reported in *Vaidyanatha Thevar v. Murugaiyan Chettiar*(2). As the matter has been very fully discussed in these cases, especially by my learned brother DEVADOSS, J., in *Mangala Goundar v. Ayyathorai Mudaliyar*(3), it would be a waste of time for me to reconsider in this order all the authorities, and sitting as a single Judge it would add to the confusion if I decided the present petition either way myself. I therefore briefly note the main points on each side. The petitioner adopts *in toto* the arguments of DEVADOSS, J., in *Mangala v. Ayyathorai*(3).

The chief argument for the respondent is that it has always been held hitherto that the disqualification of a candidate can be gone into in an election petition though there has been no explicit ruling on the point. In *Srinivasalu Reddi v. Kuppuswami Goundar*(4), three candidates offered themselves for election for a vacant seat on the Taluk Board of Tindivanam. The President of the Taluk Board rejected the nomination of the plaintiff on the ground that he was an Honorary Magistrate and therefore disqualified for election under section 55 (2). Later, the third candidate withdrew. So only one candidate was left and he was declared elected. The plaintiff then filed a suit in the District Munsif's Court against the President and the successful candidate for a declaration that he was a duly nominated candidate, etc. The learned Judges, MADHAVAN NAIR and CURGENVEN, JJ., held that no suit lay. It is clear from the judgment that they considered that plaintiff had a proper remedy by way of an election petition but what was actually decided was that no civil suit lay. In *Gopala Ayyangar v. Ebrahim Rowther*(5) (Full Bench Case), the Judges proceeded on the footing that it was open to the parties in an election petition to raise the question of disqualification. It is strongly argued that the remedy under section 51 is a strictly limited one which cannot be availed of by any one but the Councillor himself or a fellow Councillor and that

(1) (1925) 87 I.C., 363.

(2) (1928) M.W.N., 549.

(3) (1927) 55 M.L.J., 632.

(4) (1927) 27 L.W., 362.

(5) (1925) I.L.R., 48 Mad., 609.

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it leaves a defeated candidate without any remedy. The view put forward is that section 51 refers only to disqualifications arising after the person has been elected as a Councillor, as the language of section 50 contrasted with section 49 implies, and that if this interpretation be held to be correct the difficulty felt by DEVADOSS, J., as to the possibility of two conflicting decisions, one by the District Judge under section 51 and the other by the Subordinate Judge on an election petition, will not arise; and it is also pointed out that the remedy by way of prosecution under section 314 is limited to the disqualifications under section 50. I think there can be no doubt that the disqualifications in section 49 apply to candidates and those in section 50 to the elected councillors. But section 51 expressly says,

"Whenever it is alleged that any person who has been elected or appointed as a councillor is disqualified under section 49 or section 50"

Therefore, although the argument of the learned Advocate for the respondent is very attractive, it is against the plain words of section 51 which contemplates disqualifications both under sections 49 and 50. As to the argument that the disqualification of candidates can be gone into in an election petition in England, the rules there are entirely different and under the Municipal Corporations Act of 1882 (45 and 46 Vic., Cap. 50), section 87, the disqualification of a candidate is a ground for an election petition. It is also argued for the respondent that my learned brother DEVADOSS, J., has taken an unduly limited view of the meaning of the word "election". He states "non-compliance with the provisions of the Act or the rules made thereunder can only mean non-compliance by the officer whose duty it is to fix the date of election, receive votes and act as polling or returning officer." In *Srinivasulu Reddy v. Kuppusawmi Goundar*(1), quoted above, CURGENVEN, J., held "that the term 'election' may be taken to embrace the whole procedure whereby an 'elected member' is returned, whether or not it be found necessary to take a poll." He followed the view taken by JACKSON, J., in *Srinivasachariar v. Venkatarama Iyer*(2), and by WALLACE, J., in *Sarvothama Rao v. Chairman, Municipal Council, Saidapet*(3). MADHAVAN NAIR, J., agreeing with CURGENVEN, J., adopted this broader meaning of the term "election" as against the more

restricted one which he had taken in *Krishnasamy v. Ghulam Muhammad Ghouse*(1), with PHILLIPS, J. However, on this point it has been argued by the learned advocate for the petitioner that DEVADOSS, J., did not really say anything more than that the rules framed for election covered only the points which he mentioned. It is not disputed that, these rights having been created by a statute, there is no remedy outside the statute and, if the petitioner has no other remedy than an objection to the nomination at the time and an appeal to the local Government together with any remedies he may have under section 51 and section 314 there is no further remedy. To my mind, the strongest reason given for his opinion by my learned brother DEVADOSS, J., is the possibility of a conflict of decisions. It is clear that, as stated above, section 51 must apply, as it purports to do, to the disqualifications both under section 49 and section 50. It applies, therefore, to the disqualifications of a candidate. If an election petition to the Subordinate Judge lies under the election rules and also a petition by a fellow Councillor under section 51 to the District Judge, it follows that there may be a conflict of decisions. Personally I am inclined to the view taken by DEVADOSS, J., rather than to that taken by RAMESAM, J. But the matter being one of great importance in which it is desirable that there should be an authoritative decision, I would request that a reference may be made either to a Bench of two Judges or to a Full Bench as his Lordship the CHIEF JUSTICE may think fit. The point for reference is,

"Can a disqualification under section 49 or section 50 of an elected candidate be a ground for a petition impugning the election under rule I and rule II (c) of the rules for the decision of disputes as to the validity of an election held under the Madras Municipalities Act, 1920, or is the remedy confined to that prescribed in section 51 and section 314 of the said Act?"

The CHIEF JUSTICE.—Put before a Bench of three Judges.

ON THIS REFERENCE—

K. Bashyam Ayyangar (with *V. C. Veeraraghava Achari*) for petitioner.—The question of disqualification in the nomination of a candidate for an election, cannot be gone into in an election

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(1) (1927) 27 L.W., 362.

(2) (1924) 47 M.L.J., 762.

(3) (1928) 17 L.W., 431.

(1) (1926) I.L.B., 50 Mad., 86.

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petition under the Election Rules. Section 51 specifically applies, and not Rule I of the Election Rules; Rule I itself says "Unless otherwise provided for" and it is otherwise provided in section 51, viz., a petition to the District Judge. If an election petition to an Election Court lies under Rule I, then there may be a conflict of decisions between the Election Court and the District Court acting under section 51. The Legislature cannot be deemed to contemplate such a conflict: see *Mangala Goundar v. Ayyathorai Mudaliyar*(1). After an election has taken place, section 51 of the Act gives the remedy.

T. M. Krishnaswami Ayyar with *T. E. Ramabhadra Achariyar* for respondent.—The objection as to conflict of decisions does not really exist. Section 51 applies to disqualifications arising after election. Section 51 refers only to a special remedy given to certain persons, viz., Councillors and the Chairman, and not the general body of electors or the rival candidates. Election petition under Rule I and Rule II is competent for the latter class; otherwise the latter will have no remedy in such cases. Election proceedings commence with nomination of the candidates, and all irregularities and illegalities under the Act can be objected to by means of an election petition: see *Gopala Ayyangar v. Ibrahim Rowther*(2). The Election Court can go into the question of the disqualification of a candidate on his nomination, under Rules I and II (c) of the Election Rules. A suit is allowed in such cases in the English Election procedure, and a suit is replaced by an election petition under the Election Rules in the Indian law. Section 51 contemplates a present subsisting disqualification after the election has taken place; section 51 says "is disqualified"; the language of the section points to disqualifications arising after election.

V. C. Veeraraghava Achari for petitioner, in reply.—In section 51, "is disqualified" includes also disqualified at the time of the nomination. See *Hargreaves v. Hopper*(3). Disqualification under section 48 may fall under the Election Rules, as section 48 is not mentioned in section 51.

OPINION.

COURTS
TROTTER, C.J.

COURTS TROTTER, C.J.—The facts of this case are fully set out in the referring judgment of Mr. Justice

(1) (1927) 55 M.L.J., 632.

(2) (1926) I.L.R., 48 Mad., 509.

(3) (1875) 1 C.P.D., 195 at 198.

PAKENHAM WALSH. The question is whether a disqualification on nomination on the ground that at the time of nomination the petitioner was an Honorary Magistrate of the Saidapet Bench Court and thus disqualified under section 49 (2) (iv) of the Madras District Municipalities Act of 1920 forms a ground for an election petition or can only be dealt with under section 51. My view of section 51 is that it can only apply where there has been an election of the candidate as a councillor which is apparently valid on the face of it. In my view, it cannot apply to the inchoate stage of nomination which has not resulted in at least something which purports to be an election. Moreover, so far as I can see, no person except a councillor could take action before the District Judge against the person suggested to be disqualified. I see no option but to come to the conclusion that this cumbrous machinery leaves the result that an election petition is open to those entitled to launch it in order to raise this ground of disqualification.

WALLACE, J.—The short question for decision here is whether an elector in an election held under the Madras District Municipalities Act of 1920 can, in an election petition before the Subordinate Judge or District Judge, urge, as a ground for setting aside the election, that the elected candidate was disqualified under section 49 or section 50 of the Act, or can this matter be moved only by a councillor or by the Chairman under section 51 and before the District Judge alone.

As usual, the Act fails to indicate clearly the answer to be given. The wording of section 51 is unhappy. It is not said who are the persons who may allege that the elected councillor is disqualified or in what form or manner the allegation is to be made, or how or when the person challenged is called on to admit or not to

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admit the allegation. Again the present tense "is disqualified" in sub-section (1) cannot be aptly used of section 49, since it refers to the present state of the councillor who has been elected, whereas section 49 refers to his prior state on the date of the nomination, election or appointment. The same remark applies to the use of the same term in sub-section (2). It is also not clear what differentiation, if any, is intended between "is disqualified" in reference to an allegation by outsiders and "has become disqualified" in reference to the doubts of the councillor. Are the doubts of a councillor remediable in law only when they relate to a period after his election and not when they relate to the period of nomination or actual election? However, the general sense of the section seems to be that when any question arises whether a person elected as councillor was disqualified under section 49 at the time of nomination or election or has since the election become disqualified under section 50, the matter should be moved before the District Judge by a councillor or the Chairman. The question is whether that section is exhaustive so that the ordinary voter, when the election has resulted in the election of a candidate whom he regards as disqualified, cannot agitate that matter in an election petition. It would seem strange if he could not and unless the Act and rules make it abundantly clear that he cannot, I should hold that no such prohibition exists.

The general rules as to election petitions are passed under the rule-making power given under section 303 (b), and any rules therein which deal with matters not expressly prohibited by the Act will be *intra vires*. Obviously, the Act does not expressly prohibit an elector raising in an election petition the matter of the disqualification of a candidate, since the Act does not even

mention an election petition at all. So we have to see whether the rules allow such a point to be raised in an election petition. Such a petition apparently can raise any point whatever, but the election will not be set aside thereupon unless in the opinion of the Judge hearing it one of the matters set out in rule II is proved. The only part of rule II which can apply to the present case is rule II (c). I am not prepared to hold that the existence of a disqualification under section 49 at the time of nomination is an "irregularity in respect of a nomination paper" within the meaning of that rule. So that the question is whether it amounts to a "non-compliance with the provisions of the Act or the rules made thereunder."

I think it may fairly be brought under the former category since, as I read sections 48 to 50, the Act prescribes that persons who suffer under the disqualifications mentioned in those sections shall not be councillors. I would therefore hold that the election of a person disqualified under sections 48 to 50 is contrary to the provisions of the Act. Now section 48 is not mentioned in section 51. If therefore section 51 is the only section by virtue of which the absence of qualification or the existence of disqualification in an elected candidate can be attacked, there is no provision for preventing the election of a person who is unqualified under section 48 except the scrutiny of the Chairman at the time of the nomination (see rules 4 (2) (1) of the rules for the conduct of elections). Such a scrutiny is also considered a necessary protection in a case under section 49 to which the same rule applies. It is reasonable to hold that the electorate should have the right to challenge the qualification of an elected candidate, whenever the candidate is disqualified by any of the three sections 48 to 50.

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The main argument on the other side is that which has been emphasized in the order of reference, namely, that to allow this matter to be agitated before an Election Petition Court, which may be the Court of a Subordinate Judge, may lead to a conflict of decisions; for instance, the Subordinate Judge may hold on an election petition that the candidate was disqualified while the District Judge on a petition under section 51 may hold that he was not, or *vice versa*. But I do not think any real conflict will occur, if section 51 is used as it evidently was intended to be used. I think it applies to cases where the election has gone through without challenge and something has occurred thereafter which raises doubt about the qualification of some sitting councillor. The Election Court decides whether or not there has been a proper election of a properly qualified candidate and its decision on that point is final. The District Judge under section 51 decides, where an election has not been challenged and has stood, whether subsequent doubts as to the qualification of any councillors are justified and his decision on that point is final.

I would therefore answer to the reference that the matter of disqualification of an elected candidate can be raised in an election petition before the Election Court.

ANANTA-
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ANANTAKRISHNA AYYAR, J.—The point referred to the opinion of the Full Bench is—

“Can a disqualification under section 49 or section 50, of an elected candidate be a ground for a petition impugning the election under rule I and rule II (c) of the rules for the decision of the disputes as to the validity of an election held under the Madras Municipalities Act of 1920, or is the remedy confined to that prescribed in section 51 and section 314 of the said Act?”

The judgment of Mr. Justice DEVADOSS in *Mangala Goundar v. Ayyathorai Mudaliyar*(1) contains a full discussion of the question. The arguments for and against the view adopted by Mr. Justice DEVADOSS in the above case have been fully set out in the order of Mr. Justice PAKENHAM WALSH which gave rise to this reference.

The first question is, what exactly is the scope of what is termed “election” in the District Municipalities Act and the rules framed thereunder. In Wharton’s Law Lexicon, page 312, the first meaning given to the word “election” is “the act of selecting one or more from a greater number for an office.” In Stroude’s Judicial Dictionary—Volume II, page 609, it is stated as follows: “In the Local Government Act of 1884, election includes both the nomination and the poll (section 75).” I think that in the Madras District Municipalities Act also, “election” should be taken to include both the nomination and the poll. Though a restricted view of the meaning of the word “election” was taken in some cases, I think that the view that “election” includes both nomination and the poll was the view adopted by a larger number of learned Judges in this Court, as seen from the cases cited in the judgment of PAKENHAM WALSH, J. Notwithstanding the use of the words “nomination” and “election” in section 49, clause (2), of the Act, and speaking with all respect, I think that the latter is the correct view to take. The rules framed for conduct of elections of Municipal Councillors assume that nomination of candidates is included in the election.

The next question to be considered is: What is the procedure to be adopted when a candidate is disqualified

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under section 49 of the Act. It was argued that the remedy in such a case is that prescribed by section 51 of the Act. I am not able to accept this contention. Reading section 51, it seems to me that it applies only to a stage after a candidate has been duly elected or appointed. The use of the words "is disqualified" in the section seems to me to support this view. Sub-section (1) of section 51 runs as follows :

"Whenever it is alleged that any person who has been elected or appointed as a councillor *is disqualified* under section 49 or section 50 and such person does not admit the allegations, or whenever any councillor is himself in doubt whether or not he *has become* disqualified for office, etc., etc."

The expressions "*is disqualified*" and "*has become disqualified*" occurring in the section seem to me to postulate a case where a person has validly become a councillor either by means of a proper and regular election, or by a proper appointment; and they seem to provide only for cases where a person has been validly and properly elected or appointed as a councillor, but where a question is raised that, owing to the present existence in him of a particular disqualification, he should cease to be a councillor.

If the above view be correct, then section 51 could not apply to a stage prior to such person having become a councillor; it cannot apply to the stage of "nomination" of candidates, and dispute about the disqualification of a candidate who has been "nominated."

Again the remedy provided by section 51 could be availed of only by a councillor; it is not open, under that section, to any voter or candidate to take action or move the District Judge.

The further question then arises whether voters or rival candidates are entitled to take any proceedings in Court against a nominated candidate on the ground of

his labouring under a disqualification mentioned in section 49 of the Act. It seems to me that an "election petition" could be presented against the returned candidate, under rule 1 of the rules for the decision of disputes as to the validity of an election, framed under the District Municipalities Act. Under rule II, it is open to the Judge inquiring into the matter to declare that the election of the returned candidate is void, if he is satisfied under clause (c) that

"The result of the election has been materially affected by any non-compliance with the provisions of the Act or the rules made thereunder."

In the face of the provisions of section 49, that a person shall be disqualified for election as a municipal councillor, if such person is, at the date of the nomination, labouring under any of the disqualifications mentioned in the section, and in spite of the existence of such disqualification, if a candidate is nominated and subsequently declared elected, then the judge passing orders on the election petition is entitled to declare the election of the candidate to be void, being contrary to the provisions of section 49 of the Act. The decision of the Full Bench in *Gopala Ayyangar v. Ibrahim Rowther*(1) evidently proceeded on such an assumption. Otherwise, the voters or the rival candidates would be without any real remedy, and in my view it is not a proper answer to say that it is open (1) to a Councillor to take action under section 51 of the Act, and (2) to the Chairman in charge of the nomination proceedings to solicit orders from the Government. It is clear that the *rival candidate*, who would be entitled to be declared elected if the returned candidate be held to be disqualified under section 49 of the Act, could not have his proper rights secured to him, unless such a matter

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(1) (1925) I.L.R., 48 Mad., 509.

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could be inquired into by means of an "election petition." I am not satisfied with the argument advanced in support of the other view, namely, that though rights are created in voters and rival candidates, yet it should be taken that the Legislature took the view that because remedies are made available to councillors, therefore it could not be said that injustice is done to *voters* or *rival candidates*. If the rules permit of such an interpretation, I think we should construe the rules as providing for the enforcement by persons themselves of rights conferred on them by statutes. The policy generally adopted in such cases seems to be to have such disputes decided by means of an "election petition," and I think the rules on a proper construction bear out that view.

In this view, there would be no conflict of jurisdictions, nor would there be cases of existence of bare rights in persons but without there being available to them any remedies to enforce the same.

My answer to the question is that a disqualification under section 49 could be made a ground for a petition impugning the election under rule I and rule II (c) of the rules for the decision of disputes as to the validity of an election, held under the Madras District Municipalities Act of 1920.

K.B.

APPELLATE CIVIL—FULL BENCH.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Beasley and Mr. Justice Waller.*

RALLI BROTHERS, MADRAS (RESPONDENTS),
APPELLANTS,

1928,
March 21.

v.

PERUMAL (APPLICANT), RESPONDENT.*

Workmen's Compensation Act (VIII of 1923), sec. 2 (1) (n) and Sch. II (V)—"Employed for the purpose of loading"—Meaning of—Person employed in receiving goods let down by a crane in a warehouse from its upper to its lower floor—Warehouse at a distance of a quarter of a mile from quay—Workmen injured by falling of bale—If entitled to compensation for injury.

Where a person, who was employed at a warehouse in receiving goods lowered down by a crane from the upper floor of the godown to its lower floor, which were to be there put into carts and carried to the quay by other workmen for loading in a ship at a distance of a quarter of a mile from the warehouse, was injured by the falling of a bale so lowered down, and applied to the Commissioner for compensation under the Workmen's Compensation Act (VIII of 1923) against his employers,

Held that the applicant was not a workman "employed for the purpose of loading a ship," within the meaning of clause 5, schedule II of the Workmen's Compensation Act (VIII of 1923), and was not entitled to compensation under the Act.

Grant & Co. v. Coverdale, Todd & Co., (1884) 9 A.C., 470, relied on.

APPEAL against the order of the Court of the Commissioner for Workmen's Compensation, Madras, made in Application No. 151 of 1928.

This is an appeal against the order of the Commissioner for Workmen's Compensation, Madras, in which

* Appeal against Order No. 369 of 1923.

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he granted an amount as compensation to the applicant, who was injured by the falling of a bale on him, while he was employed in the warehouse in receiving goods let down by a crane from the upper to the lower floor of the godown. The other facts and circumstances appear from the Judgment. The employers preferred this appeal.

Nugent Grant for appellants.—The question is whether the applicant was a workman employed in loading, within clause 5, schedule II of the Act (VIII of 1923). The warehouse is quarter of a mile distant from the quay-side, where the loading was to take place. If the destination is shipment, a person engaged in any prior stage is not a workman employed in loading. Acts ancillary to loading cannot be acts of loading. The acts must be so intimately connected as not to be merely ancillary to loading but must form part of the process of loading. This is the principle to be extracted from the English cases: See *Merrill v. Wilson, Sons & Co., Limited*(1), *Lyons v. Andrew Knowles & Sons, Ltd.*, *Stuart v. Nixon & Bruce*(2).

Purpose of loading means the same thing as the process of loading; purpose of loading does not cover a larger field of thought. Loading begins after everything is done by the charterer to have the goods ready for the process of loading: see *Grant & Co. v. Coverdale, Todd & Co.*(3).

K. V. Krishnaswami Ayyar and *K. V. Sesha Ayyangar* for respondent.—The Indian Act (VIII of 1923) uses language which is wider than the English Act.

The use of the words "warehouse or shed" in schedule II (V) shows that a wider class of acts than mere actual loading is included within the clause in question. The English decisions are not relevant in construing the language of the Indian Act. Remoter acts than actual slinging of the goods into the ship are covered by the Indian Act. The act of loading begins from the acts of removing from the warehouse; the transaction of loading begins there. Schedule II, clause 1 of the Act (VIII of 1923) refers to workmen under the Indian Factories Act. The latter Act refers to work "incidental to or connected with" the employment. The Indian Mines Act also uses the expression "Incidental to mining." The Act must be understood in a

popular sense; when goods are removed from the warehouse, it is under the orders of the appellant company for loading. Charter-party cases have no application to this case. See *Grant & Co. v. Coverdale, Todd & Co.*(1), *Hudson v. Ede*(2), *Lyons v. Andrew Knowles and Sons, Ltd.*; *Stuart v. Nixon & Bruce*(3). Section 30 of the Act (VIII of 1923) gives a right of appeal only on substantial questions of law. There is no such substantial question of law in this case.

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JUDGMENT.

COUTTS TROTTER, C.J.—The facts in this case are fortunately not in dispute and are stated in the order of the Commissioner. I can shortly summarise them as follows. The applicant, the injured workman, who, it is agreed for the purposes of this case, is to be treated as being in the employment of Messrs. Ralli Brothers, the appellants before us, was employed in a warehouse which was within the premises of the Port Trust and leased by that body to Messrs. Ralli Brothers. The godown was about a quarter of a mile away from the wharf alongside which steamers are moored. Into that godown were stored various goods, the property of Messrs. Ralli Brothers, some awaiting shipment to Europe and some ready to be entrained at the neighbouring railway station to be conveyed to various destinations in British India. The injuries to the workman were caused by a bale of cotton being lowered from the upper floor of the godown by a crane to the lower floor in which he was waiting to receive it. Owing to negligent handling of the crane, the bale was lowered on to his leg and caused the injury for which he now seeks compensation. That bale was in fact destined to be put on board a ship lying alongside the quay in the harbour to be conveyed by that ship to Europe. In the ordinary

COUTTS
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(1) (1884) 9 A.C., 470 at 475 and 477.

(2) (1868) L.R., 3 Q.B., 412 at 414.

(3) [1901] A.C., 79.

(1) [1901] 1 Q.B., 35.

(2) [1901] A.C., 79.

(3) (1884) 9 A.C., 470.

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course, the applicant on receiving that bale would have taken it out of the slings of the crane, handed it over to cartmen who would have put it on their hand-cart, taken it to the quayside a quarter of a mile away and then have handed it over to a gang of stevedores on the quay, whose duty it was to put it into the slings of the ship's crane or the Port Trust crane to be slung aboard the ship and stowed in the hold.

The question that arises under the Indian Act, VIII of 1923, is whether this applicant is a workman within the meaning of section 2 (1) (n) of the Act read with its second schedule. It is not questioned that, if he was a workman within the meaning of the Act, the acts which caused him injury arose out of and in the course of his employment. The material words are to be found in Schedule II (V): "Employed for the purpose of loading, unloading or coaling any ship at any pier, jetty, landing-place, wharf, quay, dock, warehouse or shed on, in or at which mechanical power is used."

Mechanical power was clearly used in lowering this bale from the upper to the lower floor of the warehouse, and therefore the only question we have to consider is, whether this man was employed for the purpose of loading a ship. If the words in Schedule II "at any pier, jetty" and so forth refer only to "ship" and do not relate back to the word "employed," the decision must clearly be against the workman, because the ship was not "at" the warehouse in which he worked which was a quarter of a mile away from the ship; and if that be the true construction of this not very clearly drafted section, there is no more to be said and his case must fail, because the schedule in that event would relate only to warehouses which are in such a position that goods could be directly slung from them straight on board the ship waiting at the quay-side. The Commissioner has

adopted another construction of the clause of the schedule and has related the words "at any pier," "jetty" and so forth back to the word "employed." I would only say in passing that it seems to be inapt language to describe a man as being employed "at" and not "in" a warehouse or shed. But I think it is advisable that we should deal with the matter on broader lines and consider whether this man can be said within the meaning of the Act to have been employed "for the purpose" of loading a ship. It is obvious that on any view of this case a line must be drawn somewhere. This particular bale of cotton came from Tinnevely whence it was consigned by rail to Messrs. Ralli Brothers in Madras to be stored in a godown and ultimately put on board a steamer bound for Europe. No one, I think, would contend that a workman who handled the goods in a warehouse in Tinnevely could reasonably be said to be employed for the purpose of loading a steamer in Madras. The line must be drawn somewhere and I think that in English cases the principle can be found as to where it is to be drawn. It may be true, as was said by the learned Counsel who appeared for the workman, that the trend of the highest authorities in England in interpreting the Workmen's Compensation Act of 1906 is to give a broad interpretation to the statute in the direction of favour to the workman. But there is this difference between the English and the Indian Statute that, whereas the former applies to all workmen, the latter only applies to certain defined classes of workmen and casts upon us, in my opinion, the duty of defining those classes with such precision as is possible. We are not without guidance in English cases of high authority as to what point is to be taken as that at which the process of loading begins. It has been said by both sides in turn that those cases are not

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at the East Bute Dock, that authority might have applied. But not only was that not the case, but in point of fact, cargo not only could be, but actually had been brought up by carts to the East Bute Dock and put on board ship; and I infer from the finding of the referee that the whole might have been done by carting, though I agree that it would have been at an expense which was preposterous and unreasonable if you were to look at the interest of the charterer, but if the charterer has engaged that he will do a certain thing, he must of course pay the damage arising from his not doing it."

I quote also a sentence from Lord BRAMWELL at page 478:—

"In the present case, frost did not prevent the loading; what it did was to prevent the particular cargo which the charterer had provided from being brought to the place where the loading would not have been prevented."

A suggested conflict between these cases was considered by the Court of Appeal in *Stephens v. Harris & Co.*, (1), and it was held that they were consistent and that *Hudson v. Ede*(2) might still stand as good law on the footing that it was there proved by evidence that the only possible means of access to the ship was by lighters covering a river journey over a hundred miles and that that mode of access was in fact blocked by frost.

Applying this reasoning to the case before us, as I respectfully do, it seems to me impossible to say that the only practicable mode of loading this ship was the one actually adopted in this case. If you exclude that, this man was clearly not employed in loading the ship. Lord SELBORNE clearly defines what is to be understood as ordinarily comprising the operation of loading, viz., as commencing when the ship, that is to say, its crew, begins to take part in the operation. The goods to be shipped are alongside the quay, the ship's crew or stevedores employed by the ship for the purpose are working the ship's derricks ready to receive the cargo

as it is slung over the rail. In other words, the work of loading does not begin until there is contact and collaboration between the cargo-owner's servants in charge of the cargo on shore and the ship's crew or stevedores employed in their place and ready on board ship to receive the goods as they come over the ship's rail and stow them in the hold.

I feel myself constrained to follow that high authority and decide that this man was not "employed for the purpose of loading a ship." It seems to me that the words "for the purpose of" really do not amount to more than if the section had said "in loading." If they are held to mean more, we are driven to fixing a line somewhere between the workman who handles the goods at Tinnevely and the workman who handles them on the quayside in the Madras harbour and is brought into direct contact and co-operation with those receiving the cargo on board; and where to fix that line I know not. The intervention of the carting coolies between the task of this workman and the coolies ready to handle the bales on the quayside seems to me to be a break in the chain which is fatal to this workman. Moreover, I find it difficult to believe that it could be reasonable to conclude that a man engaged in "loading" should be in a better position than one engaged in the same place and on the same work in handling cargo "unloaded" from a ship. No one, I think, could maintain that if the same processes proved in this case were reversed, as in the case of discharging a ship's cargo, this man could possibly bring himself within the Act. The ship discharged her cargo on to the quay; when that is done she is unloaded, and so far as I can see, can have no further concern in the subsequent handling of the cargo. Having discharged her cargo, she is free to sail; this man might have been injured exactly in the same way

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(1) (1887) 57 L.J., (Q.B.) 203. (2) (1888) L.R., 3 Q.B., 412.

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in handling her cargo on its way into the godown as he was in handling it on its way out. But I do not think it could be said that a man who was injured thus, when the ship had sailed and was truck down on the horiyon, was engaged in unloading her.

We had also cited to us the case of *Lyons v. Andrew Knowles and Sons, Ltd.*; *Stuart v. Nixon & Bruce*(1). In that case a stevedore who was employed in stowing goods into the hold of a ship was held to be continued to be employed for that purpose when the cargo was all in the hold and he was only occupied in the operation necessary to put on the hatchway cover; and in the course of doing that, he was injured. That seems to me to amount to this; that if a man is employed to pack things in a box, as part of his business he has to put the lid on the box; for, after all, a hold in a ship is nothing more than a big box. I do not think that that decision gives any real assistance in this case. It was apparently cited merely for the purpose of supporting the argument that loading is not to be limited to the mere operation of putting the cargo from the wharf into the hold and with that proposition no one desires to quarrel; but it seems to me to have no application to the present case.

I regret the result, for the reason that it presumably precludes an appeal to the Privy Council, from whom we should have welcomed further guidance if only because, as we are told, our decision affects over a million labourers in this country. The employers could and would appeal, had our decision been against them; but labour is as yet so little organized in this country, that there are no funds available, so far as I know, to take up a test case. I am glad to be told that the employers are fighting this case on principle only, and

that this individual workman will be given a generous *ex gratia* payment in any event.

WALLER, J.—The respondent, at the time of the accident, was employed by the appellants at a godown rented by them from the Port Trust. He was engaged in hoisting and lowering by means of a hydraulic crane certain goods, some of which—casks of ghee—had been unloaded from a ship, others of which—bales of cotton—were about to be loaded on to another. Some bales of cotton, which were being lowered, fell on him and injured his right leg. The Commissioner found that he was a “workman” within the meaning of the Act, conceding at the same time that, if he had been injured by a cask of ghee, in respect of which the process of unloading was already complete, he would not have been entitled to the benefit of the Act. It is a curious anomaly that a man employed in handling goods for shipment by sea should be within the Act, while another employed in the same warehouse in handling goods for shipment by rail should be outside it.

The process of removing cotton from the godown to the ship is described by Mr. Wright, the appellants’ godown and shipping manager, as follows: One set of workmen in this case, the appellant was one of them,—lower the bales, release them from the slings and put them aside ready for the carts. They work under maistris employed by the appellants. The bales are then placed on carts, taken to the quay and tipped on to it. They are finally loaded on to the ship by another set of workmen. These workmen as well as the cartmen are employed by the appellants’ shipping contractor.

The relevant part of the Act is schedule II (5), which defines a workman—for our present purpose—as a person “employed for the purpose of loading, unloading or coaling any ship at any pier, jetty, landing place,

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(1) [1901] A.C., 79.

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wharf, quay, dock, warehouse or shed, on, in, or, at which, steam, water or other mechanical or electrical power is used." The clause is obviously susceptible of two meanings. It may mean either that the person is to be employed at the pier, jetty or other loading place or that the ship must be lying beside it. If the latter is the correct construction, the respondent is out of Court, for the godown in question is quarter of a mile away from the quay. The Commissioner preferred the former, which he thought to be the more logical of the two. I should myself have thought that the more logical construction is that which avoids the anomaly above referred to, and to say that the Act means that loading begins where unloading ends, by the side of the ship. That is, I think, the intention of the clause. It enumerates a number of loading and unloading places. All eight of them are places where the operation of unloading is carried out directly from the ship. The first six of them are places from which the operation of loading is carried out directly on to the ship. The most natural construction, in my judgment, is to hold that the last two—warehouses and sheds—are intended to be similarly situated, in juxtaposition to the ship. If it is to be held that the process of loading can begin at a warehouse at a distance from the ship, I can see no limit to the distance. In this instance, it is quarter of a mile, but the respondent might have been handling these bales in a godown at Chingleput, 36 miles away, preparatory to their being put on to carts to be driven to the quayside and I do not see how, on the construction adopted by the Commissioner, he could have been denied the benefit of the Act. In *Grant & Co. v. Coverdale, Todd & Co.*(1), Lord WATSON said that he was not prepared to assent

(1) ('884) 9 A C., 470.

to a construction "which would imply that the word 'loading' had as many different meanings as there were merchants or manufacturers of iron in Cardiff who happened to select different localities in order to store their iron for the purpose of shipment." He was, no doubt, considering the meaning of the word in relation to a charter-party, but I quote his observations in order to show the difficulties we shall be involved in, if we decide that a "warehouse" within the intention of clause V, can be a place, situated at a distance from a ship, where goods are stored for the purpose of shipment. If the Legislature desires to protect all workmen employed in such places—and it is conceded that, even on the Commissioner's construction, only some of them,—those employed for the purpose of handling goods for shipment by sea, are at present protected,—that can easily be done by notifying under sub-section (3) of section 2 of the Act that their occupation is hazardous.

BEASLEY, J.—I agree.

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WALLACE, J.—This case comes before this Bench in the matter of the judgment of this Court in a Second Appeal. There was a disagreement in the judgment of this Court in S.A. No. 1328 of 1924 between two learned Judges of this Court, Mr. Justice DEVADOSS and Mr. Justice JACKSON. The appellant's appeal stood dismissed on this difference of opinion and he has put in this Letters Patent Appeal.

The sole question for decision is whether Exhibit C, which was an application for attachment of an amount in the trial Court put in by the plaintiff, the appellant herein, is a sufficient application to that Court for the execution of a decree within the meaning of section 73 of the Code of Civil Procedure. The sum which he attached was the proceeds of a sale under an attachment before judgment by the defendant to this suit. The plaintiff himself obtained his decree on 16th June 1922, and on the 30th June following, he put in the application, Exhibit C, asking for an order of attachment and an order was passed attaching the fund which had been paid into Court to the credit of the defendant's suit. There were admittedly certain defects in the application, Exhibit C, a lack of certain particulars which are required under Order XXI, rule 11 for a proper formal execution application under that rule. But what we are concerned with is not so much whether that application conforms to the provisions of Order XXI, rule 11, but whether it is for practical purposes and for the purpose of section 73 a sufficient application for the execution of a decree. Mr. Justice DEVADOSS held in favour of the appellant that the application was sufficient for that purpose. Mr. Justice JACKSON, impressed by the want of particulars required by Order XXI, rule 11, has held that the application could

not be treated as a proper application for the execution of a decree for the purpose even of section 73. Now the executing Court itself, although it treated Exhibit C as an interlocutory application in the suit, did as a matter of fact issue an attachment by its order upon the petition. That is, it did in fact treat it as an effective execution application for the execution of the plaintiff's decree. It did not consider the lack of particulars as calling for any amendment, alteration or correction, and did not return the petition for supply of those particulars; it admitted the petition, accepted it and issued attachment. On these facts we think that the more correct view to take is the view taken by Mr. Justice DEVADOSS that the petition, although defective in form is in substance sufficient for the purpose of an application under section 73. The purpose of that section obviously is that there should be an equitable distribution of assets between those creditors who have been diligent enough to obtain decrees and put in execution applications before the time such assets have been received, and we must in this case look rather to the substance than to the form of the application in order to administer the equity which the law provides. Agreeing, therefore, with the view of Mr. Justice DEVADOSS, we allow this appeal. The decree of the lower Court is set aside and the District Munsif will pass a decree in conformity with the provisions of section 73. The plaintiff will receive proportionate costs before the Second Appellate Bench and in the lower Courts. In this Letters Patent Appeal, as the other side has not appeared before us, the plaintiff will bear his own costs.

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APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Reilly.

1929,
February 1.

THE CORPORATION OF MADRAS (DEPENDANT),
APPELLANT,

v.

MESSRS. SPENCER & Co., LTD., MOUNT ROAD,
MADRAS (PLAINTIFF), RESPONDENT.*

The Madras City Municipal Act (IV of 1919), sec. 287—If licence fee could be imposed under, for purposes of taxation—If must be reasonable—Fixing amount of fee—If Court can assume power conferred on Corporation—Licence fee for storing foreign liquor raised from Rs. 25 to Rs. 200—Expenses of supervising practically nil—Enhanced fee if unreasonable.

A licence fee imposed by the Corporation of Madras under section 287 of the Madras City Municipal Act cannot be imposed for the purpose of taxation. It must be a reasonable fee. The Court will not take upon itself the power conferred by statute on the Corporation to fix the amount of the fee.

Where the Corporation of Madras raised the licence fee for storing foreign liquor from Rs. 25 to Rs. 200, and it appeared on the evidence that the expenses of supervising the places where the foreign liquor was stored, were practically nil, held, that the levy of the enhanced fee was unreasonable.

Kruse v. Johnson, [1898] 2 Q.B., 91; *Municipal Corporation of Rangoon v. The Soorattee Bara Bazaar Co., Ltd.* (1927) I.L.R., 5 Rang., 212, followed; *Institute of Patent Agents v. Lockwood*, [1894] A.C., 347, referred to.

ON APPEAL from the Judgment of Mr. Justice BEASLEY, dated the 15th day of April 1928, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S.No. 197 of 1927.

The plaintiff company stored spirits at a number of places in the City of Madras. By section 287 of the Madras City

Municipal Act, it is provided that (1) the owner or occupier of every place used for any purpose specified in Schedule VI shall in the first month of every year or, in the case of a place to be newly opened, before it is opened, apply to the Commissioner for a licence for the use of such place for such purpose; (2) the Commissioner may by an order and under such restrictions and regulations as he thinks fit grant or refuse to grant such licences; and (3) no person shall otherwise than in conformity with such a licence, use any place for such purpose. One of the purposes set out in Schedule VI is the storing of spirits. Previous to the 15th December 1925, the licence fee was Rs. 25, but on the 15th December a resolution was carried at a meeting of the Corporation whereby the licence fee was raised to Rs. 150 and on the 9th March 1926 at a General Meeting of the Council, a resolution that the licence fee should be enhanced from Rs. 150 to Rs. 200 was carried, and a licence fee of Rs. 200 was imposed in respect of every place in which spirits were stored by the plaintiff company. The plaintiff company repudiated their liability, but paid the fee under protest, and filed a suit for the recovery of the amount collected from them. The learned trial Judge held "that the plaintiffs are not entitled to a declaration that they are not liable to pay any licence fee but they are entitled to a declaration that the licence fee of Rs. 200 in respect of each of their premises is unreasonable and unauthorized taxation, and they are therefore liable only to pay a licence fee of Rs. 25, which is the sum which on the evidence I consider is amply sufficient to cover all the duties performed and the expenses incurred by the defendant-Corporation with respect to these licensed premises and other premises in respect of which similar licences have been granted."

S. Rangaswami Ayyangar for appellant.—There is no distinction between a tax and a licence fee, in Indian Municipal Acts, and there is no restriction on a local authority prohibiting the exercise of the power to levy a licence fee for the purpose of raising revenue. The intention of the legislature as gathered from the successive enactments relating to the Corporation of Madras has been to gradually do away with the limitations on the exercise of such a power, and under the Act now in force the power is absolute. Section 110: companies tax is treated as a licence fee and is payable in addition to any other licence fee that may be leviable. Section 111 deals similarly with profession tax. Section 130: tolls are not levied on vehicles licensed or registered. Section

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139: all moneys received by the Corporation constitute the Municipal fund, and that includes fees levied under section 365. The levy is neither under part III nor part IV, but under part VI which deals with procedure and miscellaneous matters.

A Court of law is not competent to go into the reasonableness or otherwise of the levy. If in any particular case the fee is said to be unreasonable, the Corporation alone can give relief. See *Institute of Patent Agents v. Lockwood*(1), observations of Lord Herschell, pp. 353-355. As to what is reasonable or unreasonable, See *Kruse v. Johnson*(2). The expenses connected with each trade cannot be separately ascertained and the licence fee cannot be based upon expenses relating to each trade separately. The amount of the fee is in the discretion of the licensing authority, Dillon's Law of Municipal Corporation, Vol. II, p. 1021.

The increase in this case may be sudden, but having regard to the entire expenditure incurred in connection with the licensing department, and the fee levied in other cities such as Calcutta, the present assessment cannot be said to be unreasonably high.

Vere Mockett (O. T. Govindan Nambiar with him) for respondent.—The Rangoon case, *Municipal Corporation of Rangoon v. The Sooratee Bara Bazaar Co., Ltd.*(3) decides both that a Court of law has jurisdiction to go into this matter and that the licence fee levied should bear some reasonable relation to the work involved in supervising the licensed premises. In the present case the power conferred on the local authority has been most unreasonably exercised. The fee was increased from Rs. 25 to Rs. 200 in the course of three months. There has been no increase in the work of supervising. The present levy is manifestly unjust and partial throwing an unduly heavy burden on one class of trade.

JUDGMENT.

PHILLIPS, J. —The only question for determination in this appeal is whether the action of the appellant, the Madras Corporation, in raising the licence fee for storing spirits from Rs. 25 to Rs. 200 was within its

powers. BEASLEY, J., who tried the case has held that the increase in the fee is unreasonable within the meaning of the term as defined by Lord Russell, C.J., in *Kruse v. Johnson*(1), and has directed refund to the plaintiffs, Messrs. Spencer & Co., of the excess amount paid by them. Mr. Rangaswami Ayyangar for the appellant now takes exception to this finding and says that the power to levy fees for licences under the Madras Act IV of 1919 is conferred on the Council and it is within their power to fix the fee at any figure they please. He contends that if they fixed it at a figure too high or too low, the tax-payer has two remedies, (1) by exercising pressure on the member of the Corporation for his ward with a view to getting the figures altered, and (2) the correction of its own mistake by the Council; but he was not at first prepared to accept the dictum in *Kruse v. Johnson*(1), that the Court has power to interfere with by-laws which are unreasonable. The definition given of "unreasonable" at page 99 of the report of that case is as follows:—

"If, for instance, they (i.e., the by-laws) were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men. . . ."

Appellant's contention in the first place is, that the fees fixed for licences for what are called dangerous and offensive trades which are leviable under the provisions of the Act are revenue in the same sense as the taxes which the Council is empowered to levy. When there is a question of what is the power of taxation conferred by Government on a public body, a very careful scrutiny is necessary to see that only powers specially conferred

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(1) [1894] A.O., 347.

(2) [1898] 2 Q.B., 91 at 100.

(3) (1927) I.L.R., 5 Rang., 212.

(1) [1898] 2 Q.B., 91.

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are exercised and that nothing further is added to them. In Part III of the Act which purports to deal with Taxation and Finance, Chapter V deals with Taxation, and enumerates the several taxes which the Council is empowered to levy. Licences are dealt with in Part IV of the Act and are leviable under section 287. The power to levy fees for licences is given in the chapter on Procedure. There can be little doubt that there is a great difference between taxes and licence fees. The fact that in sections 110 and 111 the levying of taxes is authorized but is stated to be by way of licence fee does to some extent support the argument that taxes and licence fees have something in common, but that a tax is not the same as a licence fee, is clear from the fact that no permission has to be obtained before the tax becomes payable and the tax is not paid for such permission, whereas the licence fee is payable in respect of a permission which is granted by the Corporation. I must confess that the words "by way of licence fee" in sections 110 and 111 are not very intelligible to me and I cannot think that the sections would be affected in any way by the omission of these words. Presumably the Legislature intended to attach some meaning to these words, but nothing has been suggested in the course of these proceedings in explanation of the meaning. Whatever may be the meaning, I am satisfied that taxes cannot be treated as being in the same category as licence fees under the Act. The argument, therefore, that, when the Corporation is empowered to levy licence fees, it may do so solely for the purpose of revenue does not seem to me to be tenable. BEASLEY, J., has held that fees are leviable as compensation to the Corporation for the expenses incurred in the issue of licences and the general regulation of the trades and other occupations which are licensed and that there must be some relation between

these expenses and the amount of fees leviable. This was the view which was adopted by the Rangoon High Court in *Municipal Corporation of Rangoon v. The Sooratee Bara Bazaar Co., Ltd.*(1). With all respect, I think this is a very reasonable view to take, and, although possibly the above is not the sole consideration which may be taken into account in fixing the amount of fee, it is the main consideration. The licence fees are in respect of what are called dangerous and offensive trades, that is to say, it is necessary in the interests of the City that the Corporation shall know where such trades are being carried on, and shall be in a position to see that they are carried on in a proper manner without causing unnecessary nuisance to other people or danger to the public generally. That being so, it is clear that the Corporation must have power to raise money for the exercise of these powers, but it does not follow that the Corporation has the power to levy any sum it likes by way of licence fee in order to raise the revenue, and in fact it is conceded by Mr. Ranga-swami Ayyangar that there must be some limit to the fee which can be imposed; but he is not prepared to suggest what that limit will be. If there is such a limit, there is good reason for holding in accordance with the principle of *Kruse v. Johnson*(2) that, if the fee is unreasonable within the meaning of Lord Russell's definition in that case, the Court has power to interfere with its levy. We have been referred to another case, *Institute of Patent Agents v. Lockwood*(3), in which Lord HERSHELL, when dealing with the rules framed by the Board of Trade under the Patents, Designs, and Trade Marks Act, 1888, which fixed a certain fee, in the course of his judgment observed, at page 355,

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(1) (1927) I.L.R., 5 Rang., 212.

(2) [1898] 2 Q.B., 91.

(3) [1894] A.C., 847.

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"I confess that it seems to me, if there were any power to impose fees at all, very difficult indeed to arrive at the conclusion, when the Board of Trade have sanctioned a particular fee, that it is within the province of a Court of law to canvass their conclusion, and to determine what is the legitimate amount at which the fee may be fixed."

If that remark is applicable to the present circumstances, it would follow that, as the Council has power to fix the fee, it is not within the province of this Court to interfere, but there is a subsequent remark at page 357, namely,

"I will say one word, however, before leaving this part of the subject, upon the point suggested, that they involved something harsh or unfair as regards the respondent. . . ."

It is not unreasonable to interpret that as showing that the learned Judge had the principle laid down in *Kruse v. Johnson*(1) in his mind, namely, that if there was something harsh or unfair in the rules, it may be that the Court will interfere. The case is certainly no authority to the contrary and was not even cited in *Kruse v. Johnson*.(1). The question, therefore, before us is whether BEASLEY, J., was right in holding that the levy of this fee was unreasonable. Apparently from 1904 to 1924 the fee of Rs. 25 was fixed as the fee for storing spirits. Until that date, the word "spirits" was interpreted as denatured spirits and the fee was levied for the storage of such spirits. In 1924 and 1925, the licence in its present form was granted for a fee of Rs. 25. At the end of 1925, a proposal was made to raise it, and we have the minutes of the proceedings of the Council from the 15th of December 1925 to 9th of March 1926 when the Council finally fixed the fee at Rs. 200, changing the nature of the licence to one for arrack and for foreign liquors containing alcohol. From the notes of the then Commissioner, it would appear that the Corporation

(1) [1898] 2 Q.B., 91.

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resented the action of Government in collecting the abkārī revenue within the City and in not allowing the Corporation to utilize such revenue for themselves. As compensation, the Government were paying a fixed sum annually to the Corporation. The Commissioner suggested that, as the Government insisted on the old conditions being adhered to, the power to levy a fee for storing spirits should be fully exploited and raised. Accordingly, the fee was raised from Rs. 25 to Rs. 200. Can it be said that this alteration was made reasonably? Taking it that the fee income must be more or less proportionate to the trouble and expense incurred by the Corporation in issuing licences and in controlling trades and other matters for which licences are issued, the reason at the bottom of the resolution of the Council is clearly not in accordance with the spirit of the Act. The fee was not raised because of the expense of collection or regulation, but was merely a counter demonstration to the order of Government refusing to allow the Corporation to take the abkārī revenue of the City. The result of this increase of fee has undoubtedly been to impose on the persons who store such liquor a very unfair burden as compared with other tax-payers in the City. From the evidence which has been adduced, it would appear that the expenses of supervising the places where foreign liquor is stored are practically nil. The site is inspected when the licence is originally granted and, so far as the evidence goes, no further action appears to be taken. If we compare the fee for this licence with the fees for other matters which entail much greater expense and trouble on the Corporation, such as fees for stables, dairies and storing skins and explosives, we find that the fee for storing spirits is by far the highest, although those other matters entail much greater trouble and are more dangerous and offensive to the general public. The

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fee for other licences was not raised at the same time, and consequently it is impossible to hold that there was justification for raising the fee for a licence for storing spirits by 800 per cent. It was certainly not done with a view to pay for the expenses in connection with such licences, but was obviously done to increase the revenue of the Corporation from liquor, thereby replacing the abkārī revenue taken by Government. This being so, I must find that BRASLEY, J., was amply justified in finding that the levy of the enhanced fee was unreasonable.

While holding that the enhanced licence fee is unreasonable, the learned Judge has in his decree ordered that "the plaintiffs are therefore liable only to pay a licence fee of rupees twenty-five (Rs. 25) which sum is amply sufficient to cover all the duties performed and the expenses incurred by the defendant-Corporation with respect to those licensed premises and other premises in respect of which licences have been granted." While agreeing with him that the enhanced fee is excessive, I do not think that the Court is justified in taking upon itself the power conferred by the Act upon the Council, namely, the fixing of the amount of fees. In this case the omission to fix the fee for a licence will make no difference in the substance of the decree, for the fee which was formerly leviable was Rs. 25 and this figure must be restored, as the resolution for its enhancement is invalid, and the plaintiffs are therefore entitled to the refund of the balance of Rs. 175. The words of the decree quoted above should therefore be removed, but the decree is in other respects confirmed.

A somewhat surprising argument has also been advanced on the question of costs. The learned Judge has passed the usual order that costs should follow the

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result, and the circumstances would have to be exceptional to justify our interference with the order. Not only must we be of opinion that there were circumstances which justified a departure from the usual order as to costs, but we must be further satisfied that those circumstances were so exceptional that the learned Judge cannot have exercised his discretion judicially in ignoring them. That is far from being the case here, and this ground of appeal must be rejected.

The appeal is accordingly dismissed with costs.

REILLY, J.—I agree with the finding of the learned Judge on the Original Side that the power given by the Madras City Municipal Act to the Council to levy licence fees cannot be used as a power of taxation. The Act clearly provides in Part III for taxation, and lays down what taxes the Corporation may levy. Then the Act goes on to an entirely different part, Part IV, which is headed "Public Health, Safety and Convenience." In that Part, there are provisions to the effect that no person shall carry on certain trades or occupations or use any premises for certain purposes, without getting a licence from the Commissioner. The section in that Part, with which we are particularly concerned, is section 287, which provides that no person shall use any place for any of the specified purposes, without getting the permission of the Commissioner in the form of a licence. A person who wishes to use his premises for such purposes has to apply for a licence. The Commissioner may grant, or refuse to grant, such a licence. If he grants it, he may fix any conditions or restrictions which he thinks necessary. There is nothing whatever in this section about a person who wishes to use his premises for such a purpose being taxed, or his occupation or his premises being taxed. He has under those provisions to get a licence. When

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we come to the end of the Act, there is another part headed "Procedure and Miscellaneous." Section 365, at the beginning of that part, sets out that every licence or permission must be signed by the Commissioner and must specify the restrictions, if any, which are imposed by the Commissioner. Then sub-section (2) goes on to say "For every such licence or permission, fees may be charged at such rate as may be sanctioned by the Council." It is suggested that the fixing of fees for these licences may be used by the Council as a method of taxation. Surely, if that was intended, that power would have been provided for in the part of the Act which deals with taxation. What could be the reason for bringing it in as a mere matter of procedure at the end of the Act? Mr. Rangaswami Ayyangar for the Corporation has suggested that, because in the sections which deal with taxation one or two of them refer to the method of collecting taxes as "by way of licence fees," therefore we must hold that there is no distinction between licence fees and taxes. I can see no sufficient reason in the rather loose language which is used in those sections about the means of collecting taxes, to lead us to hold that under the Act it is intended that there should be no distinction between licence fees and taxes. I do not think that the matter really admits of any doubt. But, if there were any doubt about the meaning of section 365 (2), if it were possible to read that sub-section in two ways—in one way as empowering the Council to impose taxes on persons who apply for licences, and in another way as empowering them only to require those persons to pay fees—then under the ordinary principle of construction, when we are dealing with a statute which imposes or which it is contended imposes any liability on a subject or citizen to taxation, it would be imperative upon us to adopt the construction

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most favourable to the subject or citizen. But I do not think it is necessary to call that principle of construction to our aid in this case. I cannot imagine that the Legislature, when providing for licence fees under the heading "Procedure" and omitting them from the provisions regarding taxation, ever intended them to be treated in any way as taxes.

If the power to levy these fees cannot be used for taxation, it is admitted that the Council has not the power to fix any arbitrary fee which it chooses. Mr. Rangaswami Ayyangar has admitted that there must be some limit to its power and that the fees must be reasonable. He has rightly contended that in interpreting the word "reasonable" in this connection we must give it a wide and liberal interpretation. And I quite agree with his contention that, when such a question comes before a Court, it is not for the Judge to try minutely to assess what is the proper fee; nor is it for the Judge to substitute his judgment in the matter for that of the public body to which the Legislature has entrusted it. But I think there are two principles which we may use to determine whether the fees fixed by a Municipal Corporation with powers such as these can be held to be reasonable or not. If we accept the proposition that the power of charging licence fees cannot be used for taxation, then we must say that as a whole the fees charged by the Corporation must not be very much in excess of what the duties cast upon them and their staff in connection with the licences cost them. There is the cost of issuing the licences; there is the cost of inspecting the premises to see whether they are suitable for the purpose proposed; and there is the subsequent cost of inspecting the premises to see that they are being used properly and that the conditions and restrictions imposed by the Commissioner are

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observed. But, roughly speaking, if the fees are charged at so high a rate that as a whole they bring in very much more than the cost of these operations to the Corporation, then I think we can rightly say that they are unreasonable. There is another principle. Although it is almost impossible for the Corporation itself to ascertain, when they are issuing a number of licences to persons engaged in different trades and occupations, exactly what is the cost of any particular licence or of licences for persons engaged in particular trades or occupations—and certainly we could not attempt anything of that sort—yet, surely it would be unreasonable if they so fixed the fees that the whole cost incurred by them in connection with all the licences or a grossly disproportionate part of it was imposed on one particular trade or a few particular trades. These principles, I think, may be of help in ascertaining whether a particular fee is reasonable or not. Mr. Rangaswami Ayyangar referred us to the case of *Kruse v. Johnson*(1) and asked us to accept the view of what is reasonable and unreasonable taken by Lord RUSSELL, C.J., in that case. That I am very willing to do. But we must remember that Lord RUSSELL in that case said that a by-law which was partial or unequal in its operation would be unreasonable; and in the same way I think we can properly say that a licence fee, if it was imposed partially or in a way which would make it unequal in operation, would also be unreasonable.

Mr. Rangaswami Ayyangar has tried to tell us how much the issue of these licences is costing the Corporation a year, and he has put before us some calculations which show that the total cost of the licensing operations is about Rs. 95,000 a year. I cannot say that I am entirely satisfied with the way in which he has arrived at that result. It appears to me that some parts

(1) [1898] 2 Q.B., 91.

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of his calculations require a good deal of clearing up. But let us assume that his figures are correct. He has also told us that the total amount collected for these licences is about Rs. 90,000 a year. If these figures are correct, the Corporation is collecting about Rs. 5,000 less than what the licensing operations cost them. If that is so, it would be very reasonable or them to increase their licence fees so as to cover the deficit. How they should increase them is not for us to determine. One obvious method would be an all-round increase of licence fees so as to cover the deficit. Another method would be to find out whether some licence fees are clearly too low and to raise them. But what has the Corporation done in this case? From the schedule with which Mr. Rangaswami Ayyangar has provided us, it appears that there are over a hundred different classes of occupations and trades for which people have to apply for licences. They have selected the one with which we are concerned—the storing of spirits. The fee for storing spirits, before the change with which we are concerned was made, was Rs. 25 a year. The storing of spirits is obviously not a very dangerous thing. It is not a thing which is offensive to the physical senses of persons in the neighbourhood. And the evidence shows that the Corporation and its staff spend practically no time or effort on inspecting places where spirits are stored. For that kind of licence one would expect to find a very moderate fee charged. Perhaps it may be said that Rs. 25 was a moderate fee. But they determined to raise it; and they proceeded to raise it eight times, to Rs. 200. That I find is double the amount charged for storing any other thing, however dangerous or offensive, in this town. It is four times what is charged for licensing places for storing such dangerous things as nitro-glycerine,

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fulminate of mercury and other explosives. It is many times the fee charged for storing fire-works. On the calculations which Mr. Rangaswami Ayyangar has made, it appears that, before this change in the rate of fee, about 1/48 of the whole cost of the licensing operations was collected from the persons who had to obtain licences for storing spirits; after the change, about one-sixth of the whole cost of the licensing operations is collected from them. We are informed that there are only 72 of these particular licences. I find from the schedule with which we have been provided that more than 6,700 licences are issued for trades, businesses and occupations. But 72 of them are made to pay about one-sixth of the cost of the whole licensing operations. I think that, when these facts are stated, no one could really contend that the fee fixed, Rs. 200, is in any sense of the word a reasonable one. That being so, the Council had no power to fix the fee at so high a figure. They appear to have done it with the intention of using their power as a power of taxation; and I may add that they appear to have used their power for improper discrimination.

I therefore agree that there is no sufficient reason for us to interfere with the decree of the learned Judge that the excess over Rs. 25 for each of these licences must be refunded to the plaintiffs. I agree also that the learned Judge went too far when he attempted to decide for the present or for the future what is the reasonable fee which the Council should fix. That I think is a matter for them; and therefore I agree that the words quoted from the decree by my learned brother should be struck out. With that modification, I agree that this appeal must be dismissed with costs.

Short, Bewes & Co.—Attorneys for respondent.

B.C.S.

APPELLATE CIVIL.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice and
Mr. Justice Anantakrishna Ayyar.*

THE MUNICIPAL COUNCIL, CUDDAPAH
(DEFENDANT), APPELLANT,

1929,
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v.

THE MADRAS AND SOUTHERN MAHRATTA
RAILWAY COMPANY, LIMITED
(PLAINTIFF), RESPONDENT.*

*The Madras District Municipalities Act (V of 1920), sec. 81—
Property tax—If railway administration liable to, in absence
of notification under sec. 135, Indian Railways Act (IX of
1890)—Notification empowering local authority functioning
under Madras Act IV of 1884 to levy taxes in respect of
“Houses, land and water”—If will entitle to imposition
of “property tax,” under Madras Act V of 1920.*

A notification of the Government of India issued under section 135 of the Indian Railways Act, empowering a local authority, functioning under the Madras District Municipalities Act (IV of 1884), to levy taxes in respect of “Houses, land and water,” will not entitle that local authority, functioning under the Madras District Municipalities Act (V of 1920), which repealed the earlier enactment, to impose “Property tax” under section 81 of the later enactment, as the taxes in respect of which the notification was issued are substantially different from the “property tax” mentioned in Act V of 1920.

APPEAL against the decree and judgment of Mr. Justice SRINIVASA AYYANGAR passed in the exercise of the Extraordinary Original Civil Jurisdiction of the High Court in C.S. No. 123 of 1925.

The facts necessary for this report appear in the Judgment.

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The relevant portion of section 135 of the Indian Railways Act (IX of 1890) is as follows :—

Notwithstanding anything to the contrary in any enactment or in any agreement or award based on any enactment the following rules shall regulate the levy of taxes in respect of railways and from railway administrations in aid of the funds of local authorities, namely :—

(1) A railway administration shall not be liable to pay any tax in aid of the funds of any local authority unless the Governor-General in Council has, by notification in the Official Gazette, declared the railway administration to be liable to pay the tax.

C. Sambasiva Rao for appellant.—The notification of the 24th November 1911 authorizes the defendant-municipality to levy on the railway administration “Houses, land, and water-taxes.” Under section 81 of the Madras District Municipalities Act “property tax” is leviable in respect of land, which is one of the items mentioned in the notification of 1911. The tax in question was therefore clearly authorized. Even if it is argued that the notification of 1911 did not authorize the levy, I can rely on the prior notification of the Government of India issued in November 1907 under which every railway administration was made liable to pay any legal imposition of tax in respect of land within any local area. The terms of that notification are very wide.

R. N. Aingar for respondents.—Under section 135 of the Railways Act no tax can be levied by a local authority in aid of their funds unless authorized by a notification of the Government of India. In this case there is no notification authorizing the levy of “property-tax.” “Property-tax” cannot be said to be identical with or covered by “houses, land and water-taxes.” The incidence as well as the scale of levy vary. The appellant is not entitled to rely on the notification of 1907 because the notification of 1911 in terms supersedes all earlier notifications.

JUDGMENT.

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TROTTER, C.J.

COUTTS TROTTER, C.J.—Under section 135 of the Indian Railways Act, IX of 1890, it is laid down that a Railway administration shall not be liable to pay any tax in aid of the funds of any local authority unless the

Governor-General in Council has, by notification in the Official Gazette, declared the Railway administration to be liable to pay the tax. This tax is sought to be imposed by virtue of Act V of 1920, the District Municipalities Act, whereby Municipal Councils are entitled to levy property tax under section 81. In fact no notification has been issued by the Government of India since Madras Act V of 1920 came into force and the Municipal Council can only rely upon a notification of the 24th November 1911 which was issued under the previous Act. It is said that the new section of the Act of 1920 amounts to no more than a compressing into one category of what under the old Act had fallen under three. To my mind that argument is unsound. Taxing statutes are to be construed strictly and the argument appears to me to violate all recognized principles of statutory construction. That is enough to dispose of this case. That is the conclusion that the learned Judge came to, and we think that his judgment should be confirmed, and the appeal dismissed with costs.

But it is obvious that a wider question is in the offing, and though it is not necessary for the decision of this case, I think I ought to indicate it, in the hope that a consideration of it may avoid future difficulties. In the notification of 1911, the taxes which the Railway administration was declared liable to pay were defined generally as house, land and water tax, in the schedule to that notification. I entertain very great doubts as to whether a notification in such terms is *intra vires* of the statute. What an assessee wishes to know is, not so much what is the nature of the tax and to what subject-matter it applies, as his liability to pay under the section of the District Municipalities Act in force at the time, in other words, he is not greatly interested whether he is

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paying a tax on land or in respect of the supply of water, but he is vitally interested to know how much he is called upon to pay, and that depends upon the particular section applicable of the District Municipalities Act. I am strongly inclined to think that the notification required should not be in mere general terms specifying the nature of the tax which leaves the Municipality free to impose a tax of any amount they choose, provided it falls into the class specified by the notification. However, this case can be decided on the narrower ground I have indicated in the first part of this judgment, and it is not necessary to base it on the wider one that the mere notification of categories of taxation sanctioned without specific reference to the section of the District Municipalities Act which purports to impose such a tax is *ultra vires* of the Government of India. But I think it is a point which the Government of India should carefully consider, and, if necessary, rectify in future notifications.

ANANTA-
KRISHNA
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ANANTAKRISHNA AYYAR, J.—The Municipal Council, Cuddapah, is the appellant in this appeal. The Municipal Council assessed the Madras and Southern Mahratta Railway Company to property tax in respect of certain vacant sites belonging to the Railway Company. After paying the amount of the tax under protest, the company filed Original Suit No. 615 of 1924 on the file of the District Munsif's Court, Cuddapah, for a declaration that the assessment was illegal and for refund of the amount of the tax with interest. The suit was transferred, and withdrawn, to the file of the High Court, and the learned Judge who tried the suit on the Original Side of this Court granted the reliefs prayed for by the plaintiff company.

The ground on which the learned Judge held in favour of the plaintiff is that no proper notification has

been issued by the Government of India under the Railways Act, making the Railway Company liable to pay the property tax claimed by the Municipal Council. To appreciate the dispute between the parties, it is necessary to state that under section 135 of the Indian Railways Act (IX of 1890), etc. [his Lordship here quoted the relevant portion of the section].

It is common ground that on 29th of November 1907 a notification was issued by the Government of India under section 135 of the Indian Railways Act. But on the 24th of November 1911, Notification Number 230 was issued by the Government of India, Railway Department, in these terms:—

“ In pursuance of section 135 of the Indian Railways Act, 1890 (IX of 1890) and in supersession of all previous notifications on the subject, the Governor-General in Council is pleased to declare that the administration of the Madras and Southern Mahratta Railway shall be liable to pay in aid of the funds of the local authorities set out in the schedules hereto annexed, the taxes specified against each in the second column thereof.

Schedule.

Local authorities.		Taxes.	
Cuddapah	...	House, land and water taxes.	

(Signed) VOLKERS,
Secretary, Railway Board

On the date of the above notification, Madras District Municipalities Act (IV of 1884) was in force in this Presidency. Under that Act, the Municipal Council had authority to levy tax on buildings or lands or both, under section 63, and also levy water-tax under section 75. Act IV of 1884 has since been repealed by Madras Act V of 1920. Under Act V of 1920, Municipal Councils have got authority to levy property tax under section 81. That section enacts that property

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tax which shall be levied at a consolidated rate on all buildings and lands, shall comprise a tax for general purposes and may also comprise:—

- (a) Water and drainage tax.
- (b) Lighting tax.
- (c) A railway tax.

No notification has been issued by the Government of India after Madras Act V of 1920 came into force. The question for consideration is whether the Municipal Council, Cuddapah, is entitled to levy "property tax" in respect of vacant sites of the Railway Company by virtue of the notification issued by the Government of India in 1911 quoted above. The learned trial Judge has answered the question in the negative, and in my opinion, he is right.

It was argued by the learned Counsel who appeared for the Municipal Council that the notification of 1911 should be taken to authorize the Municipal Council to levy what is mentioned as property tax in section 81 of the District Municipalities Act of 1920 in respect of lands. He argued that the property tax mentioned in section 81 was to be levied on all buildings and lands within municipal limits and that the same shall comprise a tax for general purposes and may also comprise a water and drainage tax, and that as under the notification the levy of house, land and water taxes was authorized, property tax also should be taken to have been authorized in so far as tax on lands is concerned. I am unable to agree with that contention. Section 135 of the Indian Railways Act makes it clear that a railway administration is not liable to pay any tax in aid of the funds of any local authority, unless the Governor-General in Council has by notification in the official gazette declared the railway administration to

be liable to pay *the* tax. When therefore a Municipal Council seeks to make a railway administration liable for any tax, it should be able to produce a notification by the Government of India declaring the railway administration to be liable to pay that tax. What is now sought to be levied, is "property tax." The Municipal Council should produce a notification by the Government of India declaring the railway administration to be liable to pay the "property tax." It is not enough if the Council is able to produce a notification declaring the railway administration liable to pay "house, land and water taxes." The two are substantially different. Under section 63 of the Municipal Act of 1884, there was a limit to the rate at which taxes on buildings and lands could be levied, namely, $8\frac{1}{2}$ per cent on the annual value of the buildings or lands or both. Under Act V of 1920 there is no such limit, and what is called the "property tax" in section 81 comprises many things which could not be held to come under "house, land and water taxes." Taxing enactments should be strictly construed and the right to tax should be clearly established. Conditions precedent to the imposition of any tax should be strictly complied with. In the absence of any notification by the Government of India declaring the railway administration to be liable to pay "property tax", I think the learned Judge was right in his view that the Municipal Council had no right to levy tax in respect of vacant sites owned by the Railway Company in question. The policy of the Legislature would seem to be to reserve to the Governor-General in Council the right to decide what taxes railway administrations are to be made liable for and to what extent. The Governor-General in Council had no occasion to consider whether the railway administration in question should pay "the property tax" mentioned in section 81

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of Act V of 1920. The taxes in respect of which the notification was issued in 1911 are in my opinion substantially different from the "property tax" mentioned in section 81 of Act V of 1920. The rates are different and the incidence also different. Therefore the notification of 1911 would not, in my opinion, be of any avail to the Municipal Council.

It was further argued by the learned Counsel for the appellant that there was a prior notification by the Government of India on 29th November 1907 under which the Governor-General in Council was "pleased to declare that every railway administration in British India shall hereafter be liable to pay in respect of property within any local area, every tax which may lawfully be imposed by any local authority in aid of its funds, under any law for the time being in force." He argued that the words of that notification were wide enough to include any tax which may be imposed by a Municipal Council under any Act. But I think it is enough to say in answer to this contention that the notification of 1907 ceased to exist when the notification of 1911 was issued. For the notification of 1911 specifically says that the same was issued "in supersession" of all previous notifications on the subject. Its wording is: "in pursuance of section 135 of the Indian Railways Act IX of 1890 and in supersession of all previous notifications on the subject, the Governor-General in Council is pleased to declare, etc." Thus it is clear that the notification of 1907 ceased to be in force after 1911 and that the same could not be invoked by the Municipal Council for the levy of any tax in 1924. I do not therefore consider it necessary to examine whether the notification of 1907 is open to any other legal objection,

The argument of the learned Counsel for the appellant regarding the notification of 1907 therefore fails.

For the above reasons, I think the appeal fails and is dismissed with costs.

King & Partridge—Attorneys for respondent.

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APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice Wallace.

VENKATASOMARAJU AND 3 OTHERS (PLAINTIFFS),
APPELLANTS,

1929,
January 25.

v.

VARAHALARAJU AND 21 OTHERS (DEFENDANTS),
RESPONDENTS.*

Art. 47, Limitation Act (IX of 1908)—Sec. 145, Criminal Procedure Code (V of 1898)—Adverse order, under section, on Manager of joint Hindu family—Effect of, on the other members.

An adverse order passed with jurisdiction in proceedings under section 145, Criminal Procedure Code (V of 1898) against a father of a joint Hindu family in his capacity as the representative of the family, binds the other members of the family (viz., his sons), though they were not *eo nomine* parties to the proceedings. Hence a suit by the sons for possession of the properties concerned, brought more than three years after the adverse order, is barred under article 47 of the Indian Limitation Act (IX of 1908).

APPEAL against the decree of the District Court of Godavari at Rajahmundry in A.S. No. 63 of 1922

* Second Appeal No. 297 of 1925.

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preferred against the decree of the Court of the Subordinate Judge of Rajahmundry in O.S. No. 37 of 1920.

The facts and arguments are given in the judgment of ODGERS, J.

A. Krishnaswami Ayyar (with *V. Govindarajachari*) for appellant.

A. Satyanarayana for respondent.

JUDGMENT.

ODGERS, J.

ODGERS, J.—In this case the plaintiffs are the appellants. In September 1920, they brought this suit to recover possession with mesne profits of certain lands from the defendants. Plaintiffs' father bought the land in question from defendant 1, in 1911. Proceedings were taken in June 1915 against the plaintiffs' father under section 145, Criminal Procedure Code, when defendant 2 resisted his possession, in which the possession of the second defendant in the land was confirmed. The question is whether those proceedings bind the plaintiffs who are the undivided sons of their father Alluri Subbaraju who bought the property on behalf of the joint family. The importance of it is this, that if those proceedings do bind the present plaintiffs they are out of time with this suit, because it was instituted more than three years from the date of the final order in the case (Exhibit III) under section 145, Criminal Procedure Code. It is argued that this order does not bind the sons who were not parties to it and was made without jurisdiction. The order came up to this Court in Criminal Revision Case No. 205 of 1916 after the death of the father Alluri Subbaraju when first plaintiff asked to be brought on as legal representative of his father. In the then state of section 145, Criminal Procedure Code, this was impossible, but this

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Court held that this order was not made without jurisdiction. We are therefore bound by this decision as to this latter point. An order under section 145, Criminal Procedure Code, applies to anybody bound by such order or anyone claiming under such person. It is perfectly clear that the plaintiffs were aware of the proceedings, also that the property was acquired for the joint family and the plaintiffs' father was in possession as manager on their behalf. It is also plain that section 145, Criminal Procedure Code, is only a *quasi* criminal matter as it falls within the purview of Article 47 of the Limitation Act unlike most criminal proceedings. *In re Nathbhai*(1), held that all parties with actual notice of the proceedings under section 145 were bound by them. That has also been held here in Criminal Revision Case No. 87 of 1917. So that not merely the actual parties to, but all persons who may be concerned in, the dispute are parties with whom the Magistrate has to deal, the object being to prevent a breach of the peace. So it is not only the actual parties to the order but all parties with notice of the proceedings who are bound. In *Ram Sahai v. Binode Bihari Ghosh*(2), it is distinctly laid down that where the manager of a joint family has taken proceedings under section 145 as the managing member, he and the whole family are bound by the order under it. This seems to be in accordance with reason and common sense. There, therefore, seems no good reason why, having regard to the authorities cited, we should not hold that under the circumstances the plaintiffs were bound by notice of these proceedings under section 145. If all persons are so bound who have had actual notice, though not parties to the order, as laid down in *In re Nathbhai*(1), and followed in

(1) (1909) 11 Bom. L.R., 377.

(2) (1923) I.L.R., 45 All., 306.

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this Court as stated above, it stands to reason that these plaintiffs who admittedly had notice of the proceedings should also be bound. There is the additional reason that their father had acquired the properties as manager of the family on their behalf and it seems only reasonable that the other members of the family should be bound. The plaintiffs must then fail on this point of limitation and the Second Appeal must be dismissed on that point.

* * * *

In the result the second appeal is dismissed but without costs except as regards respondents 11 to 14 who will receive one set.

WALLACE, J.

WALLACE, J.—I agree and just wish to add my own view on the point whether the plaintiffs' suit is barred by Article 47 of the Indian Limitation Act.

The contention that it is not barred because the order under section 145 of the Criminal Procedure Code was passed without jurisdiction seems to me untenable in this Court in the face of the decision of this Court itself in previous proceedings that the order was with jurisdiction. The fact that the plaintiff was not a party to these proceedings and was not allowed to come on as a party cannot affect the jurisdiction of the order. Plaintiff then can only succeed in the face of Article 47, if he can show that he is not a person bound by the order under section 145 of the Criminal Procedure Code. His general argument is that, as a proceeding under section 145 is of the nature of a criminal proceeding, it can only bind the persons actually named therein, and that though Article 47 lays down that the limitation period shall apply also to persons claiming under those who were bound, he is not claiming under his father but in his own right as a member of the same joint family of which his father was the manager. On his argument, therefore, he is

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neither a person bound by the order nor a person claiming under one who is bound by the order. The latter part of his argument may be conceded; the former, in my view, cannot. Without going into the general question whether an order under section 145 of the Criminal Procedure is a *judgment in rem* and maintains a party found to be in possession as against all the world until he is ousted by an order of the Civil Court, I am clear that, where the manager of the joint family in his capacity as such is a party to the proceedings, the joint family as a whole is a party and the proceedings bind any member of the joint family in his capacity as such. The possession of the manager as such is the possession of the joint family, such possession as can in the nature of the circumstances be had. If eventually the Civil Court declared that the joint family is entitled to possession, the manager would retain for the joint family the possession given to him by the Criminal Court, while if the Civil Court declared the other party entitled to possession, the manager could not possibly resist the decree and claim to remain still in possession on his own individual behalf. The real party to the criminal proceedings in such a case obviously is the joint family and not the individual person who happens to be the manager. If the appellant's view is accepted, the usefulness of the proceedings under section 145 will be greatly curtailed. While these proceedings are *quasi* criminal, they are also *quasi* civil and there can be no legal objection to the actual parties cited being representative of others as in an ordinary civil case. In the present case, there can be no doubt that the plaintiff's father was a party to the proceedings in his capacity as manager of the joint family of which the plaintiff was a member. The plaintiff was therefore represented in the proceedings by the manager of his family, and as the manager is bound,

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WALLACE, J. above lines in *Ram Sahai v. Binode Bihari Ghosh*(1)
I therefore agree that the appellant's suit for possession was rightly dismissed as barred by time.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Jackson.

1929,
April 18.

THE MUNICIPAL COUNCIL OF KUMBAKONAM
(DEFENDANTS), APPELLANTS,

v.

THE SOUTH INDIAN RAILWAY COMPANY, LIMITED
(PLAINTIFFS), RESPONDENTS.*

Madras District Municipalities Act (V of 1920), s. 345 and rr. 8 and 15 of Sch. IV—Provisional assessment of property tax—Amendment by Chairman, retrospective effect and validity of.

Property tax imposed provisionally by a District Municipality can be amended by the Chairman, by virtue of section 345 and rules 8 and 15 of Schedule IV of the District Municipalities Act (V of 1920) within three years of the provisional assessment, and the amendment will act retrospectively for the period for which the assessment was provisionally made.

APPEAL under clause 15 of the Letters Patent from the decree of the Hon'ble the CHIEF JUSTICE, dated 12th March 1925, passed in the exercise of the Extraordinary Original Civil Jurisdiction of this Court in C.S. No. 284 of 1924.

(1) (1923) I.L.R., 45 All., 800.

* Letters Patent Appeal No. 118 of 1926.

This was a suit for refund of property tax paid by the South Indian Railway Company under protest on the ground that the defendant Municipality had no right under the Madras District Municipalities Act (V of 1920) to increase, with retrospective effect, a property tax once imposed, two years after the imposition. The defendant pleaded that the power of revision was given by the Act.

The suit which was tried by COURTS TROTTER, C.J., in the exercise of the Extraordinary Original Civil Jurisdiction of the High Court, on transfer from the District Munsif's Court of Kumbakonam, was decreed with costs. The defendant appealed.

The effect of rule 8 of Schedule IV of the District Municipalities Act and the relevant portion of rule 15 of Schedule IV of the Act are given in the judgment.

Section 345 of the Act is as follows:—

“No distraint shall be made, no suit shall be instituted and no prosecution shall be commenced in respect of any sum due to the Municipal Council under this Act after the expiration of a period of three years from the date on which distraint might first have been made, a suit might first have been instituted or prosecution might first have been commenced, as the case may be, in respect of such sum.”

K. Bashyam for appellant.

R. N. Aingar for respondent.

The JUDGMENT of the Court was delivered by

RAMESAM, J.—In this case, the Municipal Council of Kumbakonam assessed the South Indian Railway Company for the year 1921–22 on a certain footing. The tax imposed was Rs. 632–14–6. A demand notice for this amount was sent on 31st July 1921 and the amount was paid. A foot-note to this demand notice mentioned the fact that the demand was provisional and was “subject to revision under proviso (a) to section 82 (2) of

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Act V of 1920 on receipt of particulars from the Executive Engineer *re* present estimated cost of erecting the building." It may be mentioned that proviso (a) to section 82 (2) of Act V of 1920 really indicates the mode of assessment. It does not relate to any power of revision. Such power is really contained in rule 8 of Schedule IV attached to the Act. This rule says that the Chairman may amend the assessment books at any time by altering the amount of tax. In February 1923 the Chairman amended the tax and sent a communication to the Railway Company informing them of the altered assessment and also stating that the altered assessment would take effect from 1st April 1921. The question now in this case is, whether the amendment made in 1923 can be so made as to operate from 1st April 1921. Rule 15 of Schedule IV says,

"When the chairman has amended the assessment book of his own motion, otherwise than in the course of a general revision, under rule 8 . . . the amendment shall be deemed to have effect from the earliest date in which the circumstance justifying the amendment existed in the year to which the orders have reference."

The orders mentioned in this rule are the orders of amendment, the year to which the orders have reference is 1921, beginning from 1st April, and the earliest date in which the circumstances justifying the amendment existed in the year would be 1st April 1921. Therefore, so far as rule 15 of Schedule IV is concerned, there is nothing in it to prevent an amendment in 1923 of an assessment made in 1921 and rule 8 itself says that the amendment may be "perhaps, years after", as the learned Chief Justice observes. Our attention has been drawn by the learned advocate for the appellants to section 345. Under this section, it appears that an amendment, made more than three years after the year for which it was intended to have effect is useless and

cannot be carried into operation. If this construction of section 345 is not correct, it may be that there is no limit of time to the orders and the mode of assessment. As the rules and the Act stand, there can be no doubt that the amendment of an assessment can be made at any time within three years so as to operate retrospectively. As to the inconvenience to big concerns like Railway Companies which have to produce a balance sheet and declare dividends, inconvenience may exist; but, in the face of the section and the rules, the inconvenience cannot prevent the operation of the Act and the rules thereunder. We, therefore, allow the appeal and dismiss the suit with costs throughout.

King & Partridge—attorneys for respondent.

N.R.

APPELATE CRIMINAL.

Before Mr. Justice Wallace.

KING-EMPEROR (COMPLAINANT IN BOTH), PETITIONER,

v.

ABDUL MALIK (FIRST ACCUSED IN BOTH), RESPONDENT.*

Accused—Old offender—No proof or admission as such—Enhanced sentence—If legal—Certificate of Police—Practice relating to—If proper.

An accused person cannot be sentenced to enhanced punishment as an old offender, until there is some proof or admission by him before the Court that he is the person who committed the previous offences.

The practice of accepting a mere certificate by the Police as proof that an accused is an old offender, without the particulars of previous convictions either being entered in the statement of charge, or read out to him, is improper.

* Criminal Revision Cases Nos. 107 and 108 of 1929.

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PETITIONS under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the orders of the Chief Presidency Magistrate, Egmore, Madras, in Calendar Cases Nos. 15013 and 15014 of 1928.

P. Govinda Menon for Crown Prosecutor for the Crown.

No one appeared for the accused.

JUDGMENT.

Accused does not appear. I am asked to enhance the sentence of imprisonment passed on accused, on the ground that it is much too light for an old offender. I agree that it is much too light if accused is an old offender. The difficulty is that I find no proof of that. I am told that the practice in the Presidency Magistrate's Courts is to accept a mere certificate by the Police as proof that an accused is an old offender, and that the particulars of previous convictions are neither entered in the statement of charge nor read out to him. All the information given to accused is that he is charged under section 75, Indian Penal Code, which of course conveys nothing to him. He is clearly entitled to challenge the fact of the various previous convictions made matter of charge against him, and if he challenges these, then proof of these convictions and of his identity with the person previously convicted must be given. If the present practice is as I am now informed, then the sooner it is altered the better. An accused person cannot be sentenced to enhanced punishment as an old offender, until there is some proof or admission by him before the Court that he is the person who committed the previous offence. I am therefore unable to enhance the sentence on the ground of accused being an old offender, as there is no proof that he is.

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Apart from that, it appears to me that the Chief Presidency Magistrate was unduly lenient in making the sentences in these two cases run concurrently. There were two distinct house-breakings and it is a mistake to treat such offences leniently. I direct that the sentence in C.C. No. 15013 do come into force on the expiry of the sentence in C.C. No. 15014 of 1928.

B.C.S.

PRIVY COUNCIL.*

BOMMADEVARA NAGANNA NAIDU (SINCE
STRUCK OUT) AND ANOTHER (PLAINTIFFS), APPELLANTS,

1929,
July 1.

v.

YELAMANCHILI PITCHAYYA AND OTHERS
(DEFENDANTS)—RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Estates Land Act, Madras (I of 1908), ss. 3 (16), 12—Lease before Act—Reservation of trees—Effect and duration of reservation—Dry pasturage waste—Covenant to pay increased rent on cultivation—Right to inclusion in patta.

Where land subject to the Madras Estates Land Act, 1908, was leased before the Act to a ryot who executed a contract by which all rights in trees on the land were reserved to the landholder, the effect of section 12 of the Act is that the reservation continues as to trees on the land at the passing of the Act during the occupancy rendered permanent by the Act, and not merely during the term of the lease, the ryot having the right to use, enjoy and cut down only trees which after the passing of the Act are planted by him or grow naturally.

There is no provision in the Act enabling a land-holder to claim an enhancement of rent or any additional payment for trees, the right to which he has lost by the operation of the Act.

* Present :—Lord BLANESBOROUGH, Lord TOMLIN and Sir BINOD MITTER.

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Where a lease to a ryot before the Act describes part of the land leased as "dry pasture waste" but provides that if any part of it is cultivated, the rent thereon shall be increased to that provided for "cultivation" land, there is not thereby a reservation of that part as pasturage, and, subject to the exceptions in section 3 (16), it is ryoti land which the ryot is entitled to have included in his patta, even though it has never been cultivated.

Sreemantha Raja Yarlagada Mallikarjuna Prasada Naidu v. Subbiah, (1919) 39 M.L.J., 277, distinguished.

APPEAL (No. 115 of 1924) from a decree of the High Court (October 28, 1919) varying a decree of the District Court of Kistna at Masulipatam which affirmed a decree of the Court of the Suits Deputy Collector.

The suit was brought by the father of the appellants against defendants now represented by the respondents for a decree directing the defendants to accept a patta tendered to them by the appellants under the Madras Estates Land Act, 1908, and to execute a corresponding muchilika.

The questions arising were (1) as to the effect of section 12 of the Act where a ryot had contracted before the Act that all rights in trees on his holding should belong to the land-holder; (2) whether 297 acres included in a lease before the Act were ryoti land within section 3 (16) and section 6 of the Act.

On the first question, the High Court (SESHAGIRI AYYAR and NAPIER, JJ.), reversing the District Judge, held that the reservation did not operate beyond the term of the lease, and on the second they held, upholding the lower Courts, that the lands were ryoti lands.

The facts and the terms of section 12 of the Act appear from the judgment of the Judicial Committee.

P. V. Subba Rao for second appellant.

Dunne, K.O., and *Narasimham* for the respondents.

The JUDGMENT of their Lordships was delivered by

LORD BLANESBURGH.—There are two questions raised by this appeal: they both lie within the narrowest compass; the second of them barely survives to come before the Board, so complete has been judicial agreement upon it in India, while the determination of the first, which now alone is serious, depends upon the construction of a few words in a single section of a statute. Yet the plaint in the suit was issued as long ago as the 18th October 1912, and it is nearly seventeen years thereafter that these short questions reach the Board for final determination, and, in the result will now be settled as they were settled by the Revenue Court in India nearly fifteen years ago. In the course of the proceedings not only has the plaintiff died, but one of his legal representatives, originally appellant, has dropped out, leaving it to the plaintiff's other representative, the second appellant, by himself to bring his case to a hearing. Not the least important of their Lordships' duties in disposing of the appeal has been the task of determining how the costs thrown away as the result of well-nigh interminable proceedings in India should now be borne.

The two appellants are the sons and legal representatives of the original plaintiff, the late Raja of North Vallur. On the 6th June 1901, the Raja granted to one Ramayya Garu, father of the respondents, for a term of ten years, expiring Fasli 1320, a lease of some 1,363 acres of land in the village of Narayanapuram. Prior to this lease in his favour, Ramayya Garu had, as it is now agreed, no occupancy or other rights in the holding, which, but for the passing of the Madras Estates Land Act, 1908, would in ordinary course have reverted to the Zamindar on the expiry of the lease.

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Of the acres comprised in it, some 843 were entered as being in cultivation and 520 as being dry pasture waste. The annual rental for the whole was fixed at Rs. 1,784-13-0, representing, so far as the "cultivation" lands were concerned, a rent of Re. 0-14-2 per acre, and for the "dry pasture waste" a rent of 8 annas per acre. The lease, however, contained a provision, much relied upon by the appellant in support of his second ground of appeal, that if the lessee raised dry cultivation on the dry pasture waste he had to pay cist upon the land so cultivated at the higher rate of Re. 0-14-2 per acre as well as expenses.

The main, if not the only real, question now at issue between the parties is as to their respective rights in what the District Judge, at one stage of the case, described as an immense belt upon the holding of paying trees—comprising at least 8,000 palmyras and date palms fit for tapping, yielding a substantial revenue, and estimated by a succeeding District Judge to be of a capital value of roughly Rs. 34,000. By the lease the Raja or Zamindar reserved to himself full rights in regard to all these trees. The lessee was "not in the least to be entitled to them"; as the cist of all the trees standing on the lands was not included in the rent reserved, the lessee was not to raise any objection whatever to the Zamindar dealing with the same. And, as a matter of fact, these trees during the term continued to be let by the Zamindar to other persons for tapping at rents yielding for him a substantial revenue. It was not contested before the Board that in these circumstances, the possession of and all rights over the trees remained during the pendency of the lease in the Zamindar, and that no payment whatever in respect of them was included in the cist thereby reserved.

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In that state of things and while the lease was still current, the Madras Estates Land Act, 1908, became law. This suit is concerned with the changes by the passing of that Act effected in the relations of the Zamindar as lessor on the one hand, and the respondents, who by the death of their father had then become entitled to the lease, on the other, in respect of the subsequent property rights, first, in the trees—the important question—and next in the "dry pasture waste," now at all events a subordinate matter.

It will be convenient to call attention at once to the provisions of the statute relevant to the consideration of these two questions.

In the Act which came into force on 1st July 1908, an estate means amongst other things any permanently settled estate or temporarily settled zamindari (section 3 (2) (a)); that is to say, it extends to the estate or zamindari of the Raja of North Vallur. "Holding" (section 3 (3)) means a parcel or parcels of land held under a single *patta* or engagement in a single village. In other words, the lands included in the lease of 1901 are by that term aptly described. *Ryoti* land means cultivable land in an estate other than private land, but does not include, *inter alia*, tank-beds (section 3 (16)). *Ryot* means a person who holds for the purpose of agriculture *ryoti* land in an estate on condition of paying to the land-holder the rent which is legally due upon it (section 3 (15)). With these terms so defined, section 6 provides that, subject to the provisions of the Act, every *ryot* then in possession of *ryoti* land situate in the estate of a land-holder shall have a permanent right of occupancy in his holding, while section 9 enacts that no land-holder shall as such be entitled to eject a *ryot* from his holding otherwise than in accordance with the

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provisions of the Act. Section 12, upon which much turns, is textually as follows:—

“Subject to any rights which by custom or by contract in writing executed by any *ryot* before the passing of this Act are reserved to the land-holder, every occupancy *ryot* shall have the right to use, enjoy and cut down all trees now in his holding, and in the case of trees which after the passing of this Act may be planted by the *ryot* or which may naturally grow upon the holding, he shall have the right to use, enjoy and cut them down, notwithstanding any contract or custom to the contrary.”

Section 24 provides that the rent of a *ryot* shall not be enhanced except as provided by the Act. Section 28: that in all proceedings under the Act the rent or rate of rent for the time being lawfully payable by a *ryot* shall be presumed to be fair and equitable until the contrary is proved. Section 30 enables a landlord to institute proceedings for enhancement of rent before the Collector on certain stated grounds and no others. By section 50 (2), every *ryot* is entitled to call upon his land-holder to grant him a *patta* for any current revenue year, and every land-holder is entitled to call upon his *ryot* to give him a *muchalka* in exchange. The proper contents of the *patta* and *muchalka* are detailed in section 51, and after provision made by section 54 for the tender of a *patta* by the land-holder, section 56 provides—and it is under this section that the present suit was instituted—that when a *ryot* for one month fails to accept the *patta* tendered to him and to give a *muchalka* in exchange, the land-holder may sue before the Collector, to enforce acceptance of such *patta*.

As their Lordships have already observed, the lease of the 6th June 1901 was still current when the Estates Land Act came into force. The effect of the statute, as will have been seen, was at once to give to the respondents a permanent right of occupancy in their holding so far as that consisted of *ryoti* land, and at once to supersede

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many of the provisions of the lease then current. Notwithstanding this, however, the parties until the expiry of the term apparently allowed their relations towards each other to be regulated by the lease, and it was not until after Fasli 1320, that the Raja tendered to the respondents for the year 1912 a *patta* in respect of such part of the original holding as he conceived himself bound to include in it. On the refusal of the respondents to accept the *patta* tendered and to execute a proper *muchalka*, this suit was, under section 56 of the Act, brought by the Raja to enforce his statutory rights in these matters.

The refusal of the respondents to accept the tendered *patta* was due to the fact that in their view its terms were, mainly in two respects, improper.

First, there were included in it the provisions of the lease already referred to, whereby the trees on the holding were reserved to the land-holder, and the respondents objected that, by virtue of section 12 of the Act, the *patta* should have left with them the right to use, cut down and enjoy all trees in their holding.

Secondly, there were excluded from the *patta* the 520 acres of dry pasture waste which had been included in the lease. The respondents claimed that this acreage should remain part of their holding as being in fact cultivable and therefore *ryoti* land within the meaning of the Act.

It will be convenient to deal in their order with these two objections to the *patta*, showing incidentally how each of them fared in the Courts in India.

First, as to the trees, the Deputy Collector in his judgment of the 17th August 1914 in the Revenue Court, expressed the opinion that, as the Zamindar had reserved his right to them by written contract, he was entitled, under section 12 of the Act, to continue

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to reserve the right by the suit *patta*, limited, however, to the trees which existed before the Act and not extending to any which might have been planted by the respondents or might naturally have grown upon the holding since its passing. The learned District Judge, on appeal on this point by the respondents, took the same view, and by decree of the 22nd December 1916, dismissed their appeal from the Collector's judgment.

On further appeal, however, to the High Court at Madras, the learned Judges there took a different view, which they expressed in a judgment of the 22nd April 1918. Under section 12 of the Estates Land Act, the tenant, they said, was, subject to custom or written contract, entitled to the trees on payment of rent to the land-holder, and in this case the reservation of the trees in the lease held good, but, in their opinion, only for the period of the lease. The reservation was no longer subsisting at the time of the tender of the *patta*, and it ought not accordingly to have been retained therein. Other reasons given by one of the learned Judges in support of the same conclusion have not been relied on before the Board, and need not be further alluded to.

In the result the learned Judges of the High Court thinking that the trees must be included in the holding, but that it was allowable under the Act to charge the respondents with a cist in respect thereof, directed an enquiry to ascertain the proper amount of such cist, and after prolonged and elaborate proceedings to that end, to which for the moment their Lordships do not further allude, the High Court, in a final judgment on the 28th October 1919, fixed the amount payable by the respondents in this behalf at a single payment of 5 annas in respect of each tree, and in other respects gave effect

to their judgment of the 22nd April 1913. And of all of this the appellant now complains.

The question turns, it will be seen, upon the meaning to be attached to the introductory words of section 12 of the Act: "Subject to any rights which by custom or by contract in writing executed by any *ryot* before the passing of this Act are reserved to the land-holder," and it may be conceded that, as a matter of first impression, the view of these words taken by the High Court is attractive enough. There is, on the face of them, no obvious reason why the reservation should extend beyond the duration of the contract by which it is made. But this first impression disappears on a closer examination of the clause. The section is certainly dealing with a possession terminable when the Act came into force and converted into a permanent right of occupancy by section 6. It is contemplating that as an incident of the terminable possession, rights with respect to the trees on the holding might have been reserved to the land-holder either by custom or by contract. It provides that where the reservation is by custom, it, so far as existing trees are concerned, is to remain effective throughout the whole of the occupancy, by the Act made permanent. So much, it was conceded in argument, was the effect of the section. But if reservation by custom was so long operative, why, so far as the section is concerned, should the result be different when the reservation had been made by contract? A reservation by custom is in this connexion surely no more than this, that in places where the custom obtains such reservation is conventional without being expressly made, in contra-distinction to places where no such custom exists—as, for example, in the zamindari of North Vallur, in which case the reservation, if it is to be operative, must be expressed as part of the contract.

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But in each case the reservation, when not qualified, will be operative for precisely the same period of time and no longer—that is to say, until, on the expiry of right to possession by the tenant, the holding reverts to the Zamindar. Accordingly, as might from this point of view be expected, the section makes no distinction in the result between a reservation made by custom and one made by contract, and in their Lordships' judgment, the true conclusion is, that where the reservation, however constituted, is conterminous with the previously limited possession, it remains, except with regard to trees subsequently planted by the *ryots* or naturally grown upon the holding, operative throughout the occupancy made permanent by the Act.

It would appear that the learned Judges of the High Court came to the conclusion they did in this matter in the belief that it was open to them under the Act to charge the respondents with a suitable payment in respect of the trees which for the first time by virtue of the Act became theirs. At a later stage, however, the learned Judges themselves were less confident of the correctness of this view, which is, as it seems to the Board, mistaken. Their Lordships can find no provision in the Act enabling the land-holder to claim an enhancement of rent or any additional payment for his lost trees. Accordingly, if the view of this section taken by the High Court were correct, its effect in the present case must be altogether to deprive the land-holder, without any kind of compensation provided, of property of great value, and its effect would be similar in many other cases. A construction of the section leading to such a result is not lightly to be entertained, and, in their Lordships' judgment, is not here called for. On this question, therefore, the Deputy

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Collector, supported by the learned District Judge, reached, in the view of the Board, the true conclusion.

The respondents' second objection to the *patta* was the exclusion therefrom of the 520 acres, and this objection can be dealt with more briefly. Upon the evidence taken before him, the Deputy Collector on the 17th August 1914, found that of the 520 acres in question, some 222 acres were tank-bed land, and that their exclusion from the *patta* was, in consequence, justified under the Act. He held, however, in a most careful judgment, that the remaining 297 acres should be included as being "cultivable" land, although it had never in fact been cultivated, and this view of the Deputy Collector, although, so far as it was against them, it has been contested by both parties throughout the Courts in India, has been upheld in all of them. Before the Board, the respondents no longer contended that the tank-bed land should be included in the *patta*, but the appellant, relying for his contention upon the case of *Sreemantha Raja Yarlagaada Mallikarjuna Prasadu Naidu v. Subbiah*(1), still urged that the remaining 297 acres were given only for pasturage and not for cultivation, that, like the tank-bed lands, they should remain excluded from the *patta*, the provision of the lease already referred to, which raised the rent per acre to Re. 0-14-2 on the extent cultivated, being meant to serve as a penal rent against the land being improperly used for cultivation purposes. Their Lordships cannot accept this argument. They prefer the explanation of the provision referred to, given by the Deputy Collector, which they give in his own words:—

"The reason why an alternative rate, i.e., a lower rate, was conceded in case of non-cultivation was apparently due to the facts that the land was waste before, that it would take

(1) (1919) 39 M.L.J., 277

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some years before it could be reclaimed and brought under cultivation, and that it would be a hardship on the lessee if he were not allowed to pay a favourable rate till then. He was not, therefore, required to pay the full rate immediately."

In their Lordships' judgment accordingly this portion of the appellant's appeal entirely fails, and in the result the suit *patta* as it was adjusted by the Deputy Collector on the 17th August 1914 was rightly adjusted, and the subsequent attempts on both sides to have its terms varied have been misconceived.

In that state of things a very serious question arises as to the costs of these attempts. Their Lordships have considered this question very carefully, inquiring how far these costs have been occasioned by mistaken views contended for by one side or by the other. For the costs thrown away by the prolonged inquiries to ascertain the proper sum to be paid in respect of what may be called the suit trees, the respondents are mainly, if not entirely, responsible. For the costs thrown away in ascertaining what may again be described as the appealable value of the trees, they were in the view of the Board, entirely responsible. The increase again in the costs throughout by the appellants' mistaken contention as to the cultivatable lands has been relatively slight. In the result their Lordships have reached the conclusion that, no interference being made with the order as to costs in the decree of the Revenue Court of the 17th August 1914 or in that of the District Court of the 22nd December 1916 the justice of the case will be met if the respondents pay three-fourths of the subsequent costs incurred by those representing the original plaintiff or his estate, whether in the High Court, in the District Court, or on this appeal.

In the result accordingly their Lordships will humbly advise His Majesty that this appeal be allowed; that the order of the High Court of the 28th of October

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1919 except in so far as it affirms the decree of the District Court of 22nd December 1916 be discharged, and that the last-mentioned decree be restored.

The respondents must pay the costs already specified.

Solicitors for appellants: *Chapman-Walker and Shephard.*

Solicitor for respondent: *H. S. I. Polak.*

A.M.T.

APPELLATE CIVIL—FULL BENCH.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Ramesam, Mr. Justice Odgers,
Mr. Justice Venkatasubba Rao and Mr. Justice Mackay.*

P. M. A. VELLIAPPA CHETTIAR AND ANOTHER
(PLAINTIFFS), APPELLANTS,

v.

SAHA GOVINDA DASS AND FOUR OTHERS
(DEFENDANTS), RESPONDENTS.*

Letters Patent (Madras), cl. (12)—Contract in Madras for sale of land situate outside Madras—Parties resident in Madras—Suit by purchaser for specific performance—If "suit for land", and not cognizable by High Court on Original Side.

A suit by a purchaser of lands situate outside Madras for specific performance of a contract to sell, made in Madras, by parties resident therein, is not a suit for land within the meaning of clause (12) of the Letters Patent (Madras), and such a suit is cognizable by the High Court in its Ordinary Original Civil Jurisdiction.

Ramdhone Shaw v. Nobumoney Dossee, (1865) 1 Bourke, 218.

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Hatimbhai Hassanally v. Framroz Eduljee, (1927) I.L.R., 51 Bom., 516 (F.B.), followed.

ON APPEAL from the judgment of Mr. Justice SRINIVASA AYYANGAR, dated 2nd June 1926, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 12 of 1921.

The appeal came on for hearing before COURTS TROTTER, C.J., and MADHAVAN NAIR, J., who made the following

ORDER OF REFERENCE TO A FULL BENCH:—

We think that before a decision can be given on this matter a question must be disposed of by a Full Bench having regard to the Indian authorities, and that question is this:—

“Is a suit by a purchaser of lands situate outside Madras for specific performance of a contract to sell made in Madras by parties resident therein, a suit for land within the meaning of clause (12) of the Letters Patent, and so not cognizable by the High Court in its Ordinary Original Civil Jurisdiction?”

If English law applied, it is quite clear that the Madras High Court would have jurisdiction, and that is not disputed.

It is said that the words in the Letters Patent make the position different under Indian law.

All the authorities are considered in the judgment of the learned trial Judge and we do not think it would assist the Full Bench to review them again.

It is clearly necessary that an authoritative ruling on this point should be laid down by this Court.

ON THIS REFERENCE

T. M. Krishnaswami Ayyar (*M. Subbaraya Ayyar* with him) for second appellant.—The land is situated in the Chittoor District. The contract for purchase was made in Madras where all the parties were residing. Plaintiff seeks to enforce the contract for proper conveyance by defendants 1 and 2. On this matter there is no difference between English and Indian Law. Specific performance is an action *in personam* on the equity side. In 1801 the Supreme Court at Madras was constituted as a Court of Equity and as a Court of Record, Morley's Digest, Vol. II, p. 588, at p. 614. The Supreme Court exercised the

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jurisdiction of the King's Bench and Chancery Divisions. When High Courts were constituted by charter the powers of the abolished Courts were vested in the newly created Courts. Clause (11) of the Letters Patent deals with the ordinary original civil jurisdiction, clause (12) with suits for land or other immovable property and clause (19) with the law to be administered. There are two views which have been expressed regarding the interpretation of the expression “suit for land”, (1) suit for recovery of land or title to land, and (2) suit in which land is involved in some way. There is no Madras decision directly on the point now under consideration. There have however been decisions on analogous positions. A suit merely for the accounts of the management of a trust and for the administration of a trust is not a suit for land as title or possession is not directly involved, *Krishnadoss Vithaldoss v. Ghanshamdoss Narayanadoss*(1). That decision is approved in *Hatimbhai Hassanally v. Framroz Eduljee*(2), the latest decision on the construction of clause (12). The word “for” would seem to indicate that the title to or possession of immovable property must be the primary object of the clause. Of the earlier cases, *Hunsraj v. Runchordas*(3) held that a suit for specific performance was not a suit for land. Similarly, in *His Highness Shrimant Maharaj Yeshvant Rao Holkar v. Dadabhai Cursetji Ashburner*(4), it was held that a suit for specific performance was not a suit for land. This case was dissented from in *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*(5), but it has been approved by the Full Bench in *Hatimbhai's* case. It is erroneous to say that the Court does not act *in personam* in mortgage suits. *Sreenath Roy v. Cally Doss Ghose*(6) held that a suit for specific performance was a suit for land, and that was followed in *Ratanchand Dharamchand v. Gobind Lall Dutt*(7). There is really no discussion in that case. *Ramdhone Shaw v. Nobumoney Dossee*(8) is in my favour. That decision was approved of in *Juggodumba Dossee v. Puddomoney Dossee*(9), and in *Kellie v. Fraser*(10). A suit to recover title deeds although it may involve a question of title is not a suit to obtain possession of land or to deal in any way with the land itself,

(1) (1924) 49 M.L.J., 311.

(3) (1905) 7 Bom. L.R., 319.

(5) (1925) I.L.R., 50 Bom., 1.

(7) (1921) I.L.R., 48 Cal., 882.

(9) (1875) 15 Beng. L.R., 318.

(2) (1927) I.L.R., 51 Bom., 516 (F.B.).

(4) (1890) I.L.R., 14 Bom., 353.

(6) (1879) I.L.R., 5 Cal., 82.

(8) (1865) 1 Bourke, 218.

(10) (1877) I.L.R., 2 Cal., 445.

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Juggernanth Doss v. Brijnath Doss(1). There is no difference between that and the case where a conveyance is to be executed. In *Land Mortgage Bank v. Sudurudeen Ahmed*(2), a vendor's suit for specific performance was allowed. In *Nagendra Nath Chowduri v. Eraligool Company, Ltd.*(3), SANDERSON, C.J. and RICHARDSON, J., followed *Land Mortgage Bank v. Sudurudeen Ahmed*(2). See also *Goculdas v. Chaganlal*(4).

K. S. Krishnaswami Ayyangar (T. N. C. Srinivasa Varadachari with him) for respondents 1 and 2.—Some of the Indian decisions seem to have imported principles of Equity into the determination of this question. I need not go so far as to say that a suit is a suit for land even if remotely or incidentally it relates to land. The relief asked for in this case operates directly on title to land. The test is whether the suit is substantially for the recovery of land. The decree in this case would give title to property. The Court has to consider what is the primary object of the suit. The latest Full Bench decision in Bombay is in my favour. There is a difference between a vendor's suit and a purchaser's suit for specific performance. The following cases have a direct bearing on the point before the Full Bench:—*Natum Lakshimikuntham v. Krishnaswamy Mudaliyar*(5), *Sundara Bai Sahib v. Tirumal Rao Sahib*(6). A suit to avoid an encumbrance on land is a suit for land, *Official Assignee of Madras v. Ramaswami Ayyangar*(7). A suit for damages for trees cut and carried away is a suit for land, *Srinivasa Aiyangar v. Cunniappa Chetty*(8), same case on appeal in *Srinivasa Aiyangar v. Kannappa Chetty*(9). In *Pranlal v. Goculdas*(10), a suit for declaration of priority was held to be a suit for land. Where, in a suit for recovery of title deeds, the substantial point to be decided was the title of the plaintiff to the property to which the title deeds related, it was held that the suit so far as it related to title deeds was a suit for land, *Zulekabai v. Ebrahim Haji Vyedina*(11).

T. M. Krishnaswami Ayyar in reply.—*Sundara Bai Sahib v. Tirumal Rao Sahib*(6), is clearly wrong. Suit for execution

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| (1) (1878) I.L.R., 4 Calo., 322 | (2) (1892) I.L.R., 19 Calo., 358. |
| (3) (1923) I.L.R., 49 Calo., 670. | (4) (1927) I.L.R., 54 Calo., 655. |
| (5) (1903) I.L.R., 27 Mad., 157 | (6) (1909) I.L.R., 33 Mad., 131. |
| (7) (1912) 23 M.L.J., 726. | (8) (1914) 26 M.L.J., 567. |
| (9) (1915) 30 M.L.J., 120. | (10) (1925) 27 Bom. L.R., 570. |
| (11) (1912) I.L.R., 37 Bom., 494. | |

of a conveyance does not relate to an interest in immovable property. There is no question of title, proprietary or possessory in this case.

OPINION.

COUTTS TROTTER, C.J.—I have had the advantage of reading the judgment about to be pronounced by my brother RAMESAM, and entirely concur in it. I only add a few words of my own in order to bring out certain points which he has made, with which I find myself in specific and emphatic agreement.

The first is, that our opinion is directed to a concrete and isolated case, that of a suit by a purchaser of land for specific performance against his vendor of the contract for the sale of land entered into by his vendor, and is not to be considered as containing *in gremio* analogies which can be usefully applied to such subject-matters as vendors' suits for specific performance, suits on mortgages, suits for maintenance, suits for the wrongful removal of surface trees or subterranean coal. A number of decisions have been cited to us on these and kindred topics. Some of them I think to be wrong, others very doubtful, but of all of them, it appears to me to be enough to say, that they do not directly bear on the point before us, and that our decision leaves future discussion on such questions entirely at large.

Secondly, I am satisfied that a phrase like "suit for land" can only be defined, if it has to be defined, by what logicians call "enumeration of categories," as MACKAY, J., forcibly pointed out in the course of the argument. That is to say, that the Legislature can only help us by setting out what it intends to be included in the term "suits for land" and what excluded—a method of legislation which has been pursued not unsuccessfully in the explanations and illustrations to many sections of Indian Acts. That has not been done here; and

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we are left to ourselves to fit the statutory words as best we can to each case as it comes before us. Such attempts as have been made to arrive at a definition on other lines have only resulted in prefixing an adverb to the words of the statute—the favourite one being “substantially.” That seems to me merely to add an unnecessary task to our original one: the imponderable adverb “substantially” itself calls for a definition, a task more difficult, in my opinion, than the definition of the actual words of the Letters Patent. The truth is that many Indian statutes fall into one of two extremes. They sometimes throw at the Courts cryptic expressions without a word of explanation or illustration to show what was the real intention of the Legislature: and this is an instance. On the other hand, it sometimes passes Acts which are obviously intended to deal with every conceivable case that can arise—which means of course every case that was present to the mind of the draftsman. The Limitation Act offers a striking example of both. The Act with all its 31 sections and 183 articles has no specific article to deal with so obvious a case as that of a simple suit for debt. On the other hand, into article 183 it has introduced the term “revived,” without a word of definition or explanation; the inevitable result has followed, that the Indian Courts for half a century have been compelled to delve in venerable English reports to acquire learning about writs of *scire facias* and the like, a task which ought never to have been set them.

Finally, I wish to make it clear that my decision is not based on any consideration that specific relief was as a matter of history administered by Courts of Equity and not Courts of Common Law in England, or even that in its essence and nature it was an equitable and not a legal remedy. These considerations do not seem

to me to go to the root of the matter for this country, for the simple reason that here, the remedy, whatever its origin be, is prescribed by statute. But I do not think that the statute overrides one fundamental juridical distinction which obtains in every organized community in the world: viz., that between decrees that affect the status of individuals, or bring about *proprio vigore* an immediate change in the ownership of property, and decrees which merely purport to compel the defendant to do or abstain from doing something which the Court orders. In the technical language of law, it is known as the distinction between actions *in rem* and actions *in personam*; but the distinction, I think, is not technical, but based as I have said on universally accepted juridical canons.

I therefore agree that our answer should be that this is not a suit for land.

RAMESAM, J.—This appeal arises out of a suit for specific performance of a contract whereby defendants 1 and 2 agreed to convey to the plaintiff, for a consideration of Rs. 55,000, their right, title and interest in Konasamudram village in the Karvetnagar Zamindari, and for other reliefs.

The third defendant is a mortgagee of the suit properties, and it was alleged that he also agreed to convey to the plaintiff his right over the suit properties. Defendants 4 to 6 were impleaded as subsequent purchasers of the properties with notice of agreement in favour of the plaintiff. The suit was filed on the Original Side of the High Court. The village of Konasamudram is situated in the Chittoor District, and is not within the limits of the ordinary original jurisdiction of the High Court. At the time of the trial, a question was raised as to the jurisdiction of the Original Side to try the case. The jurisdiction of the Original Side turns

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upon the construction of clause 12 of the Letters Patent issued for the Madras High Court (28 and 29 Vic., Chapter XV). Clause 12 empowers the High Court "to try and determine suits of every description, if, in the case of suits for land or other immovable property, such land or property shall be situated, or in all other cases, if the cause of action shall have arisen, either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits." It is admitted that defendants 1 to 3 were residents of Madras at the time of the institution of the suit. The learned trial Judge came to the conclusion that the present suit was a suit for land within the meaning of clause 12 of the Letters Patent, and as the land is not situated within the limits of the ordinary original jurisdiction, he held that the suit did not lie and dismissed it, though he recorded also findings on other issues. The plaintiff filed this appeal, which has been referred to a Full Bench by my Lord the CHIEF JUSTICE and MADHAVAN NAIR, J., having regard to the Indian authorities.

There is a very large body of case-law on clause 12 of the Letters Patent and the construction of that clause has led to considerable diversity of opinion. There has been a conflict of opinion on the construction of the various parts of the clause and on their bearing on one another and also on the meaning of the expression "suits for land or other immovable property." I will first deal with the question whether the present suit should be regarded as a suit for land or other immovable property. If this question is answered in the negative, then on any view of the rest of the clause, the Original

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Side has jurisdiction to try the suit, for the defendants dwell or carry on business, or personally work for gain, within the limits of the ordinary original jurisdiction.

The case has been very exhaustively argued by the learned advocates for the appellant and for the respondents, and between them, all the decisions of the Madras, Bombay and Calcutta High Courts bearing on clause 12, and the Privy Council decisions, have been referred to and commented on before us. They range from *Ramdhone Shaw v. Nobumoney Dossee*(1) to *Goculdas v. Ohaganlal*(2), decided last year (1927). An examination of these decisions shows that it is impossible to reconcile them even omitting those which expressly purport to differ from each other,—the attitude of the same Judge with reference to the expression "suit for land" sometimes varying according to the nature of the suit before him, the inclination being to give a wider meaning to the expression, if it is a suit of one kind such as a suit on a mortgage, and to give a narrower meaning, if the suit is of a somewhat different category. In the case of other Judges, the tendency has been to give the widest possible meaning to the expression. Under such circumstances, it is obvious that any attempt to define the term "suit for land or other immovable property" on any general principles, that is, in abstract terms only, without reference to concrete details, is bound to end in failure: and, however, thoroughly one may analyse the discussion, the result is not likely to be more successful. The very able and exhaustive judgments of MARTEN, C.J., and the other Judges in *Hatimbhai Hassanally v. Framroz Eduljee*(3), illustrate this statement—a case heard by a Full Bench of seven Judges, two Judges dissenting in the final decision. I therefore prefer to

(1) [1865] 1 Bourke, 218.

(2) (1927) I.L.B., 54 Cal., 655.

(3) (1927) I.L.B., 51 Bom., 518 (F.B.).

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take a different course of action in dealing with this case. I would eliminate those cases dealing with suits of a nature different from the one before me, and would confine myself to suits for specific performance only. For instance, I would not discuss cases relating to suits on mortgages. A suit for redemption may easily be considered as a suit for land. A suit for foreclosure, though the primary object is to recover money, may also be described as a suit for land, as there is a prayer for recovery of land by reason of the foreclosure, but greater difficulty arises if it is a suit for sale; though the Court may have to sell the land, what the plaintiff recovers is always money, and it is difficult to describe the suit as one for land; and yet after the definition of "mortgage" in the Transfer of Property Act, one may say that every mortgage is a transfer of an interest in immovable property, and an action on a mortgage, even where its object is to recover money by sale, is really a mode of reducing that interest in immovable property to enjoyment. I do not propose to consider which is the correct view as between these two conflicting views. The early decision of the Madras High Court in *Nalum Lakshimikantham v. Krishnaswamy Mudaliar*(1), and the decisions in *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*(2), and *Hatimbhai Hassanally v. Framroz Eduljee*(3), and the case *In the matter of the Petition of S. J. Leslie*(4), need not therefore be considered. Similarly, the decision in *Juggodumba Dossee v. Puddomoney Dossee*(5), where the suit related to a trust and the plaintiffs, alleging that the defendant committed breaches of trust, prayed for the establishment of their right as joint

(1) (1903) I.L.R., 27 Mad., 157. (2) (1925) I.L.R., 50 Bom., 1.
(3) (1927) I.L.R., 51 Bom., 518 (F.B.). (4) (1872) 9 Beng. L.R., 171.
(5) (1875) 15 Beng. L.R., 318.

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trustees and for the settlement of a scheme, does not come in for discussion here. So also *The Delhi and London Bank v. Wordie*(1), *Goculdas v. Chaganlal*(2), and *Krishnadoss Vithaldoss v. Ghanshamdos Narayanadoss*(3). In the case of *Kellie v. Fraser*(4), the suit was one to file an award, the award covering landed property outside Calcutta. In *Juggernath Doss v. Brijnath Doss*(5), and *Zulekabai v. Ebrahim Haji Vyedina*(6), the suits were merely to recover title-deeds. In the following group of cases though the suit was not actually for recovering land, an issue regarding title to the land or some interest in it had to be considered for giving the relief. In *Official Assignee of Madras v. Ramaswamy Iyengar*(7), the suit was to avoid an encumbrance on the land. In *Srinivasa Aiyangar v. Cunniappa Chetty*(8), the suit was for the recovery of damages for trees cut and carried away from plaintiff's casuarina plantation, the title to the plantation being in question. Under the General Clauses Act X of 1897 (clause 25 of section 3) "immovable property" includes land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth. The suit for trees in *Srinivasa Aiyangar v. Cunniappa Chetty*(8) may be considered as a suit for immovable property. This was affirmed in *Srinivasa Aiyangar v. Kannappa Chetty*(9). In *Sudamdih Coal Co., Ltd. v. Empire Coal Co., Ltd.*(10), the suit was for compensation for wrongful cutting and removal of coal. In *Vaghoji v. Camaji*(11), the suit was for a declaration of the plaintiff's right to *Talao* and for an injunction. In

(1) (1876) I.L.R., 1 Cal., 249. (2) (1927) I.L.R., 54 Cal., 855.
(3) (1924) 49 M.L.J., 311. (4) (1877) I.L.R., 2 Cal., 445.
(5) (1878) I.L.R., 4 Cal., 322. (6) (1912) I.L.R., 37 Bom., 494.
(7) (1912) 23 M.L.J., 728. (8) (1914) 26 M.L.J., 587.
(9) (1915) 30 M.L.J., 120. (10) (1915) I.L.R., 42 Cal., 842.
(11) (1904) I.L.R., 29 Bom., 249.

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Pranlal v. Goculdas(1), the suit was for declaring the priority of one mortgage over another. Therefore the above group of cases beginning with *Official Assignee of Madras v. Ramaswamy Iyengar*(2) do not call for any consideration. In *Sundara Bai Sahiba v. Tirumal Rao Sahib*(3), and *Yeshvadabai v. Janardhan*(4), the suits were for maintenance seeking to make it a charge on land within the limits of the original jurisdiction but the defendant was not a resident within the said limits. On the ground that the suits for maintenance were suits for land the suits were decreed. It is noticeable that these two cases are in one sense the converse of most other decisions on the subject; whereas, in other cases, the defendant raised the plea that the suit was one for land and therefore the suit did not lie, the land being outside the limits of the Original Side, in these two suits, it was the plaintiffs that contended that the suit was one for land, the land being within the limits of the original jurisdiction, and it was the defendant that contended that the suit was not one for land. The suits being for maintenance, one feels somewhat inclined to help the plaintiff, and this may explain the result in these two decisions, though it seems to me that the decisions may be put on another ground. To call a suit for maintenance a suit for land because an item of land is sought to be charged, though there is no dispute as to the title, seems to me to strain the expression too far. The case might have been put on the ground that part of the cause of action arose within the limits of the Original Side jurisdiction, because a land within such limits was sought to be charged, and that being so, the suits could be filed on the Original Side with leave of the Court. I would agree with the conclusion in these

(1) (1925) 27 Bom. L.R., 570.

(2) (1912) 23 M.L.J., 726.

(3) (1909) I.L.R., 38 Mad., 131.

(4) (1923) 25 Bom. L.R., 1172.

two cases on this ground, but not on the ground that the suits were for land. But I would not further utilize these cases for the purpose of this present discussion. There now remain the cases dealing with suits for specific performance.

The earliest of these cases is *Ramdhone Shaw v. Nobumoney Dossee*(1), decided in 1865. This was referred to with approval by MARKBY and PONTIFEX, JJ., in *Juggodumba Dossee v. Puddomozy Dossee*(2), and it was mentioned in answer to a question of GARTH, C.J., in *The Delhi and London Bank v. Wordie*(3), and it was considered to be good law by KENNEDY, J., in *Kellie v. Fraser*(4). It was cited before PONTIFEX, J., in *Sreenath Roy v. Oally Doss Ghose*(5). There the suit was originally for specific performance of an agreement to execute a mortgage, but, at the trial, the plaintiff's counsel was content with a decree for money, and did not ask for any order for specific performance. In spite of this, it was held that the suit did not lie. PONTIFEX, J., gives no reasons for not following *Ramdhone Shaw v. Nobumoney Dossee*(1). I am inclined to dissent from this case. The same result as in *Ramdhone Shaw v. Nobumoney Dossee*(1) was arrived at in *His Highness Shrimant Maharaj Yashvant Rav Holkar v. Dadabhai Cursesji Ashburner*(6). It is true that this was dissented from in *India Spinning & Weaving Co., Ltd. v. Climax Industrial Syndicate*(7), but it was approved in *Hatimbhai Hassanally v. Framroz Eduljee*(8), and in *Hunsraj v. Runchordas*(9), which was also a suit for specific performance. The cases *Land Mortgage Bank v.*

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(1) (1865) 1 Bourke, 218.

(2) (1875) 15 Beng. L.R., 318.

(3) (1876) I.L.R., 1 Cal., 249.

(4) (1877) I.L.R., 2 Cal., 445.

(5) (1879) I.L.R., 5 Cal., 82.

(6) (1890) I.L.R., 14 Bom., 353.

(7) (1925) I.L.R., 50 Bom., 1.

(8) (1927) I.L.R., 51 Bom., 516 (F.B.).

(9) (1905) 7 Bom. L.R., 319.

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Sudurudeen Ahmed(1), and *Nagendra Nath Chowdhuri v. Eraligool Company, Ltd.*(2), which were vendor's suits for specific performance, and *Ratanchand Dharamchand v. Gobind Lall Dutt*(3), which was a creditor's suit for specific performance of an agreement to mortgage, do not help us very much.

I may observe that in a suit for specific performance the decree is primarily addressed to the defendant: that is, the Court acts *in personam*—which a Court of Equity is always entitled to do. Though the land may be described in the conveyance, it is not going to be touched even in the execution of the decree as in the case of a decree for sale on a mortgage, nor does any issue as to the title to the land arise in such a suit. These are strong considerations for holding that a suit for specific performance is not a suit for land.

In the result, I would answer the reference by holding that the suit is not a suit for land.

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ODGERS, J.—I entirely agree with the two judgments just delivered by my Lord and my brother RAMESAM. The difficulty, or one may say, the impossibility of a definition of a "suit for land" has been commented on over and over again, and, in my opinion, no definition expressed in general words can possibly be satisfactory in the sense of covering every case which may arise. The only method is to see if the facts of any particular case fall within the meaning of the words; so the question in this case must, in my view, be decided with reference to the essential nature of the remedy sought. As my Lord has pointed out, it may be unsafe to apply wholesale the doctrines of the English Courts of Equity to a suit for specific performance in this country, where the law on the subject has been codified, but this

(1) (1892) I.L.R., 19 Cal., 358. (2) (1922) I.L.R., 49 Cal., 870.
(3) (1921) I.L.R., 48 Cal., 882.

codification does not, and cannot, destroy the essential nature of this remedy, i.e., that it acts *in personam* and not *in rem*. Once this fundamental distinction is grasped, it appears to me unarguable that a suit for specific performance is a "suit for land." Therefore the suit in question is not a suit for land.

VENKATASUBBA RAO, J.—I agree that a suit by a purchaser of lands for specific performance of a contract to sell, is not a suit for land. The reference to the Full Bench as worded, raises another difficult question, but it is unnecessary to deal with it, on account of the view we have taken that the suit in question is not a suit for land.

The expression "suit for land" has given rise to conflicting views and has been, from time to time, the subject of numerous decisions. Some Judges have construed the words as meaning "suits relating to or concerning land." It seems to me that this construction, at any rate, is no longer open to the Indian Courts, having regard to two decisions of the Privy Council, which must be deemed to have held that administration suits are not suits for land; *Benode Behari Bose v. Nistarini Dassi*(1) and *Srinivasa Moorthy v. Venkata Varada Aiyangar*(2). That this is the effect of these two cases is assumed at least in three rulings, one of Bombay and two of Madras; *Hatimbhai Hassanally v. Framroz Eduljee*(3), *Krishnadoss Vithaldoss v. Ghanshamdoss Narayanadoss*(4), *Mt. Amir Bi v. Abdul Rahim Sahib*(5). Now, where in a suit for administration, land is involved, it is in a sense "a suit relating to or concerning land"; but such a suit has now been authoritatively held not to be a suit for land.

(1) (1905) I.L.R., 33 Cal., 180 (P.C.).

(2) (1901) I.L.R., 34 Mad., 257 (P.C.).

(3) (1927) I.L.R., 51 Bom., 518 (F.B.). (4) (1924) 49 M.L.J., 311.

(5) (1928) 55 M.L.J., 266.

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However reluctant one may be to define the term "suit for land," it is impossible to answer the reference, without attempting some kind of definition. I shall not discuss the point, for it has been discussed threadbare, but I shall content myself with stating that, in my opinion, a suit is not a suit for land, unless the decision in that suit primarily involves title to, or primarily affects possession of, land. Applying this test, I am satisfied that the present suit is not a suit for land.

I may take occasion to point out that the conflict in regard to clause 12 of the Letters Patent covers a very wide field. It is not confined to the expression "suits for land." I shall indicate briefly the points respecting which there has been this wide diversity of judicial opinion. *Firstly*, on the interpretation of the words "suits for land," not only have different Courts taken different views, but a consistent view has not always been taken even by the same Court. *Secondly*, is the last alternative of clause 12 beginning with the words "or if the defendant at the time of the commencement," a separate alternative, or, is it dependent on the earlier alternative, beginning with the words "or in all other cases"? See *Hatimbhai Hassanally v. Framroz Eduljee*(1). Some learned Judges have held that the final alternative is a separate alternative. With what result? Even when it is held that a suit is a suit for land and the property is wholly outside, still the Court can entertain the suit on the ground that the defendant dwells, etc., within the local limits of its jurisdiction. *Thirdly*, does the clause, "in case the leave of the Court shall have been first obtained," which has been compendiously described as the enlarging clause, apply only

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to the cause of action in all suits other than those for land? (See the judgment of KEMP, J., in *Hatimbhai Hassanally v. Framroz Eduljee*(1).) *Fourthly*, some learned Judges have gone the length of holding that even where a suit is held to be a suit for land, the Court has jurisdiction, if it can enforce its decree by the personal obedience of the defendant resident within its local limits. This power is supposed to rest upon what is termed the equity jurisdiction of the Court.

I have set forth in some detail the wide divergence of opinion in regard to this clause, with the object of drawing attention to the necessity of recasting the section, for, as MARTEN, C.J., points out in *Hatimbhai Hassanally v. Framroz Eduljee*(1), uncertainty on a matter of such importance as jurisdiction is liable to lead to serious results.

MACKAY, J.—In a suit for specific performance of a contract to sell, relief is given by ordering the person who contracted to sell to do the act which he is under an obligation, a duty enforceable by law, to do: that is to say, in the case of a contract to sell land, to execute a conveyance. If the person against whom a decree for the specific performance of the contract has been made has had an opportunity of obeying the decree, and has wilfully failed to do so, the decree may be enforced by his detention in the civil prison, or by the attachment of his property, or by both. Since, in the case proposed, the parties who contracted to sell are resident in Madras, a decree, if passed, might be enforced in this manner. If the decree is not obeyed, the Court may, in lieu of or in addition to these processes, direct that the act required to be done may be done by a person appointed by Court, at the cost of the judgment-debtor.

(1) (1927) I.L.R., 51 Bom., 516 at 647 (F.B.).

(1) (1927) I.L.R., 51 Bom., 516 at 565 (F.B.).

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The judgment-debtor may have an imperfect title or no title at all. Except so far as provided by section 18 of the Specific Relief Act, the Court goes no further. It does not investigate or adjudicate on the title conveyed. It compels the performance of an obligation: it acts as a Court of Equity on the conscience. The person contracting to sell may prove to be unwilling or unable to deliver possession. With that, the Court has no concern. The purchaser having obtained his conveyance has, if he finds it necessary, to litigate, whether it be as to title or as to possession, in the local Court of competent jurisdiction, in this case a Court in the District of Chittoor, in which the land is situate. Neither title nor possession is in question in a suit for specific performance, although the decree directs that such title as is in the judgment-debtor be conveyed.

A suit for specific performance is a suit *in personam*: a suit for land is an action *in rem*. They are *toto cælo* apart: they belong to different jurisdictions which are now no doubt fused. The object of clause 12 of the Letters Patent is to bar the ordinary original civil jurisdiction of the High Court as to actions *in rem*, when the land is situate outside Madras; it does not bar the jurisdiction as to suits *in personam*. The word "for" which has occasioned all the difficulty is the same in each case, but a suit for specific performance is, not merely in its history but in its nature, distinct from a suit for land. That the present suit is concerned with the passing of title to land is a mere accident.

In my opinion, therefore, a suit for specific performance of a contract to sell land without the ordinary original civil jurisdiction of the High Court, when the parties are resident in Madras and amenable to the enforcement of a decree *in personam*, is not a suit for

land and the High Court has cognizance in its ordinary original civil jurisdiction.

I would be guilty of repetition, if I added anything further to the judgments which have just been delivered.

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SPECIAL BENCH.

Before Mr. Justice Kumaraswami Sastri, Mr. Justice Odgers and Mr. Justice Wallace.

ZAMINDARNI OF TIRUVUR, ASSESSEE,

v.

COMMISSIONER OF INCOME-TAX, REFERRING
OFFICER.*1929,
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Sec. 2 (1) of the Indian Income-tax Act (XI of 1922)—
Agricultural income.

The fact that a certain pecuniary legacy bequeathed by a zamindar has to be paid by his executor out of agricultural income does not make the legacy an "agricultural income" within section 2 (i) of the Indian Income-tax Act (XI of 1922).

In the matter of the income-tax assessment of Vellanki Lakshmi Narasayamma Rao Bahadur, Zamindarni of Tiruvur. Reference under section 66 (2) of the Indian Income-tax Act (XI of 1922).

The facts are given in the Judgment.

V. Govindarajachari and Y. Govindarajulu for assessee.— This allowance is charged on the lands; hence it is agricultural income. Even if it is not charged, what is paid as allowance is the "rent" derived from the lands. See section 2 (1) (a) and section 4 (2) (8).

M. Patanjali Sastri for Referring officer, not called upon.

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JUDGMENT.

The only question in this case is whether the legacy received by the assessee under the terms of her father's will and in respect of which she got a decree is exempt from the payment of income-tax being "agricultural income." Her father was the Zamindar of Gannavaram and he executed a will which is annexed as Exhibit C. Under the will he appointed his wife as the executrix, gave her a life-estate in the property and directed her to give his daughters a sum of Rs. 600 each per month. This sum of Rs. 600 was not paid and it fell into arrears. The daughter got a decree for Rs. 80,000 in the Sub-Court of Bezwada and this sum is taxed as income.

It is argued for the assessee that she got a rent-charge on the income of the estate in respect of the amount that the executrix had to pay and that this sum of Rs. 600 should be treated as "agricultural income" as defined in section 2, clause (1). We think that this legacy cannot be brought under that clause and that she was rightly assessed on the amount she realized as arrears of maintenance. We answer the reference accordingly and direct that the assessee should pay Rs. 250 as costs of this reference.

N.R.

APPELLATE CIVIL.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice and
Mr. Justice Anantakrishna Ayyar.*

THE AUTO SUPPLY Co., LTD. (PLAINTIFF), APPELLANT,

1929,
March 15.

v.

V. RAGHUNATHA CHETTY (DEFENDANT), RESPONDENT.*

*Hire-purchase agreement—Motor bus delivered under—
Hirer to pay initially by way of hire without demand a certain
sum and subsequently instalments of smaller sum—Hirer to hold
vehicle as bailee till whole amount paid—Owner to be entitled to
terminate contract and recover vehicle in case of default in instal-
ment—Breach by hirer—If hirer entitled to return of balance of
initial payment after deducting a month's hire on basis of
subsequent payments.*

A motor bus was delivered under a hire-purchase agreement, containing the following amongst other terms:—

(a) The hirer shall pay at Madras by way of hire without demand the sum of Rs. 1,140 and thereafter a sum of Rs. 226 on the twelfth day of every calendar month beginning with the month next after the date herein until eleven monthly instalments have been made, unless he shall have terminated this agreement as hereinafter provided.

(b) The hirer acknowledges that he holds the vehicle as a bailee of the owner and shall not have any property or interest as purchaser therein until he shall have exercised his option of purchase as herein provided, and shall have paid the whole amount due under this agreement.

(c) The owners may terminate the contract of hiring and forthwith recover possession of the vehicle, if any monthly hire is in arrear and left unpaid for seven days after the date fixed for its payment.

The hirer committed default in the payment of the monthly instalments, and the owner terminated the hiring and claimed delivery of the bus with payment of arrears then accrued.

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Held, that the initial payment of Rs. 1,140 was not by way of advance of rent but only the first instalment of rent, and that the hirer, on the termination of the agreement, was not entitled to the return of the balance of that sum after the appropriation out of it by the owner of Rs. 226 as being rent for the first month.

Helby v. Mathews, [1895] A.C., 471, followed.

Per ANANTAKRISHNA AYYAR, J.—Even if the initial payment be regarded as a premium for granting the hire, the hirer who broke the contract was not entitled to its return.

ON APPEAL from the judgment of Mr. Justice BEASLEY, dated 24th day of October 1928, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 316 of 1928.

The facts necessary for this report appear in the Judgment.

Nugent Grant for appellant.—The only point to be argued is as to the character of the initial payment, whether it is an advance of hire or hire for the first month, in other words, in the event of a breach of the agreement by the hirer, and the consequent termination of the agreement, the hirer is entitled to a return of the balance of the initial payment after deducting Rs. 226 as and for the first month's hire. There is now no dispute as to whether the agreement is one of hire-purchase or sale. The learned trial Judge has found that it is the former. "By way of hire" used in the agreement excludes the operation of those English and Indian decisions which deal specifically with "advance hire." The initial payment is fixed at a considerably higher figure than the rate of the subsequent payments so as to provide against the contingency of the vehicle being thrown back on the hands of the owner after a month or so when the value of the car would have depreciated. The rate of subsequent payments would undoubtedly have been higher but for the substantial initial payment. *Helby v. Mathews*(1) recognizes these circumstances and is a strong authority in my favour. See also *Brooks v. Beirnsstein*(2).

G. Krishnaswami Ayyar for respondent.—To construe the contract as contended for on the other side would work a great

(1) [1895] A.C., 471.

(2) [1909] 1 K.B., 98.

hardship on the hirer. The initial payment would on that construction become a penalty and the Court ought to relieve against it. In *Helby v. Mathews*(1) the initial payment was a very small sum. In *Brooks v. Beirnsstein*(2) there was a clear provision that the first payment was in no case returnable.

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JUDGMENT.

COUTTS TROTTER, C.J.—This case turns on the construction of an agreement, dated the 12th of September 1927, which is commonly called a hire-purchase agreement. By that agreement, the plaintiffs, the Auto Supply Company, Limited, delivered a Morris motor bus of which they were the owners to the first defendant who hired it under the terms of the agreement. The terms were these :—

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By clause (3), the hirer was to pay by way of hire without demand a sum of Rs. 1,140 on delivery, and thereafter a sum of Rs. 226 on the 12th day of every month, beginning with the month next after the date of the agreement, until eleven monthly instalments had been made, unless in the interim he should have terminated the agreement.

Then, by clause (4), in the event of all the stipulated monthly hire being duly and punctually paid, the vehicle was at the hirer's option to become his absolute property but he had a further option to buy the vehicle outright at any time during the currency of the agreement by paying the balance of all the hire stipulated under the agreement. By clause (2) the hirer was to pay the owners a sum of Re. 1 as consideration for the option to purchase given to him. It was also provided that the owners might terminate the contract of hiring and forthwith recover possession of the vehicle in certain events, one of which was that the hire for any given

(1) [1895] A.C., 471.

(2) [1909] 1 K.B., 98.

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month was in arrear and left unpaid for seven days after the date fixed for its payment (clause 4 (a)). That is the event which happened. No monthly instalments were paid for March, April, May and June 1928, the total amount due to the owners in respect of those months being Rs. 904. On the 30th June 1928, the plaintiff company terminated the hire and called for delivery of the bus to them with payment of the arrears then accrued. This was not done and the plaintiff filed the present suit for possession of the bus or, in lieu of that, Rs. 2,500, its estimated value at the time, for the arrears of hire, i.e., Rs. 904 and for damages for wrongful detention from the date of demand, i.e., 30th June 1928.

The learned Judge has held that the agreement before us was a hire-purchase agreement which I take to mean that it was a hiring with an option of purchase to the hirer on the fulfilment of the stipulated conditions and was not a sale which would pass the property in the bus to the hirer with stipulated retardation of payment of the purchase price by monthly instalments. It has not been questioned by either side that the learned Judge was right in so finding and that takes us out of the ambit of the decision in *Lee v. Butler*(1), and the position is that which is dealt with in the leading case of *Helby v. Matthews*(2). The learned Judge has decided that on the termination of the hiring the plaintiff owners were not entitled to retain the Rs. 1,140 paid as an advance under the agreement but only to Rs. 226 corresponding to the ordinary monthly instalments for the balance of the duration of the hiring. This seems to me to be adding a term to the contract which is not there. No doubt it was in the contemplation of the

(1) [1893] 2 Q.B., 318.

(2) [1895] A.C., 471.

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draftsman of the agreement that the sum of Rs. 1,140 was something more than what it is described as being, namely, the first month's hire, and that for the protection of both parties. Every one knows that a new motor vehicle after it has been on the road for even a month is depreciated in the market by something like 50 per cent, and I make no doubt but that the object of this clause is to prevent the hirer turning a new into a second hand car, depreciate it 50 per cent, and then put it on the hands of the owners in that condition. It is quite true that there is no express clause in this contract that on the termination of the agreement either by return of the vehicle by the hirer or by breach of the conditions of the agreement by him, he shall forfeit all he has already paid including the initial sum of Rs. 1,140, but it appears to me that it is a necessary implication of the contract and I so hold. The learned Judge thinks that this is a case of hardship for the defendant, the hirer. Were his decision to be upheld, it seems to me that it would be an intolerable hardship on the owners. They hand over a new car, it can be thrown back on their hands at the end of a month on payment of the small sum of Rs. 226, leaving in their hands a car depreciated 50 per cent in its value. Indeed, if the sum of Rs. 1,140 is not to be treated as hire at all, I do not see why it should not be open to the hirer to return the car one day before the end of the first month and have had a month less one day to use the car for nothing. It is quite true, as I have already said, that there is no express provision in this agreement that, when the agreement is terminated by the choice of the hirer or by his default, all sums paid by him up to date are to be retained by the owners without giving credit to him for a farthing. But it seems to me that it is a necessary implication of this agreement, that such

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sums should be irrecoverable by the hirer and that we should not be justified in treating the initial payment of Rs. 1,140 as in any event returnable to him on the termination of the hiring. There is no question here of any misleading of the hirer; he signed the agreement with his eyes open and in many ways it was an exceedingly favourable agreement to him in that he could at his own choice put an end to the hiring whenever he was so minded. But I think it must be a necessary implication that he was not entitled to get back anything which he had paid under the terms of the agreement. I have no doubt that the initial payment was made a heavy one with the express purpose of acting as a deterrent to hirers throwing back road-depreciated cars on the hands of the owners within a few months of the commencement of the hiring. On the best view I can form of this case, I feel constrained to differ from the conclusion of the learned Judge and to allow this appeal with costs.

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ANANTAKRISHNA AYYAR, J.—As I have the misfortune to differ from the learned trial Judge in this case, and as the case raises a question of importance relating to the incidents of hire-purchase agreement, I feel bound to express in my own words the reasons for my decision. The plaintiff in the original suit, Auto Supply Co., Ltd., is the appellant before us. In pursuance of an agreement, dated the 12th of September 1927, the plaintiff delivered a Morris motor bus to the first defendant (the second defendant stood surety for the first defendant). Under the terms and conditions contained in the said agreement, the first defendant paid a sum of Re. 1, in consideration of the option to purchase given to him under clause 2 of the agreement; and under clause 3 he paid in September 1927, a sum of Rs. 1,140 to the plaintiff; he also paid to the plaintiff by way of hire

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Rs. 226 in each of the months after September 1927. The first defendant committed default in the payment of the monthly instalments due for the months of March, April, May and June 1928; i.e., on the 12th of June 1928, there was due by the defendant to the plaintiff a sum of Rs. 904. On the 30th of June 1928 the plaintiff company exercised its right under the agreement and terminated the hiring and called upon the defendant to deliver the motor bus to the plaintiff and to pay the arrears due. The defendant not having done so, the plaintiff filed the suit for possession of the motor bus, or in lieu of it Rs. 2,500 its present value, for the arrears of hire Rs. 904, and also for damages for wrongful detention from the 1st July 1928 until delivery of the bus to the plaintiff. The learned Judge decreed the suit in plaintiff's favour, but held that out of Rs. 1,140 paid by the defendant to the plaintiff in September 1927, the plaintiff was entitled to retain only Rs. 226, as for hire for the first month and that credit must be given by the plaintiff to the defendant for the balance (Rs. 1,140 minus 226 or Rs. 914). It is against this portion of the decision of the learned Judge that the plaintiff company has preferred this appeal.

The first question to be considered is, what is the exact legal nature of the agreement between the parties. It is necessary to distinguish between (1) contracts to buy and pay by instalments, and (2) contracts to hire, the hirer having an option to return goods, with a provision that on payment of certain number of instalments the article should belong absolutely to the hirer. In a contract of sale for a price payable by instalments, the purchaser has no option of terminating the contract and returning the chattel,—whereas, in a contract of hire-purchase, the hirer has such an option. In the case of a hire-purchase contract, the hirer has got an option to

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purchase, which he may exercise or not, according to his sweet will and pleasure; but in the case of a contract of sale, the purchaser has become the owner of the chattel, but the price is by agreement payable by instalments. This distinction has been well pointed out in the judgment of the House of Lords in the case of *Helby v. Mathews*(1). The learned trial Judge in the case before us held that the agreement in question was a hire-purchase agreement. That finding is not disputed before us by either of the parties. The question then is, whether the learned Judge's direction that the plaintiff should give credit to the defendant for the difference between Rs. 1,140 paid in September 1927 and Rs. 226, is correct. Now turning to the terms of the agreement between the parties, I find that clause 2 of the agreement provides that "on the signing of the agreement, the hirer (the defendant) shall pay the owners (the plaintiff) a sum of Rs. 1 in consideration of the option to purchase given to the hirer hereunder and the said sum shall become the absolute property of the owners." Clause 3 is important: "The hirer shall pay at Madras by way of hire without demand the sum of Rs. 1,140 and thereafter a sum of Rs. 226 on the 12th day of every calendar month beginning with the month next after the date herein, until 11 monthly instalments have been made, unless he shall have terminated this agreement as hereinafter provided. The hirer acknowledges that he holds the vehicle as a bailee of the owner and shall not have any property or interest as purchaser therein until he shall have exercised his option of purchase as hereinbefore provided and shall have paid the whole amount due on this agreement." "The owners may terminate the contract of hiring and forthwith

(1) [1895] A.C., 471.

recover possession of the vehicle if any monthly hire is in arrear and left unpaid for seven days after the date fixed or its payment." It is admitted that the defendant committed default in payment of the amounts due for the month of March and the subsequent months. The question is whether on the true construction of the agreement the defendant is entitled to credit for the sum of Rs. 914. If on a proper construction of the contract the defendant is not entitled to the same, then the defendant's contention must be overruled, and no question of any "hardship" to him would, in my view, arise. The parties dealt at arms length and there is no question of the bargain pressing hard on one, and not on the other. For the considerations recited in the agreement and moving from one party, the other party has undertaken to do something. It is admitted that the defendant is not entitled to the return of any of the instalments paid from October 1927 to February 1928; but it is contended that the defendant is entitled to the return of Rs. 914 out of the amount of Rs. 1,140 paid by the defendant to the plaintiff on the date of the agreement when the bus was delivered to the defendant. Is there any reason for making any distinction between the payment made in September 1927 and the other payments made subsequently? The agreement speaks of all these payments as payments made "by way of hire." The amount of hire payable by the defendant to the plaintiff has been fixed by the parties; that which is payable in September 1927 has been fixed by them at Rs. 1,140 and that which is payable on the 12th of each of the succeeding 11 months has been fixed by them at Rs. 226. As it is admitted that it is the defendant who broke the contract, *prima facie* he is not entitled to recover any amounts paid by him to the plaintiff. If this amount of Rs. 1,140 be treated as "hire", it is clear

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that it is hire paid by the defendant for the use of the bus, and it stands on the same footing as the subsequent instalments paid by him; and as he had the use of the bus for the period, the defendant is not entitled to the return of any portion of the hire paid by him. The learned Judge says that the plaintiff is not entitled to retain Rs. 1,140, treating the same to have been paid "as advance of rent" on entering into the agreement; the agreement does not mention this sum as "an advance of rent." My attention has not been drawn to any evidence, or provision in the document, that the sum of Rs. 1,140 was paid as "advance" of rent. If once it is proved or admitted that it is "an advance of rent," then quite different considerations would apply. But, as already mentioned, there is no evidence to support the finding that the amount in question was paid as advance of rent. If parties treated it as "advance of rent," then naturally one should expect the agreement to contain specific provision as to how this advance of rent was to be dealt with subsequently, whether the same should be returned to the hirer or whether the same should be taken towards the rent due for some particular instalments. The agreement in question does not make any such provision. Further, there is no warrant in the case for the view that the hire (rent) due for September 1927 was only Rs. 226. The agreement only states that the hirer shall pay by way of hire the sum of Rs. 226 on the 12th day of every succeeding month after September 1927 until 11 monthly instalments have been made, unless in the meantime he shall have terminated the agreement. The provision, as I understand it, is not that the parties have agreed that the proper rent for each month is Rs. 226, but they have made a consolidated provision that the hirer shall pay by way of hire a sum of Rs. 1,140 at the time of the

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delivery of the bus to the defendant and also pay a sum of Rs. 226 on the 12th day of 11 subsequent months. The essential difference is this. According to the defendant's view, Rs. 226 would represent the rent of a new motor bus for the first month of its user, and the same would be the proper rent for each of the 11 months following. If so, the defendant could have the use of a new motor bus for one month by paying Rs. 226 and he could at the end of the period return the same without being under any further liability to the plaintiff. Again, if defendant's view be upheld, he could return the bus just one day before the expiry of the first month without being liable to pay any amount as rent. Obviously no owner of a new motor bus would agree to let the same on such terms. The obvious intention of the parties should therefore be taken to be that the first instalment of rent to be paid was to be Rs. 1,140 and that payable for each of the other instalments was to be Rs. 226. There is nothing wrong in the parties agreeing to different amounts to be paid as rent for different periods. The reasonable view to be taken of the agreement is, in my opinion, that the defendant paid Rs. 1,140 as the first instalment of rent, and agreed to pay 11 further subsequent instalments of Rs. 226 each on the 12th of every succeeding month, so long as the agreement continued to be in force. But for the fact that the initial payment made by the defendant was a comparatively large amount, the amount due for each of the subsequent instalments would have been much more than Rs. 226, in other words, in fixing the amount of the subsequent instalments, the parties had due regard to the amount of initial payment made by the defendant to the plaintiff. If the amount to which the plaintiff would be absolutely entitled in case of breach of the agreement by the defendant was to be only Rs. 226, that is, only a portion

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of the initial payment, then, it stands to reason, as was contended before us, on behalf of the appellant, that the amount of the subsequent instalments would have been fixed at a very much higher figure than Rs. 226. I am therefore of opinion that the amount of Rs. 1,140 in question should not be taken as an "advance of rent" in the ordinary acceptation of the expression, but that it was the first instalment of rent agreed to be paid by the defendant to the plaintiff for the use of the bus, and that it stands on the same footing as the payments made in respect of the instalments from October to February, and that the defendant is not entitled to a refund of any portion of the same.

If, on the other hand, payment of this amount of Rs. 1,140 should not be treated as payment of rent, it should in my view be taken as a *premium* taken by the owner—the plaintiff—with a view to grant the lease to the defendant. If it should be taken as a premium to grant a lease, then the lease having been granted, the defendant is not entitled to have any portion of the said amount returned to him. The same should be taken to have been paid for the plaintiff's executing and granting the lease; and the defendant enjoyed the benefit of the same when he got the lease. This view receives support from the decision of MUTHUSWAMI AYYAR and BEST, JJ., in *Kammaran Nambiar v. Chindan Nambiar*(1). The plaintiff—the landlord—sued to eject the defendant—the tenant—on the ground that the defendant allowed the rent to fall into arrears, and that the landlord was entitled to recover possession on the footing of forfeiture of the lease. It appeared that the defendant had paid the plaintiff a consideration (premium) for the grant of the lease. The lower Courts held that the plaintiff was not

entitled to recover possession before he returned the consideration (premium). The learned Judges of the High Court observed as follows :—

"We do not agree with the Judge that if the clause for forfeiture of the perpetual lease is enforceable, the plaintiff is only entitled to a decree on refund of the consideration paid by the tenant at the time of obtaining the lease. Exhibit A contains no provision for such repayment, and an obligation to refund cannot be inferred from the clause for forfeiture .

. . . In the case of a lease, the consideration paid for it is exhausted by the grant of the lease, and the tenant's forfeiture of the lease cannot operate to convert the original consideration into a debt."

The High Court held that the plaintiff was entitled to recover possession without returning any portion of the consideration (premium) paid for the grant of the lease. In my view, the principle of that decision would apply to the case before me, in case it is taken that the initial payment made by the defendant in this case should be taken to be in the nature of *premium* for the grant of the lease.

Thus, whether the amount in question be treated, as I am inclined to take it, as the first instalment of rent fixed by the parties to be paid by the defendant for the use of the bus (the amount of the subsequent instalments being fixed having regard to the amount fixed as the (first) initial instalment), or whether the said amount be taken as "premium" paid to the lessor by the lessee for the grant of the lease, in either view the defendant who broke the contract is not entitled to the return of the same. It was suggested that such a construction of the contract works to the great advantage of the one party (the plaintiff) but works hardship on the other (the defendant). The rights of the parties have to be worked out according to the terms of the contract which they entered into with their eyes open ;

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each got under the contract what he bargained for, and there is no question of fraud or mistake. In this case, it seems to me that no question of "hardship" is before the Court for consideration. Further, the judgment of Lord MACNAGHTEN at page 482 of *Helby v. Mathews*(1), mentions considerations which would seem to show that there is no question of hardship in such a case at all. His Lordship observed:

"The advantages are not all on one side. If the object of desire loses its attractions on closer acquaintance—if faults are developed or defects discovered—if a coveted treasure is becoming a burthen and an encumbrance, it is something, surely, to know that the transaction may be closed at once without further liability and without the payment of any forfeit. If these agreements are objectionable on public grounds, it is for Parliament to interfere. It is not for the Court to put a forced or strained construction on a written document or to import a meaning which the parties never dreamed of because it may not wholly approve of transactions of the sort."

The learned advocate for the respondent drew our attention to the circumstance that in *Helby v. Mathews*(1) the amount of the initial payment was only 10s. 6d., and that the amount of each of the succeeding instalments was also only 10s. 6d. But, in my view, that does not make any real difference. The subject-matter of hire in *Helby's* case was a pianoforte; whereas the subject-matter of the agreement before us is, as already mentioned, a new motor-bus; and one can well understand the effect of the first few months' use on the respective chattel concerned, on which will depend the amount of the initial payment of hire. It was also argued on behalf of the respondent that in the case of *Brooks v. Beirnsstein*(2) there was a specific provision that the hirer was in no case to be entitled to any credit

(1) [1895] A.C., 471.

(2) [1909] 1 K.B., 98.

for the amount paid for option or for the said rent or part thereof, except at purchase of the said furniture under the provisions of the agreement. But that circumstance also does not, in my view, make any difference, for the reasons mentioned by me already. In *Brook's* case, the hirer paid £1 on the signing of the agreement, £14 at the time of the delivery of the furniture and £20 before the 29th of June 1907, in all making £35. He had also paid rent at £7 per month for the subsequent months but got in arrear and owed £51 for rent unpaid. The owners, in exercise of the power given to them by the agreement, retook possession of the goods and claimed the arrears of rent £51 without giving credit to any portion of £35 paid by the hirer. As mentioned by BIGHAM, J., "But in truth the hirer has enjoyed the use of the furniture which was the consideration for the rent, and I can see no reason why he should not be liable to pay the arrears claimed."

Our attention has not been drawn to any Indian case on the point. For the reasons mentioned by me, I am not able to make any distinction between the sum of Rs. 226 paid on various occasions by the defendant, and the sum of Rs. 1,140, the initial payment made by him. If the former represent hire or rent, I think that the latter also should be taken to have the same legal characteristic. There is no evidence to show that the rent for September 1927 was fixed as at something less than Rs. 1,140; I do not feel justified in fixing the proper rent for the first month (September 1927) at Rs. 226, nor am I able to find any evidence or any indication to support the argument that the amount of Rs. 1,140 should be taken as payment of "advance of rent." If, however, the said amount be taken to represent "premium" (consideration) paid for the grant of

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the lease, then the lease having been granted and the defendant having admittedly had possession and enjoyment of the bus for some months, the consideration, that is, the premium paid, has become exhausted by the grant of the lease, and in that view also the defendant is not entitled to the return of the same or any portion thereof. The agreement in question is one of hire purchase and the parties having dealt with each other at arms' length, and each had what he bargained for, no question of hardship arises, in my view of the case. In a case of this nature, it is with great reluctance that I have had to differ from the decision of the learned Judge. But, for the reasons given by me above, I think that the direction in the decree that the defendant should be given credit for the sum of Rs. 914 is not correct, and that the appeal should be allowed with costs.

Attorneys for appellant.—Short, Bewes & Co.

B.C.S.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Madhavan Nair.

GANAPATHY (THIRTY-FIRST DEFENDANT), APPELLANT,

v.

SUBRAMANYAM CHETTY AND OTHERS (SECOND PLAINTIFF, AND DEFENDANTS 2 TO 5, 9 TO 24 AND 25 TO 30), RESPONDENTS.*

1929,
January 25.

Hindu Law—Suit for partition by a Hindu father and his minor sons against his father and brother and others—Death of grandfather and father pending suit—Election by major son to continue suit for himself and his minor brother—Application by mother of minor plaintiff not to have partition—Minor plaintiff transposed as defendant—Status of minor, whether divided.

A Hindu father, on behalf of himself and his two minor sons, instituted a suit for partition against his father, his brother and his sons. Before a decree was passed, the grandfather, and subsequently, the father, died. One of the sons, having become a major, elected to continue the suit on behalf of himself and his minor brother. The mother of the minor plaintiff applied to the Court to be made his guardian *ad litem* and stated that a partition was not in the interest of the minor and that she did not want a partition for him, and the minor was accordingly transposed as a defendant. The defendants, who were members of the family, thereupon stated that they did not wish to remain united with the minor plaintiff. A decree was passed by the lower Court, awarding one-third share to the major son on behalf of himself and his minor brother. On appeal by the minor son,

Held, that, in a litigation in which a minor is concerned, the Court is bound to look after his interests, and this rule applies where the minor was a co-plaintiff as well as where he was the sole plaintiff;

that the filing of a plaint for partition by the father on behalf of himself and his minor sons did not necessarily effect

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a severance in status, as regards the minors, from the defendants who were members of the joint family, until a decree was passed; that the election of the major son to continue the suit, on his and the minor's behalf, did not effect a division of status as regards the minor;

that it was obviously not in the interest of the minor to become divided from the defendants, as his share would be enhanced by the death of the grandfather;

that, as the minor continued to be joint with the defendants, at any rate until the refusal of the defendants after the grandfather's death to remain joint with him, his share was not affected by such refusal;

and that a decree should be given to the major plaintiff only for his own share in the joint family property.

APPEAL against the decree of the Court of the Subordinate Judge of Ramnad in Original Suit No. 8 of 1920.

This appeal arises out of a suit for partition, instituted by the first plaintiff for himself and his two sons, who were minors at the date of suit, against the father of the first plaintiff, his brother and his sons. Pending suit, the first defendant (the grandfather) died on 26th October 1923 and the first plaintiff (the father) died in June 1924. The second plaintiff, who had become a major (for himself and his brother still a minor), elected to continue the suit. But, on behalf of the third plaintiff (minor), his mother applied to the Court to be appointed his guardian, stating that she did not want a partition as it was not to his interest, and the minor was transposed as the thirty-first defendant. But the Subordinate Judge passed a decree for a third share in favour of the major plaintiff and the minor son (the thirty-first defendant). The latter preferred this appeal.

T. M. Krishnaswami Ayyar (for *K. Raja Ayyar*) for appellant.—The lower Court is wrong in compelling the minor son (thirty-first defendant) to take a reduced share with the major plaintiff. The minor son had not become divided in status either

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by his father's unilateral declaration in the plaint or by the act of the major son to continue the suit for his minor brother. Until a decree is passed by the Court, the status of the minor did not become divided. The Court is entitled and bound to look to the interest of the minor plaintiff: See *Doraisami Pillai v. Thungasami Pillai*(1), *Ganesha Row v. Tuljaram Row*(2). It is the Court's decree that effects the division of status in a suit by a minor for partition, *Chelmi Chetti v. Subbamma*(3), and *Lalta Prasad v. Sri Mahadeoji Birajman Temple*(4). There is a right of revocation of the declaration as to status in a plaint in a partition suit. That declaration is not an unambiguous declaration nor is it conclusive: *Vemi Reddi v. Nallappa Reddi*(5), *Krishnaswami Naidu v. Nammayya Naidu*(6), and *Palani Ammal v. Muthuvenkatachala Moniagar*(7). If a decree for partition is passed, the division may no doubt take effect from the date of the plaint; see *Krishnaswami Thevan v. Pulukaruppa Thevan*(8), and *Sri Ranga Thathachariar v. Srinivasa Thathachariar*(9). Even in the case of a major plaintiff, he can revoke his declaration of intention in the plaint as to partition; *a fortiori* in the case of a minor plaintiff, the declaration of the next friend is not conclusive. It is clearly prejudicial to the minor to have a partition under the altered circumstances of this case.

T. R. Ramachandra Ayyar (with *S. R. Muttuswami Ayyar*), for the respondents 2, 3 and 27.—Where a father brings a suit on behalf of his minor sons, it is conclusively for the minor's benefit. Unless the question of benefit is raised, the Court will not inquire if partition is beneficial to the minor in such a case. In the case of a sole plaintiff or all the plaintiffs (all being minors), the suit by a next friend will have to be subject to the discretion of the Court.

Even though the third plaintiff (now thirty-first defendant) wants to remain joint with the defendants, the latter do not want to remain joint with him. They have so stated in their written statement. In *Chelmi Chetti v. Subbamma*(3), the minor plaintiff was the sole plaintiff, who died, and his mother applied as his legal representative.

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| (1) (1903) I.L.R., 27 Mad., 377. | (2) (1913) I.L.R., 36 Mad., 295 (P.C.). |
| (3) (1917) I.L.R., 41 Mad., 442. | (4) (1920) I.L.R., 42 All., 461. |
| (5) (1920) 11 L.W., 611. | (6) (1924) 20 L.W., 540. |
| (7) (1924) I.L.R., 48 Mad., 254 (P.C.). | (8) (1924) I.L.R., 48 Mad., 465. |
| | (9) (1927) I.L.R., 50 Mad., 866. |

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Institution of a suit by a father for himself and his minor sons, effects a severance in status, unless the father acts fraudulently and prejudicially to the minors. The father has power to represent the sons. The father can divide or re-unite the sons without their consent. *Babu alias Govindoss Krishnados v. Gokuldoss Govardhandoss*(1), *Ramdos v. Chabildas*(2), *Alur Lakshmi Narasimha Sastrulu v. Venkata Narasimha*(3). Father's release is binding on the sons: see *Balabux v. Rukhma Bai*(4).

T. M. Krishnaswami Ayyar for appellant in reply.—The son and grandson can compel partition against the father and the grandfather: see *Mayne's Hindu Law*, paragraph 471; *Suraj Bunsu Koer v. Sheo Persad Singh*(5).

The father's (first plaintiff's) declaration in the plaint is merely a unilateral declaration and not a bilateral transaction, in which case fraud or collusion may have to be shown by the minor to set it aside. The cases relied on by the respondent relate to bilateral transactions and not to mere unilateral declarations. *Jus accressendi* or the possibility of increase in share is sufficient benefit for the minor; see *Kamakshi Ammal v. Chidambara Reddi*(6), and *Palani Goundan v. Kasi Goundan*(7).

V. Ramaswami Ayyar, R. Kesava Ayyangar, and B. Sitarama Rao, for other respondents.

JUDGMENT.

PHILLIPS, J.

PHILLIPS, J.—In this suit the first defendant is the father of the first plaintiff and the second defendant, by different mothers. Plaintiffs 2 and 3 are the minor sons of the first plaintiff and defendants 3 and 30 are the minor sons of the second defendant. The suit was instituted by the first plaintiff on behalf of himself and his minor sons for a partition. It is alleged that the first plaintiff wished to effect a partition in 1915 or 1916, but no partition appears to have been effected before

(1) (1928) 55 M.L.J., 132 (140).

(3) (1918) 52 I.C., 614.

(5) (1879) I.L.R., 5 Calc., 148 (164) (P.C.).

(2) (1910) 12 Bom. L.R., 621.

(4) (1903) I.L.R., 80 Calc., 725 (P.C.).

(6) (1866) 3 M.H.C.R., 94.

(7) (1918) 50 I.C., 552.

this suit was filed in 1920, and it has not been shown that there was any separation in status. During the pendency of this suit, the first defendant died on 26th October 1923, and in June 1924 the first plaintiff died. On the first plaintiff's death, the second plaintiff who had attained majority elected to continue the suit on behalf of himself and his minor brother the third plaintiff. At the end of the trial, the third plaintiff's mother applied to be made guardian of her minor son, the third plaintiff, and stated that the partition was not in the interest of the third plaintiff and that she did not want a partition so far as he was concerned. The third plaintiff was, accordingly, transposed as the thirty-first defendant.

The Subordinate Judge has held that it was not open to the third plaintiff to withdraw from the suit as he was bound by the act of his father and has accordingly decreed the partition and allotted one-third share to the second plaintiff for himself and his minor brother, the thirty-first defendant. The latter now appeals and the only question that arises for consideration is whether the minor third plaintiff was separated in status from the defendants by reason of his father's unequivocal declaration of an intention to be divided in status. It is contended for the appellant that it is not to the third plaintiff's interest to be separated from the family, but the respondents contend that this question cannot now be considered, because the third plaintiff is bound by the father's declaration and became separated from the date of the filing of the plaint. It is well settled that, in a litigation in which a minor is concerned, the Court is bound to look after the interests of such a minor, and this has been recognized so far back as 1866; *Kamakshi*

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Ammal v. Chidambara Reddi(1), which was followed in *Chelmi Chetti v. Subbamma*(2). *Palani Goundan v. Kasi Goundan*(3) is to the same effect. It was also held in *Doraisami Pillai v. Thungasami Pillai*(4) that a minor's interest must be protected by the Court. In *Ganesha Row v. Tuljaram Row*(5) it was held that a compromise entered into by a father on behalf of his minor son without the leave of the Court was not binding on a minor. It is, therefore, clear that it is the duty of the Court to protect the interests of a minor party. The cases referred to were cases in which the minor was the sole plaintiff but this cannot affect the principle. Ordinarily, when a father sues on behalf of his minor son, it may be presumed that he is acting in the interests of that son unless there is anything to show the contrary. If, however, it does appear to the Court that a father is not acting in the best interests of his son, on the principle set forth above, the Court is bound to protect that son's interest even against the acts of his father. I cannot therefore accept the contention of Mr. Ramachandra Ayyar, for respondents, that the Court cannot interfere to protect a minor from the act of his father. Taking that view we have now to consider whether the filing of the partition suit by the father did actually effect a separation not only of himself but also of his minor sons from the rest of the family, or whether it is open to the Court to refuse partition so far as the minor is concerned.

The first point to be considered is whether the filing of this plaint did constitute a final division in the family. When a declaration has been made of an intention to separate by the filing of a plaint for partition

(1) (1886) 8 M.H.C.R., 94.

(3) (1918) 50 I.C., 552.

(5) (1918) I.L.R., 36 Mad., 295 (P.O.).

(2) (1917) I.L.R., 41 Mad., 442.

(4) (1908) I.L.R., 27 Mad., 377.

and such plaint has resulted in a partition decree, undoubtedly the date of separation would be the date of the filing of the plaint. But the mere filing of the plaint does not necessarily effect a final severance in status, for it has been held that a plaintiff may withdraw his declaration of intention and that then no severance is effected. *Vemi Reddi v. Nallappa Reddi*(1), and *Krishnaswami Naidu v. Nammayya Naidu*(2). This has been affirmed by the Privy Council in *Palani Ammal v. Muthuvenkatachala Moniagar*(3). There is a remark in the judgment in the latter case to the effect that the withdrawal must be before trial, but that that means before a final decree is made clear by reference to *Palaniammal v. Muthuvenkatachala Moniagar*(4), the same case before this Court, from the judgment in which it appears that the withdrawal took place during the pendency of an appeal. In this view it would be difficult to hold that a declaration of intention by the father, which is subject to revocation, must necessarily effect a separation of his sons from that date. There is authority for holding that when a partition has been actually effected either by a decree, or by agreement between the parties, that partition effected by the father is binding on his sons and can only be questioned on some such ground as fraud or collusion. *Ramdas v. Chabildas*(5), *Alur Lakshmi Narasimha Sasstrulu v. Venkata Narasamma*(6), and *Umed Babar v. Kushalbai Kevalbai*(7). But that does not show that, if the intention to separate has not been carried into effect, the sons will be equally bound. In the present suit, before the intention could be carried into effect by the

(1) (1920) 11 L.W., 611.

(3) (1924) I.L.R., 48 Mad., 254 (P.O.).

(5) (1910) 12 Bom. L.R., 621.

(2) (1924) 20 L.W., 540.

(4) (1917) 33 M.L.J., 759.

(6) (1918) 52 I.C., 614.

(7) (1909) 2 I.O., 426.

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passing of a decree, the father died. It would, therefore, appear that on the date of his death the minor sons had not been irrevocably divided from the rest of the family.

In the circumstances of the present case, the inference of non-division is all the stronger because when the suit was filed, the father of the whole family, viz., the first defendant, was alive and was the head of the family. When, therefore, the first plaintiff asked for a partition, the presumption that he would bind his minor sons by his actions is not so strong as if he were filing a suit against his brothers as the head of his own branch. The third plaintiff, as grandson, could himself have maintained a separate suit for partition, as also any one of the members of the first defendant's family. While, therefore, the filing of the plaint by the first plaintiff may be deemed to have effected his separation from the family, because he did not revoke his declaration of intention, yet it does not necessarily effect a division between the third plaintiff and the other members. In *Balabux v. Rukhmabai*(1) and *Mst. Jatti v. Ranwari Lal*(2), the Judicial Committee of the Privy Council has laid down that when one member of the family becomes separate, there is no presumption that the remaining members remain united, and further that when there has been a separation between the members, there is no presumption that there is a separation between one of the members and his descendants. These however are only presumptions, and such presumptions may be rebutted by circumstantial evidence or otherwise, as is evident from the decision of the Privy Council in *Palani Ammal v. Muthuvenkatachala Moniagar*(3), where it was held that a separation of one member did not necessarily create a division between all the members, and it was observed

(1) (1903) I.L.R., 30 Cal., 725 (P.C.). (2) (1923) I.L.R., 4 Lah., 350.

(3) (1924) I.L.R., 48 Mad., 254 (P.C.).

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the decree has to be looked to, to show whether the separation was only separation of the plaintiff from his parceners or was a separation of all the members from the other. It does not therefore necessarily follow that, when the third plaintiff's father effected a separation between himself and his family, he effected a separation between his sons and their grandfather and uncle, and to decide this point one must consider the circumstances of this case. The observation of the Privy Council in *Ramalinga Annavi v. Narayana Annavi*(1), that the separation of the father effected a separation of his branch must be read in connexion with the facts of the case and of the fact that their Lordships were merely considering the question of the date of separation and not of the factum of separation of the junior members. It seems to me, on a consideration of all these authorities, that the filing of the plaint by the first plaintiff did not necessarily effect a separation of the third plaintiff as well. Before the partition was completed by a decree, representation was made to the court that it would not be in the interests of the third plaintiff to become separated from the other members of the family, and in the interests of the minor third plaintiff, the Court is bound to take that plea into consideration. So far as the third plaintiff's pecuniary interest is concerned, it is obvious that a separation effected before the death of his grandfather would be less beneficial to him than separation after that date; or in the latter case he would be entitled to a larger share. It is pointed out that, when the third plaintiff declared his intention not to become separated, the other members of the family, viz., second defendant and his sons replied that they did not wish to remain united

(1) (1922) I.L.R., 45 Mad., 489.

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with the third plaintiff. Until that date, however, there had been no such expression of intention by the defendants. In fact, in the written statement, the defendants pleaded that the plaintiffs had not been excluded from a share in the family property. The third plaintiff being a member of the joint family must remain so until he becomes separated. If he did not become separated by the filing of the plaint, he remains an undivided member of the family until a separation is effected. There has been no such separation until the declaration by the second defendant at the conclusion of this suit, assuming that that was an unequivocal declaration of intention. That being so, the share to which the third plaintiff was entitled on that date is a larger share than that which has been allotted to the second plaintiff on his behalf and the order of the Subordinate Judge decreeing only one-third share to the second plaintiff and the third plaintiff jointly is prejudicial to the latter's interest. It is also difficult to understand how the order of the Subordinate Judge can be justified after he had allowed the third plaintiff to be transposed as the thirty-first defendant. Having allowed the third plaintiff's plea to that extent, it was not open to him to compel him as defendant to have a decree. As I hold that there had been no separation of the third plaintiff from the family by reason of the filing of a plaint by his father, and as it would be prejudicial to his interests to decree such separation, I must uphold his interests and refuse such a decree. It may be true that the declaration of the second defendant in answer to the third plaintiff's refusal to continue the suit effected a separation, but that, being at a much later date than the plaint, cannot be dealt with in these proceedings, and the third plaintiff is entitled to a finding that, when the suit was filed, he was not a divided member of the family.

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The decree will therefore be modified by giving his share to the second plaintiff alone, leaving the other parties to effect a partition with the third plaintiff as and when so advised. Defendants 2, 3 and 30 will pay the costs of this appeal out of the estate.

A memorandum of objections has been filed by respondents 11 to 18 and the advocate who appears for them appears also for respondents 5, 6 and 21. So far as respondents 5, 6 and 21 are concerned, it is contended that they are unnecessary parties in this appeal and therefore they should be allowed their costs. They were necessary parties in the lower Court and have been added as formal parties in the appeal but no relief was asked as against them and it was not necessary for them to be represented here. There is therefore no reason for awarding them costs against the appellant.

The plea put forward on behalf of respondents 11 to 18 who were alienees from the first defendant is, that when a partition is effected the properties alienated to them should as far as possible be allotted to the share of their alienor, the first defendant, and that they should be allowed to retain the properties, as the alienation to them was binding on the first defendant. This equity for which they ask is not opposed either by the second defendant or the third plaintiff and will be allowed, but in the circumstances it is not necessary to pass any order as to costs.

MADHATAN NAIR, J.—I agree.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Jackson.

1929
April 4.

MALLAVARAPU RAMA RAO (FIRST PLAINTIFF), APPELLANT,

v.

MALLAVARAPU HANUMANTHA RAO AND OTHERS
(DEFENDANTS), RESPONDENTS.*

Hindu Law—Partition—Suit by two sons, one of whom was a minor, against his father and his alienees for partition of their shares—Death of minor plaintiff before decree—Share of major plaintiff, quantum of—Sale by father for an antecedent mortgage debt—Sale, whether binding on son, in the absence of pressure by creditor.

In a suit for partition, instituted by a Hindu for himself and his minor brother against their father and his alienees, the minor brother died before the decree. The father had sold some property to discharge an antecedent mortgage debt but there was no pressure by the mortgagee for payment at the time of the sale. The major plaintiff claimed a two-thirds or at least a half share in the property on the ground that his minor brother's share had accrued to him. He also contended that the sale was not binding on him.

Held, that the major plaintiff was only entitled to a third share in the family property, as the share of the minor who died before the decree vested in the father by survivorship;

and that the sale by the father for an antecedent mortgage debt was binding on the plaintiff, even though there was no pressure for payment of the debt at the time of the sale: *Bandhu Ram v. Ram Kishun Sonar*, (1923) 21 All. L.J., 354, dissented from.

APPEAL against the decree of the Court of the Subordinate Judge of Nellore in Original Suit No. 43 of 1925.

The material facts appear from the Judgment.

* Appeal No. 257 of 1927.

This appeal (A.S. No. 257 of 1927) and two other appeals arose out of the same suit.

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B. Somayya for appellant in A.S. No. 257 of 1927 (first plaintiff).—The deceased minor plaintiff was undivided from the first plaintiff at the time of his death. The major plaintiff is entitled to a two-thirds share and the father was entitled to one-third share. In any event the major plaintiff was entitled to a half share, and the father or the Official Receiver only to the other half share. The major plaintiff never intended to separate himself from the minor brother, who was a co-plaintiff. The alienation is not binding as there was no pressure or necessity at the time of sale: See *Bandhu Ram v. Ram Kishun Sonar*(1).

M. Patanjali Sastri for second defendant (second respondent).

K. V. Subrahmanya Ayyar for third, eighth to tenth respondents.—The first plaintiff (major) could not compel the father to divide himself from the minor son; the major plaintiff became divided in respect of his share by his suit. No pressure or necessity need be proved for a sale by a Hindu father to pay an antecedent mortgage debt. The sale is binding on the sons, as it was for an antecedent debt. The decision in *Bandu Ram v. Ram Kishun Sonar*(1) is erroneous.

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

RAMESAM, J.—These three appeals are filed against the Judgment in O.S. No. 43 of 1925 on the file of the Subordinate Judge's Court of Nellore. The original plaintiffs were two brothers. The first was a major and the second a minor appearing by his elder brother as next friend. The second plaintiff died during the pendency of the suit. The first defendant was their father, the second defendant was the brother of the first defendant, and the other defendants were the alienees from defendants 1 and 2. The eighth defendant was the special Receiver appointed in the insolvency proceedings in connexion with the insolvency of the first

(1) (1923) 21 All. L.J., 354.

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defendant who became insolvent while the suit was pending. The suit was filed to declare that the partition between the first defendant and the second defendant in 1915 was unfair and therefore not binding on the plaintiffs, to set aside certain alienations made by defendants 1 and 2 and also for a partition of the shares of plaintiffs 1 and 2 and recovering possession of them. The Subordinate Judge found that the partition of 1915 was fair and binding on the plaintiffs, and on that footing gave a decree to the first plaintiff for partition and possession of his share of the properties that were allotted to his branch. Appeal No. 256 was filed by the Receiver (eighth defendant); Appeal No. 257 was filed by the first plaintiff and Appeal No. 363 was filed by one of the alienees, the alienation in whose favour was declared not to be binding on the plaintiffs. We will now take up these appeals in order.

In Appeal No. 256, the only point raised by the eighth defendant is that provision should be made in the decree for the discharge of the first defendant's debts out of the joint family properties and that the decree for partition should be only of the rest of the properties that remained after provision is made for the payment of the debts. The eighth defendant filed a written statement in the Court below saying that as the main object of the suit was to have the partition of 1915 and the alienations made by the first defendant declared invalid and to have them set aside, and not a partition between the first defendant and his sons, the validity and binding nature of the debts cannot be gone into in this suit. Apparently, at the time when issues were framed with reference to this allegation, the parties did not think it necessary to raise an issue relating to the debts. The result was that all the parties and the Subordinate Judge thought that no inquiry about the

debts was necessary and the decree passed does not make any provision for any enquiry and the preliminary decree is a pure decree for partition. Now the eighth defendant wants such a provision to be inserted. We think it is too late. After all, the creditors do not suffer by our refusing to adopt the course suggested and it does not injuriously affect the interests of any parties. This appeal is therefore dismissed with costs. The Receiver may pay the costs and take his own costs from the estate of the insolvent.

In Appeal No. 257, the first plaintiff is the appellant. He argues that he never intended to separate from his younger brother but his object was that he and his younger brother should be separated from his father, and therefore he was entitled to two-thirds of the properties that were allotted to his branch, or at any rate half of them and the first defendant half. We think that both these contentions are not well founded. The second plaintiff, being a minor, is incapable of exercising the intention to separate by himself. The next friend does it for him. If the Court thinks fit to allow partition on behalf of the minor, one can well say that the minor has become divided; but until the decree is passed, one cannot say that the minor's interests are divided from the rest of the family. The first plaintiff has become divided from the rest of the family. The result is the first plaintiff went out of the family and the second plaintiff remained with the family, and consequently the share of the second plaintiff vested in the first defendant by survivorship. The Subordinate Judge is right in his conclusion. This point therefore fails.

The second point argued for the first plaintiff is that the alienation in favour of the sixth defendant was nominal. We think that the Subordinate Judge is right in the conclusion he arrived at. His reasons are

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RAO. given in paragraph 14 of his judgment with which we agree.

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The third point is that the partition of 1915 was really unfair. Here also we agree with the conclusion of the Subordinate Judge. The result is Appeal No. 257 also fails and is dismissed with costs.

Some grounds are taken against the third respondent. So far as that item is concerned, the third respondent will be entitled to get costs proportionate to that item. The other respondents will get their proportionate costs, i.e., proportionate to their interests.

Appeal No. 363 of 1927 is by the fifth defendant. His sale deed is Exhibit V. It was effected for the purpose of discharging the prior mortgage debt under Exhibit I. It is also not disputed that the consideration for the sale deed was paid in discharge of the mortgage debt as the endorsement on the deed shows. The Subordinate Judge following the decision in *Bandu Ram v. Ram Kishun Sonar*(1), has held that there was no pressure for the sale and therefore the sale was not binding on the plaintiffs. Whatever may be the law as to the right of a manager to sell when there was no pressure, a father can certainly sell for discharging antecedent debts as here. There is no question about the existence of the antecedent debt or of the fact of its having been paid off. We do not agree with the decision in *Bandu Ram v. Ram Kishun Sonar*(1). We allow this appeal and hold that this sale is binding on the plaintiffs. We direct that this item be excluded from partition.

The fifth defendant will have his costs in appeal and in the Court below.

K.B.

(1) (1923) 21 All. L.J., 354.

APPELLATE CIVIL.

Before Mr. Justice Waller and Mr. Justice
Krishnan Pandalai.

NARAYANA SAHU AND ANOTHER (PLAINTIFF AND
RESPONDENT), PETITIONERS,

1929,
April 22.

v.

PENTAMMA (DEFENDANT—PETITIONER), RESPONDENT.*

*Civil Procedure Code (V of 1908), O. XXI, rr. 89 and 92—
Petition to set aside sale within 30 days—Omission to
include auction-purchaser, effect of.*

In an application to set aside a sale under Order XXI, rule 92, Civil Procedure Code, coupled with rule 89, which is otherwise in order and in time, the omission to include the auction-purchaser till after the expiry of the 30 days allowed for the application is not fatal to it.

PETITION under section 115, Civil Procedure Code (V of 1908), to revise the order of the District Court of Vizagapatam in A.S. No. 237 of 1926 preferred against the order of the District Munsif of Rajam in E.A. No. 416 of 1926 in E.P. No. 1345 of 1925 in O.S. No. 299 of 1923.

The facts and arguments are given in the Judgment.

V. Govindarajachari for petitioners.

Y. Suryanarayana for respondent.

The JUDGMENT of the Court was delivered by

KRISHNAN PANDALAI, J.—This matter has been posted before a Bench owing to the absence of any clear ruling in this Court on the point involved, i.e., whether in an application to set aside a sale under Order XXI, rule 92, read with rule 89 which is otherwise in order and in

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* Civil Revision Petition No. 1007 of 1927.

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time the omission to implead the auction-purchaser till after the expiry of 30 days allowed for the application is fatal to it.

The facts are simple and undisputed. Property was sold in execution of a decree on 12th April 1926. On 28th April 1926 defendant's pleader filed a lodgment schedule mentioning in the cause-title the names of the plaintiff (decree-holder) and defendant (judgment-debtor) and the auction-purchaser who was the decree-holder's son and praying for an order to deposit the amount required by Order XXI, rule 89 and stating that the amount is deposited for setting aside the sale. The chellan was accordingly issued and the amount was deposited on 11th May within thirty days. The Court had been closed from 2nd May and re-opened on 14th June, on which day, the defendant filed a petition headed Order XXI, rule 92, showing in the cause-title the names of the plaintiff and defendant only, but for some reason, probably by inadvertence, omitting the name of the auction-purchaser and stating that the proper amount had been deposited in the treasury as per receipt produced and praying that full satisfaction of the decree may be entered and that the sale should be set aside. The plaintiff to whom notice of this application was sent raised various objections most of which were unfounded e.g., that the sum due was not deposited and the application was not filed in time but he also raised the objection that the auction-purchaser (his own son) had not been impleaded. Thereupon notice of the application was sent to the auction-purchaser also and served on 30th June 1926—some days after the expiry of the thirty days allowed for applications under Order XXI rule 92. The District Munsif held that the deposit was in time and set aside the sale. The learned District Judge confirmed the order.

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In this Court, the only point pressed is that it is necessary in applications under Order XXI, rule 92 that the party to be prejudicially affected by the order, e.g., the auction-purchaser should be impleaded and notice sent to him and that unless the applicant has impleaded the auction-purchaser within the time allowed the application is time-barred and unsustainable. Our difficulty in deciding the question on the words of the relevant rules themselves which should be the ultimate basis of decision on such a question, is the wealth of conflicting judicial opinion on it. The petitioner's advocate referred to the following cases in his favour:—*Ajiuddin Ahamed v. Khoda Buz*(1), *Sumitra Kuer v. Damri Lall*(2), *Karamat Khan v. Mir Ali Ahmed*(3), *Khoda Buz v. Sadu Pramanick*(4). The respondent's advocate referred to the following decisions *contra*:—*Ganesh Bab Naik v. Vithal Vaman*(5), *Raj Chandra Das v. Kali Kanta Das*(6), *Mussammat Bibi Zainub v. Paras Nath*(7), *Iswardas Marwari v. Biseswarlal Marwari*(8), *Satish Chandra De Sarkar v. Rakhal Chandra Saha*(9), *Haji Muhammad v. Ghulam Hussain*(10), *Kirpa Ram v. Nand Lal*(11). In our own Court there are no reported decisions but reference had been made to A.A.O. No. 19 of 1919 in which the learned Judges differed.

In our opinion all that Order XXI, rule 92, read with rule 89, requires, before an order setting aside a sale is made, is (1) an application within the time allowed praying that relief, (2) deposit in Court of the sum required by rule 89 (1) (a) and (b) within the time allowed, and (3) notice of the application to all

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| (1) (1919) 50 I.C., 5 (Calo.). | (2) (1921) 62 I.C., 61 (Pat.). |
| (3) (1890) All. W.N., 124. | (4) (1910) 14 Calo. L.J., 620 at 625. |
| (5) (1912) I.L.R., 37 Bom., 387. | (6) (1923) A.I.R. (Calo.), 394. |
| (7) (1923) I.L.R., 2 Pat., 800. | (8) (1925) 94 I.C., 31. |
| (9) (1927) 47 Calo. L.J., 62 at 64. | (10) (1927) A.I.R. (Lah.), 681. |
| | (11) (1928) A.I.R. (Lah.), 413. |

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persons affected, of whom the auction-purchaser is one. There is nothing in the rules themselves which requires that the names of the parties affected including that of the auction-purchaser should be contained in the application or added within any particular time although normally it is the usual, because the most convenient, plan for the applicant to mention those of them whom he knows at once in the application, so that notice may go to them without delay. In *Ganesh Bab Naik v. Vithal Vaman*(1), the auction-purchaser was not made a party to the original application or to the appeal though notice was issued to him by the first Court and he was added as party to the appeal under Order XLI, rule 20. On this point the Bombay High Court observe (p. 390) that according to Order XXI, rule 92

"where in the case of an application under rule 89, the deposit required by that rule is made within 30 days from the date of the sale, the Court shall make an order setting aside the sale provided that no such order shall be made unless notice of the application has been given to all persons affected thereby. That cannot mean that notice must be given within 30 days of the date of sale."

We respectfully agree with the view and hold that the notice given in this case to the auction-purchaser was not infructuous because his name was not added to the petition, dated 14th June 1926, and notice to him was applied for only after the expiry of 30 days from the date of the sale.

In order to mitigate the hardships that are sure to arise from a strict adherence to the opposite view, some decisions have gone to the length of laying down that it is enough if the auction-purchaser's name is mentioned somewhere in the body of the judgment-debtor's application though not in the cause-title as one of the parties. *Raj Chandra Das v. Kali Kanta Das*(2) and *Mussamma*

(1) (1912) I.L.R., 37 Bom., 387. (2) (1923) A.I.R. (Calo.), 394.

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Bibi Zainub v. Paras Nath(1). We think that it is not correct to adopt a rule not justified by the language of the Code and then attempt to mitigate the hardships thereby created by tolerating its infringement. But if the substance of the matter is that the judgment-debtor must do all that he is required by law to do and no more within the time limited and then the Court must pass the order after notice to the persons affected, the fact that in this case, in the judgment schedule, dated 28th April (i.e., 16 days after the sale), the auction-purchaser was mentioned and it was also stated that the amount is to be deposited for setting aside the sale and the fact that the deposit was in fact made within 30 days of the sale, were quite sufficient to meet the requirements of the law in any view of the case. The Civil Revision Petition is dismissed with costs.

N.R.

(1) (1923) I.L.R., 2 Pat., 800.

APPELLATE CIVIL.

Before Mr. Justice Waller and Mr. Justice
Krishnan Pandalai.

1929,
March 19.

SIR GULAM MUHAMMAD ALI SAHIB BAHADUR,
KHAN BAHADUR, G.O.I.E., PRINCE OF ARCOT,
ASSESSEE

v.

THE CORPORATION OF MADRAS, RESPONDENT.*

Madras City Municipal Act (IV of 1919), sec. 111, explanation II—Whether political pension is a "Pension", within—Profession tax, a half-yearly tax—Right to levy retrospectively—Limitation Act (IX of 1908), art. 120.

Not merely pensions ordinarily paid to retired officials in consideration of their past services, but political pensions also (i.e., the pension paid, as in this case, by the Government to the Prince of Arcot) come within the meaning of the word "pension" in explanation II to section 111 of the Madras City Municipal Act (IV of 1919).

Under the provisions of the Act and the rules framed thereunder, profession tax becomes "due" by a person liable to pay it, only after he has been assessed to a particular amount by the Commissioner. Such assessment must be made in each respective half-year, and hence, profession tax for any half-year prior to the current half-year cannot be levied unless it had been assessed in that half-year.

CASE stated under rule 17 of the Taxation Rules of the Madras City Municipal Act, 1919, by the Chief Judge, Court of Small Causes, Madras, for the decision of the High Court on certain questions of law which arose in Municipal Taxation Appeal No. 4 of 1927 on the file of the Court of Small Causes at Madras.

* Referred Case No. 3 of 1928.

In this case, the Commissioner of the Corporation of Madras assessed the Prince of Arcot on 15th September 1926 to profession tax in the sum of Rs. 437-8-0 for the first half-year of 1926-27 and to a like sum, for each of the eleven previous half-years also. Objecting to the whole demand, the assessee appealed to the Standing Committee of the Corporation on the grounds that the allowance he was receiving from the Government was neither a "pension" as ordinarily understood, nor one within the meaning of explanation II to section 111 of the Madras City Municipal Act and that the Corporation was entitled to assess a person to profession tax only for the current year and not for back years. The Standing Committee having decided against him, the assessee appealed to the Chief Judge of the Court of Small Causes, Madras, under rule 15 of Schedule IV of the Act. The Chief Judge decided that the allowance was a "pension" within the meaning of explanation II of the section 111 but that the Corporation was entitled to demand and levy the tax only for the current year and not for the previous five years. At the request of the assessee, the Chief Judge referred under rule 17 of the Taxation Rules framed under the Act, three questions for the decision of the High Court, which are stated at the beginning of the judgment of the High Court.

T. Rangachari (with M. Subbaraya Ayyar) for assessee.—This allowance is not a pension within the meaning of explanation II to section 111 of the Act. "Pension" is here used to denote allowances drawn by retired holders of appointments in consideration of their past services. The history of this allowance shows that it was given to the Nawab of Arcot because he was deprived of his Raj and it is expressly stated to be an appanage to his title. Decisions based on the wording of the Pensions Act and Civil Procedure Code are not to be taken as guides in construing the word in this Act. The Pensions Act

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itself draws a distinction between "pensions" and "grant of money or land revenue." This belongs to the latter class.

S. Rangaswami Ayyangar for the Corporation.—This is a "pension" within the meaning of the explanation. "Pension" is not confined to ordinary pensions as contended for by the appellant, but connotes and includes political pensions also, given for the support of the title of persons of rank or for surrender of rights; see the meaning of the word "pension" in *Murray's Oxford Dictionary*, in *Webster*, and in *Wharton's Law Lexicon*. It has been so understood in construing the Pensions Act and the Civil Procedure Code; *Moberly v. The Municipal Council of Cuddalore*(1), *Subraya Mudali v. Velayudh Chetty*(2), *Muthusami Naidu v. Prince Alagia Manavala Simmala Raja*(3), *Mariam Begum v. Mirza*(4), *Bishambar Nath v. Imdad Ali Khan*(5), *The Secretary of State for India in Council v. Khemchand Jeychand*(6), *Ranjunathamul v. Madho Singh*(7). Profession tax is a half-yearly tax and it becomes due and owing soon after the expiry of the sixty days mentioned in section 113, without even a formal assessment and demand; demand is only necessary to enable a distraint. The tax is payable for the amenities enjoyed within the municipality. The Act has not prescribed any limit of time for the imposition and demand of the tax, as it has done in the case of property tax. The rule of six years prescribed by article 120 of the Limitation Act applies even if no assessment and demand had been made; *President of Municipal Commission, Guntur v. Sri Kakuluapu Padmarazu*(8), *The Queen v. Blenkinsop*(9), *Davis v. Burrell*(10), *Gill v. Mellor and Gill v. Monday*(11); C.S. No. 284 of 1924; 24 Halsbury, pages 90 and 91 and rules 3 to 6 of the rules framed under the Act.

T. Rangachari in reply.—The tax has to be determined, assessed and demanded every half-year under the Act and the rules. There is no rule empowering assessment for back years. The liability to pay arises only on assessment and demand and not on merely classifying a person as coming within one class or another *Gill v. Mellor*(11). Section 113 should be read with

(1) (1914) I.L.R. 38 Mad., 879.

(3) (1902) I.L.R., 26 Mad., 423.

(5) (1890) I.L.R., 18 Cal., 216.

(7) (1926) 52 M.L.J., 622.

(9) [1892] 1 Q.B., 43.

(2) (1906) I.L.R., 30 Mad., 153.

(4) (1889) I.L.R., 17 Cal., 234 (P.O.).

(6) (1880) I.L.R., 4 Bom., 432.

(8) (1984) I.L.R. 8 Mad., 124.

(10) (1951) 10 C.B., 321; 138 E.R., 325.

(11) [1924] 1 K.B., 97.

section 111. Article 120 applies only to suits and not to the right to assess. Fiscal statutes cannot be construed to operate retrospectively; *Maxwell*, 6th edn., pages 365 and 503 and *The King v. The Church Wardens of Dursley*(1).

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JUDGMENT.

The questions referred to us under rule 17 of the Taxation Rules of the Madras City Municipal Act of 1919 are three in number:—

(1) Whether the payments made by the Government to the Prince of Arcot are in the nature of "pension", and he is therefore a person in receipt of a "pension" within the meaning of explanation II to section 111 of the City Municipal Act, 1919?

(2) Does the liability of any person to pay profession tax for any half-year arise immediately on the expiry of the sixty days mentioned in section 113, or does it arise only upon his being assessed by the Commissioner for that half-year under rule 8 of the Taxation Rules and served with notice of such assessment?

(3) Is the assessment to profession tax of the Prince of Arcot under rule 8 of the Taxation Rules and section 113 of the City Municipal Act made on the 15th of September 1926 invalid for the ten half-years commencing from the second half-year of 1920-21?

The first question is, whether the periodical payments made by the Government to the Prince of Arcot are equivalent to receipt by him of a "pension" within the meaning of explanation II to section 111 of the Madras City Municipal Act. The material part of that section runs as follows:—

"Every person not liable for the companies' tax who, within the city and for the period prescribed in section 113, exercises a profession, art, trade or calling or holds any appointment, public or private, bringing him within one or more of the classes

(1) (1886) 5 A. and E., 10; 111 E.R., 1070.

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of persons specified in the Taxation Rules in Schedule IV, shall pay by way of licence fee and in addition to any other licence fee that may be leviable under this Act, a tax as determined under the said rules."

The intention of the section seems clear enough. Any person engaged in the active pursuit of a profession, art, trade or calling or holding any appointment, is liable to pay profession tax, if the income he enjoys therefrom brings him within any of the clauses specified in the schedule. If and when he retires, he ceases to be liable. So far, however, as the holders of appointments are concerned, explanation II provides that a person in receipt of a pension paid from any source shall be deemed to be a person holding an appointment within the meaning of the section. In other words, persons who have once held appointments are deemed to hold them for ever, while retired merchants, bankers, doctors and lawyers living on their invested funds seem to escape. Section 93 of the District Municipalities Act draws all classes in and makes, as it should, a distinction between holding an appointment and enjoying a pension. The learned Chief Judge has gone at length into the history of the negotiations between the Government and the Nawab of the Carnatic, which culminated in the agreement of 1867, by which the allowance now in question was fixed. It is not necessary for us to do more than to refer to Exhibit D, the final letter of the Chief Secretary to the Government of Madras, recording the agreement. The allowance is therein described as "settled on the title," "for the support of the title," "attached to the title." Mr. Rangachariar relies on these expressions as showing that the allowance is no more than an appanage to the title and is not a pension properly so called. Periodical payments made by the State for the support of a title

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conferred by it certainly come within the definition of "pension." One of the definitions of the word in the Oxford Dictionary is "a regular payment to persons of rank . . . to enable them to maintain their estate." That definition covers the present case exactly. From another point of view, it is equally clear that the allowance is a pension. The consideration for it was the surrender by the Prince of certain rights. Webster's Dictionary gives, as one of the definitions of "pension," "a stated allowance or stipend made in consideration . . . of the surrender of rights." Several decisions have been cited before us, wherein it was held that certain allowances paid by Government were political pensions. We think it unnecessary to refer to them. It seems to us perfectly clear that the allowance in question is a political pension. Mr. Rangachariar contends that the word "pension" in explanation II should be limited to allowances drawn by retired holders of appointments in consideration of past services. The word is not defined in the Act, but we see no reason so to limit its application. It is used generally and without any qualification and must be held to cover political pensions, as well as pensions in the ordinary sense. The first question is answered in the affirmative.

The second and third questions referred may be disposed of together. They raise the question whether the assessment of the appellant made on 15th September 1926 for ten half-years commencing from the second half-year of 1920-21 and purporting to be made under rule 8 of the Taxation Rules and section 113 of the City Municipal Act was valid.

The appellant was on 15th September 1926, i.e., within the first half-year of 1926-27, assessed to profession tax for that half-year and eleven previous half-years or six years in all. The reference relates only to the

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first ten half-years of the above period apparently because the appellant did not question the opinion of the learned Chief Judge of the Small Cause Court who heard this matter that it was competent to the respondent to assess the appellant for the half-year in which the assessment took place and for one previous half-year or a period of a year in all. It is not disputed that the respondent was authorized, if the appellant was otherwise liable to profession tax, to assess him for the half-year in which the assessment was made. The dispute was about the eleven previous half-years and though the reference expressly relates to the first ten of those half-years, if the opinion of this Court in the matter referred affects the assessment for the eleventh half-year which has been left out from the reference, it is competent to this Court under rule 18 of the Taxation Rules to pass such order as it thinks fit.

The argument for the respondent Corporation is, firstly, that profession tax becomes due and owing, as soon as the minimum period of sixty days required by section 113 has expired, even without anything done on the part of the Corporation to assess it and inform the assessee of the amount payable, and secondly, that even if the tax becomes due and owing only after assessment and intimation of the same to the assessee, it is open to the Corporation to assess a person to the tax at any future time within six years after the expiration of the half-year for which the assessment is made.

We think that these contentions cannot be upheld. In the first place, the profession tax becomes due and owing, not merely by the exercise of the profession, art, trade or calling, during the period required by section 113, but by the assessment to the tax based upon such exercise. Reliance is placed on the words in that section that

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"If the tax due in respect of the half-year is not paid, the Commissioner shall cause a notice to be served on such person".

But this section must be read with other provisions of the Act. By section 133, the rules and tables embodied in Schedule IV shall be read as part of Chapter V in which the sections relating to profession tax and other taxes occur. By section 111, profession tax is imposed upon persons who fall

"within one or more of the classes of persons specified in the Taxation rules in Schedule IV"

and the amount payable is

"a tax as determined under the said rules".

Rule 8 of Schedule IV provides that persons shall be assessed by the Commissioner to the profession tax under one of nine classes therein specified on a scale to be determined within certain limits by the Corporation from time to time. By rule 9, the Commissioner is authorized in the case of persons not drawing a fixed salary to determine the class in which a person falls on certain general considerations but without calling for accounts from the assessee. Rule 12 gives an assessee to profession tax who is dissatisfied with the assessment by the Commissioner the right to apply to him for revision, provided the application is delivered to the Municipal Office within fifteen days from the date of the service of the notice under section 113. This indicates clearly that the tax said to be "due" in section 113 is that to which the assessee has been first assessed under the powers conferred by rule 8. It also shows that the notice under section 113 is the initial and essential step in the process of final determination of the tax according to the provisions for revision of the assessment; for, until that notice is served and for fifteen days thereafter, the right of claiming revision is preserved. That notice has another importance, because under rule (22), the tax

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demand may be distrained for, if it is unpaid for fifteen days and the omission is not satisfactorily explained. Rule 14 provides that if the assessee is dissatisfied with the orders of the Commissioner on an application for revision, the application must be heard and decided by the Standing Committee and that a copy of the Committee's decision should be sent to the applicant within two days thereof. Rule 15 then confers on the assessee a right of appeal to the Small Cause Court, provided notice of appeal is given to the Corporation in ten days, and the appeal itself is presented in fourteen days from the date of the decision of the Standing Committee and the applicant has paid in the case of a tax leviable by half-yearly instalments (profession tax is such a tax) the half-yearly instalment due under the order appealed against. From the above provisions, it is clear that the tax is not due till the Commissioner has assessed the person liable, and that even then it is only provisionally fixed, for it is liable to revision in the manner mentioned above.

A reference to the corresponding provisions of the Acts I of 1884 and III of 1904 shows that the machinery of assessment and revision which was provided for in those Acts in the body of the Act is in the present Act of 1919 relegated to Schedule IV. The comparison is instructive as showing that the classification or assessment by the Commissioner is as essential now as it was under the former Acts. A bird's-eye view of the comparative provisions of the two earlier Acts will be found in *Veeraraghavulu v. The President, Corporation of Madras*(1). Under section 101 of the Act of 1884, corresponding to section 118 of the Act of 1904, the President was required to keep lists of persons liable to

(1) (1910) I.L.R., 34 Mad., 130 at 131.

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pay profession tax and other taxes. In Schedule IV of the present Act, rule 1 requires the Commissioner to prepare and maintain property tax registers. Section 103 of the Act of 1884 corresponding to section 120 of the Act of 1904 made persons exercising a profession or holding an appointment in the City liable to pay profession tax. Section 111 of the present Act corresponds to this. Section 104 of the Act of 1884 corresponding to section 121 of the Act of 1904 empowered the President to determine in which of the scheduled classes any person was to be placed and to revise such classification from time to time. Now rule 8 of Schedule IV empowers the Commissioner to assess persons to profession tax under one of the nine scheduled classes and rule 14 empowers him to revise the classification. Section 106 of the Act of 1884 corresponding to section 125 of the Act of 1904 empowered the President, in case the tax due on assessment or revision was unpaid, to send a notice that in case the tax was unpaid for fifteen days after service of the notice, the defaulter will be prosecuted, and those sections empowered such prosecution. Section 107 of the Act of 1884 corresponding to section 420 of the Act of 1904 empowered the Magistrate to impose a penalty of twice the amount of the tax. In the present Act, prosecution for non-payment of profession tax has been done away with, but the notice mentioned in section 113 corresponds to the notice mentioned above and the present notice has two objects. It enables the assessee if he so desires to apply in fifteen days to get the assessment revised and the Corporation, in case the tax remains unpaid for fifteen days without good cause, to distrain on the defaulter's goods. It follows that, neither under the old Acts nor under the present, can the profession tax be said to be "due" till the proper authority has assessed the same by the name of

the assessee being placed in the proper class. Under section 370 (a) of the present Act, such act of classification or assessment should be evidenced by a writing signed by the Commissioner or by some Municipal Official delegated by him in writing under section 16, and it is noteworthy that under this last section, the power of revision given to the Commissioner by rule 14 cannot be delegated.

But it is urged that no time is fixed for the Commissioner to make the assessment and that it is therefore open to him to make assessments backward for a period of six years. This limit on the alleged power of backward assessment is suggested on the ground that the period of limitation for bringing a suit under section 396 for a tax after it has become due and owing, is six years. But if the power of backward assessment exists, the limit suggested for its exercise disappears. For the right to sue accrues only after the tax has become due and if it becomes due, as we have held it does, only on assessment by the Commissioner, the period of limitation for any suit must begin from the date of the assessment. In other words, the contention for the Corporation leads logically to the result that, though once a tax is assessed and has become due, the Corporation has only six years to recover it by suit, yet the Commissioner is authorized to put off assessing persons to profession tax for an unlimited period and so put off indefinitely the due date of the tax and the liability of the assessee. The startling nature of this result is what compels the respondent to impose on himself a supposed limit, really illusory, of six years for the exercise of the power contended for. By itself, this would be a strong ground for insisting upon explicit and clear foundation in the provisions of the Act and the rules thereunder for the existence of such a power. It is admitted that there is no express

provision in the Act and the rules, which confers any such authority. But it is said that there is also nothing which negatives it, and, in the absence of any such prohibition, the authority must, it is argued, be deemed to exist. Both on an examination of the scheme and purpose of the City Municipal Act and on general grounds of construction of similar enactments, we are unable to read, by implication into that Act, the power contended for.

The scheme of imposition, assessment and collection of taxes laid down in the Act would seem to show that, while the rate of taxation is fixed for each year beginning 1st April by the Council at the Budget meeting in the February previous (section 156), the assessment of taxes payable by each individual is a contemporaneous operation within the period of taxation (year or half-year), in which, while the Commissioner is afforded facilities for obtaining all relevant information on which the assessment is to be based (see sections 114 and 115, 368), the assessee is required within a very short time after the assessment to take all his objections to the assessment proposed (rule 12 of the Taxation Rules). It is hardly consistent with this scheme that the tax fixed by the Council, say for 1920-21, in February 1920 should have to be assessed and realized from the individual tax-payers six years (as we have pointed out an unlimited number of years) later, when the Commissioner charged with the duty of assessment would find that all relevant information had ceased to be available and the assessee might long ago have ceased the profession and enjoy the income or salary from which he might be expected to pay the tax. In the case of Companies' tax, to which similar provisions to those applicable to profession tax are applicable, the incongruity is still more marked. No big concern like a limited company with

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obligations to its shareholders, which has to produce a balance sheet in each working year and on the result of that balance sheet to declare dividends to its shareholders, could be carried on if its municipal assessment in that year is uncertain and is liable to be suddenly demanded for several years together at a perfectly unknown and indefinite date. The learned Chief Judge has referred to other aspects of the hardship to which assesses would be put if the power contended for by the Corporation were upheld. We think it unnecessary to refer to them.

In rule (6), Schedule IV of the Act, it is expressly provided that when the Commissioner makes an amendment of the property tax register as he is empowered to do under rule (3) by altering, adding or deleting items therein, such amendment shall be deemed to have taken effect from the earliest date in the current year on which the circumstances justifying the amendment existed. This rule is remarkable both for what it enacts and for what it forbids. In the case of property tax, if a property has escaped taxation for a period of years, the Commissioner may in any subsequent year by amending the register assess it to the tax. But the rule says that the tax is to be operative only from the earliest date in the current year in which the omission was rectified. Similarly, if a property has been taxed too low, the Commissioner may amend the register. But in that case also the enhanced tax due to the amendment takes effect only from the earliest date in the year current when the amendment was made on which the property was liable to the enhanced tax. The careful prohibition against retrospective assessment in the case of property tax beyond the beginning of the current year is to our mind a very strong indication that in the case of other taxes like the profession tax

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retrospective assessment to a greater extent was not contemplated. Property tax is a yearly tax though payable half-yearly. Profession tax is a half-yearly tax. With this difference, if the analogy of the property tax may be used, the inference would seem to be that the power of assessment conferred by rule 8 of the Taxation Rules is to be properly exercised within the half-year to which the assessment relates.

Further, the companies' tax imposed by section 110 and the profession tax imposed by section 111 are expressly by those sections levied "by way of licence fee and in addition to any other licence fee that may be leviable under this Act." The tax on carriages and animals imposed by section 116 is another instance of a licence fee described as a tax. This is made clear by section 121 which says that when the tax due on any carriage or animal is paid, the Commissioner shall grant the person a licence to keep such carriage or animal for the period to which the payment relates and by section 360 which speaks of the licence under section 121 in connexion with the prosecution of a defaulter. The other licence fees referred to are those leviable under Chapter 12 of the Act and Schedule VI thereof read with section 365 (2). The essence of a licence is that it is a permission which must be usually obtained before the thing licensed is done (Wharton's Law Lexicon, page 428). The City Municipal Act in several sections (e.g., sections 287, and 290, 295) requires that the licence mentioned therein should be obtained in respect of existing undertakings within the first month of the year and in respect of new undertakings before they begin and it is an offence to carry on an undertaking which requires a licence without it. In the case of such licences, those who ought to get them are expected to apply for and obtain them on payment of the fees

fixed by the Council under section 365 (2). In default, they stand the risk of prosecution, and the Magistrate is required in case of conviction to recover, in addition to any fine that may be imposed, the licence fee and pay it over to the Corporation. But this coercive recovery of the fee does not entitle the convicted person to the licence which, if wanted, must be obtained by further payment (section 365 (8) and (9)). In the case of licence fees described as companies tax and profession tax, the amount of which depends on the rates fixed by the Council and on the classification of the particular individual in one of several classes, (and this is true to a certain extent in respect of the tax on vehicles and animals), the fact that the levy is still declared to be by way of licence fee strengthens the inference that the assessment is intended to be made before or during the period to which it relates and could not have been intended to be made long afterwards retrospectively for several periods together.

When the words of an enactment are clear and imperative, considerations of inconvenience or hardship have no place in its application to circumstances falling within the words. But where there is no express indication in an enactment as to whether the powers given by it were meant to be used in particular circumstances, the fact that great hardship and inconvenience would result thereby is a reason for so construing the words as to meet all attempts to abuse the power either by exercising them in cases not intended by the statute or by refusing to exercise them when the occasion for their exercise has arisen. (Maxwell on Interpretation of Statutes, 6 Edn., page 226.) Statutes which impose pecuniary burdens are subject to the rule of strict construction, and in a case of reasonable doubt, the construction most beneficial to the subject is to be

adopted (*ibid.*, pages 503 and 504), though the principle of strict construction is less applicable where the powers are conferred on public representative bodies for essentially public purposes (*ibid.*, page 530). The only inconvenience that may be urged to result from the Corporation not having the power contended for is that some persons who may have escaped taxation to profession tax in previous years cannot be assessed thereto in subsequent years. But that inconvenience, if such it really is, already exists in respect to property tax, far the most important source of municipal revenue. And, after all, if the municipal executive is vigilant and efficient, such cases must be comparatively rare. On the other hand, a power to assess persons for many years retrospectively if granted is more likely to encourage slackness and inefficiency on the part of the municipal executive and also will produce very great hardships on those who are suddenly called upon to pay in a lump sum the taxes which ought to be met out of current income. The present case in which the appellant was called upon to pay, in addition to the tax for the current half-year, a sum of Rs. 4,600 and odd on account of 11 half-years' arrears is a good illustration. We can find no justification, for this either in the express terms of the Act or in any reasonable construction of its intention. The decision in *Gill v. Mellor and Gill v. Monday*(1) is no authority in favour of the respondent as in that case the necessary steps had been taken in previous years to make the rate an arrear and all that remained was its collection. The decision was merely that when a rate is duly made and published, it is the duty of the parties concerned to seek the Collector and pay it. Having regard to the

(1) [1924] 1 K.B., 97.

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difference between the procedure prescribed for making and publishing the rates according to the English Acts and that prescribed for the assessment of property tax under the City Municipal Act, the appellant not having been assessed at all in respect of the previous half-years before 15th September 1926, there were no arrears before that date.

Our conclusion on the second and third questions referred is that liability to pay profession tax arises only after assessment under Rule 8 of the Taxation Rules, and that the appellant, the Prince of Arcot, not having been assessed in respect of the eleven half-years commencing from the second half-year of 1920-21 within the several half-years, the assessment of 15th September 1926 was invalid in respect of those eleven half-years.

N.R.

APPELLATE CRIMINAL.

*Before Mr. Justice Waller and Mr. Justice
Anantakrishna Ayyar.*

1929,
March 11.

VASUDEVA MUDALI AND SIX OTHERS
(ACCUSED), APPELLANTS.

*Indian Penal Code, sec. 149—"Offence"—Meaning of—If
extends to offences under the Indian Railways Act.*

The word "offence" in section 149 of the Indian Penal Code is confined to offences under the Code, and does not include within its meaning, offences under the Indian Railways Act.

Aydross v. Emperor (1922) 17 L.W., 21, *In re Puvanur Athamu*, (1924) 20 L.W., 914, followed.

* Criminal Appeal No. 707 of 1928.

APPEAL against the order of the Court of Session of the Chingleput Division in Case No. 21 of the Calendar for 1928.

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In re.

V. L. Ethiraj and *D. Ramaswami Ayyangar* for appellants.

K. N. Ganpati for *Public Prosecutor* for the Crown.

JUDGMENT.

This appeal relates to an occurrence arising out of the strike on the South Indian Railway in July last. All of the seven appellants have been convicted of offences under section 147 of the Indian Penal Code, and 127 of the Railways Act. The first appellant has been further convicted of an offence under section 128 of that Act and the other appellants have been convicted of the same offence with reference to section 149, Indian Penal Code.

The first objection taken is, that the word "offence" in section 149 being confined to offences under the Penal Code, the conviction of the second to seventh appellants under section 128 of the Railways Act with reference to that section is illegal. That has been held in *Aydross v. Emperor* (1) and *In re Puvanur Athamu* (2). We have considered the question at length and with care, and find ourselves constrained to say that those decisions are right. The position is curious and unsatisfactory. A large body of men set out to obstruct a railway line and to throw stones at trains. They form an unlawful assembly, for, by section 40 of the Penal Code, the word "offence" in section 141 includes offences under any special law. If, however, the rioters proceed to carry out their common object and to commit offences under sections 127 and 128 of the Railways Act, you can convict only those of them who are proved themselves

(1) (1922) 17 L.W., 21.

(2) (1924) 20 L.W., 914.

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to have committed those offences. The rest are not constructively guilty, as section 149 cannot be invoked against them, although the offences committed are the very offences they set out to commit and were committed in prosecution of their common object.

This being the legal position, we must acquit the second to seventh appellants on the second count of the indictment. The third count which relates to the charge under section 127 of the Railways Act has also been framed with reference to section 149, Indian Penal Code. All of the appellants must be acquitted on it also. As regards the charge of rioting, there is ample evidence to connect all of the appellants with the unlawful assembly and the convictions on that charge must be sustained. There is also plenty of evidence that the first appellant committed an offence under section 128 of the Act. This conviction must be confirmed.

The result is that the sentences of six months' rigorous imprisonment passed on all of the appellants under section 147, Indian Penal Code, are confirmed. The sentences passed on the second to seventh appellants under sections 127 and 128 of the Railways Act are set aside. The sentence passed on the first appellant under section 128 of the Railways Act is confirmed and it will run concurrently with the other sentence passed on him. The sentence passed on him under section 127 of the Railways Act is set aside. The fourth to seventh appellants will be recommitted to serve the unexpired portion of their sentences.

B.C.S.

APPELLATE CIVIL—FULL BENCH.

Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Wallace, and Mr. Justice Anantal Krishna
Ayyar.

T. MAHOMED YUSUF AND FIVE OTHERS,
(DEFENDANTS), APPELLANTS,

1929,
March 12.

v.

KHAN BAHADUR MUHAMMAD SADULLA BADSHA
SAHIB AND FIVE OTHERS (PLAINTIFFS), RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), Order XXI, rule 50—
Death of partner before institution of suit against partner-
ship—Decree in firm name alone—Execution of decree—If
private estate of deceased partner liable in—Order XXI, rule
50 (2)—Applicability of—Plaintiff not aware of death of
partner before institution of suit—If would entitle him to
obtain leave to execute against legal representatives under
Order XXI, rule 50.*

Where a partner dies before the institution of a suit against the partnership, and a decree is obtained against the firm alone in the firm name, the private estate of the deceased partner is not liable to be proceeded against in execution of such decree.

Order XXI, rule 50 (2), of the Code of Civil Procedure in terms applies only to a person who is alleged to be a partner, and does not apply to legal representatives of a partner who was dead at the time the plaint was filed.

The circumstance that the plaintiff had no knowledge of the death of a partner before the institution of the suit would not make any difference on the question.

Ellis v. Wadson, [1899] 1 Q.B., 714, and *Mathurdas Ganji v. Ebrahim Fazalbhoy*, (1927) I.L.R., 51 Bom., 986, followed.

ON APPEAL from the order of Mr. Justice WALLER, dated 7th day of October 1927, and passed in the

* Original Side Appeal No. 92 of 1927.

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exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 63 of 1926.

This appeal coming on for hearing before COURTS TROTTER, C.J., and ODGEAS, J., their Lordships made the following

ORDER OF REFERENCE TO A FULL BENCH:—

COURTS TROTTER, C.J.—This case raises a point of some difficulty which in my opinion ought to be referred to a Full Bench. The facts are not in dispute. The suit was brought against the firm of Haji Sheik Mira Sahib & Co., in the firm name. The plaintiff in that suit was given a decree against the firm for Rs. 6,453. It is conceded that Haji Badrudeen Sahib, now deceased, was at one time a partner in the defendant firm. The application under review was an application to issue execution against his assets in the hands of his legal representatives and the learned Judge granted leave. It is argued before us that, having regard to the way in which the suit was framed, this cannot be done, and that execution must be confined to the partnership assets, if any, which can be traced to the hands of the deceased partner's legal representatives and cannot be extended to his estate generally. The difficulty appears to me to arise by reason of the provisions of Order XXI, rule 50 as contrasted with Order XXX, rules 3 and 4. Order XXI is the part of the Code which specifically deals with execution, and rule 50 deals with the question of executing decrees against a firm where the decree is granted against the firm in its firm name. This is on the face of it the operative rule, and it is fairly clear that sub-rule (b) of that rule, which is the only one that can possibly be suggested as applicable to the present case does not so apply, for it confines execution to a person who has appeared or who has admitted upon the pleadings that he is, or has been adjudged to be, a partner. The question is, to what extent Order XXX, which is a new order corresponding in the main to Order XLVIII-A of the Rules of the Supreme Court of England, can be held by necessary implication to have extended this liability. The facts here are that at the time he got his decree the plaintiff knew that Badrudeen Sahib was dead but he did not know that he had in fact been a partner. That appears to exclude the operation of the proviso to Order XXX, rule 3, which deals with the case of a partnership, which had been

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dissolved to the knowledge of the plaintiff before the institution of the suit. I do not myself see how it can be said that the plaintiff had knowledge of dissolution, merely because he knew that a particular individual was dead, though at the time he instituted the suit he did not know that he was a partner. But the real difficulty is created by Order XXX, rule 4, which enacts that, where two or more persons may sue or be sued in the name of a firm and any such person dies, whether before the institution or during the pendency of the suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit. The question that is to be determined is whether this amplifies the scope of Order XXI, rule 50 and makes the legal representatives liable in execution in a case like the present. It is contended that Order XXX, rule 4 (1), only means that it is not necessary to join the legal representatives of the deceased in order to issue execution against them. It is argued on the other side that the purpose of that sub-rule is merely to preclude the possibility of the suit being said to be bad for non-joinder of such legal representatives and that, unless it means that and no more, it is impossible to reconcile it with the proviso to rule 3. The whole subject has been elaborately discussed in *Mathurdas Canji v. Ebrahim Fazalbhoy*(1), where all the authorities, both Indian and English are reviewed. I do not think myself that the English authorities are of much help because there is nothing in the provisions of Order XLVIII-A, rule 3 corresponding to our Order XXX, rule 4. I would formulate the question thus:—

“Where a decree is passed against a partnership in its firm name and the plaintiff at the time of filing his suit knew that a person who was afterwards discovered to be a partner was dead but did not know that he was a partner, can execution be issued against the legal personal representatives of such deceased person?”

The question is one that is likely to recur, and I think there ought to be an authoritative ruling for the guidance of the Courts of this Presidency.

ODGEAS, J.—Speaking for myself, I should have been content to rest our decision on *Mathurdas Canji v. Ebrahim Fazal bhoy* (1) which seems to me to be correct and relevant to this case.

(1) (1927) I.L.R., 51 Bom., 986.

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There is, however, as my Lord has pointed out, the difficulty with regard to rule 4 of Order XXX, and I have no desire to oppose the reference of this important point to a Full Bench and accordingly concur in the order of reference proposed.

ON THIS REFERENCE—

P. Viswanatha Ayyar for appellants.—The facts in this case are undisputed. The only question is whether Order XXI, rule 4 of the Code extends the liability beyond the classes of persons who are specifically referred to in Order XXI, rule 50 (2). Order XXX appears for the first time in the Code of 1908, and is modelled after Order XLVIII-A of the Rules of the Supreme Court in England. Whereas before the Code of 1908 a plaintiff suing a partnership had to mention the names of the partners in the plaint, now he is permitted, if he so chooses, to sue the partnership in the firm name. Order XXI, rule 50, restricts execution to partners who have been served with a summons to appear and answer. In the present case Badruddin Sahib died before the institution of the suit. Order XXX, rule 3, deals only with service of summons. The question of execution must be determined only under Order XXI, rule 50. There is no allegation here that the legal representatives were ever partners. The personal estate of the deceased partner could not be made liable in execution unless the legal representatives had been made parties to the action. The case of the death of a partner before suit is fully considered by Lord Justice ROMER in *Ellis v. Wadeson*(1), and that decision is entirely in my favour. A recent Indian decision, *Mathurdas Canji v. Ebrahim Fasalbhoy*(2), construing Order XXX, rule 4 says that "it was enacted to set at rest the doubt that existed in connexion with section 45 of the Indian Contract Act . . . but it was not intended that a suit in a firm name should be deemed to include the personal representatives of a deceased partner." In *Veerappa Chetty v. Tindal Ponnen*(3), which was followed in *In re Arunachalam Chettiar*(4), it was held that no suit could be filed against a dead person.

G. Krishnaswami Ayyar (with him *T. R. Srinivasa Ayyar*) for respondents.—The only question the Court could go into at the execution stage is as to whether Badruddin Sahib was or

was not a partner in the firm. In *Jirraj v. Bhagvandas*(1), leave was given to execute against legal representatives, see also *Motilal v. Chandmal*(2), and *Wigram v. Cox*(3).

P. Viswanatha Ayyar replied.

The OPINION of the Court was delivered by

ANANTAKRISHNA AYYAR, J. The question that has been referred for the opinion of the Full Bench is "where a decree is passed against the partnership in its firm name and the plaintiff at the time of filing his suit knew that a person who was afterwards discovered to be a partner was dead but did not know that he was a partner, can execution be issued against the legal personal representatives of such deceased person", in respect of assets in their possession belonging to the deceased partner?

Before the enactment of Act V of 1908, the procedure that was generally adopted in Indian Courts in respect of suits against firms was to have the names of the members of the firm set out in the plaint and to have them or one of them personally served with a summons. In the case reported in *Yeknath Babaji v. Gulabchand Kahanji*(4),

FORBES, WESTROPP, and TUCKER, JJ., held that

"The suit being instituted against the firm, the names of the members of the firm should have been mentioned in the plaint, and they or one of them should have been personally served with a summons, if within the jurisdiction."

Sir BARNES PEACOCK, Chief Justice, and HOBHOUSE, J., in *Koylash Uhunder Roy v. Edward Ellis*(5), observed as follows:

"In the case of an unincorporated or unregistered company, the proper course would be to sue the individual members of the company in the same way as the individual members of

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(1) [1899] 1 Q.B., 714 at 718.
(3) (1907) I.L.R., 31 Mad., 83.

(2) (1927) I.L.R., 51 Bom., 936.
(4) (1915) 2 L.W., 828.

(1) (1922) 24 Bom. L.R., 1087.

(2) (1923) 25 Bom. L.R., 1081.

(3) [1894] 1 Q.B., 792.

(4) (1863) 1 Bom. H.C.R., A.C.J., 85.

(5) (1867) 8 W.R., 45 (Civil Rulings).

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any other firm, not being incorporated or registered, would have to be sued. But it appears that the plaintiff does not know of what persons the company is composed; if that is so, we are of opinion that he might sue the company by the name of 'the Bengal Indigo Company', the name under which they are carrying on business and contracted with him, if at all. But he will have to state in his plaint that he is unable to give any better description of the defendants than that. The suit will then proceed against that company, and any property belonging to the firm will be liable to be taken in execution, if a decree be obtained."

In Macpherson's Procedure of the Civil Courts of the East India Company, published in 1850, it is stated that

"If there be a demand against a partnership, all the partners must be before the Court and if any of the partners liable to the demand are dead, their representatives ought to be parties."

Under section 74 of Act XIV of 1882,

"If the defendants are partners and the suit relates to a partnership transaction or to an actionable wrong in respect of which relief is claimable from the firm, the service may be made, unless the Court directs otherwise, either (a) on one defendant for himself and for the other defendants, or (b) on any person having the management of the business of the partnership at the principal place of such business."

Subject to that exception, the section states that

"When there are more defendants than one, service of the summons shall be made on each defendant."

Order V, rule 11 of the present Civil Procedure Code (V of 1908) enacts that

"Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant."

Thus, according to the procedure followed by the Indian Courts, in a suit against an unincorporated company, the names of all the individual members must be given in the plaint. The practice of English Courts was different, and there such a partnership or firm may sue or be sued by its usual designation. When the new

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Civil Procedure Code was passed, opportunity was taken to permit of a similar procedure being followed in cases of suits by and against firms, and Order XXX was inserted which proceeded on the lines of Order XLVIII-A of the Rules of the Supreme Court.

Thus an alternative procedure was prescribed, of which parties could, in their option, take advantage. In suits against firms, if the plaintiff be so minded, he could sue any two or more persons claiming or being liable as partners and carrying on business in British India, in the name of the firm of which such persons were partners at the time of the accruing of the cause of action. The plaintiff in such cases is not bound to disclose the names of the partners in the plaint. As regards service of summons in such cases, Order XXX, rule 3, prescribes the procedure, that it may be served (a) upon any one or more of the partners, or (b) at the principal place at which the partnership business is carried on within British India, upon any person having at the time of service the control or management of the partnership business there, as the Court may direct, and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without British India. There is a proviso to rule 3 which enacts

"That, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within British India whom it is sought to make liable."

Further, when the suit is filed as aforesaid against a firm, if any of the persons sued in the name of a firm should happen to die, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representatives of the deceased as a party to the suit.

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The procedure in case of suits against firms has been thus simplified, following the English practice.

When the question is how such decrees against firms can be executed, the Code lays down the general rule in Order XXI, rule 50, viz., that such decrees can be executed against any property of the partnership; but that a decree against a firm shall not release, render liable, or otherwise affect, any partner therein, unless he has been served with a summons to appear and answer.

These being the general principles laid down by the Code regulating the procedure to be followed in suits against firms and the mode of executing such decrees, we may refer to the special facts found in the particular case in which reference to the Full Bench has been made. A decree for money was passed against the firm of Haji Sheik Mira Sahib and Company for Rs. 6,453. It was conceded that Haji Badruddin Sahib was a partner in the defendant's firm, but he was dead before the suit was instituted. The plaintiff—decree-holder applied under Order XXI, rule 50, sub-clause (2), for leave to execute the decree against the legal representatives of the deceased Badruddin Sahib. The question is whether the decree-holder is entitled to have such leave.

It is contended that the decree-holder is entitled to cause the decree to be executed not only against persons referred to in sub-rule (1), clauses (b) and (c) of Order XXI, rule 50, but that he is also entitled to have the decree executed against any other person as being a partner in the firm; and it was argued that the circumstance that the person who was a partner in the firm was dead at the time of the application could be no bar to the decree-holder being granted leave for execution as claimed, and that the only question which the legal representatives could raise would be whether the

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deceased was a partner in the firm or not. On the other hand it was urged on behalf of the legal representatives that the Civil Procedure Code has only followed the procedure prescribed by the Rules of the Supreme Court, and that under the English Rules, where a partner dies before action and a decree is obtained against the firm alone in the firm name, the private estate of the deceased partner is not liable to be proceeded against in execution.

Having considered the provisions of Order XXI, rule 50, and Order XXX, rules 1 to 5, and also the corresponding provisions of Order XLVIII-A of the Rules of the Supreme Court, we are of opinion that the decree-holder is not entitled to claim leave to execute the decree against the personal properties of the deceased partner in the hands of his legal representatives. When the partnership is a going concern and the partners are sued in the name of the firm, the summons is to be served as laid down in the first portion of Order XXX, rule 3; but, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within British India whom it is sought to make liable. Order XXX, rule 3 of the Civil Procedure Code, is thus relevant only when the question of the service of a summons is concerned, and questions relating to execution of decree against firms have to be decided with reference to Order XXI, rule 50. It is admitted that neither clause (b), nor clause (c) of rule 50, sub-rule (1), applies to the present case. In our opinion, neither can sub-rule (2) of rule 50 apply to the present case. According to the wording of the sub-rule (2), it would apply only when the decree is sought to be executed against any person as being a partner in the firm. Here it is not contended that the legal representatives

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against whom the decree is sought to be executed were ever partners in the firm; so that unless the person against whom leave to execute the decree is asked is alleged to be a partner in the firm, sub-rule (2) cannot be invoked by the decree-holder. As observed by BENSON and SUNDARA AYYAR, JJ., in *Sahib Thambi v. Hamid*(1),

"The general rule of law is that in suits where one person is allowed to represent others as defendant in a representative capacity, any decree passed can bind those others only with respect to the property of those others which he can in law represent, and no personal decree can be passed against them, although the parties on record *eo nomine* may be made personally liable. . . .

The principle is recognized in England in partnership suits in Order XLVIII (a), rule 8, Judicature Act, which lays down that where a judgment or order is against a firm, execution may issue only against any property of the partnership, so far as partners who are not individually served and those who have not appeared are concerned."

In England, it has been held that if one of several partners dies before action is brought, and the plaintiff seeks, in suing the firm, to make the deceased partner's private estate liable, he must add as defendant the personal representative of such deceased partner. (See the Annual Practice, 1928, pages 840 and 841.) In *Ellis v. Wadeson*(2), ROMER, Lord Justice, delivering the judgment of the Court of Appeal observed at page 718:—

"Now consider the question of death. Suppose a partner dies before action brought, and an action is brought against the firm in the firm's name. The dead man is not a party to the action so far as his private estate is concerned, for a dead man cannot be sued, though the legal personal representatives of a dead man can be sued in a proper case. In that case, the action would be an action solely against the surviving partners. At common law, if a creditor sued joint debtors and one died, the survivors only could be sued. Since the Judicature Act,

(1) (1911) I.L.R., 36 Mad., 414 at 417.

(2) 1899] 1 Q.B., 714.

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undoubtedly, in the case of a partnership liability, the creditor might now join in one action the surviving partners, and the legal personal representatives of the deceased partner, but the latter would have expressly to be added as defendants. If the legal personal representatives of a deceased partner are not added expressly as defendants, and the action is brought against the firm in the firm's name, then judgment can only be obtained as against the surviving partners and be enforced against them and against the partnership assets. I may mention that the reason why the partnership assets can be reached is because, notwithstanding the dissolution by death, the surviving partners for many purposes have authority continued to them to bind the dead man's interest in the partnership assets, for the authority of partnership extends to enable the surviving partners in case of dissolution by death, to wind up the affairs of the partnership, to pay the partnership debts, to defend claims against the partnership, and so forth. See Lindley on Partnership, 5th Ed., pp. 217, 218 and 587."

Evidently, it was not the intention of the Indian Legislature to depart from the above statement of law in England since we do not find any such indication in the provisions of the Civil Procedure Code. No doubt Order XXX, rule 4, is new, and there is no corresponding provision in the English rules, but rule 4 only gives the legal representatives a right to apply to be made a party to suits in the name of firms. It has been enacted in the Code, evidently to obviate difficulties that might otherwise be suggested, having regard to the provisions of section 45 of the Indian Contract Act. But it does not in our opinion enable a decree-holder to claim the right now claimed by him before us.

The case before us is not the case of a partner dying after suit. The deceased partner in the case before us had no opportunity of contesting the suit, neither had the legal representatives of the deceased partner any such opportunity. If the decree-holder's contention regarding Order XXI, rule 50, be accepted, then the only question that could be decided in an inquiry under

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that sub-rule being whether a particular person was a partner or not, no other contentions relating to the suit could be raised or tried at the instance of the legal representatives. The correctness of a decree could not be impugned in execution proceedings. The legal representatives would thus be deprived of all defence to the suit. The other surviving partners could not have any right to represent a deceased partner except as regards partnership properties. Thus the contention of the decree-holder involves manifest injustice to the estate of the deceased partner and unless there be anything in any enactment compelling us to uphold that contention, it seems to us that we should avoid such a conclusion, if possible. It thus being clear that, so far as the private estate of the deceased partner is concerned, there has been no representation in the suit, the legal representatives of the deceased partner, so far as the personal estate of the deceased is concerned, could not be held in any way to be bound by the decree obtained by the plaintiff against the firm. In our view, if the Legislature wanted to go further than the English practice on the point, it would have made sub-rule (2) of Order XXI, rule 50, clear on the point; and having regard to the decision of the Court of Appeal in the case of *Ellis v. Wadeson*(1), given on the corresponding provisions of the English rules (which are practically the same as the provisions of the present Civil Procedure Code), we think that the contention of the decree-holder should be disallowed. No suit can be instituted against a dead person and a plaint filed against a dead person is a nullity "even when the suit is instituted *bona fide* and in ignorance of the death of the defendant" See *Veerappa Chetty v. Tindal Ponnem*(2), *per*

(1) [1899] 1 Q.B., 714.

(2) (1907) 1 L.R., 31 Mad., 86.

WALLIS and MILLER, JJ., and *In re Arunachalam Chettiar*(1). It cannot be said that in the present case there were any valid proceedings in which the personal estate of the deceased Badrudin Sahib could be said to have been represented in law. The question has not been discussed in either of the cases *Jivraj v. Bhagvandas*(2), or *Motilal v. Chandmal*(3), nor have the English decisions been referred to therein. We agree generally with the more recent decision of the Bombay High Court reported in *Mathuradas Canji v. Ebrahim Fazalbhoy*(4). No doubt the learned Judges there remarked that the firm concerned in that case had been dissolved to the knowledge of the plaintiff before the institution of the suit, by reason of the death of a partner. But, for the reasons already given, we think that the circumstance that the plaintiff had no knowledge of the death of a partner before the institution of the suit does not make any difference on the question now before us, and unless the legal representatives had been made parties to the suit, the personal estate of the partner who died prior to the institution of the suit, in the hands of the legal representatives, could not be made liable in execution of a decree obtained against the firm, and the plaintiff in such a case is not entitled to apply for leave under Order XXI, rule 50 (2).

The new provisions introduced in the Civil Procedure Code of 1908 are only enabling provisions which may be taken advantage of by a plaintiff who wishes to institute suits against firms. There are some advantages undoubtedly in following that procedure, but at the same time, there are some disadvantages also as the case before us emphasizes. The language of Order XXI, rule 50 (2), in terms applies only to a person who is

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(1) (1915) 2 L.W., 828 at 830.
(3) (1923) 25 Bom. L.R., 1081.

(2) (1922) 24 Bom. L.R., 1037.
(4) (1927) 1 L.R., 51 Bom., 986.

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alleged to be a partner and does not apply to legal representatives of a partner who was dead before the plaint was filed. The scope of that sub-rule cannot be enlarged by reference to the rule of service prescribed by Order XXX, rule 3. Sub-rule (4) of Order XXI, rule 50, is very clear, that "save as against any property of the partnership, a decree against a firm shall not release, render liable, or otherwise affect, any partner therein, unless he has been served with a summons to appear and answer." A reference to the Rules of the Supreme Court makes it reasonably clear that in execution of a decree obtained against a firm as such, the separate property of a partner who was dead at the date of the issue of the writ cannot be proceeded against in execution; and in our opinion that seems to be the law which is sought to be reproduced in the provisions of the present Civil Procedure Code. The plaintiff as soon as he ascertained the facts should have applied to amend his claim by adding the personal representatives of the deceased partner. He did not choose to do so, and preferred to take his chance on the point of law.

The answer to the question referred to us is accordingly in the negative.

R.O.S.

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Wallace, Mr. Justice Beasley
and Mr. Justice Madhavan Nair.*

ALAGASUNDARAM PILLAI (RESPONDENT—PLAINTIFF),
PETITIONER,

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v.

PICHUVIER (CLAIMANT—PETITIONER), RESPONDENT.*

Civil Procedure Code (Act V of 1908), Orders IX and XXI, rules 97 and 100—Execution of decree—Sale—Purchase by decree-holder—Possession by latter—Dispossession of third party—Application by latter complaining of dispossession—Application dismissed for default—Application by latter to set aside order—Order IX, Civil Procedure Code, whether applicable—Inherent jurisdiction of Court, whether exists.

Held, by the Full Bench—

(1) that proceedings under rule 97 or rule 100 of Order XXI of the Code of Civil Procedure are proceedings in execution, and section 141 of the Code is, therefore, not applicable to such proceedings (unless they also fall within Section 47), and in consequence the provisions of Order IX do not apply to them; and (2) that the Court has no *inherent* power to set aside an order of dismissal for default or an order passed *ex parte* in such proceedings, on sufficient cause being shewn.

PETITION under section 115 of Act V of 1908 to revise the order of the Court of the District Munsif of Madura passed in I.A. No. 145 of 1926.

The material facts appear from the following Order of Reference, passed by WALLACE and TIRUVENKATA ACHARIYAR, JJ.:—

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The questions which arise in this case are whether (1) the provisions of Order IX, Civil Procedure Code, apply to proceedings instituted under rule 100 of Order XXI of the Code, and

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(2) whether, otherwise, the Court has inherent power to set aside the dismissal for default of an application made under rule 100 where the ends of justice render it necessary to do so. The material facts of the case are these:—The petitioner before us obtained a decree for money in Small Cause Suit No. 955 of 1923 on the file of the Madura Sub-Court against the respondent's mother. In execution of that decree, the immovable properties to which the application relates were sold and purchased by the decree-holder himself. He subsequently obtained possession of those properties through Court, dispossessing the respondent, who is a minor. The present application was thereupon put in on his behalf alleging that the applicant was in possession of the properties on his own account and praying that he should be restored to possession. Upon this application notice was ordered to the auction-purchaser and a date was fixed for the hearing of the application. On that date when the case was called on, the applicant did not appear but the auction-purchaser did; and the application was therefore dismissed for default. The respondent's guardian thereafter applied under Order IX, rule 9, for the setting aside of the order of dismissal. That petition was opposed by the auction-purchaser. The District Munsif after hearing both the parties ordered the restoration of the application. Against that order this revision petition has been preferred.

It is contended on behalf of the auction-purchaser who is the petitioner before us that the District Munsif acted without jurisdiction in restoring the application of the respondent under rule 100 which had been dismissed for default, as the application under rule 100 is a proceeding in execution of a decree, to which Order IX does not apply. It is further argued that the order of the District Munsif is also bad as he has given no reasons for setting aside the order of dismissal and that, on that ground also, it should be set aside.

On behalf of the respondent it is argued that an application under rule 100 is not an application in execution of a decree but that it is an independent original proceeding to which Order IX applies by force of section 141, Civil Procedure Code. It is further argued that, if Order IX does not apply, the Court which deals with such an application has inherent power in the interests of justice to restore the application which has been dismissed for default, which order also must be taken to have been passed by the Court in the exercise of its inherent power. These questions were argued before us at great length and we were referred to most of the authorities bearing on them. There is no

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doubt a conflict of authorities on both the questions. The authorities cited relate to the applicability of Order IX not only to proceedings instituted under rule 97 or 100 of Order XXI to which the auction-purchaser in the Court-sale and a person not a party to the suit or decree are parties, but also to proceedings under rule 90 for setting aside sales of immovable properties held in execution of decrees and to proceedings instituted by claimants under rule 58 with reference to properties attached in execution of decrees. The broad contention put forward on behalf of the petitioner (auction-purchaser) is that all such proceedings are proceedings in execution of a decree to which Order IX does not apply; the leading authority for that contention being the decision of their Lordships of the Privy Council in *Thakur Prasad v. Fakirullah* (1). It is also contended that the Court has no inherent power to restore an application dismissed for default, especially in those cases in which the Legislature itself has provided a remedy by suit. For the purposes of the present case, it seems to us to be unnecessary to consider the question whether the applications which are instituted by third parties under rule 58 preferring claims to properties attached in execution of a decree are proceedings in execution of the decree or whether they are independent proceedings in the nature of original suits though they relate to property attached in execution of the decree, nor is it necessary to consider whether an application under rule 90, whether made by a judgment-debtor or a decree-holder, for setting aside a sale in execution of a decree, should or should not be viewed as a proceeding in execution of a decree, as we consider that applications made under rule 97 or 100 are in their nature essentially different. Those applications do not concern the parties to the suit or decree as such. When the auction-purchaser is also a stranger to the suit, the proceedings under rule 97 or 100 are entirely between persons who are not parties to the suit or decree. Even when, as in the present case, the decree-holder himself is the auction-purchaser, it is not in his character as decree-holder that he is a party to such proceedings. Further, unlike applications under rule 90 which are made during the pendency of applications for the execution of a decree and the result of which would materially affect the further course of the execution proceedings, the applications under rules 97 and 100 come to be made when the execution of the decree is over. When the sale is confirmed, the decree is satisfied *pro tanto*, irrespective of whether the auction-purchaser is

(1) (1894) I.L.R., 17 All., 108.

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the decree-holder or a third party, and the result of the application under either of those rules will not affect the further course of the execution proceedings or re-open the execution of the decree to any extent. If the claim of the dispossessed party is allowed, the remedy of the auction-purchaser in such a case, even when he is also the decree-holder, is to file a suit as provided in rule 108. We think, therefore, that the authorities which following the Privy Council decision in *Thakur Prasad v. Fakirullah*(1), lay down that Order IX does not apply to applications for execution of decrees or applications in execution of decrees, do not affect applications made under rule 97 or 100 which, in our opinion, cannot be regarded as applications either for execution of the decree or in execution of the decree. So far as the Privy Council decision in *Thakur Prasad v. Fakirullah* (1), is concerned, upon which the learned Advocate for the petitioner chiefly relied, we are unable to accept his contention that any application, whatever may be its nature and by whomsoever made, must be deemed to be an application in execution of a decree, if it is made under any of the rules in Order XXI. In that case, their Lordships were dealing with an application for the execution of a decree which the High Court of Allahabad held was barred under section 373 of the old Code, corresponding to Order XXIII, rule 1 of the present Code, as the previous application for execution of the same decree had been withdrawn without an order of Court granting liberty to file a fresh application in respect of the same matter. Their Lordships held that the view taken by the Allahabad High Court was wrong and that section 373 which relates to suits, does not apply to proceedings in execution. The petitioner's advocate relies upon the following passage in their Lordships' judgment as laying down in broad terms that all proceedings, whatever may be their nature, which are made under any of the rules in Order XXI must be considered to be a proceeding in execution and that the procedure which is prescribed in the Code for suits does not apply to any of those proceedings. The passage relied on runs thus: "It is not suggested that section 373 of the Civil Procedure Code would of its own force apply to execution proceedings. The suggestion is that it is applied by force of section 647. But the whole of Chapter XIX of the Code consisting of 121 sections is devoted to the procedure in executions, and it would be surprising if the framers of the Code had intended to apply another procedure mostly unsuitable, by saying in general terms

(1) (1894) I.L.R., 17 All. 106.

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that the procedure for suit should be followed as far as applicable. Their Lordships think that the proceedings spoken of in section 647 include original matters in the nature of suits, such as proceedings in probates, guardianships and so forth, and do not include executions. That is the view taken by the High Court of Calcutta after a consideration of the Allahabad decisions in the case of *Bunko Behary Gangopadhy v. Nil Madub Chuttopadhy*(1). On this construction of section 647 the reasoning of the High Court in *Sarju Prasad's* case falls to the ground. And it is clear, both from the Code itself and from the provisions of the Limitation Act of 1877, that the Legislature contemplated that there might be a succession of applications for execution". Chapter XIX of the old Code has in the present Code been re-enacted as Order XXI. We do not think that their Lordships, in observing that the whole of Chapter XIX of the Code consisting of 121 sections (now Order XXI, rules 1 to 108), are devoted to the proceedings in execution, intended to lay down that every proceeding which may be taken under any rule of that chapter is a proceeding in execution whether in fact it concerns or not the execution of a decree. Their Lordships' observations though general in terms have to be construed with reference to the actual case which they had to decide and they have been so construed in those cases which were referred to us in which Order IX has been held to be applicable not only to proceedings instituted under rule 97 or 100 but also under rules 58 and 90. As we have already observed we are not directly concerned in this case with the decisions passed with reference to the proceedings instituted under rule 58 or 90.

The distinguishing feature between applications under rules 97 and 100 and applications made under rules 58 and 90 is that while the latter are made in the course of the execution proceedings with reference to pending applications for execution of the decrees, the former are quite unconnected with any pending application for the execution of a decree. An application under either of those rules, which may be entirely between third parties and in which the questions raised do not in any way affect the execution of the decree, cannot with any propriety be held to be a proceeding in execution merely because those rules occur in Order XXI.

(1) (1891) I.L.R., 18 Cal., 695.

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Confining ourselves to the authorities which relate to proceedings under rules 97 and 100, we are of opinion that the view taken in those cases which hold that they are not proceedings in execution of a decree and that they are more in the nature of original proceedings to which Order IX is applicable by force of section 141 is the sounder view to take, and we would ourselves have adopted that view in this case but for a direct decision of DEVAOSS, J., concurred in by WALLER, J. in *Kaliakkal v. Palani Koundun*(1), to the contrary. In that case, which is directly in point, the learned Judges have held that proceedings under rules 97 to 101 are execution proceedings and therefore Order IX does not apply to them. In that view they held that the District Munsif had no jurisdiction to set aside under Order IX, rule 13, an *ex parte* order passed by him on the application made in that case.

The same view is taken in *Haricharan Ghose v. Manmatha Nath Sen*(2), but the opposite view is taken among others in *Sheonandan Chowdhury v. Debi Lal Chowdhury*(3), *Satya Narayan v. Govind Sahay*(4). In *Haricharan Ghose v. Manmatha Nath Sen*(2), JENKINS, C.J., rests his conclusions not only upon the interpretation of *Thakur Prasad v. Fakirullah*(5), but also on the ground that the circumstance that a remedy by suit is given is a clear indication that Order IX should not, and does not, apply. With the latter part of the reasoning of the learned Chief Justice we are unable to agree. In an application made under rule 100 all that the applicant has got to show is that when he was ousted from possession he was in possession on his own account and not an account of the judgment-debtor. If he establishes that fact his petition must be allowed. But if he is obliged to bring a suit to recover possession, he will have to make out that he has a good title to the property which is a much more onerous position. There seems to be no sufficient reason why, if a party to those proceedings, whether appellant or respondent, is unable for no default on his part to be present at the hearing and the application is either dismissed for default or ordered *ex parte*, he should be debarred from having it reheard and that he should be driven to a regular suit. The dismissal of an application for default is, as pointed out by their Lordships of the Privy Council in *Debi Baksh Singh v.*

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Habib Shah(1), intended to be a punishment for wilful default, and gross injustice will be done if it is to be inflicted in cases where there has been no default.

Ramappa Chettiar v. Ekambara Padayachi(2), which related to a claim petition, VENKATASUBBA RAO, J., overruled the contention that the restoration of a claim petition which was dismissed for default cannot be made, because under Order XXI, rule 63, the claimant has a right of suit. The contrary view that proceedings under rule 97 or 100 are not proceedings in execution but are independent original matters in the nature of suits and that therefore Order IX applies to such applications by force of section 141 is held in the following cases among others: *Sheonandan Chowdhury v. Debi Lal Chowdhury*(3), *Satya Narayan v. Govind Sahay*(4). In our opinion the claim which is put forward by a stranger to a decree in order to avail himself of the summary remedy given to him by rule 100 for recovery of possession of immovable property from which he has been dispossessed is an original matter in the nature of a suit and it cannot by any stretch of language be considered to be a proceeding in execution of a decree. We need scarcely add that the enumeration of original matters in the nature of suits which are mentioned in their Lordships' judgment in *Thakur Prasad v. Fakirullah*(5), and on which the petitioners' advocate laid stress are merely illustrative, as the language used by their Lordships clearly shows. As regards the second question, if Order IX does not apply to proceedings under rules 97 to 100, then the dismissal of this application for default can be made only in the exercise of the Court's inherent power to dismiss any application which *prima facie* is not prosecuted. If that is so, it is difficult to see why the Court should not equally have the inherent power to set aside an order of dismissal, when it is shown that the non-appearance was due to no default on the part of the applicant but to some accident which prevented him from appearing. In such cases, no further application for the same relief can be put in, and it will work serious injustice if the Court can neither interfere under Order IX, rule 9, or under the inherent power to set aside the order of dismissal which the Court would not have made if at that time it had been aware of the real facts of the case. In support of the view

(1) (1925) 50 M.L.J. 200.

(2) (1912) I.L.R., 41 Cal., 1.

(3) (1923) I.L.R., 2 Pat., 372.

(4) (1918) 3 Pat. L.J., 250.

(5) (1894) I.L.R., 17 All., 106.

(1) (1918) I.L.R., 35 All., 331.

(2) (1924) 47 M.L.J. 13.

(3) (1923) I.L.R., 2 Pat., 372.

(4) (1918) 3 Pat. L.J., 250.

(5) (1894) I.L.R., 17 All., 106.

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that the Court has such inherent power and that it is bound to exercise it where the interests of justice require it to do so, we may refer to the case in *Bhalu v. Ram Lal*(1), which follows the decision of the Privy Council in *Debi Baksh Singh v. Habib Shah*(2), already referred to. But there are observations in some other cases which imply that the Court has no such inherent power. Even as regards applications for execution of a decree which for no default of the applicant is dismissed for non-appearance, the mere ground that a fresh application is competent should not be held to be a sufficient ground for holding that the Court cannot restore the application so dismissed in the exercise of its inherent power, when the interests of justice render such order necessary. A fresh application, though permitted by law, may be of no use, because it may be barred by limitation either under the Limitation Act or under section 48, Civil Procedure Code. It seems to us that the conflict of authority which exists on the questions arising in this case cannot but prove embarrassing to the litigants and the Courts, and that it is eminently desirable to have an authoritative ruling of a Full Bench on those questions. We, therefore, refer to a Full Bench the following questions:—

(1) Does Order IX of the Civil Procedure Code apply to proceedings instituted under rule 97 or 100 of Order XXI?

(2) If the above question is answered in the negative, has the Court an inherent power to set aside the order of dismissal for default or an order passed *ex parte* against the respondent in those applications, on sufficient cause being shown?

ON THIS REFERENCE—

P. R. Srinivasa Ayyangar and *P. N. Appaswami Ayyar* for the petitioner.—The petition was filed in the lower Court by the respondent, complaining of dispossession by the auction-purchaser, who was the decree-holder, under rule 100 of Order XXI, Civil Procedure Code. The petition falls under section 47, Civil Procedure Code. The matter arises in execution proceedings. Though after sale, execution is over in a sense, still proceedings after sale are in execution proceedings. The ruling of the Privy Council in *Thakur Prasad v. Fakirullah*(3) applies to the proceedings now in question. The present proceedings are execution proceedings. As they are proceedings in execution, Order IX does not apply to them. Section 141 does not extend the provisions of Order IX

(1) (1931) 60 I.O., 720.

(3) (1913) I.L.R., 35 All., 331.

(3) (1894) I.L.R., 17 All., 106.

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proceedings in execution, including those under rule 97 or 100 of Order XXI. Proceedings under rule 97 or rule 100 are in Order XXI which relates to, and headed as, "execution of decrees and orders." By construing this application as an execution proceeding, several disabilities, such as *res judicata*, *bona fide* withdrawal without leave of Court, etc., are avoided. This is only a summary procedure. The aggrieved party has a right of suit under rule 103 of Order XXI. The Code does not make a distinction between an application under rule 94 or prior to it and an application made at later stages under rules 94 and 103. This is not an original application as stated in the Privy Council case in *Thakur Prasad v. Fakirullah*(1). See *Narayanan Chettiar v. Muthu Chettiar*(2); *Kailash Chandra Rapdar v. Gopal Chandra Poddar*(3); *Bhubaneswar Prasad Singh v. Tilakdhari Lal*(4). There is no inherent power in the Court to set aside the order of dismissal for default in this proceeding. Even in the case of a suit dismissed for default, it has been held by the Full Bench that there is no such inherent power, apart from Order IX of the Code. *A fortiori*, the summary proceedings now in question, there is no inherent power, especially as there is a remedy by suit under rule 103. Power to set aside must be expressly given by statute, as in *Kaliakkal v. Palani Sundan*(5); *Vemareddi Ramaraghava Reddi v. Rajah of Nkatagiri*(6).

S. Krishnaswami Ayyangar for respondent.—(1) Proceedings under rule 100 of Order XXI are not proceedings in execution; secondly, even if they are proceedings in execution, Order IX will apply to them by virtue of section 141 of the Code. These proceedings are after execution is over. The auction-purchaser may be a stranger to the decree and the claimant or person dispossessed or obstructing may also be a stranger. After the decree is satisfied, there is no execution proceeding. See *Jagannadha Rao v. Basavayya*(7). The dispute between auction-purchaser and claimant is not in execution; it does not affect the execution. Delivery of possession to auction-purchaser is not execution of the decree; the purchaser may sue for possession; so also the claimant can sue without resorting

(1) (1931) I.L.R., 17 All., 106.

(3) (1936) I.L.R., 53 Cal., 781 (F.B.).

(5) (1935) 60 M.L.J., 300.

(2) (1936) 51 M.L.J., 219.

(4) (1939) 4 Pat. L.J., 125 (F.B.).

(6) (1936) 52 M.L.J., 123.

(7) (1937) 53 M.L.J., 255.

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to a petition. The mere fact that a summary procedure is given to the auction-purchaser or claimant does not make it an execution proceeding; he is not asking for the execution of the decree or order. See *Sheenandan Chowdhury v. Debi Lal Chowdhury*(1). *Satya Narayan Lal v. Govind Sahay*(2), though a contrary view has been taken in a Full Bench case in 4 Pat. L.J., 135. Secondly, even if the proceedings are in execution, still Order IX will apply to them, as they are not applications for execution; section 141 applies to them; the Privy Council case in 17 All., 106, as well as section 647 of the old Code of 1882 (corresponding to section 141 of the new Code), refer only to applications for execution and not to applications in execution proceedings. The original applications mentioned in 17 All., 106, are not exhaustive; there may be, and are, other original applications mentioned in the Civil Procedure Code itself, such as, arbitration proceedings, *Venkata Narayana Rao v. Suryanarayana*(3). The fact that the proceedings under rule 97 or rule 100 occur in Order XXI does not make them execution proceedings.

Next, the Court has inherent power to set aside orders, in the interest of justice. Section 151, Civil Procedure Code, embodies such a power. *Ghuznavi v. The Allahabad Bank, Ltd.*(4). Where there is no prohibition in the Code, the Court can act under inherent powers in the interests of justice. The case in *Neelaveni v. Narayana Reddi*(5), only holds that section 151 is controlled by Order IX, where the latter applies.

OPINION.

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WALLACE, J.—The two questions referred for the decision of the Full Bench are:—

(1) Does Order IX of the Civil Procedure Code apply to proceedings instituted under rule 97 or 100 of Order XXI?

(2) If the above question is answered in the negative, has the Court an inherent power to set aside the order of dismissal for default or an order passed *ex parte* against the respondent in those applications, on sufficient cause being shown?

(1) (1923) I.L.R., 2 Pat., 372.

(2) (1918) 2 Pat. L.J., 250.

(3) (1925) 23 L.W., 409.

(4) (1917) I.L.R., 44 Cal., 929 (F.B.).

(5) (1919) I.L.R., 43 Mad., 94 (F.B.).

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As to the first question, it is not contested that Order IX does not apply to proceedings in execution except such as involve the determination of any question under section 47, in which case the orders thereon would amount to decrees (see *Subbiah Naicker v. Ramanathan Chettiar*(1) and *Kailash Chandra Tarapdar v. Gopal Chundra Poddar*(2)—decisions which have been followed in this Court in *Kaliakkal v. Palani Koundan*(3) and *Narayanan Chettiar v. Muthu Chettiar*(4),) and the argument at the bar has settled round the question whether proceedings under rules 97 and 100 of Order XXI are proceedings in execution at all. If they are proceedings in execution, it must also be admitted that there is a certain amount of over-lapping in the Code, since cases might arise in which the proceedings would, on the face of them, come both under section 47 and under rule 97 or 100; for example, cases of obstruction to delivery to the decree-holder under rule 97 by a judgment-debtor or some other party to the suit at his instigation, or cases of some other party to the suit than the judgment-debtor being dispossessed under rule 100 by the decree-holder or the auction-purchaser. Such cases will come both under section 47 and under rule 97 or 100 and a different procedure would be adopted according to the category in which the Court placed the proceedings. Presumably in a case of such conflict, the main section 47 would prevail over the rules in the First Schedule, and, if so, the orders passed in the proceedings would be decrees and Order IX would apply. The fact of such over-lapping is not to my mind a sufficient reason in itself on which to decide that orders under rules 97 and 100 are not proceedings in execution.

(1) (1914) I.L.R., 37 Mad., 492.
(3) (1925) 50 M.L.J., 200.(2) (1926) I.L.R., 53 Cal., 751.
(4) (1926) 51 M.L.J., 219.

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The more general question is whether Order IX applies to proceedings under rules 97 and 100, and the answer to that really depends on the question whether such proceedings are proceedings in execution. There is no definition of "execution" in the Code and the only guide we have as to what the Legislature intended that word to cover is the contents of Order XXI, which is headed "Execution of Decrees and Orders." Rules 97 and 100 come under that heading. *Prima facie* then the Legislature intended that proceedings under these rules should be regarded as included under the word "execution."

The respondent in the Civil Revision Petition from which this reference arises contends that execution comes to an end when the decree is satisfied, and that, when the decree is not for possession and the decree-holder has obtained his money by the Court-sale, it is improper to hold that any question of possession is a matter of the execution of the decree. He points out that a proceeding under rule 97 or rule 100 may not be at all between the parties to the suit; for example, it may be between a stranger auction-purchaser at the Court-sale and a stranger obstructing in one case or dispossessed in the other. He argues that it would be an anomaly to regard proceedings between two strangers to the suit as proceedings in execution of the decree in the suit. There is a great deal of force in this contention and it has weighed with the referring Judges, of whom I was one. Nevertheless, on further consideration, I am constrained to hold that it does not outweigh the inference from the inclusion of these proceedings in the order relating to the execution of decrees and orders. It does not seem reasonable to hold that the Legislature intended us to draw, so to speak, a dividing line after rule 96 and say that all rules below this line do not

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relate to execution. In fact, as already indicated, they may in certain cases relate so closely to execution that they would properly fall to be decided under section 47. The Legislature was clearly not prepared to draw the distinction which the respondent seeks to make. For example, rule 100 covers both the cases of dispossession by the holder of a decree *for possession*, and dispossession by an auction-purchaser of property sold in execution of a decree. The first dispossession is clearly in the course of execution of the decree for possession, and there is no hint that the Legislature intended that the second dispossession should not equally be regarded as in execution. Otherwise, we will have to suppose that the Legislature intended us to draw the dividing line right through rule 100 itself. Similarly, rule 97 covers the case of obstruction to the holder of a decree *for possession*, and the dividing line will have to be drawn through it also. Proceedings under rules 97 and 100 follow as sequelae on the execution of the decree (using the word "execution" in its stricter sense) and on the Court-sale, and the Legislature has enacted that such proceedings shall be regarded in law as part of the execution proceedings. There is really very little more to be said on this part of the case. It may be noted also, however, that an application under rule 97 or rule 100 must be put in to the executing Court, which may or may not be the Court before which the suit for possession would fall to be tried." This point has to be decided not so much on any general theory as to what execution may be or may include but on what the Legislature has laid down that it shall include.

If it is an execution proceeding, then section 141, on which the respondent relies, will not avail. It is argued

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that section 141 will apply to all execution proceedings which are not applications for execution, but I think it is a distinction without a difference. An application under the execution Order XXI will *ex facie* be an application for execution. Besides this, the general trend of authority which has interpreted the leading Privy Council case on this section or rather on the old section 647 corresponding, namely, *Thakur Prasad v. Fakirullah*(1), is against the idea that section 141 applies to execution proceedings at all. The Privy Council laid down that the old section 647 was intended to exclude from its purview the whole of the old chapter XIX which is devoted to the procedure in execution. The old chapter XIX is now Order XXI, and both rules 97 and 100 were in chapter XIX as sections 328 and 332. With this Privy Council decision before them, the framers of the amended Code made no substantial change in the general wording of section 647, beyond omitting the explanation, which was unnecessary in view of the Privy Council decision, and re-enacting section 647 as the present section 141.

Of the many cases and rulings cited at the bar, not many are of assistance. The state of the law in the Calcutta and Patna High Courts was for some time uncertain and rulings on either side may be and have been cited from both Courts. But the Full Bench in *Kailash Chandra Tarapdar v. Gopal Chandra Poddar*(2) has finally settled the law for the Calcutta High Court and that ruling is against the respondent. In Patna, *Sheonandan Chowdhury v. Debi Lal Chowdhury*(3) and *Satya Narayan v. Govind Sahay*(4) are in favour of the respondent's view,

(1) (1894) I.L.R., 17 All., 108.
(3) (1923) I.L.R., 2 Pat., 372.

(2) (1926) I.L.R., 53 Cal., 781.
(4) (1918) 3 Pat. L.J., 250.

but the Full Bench in *Bhubaneswar Prasad Singh v. Tilakdhari Lal*(1), which interprets the Privy Council case as covering all proceedings in execution, is entirely against him. So that both the High Courts of Patna and Calcutta have decided against the respondent's view.

It is, therefore, obvious that section 141 does not apply to such proceedings under Order XXI as are not also proceedings under section 47. Therefore on the first question the answer is that Order IX does not apply to such proceedings under rule 97 or 100 as do not also fall within section 47.

As to the second question, that is, the Court's inherent power to set aside the order, the respondent urges that the Court must have inherent power to set aside its own order of dismissal for default. The contention is that, where the Court is not restricted by the sections of the Code, it has inherent power to do anything in the name of justice. Such a contention in substance is that the Civil Procedure Code is not a Code conferring powers on a Court but is a Code restricting and delimiting its unlimited powers. To such a view we cannot subscribe. It would allow the Court to do any act whatever, provided there was no provision in law directly prohibiting that act being done, and would in effect put the Court above the written law altogether. The ordinary Civil Court derives its powers from the Civil Procedure Code and other statutes and possesses only such powers as are therein conferred. The inherent power, so far as it exists, is itself a matter of statute (see section 151 of

(1) (1919) 4 Pat. L.J., 135.

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the Civil Procedure Code). It has been held by a Full Bench in *Neelaveni v. Narayana Reddi*(1), that, in the case of setting aside *ex parte* decrees, the Court has no inherent power and can only act under Order IX, rule 13. It would be surprising if, in the matter of execution, the Court has inherent powers which it does not possess in the case of a suit. The resort to inherent powers may be justified in a case of gross injustice where the party has no other remedy. But here the party has his remedy by way of suit. This is the principle which has been adopted in several cases in this Court. See *Kaliakkal v. Palani Koundan*(2), *Narayanan Chettiar v. Muthu Chettiar*(3), and *Vemareddi Ramaraghava Reddi v. Rajah of Venkatagiri*(4). In *Ramappa Chettiar v. Ekambara Padayachi*(5), a single Judge of this Court has ruled that a Court has inherent power to restore a claim petition under rule 58 dismissed for default but no authority has been cited or dealt with on the point. On full consideration and giving weight to the matters set out in the order of reference, I think we should not be justified in laying down any general principle that an ordinary Civil Court has inherent power to set aside its own order and to interfere in any case in which it thinks a failure of justice has occurred, when the aggrieved party has another remedy by which it can be set aside, even though the remedy is not as summary or as cheap. As a matter of fact, the respondent might have come forward at the earlier stages of the execution proceedings, for example, when the property was attached, and did not choose to do so but waited until the final proceedings for delivery

(1) (1919) L.L.R., 48 Mad., 94.

(3) (1926) 51 M.L.J., 219.

(2) (1925) 50 M.L.J., 300.

(4) (1926) 52 M.L.J., 123.

(5) (1924) 47 M.L.J., 12.

were going on, and then failed to appear and prosecute his case.

I therefore would answer both the points referred to the Full Bench in the negative.

BEASLEY, J.—I agree.

MADHAVAN NAIR, J.—I agree.

WALLACE, J.—This opinion will be sent back to the Division Bench of which I shall be a member. The matter of costs will be decided then.

K.R.

APPELLATE CIVIL.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
and Mr. Justice Jackson.*

IN THE MATTER OF THE MADRAS NATIVE PERMANENT FUND, LIMITED, IN LIQUIDATION, BY
MESSRS. FRASER AND ROSS, LIQUIDATORS,
APPELLANTS,

v.

T. S. NATESA SASTRI AND 8 OTHERS, RESPONDENTS.*

Indian Companies Act (VII of 1913)—Nidhi—Memorandum of Association—Object, to advance money to help shareholders to acquire property—Articles of Association—Shares of Rs. 100 each—Shareholders enabled to sever connexion with company and end liability on payment of Rs. 84 per share—If intra vires of the Act—If such shareholders liable as contributories on liquidation.

Where the effect of the Articles of Association of a Nidhi, started, as set out in the Memorandum of Association, with the object of helping shareholders to acquire property, was to

* Original Side Appeal No. 30 of 1923.

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enable persons, who had subscribed for shares of Rs. 100 each, to sever their connexion with the company and end all their liability with regard to it, when they had paid up Rs. 84 per share, held, that such a course would be *ultra vires* the Memorandum of Association, and would constitute a reduction of capital without the assent of Court, and thus directly contravene the provisions of the Indian Companies Act, and that those persons will, on liquidation, be liable as contributories.

ON APPEAL from the judgment of Mr. Justice WALLER, dated 20th January 1928, and passed in the exercise of the Ordinary Original Civil Jurisdiction in O.P. No. 75 of 1927, holding that the 357 persons mentioned in the liquidators' list are not contributories within the meaning of the Indian Companies Act.

The Nidhi was registered as a limited liability company under the Indian Companies Act, 1864. According to the Memorandum of Association the object with which the company was started was to make advances to shareholders to enable them to purchase property, etc. By the Articles of Association of the company a shareholder was to pay Re. 1 per share per month for 84 months, at the end of which period he would be entitled to a payment of Rs. 100 per share. The Articles of Association also provided that a shareholder might at any time withdraw from the company on the ground of loss of employment, etc., in which case the amount paid by him on the shares had to be refunded to him. After an order directing the liquidation of the Nidhi was passed, the liquidators applied to the Court for an order that those shareholders of the company who had withdrawn from the company and had been paid off under the provisions of the Articles of Association should be included in the list of contributories. Mr. Justice WALLER, who heard the application, held that those shareholders were not contributories. Against that order, the liquidators filed the present appeal.

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O. T. Govindan Nambiar for appellants.—The provisions for the withdrawal of a shareholder from the company and the termination of his liability in relation thereto are *ultra vires* of the Memorandum of Association and the Indian Companies Act, inasmuch as they amount to a reduction of capital without sanction of Court. Those persons who had thereby ceased to be members are still shareholders in law, and are liable to be included in the list of contributories. See *Bellerby v. Rowland and Marwood's Steamship Company, Limited*(1).

S. Duraiswami Ayyar for respondents.—The company consists of two branches, the loan branch and the deposit branch. All the debts of the company are of the deposit branch, and the debts of that branch are not binding on the company. The company had no power to open the deposit branch. The proposed contributories could not be made liable for those debts.

O. T. Govindan Nambiar in reply.—The question as to whether the debts in the deposit branch are binding on the company or not has no bearing on the issue before the Court. Even if the company had no debts, the costs of winding up have to be paid and for that purpose at least the rights and liabilities of contributories have to be settled. The list of the company's debts has already been settled by the Court, and a person who is not in the list of contributories cannot question their binding character. Once a debt has been admitted it can only be expunged on an application by the Official Liquidator or by a contributory. The respondents cannot now question the debts unless they are placed in the list, see *Halsbury's Laws of England*, Vol. 5, p. 523.

JUDGMENT.

This matter arises out of the liquidation of the Madras Permanent Fund, Limited, which is what is commonly called a nidhi. The greatest difficulties arise when these funds are turned into limited companies because their articles are usually drawn without regard either to the provisions of the memorandum, or to the general law embodied in the

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Companies Act. The effect of the articles relied upon in this case was shortly to enable persons who had subscribed for shares of Rs. 100 to sever their connection with the company and end all their liability when they had paid up Rs. 84. That appears to us not only to be *ultra vires* of the memorandum but to be a reduction of capital without the assent of the Court which is directly forbidden by the Indian Companies Act. That being so, it is clear that these 357 persons mentioned in the liquidators' list should be declared to be contributories. Mr. S. Doraiswami Ayyar argued a wider ground before us, namely, that the debts which it was sought to make these persons liable to contribute to liquidate were debts themselves incurred *ultra vires* of the powers of the fund. That may be right or wrong; but it is obvious that it is premature to discuss it at this stage. When these persons are called upon to contribute to the liquidation of definite debts, it will be open to them to argue that the debts which they are called upon to contribute to pay are *ultra vires* of the powers of the company, that is to say, are not in law debts at all. That must be dealt with on its merits as each case arises. It is not a matter with which we can deal now.

Costs as between attorney and client out of the estate.

King & Partridge, Attorneys for appellants.

B.C.S.

APPELLATE CIVIL.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice, and
Mr. Justice Anantakrishna Ayyar.*

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THE DEVAKOTTAH NAGARATHAR SRI MINAKSHI
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Indian Trusts Act (II of 1882), sec. 66—Trustee wrongfully mingles trust property with his own—If beneficiary entitled to charge on whole fund for amount due—Trustee of endowed school—Money belonging to endowment entrusted to him by co-trustees—Money put into his own business without the knowledge or consent of co-trustee—Trustee adjudicated insolvent—If co-trustees entitled to charge on whole estate in priority to other creditors.

Where a trustee wrongfully mingles trust property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him.

Where a banker, who was one of the trustees of an endowed school, had a sum of money belonging to the endowment entrusted to him by his co-trustees, and he put that sum into his own business without the knowledge or consent of his co-trustees, and his business came to a standstill, and he was adjudicated an insolvent, *held*, that the bankrupt's co-trustees were entitled to a charge on the whole estate in the hands of the Official Assignee in priority to other creditors, on the basis of following moneys which have been misappropriated to the fund in which they must be supposed to have been sunk. *In re Hallett's Estate*, *Knatchbull v. Hallett*, (1879) 13 Ch.D., 696, *Sinclair v. Brougham*, [1914] A.C., 898, and *Pennell v. Deffell*, (1858) 4 De G.M. & G., 372, followed.

ON APPEAL from the judgment of Mr. Justice WALLER, dated 20th September 1927, and passed in the exercise

* Original Side Appeal No. 82 of 1927.

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of the Insolvency Jurisdiction of the High Court in Petition No. 278 of 1925, Application No. 418 of 1927.

M. A. R. N. Ramanathan Chettiar, a Nattukottai Chetti, was carrying on a money-lending business under the firm name of M. A. R. N. Ramanathan Chettiar. He was a member of the committee of the Nagarathar Sri Minakshi Vidyasala Paripalana Sangam, and also the treasurer of the Sangam. As treasurer, Ramanathan Chettiar collected various sums subscribed for the upkeep of the school conducted by the Sangam. He paid these sums into his own business without the knowledge or consent of his co-trustees, and in 1925, the firm was adjudicated insolvent. At the time of adjudication, a sum of over Rs. 40,000 stood to the credit of the Sangam in the firm's books. The committee of the Sangam claimed that the said amount should be paid in full by the Official Assignee in preference to the debts due to the other ordinary creditors. The Official Assignee passed an order rejecting the claim, stating that "the relationship between the governing body and the insolvent was that of debtor and creditor. Assuming for the purpose that he was in a fiduciary relationship and that he acted improperly in investing the moneys of the school in his firm, the same cannot be thus identified or earmarked. When the firm was adjudicated insolvent, there was no cash and no part of the assets could be followed by the beneficiary." Against that order of the Official Assignee, the committee appealed to the Judge sitting in Insolvency, who allowed the appeal and gave the committee a first charge for the full amount of their claim on the assets of the firm of the insolvent.

S. Duraiswami Ayyar (V. Varadaraja Mudaliar with him) for appellant.—The committee, not having shown that its money was traceable to any fund vested in the Official Assignee, was entitled to rank only as a simple unsecured creditor, *In re*

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Hallett & Company, ex parte Blane(1), judgment of LOPES, L.J., at 244: "If trust money can be traced, it is liable to be followed by the trustee, and will not pass to the trustee in bankruptcy; but if it has been mixed up with other money so as not to be distinguishable, it cannot be followed."

[CHIEF JUSTICE.—No money really passed into the hands of Hallett. It was a mere book adjustment.]

The rule as to following trust property requires that there must be something specific which is capable of being identified as that into which the money has been converted. Lewin on Trusts, 12th Edn., p. 1155; 13th Edn., p. 934. See also Godefroi on Trusts and Trustees, 5th Edn., p. 575, and Halsbury's Laws of England, Vol. 28, p. 207.

V. V. Srinivasa Ayyangar (S. G. Sadagopa Mudaliar with him) for respondent.—There is no dispute as to the facts. On the admission of the appellant's counsel at the trial the respondent is entitled to a charge on the entire fund. "If a trustee pay trust money into a bank to the account of himself not in any way earmarked with the trust, and also keep private money of his own to the same account, the Court will disentangle the account, and separate the trust from the private money and award the former specifically to the *cestui que trust*." Lewin on Trusts, 13th Edn., p. 933, and *Pennell v. Deffell*(2); see also *Sinclair v. Brougham*(3), *In re Hallett's Estate, Knatchbull v. Hallett*(4), and Halsbury's Laws of England, Vol. 28, p. 208.

JUDGMENT.

COUTTS TROTTER, C.J.—I have so little confidence in my own ability to decide correctly a case involving wide principles of Equity, that I am relieved to find that the amount here at stake is sufficient to enable an appeal to be taken to a higher tribunal. I approach this case with much more than the diffidence expressed by Lord SUMNER in *Sinclair v. Brougham*(3), and feel myself under the ban expressed by THESIGER, L.J., in *Hallett's*

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(1) [1834] 2 Q.B., 237.

(3) [1914] A.C., 898.

(2) (1853) 4 De.G.M. & G., 372.

(4) (1879) 13 Ch.D., 696.

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case (13 Ch. Dn., 696 at p. 722), as to the unlikelihood of Common Law judges even of the eminence of Lord BRAMWELL being able to understand any but the simplest and most firmly established of Equity doctrines.

My duty is simply to set out the facts which are practically undisputed, and to apply to those facts the principles I conceive to be laid down by the decided cases as best I can.

[His Lordship then stated the facts.] The sole question before us is whether the bankrupt's co-trustees are relegated to the position of ordinary creditors in the insolvency, or are entitled to say that they stand on a higher footing and are entitled to a charge on the whole estate in priority to other creditors, on the basis of following their moneys which have been misappropriated, to the fund in which they must be supposed to have been sunk.

I have most carefully perused the cases that the diligence of counsel has placed before us; and I wish to express my indebtedness for the assistance they have given us. The guiding principles, as I conceive them to be, are laid down in two great judgments—that of JESSEL, M.R., in *In re Hallett*(1), and that of Lord HALDANE in *Sinclair v. Brougham*(2). I do not propose to examine the early Common Law cases, though they have been cited to us, because, as JESSEL, M.R., points out, the judges were then dominated by the idea that, money being unidentifiable, it could in no case be followed, a doctrine eliminated by “modern equity,” to use his own language. I take these propositions to be indisputable; and in stating them, I use throughout for brevity the term “trustee” to cover all cases of persons who stand in a fiduciary position and “*cestui que*

(1) (1879) 13 Ch. D., 696.

(2) [1914] A.C., 898.

trust” to cover the cases of all those towards whom the persons I have called “trustees” stand in that position :—

(1) That if the trustee keeps the sums entrusted to him entirely separate from his own moneys, as by putting them in cash in a bag, to use Sir G. JESSEL's instance, or by putting them into a separate account at a bank, the *cestui que trust* can follow them.

(2) That if the trustee can be shown to have converted the trust money into a specific thing, such as a piece of land, or a definite parcel of goods remaining in his possession, the *cestui que trust* can take that land or those goods as representing his money or claim a lien on them for the money expended on the purchase.

(3) Then comes the more common case where the trustee has mixed up the trust money with his own. I think here it is clear that, if the trustee has bought land or goods out of moneys which are partly his own and partly those of the *cestui que trust*, the *cestui que trust* can claim a charge on the property for the amount of his funds which was expended in the purchase. That is not always easy of ascertainment, and the working rule appears to be that if the trust moneys have disappeared and no residue is left, the *cestui que trust* will be entitled to a charge on the whole until it is ascertained what portion of the purchase money was contributed by the trustee out of his own funds and not out of the trust money, the onus being cast on the trustee to prove what portion came from his own funds. When that is ascertained, the *cestui que trust* will only have a lien on the property for the amount ascertained to be due to the misuse of the trust moneys.

Then arises the case where the trust moneys have not only been mixed with the trustee's moneys, but

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where there is no tangible asset which could be alleged to have been acquired with the trust funds—wholly or partially. That is the case before us, because here what the trustee did was to put the trust moneys in his hands into his own business and subject them to all the fluctuations of that business, and it is clear that the business was so unsuccessful that the actual funds in the hands of the Official Assignee as at this date realized amount to nothing. It was strenuously argued by Mr. Doraiswami Ayyar that in such circumstances the Court could not give a preferential charge over prospective as distinct from actually tangible assets of the business. That argument ultimately seems to me to imply that a trustee has only to put trust moneys into a business, and then and there the *cestui que trust* is debarred from invoking the equitable doctrine, and sinks to the position of an unsecured and unpreferred creditor of the estate. That view seems to me to have been negatived so long ago as 1853 by the judgment of TURNER, L.J., in *Pennell v. Deffell*(1). At pages 388 and 389, the learned Lord Justice takes the very case we have to consider as a clear illustration of a case to which the equitable doctrine would apply.

We were much pressed with the case of *In re Hallett & Co., ex parte Blane*(2). After a careful consideration of that case, I think it decides no more than this:—that a paper adjustment cannot be treated as a passing of moneys of the *cestui que trust* into the hands of the trustee. On page 242, the point is first and emphatically taken by DAVEY, L. J. Mr. Muir Mackenzie in argument had said: “The £1,600 was in fact received by Hallett & Co.” DAVEY, L. J., then said; “No; all that happened

(1) (1853) 4 DeG.M. & G., 372.

(2) [1894] 2 Q.B., 237.

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was that they got a credit for that amount.” I read the judgments which follow as proceeding on those lines, viz., that while you can follow money, you cannot follow a mere book adjustment.

I think that the learned Judge came to the right conclusion and that this appeal should be dismissed with costs payable by the Official Assignee out of the estate. Certificate for two counsel. Official Assignee to take his costs out of the estate.

ANANTAKRISHNA AYYAR, J.—(After stating the facts):—The school authorities appealed to the learned Judge sitting in Insolvency against the order of the Official Assignee. The learned Judge (Mr. Justice WALLER) allowed the appeal and gave the school authorities a first charge for the full amount of their claim, on the realization of the debts due to the firm of the insolvent.

The Official Assignee has preferred this appeal against the order of the learned Judge, and contends that the school authorities are not entitled to rank higher than the ordinary unsecured creditors of the insolvent.

Before discussing the question of law raised by Mr. S. Doraiswami Ayyar, the learned Counsel for the appellant, I think it is better just to refer to the finding of fact arrived at by the learned Judge. In the course of the judgment, the learned Judge has recorded the following admission made before him by the Counsel who appeared for the Official Assignee. “Mr. S. Doraiswami Ayyar for the Official Assignee concedes that he is unable to support the view that the relation between the insolvent and the trust was one of debtor and creditor. He admits that Ramanathan Chetti was a trustee and received the trust funds as a trustee and mixed it with the funds of his own business.” As a trustee of the Nagarathar school, the insolvent was

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entirely in the wrong in utilizing the trust funds in connexion with his own business. As the learned Judge remarks, "there can be no question as to the wrongful nature of Ramanathan Chetti's action, for the mingling itself was wrongful."

The question then is whether the beneficiary (the school) is entitled to a first charge on the trade assets of Ramanathan Chetti's firm. Section 66 of the Indian Trusts Act (II of 1882) enacts as follows:—

"Where the trustee wrongfully mingles the trust property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him."

The learned Counsel for the appellant contends that the beneficiary is entitled to a charge for the trust money, only if he can trace it to a specific fund. The trust funds have been admittedly utilized by the insolvent in connexion with his money-lending business. It is not now possible to say which particular asset due to the firm represents the trust moneys. In these circumstances, it is argued for the Official Assignee that the beneficiary is entitled only to rank as an ordinary creditor along with the other creditors of the insolvent. In support of his contention, the learned Counsel strongly relied on *In re Hallett, ex parte Blane*(1). The following passage on page 244 in the judgment of Lord Justice LOPES was relied upon:—

"If trust money can be traced, it is liable to be followed by the trustee and will not pass to the trustee in bankruptcy; but if it has been mixed up with other money so as not to be distinguishable, it cannot be followed."

This case however has been understood by text-writers as authority for the proposition "that in the case of money" there must be in fact a payment, since "the doctrine of following" depends upon identification

(1) [1894] 2 Q.B., 237.

of the subject matter; and where money not actually received was credited to an account, the doctrine was held inapplicable. Godefroi on Trust and Trustees, 4th Edition, pages 564 and 565. In Lewin on Trusts, 12th Edition, page 1155, it is stated as follows:—

"In order, however, that the rule as to following trust money should apply, there must be something specific which is capable of being identified as that into which the money has been converted, and where a transaction has been carried out by a set-off in account so that no cheque, note, coin or credit has ever passed or existed in specie, the doctrine is inapplicable."

Turning to the judgments delivered in *In re Hallett & Company's* case, we find that Lord ESHER (Master of the Rolls) says at page 244:—

"Hallett & Company did not in truth receive any money; they entered into a transaction with Hewitt & Company, the result of which was that no money passed . . . Hallett & Company did not in fact receive any money or tender of money or anything tangible which it would be possible to follow or to lay hands upon; . . . all that can be shewn is a settlement of account; and a settlement of account cannot be followed."

Similarly, LOPES, L.J., says:—

"So far as regards the following of this sum of £1,600, the attempt fails at the first stage, for that particular £1,600 was never received by Hallett & Company; no money had passed; there had been a mere settlement with Hewitt & Company. Then, again, this specific sum never passed on to Cocks & Company; and the second stage fails too."

Similarly, at page 245, DAVEY, L.J., also makes similar remarks:—

"This money was not received by them (Hallett & Company) in any sense which is material to the present purpose. Nothing was received by them in specie, notes, cheques or coin; there was no credit existing in specie; nothing which the *cestui que trust* could follow and say that the property had been converted into."

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Therefore, the case *In re Hallett & Company, ex parte Blane*(1) could be distinguished on the ground that in that case it was found that the very first step that the beneficiary should prove in such cases, namely, that the trustee received moneys of the beneficiary was not proved. On the other hand, authority seems to be fairly clear that where a trustee wrongfully mingles the trust property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him. (See section 66 of the Indian Trusts Act, Halsbury's Laws of England, Vol. 28, page 207, sections 415 and 416.) It was admitted that where trust money is wrongfully laid out in the purchase of specific real or personal property, the beneficiary can elect to have a charge upon it for the amount of the trust money. (See authorities referred to in paragraph 415 of Halsbury's Laws of England, Volume 28.) If therefore the trustee in this case had purchased a going concern of another with the trust funds, then the beneficiary would have an option either to take the purchased property or elect to have a charge upon it for the amount of the trust money. If, instead of purchasing a going concern, the trustee wrongfully utilizes the trust money for starting a business, or for carrying on a business of his own, then it would seem that the beneficiary is entitled equally to elect to have a charge upon the assets of the business for the amount of the trust money.

It was, however, contended by the learned Counsel for the appellant that the doctrine of following trust property is not applied, and could not in the nature of things apply, when the trust funds are wrongfully applied by the trustee in a trade or business. If the doctrine is not confined in its application to cases of

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mingling of trust moneys with the trustee's own money where there is a mingled fund available, if the doctrine also applies to cases where with the money of the beneficiary the trustee wrongfully buys other property, and if the beneficiary could in such cases claim to have a charge on such property to the extent of the trust money utilized wrongfully by the trustee, I am not clear why the doctrine should not apply when the trustee, instead of utilizing the trust money for the purchase of property, utilizes it in a trade or business of his own. Having regard to the findings in the present case and to the admission made on the Official Assignee's behalf, as recorded by the learned Judge, there is no difficulty as regards the facts in the present case; for, as already mentioned, it was admitted before the learned Judge on behalf of the Official Assignee that "Ramanathan Chetty was a trustee and received the trust fund as a trustee and mixed it with the funds of his own business." The learned Counsel for the respondent cited to us the case of *Pennell v. Defell*(1). Lord Justice TURNER observed as follows:—

"It is, I apprehend, an undoubted principle of this Court that as between *cestui que trust* and trustee and all parties claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust; and from this principle I do not understand the Master of the Rolls to have in any degree dissented. Several cases illustrating the principle were cited in the argument, but perhaps it cannot be better illustrated than by referring to a case of familiar, almost daily, occurrence, the case of trust-moneys employed in trade. An executor of a deceased partner continues his capital in the trade with the concurrence of the surviving partners, and carries on the trade with them.

(1) [1894] 2 Q.B., 237.

(1) (1858) 4 De G.M. & G., 372 (43 E.R., 551 at 558).

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The very capital itself may consist only of the balance which at the death of the partner was due to him on the result of the partnership account. That capital may have no existence but in the stock-in-trade and debts of the partnership. The stock-in-trade and debts may undergo a continual course of change and fluctuation, and yet this Court follows the trust capital throughout all its ramifications and gives to the beneficiaries of the deceased partner's estate the fruits derived from that capital, so continually altered and changed. We have here, I think, the most perfect instance of the extent to which the doctrine of following trust property has been carried by the Court, an instance, too, which exemplifies the difficulties with which the Court has felt bound to grapple for the purpose of carrying out that doctrine, for nothing can be more difficult, nothing more inconvenient, than to follow out such a case to its results."

We were also referred to *In re Hallett's Estate, Knatchbull v. Hallett*(1), to the Judgment of JESSELL (Master of the Rolls) at page 707, *et seq.* The decision of the House of Lords in *Sinclair v. Brougham*(2), was also referred to, and several passages from the speeches of the learned Lords who took part in that case were read to us. For example, at page 438, in Lord DUNEDIN's speech, the following passage occurs:—

"Now there are certain situations, of which Hallet's case is an example, where the one sharing party has a right to say to the other, it is not in your mouth to say that the assets are not all mine, to the extent of my full claim. I do not think this is one of those positions. Neither party is here in any fiduciary position to the other."

Similarly, passages at page 418 in the speech of the Lord CHANCELLOR (Viscount Haldane) were also read to us.

I think that some of the passages occurring in the above case could be construed as laying down the principle contended for by the respondent, though it may be said that the point for decision before the House was quite a different one, and that the learned Lords

(1) (1879) 13 Ch. D., 696.

(2) [1914] A.C., 898.

were not considering the exact point now before the Court.

In *Perry on Trusts*, 6th edition, Volume II, paragraph 828, page 1364, it is said that

"to entitle the trust creditor to preference, it must at least appear that the fund remaining for distribution contains the proceeds of the trust."

Again in paragraph 838, it is mentioned that

"if the executor of a deceased partner is also the surviving partner, and he continues the deceased partner's capital without authority in the business and changes the property many times over, the Court follows the trust fund through all these changes and gives the beneficiaries of the deceased partner's estate the capital and all its proceeds or gains in the business in which it has been employed."

The only Indian case I am aware of, which is somewhat similar to the present case, is *Mulraju Lakshmi v. Official Assignee of Madras*(1), decided by SADASIVA AYYAR and NAPIER, JJ.

"Where a jeweller who was entrusted by the claimant with sovereigns and gold to be made into a jewel for him converted the same into cash and subsequently became bankrupt, and after the Official Assignee took charge of his estate, the owner of the sovereigns and gold put forward a claim that he was entitled to a preferential treatment and to get out of the estate the full value of the sovereigns and gold entrusted by him to the bankrupt,"

the Court held

"that the transaction between the claimant and the jeweller amounted to a bailment and that the jeweller became in consequence a trustee for the claimant in respect of the sovereigns and gold entrusted to him."

But as there was no evidence in that case, that the sovereigns and gold formed a portion of the estate taken possession of by the Official Assignee and as there was nothing to identify the same, the Court held that

(1) (1915) 29 I.O., 87.

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"the claimant was not entitled to the benefit of the doctrine of tracing and quasi-charge, and therefore to any preferential payment."

Justice SADASIVA AYYAR at page 41 says

"If in this case I could have found my way to decide that the assets taken possession of by the Official Assignee did include, or must have included, the gold or the value of the gold contained in the sovereigns and the bar given by the petitioner to the insolvent, I would be inclined to apply the doctrine of tracing and the doctrine of a *quasi-charge* even to the full limits indicated by Lord DUNEDIN in his judgment in the recent House of Lords case; but I do not see my way to differ from the findings of Mr. Justice BAKEWELL that the petitioner has failed to show that the gold or the price of that gold was invested in or formed part of any of the assets taken possession of by the Official Assignee."

Again the learned Judge adds:

"On the finding then that none of the assets found with the insolvent is proved, directly, or even by a remote fact from which a reasonable inference could be drawn, to have contained any portion of the petitioner's gold or could have been acquired with the use of the proceeds of that gold, I must and do confirm the order of the learned Judge."

The principle would seem to be that a wrong doer cannot be permitted to take advantage of his own wrong, and that no wrongful act of the trustee could prejudice the rights of the beneficiaries, in cases like the present.

I am, therefore, of opinion that the learned Judge was right in holding that the principle of following trust property applied to the facts and circumstances of the present case. I would therefore dismiss the appeal with costs. Costs to be realized from the estate. Certificate for two Counsel. The Official Assignee is entitled to take his costs from out of the estate.

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Before Mr. Justice Wallace and Mr. Justice Pakenham Walsh.

MANIKKA S. BALARAMIER (PETITIONER IN
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No. 801 OF 1926), PETITIONER,

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VASUDEVAN AND OTHERS (RESPONDENTS) (LEGAL
REPRESENTATIVES OF RESPONDENT IN C.R.P. No. 801
OF 1926), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O. XXII, r. 6—Death of respondent before hearing of a civil revision petition—Legal representatives not brought on record—Case heard and judgment pronounced after death of respondent—Judgment, validity of—Right of petitioner to apply to bring on legal representatives and retain the judgment—Right to bring legal representatives within three months of the death, and have case re-argued.

Where, after the death of the respondent in a civil revision petition in the High Court and without his legal representatives on the record, the case came on for hearing, arguments heard on both sides and judgment was pronounced in favour of the petitioner, the judgment had no validity in law; the petitioner was entitled to apply, within three months of the respondents' death, to bring his legal representatives on the record and to have the case re-argued, but he was not entitled to have the former judgment retained without a re-hearing by merely adding the legal representatives on the record.

PETITIONS (Civil Miscellaneous Petitions Nos. 763 and 764 of 1928) filed in Civil Revision Petition No. 801 of 1920, in the High Court, to bring the legal representatives of the deceased respondent on the record, and to have the civil revision petition re-argued or to have the

* C.M.P. No. 763 of 1928 and C.M.P. No. 764 of 1928.

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VASUDEVAN. judgment in the case retained after entering the names of the legal representatives in the record.

The material facts appear from the judgment.

V. Sundaram Ayyar for petitioner.

S. Rangaswami for respondents.

JUDGMENT.

WALLACE, J.—(The judgment was written by WALLACE, J., and pronounced by PAKENHAM WALSH, J., on behalf of the Bench.)

We are concerned with two petitions, C.M.Ps. Nos. 763 and 764 of 1928, both arising out of the hearing by this Court of C.R.P. No. 801 of 1926. That petition was heard by Mr. Justice DEVADOSS and Judgment was pronounced on 6th December 1927. It has subsequently come to light that the respondent in the civil revision petition died on 26th November 1927, a few days before the judgment was pronounced. The formal order of this Court on the civil revision petition shows respondent's name. The petitioner before us, on 2nd February 1928, within 3 months of the death of the respondent, has put in the present two petitions, No. 764, to bring on the legal representatives of the deceased in the civil revision petition, and No. 763, to have the civil revision petition re-heard. He contends, however, that the latter petition is unnecessary and that he is entitled to have the legal representatives brought on and the Judgment of Mr. Justice DEVADOSS to stand against them. His main contention is that when a party to a legal action has died and the legal representatives have been brought on in time so that the action does not abate, the bringing on of the legal representatives validates all proceedings in the action up to the date of their being brought on, which have taken place since the death of the party. This involves the

proposition that proceedings, to which the legal representatives are not parties and to which no representative of theirs was a party, will nevertheless bind them. It is argued that that is not improper or illegal, because the case of the respondent in the civil revision petition, though he was dead, was fully argued by his learned Advocate, and therefore the case of the legal representatives has not suffered. But that is to bind the legal representatives by the case of the respondent and it cannot be argued that that cannot in law ever prejudice them.

The point is practically *res integra*, but I consider that the true view must be that a legal action, on the death of a party to it, passes into a state of suspense, which itself, if the legal representative is not brought on record within time, passes into a state of abatement, and that while the action is in a state of suspense, no valid act, which is not purely formal or processual, but involves a decision on the merits of any part of the action, can be done by the Court. A simple but not exhaustive test would be: would the order by which it is sought to bind the legal representative be of the nature of a *res judicata*? I do not think that the rulings cited before us are of much assistance. So far as the intention of the legislature may be gathered, rule 6 of Order XXII is an indication that it did not intend to apply the principle contended for by petitioner beyond the restricted operation of that rule. It is easy to foresee that the adoption or the rejection of petitioner's principle will alike give rise to difficulties. These will have to be dealt with as they arise. In the present case I consider that the proper order to pass is to hold that the civil revision petition has been in suspense since the date of the respondent's death, to bring on the legal representatives in it now and to have the

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WALLACE, J. civil revision petition re-heard, since the order pronounced in it by Mr. Justice DEVADOSS has now no validity in law. I would grant both petitions, and post the civil revision petition for fresh hearing and direct each party to bear his own costs in these petitions.

PAKENHAM WALSH, J.—I agree.

K.B.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Madhavan Nair.

1929,
July 24.

PARINAM RAMA RAO AND ANOTHER (RESPONDENTS),
APPELLANTS,

v.

PARINAM KRISTNAMMA (PETITIONER), RESPONDENT.*

Married Women's Property Act (III of 1874), sec. 6—Amending Act (XIII of 1923), sec. 2—Applicability of sec. 6 to policies effected by Hindus in Madras before 31st December 1913—Effect of sec. 2 of Act XIII of 1923.

Section 2 of Act XIII of 1923, which declares that section 6 of the Married Women's Property Act, 1874, shall apply to any policy effected by any Hindu in Madras after the 31st December 1913, does not take away the applicability of that section to similar policies effected before that date, as held by the Full Bench in *Balambal v. Krishnayya*, (1914) I.L.R., 37 Mad., 483.

APPEAL against the order of the District Court of Ganjam in Original Petition No. 45 of 1926.

This appeal arises out of an application for letters of administration made by the widow of one P. Subba Rao in respect of a policy of life insurance effected by him

* Civil Miscellaneous Appeal No. 333 of 1927.

in 1894. He died in 1926. The policy, on the face of it, was for the benefit of the widow and her children. The application was opposed by the son by the first wife of the deceased and by the divided brother of the deceased, who claimed that the policy was pledged to him for a debt due by the deceased. The respondents contended that section 6 of Act III of 1874 did not apply to Hindus by reason of section 2 of Act XIII of 1923. The District Judge overruled the contention and granted letters of administration to the widow. The respondents preferred this appeal.

V. Govindaraja Achari for appellants.—The trust in favour of the petitioner in the policy is invalid. Section 6 of the Married Women's Property Act does not apply to this case. There was a conflict of decisions as to the applicability of section 6 to Hindus; the Full Bench decided in 37 Mad., 483, that section 6 was applicable to Hindus. By the Amending Act (XIII of 1923) section 6 is made applicable to Hindus after 31st December 1913. Before 1913, it is implied by the legislature that section 6 did not apply to Hindus, as held by the other High Courts and in 35 Mad., 162. It is made clear by the Amending (Act XIII of 1923) section 2, that, prior to 1913, section 6 did not apply to Hindus, and that the Full Bench decision in 37 Mad., 482, is not good law. If the legislature meant to leave the Full Bench case untouched, it would have said that the amendment takes effect throughout British India.

B. Jagannadha Das for respondent was not called on.

The JUDGMENT of the Court was delivered by

VENKATASUBBA RAO, J.—The short question in this appeal is this: Has section 2 of Act XIII of 1923 the effect of rescinding *Balambal v. Krishnayya*(1)? The District Judge is of course wrong in saying that it was not open to the legislature to give effect to a view different from that taken in that decision. But the question is, what is the true construction of section 2?

(1) (1914) I.L.R., 37 Mad., 483 (F.B.).

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It declares that the provisions of section 6 of the Married Women's Property Act of 1874 shall apply in the case of any policy effected by any Hindu in Madras after the 31st December 1913 (the Full Bench decision having been given on the 19th December). It does not further enact that they shall not apply to policies effected before that date. What then about such policies? They are clearly governed by the old Act. The present policy was effected in 1894 and governed as it is by the earlier Act, the decision of the Full Bench applies. We therefore confirm the judgment of the lower Court and dismiss the appeal with costs.

K.R.

INSOLVENCY.

Before Mr. Justice Kumaraswami Sastri.

1928,
November 21.

THE NEDUNGADI BANK, LTD., MADRAS, APPLICANTS,

v.

THE OFFICIAL ASSIGNEE OF MADRAS, RESPONDENT.*

Presidency Towns Insolvency Act (III of 1908); sec. 52—Debtor's property taken possession by receiver—Debtor subsequently adjudicated insolvent—If section 52 applicable to property in receiver's possession—Property in possession of receiver appointed by Court—Legality of possession—If can be questioned by third parties while order appointing receiver remains in force.

Where the property of a debtor is taken possession of by a receiver appointed by the Court, and the debtor is subsequently adjudicated an insolvent, section 52 of the Presidency Towns Insolvency Act does not apply, and the property cannot, during

* I.P. No. 264 of 1928, Application No. 723 of 1928.

the continuance of the possession by the receiver, be held to be in the possession, order and disposition of the debtor.

When an order is made by the Court appointing a receiver, and the receiver takes possession of property, it is not open to third parties to question the legality of the possession of the receiver so long as the order appointing the receiver remains in force.

APPLICATION in the Insolvency of K. Audisesha Nayudu for an order directing the Official Assignee of Madras to deliver to the applicants certain goods and to pay them a sum of money alleged to have been realized by the sale of other goods.

T. L. Venkatarama Ayyar (K. S. Nair with him) for the applicants.

V. Varadaraja Mudaliar for respondent.

JUDGMENT.

This is an application by the Nedungadi Bank, Ltd., for an order directing the Official Assignee to deliver possession of five motor cars specified in the application and to pay Rs. 44 which is alleged to be the amount realized by the sale of one motor car which was sold by the Official Assignee.

The affidavit in support of the application sets out that the insolvent, Audisesha Nayudu, was the proprietor of the City Taxi Company, that he obtained an overdraft from the bank on the terms set out in a deed, dated the 1st of June 1926, by which it was *inter alia* provided that the bank should allow accommodation to the insolvent to the extent of Rs. 5,000 on the security of six motor cars described in the schedule to the registered deed, that the bank became the mortgagee of the six cars to the extent of the advances made, that the deed also provided that the bank would be entitled to take possession of the cars whenever desired by it, that one Sambamurthi claiming to be a creditor of the

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insolvent filed C.S. No. 69 of 1928 on the file of this Court for the enforcement of his claim in that suit, and Mr. K. G. Ramaswami Ayyangar, Advocate, was appointed receiver of the properties belonging to the insolvent, and the receiver took possession of the cars which had been mortgaged to the bank, that the bank on being informed of it wrote to the receiver on the 22nd of June 1928 demanding Rs. 2,225-3-11 due to the bank and asking that it should be paid on or before the 1st of July 1928, and stating that, in default, possession would be taken, that the receiver applied for further time on the 26th of June 1928 which was refused by the bank, that subsequently Audisesha Nayudu was adjudicated insolvent on the 10th of July 1928, that the Official Assignee had taken possession of the cars from the receiver, that the bank called on the Official Assignee to give possession of the cars, that one of the cars was sold by the Official Assignee for Rs. 44 and that the other cars are still with the Official Assignee.

The Official Assignee states that he is not aware of the claim of the bank, that the insolvent carried on the business of hiring motor cars in this City under the name of the City Taxi Company, and for the purpose of that business he purchased and registered cars in his own name, and the cars remained in his possession till the date of his adjudication, that under the deed of mortgage, dated the 1st June 1926, the cars were allowed to remain in the possession, order and disposition of the insolvent with the consent of the bank, the insolvent being the reputed owner thereof, that the receiver was appointed with a view to run the business under the guidance of the insolvent, and pay certain creditors specified in the order including the bank, that the appointment of the receiver has not the effect of changing the ownership of the insolvent over the cars, that

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the acts of insolvency mentioned in the petition began from April 1928, and the adjudication of the 10th of July relates back to April, that the insolvent was the reputed owner of the cars, and that the bank has no claim. He says he did not take possession of one car No. 6118.

The deed of mortgage dated the 1st of June 1926 has been marked as Exhibit A. It provides that the bank shall have a first charge on the motor cars and that the bank may at any time require possession to be delivered to it. It also empowers the bank to take possession of all the cars in case the amount due is not paid when demanded. It also provides that if the mortgagor commits any breach of the agreement or if he commits any acts of insolvency or assigns his estate for the benefit of his creditors, the bank is entitled to enter on the premises and take possession of the cars.

It is not disputed that the cars were left in the possession of the insolvent, nor is it disputed that on the 12th of April 1928 a receiver was appointed to manage and run the business. The receiver application was opposed, but ultimately a receiver was appointed. The receiver was to be in charge of, manage and run the business of the City Taxi Company; he was to be guided by the advice of the defendant in the running of the business, and he was directed to make payments from the net earnings of the business to the creditors named in the counter-affidavit. It was also ordered that all the stock and good will of the company shall vest in the receiver.

This order (Exhibit B) was passed on the 12th of April 1928. The receiver wrote to the bank Exhibit C on the 5th of May 1928 intimating that he had taken possession. The bank wrote Exhibit D on the 7th of May asking for a copy of the order of Court appointing

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the receiver. On the 8th of June, the receiver wrote Exhibit E enclosing a copy of the order. On the 22nd of June, the bank wrote Exhibit F to the receiver sending him a copy of the mortgage deed (Exhibit A) and asking for payment by the 1st of July and threatening to take possession if the payment was not made by the 1st of July. On the 26th of June, the receiver wrote Exhibit G stating that the financial position of the company prevented him from making payment as desired by the bank, that he was running the business under the orders of the Court, that he had been directed to pay certain creditors including the bank, and requesting the bank to wait for some time, and stating that he would pay the amount in easy instalments from the collections. On the 28th of June the bank wrote Exhibit H stating that it could not wait any longer unless it knew something definite about the date of closing the loan. On the 3rd of July the receiver wrote Exhibit J stating that he hoped to pay something from the collections every month and that the bank could not take possession because the goods had vested in him as receiver.

On the 26th of June, the petition for adjudication was filed. On the 10th of July, the debtor was adjudicated. On the 30th of July, notice went to the bank informing it of the adjudication.

It is contended for the bank that by reason of the vesting of the property in the receiver, the order and disposition clause in section 52 of the Act does not apply as the property was in *custodia legis*, that the bank had prior to the insolvency petition given notice that it would take possession, and that any subsequent possession by the receiver being wrongful, the property was not with the consent of the bank in the possession of the defendant, even assuming that the receiver's possession was the possession of the defendant.

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I am of opinion that section 52 does not apply as the property was not in the possession, order and disposition of the debtor, either at the date of the presentation of the petition, or at the date of adjudication. There is no evidence of any acts of insolvency committed before the petition so as to make the adjudication relate back.

I am of opinion that the appointment of a receiver removes the property from the possession of the insolvent. In *Taylor v. Eckersley*(1), it was held that the order and disposition clause did not apply when the property was taken possession of by the receiver appointed by Court. In *Fletcher v. Manning*(2), it was held that goods mortgaged before insolvency and which were at the time of bankruptcy in the hands of the Sheriff under an execution against the bankrupt were not under the order and disposition of the insolvent.

It has been argued by the respondent that, as the receiver appointed did not give notice to all the debtors, the property must be deemed to have remained in the order and disposition of the insolvent, and reference has been made to *Rutter v. Everett*(3), and *In re Neal, Ex parte the Trustee*(4). In the present case, the property is tangible movable property and, unlike debts, notice to the debtor is unnecessary to complete the title of the transferee.

It has also been argued that the Court had no jurisdiction, to appoint a receiver in C.S. No. 69 of 1928, which was a simple claim for money, and reference has been made to *Chockalingam Pillai v. Pichappa Chettiyar*(5). I have in C.S. No. 473 of 1928 dealt

(1) (1877) 5 Ch. D., 740.

(3) [1895] 2 Ch., 872.

(2) (1844) 12 M. & W., 571.

(4) [1914] 2 K.B., 910.

(5) (1925) 22 L.W., 579.

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with all the authorities on the subject, and come to the conclusion that under Order XL, rule 1, of the Code of Civil Procedure, the Court has power to appoint a receiver even in case of simple mortgages. I am also of opinion that when an order has been made by a Court and the receiver takes possession, it is not open to third parties to question the legality of the possession of the receiver, so long as the order appointing the receiver is in force.

It is argued for the bank that the notices sent by the bank to the receiver demanding possession put an end to the right of the mortgagor to remain in possession, and that where notice is given of the determination to take possession conferred by the deed of mortgage, it is sufficient to take the property out of the order and disposition of the insolvent. In view of my decision on the first contention as to the effect of the appointment of a receiver, I think it unnecessary to decide this question.

I allow the application, except as to car No. 6118, of which the Official Assignee did not take possession, with taxed costs payable out of the estate. The assignee will take the taxed costs of the application out of the estate.
B.C.S.

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and
Mr. Justice Pakenham Walsh.

RAGHAVENDRA RAO AND SEVEN OTHERS (PLAINTIFFS),
APPELLANTS,

1920,
July 18.

v.

VOBIAH AND EIGHT OTHERS (DEFENDANTS), RESPONDENTS.*

Religious Endowments Act (XX of 1863), sec. 3—“Any public officer,” meaning of—Temple subject to superintendence of Mysore Government at the time of passing of the Act—Jurisdiction of Temple Committee over the temple.

The words “any public officer” in section 3 of the Religious Endowments Act (XX of 1863) mean a public officer under the Government of Madras; hence a temple committee constituted under the Act cannot claim superintendence over a temple, the nomination of the trustee whereof was vested in the officials of the Government of Mysore at the time of the passing of the Act.

APPEAL against the decree of the Court of the Subordinate Judge of Bellary in Original Suit No. 3 of 1920.

P. R. Ganapathi Ayyar for appellants.

V. S. Narasimhachar for respondents.

JUDGMENT.

KUMARASWAMI SASTRI, J.—This Appeal arises out of a suit filed by the temple committee of Kudligi for a declaration that the suit temple which they say was called Hude Kampli Devaru is subject to the control of the plaintiffs, for directing the defendants to return to

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the manager, who they allege was appointed by them, the properties of the temple, for accounts and other reliefs. The contesting defendants deny the plaintiffs' claim. Their case was that Kampli Devaru had no temple, that they had no concern with Kampli Devaru temple at Hude and the inam, that the right of appointing the pujari was in the Masa Naiks, that Kampli Devaru idol was permanently in Mysore territory, and that the Court had no jurisdiction.

The suit was instituted in 1911. It came up twice to the High Court as the suit was decided on preliminary questions. The Subordinate Judge who tried the suit after both orders of remand has found that the Kampli Devaru is a Narasimha salagrama image which is the deity of the Masa Naik caste, that it has no permanent shrine, that it is always on tour and that it has a temple and inam at Hude. He finds that the temple committee has or had no jurisdiction over this temple, that the temple was never under the control of the Board of Revenue, and that the power of appointment of trustees was at least from 1800 to 1890 exercised by the Mysore Government, and that no Dharmakarta was ever appointed or confirmed by the Board of Revenue, and dismissed the suit. Hence the appeal.

It is clear from the evidence that, in 1810, the previous trustee or pujari was dismissed by the Diwan of Mysore, and a fresh trustee was appointed. The order of the Diwan is on page 30, Exhibit P (printed documents in Appeal No. 186 of 1914). It refers to the dismissal of the first pujari's grandson, Dosa Gopaya, and the appointment of Dasaya. Then it proceeds as follows:—"In future, if to install the patta of Gosi God, Kampla God, or any other God, they should come and inform you as well as the sircar of it; a Hachadu and Paga should

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be presented from the sircar and when the relatives come and inform, you should have the patta installed, when you install patta, you shall receive the Najar usually payable therefor by them to the sircar. When making the patta installation, careful enquiry should be held in the presence of respectable persons of the place and after a decision, Hachada and Paga should be presented from the sircar and the patta should be conferred." This is dated 28th March 1810. The first person appointed continued in office until 1853. His son was the second pujari from 1853 to 1874. It appears that, in accordance with the order of 1810, he was recognized as the trustee, and the customary honours were given to him. Then his son Obaya was the pujari from 1874 to 1879 and was succeeded by his elder brother from 1879 to 1907. In 1907 disputes arose as to the successor. Several members of the community did not want the sons of Peddanna to be appointed owing to the alleged immorality of their mother, and there were various proceedings, civil and criminal, in the Courts of Mysore. The Subordinate Judge has found on the evidence that, for nearly a century, no sort of control was exercised by the Board of Revenue or by any officials in British India as regards the management of the temple and the appointment of trustees, that till 1890 the Mysore Government officials were informed of the persons who were selected by the community as trustees and they were recognizing them, that in 1890 the Diwan thought the Mysore Government did not concern itself with this endowment as it was not one of the temples which had any grant from or subject to the control of the Mysore Government. Therefore, the question for determination in this case is, whether, on these facts which the Subordinate Judge has found and which we see no reason to differ from, the temple

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committee have got any right in the matter. The Subordinate Judge has given reasons for holding that the temple committee has no right. He deals with this question in paragraph 25 of the judgment onwards. We think that the decision of the Subordinate Judge on this point is right.

Act XX of 1863 was an Act passed for the purpose of enabling the Government of India to divest itself of the management of religious endowments. It begins by saying

"Whereas it is expedient to relieve the Boards of Revenue and the local agents in the Presidency of Fort William in Bengal and the Presidency of Fort St. George from the duties imposed upon them by Regulation XIX of 1810, of the Bengal Code . . . and Regulation VII of 1817 of the Madras Code, . . . so far as those duties embrace the superintendence of lands granted for the support of mosques or Hindu temples and for other religious uses, the appropriation of endowments made for the maintenance of such religious establishments, the repair and preservation of buildings connected therewith and the appointment of trustees or managers thereof, or involve any connexion with the management of such religious establishments."

Section 3 enacts that

"in the case of every mosque, temple or other religious establishment to which the provisions of either of the Regulations specified in the preamble to this Act are applicable, and nomination of the trustee, manager or superintendent thereof, at the time of the passing of this Act is vested in or may be exercised by the Government or any public officer, or in which the nomination of such trustee, manager or superintendent shall be subject to the confirmation of the Government or any public officer, the Local Government shall, as soon as possible after the passing of this Act, make special provision as hereinafter provided."

The provisions are *inter alia* for the appointment and constitution of temple committees as provided for by section 7. Section 4 enacts that

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"in the case of every such mosque, temple or other religious establishment which, at the time of the passing of this Act, shall be under the management of any trustee, manager or superintendent, whose nomination shall not vest in, nor be examined by, nor be subject to the confirmation of the Government or any public officer, the Local Government shall, as soon as possible after the passing of this Act, transfer to such trustee, manager, or superintendent, all the landed or other property which at the time of the passing of this Act shall be under the superintendence or in the possession of the Board of Revenue or any local agent, and belonging to such mosque, temple or other religious establishment, except such property as is hereinafter provided,"

and on such handing over, it enacts that the power and responsibility of the Board shall cease. It has been found by the Subordinate Judge—and we accept the finding—that the Board of Revenue never exercised any control over this endowment, nor was the power of appointment of trustee, manager or superintendent vested in or exercised by the Government of Madras or by any public officer under the Government of Madras. The contention of Mr. Ganapathi Ayyar for plaintiffs is, that "public officer" does not mean a public officer under the Government of Madras but means any public officer wherever such public officer may exercise his function. He goes to the length of arguing that a public officer outside British India would also be a person in the contemplation of section 3 and that any institution the appointment of whose trusteeship is vested in or controlled by any public officer, whether in British India or outside, would fall under Act XX of 1863, and be subject to the jurisdiction of the temple committee appointed under section 7. I am unable to agree with this contention. I find it difficult to see how the Act can apply so as to give jurisdiction to the Board of Revenue or the temple committee in cases where a public officer subject to the control of another Government, presidency or province,

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has been exercising the powers of appointment or control. The words "public officer," I think, must, having regard to the other sections of this Act and to the provisions of Regulation VII of 1817, mean public officer under the Government of Madras and not a public officer outside the control of the Government of Madras. I have already referred to the preamble, and it refers to cases to which Regulation VII of 1817 applied, and before section 3 can be invoked, there should be two conditions satisfied, namely, that not only the Regulation VII of 1817 should be applicable but also that at the time of the passing of the Act, the nomination of the trustee, manager or superintendent should be vested in or exercised by the Government or any public officer, or such nomination should be subject to the confirmation of the Government or public officer. In the preamble to the Regulation VII of 1817, we find reference to the provinces immediately dependent on the Presidency of Fort St. George. Section 2 vests in the Board of Revenue the general superintendence of all endowments, etc., in the several provinces dependent on the Presidency of Fort St. George. Section 3 says that it is the duty of the Board of Revenue to take measures to ensure that religious establishments are properly maintained and that other trusts are properly carried out. Section 7 enables the Board of Revenue to have local agents. Section 8 says that the Collector shall be one of the local agents, and powers are given to the Government to appoint other local agents, if it so desires. Section 11 says that the local agent shall report to the Board of Revenue the vacancies and casualties as they may occur and other particulars as to whether the line of descent is by hereditary right or by election. Section 12 refers to cases where the nomination is vested in Government or a public officer, and section 13 says what

is to be done on the receipt of the report. It is clear from a perusal of the various sections referred to, that the Madras Regulation VII of 1817 was confined to the Government and territories administered by the Government of Fort St. George, and the "public officer" there was a public officer subject to that Government and not any public officer, and in construing section 3, I think it is clear that we must take "public officer" there to be a public officer who was exercising his functions under Regulation VII of 1817. Section 4 simply says that where section 3 does not apply, i.e., where the Government would not have any power to transfer the management to local committees, any endowment which then belonged to such trust shall be made over to the trustee in charge of the endowment, and the Board shall divest itself of all concern in the management. The scheme of this Act, therefore, is that in all cases where Regulation VII of 1817 applied or in cases where the appointment of trustee was either made by the Government of Madras or one of its officers, or where the confirmation of such appointment had to be made by Government or by its officers, such powers were transferred to temple committees; in all other cases, property which was subject to the endowment was transferred to the then legally entitled trustee, and the Board of Revenue had no other control over such property. It is, therefore, clear from the scheme of this Act, that to give jurisdiction to temple committees they must show that the case falls under section 3. Otherwise it is difficult to see how a temple committee can either appoint a trustee or file a suit like the present one requiring property to be handed over to the trustee whom they had no power to appoint. I am therefore of opinion that the decision of the Subordinate Judge is

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right, and the temple committee had no right to institute this suit.

The appeal fails and is dismissed with costs of respondents 1, 5 and 6.

PAKENHAM WALSH, J.—I agree.

N.B.

APPELLATE CIVIL.

*Before Mr. Justice Waller and Mr. Justice
Anantakrishna Ayyar.*

RAMANAYYA (2ND RESPONDENT), APPELLANT,

v.

KOTAYYA AND ANOTHER (APPELLANT AND 1ST
RESPONDENT), RESPONDENTS.*

*Letters Patent, clause 15 (amended)—Decision of single Judge in
Second Appeal—Refusal of leave to appeal—No appeal
against refusal.*

When, after the amendment of clause 15 of the Letters Patent, a single Judge of the High Court decides a second appeal and refuses leave to appeal, not only does no appeal lie from the judgment on the merits, but also no appeal lies from his refusal. *Lane v. Esdaile* [1891] A.C., 210, followed.

APPEAL under clause 15 of the Letters Patent against the order of VENKATASUBBA RAO, J., refusing to grant leave to file a Letters Patent Appeal against his judgment in Second Appeal No. 1506 of 1928 on the file of the High Court (A.S. No. 261 of 1928 on the file

* Letters Patent Appeal No. 88 of 1929.

of the District Court of Guntūr—O.S. No. 605 of 1928 on the file of the Court of the District Munsif of Narasaraopet).

Ch. Raghava Rao for appellant.

P. Venkataramana Rao for respondent.

The JUDGMENT of the Court was delivered by

ANANTAKRISHNA AYYAR, J.—This is an appeal purporting to have been preferred under section 15 of the Letters Patent against the refusal by a learned Judge of this Court of leave to appeal from the judgment passed by him in a Second Appeal.

A preliminary objection is taken by Mr. Venkataramana Rao, the learned Advocate who appeared for the respondent, that no appeal lies from such orders of refusal of leave to appeal.

Clause 15 of the Letters Patent of this High Court was recently amended on 3rd November 1927 and on 12th December 1928. The effect of these amendments is to declare that no appeal shall lie to the High Court from the judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the High Court (and not being an order made in the exercise of a revisional jurisdiction or in the exercise of criminal jurisdiction) of one Judge of the High Court, or of one Judge of any Division Court pursuant to section 108 of the Government of India Act, made on or after 1st February 1929, unless the Judge who passed the judgment declares that the case is a fit one for appeal. The Second Appeal in question was heard by the learned Judge after 1st February 1929 and the learned Judge when moved by the present appellant has declined to grant

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leave to appeal under clause 15 of the Letters Patent. The appellant has preferred this appeal against the said refusal by the learned Judge to grant leave to appeal. The question is whether this appeal is maintainable.

As remarked by the Privy Council in *Minakshi v. Subramanya*(1),

"It is not to be assumed that there is a right of appeal in every matter which comes under the consideration of a Judge; such right must be given by the enacted law or equivalent authority."

The Privy Council made a similar observation in *Mayor, etc., of Montreal v. Brown and Springle*(2),

"The rule of law in this country is that an appeal does not lie, unless given by express legislative enactments."

See also *Lane v. Esdaile*(3), per Lord HALSBURY, L.C. That being so, the appellant must point out the provision of the law under which he claim this right of appeal. The rule would apply with equal, if not with greater, force, when it is sought to prefer an appeal against the decision of one learned Judge of a Court to a Division Bench of that Court. Under section 108 of the Government of India Act, the Chief Justice shall determine what Judge in each case is to sit alone and what Judges of the Court are to constitute the several Division Courts. The decision passed by such Judge or Division Court would be final, unless a right of appeal be specifically given. Clause 15 of the Letters Patent is the only provision which has been brought to our notice, and it is under that clause that the present Letters Patent Appeal has been preferred. On a reading of clause 15 as amended, it is clear

(1) (1887) I.L.R., 11 Mad., 26.

(2) (1871) 2 A.C. 168 at 184.

(3) [1891] A.C., 210.

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to us that no appeal would lie to the High Court from a judgment passed by one Judge of the High Court in Second Appeal after 1st February 1929. No further appeal to the High Court is available except where the Judge who passed the judgment declares that the case is a fit one for appeal.

When a right of appeal is given subject to any condition, it is clear that the said condition should be strictly complied with before the right of appeal could be taken advantage of. As stated in Maxwell's Interpretation of Statutes, 6th edition, page 648, Chapter XII, section 3—

"Where it was provided that no appeal should be entertained unless certain rules were complied with, the neglect of the statutory requisites would obviously be fatal."

Mr. Raghava Rao, the learned advocate for the appellant, argues, however, that what clause 15 prohibits is only an appeal from the judgment of one learned Judge on the merits of a Second Appeal and that the clause does not prohibit a right of appeal from the refusal of one learned Judge to declare that the case is a fit one for appeal; in the case of such refusal, he argues there is right of appeal, and if the Appellate Bench also agrees with the learned Judge on the question that the case is not a fit one for appeal, then only is there an end of the right of appeal. In other words, if we understood his contention correctly, he argues that while there is no right of appeal against the judgment passed on the merits in the Second Appeal, there is a right of appeal from the refusal in such a case to grant leave and the Appellate Bench should decide, as best as it could, whether the refusal to grant leave to appeal was right or not. He did not hide from us the fact that the Appellate Bench may have for

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this purpose to go into the merits of the case itself to such extent as it thought necessary.

He also argued that the question now is not in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the High Court, but that it is with reference to a judgment passed by the High Court itself, and that the restrictions referred to in clause 15 do not apply to a judgment of the High Court.

We are clear that the arguments of the learned Advocate for the appellant are untenable and that the present appeal is not maintainable.

The practice of providing a right of appeal subject to conditions, though comparatively new to India, has been prevailing for a long time in England; sometimes leave of the Judge who decided the case or of the Court is made the condition precedent for the entertainment of an appeal; in other cases, leave of either a Judge or the Court on the one hand or of the Court of Appeal on the other is made condition precedent. An instance of the former is furnished by section 45 of the Judicature Act of 1873, and an instance of the latter is furnished by the Judicature Act of 1894, section 1 (5). In India, we have got an instance furnished by section 75, clause 3 of the Provincial Insolvency Act, where a right of appeal to the High Court is given on obtaining leave of the District Court or of the High Court, in respect of certain orders mentioned therein.

English Courts had to consider the very question raised in this appeal before us, namely, whether there is any right of appeal from the refusal of a Judge to grant leave to appeal.

In *Kay v. Briggs*(1), the Court of Appeal held

(1) (1889) 23 Q.B.D., 348.

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"Where a Divisional Court has refused special leave to appeal under section 45 of the Judicature Act, 1873, from their decision given in an appeal from a County Court, the Court of Appeal has no jurisdiction to hear an appeal from such refusal."

The following passage occurs in the judgment of Lord ESHER, M.R. :—

"If this Court could overrule the discretion given by that section to Divisional Courts, the practical effect would be to allow an appeal here in every case, because the facts of each would be brought before us in order to enable us to decide whether or not we ought to overrule that discretion. I think that the real meaning of section 45 is to confine the power to give leave to appeal absolutely to the Divisional Courts. I am of opinion therefore that we have no jurisdiction to interfere with the exercise of their discretion".

Fry, L.J., observes as follows in the same case :—

"If an appeal from the refusal of the Divisional Court to grant leave to appeal could be brought to this Court, our order would not satisfy the only contingency upon which the section provides that the decision of the Divisional Court shall not be final, because special leave to appeal would be given not by the Divisional Court, but by this Court. The decision of the Divisional Court would cease to be final, although the contingency remained unsatisfied."

In *Lane v. Esdaile*(1), the House of Lords decided that

"No appeal lies to this House from a refusal of the Court of Appeal to grant special leave to appeal from a judgment of the High Court; . . . such a refusal is not an order or judgment of the Court of Appeal within the meaning of section 3 of the Appellate Jurisdiction Act, 1876."

At page 215, Lord HERSCHELL observed as follows :—

"If the contention of the appellants were well founded, I think it would follow that under this section (45 of the Judicature Act of 1873), there could be an appeal to the Court of Appeal from a refusal by a Divisional Court, and an appeal again from the Court of Appeal to this House; so that every County Court case might be brought up to this House upon the question whether an appeal should be allowed or not."

(1) [1891] A.C., 210.

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Lord FIELD remarked at page 216 :—

"It seems to me that if your Lordships were to say now, 'we will give leave', and the Court of Appeal must enforce that, it would be imposing upon them the duty of giving a leave, as their leave, which they in their own judgment think ought not to be given."

We may refer to one more case, *Ex parte Stevenson*(1), where

"A Judge at chambers having refused to grant leave under Schedule II, clause 26 (a) of the Housing of the Working Classes Act, 1890, the Divisional Court held that no appeal lay to them from his decision."

The Court of Appeal held that no appeal lay.

Lord ESHER, M.R., at page 611, laid down the law in the following words :—

"I am, on principle, and on consideration of the authorities that have been cited, prepared to lay down the proposition that, wherever power is given to a legal authority to grant or refuse leave to appeal, the decision of that authority is from the very nature of the thing, final and conclusive and without appeal, unless an appeal from it is expressly given . . . The very nature of the thing really concludes the question; for, if, where a legal authority has power to decide whether leave to appeal shall be given or refused, there can be an appeal from that decision, the result is an absurdity and the provision is made of no effect. If the contention for the claimant be correct, it would follow that the case might be taken from one Court to another till it reached the House of Lords on the question whether there should be leave to appeal. That cannot be so. For these reasons, I think the appeal must be dismissed."

FRY, L.J., gives some other reasons in support of the same position, at page 612 :

"Is the order granting or refusing leave to appeal, subject to appeal? In my opinion it is not. I do not come to that conclusion on the ground that the word 'order' is not properly applicable to it, but from the nature of the thing and the object of the legislature in imposing this fetter on appeals. The object clearly was to prevent frivolous and needless appeals. If, from

an order refusing leave to appeal, there may be an appeal, the result will be that in attempting to prevent needless and frivolous appeals, the legislature will have introduced a new series of appeals with regard to the leave to appeal . . . It appears to me that would be an absurd result in the case of a provision the object of which is to prevent frivolous and needless appeals. Therefore, from the very nature of the thing, the decision of the Court which has the power of giving leave to appeal is, in my opinion, final."

It is perhaps useful to quote one or two sentences from the judgment of LOPES, L.J., at page 612 :

"Where an appeal is given that is made subject to the leave of the Court or a Judge, or any other legal authority, I think that the granting or refusal of leave by such Court, or Judge, or other legal authority, is final and unappealable. The object of making appeals subject to leave is to prevent unnecessary and frivolous appeals. If an appeal were allowed from the granting or refusal of leave to appeal, the result would be that, instead of checking appeals, they might be multiplied to a most mischievous extent, for an appeal from the granting or refusal of leave might be carried from the Divisional Court to this Court and from this Court to the House of Lords. For these reasons, I think that the preliminary objection must prevail."

It was argued that the order passed by the learned Judge refusing leave to appeal in this case should be taken to be a judgment within the meaning of the Letters Patent and in support of that position certain decisions of this Court were cited to us, *Tuljaram Row v. Alagappa Chettiar*(1), *Sonachalam Pillai v. Kumaravelu Chettiar*(2), *Official Assignee of Madras v. Ramalingappa*(3), and *Maharaja of Pithapuram v. Rama Rao*(4). Having regard to the decision of the House of Lords in '1891, A.C., 210, already referred to, it is, to say the least, very doubtful whether such an order refusing leave could be said to be a "judgment" for the purpose now under consideration, within the

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(1) [1892] 1 Q.B., 609.

(1) (1910) I.L.R., 35 Mad., 1.
(3) (1925) I.L.R., 49 Mad., 539.

(2) (1923) I.L.R., 47 Mad., 316.
(4) (1927) I.L.R., 50 Mad., 770.

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meaning of clause 15 of the Letters Patent. But we are clear, reading clause 15 as a whole, that the intention of the legislature is that a judgment passed by a single Judge in a Second Appeal after 1st February 1929, is final and not appealable, and that an appeal could be entertained against the said judgment only if the judge who decided the Second Appeal granted leave to appeal. This, to our mind, is clear from the provisions of clause 15 of the Letters Patent. The learned Judge having in this case declined to grant leave to appeal, the judgment in Second Appeal is final. Whether the order refusing leave to appeal be a "judgment" or not, it is clear that no leave that might be granted by a Division Court would satisfy the requirements of the clause which provides that an appeal would lie only when the Judge who heard the Second Appeal grants leave to appeal. The English cases fully support the above position. A decision of this Court reported in *Madhava Aiyar v. Muthia Chettiar*(1), referred to by the learned Advocate for the respondent, supports this view, though we think that the grounds for holding that no appeal lies in the present case are probably stronger than the grounds mentioned in that case.

For the above reasons, we are clear that no appeal lies from the refusal of leave to appeal by a learned Judge from a judgment passed by him in a Second Appeal after 1st February 1929, under the amended clause 15 of the Letters Patent, and we dismiss the appeal with costs of the first respondent (plaintiff).

N.B.

(1) (1916) 5 L.W., 188.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice
Madhavan Nair.

AMIRTHA NADAN AND ANOTHER (PETITIONERS,
DEPENDANTS), APPELLANTS,

1929,
April 26.

v.

INNASI MUTHU NADAN (RESPONDENT, AUCTION-
PURCHASER AND PLAINTIFF), RESPONDENT.*

*Madras Village Courts Act (I of 1889), ss. 51 and 66—
Decree of Village Court—Execution by District Munsif on
original side, validity of.*

The combined effect of sections 51 and 66 of the Madras Village Courts Act (I of 1889), the latter of which enacts that a District Munsif to whom a Village Court's decree (which is only a decree of a Small Cause nature) is transmitted for execution can execute it "as if it were a decree passed by himself," is to enable him to execute it not merely on the Small Cause side as if it were a Small Cause decree passed by himself but also to execute it on the Original Side by attachment and sale of immovable property.

APPEAL against the Order of the Court of the Subordinate Judge of Tuticorin in A.S. No. 175 of 1927, preferred against the Order of the Court of the District Munsif of Koilpatti, dated the 7th May 1927 and made in E. A. No. 420 of 1927 in Civil Suit No. 53 of 1923 on the file of the Village Munsif's Court, Lingampatti, Koilpatti Taluk.

K. S. Ramabhadra Ayyar for appellant.

A. Narasimhachariar for respondent.

JUDGMENT.

WALLACE, J.—The facts necessary for the disposal of this C.M.S.A. are as follows:—The respondent obtained

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* Appeal Against Appellate Order No. 203 of 1927.

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a money decree in C.S. No. 53 of 1923 in the Village Court of Lingampatti against the appellants. That decree was sent for execution to the District Munsif's Court of Koilpatti and received there on 13th February 1925. E.P. No. 539 of 1925 presented in that Court was dismissed for failure of prosecution. A fresh E.P. No. 539 of 1926 was put in asking for attachment and sale of immovable property. That was treated by the District Munsif's Court as an execution petition on the Original Side and immovable property was attached and sold. The sale was confirmed on 22nd February 1927. The appellants applied under Order XXI, rule 90, C.P.C., to the District Munsif's Court to set aside the sale because of irregularities and the sale was set aside. The respondent appealed to the Sub-Court, Tuticorin, which set aside the Order of the District Munsif and maintained the sale. The appellants have come up here in Second Appeal.

Clearly no Second Appeal lies, and the appeal is not maintainable as such. The appellants asked us to treat this as a civil revision petition, raising a question of jurisdiction, viz., whether the District Munsif had any jurisdiction to execute the decree on the Original Side at all, and we have had this point, which is not free from difficulty, argued before us. It was taken for the first time in this Court.

The decision of the point rests on the interpretation of section 66 of the Village Courts Act I of 1889. The section as it stands empowers the District Munsif to whom a Village Court decree is transmitted for execution to execute it "as if it were a decree passed by himself." This phrase is ambiguous. It may mean, 'execute the decree as if this particular decree was a decree signed by him and not by the Village Court,' or, it may mean, 'execute the decree with all the powers of

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execution which a District Munsif possesses to execute any decree passed by him.' The first meaning would restrict the execution to the manner under which a small cause decree can be executed, since the decree on the face of it is a Small Cause decree. The second meaning would allow the decree to be executed also in the manner in which an Original Side decree is executed. The appellants contend in favour of the first meaning and the respondent in favour of the second. The appellants refer to the definition, given in section 5 of the Act, of the words "District Munsif." That definition originally was

"The District Munsif within the local limits of whose jurisdiction the village is situate."

That definition was amended by section 4 of Act II of 1920 by the addition of two provisos, the second of which is

"provided further that, if in any area the District Munsif does not exercise small cause jurisdiction and a separate Court of Small Causes has been established, the Judge of such a Court shall be deemed to be the District Munsif."

The appellants contend that that implies that "District Munsif" as used in the Act is restricted to the Small Cause side of the District Munsif's Court, since provision was thought necessary for the cases where in any district or locality there is no District Munsif exercising Small Cause powers. There is considerable force in that contention, coupled with the obvious fact that the decrees of Village Courts are always in substance Small Cause decrees.

But the respondent refers us to section 51 of the Village Courts Act, which runs thus:

"Subject to the provisions of sections 66 and 67, no judgment-debtor shall be arrested and no immovable property attached in execution of a decree of a Village Court."

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This clearly implies that the power of attaching immovable property in execution of a Village Court decree—a power which no Small Cause Court has—is somehow inherent in or conferred by section 66, and that can only be so if the phrase “may execute as if it were a decree passed by himself” covers execution not merely on the Small Causes Side but on the Original Side as well. The appellants’ argument, as their advocate realizes, implies that a Village Court decree can never be executed by attachment of immovable property, although section 51 says that it may, and his rejoinder to section 51 is merely to say that section 51 must be regarded as a dead letter, a view which he can hardly expect us to adopt unless the opposite view is wholly untenable. Section 51 to my mind clearly permits, in conformity with its tenor, attachment under section 66 of immovable property in execution of a Village Court decree, and an application for execution based on that section must be on the Original Side, because it asks for reliefs which can only be given on the Original Side. Section 66, therefore, must be read as empowering a District Munsif to execute a Village Court decree as if it were an Original Side decree passed by himself. The second proviso to the definition of “District Munsif” under section 5 is evidently intended to deal with cases where the decree-holder wishes to execute the Village Court decree as a Small Cause decree in a locality where the District Munsif does not possess Small Cause powers, and has therefore to present it in a Court which is the Small Cause Court for that locality.

I hold that section 66 gives the District Munsif jurisdiction to receive such execution petitions on the Original Side and to execute them on that side. Therefore, there is no lack of jurisdiction. This also decides

the second point of jurisdiction raised by the appellants, viz., that the lower Court has no jurisdiction to entertain an appeal against the Order of the District Munsif setting aside the sale.

I therefore dismiss the C.M.S.A. with costs.

MADHAVAN NAIR, J.—I have had the advantage of reading the judgment of my learned brother and I agree with it. The question for decision is whether a decree passed by a Village Munsif, i.e., obviously a decree of a Small Cause nature, transmitted for execution to the District Munsif, may be executed by the latter by attachment and sale of immovable property. The contention for the appellants is that the District Munsif has no such power and that he can execute the decree only in the same way as he would execute a Small Cause decree passed by himself. According to section 66 of the Village Courts Act, a District Munsif to whom a decree passed by a Village Courts has been transmitted for execution may execute it “as if it were a decree passed by himself.” The expression “as if it were a decree passed by himself” may mean (1) as if it were a Small Cause decree passed by himself or (2) as if it were a decree passed by him on the Original Side, since the District Munsif has jurisdiction to pass both kinds of decrees. It is this ambiguity in the meaning of this expression that causes difficulty in this case. The appellant’s argument that the District Munsif can execute the decree in question only in the same way as if it were a Small Cause decree passed by him is based on the definition of the term “District Munsif” in the Village Courts Act as amended by Madras Act II of 1920 (see section 5, proviso 2), which is as follows:—

“Provided further that, if in any area the District Munsif does not exercise small cause jurisdiction and a separate Court of Small Causes has been established, the Judge of such Court shall be deemed to be the District Munsif.”

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The argument has considerable force and is almost convincing; but it entirely overlooks section 51 of the Village Courts Act, which says:—

“Subject to the provisions of sections 66 and 67, no judgment-debtor shall be arrested and no immovable property attached in execution of a decree of a Village Court.”

This section clearly implies that under section 66 of the Village Courts Act, the District Munsif in executing a decree passed by a Village Court transmitted to him for execution can attach immovable property of the judgment-debtor. Having regard to this section, the second proviso of the definition of “District Munsif” contained in section 5 is, as pointed out by my learned brother, “evidently intended to deal with cases where the decree-holder wishes to execute the Village Court’s decree as a Small Cause decree in a locality where the District Munsif does not possess Small Cause powers and has therefore to present it in a Court which is the Small Cause Court for the locality.” If the Legislature intended by the amended definition of “District Munsif” to show that the District Munsif in executing the Village Court’s decree transmitted to him for execution should execute it only as if it were a decree passed by him on the Small Cause side, then it seems to me that it would have omitted section 51 of the Act altogether.

I agree in the order proposed by my learned brother.

N.B.

APPELLATE CIVIL.

Before Mr. Justice Waller and Mr. Justice
Anuntakrishna Ayyar.

MUTHU VIRA REDDI RAMI REDDI (DEFENDANT),
APPELLANT,

v.

C. SUBBARAMIAH AND OTHERS (PLAINTIFFS),
RESPONDENTS.*

Madras Estates Land Act (I of 1908), ss. 3 (5), 26 (3) and 46 (5)
—*Civil Procedure Code (Act V of 1908), O. XL, r. I (d)*
—*Receiver, appointed by Court in a suit for ejectment, for management of a village—Suit by Receiver against tenant for enforcement of patta—Appeal by Receiver, after suit in which he was appointed was dismissed, but before he was discharged—Competency of Receiver to appeal—Rates of rent agreed to by a former owner, whether binding on Receiver under sec. 26 (3) of the Act.*

A Receiver, appointed by a Court for the management of an estate and authorized to institute suits for the acceptance of pattas, is competent to file an appeal in a suit instituted by him for acceptance of pattas, after the suit in which he was appointed Receiver was finally dismissed by the Privy Council on appeal, but before he was discharged from his office as Receiver.

Under section 26 (3) of the Madras Estates Land Act, a Receiver was a person entitled to the rent, having regard to the definition of landholder in section 3 (5) of the Act and having regard to the fact that the Court granted permission to the Receiver under Order XL, rule I (d) of the Civil Procedure Code, to file suits for acceptance of pattas; consequently, the rates of rent fixed by one of several legal representatives of a former landholder were not binding on the Receiver, who represented the proprietor of the village.

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The decision in *Swaminatha Odayar v. Sundaram Aiyar*, (1920) I.L.R., 44 Mad., 274, turns on the special language of section 46, sub-section (5) of the Act, which refers to the landholder who is the owner of the estate.

SECOND APPEAL against the decree of the District Court of Chittoor in Appeal Suit No. 261 of 1922, preferred against the decree of the Special Deputy Collector of Chandragiri in Summary Suit No. 1800 of 1926.

The material facts appear from the Judgment.

L. A. Govindaraghava Ayyar (with *S. A. Seshadri*) for the appellant.

S. Ramaswami Ayyar for the first respondent.

T. Kumaraswamiah (with *S. Ramanujachari*) for second to fourth respondents.

JUDGMENT.

The defendant is the appellant in this second appeal. The receiver of Melappudi Village sued for enforcement of patta on the defendant, a ryot of the village. There was the usual dispute between the parties as to what the proper terms of the patta should be. The defendant's plea was that one Subbaraya Pillai, who, it was alleged, was owner of the suit village, agreed with the defendant to commute the rents into a fixed money rent permanently and once for all, and issued patta in fasli 1328 embodying the rates agreed upon. The Special Deputy Collector of Chandragiri Division, who tried the summary suit, upheld the contention of the defendant, and came to the conclusion that the proper rates of rent were the cash rates and that the commutation was *bona fide* and binding on the plaintiff. He accordingly directed that the patta should be amended by insertion of the cash rates as contended by the defendant.

On plaintiff's appeal, the learned District Judge of Chittoor disagreed with the findings of the first Court

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and held that the rates in the tendered pattas were the proper rates, and he directed the defendant to accept the tendered patta and execute a muchilika in exchange with similar terms.

The defendant has preferred the second appeal, and on his behalf, it was first contended that the appeal to the lower Appellate Court filed by the Receiver was incompetent. To appreciate the contention it is necessary to state that the Raja of Karvetnagar had filed a suit to recover possession of the suit village among others, that in the appeal preferred by him to the High Court against the decree of the Subordinate Judge of North Arcot dismissing the suit, the High Court appointed a Receiver in respect of the suit village, and that, on an appeal preferred by Subbaraya Pillai and others to the Privy Council against the decree of the High Court passed in favour of the Rajah of Karvetnagar, the Privy Council, on 21st May 1922, reversed the decision of the High Court and dismissed the Raja's suit on the ground that the suit was barred by the law of limitation.

The appeal to the lower Appellate Court was presented by the Receiver on 12th June 1922. The appellant contends that, as soon as the Privy Council dismissed the suit on 21st May 1922, the receivership came to an end, and that the Receiver had no *locus standi* to prefer the appeal on 12th June 1922. We are unable to accept the contention. The Receiver had not been discharged by the Court which appointed him, time for preferring the appeal would expire before the High Court, which appointed the Receiver, could be moved to pass orders on the re-opening of the High Court in July 1922, and in the circumstances we think that the Receiver's appeal could not be said to be incompetent as contended by the appellant. We accordingly overrule this objection.

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The next objection raised by the appellant was that Subbaraya Pillai was the owner of the suit village, and that the commutation arrangement made by him with the ryot was *bona fide* and binding on the plaintiff, and that the proper rates of rent are the cash rates agreed to between Subbaraya Pillai and the ryot. The respondent, in answer to this contention, relied on section 26, sub-section (3), of the Madras Estates Land Act, under which no rate of rent at which land may have been granted by a landholder shall be binding upon the person entitled to the rent after the lifetime of the landholder, if such rate is lower than the lawful rate payable by the ryot, before the date of the grant, upon the land. The finding of the lower Appellate Court is that the new rates fixed by Subbaraya Pillai are lower than the rates payable by the ryots before. As the present case is not sought to be brought within the exception contained in sub-section (I) of the section, it is clear, having regard to the admitted fact that Subbaraya Pillai died before the *falsi* in respect of which the present suit was brought, that the rates of rent agreed to by Subbaraya Pillai would not be binding upon the person entitled to the rent after the death of Subbaraya Pillai. It was, however, argued by the learned advocate on behalf of the appellant that it could not be said that the Receiver was "a person entitled to the rent" within the meaning of the sub-section. Having regard to the definition of "landholder" in section 3, clause (5) of the Estates Land Act, and having regard to the fact that the Court granted permission to the Receiver under Order XL, rule 1 (I) (d) of the Code of Civil Procedure to file these suits, and also dismissed the application subsequently filed by the ryots to cancel the order granting the said permission for the institution of these suits, we think that the plaintiff, the Receiver, comes within

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the provisions of sub-section 3 of section 26 of the Estates Land Act. The decision in *Swaminatha Odayar v. Sundaram Aiyar*(1), relied on by the appellant, is distinguishable, as it turned on the wording of section 46 of the Estates Land Act, sub-section (5) of which specifically provides that sums payable under that section for the acquisition of occupancy ryots shall be paid to the landholder who is the owner of the estate, and any application or proceeding under the section shall be made only to or against such landholder. The Court, accordingly, held that the application by a non-occupancy ryot under section 46 of the Act could be made only to the "owner" of the estate, and not to the Receiver in charge of the estate. The word "owner" does not occur in section 26, which is the section with which we are here concerned.

On the merits, the lower Appellate Court held that Subbaraya Pillai was not the sole proprietor of the village, that he was only one of the legal representatives of the deceased Saravana Pillai, and that the other legal representatives did not join Subbaraya Pillai in the act of commutation of rents relied on by the ryots. It also held that Subbaraya Pillai was in needy circumstances at the time, that the new rates fixed by him fell short of the old rates, and that

"there was no evidence as to the circumstances under which a lower set of rates was charged by Subbaraya Pillai,"

and further that

"the grounds on which the so-called commutation was made were not really tenable and that they were hardly real."

We think that the learned District Judge's findings, being findings of fact, should be accepted by us in Second Appeal.

(1) (1920) I.L.R., 44 Mad., 274.

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We hold that, under section 26 (3) of the Estates Land Act, the rates fixed by Subbaraya Pillai are not binding on the Receiver who represents the proprietor of the village.

We accordingly dismiss the second appeal with costs.

K.B.

APPELLATE CIVIL.

Before Mr. Justice Anantakrishna Ayyar.

VAITHILINGA AIYASAMI AIYAR (PLAINTIFF),
APPELLANT,

v.

THE DISTRICT BOARD OF TANJORE
(DEFENDANT), RESPONDENT.*

Court Fees Act (VII of 1870), sch. II, cl. 17 (b)—Suit by tenant in a Revenue Court under sec. 112 of the Madras Estates Land Act (I of 1908)—Appeal to District Court—Second Appeal by tenant—Court-fee payable on the memorandum of, whether ad valorem or fixed fee under sch. II, cl. 17 (b)—Government Notification No. 1245, dated 15th April 1926.

A suit instituted in a Revenue Court by a tenant under section 112 of the Madras Estates Land Act is not a case where it is possible to estimate at a money value the subject-matter in dispute; consequently it falls under article 17 (b) of the Second Schedule of the Court Fees Act; and a memorandum of second appeal against a decree passed on appeal from the decision of the Revenue Court in such a suit should bear a court-fee stamp of Rupees fifteen, under the Government Notification No. 1245, dated 15th April 1926.

SECOND APPEAL, sought to be preferred against the decree of the District Court of West Tanjore in A.S. No. 102 of

* Stamp Register No 586 of 1929.

1928, preferred against the decree of the Sub-Collector of Kumbakonam in Summary Suit No. 52 of 1926.

The material facts appear from the Judgment.

K. Bashyam Ayyangar for appellant.

Government Pleader (P. Venkataramana Rao) for the Crown.

JUDGMENT.

The question that has been referred to me is, what is the amount of court-fee payable in respect of a memorandum of Second Appeal preferred by a ryot in a suit filed by him under section 112 of the Estates Land Act. Under that section, whenever a landholder expresses his intention to avail himself of the powers given to him under the Estates Land Act to sell the holding, he is bound to give, through the Collector, a written notice to the ryot. That section also provides that, if he (the ryot) does not pay the amount or file a suit, within 30 days, before the Collector, contesting the right of sale, the said holding or any part thereof specified in the notice will be sold. In this particular case, the ryot contested the landholder's right to sell his holding under section 112. One of the reasons given by the ryot was that there was no proper notice. There were other objections also raised by the ryot. The suit was dismissed by both the lower Courts. The ryot, when he preferred the Second Appeal to this Court, affixed a Court-fee stamp of the value of Rs. 10 to the Second Appeal Memorandum. The office took objection to the amount of Court-fee that was payable, and as the Taxing Officer felt some doubt as to the exact amount of Court-fee payable in respect of the Memorandum of Second Appeal, the matter was referred to the learned Chief Justice, and under the orders of the Chief Justice, the matter has been placed before me for

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adjudication as regards the exact amount of Court-fee payable.

The learned advocate who appeared for the appellant, Mr. K. Bashyam Ayyangar, contended that the present case is covered by clause 17 (b), Schedule II of the Court Fees Act, VII of 1870, as amended by the Madras Act V of 1922—"plaint or memorandum of appeal where it is not possible to estimate at a money value the subject-matter in dispute and which is not otherwise provided for" Under the notification issued by the Government, No. 1245, dated the 15th of April 1926, the Government were pleased "to reduce to Rs. 15 the fees chargeable under Schedule II on a Memorandum of Second Appeal in a suit of the class mentioned in article 17-B and instituted in a Revenue Court." If this Article were to apply, then the proper Court-fee payable in respect of the Memorandum of Second Appeal before me would be Rs. 15. On the other hand, the learned Government Pleader contends that it could not be said that it is not possible to estimate at a money value the subject-matter in dispute in the present case, quoting *Bunwari Lal v. Daya Sunker Misser*(1), and he pointed out that, though, under section 5 of the Estates Land Act, in respect of rent due to the landholder, a charge on the holding is created by the Act, that charge is enforceable either by way of suit filed before the Revenue Court or by the landholder taking summary proceedings to realize the rent. If the landholder should elect to proceed, as he has done in the present case, by way of sale of the holding, then, under section 112, the ryot is given the right to file a suit before the Collector contesting the right of sale of the holding. The question then narrows

(1) (1909) 13 C.W.N., 815.

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itself to this: what exactly is the meaning to be attached to the expression "Where it is not possible to estimate at a money value the subject-matter in dispute" in clause 17 (b). In one sense, no doubt, it is possible to estimate, in however unsatisfactory a manner, the subject-matter in the present case, because, as pointed out by the learned Government Pleader, the question may have to be decided in this case as to what is the amount of rent payable by the ryot to the landholder in respect of which the landholder has taken proceedings by way of sale. But at the same time it is impossible to shut one's eyes to the fact that no question regarding the amount due might arise in some of the suits filed under this provision of law. For example, when the ryot disputes the landholder's right on the ground that no legal notice had been served upon him under section 112, the question that will have to be decided is whether such notice was served on the ryot or not. In such a case, the liability of the ryot to pay rent, whatever it is, remains, and it is not disputed that the landholder could, by means of a suit before the Revenue Court, recover the same by obtaining a decree and proceeding to execute the same, or he could start fresh proceedings after giving due notice under section 112, if he is otherwise in order. Learned Judges have had to consider the exact scope of the clause "it is not possible to estimate at a money value the subject-matter" occurring in the old article 17 (6), corresponding to the present article 17 (b), and difference of opinion necessarily arose having regard to the nature of the expression used in that clause. With reference to a plaint filed under section 77 of the Indian Registration Act, *BENSON and BASHYAM AYYANGAR, JJ.*, held in *Pydal Nambiar v. Kannan Nambiar*(1), that the

(1) (1901) 12 M.L.J., 87.

subject-matter was manifestly capable of valuation, and the learned Judges directed that *ad valorem* Court-fee should be levied. In the case reported in the very next page of the same volume, *Savarimuthu Pillai v. Alagiam Pillai* (1), DAVIES and MOORE, JJ., held that it was impossible to give any valuation in the ordinary sense, in respect of such suits; and they held that the case came under the old article 17 (6), corresponding to the present article 17 (b). It is not surprising, in this state of circumstances, that the matter came before a Full Bench of this High Court, and in *Ramu Aiyar v. Sankara Aiyar* (2), the Full Bench following the decision of GARTH, C.J., in *Jantoo v. Radha Canto Doss* (3), held that, in view of the wording of the Act, the proper view would be to say that it is not possible to estimate at a money value the subject-matter in such suits.

Another class of cases, which, in my view, would also throw some light on the meaning of the expression I have now to consider, arose in connexion with suits for partition by co-tenants alleging possession in the plaintiffs and other co-tenants, and making the other co-tenants, defendants. The question arose whether the subject-matter of such plaints could be estimated in money value and what was the proper Court-fee to be paid in respect of the same. After some difference of opinion, it was held in *Gill v. Varadaraghavayya* (4) by WALLIS, C.J., and SADASIVA AYYAR, J., that, in the ordinary acceptation of the expression, such claims were not capable of money valuation within the meaning of article 17. Finally, the Court had to consider the meaning of this expression with reference to an appeal preferred from a decision passed by a Forest Settlement Officer, from whose decision under section 10 of

(1) (1902) 12 M.L.J., 88.

(3) (1882) I.L.R., 8 Cal., 515.

(2) (1907) I.L.R., 31 Mad., 89.

(4) (1919) I.L.R., 43 Mad., 396.

the Forest Act an appeal lay to the District Judge. The question arose as to the exact Court-fee payable in respect of the memorandum of appeal presented in such circumstances to the District Judge. The High Court held that the Forest Officer could not be said to be a Civil Court or a Revenue Court within the first clause of article 17, and that the proper article to be applied is the old article 17 (6), which corresponds to the present article 17 (b). In the case before me, the plaintiffs-ryots raised (among others) the question that the notice under section 112 was not valid, since it was not signed by the defendant—the landholder—but by two others, who, it was alleged, had no right to issue such notice; objection was also raised that the notice was not properly served. These pleas, though overruled by the lower Courts, have been taken in the memorandum of second appeal also. Having regard to the decisions of this Court, where the Court had to consider the meaning that has to be attached to the expression in question, I think that I should, following the reasons adopted by this Court in the three classes of cases mentioned by me, decide that it is not possible to estimate at a money value the subject-matter in dispute in the present case. In a taxing statute, unless the matter is made reasonably clear, the parties are entitled to bring their cases under the less onerous provision of the Act, if there be no other objections to their so doing. *Sekharan v. Eacharan* (1), *Pathuma Umma v. Aliyammakkanath Moideen* (2). But in the present case I am not satisfied that the intention of the Act was to bring such a case as the one before me, within the *ad valorem* Court-fee provision. No question could arise with reference to plaints filed under section

(1) (1900) 20 M.L.J., 121.

(2) (1927) 110 I.C., 752.

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112, because (though in the present case I understand that a court-fee of Re. 1 has been paid on the plaint) under clause 35 of the Notification issued by the Government, the Government have been pleased to remit the fees chargeable in respect of plaints in suits instituted before the Collector under section 112, among others, of the Estates Land Act. The question could arise only with reference to the court-fee payable in respect of appeals and second appeals; for the reasons I have given above, I have come to the conclusion that the present case before me is not a case where it is possible to estimate at a money value the subject-matter in dispute, and that being so, the present case is covered by article 17 (b) of Schedule II to the Act.

According to the recent notification referred to by me, namely, Notification No. 1245, dated the 15th of April 1926, the amount of court-fee payable on Second Appeals preferred from decisions of Revenue Courts is Rs. 15. The appellant has paid a fee of Rs. 10 and he has accordingly to pay the difference of Rs. 5. I give three weeks' time for such payment.

K.R.

ORIGINAL CIVIL.

Before Mr. Justice Kumaraswami Sastri.

K. G. ETHIRAJULU CHETTI, PLAINTIFF,

v.

A. P. RAJAGOPALACHARIYAR AND OTHERS, DEFENDANTS.*

Civil Procedure Code (V of 1908), O. XL, r. 1—Simple mortgage—Jurisdiction of Court to appoint receiver to take possession of mortgaged property—Impossibility of laying down hard and fast rule.

Though, ordinarily, a Court will not deprive the mortgagor of the possession of his property which is subject to a simple mortgage, yet where on account of circumstances created either by the conduct of the mortgagor or connected with the state of the property, the mortgagee is likely to sustain a loss not foreseen by him at the time he took a simple mortgage, a Court will have jurisdiction to appoint a receiver to take possession of the property for the benefit of the mortgagee.

It is impossible to lay down a hard and fast rule enumerating the circumstances under which alone a Court will appoint a receiver in respect of property subject to a simple mortgage.

APPLICATION by the plaintiff under Order XL, rule 1, Code of Civil Procedure, for the appointment of a receiver to take possession of certain properties for the purpose of receiving the rents and paying them over to the plaintiff.

A. Suryanarayanayya for plaintiff.

K. S. Krishnaswami Ayyangar (T. N. C. Srinivasavaradachari with him) for defendants.

JUDGMENT.

This is an application for the appointment of a receiver by the plaintiff, who has filed the suit on a

* Civil Suit No. 473 of 1928.

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registered deed of mortgage, dated the 15th of February 1926, for Rs. 23,238-3-5 repayable with interest at 12 per cent per annum, alleged to have been created by the first defendant and his deceased brother, for the recovery of Rs. 31,190-8-3 with costs and further interest.

The affidavit in support of the application states that the properties yield a rent of Rs. 145 a month while the monthly interest accruing due is Rs. 300, that the defendants are not paying the interest which they are bound to pay under the deed of mortgage, but are enjoying the rents of the properties themselves, that the value of the properties has considerably diminished and it is not possible to recover the amount by a sale of the properties, that a very large sum is due for interest alone, and that it is necessary that a receiver should be appointed for the purpose of receiving the rents and paying them over to the plaintiff so that he may not incur further loss.

The fourth and fifth defendants are the minor sons of the deceased executant of the mortgage, and they oppose the application. They deny that the mortgage is binding on them and that the value of the properties has diminished or that there is any fear of the plaintiff not being able to recover the amount due. They state that the plaintiff cannot have in law a receiver appointed, as he is only a simple mortgagee, and that this application is virtually one for getting possession which he is not entitled to under the mortgage.

On the merits, I am of opinion that this is a fit case for the appointment of a receiver. But the question, however, arises, whether the Court has power to appoint a receiver at the instance of a simple mortgagee or other person who is not entitled to possession of the properties.

Order XL, rule 1, of the Civil Procedure Code, enacts that, where it appears to the Court to be just and convenient, the Court may by order

(a) appoint a receiver of any property, whether before or after decree;

(b) remove any person from the possession or custody of the property;

(c) commit the same to the possession, custody or management of the receiver and

(d) confer upon the receiver the powers mentioned therein.

Sub-rule 2 provides that

"Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove."

I may point out that under the previous Code of 1882 the Court had power to appoint a receiver for the realization, preservation or better custody or management of any property, movable or immovable, the subject of a suit, or under attachment. The proviso to the section says that

"Nothing in the section authorizes the Court to remove from the possession or custody of property under attachment any person whom the parties to the suit, or some or one of them, have or has not a present right so to remove."

There can be little doubt that there is a material variation between the old and the new Code.

The argument for the defendants is that a simple mortgagee has only the right to bring the property to sale and that during the continuance of the mortgage he has no right to possession; and he cannot indirectly by asking for a receiver get possession. It is also argued that the plaintiff who has no present right to possession cannot ask that the defendants who are entitled to possession should be removed.

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The authorities on this question are conflicting.

In *Chockalingam Pillai v. Pichappa Chettiar*(1), it was held by Sir MURRAY COUTES TROTTER, C.J., and WALLACE, J., that the Court could not appoint a receiver in a suit for the specific performance of an agreement to sell certain properties and to give a simple mortgage of certain other properties. The learned Judges observe:

"Mr. T. R. Ramachandra Ayyar for the appellant contends that at any rate so far as the B schedule properties are concerned, it is not open to the lower Court to appoint a receiver, the point being that the lower Court cannot by way of receivership do what it would not be entitled to do even by way of decree. At the highest, the plaintiff is entitled if he succeeds only to a simple mortgage on these properties, and having obtained this simple mortgage he could not immediately sue for possession. He is not entitled on the simple mortgage to possession. The most he could do is to enforce a sale on foot of the mortgage. We think that this argument is sound and that the lower Court was not justified in appointing a receiver so far as the B schedule properties are concerned."

In *Gobind Ram v. Jwala Pershad*(2), it was held by Sir RICHARD, C.J., and BANNERJI, J., that in the case of a simple mortgage, the mortgagor was entitled to remain in possession till the property was sold, and the fact that the security was not sufficient and the property was deteriorating was no ground for the appointment of a receiver.

A contrary view has been taken in several cases. In *Arunachellam Chettiar v. Manicka Vachaka Desikar*(3), it was held that a receiver could be appointed after the decree on a mortgage where the decree-holder had been restrained by injunction from selling the mortgaged property and the security was insufficient for the realization of the decree amount by sale. Reference was made to *Ghanshyam Misser v. Gobinda Moni Dasi*(4).

(1) (1925) 22 L.W., 579.
(3) (1909) 6 M.L.T., 288.

(2) (1917) 43 I.O., 532.
(4) (1902) 7 C.W.N., 452.

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In *Parasram v. Puran Mal Ditta Mal*(1), it was held that there was nothing in Order XL, rule 1, of the Civil Procedure Code which excludes mortgage suits from its operation and a receiver can be appointed in a mortgage suit, that the Code gave the widest power to the Court to appoint a receiver when it appeared to the Court to be just and convenient, and that the right to recover the rents and profits was not necessary to enable the plaintiff to obtain a receiver. It was also held that a receiver could be appointed if the security was insufficient for the realization of the decree amount by the sale of the mortgaged property. In *Musst. Khubsurat Kuer v. Saroda Charan Guha*(2), MOOREJEE and CARNDUFF, JJ., in dealing with the contention that the appointment of a receiver in a mortgage suit is premature, because the mortgagee is not under the mortgage decree entitled to appropriate the profits of the properties given as security, observe,

"In so far as the second contention is concerned, it has been urged that the object of the appointment of a receiver in a mortgage suit is to secure the application of the profits of the mortgaged properties for the benefit of the mortgagee. If the decree is for sale, and if it is established that the security is not sufficient to satisfy the judgment debt, a receiver will be appointed almost as a matter of course, specially if there has been default in the payment of interest."

The learned Judges refer to *Weatherall v. Eastern Mortgage Agency Company*(3), *Hopkins v. Worcester and Birmingham Canal Proprietors*(4), *Herbert v. Greene*(5), and *Hackett v. Snow*(6).

In *Manindra Chandra Ray v. Suniti Bala Debi*(7), it was held that the Court could appoint a receiver at the instance of a mortgagee where the action was either for

(1) (1923) 85 I.C., 737.
(3) (1911) 13 C.L.J., 495.
(5) (1854) 3 Ir. Ch., 272.

(2) (1911) 16 C.W.N., 126.
(4) (1868) L.R., 6 Eq., 437.
(6) (1847) 10 Ir. Eq., 220.
(7) (1925) 95 I.C., 632.

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foreclosure or sale, if the security was insufficient or if the interest was in arrears.

In *Ram Kumar Lal v. Chartered Bank of India, Australia and China*(1), it was held that in a suit on a mortgage a receiver could be appointed.

In *Gobind Rani v. Brinda Rani*(2), it was held that where a mortgagee applied for the appointment of a receiver, the proper question for consideration was what steps should be taken to protect the mortgagee.

In *Rameshwar Singh v. Chuni Lal Saha*(3), the learned Judges MOOKERJEE and PANTON, JJ., observe,

"There is no foundation for the contention that a mortgagee who is not entitled to possession of the mortgaged properties is not entitled to ask for the appointment of a receiver. Whether the mortgagee is or is not entitled to possession, he may invite the Court to appoint a receiver, if the demands of justice require that the mortgagor should be deprived of possession. The principle applicable to cases of this character was lucidly stated in the case of *Herbert v. Greene*(4)."

In *Jaikissondas Gangadas v. Zonabai and Kazi Mahomed Miya Dada Miya*(5), it was held that the Court had power to appoint a receiver in the case of a suit by a mortgagee for foreclosure or sale.

In *Venkata Raja Gopala Surya Row Bahadur v. Basivi Reddi*(6), OLDFIELD, J., was of opinion that the Court had power to appoint a receiver of the mortgaged properties where a decree had been passed for sale on a simple mortgage, even though the personal remedy was barred by limitation. The learned Judge refers to and distinguishes some of the cases *contra*.

SADASIVA AYYAR, J., in dealing with the contention of the appellant that unless the mortgagee was entitled to immediate possession of the corpus of the mortgaged

(1) (1924) 87 I.C., 375.

(3) (1910) I.L.R., 47 Cal., 418.

(5) (1890) I.L.R., 14 Bom., 431.

(2) (1917) 23 C.L.J., 440.

(4) (1854) 3 Ir. Ch. Rep., 273, 274.

(6) (1914) 29 M.L.J., 467.

property or at least to the immediate receipt of the rents and profits, the Court has no power to appoint a receiver, considers that the existence of the right to recover the rents and profits is not an indispensable pre-requisite and points out the distinction between Order XL, rule 1, which follows the Judicature Act of 1873, section 25, and section 503 of the old Code which gave the Court power to appoint a receiver only when it was "necessary for the realization, etc., of any property, "the subject of a suit or attachment." The learned Judge, however, was of opinion that, when the personal remedy was barred, a receiver ought not to be appointed. He states that if the corpus is likely to deteriorate by acts of waste committed by the judgment-debtor, a receiver could be appointed.

So far as the law in England as regards receivers is concerned, equitable mortgagees have obtained orders for the appointment of receivers.

In *Crompton and Co., Limited, In re Player v. Crompton & Co., Limited*(1), WARRINGTON, J., observes at page 967

"I think the right to the appointment of a receiver is one of the ordinary rights which accrue to a mortgagee, and specially to an equitable mortgagee, who has no means of taking possession and whose security has become realizable as one of the steps in such realization."

In *Hopkins v. Worcester and Birmingham Canal Proprietors*(2), Sir G. M. GIFFARD, V.-C., was of opinion that a creditor whose principal had become due and who had given notice of demand was entitled to a receiver *ex debito justitiæ*.

I may also refer to the decisions of SRINIVASA AYYANGAR, J., in C.S. Nos. 399 and 881 of 1925, where the learned Judge was of opinion that the Court had power

(1) [1914] 1 Ch., 954.

(2) (1868) L.R. 6 Eq., 487.

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to appoint a receiver in the case of a simple mortgage, although it can only make such an appointment where special circumstances are shown.

In U.S. No. 227 of 1928, I was of the opinion that a receiver could not be appointed, following the decision in *Chockalingam Pillai v. Pichappa Chettiar*(1). In that suit, the authorities to the contrary, referred to by me above, were not cited, and there was practically no argument.

Having regard to the authorities, I think the proposition stated by me that no receiver can be appointed in a simple mortgage suit at the instance of a simple mortgagee is too wide. I think the result of the authorities is, that while Courts would not ordinarily deprive the mortgagor of his possession in cases where the mortgage is a simple mortgage, there may be circumstances created either by the conduct of the mortgagor or connected with the state of property, which may render it necessary in the interests of justice and for the protection of the mortgagee that a receiver should be appointed. It is impossible to lay down a hard-and-fast rule laying down under what circumstances the Court will appoint a receiver. But ordinarily there should be some loss or detriment not foreseen by the mortgagee at the time when he chose to take a simple mortgage, and allow possession to remain with the mortgagor, which loss could not be compensated except by the appointment of a receiver.

I think having regard to the facts of the present case—the default of the mortgagors in paying the interest and the fall in value of the mortgaged properties—a receiver should be appointed. Costs, costs in the cause.

B.C.S.

(1) (1925) 22 L.W., 579.

APPELLATE CRIMINAL.

*Before Mr. Justice Waller and Mr. Justice Krishnan
Pandalai.*

KASINATHA PILLAI (COMPLAINANT), PETITIONER,

v.

SHANMUGAM PILLAI AND ANOTHER (ACCUSED),
RESPONDENTS.*1929,
April 18.

Code of Criminal Procedure (V of 1898), sec. 253—"Groundless"
—*Meaning of—Sec. 253 (2)—Magistrate taking action
under—If bound to examine all witnesses tendered or avail-
able before taking action.*

The term "groundless" in section 253 of the Code of Criminal Procedure means that the evidence is such that no conviction could be rested on it, and not that the evidence discloses no offence whatever.

A magistrate is not bound to examine all the witnesses that may be tendered or available, before taking action under section 253 (2) of the Code.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate of Tinnevely, dated 6th March 1928 in L. Dis. No. 1552/28-C (C.O. No. 279 of 1927) on the file of the Second-class Magistrate of Tuticorin.

K. S. Jayarama Ayyar for petitioner.

V. L. Ethiraj and *S. Rajamanickam* for respondents.

Public Prosecutor (L. H. Bewes) for the Crown.

JUDGMENT.

WALLER, J.—No doubt, the language used in the WALLER, J. three parts of section 253, Criminal Procedure Code, is different, but it is, I think, impossible to lay down any

* Criminal Revision Case No. 562 of 1928.

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general principle or to attempt to define what precisely is meant by the word "groundless." Probably, as good a definition as any is that the evidence must be such that no conviction could be rested on it. It obviously does not mean that the evidence discloses no offence whatever.

In this particular case, I see no reason to dissent from the view taken by the Courts below. It is most unlikely that any Court would have convicted after hearing the evidence of the only witness examined. The petition is dismissed.

KRISHNAN
PANDALAI, J.

KRISHNAN PANDALAI, J.—This is a petition to revise the order of discharge passed by the Second-class Magistrate of Tuticorin under section 253 (2) of the Criminal Procedure Code. The complaint was brought by the father-in-law of one Sankaragomathi Chettiar, who had recently died, against the cousins of the deceased, and alleged that the daughter of the complainant (widow of the deceased) entrusted her own and her children's jewels worth about Rs. 4,000 and her husband's account books to the accused soon after the fifteenth day ceremony, for the purpose of selling the jewels and realizing the outstandings and investing the proceeds for the benefit of the widow and her children, and that, when the accused were later questioned, they denied the receipt of the jewels and accounts. The complainant stated that he presented the complaint as per his daughter's instructions and charged that the accused committed an offence under section 403 of the Indian Penal Code. The Magistrate having summoned the accused, the complainant was examined and cross-examined at length on 21st December 1927 and 11th January 1928. The complainant had been previously informed that his daughter, a resident of Tuticorin and the real complainant, should be brought to Court

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to be examined on the 11th January. On that day she was absent. The complainant asked for a commission to examine her which was refused, the Magistrate remarking that the application was not *bona fide*. Then the complainant asked for an adjournment which was also refused. The defence, as appeared from the cross-examination of the complainant, was that the deceased Sankaragomathi Chettiar had left a will under which first accused was executor, and that he was in possession of the estate as such and not under any entrustment by the widow, and that the complainant, an impecunious person, was using his daughter or her name as a tool to coerce the accused to part with the estate. The Magistrate came to the conclusion that the story told by the complainant was highly improbable, that, at the best, the dispute appeared to be one of a civil nature, to settle which the complaint was brought as a criminal case, that examination of further witnesses will not in these circumstances be of any use, and therefore he discharged the accused. The District Magistrate to whom the complainant preferred a revision petition upheld the Sub-Magistrate's order and dismissed the petition, being of opinion that it was frivolous. The learned Advocate for the petitioner has urged before us that the Sub-Magistrate had no power to discharge under section 253 (2) before examining all the complainant's witnesses, and that he could not consider the charge to be groundless before he had heard all the evidence. I wish to lay down no general rule as to whether a Magistrate should in practice examine all witnesses available or how many of them, before acting under section 253(2). That depends entirely on the circumstances of each case, for which no general rule can be laid down. But as a question of legal competence, there is no warrant for saying that Magistrates

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are bound to examine all witnesses that may be offered or available, before taking action under that sub-section. The words of sub-sections (1) and (2) of section 253 are as plain as any words can be on that point. The first sub-section states that if on taking all the evidence referred to in section 252 and if necessary examining the accused, no case is made out against the accused, the Magistrate shall discharge him. The second sub-section says that nothing in that section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case, that is before all the evidence referred to in section 252 has been taken, if for reasons to be recorded the Magistrate considers the charge to be groundless. Authority for supporting such a plain statutory provision would be needless. But authority there is. See *Narasamma v. Venkatarayudu*(1), *Kunj Behari Lal v. Emperor*(2). The amount of evidence which would enable a Magistrate to say that a particular charge was groundless is so entirely dependent on circumstances that no general rule or direction except that he is required to arrive at his conclusion judicially and not capriciously is likely to be of any use. If, acting judicially, a Magistrate has come to the conclusion, on grounds to be recorded, that the charge must fail, either because the allegations are false, or because they disclose a dispute of a civil nature which is distorted into a criminal case, or for any other reason, then there is nothing to prevent him from discharging the accused before all the complainant's witnesses have been examined. It follows that the action taken by the Sub-Magistrate was fully within his competence. In revision, we are not accustomed to enquire into the merits to see whether the conclusions of

(1) (1911) 1 M.W.N., 149.

(2) (1926) 27 Cr.L.J., 541.

the lower Court are correct on the facts. But I see nothing in the facts which would enable me to say that the order of the Magistrate was not a proper and judicial order. The petition is dismissed.

B.C.S.

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APPELLATE CRIMINAL.

Before Mr. Justice Odgers.

C. SACHIDANANDAM, AGENT, ADDISON AND
COMPANY, LIMITED, MADRAS
(COMPLAINANT), PETITIONER,

1929,
May, 2.

v.

V. SOWMYA GOPALA AYYANGAR AND ANOTHER,
(ACCUSED NOS. 2 AND 3), RESPONDENTS.*

*Criminal Procedure Code (V of 1898)—Jurisdiction—If governs
sec. 239—Abetment of offence outside territorial jurisdic-
tion of Court—If Court can try abetment with principal
offence under sec. 239.*

Jurisdiction being the foundation of the charge in a criminal case, it is to be imported or understood as being present in all the procedure set out in the Code of Criminal Procedure, and therefore clearly governs section 239 of the Code.

Unless the abetment of an offence took place within its territorial jurisdiction, a Court cannot avail itself of the provisions of section 239 to try such abetment along with the principal offence. *Bissessar v. Emperor*, (1924) 83 I.C., 911, referred to.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Presidency Magistrate, Egmore, Madras, in Calendar Case No. 7233 of 1927.

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V. L. Ethiraj for petitioner.

O. Narasimha Chari for second respondent.

P. Govinda Menon for Crown Prosecutor for the Crown.

JUDGMENT.

This case raises an interesting point.

This is a petition to revise the order of the learned Third Presidency Magistrate, dated the 3rd November 1927. There were four accused. The first accused was charged with criminal breach of trust by obtaining from Messrs. Addison & Co. two motor buses on a hire-purchase agreement, Exhibit B. This man obtained the buses from Addison & Co. and signed the hire-purchase agreement. The second accused also came to Madras with him and signed Exhibit B and also the lien agreement. Exhibit B is dated 23rd September 1924. On the 10th August, by Exhibit O, the buses were transferred to the second accused at Madura, the hire-purchase agreement having terminated on the 27th April 1925 under its conditions, as the first accused did not pay the instalments due. On the 25th December 1925, by Exhibit Q, the second accused transferred them to the third accused at Madura. The learned Magistrate convicted the first accused, being convinced that he made a dishonest disposal of the buses, and acquitted the second and third accused as he had no jurisdiction to try them. On the 26th February, I made a reference to the learned Magistrate asking for his reasons why he held that there was no jurisdiction to try these two persons. He has returned an answer which helps neither side, because he says the offence was committed in Cochin, which is obviously wrong. Now the question I have to deal with is this. The second accused is charged with abetment of criminal breach of trust. The

third accused is charged with receiving under section 411, I.P.C. The question is, put very shortly, whether the Magistrate has jurisdiction to try the abetment and the receiving which clearly took place outside his territorial jurisdiction here in Madras. The section which allows the Magistrate to try the first accused is section 181 (2) of the Criminal Procedure Code, because the property which is the subject of the criminal breach of trust was clearly received by him within the territorial jurisdiction of the Magistrate here in Madras. There is no abetment in Madras, nor is there any receiving in Madras. Mr. V. L. Ethiraj, the learned Counsel for the petitioner, relies on section 239, sub-sections (b), (c) and (f), which allow certain persons to be tried together, and the whole question really comes to this, is section 239 which occurs in chapter XIX headed "Of the charge" controlled by or independent of the chapter as to "jurisdiction"—chapter XV—which begins with section 177, which provides that "Every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed." Mr. Ethiraj points out that there are no controlling words in the section that it is subject to provisions as to jurisdiction. On the other hand, Mr. Narasimhachari points out that jurisdiction must always be the foundation of a charge and must be imported into section 239. The trouble is that, except one case, there is no authority to guide one in this matter, and it is an extraordinary thing that both the learned gentlemen who appear say that they have searched for authority and found practically none, and if this were not the end of the sittings, I should be tempted to refer this matter to a Bench. But both sides have asked me to give my own decision, and I will do so to the best of my ability. The authority against

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APPELLATE CRIMINAL:

Before Mr. Justice Curgenvven.

DAMODARAM (FIRST ACCUSED), PETITIONER.*

1929,
July 31.

Code of Criminal Procedure (V of 1898), sec. 347—Commitment under—If can be made only after compliance with provisions of Chap. XVIII of the Code.

A commitment under section 347 of the Code of Criminal Procedure can be made only after compliance with the provisions of chapter XVIII of the Code. *In re Chinnavan*, (1914) 23 I.C., 734, followed.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Fourth Presidency Magistrate, Georgetown, Madras, in Calendar Cases Nos. 20776, 20777 and 20778 of 1928 respectively.

V. L. Ethiraj and N. Somasundaram for petitioner.

V. Rajagopalachari for Crown Prosecutor for the Crown.

JUDGMENT.

These are three applications presented by the first accused to revise the orders of the Fourth Presidency Magistrate, Georgetown, passed in the following circumstances. Complaints were laid against the petitioner in each of three cases under sections 406 and 420, Indian Penal Code. The predecessor of the present learned Magistrate heard the prosecution evidence and was then transferred. The present Magistrate on taking up the case formed the conclusion that it was one which should be tried by a Court of Session, inasmuch as it involved the offences also of forgery and

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Mr. Ethiraj's view is *Bissessar v. Emperor*(1), a decision of a Bench of the Calcutta High Court. There, I think, they clearly hold, though Mr. Ethiraj says that it was not necessary for the decision, that jurisdiction governs section 239; so that unless the matter comes within the territorial jurisdiction of the Magistrate in the first instance, he cannot avail himself of section 239 to try abetment, for instance, with the principal offence. I am doubtful about the matter, I must say; but giving the best consideration I can to it, and with this expression of opinion of the Calcutta High Court, I am inclined to think that jurisdiction, being the foundation of the charge, is to be imported or understood as present in all the subsequent procedure set out in the Code; and if that is so, it clearly must govern section 239. I am therefore of opinion that the learned Magistrate was right in acquitting the second and third accused, though not for the reasons he gives, and the Criminal Revision Case must be dismissed. Of course, nothing that I have said will operate to prevent the second and third accused being proceeded against within the proper jurisdiction.

B.C.S.

(1) (1924) 83 I.C., 911.

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using as genuine a forged document, rendered punishable by sections 467 and 471, Indian Penal Code, respectively. That being so, the question arose as to the procedure to be thereupon adopted. Applications were made by the petitioner for a *de novo* trial, and in the orders against which these revision petitions are preferred, the learned Presidency Magistrate has declined to grant them for certain reasons which he gives.

The petitions raise a question as to the construction of section 347, Criminal Procedure Code, which empowers a Magistrate at any stage of an inquiry or trial before its completion to "commit the case under the provisions hereinbefore contained." It is scarcely disputable that the phrase "under the provisions hereinbefore contained" must relate to those provisions in chapter XVIII of the Code which define the procedure to be adopted in inquiries into cases triable by the Court of Session. Nor can it be disputed that in all ordinary circumstances the procedure which a Presidency Magistrate follows in the trial of a criminal case is not identical with that laid down by chapter XVIII for the conduct of a preliminary inquiry. To begin with, the question would arise whether the method of recording evidence required by section 362 (1) in a case tried by a Presidency Magistrate in which an appeal lies was adopted, or whether, availing himself of the provisions of sub-section (4) of that section, the Magistrate deemed himself absolved from taking down the evidence at length. Mr. Ethiraj for the petitioner is, however, prepared to concede here that the evidence may have been taken down *verbatim* under the prior provision, so that he does not press this possible point of difference. There can be no question however that after the evidence was so recorded the provisions of section 360 were not complied with, namely, it was

not read over to each witness in the presence of the accused as required by that section, read with sections 207 and 208 of chapter XVIII. DAMODARAM,

The general question of the construction to be placed on section 347, Criminal Procedure Code, received consideration in a Full Bench case of the Lower Burma Chief Court composed of five Judges, *Emperor v. Channing Arnold*(1). The case came up to that Court after commitment and not, as here, before a committal order had been made. Nevertheless it was held by four of the learned Judges that a commitment made otherwise than under the provisions of section 347 as I have construed them above, that is to say, as requiring compliance with the terms of chapter XVIII, Criminal Procedure Code, was illegal and should be quashed. As observed by the learned Chief Judge,

"Perhaps the strongest reason for holding that section 347 in no way overrides and in no way dispenses with the obligation of following chapter XVIII is that, in that chapter, the Legislature has laid down provisions for procedure before commitment some of which were obviously intended and rightly intended for the benefit of accused persons."

I may add that in the present cases the omission to read over the deposition to the witnesses is not a mere formal omission but may deprive the accused of the valuable right to contradict the witnesses during the sessions trial by reference to their prior statements. This Burma decision was quoted with approval in the judgment of a Bench of this Court, *In re Chinnavan*(2), upon a revision petition praying to quash the committal order in a case where a Stationary Sub-Magistrate, who had originally proceeded on a charge under section 354, Indian Penal Code, of indecent assault, subsequently and before delivering judgment,

(1) (1912) 17 I.C., 813.

(2) (1914) 23 I.C., 734.

DAMODARAM, came to the conclusion that the case should be committed to the sessions under sections 376 and 511. The learned Judges say,

"We agree entirely with the decision of the Full Bench of the Burma Chief Court that it was not intended by section 347 to enable the Magistrate to deprive the accused of any of the rights conferred on him by chapter XVIII";

and although in the case before them the committal order had already been passed and, finding no prejudice caused to the accused, they refused to quash it, it appears to me that, irrespective of my own view that this construction is clearly right, I should follow this authority in the absence of any to the contrary.

The learned Crown Prosecutor has urged that here also, as in *In re Chinnavan*(1), the petitioner must allege prejudice in order that the orders of the learned Presidency Magistrate may be set aside. I do not agree that, when these cases have not reached the stage of committal and nothing in the main proceedings has to be undone before the procedure which is prescribed by law can be followed, any question of the prejudice occasioned to the accused arises. He certainly has a right to claim that the provisions relating to inquiries before commitment shall be observed irrespective of any such consideration. My conclusion accordingly is that the orders under revision are unsustainable in law, and I set them aside and direct the lower Court to reopen the inquiry *de novo* in the light of the observations made above and proceed with it.

B.C.S.

(1) (1914) 23 I.C., 734.

APPELLATE CRIMINAL.

Before Mr. Justice Curganven.

D. VIRASWAMI NAIDU (FIRST ACCUSED), PETITIONER.*

1929,
August 1.

Indian Arms Act (IX of 1878)—Rules under—Whether consignor or consignee to obtain licence for transporting arms, etc.

Under the Indian Arms Act (XI of 1878) and the rules made thereunder, it is for the consignor and not for the consignee to apply for and obtain a licence for the purpose of transporting arms, ammunition or military stores.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the Bellary Division in Criminal Appeal No. 42 of 1928 preferred against the judgment of the Court of the Joint Magistrate of Hospet in C.C. No. 61 of 1927.

V. K. John for petitioner.

K. N. Ganpati for Public Prosecutor for the Crown.

JUDGMENT.

The petitioner has been convicted under section 19(d) of the Indian Arms Act of transporting a weapon in contravention of a regulation or prohibition issued under section 10 of that Act, and the conviction has been upheld on appeal. The learned Sessions Judge has set forth the relevant facts in paragraph 2 of his judgment and they have not been disputed before me. They show that the petitioner ordered a gun from a dealer in Bombay, ostensibly for an intending purchaser, but in fact upon his own account, and, as the learned Sessions Judge says, the only question is whether his act amounts to the offence of transporting without a licence.

* Criminal Revision Case No. 266 of 1929.

VIRASWAMI
NAIDU,
In re.

Rule 24 of the Indian Arms Rules provides for the grant of a licence for the transport of arms, ammunition or military stores, and the form in which it is granted is Form VII. I think it is clear, both from the language of that rule and the contents of the form, that, where arms are to be sent from one place to another, it is for the consignor and not for the consignee to apply for and obtain the licence. Sub-rule 1 (a) of rule 24, for instance, requires that, where arms are consigned from a Presidency Town, the licence must be granted by the Commissioner of Police of that town; and it is evidently the consignor's name and place of business that must appear in columns 1 and 2 of the licence. Further, it is laid upon him to mark legibly upon each packet an account of its contents (condition 3), and condition 4 states that the article should be delivered only to a person lawfully entitled to receive it. From these circumstances, I draw the conclusion that the transporting was done by the dealer in Bombay and was duly covered by licence. Rule 22, which relates also to the transport of arms, authorizes a licensed dealer to transport any reasonable quantities to any person licensed to possess such arms. It appears to me that the petitioner, to comply with this provision, should have held a licence to possess, and if he was found to be without one, he was liable to prosecution, on receipt of the weapon, for possessing it without a licence, but I do not think that the conviction under section 19 (d) can be sustained. I accordingly allow the petition and set aside the conviction and direct that the petitioner be acquitted and released.

